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KPMG Insights

E-News from the EU Tax Centre

Issue 167 – December 14, 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:

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- **Council of the EU:** Conclusions of December 6 ECOFIN meeting
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Latest CJEU, EFTA and ECHR

CJEU

Obligation for lawyers to inform other intermediaries under DAC6 infringes EU law

On December 8, 2022, the Court of Justice of the European Union (CJEU or Court) gave its decision in case C-694/20 concerning compatibility with EU law of the requirement for intermediaries, who are subject to legal professional privilege, to notify other intermediaries of their reporting obligation under the EU mandatory disclosure rules (DAC6). The CJEU held that the notification obligation is invalid in light of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union - specifically the right to respect for communications between a lawyer and his or her client.

Moreover, the CJEU observed that such notification obligation indirectly leads to another interference with the Charter, resulting from reporting by the notified intermediary of the identity of the intermediary subject to legal professional privilege and their involvement in the cross-border arrangement. In the Court's view, reporting of the identity of such intermediary lawyer and its involvement in the arrangement is not strictly necessary as it will not allow the relevant authority to require the intermediary to disclose information without the consent of their client.

The Court further noted that DAC6 provides that an intermediary subject to legal professional privilege remains required to notify the relevant taxpayer of his or her reporting obligations. The reporting obligation of intermediaries not subject to legal professional and – in the absence of such intermediaries – of the taxpayer ensures, in principle, that the tax authorities are informed of the reportable cross-border arrangement.

For more information, please refer to Euro Tax Flash Issue 497 and a report prepared by KPMG in Belgium.

EU Institutions

Council of the EU

Agreement on EU Minimum Tax Directive announced

On December 12, 2022, the Council of the EU announced that EU Member States reached political agreement to implement the EU Minimum Tax Directive.

According to the press release, the Czech Presidency was able to secure the required unanimous support of all EU Member States at a meeting of the Committee of Permanent Representatives (COREPER).

As a next step, the file is subject to formal adoption through a written procedure that is expected to be finalized on December 14, 2022. Once adopted, Member States are required to transpose the rules into domestic law by December 31, 2023 and to start applying the Income Inclusion Rule (IIR) for fiscal years beginning on or after December 31, 2023. The UTPR will be applied for fiscal years beginning on or after December 31, 2024.

In addition, the agreed compromise text provides the option for Member States to implement a qualified domestic top-up tax (QDMTT) and to defer the application of the IIR and the UTPR up to December 31, 2029, where a maximum number of 12 UPEs are based in an EU Member State.

For more information, please refer to KPMG's Tax News Flash and the Council press release.

Provisional agreement reached on carbon border adjustment mechanism (CBAM)

On December 13, 2022, the Council issued a press release announcing that negotiators of the Council and the European Parliament reached political agreement on the CBAM. The Czech Presidency noted that the agreement was of a provisional and conditional nature since the CBAM regulation could only be formally adopted once a number of issues included in related dossiers are resolved (despite not being part of the proposed regulation). In particular, this concerned the phase-out of free allowances established by the EU Emissions Trading System (ETS) Directive and limiting potential carbon leakage from exports. The Council also reiterated that need to ensure full compatibility of the CBAM with other EU obligations, such as those in the area of international trade.

As reported in Euro Tax Flash Issue 454, the CBAM was initially proposed by the Commission on July 14, 2021 as part of the 'Fit for 55' package and aims at reducing the risk of carbon leakage by encouraging producers in non-EU countries to green their production processes. Subsequently, the Commission, Parliament and the Council entered into trialogue negotiations to find common ground on the different positions that have been taken by each of the three parties on different elements of the CBAM proposal (for more information, please refer to a a tax alert issued by KPMG International highlighting the different positions taken by the three institutions).

The text of the provisional agreement has not been released yet. However, the Council's press release noted that the CBAM:

- will initially cover a number of products related to carbon-intensive sectors such as: iron and steel, cement, fertilizers, aluminum, electricity and hydrogen, and
- will become effective from October 2023. As an initial step, a simplified version of the CBAM would apply, limited to reporting obligations and aiming to collect data. Subsequently, the full CBAM rules would be gradually introduced, in parallel with phasing out of the free allowances – as mentioned above, this topic is yet to be agreed as part of the ETS.

In terms of next steps, the political agreement is subject to confirmation by ambassadors of the EU Member States and by the European Parliament and to formal adoption by both institutions.

