E-News from the EU Tax Centre

Issue 164 – November 3, 2022

KPMG's EU Tax Centre compiles a regular update of EU and international tax developments that can have both a domestic and a cross-border impact, with the aim of helping you keep track of and understand these developments and how they can impact your business.

Today's edition includes updates on:

- **CJEU:** Decision on the Parent-Subsidiary Directive exemption in the context of a merger
- **Czech Republic:** Revised list of non-cooperative jurisdictions for CFC rules published
- **Finland:** Draft bill to transpose DAC7
- **Germany:** Draft bill to transpose public Country-by-Country Reporting and update on Pillar Two implementation
- **Hungary:** Draft bill to transpose public Country-by-Country Reporting
- **Netherlands:** Public consultation launched on a legislative proposal to implement minimum taxation (Pillar Two)
- **Portugal:** Tax measures in the 2023 budget
- **United Kingdom:** Withdrawal of the proposed "mini-budget" tax measures
- **Netherlands (court decision):** Supreme Court ruling on dynamic interpretation of tax treaties
- **Spain (court decision):** Supreme Court ruling on dynamic interpretation of tax treaties

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Latest CJEU, EFTA and ECHR

CJEU

Decision on the Parent-Subsidiary Directive exemption in the context of a merger

On October 20, 2022, the Court of Justice of the European Union (CJEU or the Court) gave its decision in the case C-295/21 concerning the compatibility of the Belgian partial exemption regime (dividends received deduction) with Article 4(1) of the Parent-Subsidiary Directive (PSD).

The Belgian DRD regime provided – at that time – that the distributed benefits covered by the PSD are included in the basis of assessment of the company receiving the dividends, followed by a deduction of 95 percent of the total amount (100 percent for dividends received since 2018). Moreover, DRDs could be carried forward to subsequent tax years, subject to anti-tax abuse provisions in place in case of a change in control of the company entitled to DRDs. The plaintiff was a Belgian acquiring company that decided to carry forward to subsequent tax years the full amount of excess DRDs transferred from the acquired company. The Belgian tax authorities rejected this approach and argued that the amount of DRDs to be transferred and subsequently utilized should be computed on a pro-rata basis, corresponding to the net tax assets of the absorbed company in the total of the net tax assets of the absorbing company and the absorbed company. This approach was adopted by analogy to the rules applicable for the transfer of deductible losses incurred by the acquired company before the merger.

The Court held that EU law does not preclude domestic legislation that limits the amount of DRD surpluses that can be carried over to the acquiring company in the context of a merger by absorption.

For more details, please refer to Euro Tax Flash Issue 490.

EU Institutions

European Commission

Work program for 2023 published

On October 18, 2022 the European Commission adopted its work program for 2023.

According to the work program, the Commission will present a proposal for a second basket of new own resources, building on the proposal for a single set of tax rules for doing business in Europe (BEFIT) in the third quarter of 2023. This will complement the Commission's first set of proposals for new own resources that were issued in view of repaying the grant component of the NextGenerationEU recovery plan and ensuring financing for the Social Climate Fund.

In addition, the work program includes a list of priority pending proposals (Annex III), which features the Commission's proposal for a Directive restructuring the Union framework for the taxation of energy products and electricity (recast) and the Commission's proposal for a Directive on ensuring a global minimum level of taxation for multinational groups in the Union (Pillar Two). By contrast, the Unshell and DEBRA proposals are not mentioned in the priority list.

For more information, please refer to the Commission's press release.

European Parliament

Debate on windfall profit taxes on energy companies

On October 18, 2022, the Council and the European Commission discussed with members of the European Parliament (MEPs) the introduction of a windfall profit tax on energy companies.

During the debate, Commission Vice-President Valdis Dombrovskis stated that Member States must ensure that measures already adopted are aimed at supporting the most vulnerable and called for prudent fiscal policies that do not impair inflation. MEPs called on the European Commission to be more proactive in addressing the current price shock. In this regard, some MEPs noted the need for a solidarity package with fiscal transfers to offset the energy prices, while others warned against national fiscal measures distorting competition in the single market.

For more details, please refer to the press release of the European Parliament.

FISC sub-committee workshop on tax measures against increasing energy prices and high inflation

On October 27, 2022, the European Parliament sub-committee on tax matters (FISC) held a public meeting on "Increasing Energy Prices and High Inflation: What Role for Taxation". The purpose of the hearing was to discuss the tax polices introduced in EU Members States in response to supply shocks, which hit notably the energy and food sectors.