Conclusions of December 6 ECOFIN meeting

On December 6, 2022, the final scheduled meeting of the Economic and Financial Affairs Council of the EU (ECOFIN Council) under the Czech Presidency of the Council took place. Prior to the meeting, the adoption of the EU Minimum Tax Directive proposal was removed from the initial agenda. EU Member States did not discuss this file formally as a result.

During the meeting, the ECOFIN Council approved a report to the European Council, which provides updates on a range of tax measures, including:

- the introduction of the Commission's proposal for new own resource instruments was put on hold until the underlying legislative measures (the EU emissions trading system (ETS), a carbon border adjustment mechanism (CBAM) and the EU implementation of Pillar One) are adopted;

- while compromise texts have been submitted on parts of the Unshell Directive proposal, there are still several issues of a technical, practical and legal nature, which require further discussion in the Council before an agreement can be reached;
- following an article-by-article examination at three Council working group meetings, it was agreed that examination of the DEBRA Directive proposal should be suspended until the BEFIT proposal for a single set of tax rules for doing business in the EU has been put forward by the Commission.

The ECOFIN Council also approved a report by the Code of Conduct Group on its work performed during the term of the Czech Presidency (second half of 2022).

For more details, please refer to Euro Tax Flash Issue 496.

European Commission

Proposal for the exchange of information on crypto-assets and tax rulings for high-net-worth individuals (DAC8)

On December 8, 2022, the European Commission issued a proposal for an extension of the Directive on Administrative Cooperation (DAC) to cover the exchange of information on crypto-assets (DAC8). The proposed revision includes rules on due diligence procedures and reporting requirements for EU and non-EU crypto-assets service providers in correspondence to the OECD's Crypto-Asset Reporting Framework (CARF). The proposal is also aligned with the definitions included in the regulation on markets in crypto-assets (MiCA) that regulates the issuance and trading of crypto-assets within the EU.

The DAC8 proposal further provides for rules regarding the exchange of information on tax rulings for high-net-worth individuals holding a minimum of EUR 1 million in financial or investable wealth or assets under management, excluding their main private residence. Those rules would complement existing information exchanges on advance cross-border tax rulings and advance pricing agreements under DAC3.

Finally, the draft Directive proposes the introduction of a common system of minimum penalties for serious non-compliance offences, applicable both to existing and proposed disclosure requirements.

For more information, please refer to Euro Tax Flash Issue 498.

European Parliament

Resolution on new own resources proposal for the EU budget

On November 23, 2022, the European Parliament approved a resolution in respect of the Commission's proposal to establish the next generation of own resources for the EU budget as an amendment to the so-called Own Resources Decision (ORD). The proposal would require Member States to provide a national contribution to the EU budget based on revenues generated from the emissions trading system (ETS), the proposed EU carbon border adjustment mechanism (CBAM) and a 15 percent share of the taxable profits of multinational enterprises re-allocated to Member States under Pillar One (for more information, please refer to Euro Tax Flash Issue 463).

According to the press release, members of the European Parliament (MEP) call on the Council to quickly adopt the proposal and to ensure a timely introduction of these new own resources for the EU budget. In addition, MEPs welcome the Commission's plans to propose a second basket of new own resources, building on the BEFIT proposal for a single set of tax rules for doing business in the EU (for more details, please refer to E-News Issue 164). As agreed in the legally binding interinstitutional agreement of December 16, 2020, MEPs further expect the Commission to propose by the end of 2023 a new own resource from an EU financial transaction tax.

The adoption of the proposed amendments is subject to unanimous approval at Council level and ratification by each Member State.

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

ECON sub-committee adopts report on Commission's Unshell proposal

On November 30, 2022, the European Parliament's sub-committee on economic and monetary affairs (ECON) approved a report on the proposal for a Directive laying down rules to prevent the misuse of shell entities for tax purposes (the Unshell Directive). While the report is generally supportive of the text proposed by the Commission, a number of amendments are recommended. These relate in particular to the scope, gateway criteria, substance indicators and sanctions (for more information, please refer to E-News Issue 156).

As a next step, the report is scheduled to be voted on at the European Parliament plenary session in January 2023. If approved, the report would represent the Parliament's opinion on the Directive, which is not binding on the Council. It would remain up to the 27 EU Member States to agree on the final text of the Directive at Council level.

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

OECD and other International Institutions

OECD

Public consultation on Amount B under Pillar One

On December 8, 2022, the OECD issued a public consultation document seeking public comments on the three main design elements of Amount B under Pillar One.