A representative of the OECD shared an overview of support measures adopted by governments in response to the energy crises. It was noted that the majority of the measures has been implemented in non-targeted way. The panel also highlighted that tax measures have been used less frequently to support vulnerable households. The President of the German Ifo Institute noted that while governments cannot reduce the burden of the supply shocks for the economy as a whole through taxes and transfers, they can redistribute the burden within the population, to protect vulnerable groups. It was emphasized that a coordination of energy policies at European level is essential due to a risk of a subsidy race, which would primarily benefit energy providers.

For more information, please refer to the website of the European Parliament.

Draft report on lessons learnt from the Pandora Papers and other revelations

On October 27, 2022, the FISC sub-committee discussed a draft report on key findings from the Pandora Papers data leak and other revelations. Key recommendations include:

- extension of the reporting requirements under DAC6 to cross-border arrangements for the management of assets of clients who are individuals;
- extension of the scope of the Code of Conduct Group on Business Taxation, in particular to include preferential personal income or capital tax regimes, or personal income and wealth tax regimes that could lead to significant distortions in the EU;
- coordinated implementation of wealth taxation in the EU focusing on property, succession, financial assets and luxury goods that exceed a certain thresholds;
- swift adoption of the Commission's Unshell proposal once the European Parliament has submitted its opinion;
- swift implementation of the EU Whistleblower Directive of 2019 to protect whistle-blowers and investigative journalists;
- introduction of legal measures requiring public officials to declare their outside activities and assets;
- introduction of cooling-off periods for tax authority officials;
- accurate and up-to-date beneficial ownership information to be made publicly available.

For more information, please refer to the European Parliament's press release.

Other EU Institutions

European Economic and Social Committee opinion on the DEBRA Directive proposal

On October 27, 2022, the European Economic and Social Committee (EESC) published its opinion on the proposal for a Council Directive on laying down rules on a debt-equity bias reduction allowance (DEBRA) and on limiting the deductibility of interest for corporate income tax purposes.

While the EESC generally expresses its support for the objectives of the proposal, it suggests that the European Commission should reconsider the deduction limitation for interest expenses. The EESC highlights that such limitation could hamper investment, growth and job creation in the EU and put EU companies at a competitive disadvantage compared to businesses in third countries. The EESC further notes that the limited deducibility of interest expenses would create incentives to use leasing arrangements instead of direct investment in machinery and equipment. As a result, the EESC recommends a total or partial exemption from the interest deduction limitation, in particular for SMEs and micro-enterprises.

In addition, the EESC argues that the proposed risk premium of 1 percent to 1.5 percent to be used for the calculation of the equity allowance is disconnected from market reality and insufficient to compensate for the loss of deductibility of interest costs under the proposed deduction limitation.

The EESC is an advisory body that is consulted and provides opinions on EU initiatives. However, it is important to note that the EESC's opinion is not binding on the Council of the European Union (i.e. it would remain up to the 27 EU Member States to agree on the final text of the Directive).

OECD and other International Institutions

United Nations

Meeting of the UN Committee of Experts on International Cooperation in Tax Matters

Between October 18 and October 21, 2022, the UN Committee of Experts on International Cooperation in Tax Matters (UN Tax Committee) held its twenty-fifth meeting. Key discussions concerned:

- update to the UN Model Taxation Convention between developed and developing countries;
- UN Manual on negotiation of bilateral tax treaties;
- taxation of the digitalized and globalized economy;
- transfer pricing;
- environmental taxation;
- crypto-assets;
- dispute avoidance and resolution; and
- digitalization and improvement of tax administration.

For more information please refer to the dedicated web page of the UN Tax Committee.

Local Law and Regulations

Cabo Verde

Tax measures in the 2023 draft budget

On October 4, 2022, the Cabo Verde government published the 2023 state budget proposal which was presented to Cabo Verde's parliament on October 3, 2022, proposing a series of amendments to various tax laws. Key corporate tax changes include:

- introduction of a new R&D tax incentives regime, to be applicable between 2023 and 2038;
- exemption from corporate income tax for technology-based companies, operating in the special economic area for technologies and carrying R&D activities, for reinvesting their profits.

Czech Republic

Revised list of non-cooperative jurisdictions for CFC rules published

On October 14, 2022, the Czech Republic published a revised list of non-cooperative jurisdictions with respect to its controlled foreign company (CFC) rules. According to the Czech CFC rules, a non-resident company's income from qualifying assets and activities will be taxed at the level of the Czech controlling entity in cases where the non-resident qualifies as a CFC and (i) is located in one of the listed jurisdictions as at the end of the respective tax period, or (ii) does not have significant economic activity and is subject to a foreign income tax (or similar tax) which is lower than 50 percent of the income tax that would be assessed in the Czech Republic under the applicable Czech tax regulations.

The update reflects the recent updates to the EU list of non-cooperative jurisdictions adopted by the Council of the European Union (please refer to Euro Tax Flash Issues 442, 457 and 487).

For more details on defensive measures adopted by EU Member States against non-cooperative jurisdictions, please refer to KPMG's Summary of proposed or enacted measures.

Finland

Draft bill to transpose DAC7

On October 20, 2022, a draft bill was submitted to the Finnish Parliament to transpose DAC7 into domestic law. Once adopted, the law will require digital platform operators to provide the Finnish competent authority with information about certain users ("sellers") on their platform to enable the Finnish competent authority to exchange this information with other EU Member States. To comply with DAC7, the domestic legislation must be implemented by December 31, 2022, and the rules should be applied from January 1, 2023.

For more information, please refer to the press release of the Finnish government.

Draft bill for expanding taxation of hidden profit distribution submitted to Parliament

On October 21, 2022, a draft bill was submitted to the Finnish Parliament for expanding the taxation of hidden profit distributions from 75 percent (currently provided) to 100 percent. The draft bill is proposed to be applied from tax year 2023.

France

Tax measures in 2023 Finance Bill include temporary solidarity contribution

On October 24, 2022, the French Parliament adopted without a vote the first part of the 2023 Finance Bill, which provides for the following key business tax measures:

- introduction of a temporary solidarity contribution on surplus profits (taxable profits exceeding 20 percent of the average taxable profits generated in the four fiscal years starting on or after January 1, 2018) by companies in the fossil sector at a rate of 33 percent in line with the agreed EU Council Regulation of October 6, 2022;
- progressive removal of the added value contribution (CVAE), i.e. 50 percent reduction in 2023 and complete abolition as from January 1, 2024;
- adjustments to the territorial economic contribution (CET) cap mechanism;
- increase of the profits threshold for the reduced corporate income tax rate of 15 percent from EUR 38,120 to EUR 42,500 (profits exceeding this threshold are subject to the standard 25 percent rate).

As a next step, the second part of the Finance Bill for 2023 will be examined by the Parliament from October 27 to November 14, 2022. A vote on the entire text is scheduled for November 15, 2022.

For more information, please refer to a press release by the French government.

Germany

Draft bill to transpose Public Country-by-Country Reporting

On September 30, 2022, a draft bill was published by the German government to transpose the EU Public Country-by-Country Reporting Directive into domestic law. In line with the EU Directive, the draft bill would require certain German based unaffiliated companies and ultimate parent entities of multinational groups with a consolidated net turnover exceeding EUR 750 million in each of the last two consecutive financial years to publicly disclose certain tax-related information on a country-by-country basis for financial years starting on or after June 22, 2024. The reporting obligation would also apply to German based subsidiaries of non-EU headquartered groups, which are medium or large-sized, or which are established for the sole purpose of circumventing the reporting requirements. The draft rules also include a provision that would allow in-scope groups to temporarily omit information that would cause a significant disadvantage to the companies concerned, provided they can justify the reason for the omission.

Stakeholders were invited to provide comments on the draft bill until October 31, 2022. To comply with the Directive, the domestic legislation must be implemented by June 22, 2023.

For more information on the Country-by-Country Reporting Directive, please refer to the EU Tax Centre's dedicated website.

Update on Pillar Two implementation

On October 17, 2022, the German government responded to parliamentary questions in relation to the domestic implementation of the minimum corporate tax rules (Pillar Two). Key updates include:

- The German government is currently preparing a draft law to implement the Pillar Two GloBE rules into domestic law with a view to start applying the minimum tax rules for financial years beginning on or after December 31, 2023.