According to the public consultation document, Amount B is intended as a simplification and streamlining measure in applying the arm's length principle in relation to baseline marketing and distribution activities. A special focus shall be given to the needs of low-capacity jurisdictions in administering the application of the arm's length principle.

As regards the main design elements, the consultation document advises that Amount B will define a set of in-scope marketing and distribution transactions (first element) that shall be subject to a specific pricing methodology in accordance with the arm's length principle provided certain documentation requirements are met (second element). The pricing methodology will be implemented in a manner that is easy to administer for jurisdictions and that ensures consistency and certainty in respect of the application by jurisdictions (third element). The consultation document generally envisions a pricing methodology that is based on the transactional net margin method (TNMM). It is noted, however, that the Inclusive Framework is considering two exemptions where local market comparables are available to price the transaction and where a method other than the TNMM is the most appropriate method.

The consultation document stresses that the proposals do not reflect the consensus views of the Inclusive Framework, the Committee on Fiscal Affairs or their subsidiary bodies.

Comments are requested by January 25, 2023. According to the consultation document, the release of the final Pillar One deliverables is currently scheduled for mid-2023. In addition, based on statements made by OECD representatives, the implementation of the Amount B elements is foreseen via an update to the OECD Transfer Pricing Guidelines with effect from 2024.

For more information, please refer to a report prepared by KPMG International and the OECD press release.

Local Law and Regulations

Cyprus

Amendment to the 0.4 percent levy on sale of immovable property

On November 18, 2022, amendments to the law providing for a levy payable (at 0.40 percent) upon the sale of immovable property in Cyprus were published in the Government Gazette. Key amendments to the levy introduced in February 2021 include:

- imposition of the levy upon sale of "immovable property" in Cyprus and shares of a company not listed on a recognized stock exchange (regardless of percentage holding) that directly or indirectly holds immovable property in Cyprus under certain conditions;
- the levy is calculated as follows: on the sale amount, in the case of disposal of immovable property and on the latest general valuation value of the property attributed to the shares, in the case of disposal of company shares,;
- exemptions apply, i.e. no levy is imposed in the case of (i) a restructuring of a non-performing loan as defined in the Capital Gains Tax Law, (ii) a company reorganization as defined in the Income Tax Law; (iii) a sale filed either with the Department of Land and Surveys or the Cyprus Registrar of Companies prior to February 22, 2021.

On November 21, 2022, the Cypriot Tax Authority issued an announcement clarifying that it intends to grant a reasonable period of time to settle obligations that have arisen during the period between the initial enactment of the law i.e. February 22, 2021 and the amending law i.e. November 18, 2022 without imposing interest or penalties.

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

Public consultation on proposals for a special energy windfall levy and temporary solidarity contribution from crude oil sectors

On November 29, 2022, the Ministry of Finance in Cyprus launched a public consultation on two draft bills for a special energy windfall levy and a temporary solidarity contribution from crude oil sectors, respectively. The consultation closed on December 9, 2022.

The special energy windfall levy targets 2022 windfall profits of producers and suppliers of electricity from renewable energy sources. Key features of the proposal include the self-assessment declaration based on predetermined formulas that take into account profits and energy sold.

The temporary solidarity contribution on surplus profits in the crude oil, natural gas, coal and refinery sectors was prompted by the EU Regulation on an emergency intervention to address high energy prices. Key features of the proposal include:

- the temporary solidarity contribution would be applicable to tax years 2022 and 2023;
- surplus profits would generally mean the amount of profit which exceeds 20 percent of the average profits of the immediately preceding four tax years;
- the amount of the temporary solidarity contribution would be imposed at a rate of 33 percent on the surplus profits of the tax years 2022 and 2023 and will not be tax deductible for income tax purposes.

Finland

Public consultation on temporary solidarity contribution on the fossil sector

On December 2, 2022, the Finnish Ministry of Finance launched a public consultation on a proposal for the introduction of a temporary tax on energy companies prompted by the EU Regulation on an emergency intervention to address high energy prices. Key features of the proposal include:

- application to electricity producers or sellers (subject to certain exclusions) and companies with at least 75 percent of their turnover attributable to operations in the fossil fuel sector;
- the tax would be levied at a rate of 33 percent on net taxable profits for income tax purposes (subject to some exceptions) that are generated in tax year 2023 and exceed a 5 percent return on the company's equity as stated in its balance sheet;
- the tax would apply in addition to the Finnish corporate income tax and would not be deductible for tax purposes.

The consultation ended on December 12, 2022. The measures are intended to come into force as soon as possible.