- The draft law will follow the latest compromise text for a Council Directive on ensuring a global minimum level of taxation for multinational groups in the Union (for more details, please refer to Euro Tax Flash Issues 468 and 470).
- The German government is examining the introduction of a domestic minimum top-up tax.
- The German government will re-evaluate the currently applicable low-tax threshold of 25 percent for CFC purposes once negotiations on the concrete design of the minimum tax rules are completed.

Hungary

Draft bill to transpose Public Country-by-Country Reporting

On October 18, 2022, a draft bill was submitted to the Hungarian National Assembly to transpose the EU Public Country-by-Country Reporting Directive into domestic law. In line with the EU rules, the draft bill would require multinational groups to publicly disclose certain tax-related information on a country-by-country basis for financial years starting on or after June 22, 2024, where:

- the ultimate parent entity is based in Hungary and the consolidated revenues of the MNE group exceed HUF 275 billion (approximately EUR 750 million based on the December 21, 2021exchange rate) in each of the last two consecutive financial years; or
- a qualifying subsidiary / branch of the MNE group is based in Hungary and the consolidated revenues of the MNE group exceed HUF 275 billion (approximately EUR 750 million based on the December 21, 2021 exchange rate) in each of the last two consecutive financial years, if the ultimate parent does not fall within the scope of the law of an EU member state.

Based on the draft text, Hungary would require MNEs in scope to explain the reasons behind any significant differences between the income tax accrued and income tax paid, if such significant differences exist. Whilst the EU Public Country-by-Country Reporting Directive allowed Member States to permit in-scope groups to defer the disclosure of commercially sensitive information, for up to five years, the draft Hungarian proposal doesn't make use of this option.

For more information on the Country-by-Country Reporting Directive, please refer to the EU Tax Centre's dedicated website.

Ireland

Tax measures in the 2023 budget

On October 20, 2022, the Irish government published the Finance Bill 2022, which would implement the tax measures already announced by the Minister for Finance in his Budget speech on September 27, 2022 (for previous coverage, please see E-News Issue 162). Key business tax measures include:

- *Business energy support scheme:* The bill provides for the new temporary business energy support scheme to help business with energy costs that were announced in the budget. The scheme would, subject to certain conditions, be open to certain businesses engaged in a trade or profession chargeable to tax, which would include self-employed individuals, companies, partnerships and certain tax-exempt charities and sporting bodies.
- *FX movements subject to corporation tax:* The bill includes an amendment that would confirm that gains or losses resulting from foreign exchange movements on items such as trade debtors and creditors and trading bank accounts would be treated as part of profits or losses of a company's trade subject to corporation tax and not subject to capital gains tax.

- *Knowledge development box:* The bill confirms the extension of the knowledge development box (KDB) relief for a further four years, to include accounting periods beginning before January 1, 2027. However, the bill also provides (subject to a Ministerial Commencement Order) for a new effective rate of 10 percent for profits within scope of the KDB (currently 6.25 percent).
- *Reporting by certain funds:* The bill provides that additional information would need to be reported to Revenue in the annual statement of exempt unit trusts, common contractual funds (CCFs) and investment limited partnerships (ILPs) about their assets and business activities. This would include information on matters such as asset values, connected party transactions and material transactions.

For more information, please refer to a report prepared by KPMG in Ireland.

Malta

Tax measures in the 2023 budget

On October 24, 2022, the Maltese government presented the budget for 2023. Key corporate tax measures include:

- an extension of the temporary measure allowing entities with excess capital allowances, as a result of losses suffered in 2020 and 2021 during the COVID-19 pandemic, to be surrendered to other group entities for fiscal year 2022 (in addition to fiscal year 2021);
- the withholding tax rate on royalties from literary works will be reduced from 15 percent to 7.5 percent;
- the introduction of a 'one-stop shop' through the 'Start' scheme to assist start-ups in establishing their business in Malta including assistance with applications to benefit from existing incentives.

For more information, please refer to a report prepared by KPMG in Malta.

Netherlands

Public consultation launched on a legislative proposal to implement minimum taxation (Pillar Two)

On October 24, 2022, the Dutch Ministry of Finance launched an internet consultation on a legislative proposal to implement the OECD's Pillar Two Model Rules providing for a global minimum tax. The consultation period will run until December 5, 2022.

The proposal follows the latest compromise text for a Council Directive on ensuring a global minimum level of taxation for multinational groups (for more details, please refer to Euro Tax Flash Issues 468 and 470) and provides for the application of a Qualifying Domestic Minimum Top-up Tax and the Income Inclusion Rule for financial years starting on or after December 31, 2023 while the Undertaxed Profits Rule would be applicable one year later, i.e. on or after December 31, 2024

The consultation follows the statement issued on September 9, 2022 by the Netherlands, together with France, Germany, Spain, and Italy, expressing their commitment to implementing the global minimum tax in 2023 (please refer to KPMG's Tax News Flash.).

For more information, please refer to a report prepared by KPMG in the Netherlands.

Poland

Amendments to “Polish Deal” corporate income tax measures passed by the Parliament

On October 29, 2022, the Lower House of the Polish Parliament (the Sejm) passed legislation amending corporate income tax provisions that were enacted as part of the “Polish Deal” (for previous coverage, please refer to E-News Issue 157). Key amendments under the legislation include:

- modification and postponement of minimum income tax provisions by two years (instead of the previously proposed one-year postponement);
- repeal of hidden dividend regulations;
- amendments to the withholding tax regime; and
- repeal of the requirement to follow the arm’s length principle and to satisfy the documentation obligation for indirect tax haven transactions.

The legislation must now be signed by the Polish President and will become effective on January 1, 2023, except for provisions on preparing Local Files for tax haven transactions which will enter into force on the day of their announcement.

For more information, please refer to a report prepared by KPMG in Poland.

Portugal

Tax measures in the 2023 budget

On October 10, 2022, the Portuguese government submitted to the Assembly of the Republic of Portugal the 2023 draft budget bill. Key corporate tax measures include:

- introduction of a new crypto asset tax regime for taxing operations related to the issuance and disposal of crypto-assets;
- amendment of the current tax loss carry-forward regime for corporate income tax (CIT) purposes, whereby – amongst others – tax losses computed in a given tax period become available to be carried forward for an unlimited period of time, with the offset of the tax losses to be limited to 65 percent of the taxable profit computed each year (as compared to 70 percent as is currently the case);
- increase of the taxable income threshold, from EUR 25,000 to EUR 50,000, to which the reduced CIT rate of 17 percent applies i.e., in case of micro, small or medium-sized companies performing an agricultural, commercial or industrial economic activity;
- introduction of a new tax incentive regime for corporate capitalization, replacing the current tax benefits related to the notional interest deduction on share capital and the deduction for retained and reinvested profits.

United Kingdom

Withdrawal of the proposed “mini-budget” tax measures

On October 14, 2022, the UK government announced its intention to no longer proceed with the planned cancellation of the corporation tax rate increase. Instead, the previously planned increase of the rate to 25 percent will go ahead on April 1, 2023 (for previous coverage, please refer to E-News Issue 162).

The 19 percent rate will continue to apply to companies with profits of not more than GBP 50,000 (approximately EUR 58,300), with marginal relief for profits of up to GBP 250,000 (approximately EUR 291,400) as originally planned.

Uncertainty remains regarding the status of the cut in the banking surcharge from 8 to 3 percent from April 2023. This cut (which has already been legislated for) was broadly intended to offset the increase in the corporation tax rate from the same date.

For more details, please refer to a report prepared by KPMG in the UK.

Local Courts

Germany

Decision on trade tax treatment of dividends from dual resident companies

On June 28, 2022, the German Federal Court (Court) issued a decision on whether dividends distributed by a dual resident company to its German parent are subject to trade tax in Germany.

Under German law, 5 percent of the dividend amounts received by German companies are subject to trade tax if the following conditions are met:

- the recipient holds a participation of at least 15 percent in the company paying the dividends, and
- the company paying the dividends (i) has its registered office and place of effective management outside Germany or (ii) is a domestic company within the meaning of the German Trade Tax Act.

If the criteria above are not met, the dividends are subject to trade tax in full.

The plaintiff was a German company that received dividends from a wholly owned subsidiary that had its place of effective management in Germany and its registered office in Belgium. The tax authorities took the view that the German law provision defining “domestic companies” refers only to entities that have both their registered office and the place of effective management in Germany. As a result, they considered that the dividends received from the dual resident subsidiary were subject to trade tax in full.

The Court held that the wording of the provision defining “domestic companies” also covered entities that were registered abroad but had their place of effective management in Germany. As a result, only 5 percent of the dividend was subject to trade tax. The Court however explicitly left open whether the 5 percent rule would apply if the corporation paying dividends had its registered office in Germany and its place of effective management abroad.