Germany

Implementation of DAC7 and modernization of German tax procedures

On November 10, 2022, the lower house of the German Parliament (Bundestag) adopted a law to transpose EU Council Directive 2021/514 ("DAC7") and to introduce measures aiming at a modernization of German tax procedures.

DAC7 introduces an obligation for operators of certain digital platforms to provide the tax authorities with information on income derived by sellers through these platforms, which will be automatically exchanged between EU member states.

The German law would also selectively modernize German tax procedures, particularly aiming at an accelerated and more effective tax audits process. Amongst other measures, the law would require transfer pricing documentation to invariably be submitted (i.e. without separate request by the tax authority) in the event of a tax audit. In addition, the deadline for submission of documents would be shortened from 60 days to 30 days from the issuance date of the audit order.

As a next step, approval from the upper house of the German parliament (Bundesrat) is required before the law can be promulgated in the Federal Law Gazette. In principle, the law would become effective on January 1, 2023.

The measures intended to accelerate tax audits generally would apply for the first time to taxes arising after December 31, 2024.

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

Annual Tax Act 2022 includes solidarity contribution on the fossil sector

On December 2, 2022, the lower house of the German Parliament approved a revised draft of the Annual Tax Act 2022. Key corporate income tax measures include:

- *Introduction of a solidarity contribution on the fossil sector:* In line with the EU Regulation on an emergency intervention to address high energy prices, companies with at least 75 percent of their turnover attributable to operations in the fossil fuel sector would be subject to a contribution levied at 33 percent of surplus profits generated in the first fiscal year after December 31, 2021 (taxation period 1) and the following full fiscal year (taxation period 2). Excess profits would be calculated as the taxable profits in the given fiscal year, which are above 20 percent of the average taxable profits for the period 2018-2021.
- *Revised rules on German-nexus IP*: The Act would partly eliminate German non-resident taxation of royalty payments and IP transfers where the nexus to Germany is established solely as a result of the registration of rights in a German public book or register. From January 1, 2022, non-resident taxation of royalties and capital gains from transactions between unrelated parties would only apply where the licensor or transferor is resident in a non-cooperative tax jurisdiction (as defined in the German Tax Haven Defense Act). For related party transactions, non-resident taxation would generally continue to apply from January 1, 2023 unless a double tax treaty prevents such taxation under German anti-abuse provisions. Furthermore, related-party licensors would no longer be required to obtain an exemption certificate for withholding tax purposes in order to benefit from such treaty provisions in relation to royalty payments.
- *Increased depreciation rates*: The Act would introduce annual straight-line depreciation at a rate of 3 percent for residential buildings finished after December 31, 2022 (currently at 2 percent) as well as an extension of the special additional depreciation at 5 percent (on top of the regular depreciation) for rental apartments that have been built based on construction applications submitted between January 2023 and December 2026.

As a next step, the law requires approval by the upper house of the German parliament before it can be promulgated in the Federal Law Gazette.

Hungary

Further amendments to windfall profit tax measures

On December 7, 2022, the Hungarian government published a decree modifying the windfall profits tax on oil companies. With effect from December 8, 2022, oil companies shall be subject to an increased tax rate of 95 percent (previously 40 percent).

For previous coverage, please refer to E-News Issue 166.

Italy

Extension of tax credits for companies suffering from high energy prices

On November 18, 2022, a law decree was published in the Official Gazette providing, amongst other measures, for an extension of the energy consumption tax credit to support taxpayers suffering from high energy prices and inflation. Under such extended relief measure, eligible companies (with high energy/natural gas consumption) may – under certain conditions, benefit from a tax credit equal to 40 percent of electricity and gas costs incurred in December 2022. For more information, please refer to E-News Issue 162.

As a next step, the law decree must be passed by the Parliament (with possible amendments) within 60 days from its publication.

Ireland

Responses to public consultation on Pillar 2 published

On December 9, 2022, the Irish government published comments received in response to the consultation on the implementation of the OECD's Pillar Two Model Rules providing for a global minimum tax.