For more details, please refer to a report prepared by KPMG in Germany.

Decision on treaty benefits in case of triangular constellations

On June 1, 2022, the German Federal Court (Court) issued a decision on whether provisions of one double tax treaty can override the provisions of another double tax treaty in situations where more than one double tax treaty applies (triangular constellations).

The plaintiff was a German resident taxpayer, who worked as a geriatric nurse in Switzerland and commuted to his job from a second home in France. His salary was exempt from German tax under the Germany-Switzerland treaty. In addition, Switzerland did not levy any tax because the Switzerland-France treaty assigned taxing rights over the income of cross-border commuters to France. The taxpayer paid tax on the income in France, but the Germany-France treaty allocated taxing rights over this (third-country) income to Germany. The issue in dispute was whether the allocation of taxing rights for third-country income to Germany under the Germany-France treaty could override the German exemption of the income under the Germany-Switzerland treaty.

The Court held that the two double tax treaties have equal force and must be interpreted autonomously and independently of each other. In the Court's view, Germany's obligation to exempt certain income is not affected by the fact that a treaty with another country (in this case France) allocates the taxing right over this same income to Germany.

For more details, please refer to a report prepared by KPMG in Germany.

Netherlands

Supreme Court decision on the dynamic interpretation of treaties

On October 14, 2022, the Dutch Supreme Court issued a decision on the interpretation of the term 'employer' under the double tax treaty concluded between Germany and the Netherlands. The Supreme Court held that the OECD Commentaries issued after the date when a double tax treaty was concluded are relevant to the extent that they merely provide clarifications regarding a treaty provision. Subsequent commentary cannot be used if it results in a diverging interpretation.

Spain

Supreme Court ruling on dynamic interpretation of tax treaties

On June 24, 2022, the Spanish Supreme Court issued a decision in a case concerning the classification under the Spanish – German double tax treaty of payments made in respect to the transfer of customer and operational data.

The plaintiff was a Spanish company that acquired from its German parent (i) certain data regarding Portuguese customers and (ii) operational data, such as confidential financial information and know-how, enabling the Spanish company to undertake the distribution services previously provided by a Portuguese entity. The plaintiff considered that the amounts paid to the German company fall under the capital gains article of the relevant double tax treaty and that it was therefore exempt from withholding tax in Spain. The Spanish tax authority challenged this treatment and, following several appeals, the case was brought before the Supreme Court.

The Supreme Court upheld the position taken by the tax authorities and held that consideration paid to the German parent qualified in substance as royalties and was therefore subject to Spanish withholding tax. The Court also held that the OECD Commentaries issued after the date when the relevant treaty was concluded could be used as guidance if they relate to wording included in the treaty and provided they represent mere clarifications.

KPMG Insights

BEPS 2.0 – Where are we? Implementation will soon be upon us

As part of the Future of Tax & Legal webcast series, KPMG International will hold a session on November 8, 2022 to provide an update on the developments in relation to BEPS 2.0. The KPMG Tax Policy leadership group will share insights on Pillar One and Pillar Two including perspectives on OECD releases and developments in the EU, the US and the rest of the world.

Please access the event page to register.

EU Financial Services Tax perspectives

As part of the Future of Tax & Legal webcast series, KPMG International will hold a session on November 2, 2022 to take a closer look at some of the latest proposals that have risen to the top of the European tax agenda. Our panel of KPMG tax specialists will share their insights on some of the latest developments impacting the financial services industry including:

- Update on the BEPS Pillar Two Directive, ATAD 3 and the implications for those countries that are on the EU list of non-cooperative jurisdictions;
- a closer look at the geopolitical environment several of key jurisdictions and the implications for financial services; and
- latest developments in relation to the European Withholding Tax framework.

Please access the event page to register.

Renewable Energy & Energy Efficiency Directives

On September 14, 2022, the European Parliament voted on the Energy Efficiency and Renewable Energy Directives as part of European Union's plans to make Europe the first climate-neutral continent by 2050.

In this respect, the ESG network of KPMG published a new dedicated article which provides a high-level overview of these Directives and defines the different negotiating positions that the European Commission, Council of the European Union and European Parliament have adopted as they head into trialogue.

				
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Key links

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