The Irish government received a total of eleven responses, including a response letter submitted by KPMG in Ireland, which provides for the following key recommendations:

- implementing the GloBE rules in clear and consistent manner to ensure uniformity of interpretation with OECD / EU jurisdictions;
- adopting a qualified domestic minimum top-up tax (QDMTT) while committing to the 12.5 percent corporation tax rate;
- reforming the R&D tax credit regime and Knowledge Development Box (KDB) to align with the GloBE definition of a 'qualified refundable tax credit';
- adopting a territorial regime to align with GloBE rules;
- simplifying the current domestic tax regime and removing obsolete legislation;
- operating the UTPR as a top-up tax;
- advocating at the OECD and EU level for broad, robust safe harbors to be introduced to avoid increasing complexity and administrative burden on affected business
- following OECD / EU proposals that filing requirements do not fall earlier than 15 months after accounting year end;
- following any Pillar Two dispute resolution mechanism agreed at the OECD / EU level;
- establishing a database of tax regimes, tax measures and taxes levied in other countries which are accepted as falling within certain GloBE definitions, including; Covered Taxes, Controlled Foreign Company Tax Regimes, Qualifying IIRs, Qualifying UTPRs, Qualified Refundable Tax Credits, QDMTTs.

Mozambique

Reduced tax rate for agriculture, aquaculture and urban transportation approved

On November 30, 2022, the Mozambique Parliament approved a reduction in the corporate tax rate from 32 percent to 10 percent applicable to companies operating in the agricultural, aquacultural and urban transportation sector. In addition, the Parliament approved a reduction in the withholding tax rate from 20 percent to 10 percent applicable on income earned by non-residents providing services to domestic agricultural companies. The amendments shall take effect from January 1, 2023.

Netherlands

Responses to consultation on Pillar 2 draft bill published

On December 6, 2022, the Dutch government published comments received in response to the consultation launched on a legislative proposal to implement the OECD's Pillar Two Model Rules providing for a global minimum tax (for previous coverage, please refer to E-News Issue 164).

The Dutch government received a total of 16 responses, including a response letter submitted by the Dutch Association of Tax Advisers, which highlights the following key issues and concerns:

- enormous complexity of the rules, which has given rise to many questions of interpretation;
- lack of multilateral dispute resolution mechanisms;
- legal uncertainty in respect of the determination and collection of top-up tax;
- practical constraints in relation to making certain data points available that are required for the ETR and top-up tax calculation;
- fragmented implementation timelines currently envisaged by Inclusive Framework members.

Portugal

2023 Budget approved

On November 25, 2022, the Portuguese Parliament approved the Budget Law for 2023 (for previous coverage, please refer to E-News Issue 164). Key corporate tax measures include:

- introduction of a new crypto-asset regime for taxing operations related to the issuance and disposal of crypto-assets;
- removal of the time limitation to carry forward tax losses for corporate income tax (CIT) purposes, i.e. 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);
- forfeiture of loss carry-forward following ownership changes of more than 50 percent (subject to certain exceptions);
- 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;
- increased deduction of 120 percent of energy consumption (electricity and natural gas) costs incurred in the tax period beginning on or after January 1, 2022 (subject to certain exclusions);
- exemption method shall not be applicable to taxable profits attributed to foreign permanent establishments up to the amount of the tax losses attributed to that permanent establishment which have contributed to the computation of the taxable profit of the taxpayer in the previous 12 tax periods (instead of the current 5 tax periods).

The 2023 Budget law will come into effect the day after the law is published in the Official Journal.

Proposal for a temporary solidarity contribution on the fossil and food distribution sector

On November 17, 2022, the Portuguese government issued a draft law, which proposes the introduction of a temporary solidarity contribution on the energy and food distribution sectors.

The contribution would be levied at a rate of 33 percent on excess profits generated in 2022 and 2023 by companies that generate at least 37.5 percent of their turnover from extraction, mining, petroleum refining or manufacturing of coke oven products. In addition, the contribution would apply to companies in the food distribution sector, unless the food retailing activity or activity with a food predominance does not represent more than 25 percent of the total annual turnover. Excess profits would be calculated as taxable profits exceeding 20 percent of the average taxable profits in the previous four tax periods (i.e. 2018 to 2021).

As a next step, the draft law is subject to approval by the Portuguese Parliament.

Poland

Proposal for a new extra tax on gas producers

On November 28, 2022, the Council of Ministers submitted to the Polish Parliament a draft bill proposing the introduction of a new tax on extra profits on gas producers prompted by the EU Regulation on an emergency intervention to address high energy prices.

Based on the draft bill, gas distributing companies will be restricted from charging a gas price higher than PLN 200.17 (approximately EUR 42.6) per MWh to consumers in the period January 1 to December 31, 2023. The draft bill also notes that the amount of the extra tax will be defined by a separate regulation but will not exceed the amount of PLN 538.79/MWh (approximately EUR 114.8) of extracted natural gas.

At the same time, a previous proposal for a windfall profits tax at a rate of 50 percent on extraordinary profits of the energy sector has been dropped (for previous coverage, please refer to E-News Issue 163).

As a next step, the draft bill is subject to approval by the Polish Parliament. Once adopted, the provisions will come into effect the day after the law is published in the Official Journal.

Qatar

Transfer pricing documentation requirements

Further to recent interactions of KPMG in Qatar with the General Tax Authority (GTA) of Qatar in relation to the already published transfer pricing law and regulations, the GTA confirmed that any entity related to other entities must give appropriate consideration to the transfer pricing requirements, in setting prices and other terms of transactions and in reporting the income resulting from these transactions in their tax returns. Additionally, the GTA can request the respective transfer pricing documentation any time when auditing and/or assessing a company for corporate tax purposes, including:

- information and documents related to the entity's operations and functions;
- information and documents related to the operations, functions, and financial results of its related entities and with which transactions are concluded;
- information about potential comparisons, including internal comparisons of related entities;
- documents relating to the operations and financial results of potentially comparable entities and the transactions that took place between them;

- information and other documents that the entity or related entities have.

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

Romania

Clarification issued in relation to the application of the micro-company tax regime

Romania's National Agency for Fiscal Administration has published two guidance letters explaining the application of the tax on micro-companies under changes applicable from January 1, 2023, and clarifying the rules regarding opting in and out of the regime.

As background, companies applying the micro-company regime pay a turnover tax of 1 percent instead of the regular 16 percent corporate income tax. Romania has introduced significant changes to this regime, both in terms of scope as well as the revenue threshold below which companies can opt for the regime. These changes are effective starting January 1, 2023 (for more details, please refer to tax alert prepared by KPMG in Romania). The guidance letters provide practical examples on the applicability of the regime and clarify that once a company has opted out of the micro-company regime, such election is final.

Slovakia

Bill implementing public Country-by-Country Reporting Directive

Slovakia has published legislation to implement the EU Public Country-by-Country (CbyC) Reporting Directive into domestic law. In line with the EU Directive, the bill will require multinational groups (MNE) 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 Slovakia and the consolidated revenues of the MNE group exceed EUR 750 million in each of the last two consecutive financial years; or
- a qualifying subsidiary / branch of the MNE group is based in Slovakia and the consolidated revenues of the MNE group exceed EUR 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. Exceptions will apply if the non-EU ultimate parents publish the CbyC report on their website and designate a subsidiary in another Member State to file the report with the local commercial register.

As required by the Directive, the bill also introduces an obligation to state in the audit report whether the relevant entity was required to prepare and publish a CbyC report. This obligation is effective for audit reports prepared for accounting periods beginning on or after June 22, 2025.

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

United Arab Emirates

Introduction of corporate income taxation regime

On December 9, 2022, the UAE Ministry of Finance issued a decree law to introduce corporate income taxation on federal level, which will be effective for financial years starting on or after June 1, 2023 (for previous coverage, please refer to E-News 147). Key features of the envisaged corporate income tax regime include:

- corporate income tax rate of 9 percent applicable to business profits of all UAE businesses and commercial activities, subject to certain carve-outs (e.g. for the extraction sector);
- special tax rate of 0 percent applicable in respect of small businesses with taxable profits not exceeding AED 375,000 (approximately EUR 96,800) as well as on qualifying income of free zone entities;
- participation exemption for dividends and capital gains subject to certain anti-abuse provisions and holding period requirements;
- group taxations rules;
- transfer pricing rules and documentation requirements;
- anti-abuse provisions.

In addition, the updated FAQs published by the UAE government clarify that large MNEs will be subject to the regular CIT regime (9 percent) until the Pillar 2 GloBE rules are adopted in the UAE.

For more information, please refer to a report prepared by KPMG Lower Gulf Limited.

Local Courts

France

Wind farm’s interest-free loan not in line with arm’s length principle

On November 22, 2022, the Bordeaux Administrative Court of Appeal (the Court) upheld a decision issued by a lower court regarding upward transfer pricing adjustments related to several interest-free loans granted by a French taxpayer to its Romanian subsidiaries.

The plaintiff was a French company which granted several loans to four group subsidiaries for the purpose of building wind farms in Romania. The loans were financed through funds borrowed by the plaintiff both from a related company and a third party. Following a tax audit undertaken by the French tax authorities (FTA), who also collected information from their Romanian counterparts, the FTA challenged the tax treatment applied by the plaintiff and performed an upward transfer pricing adjustment based on the interest rates paid by the plaintiff to its lenders.

The Court rejected the taxpayer’s claims that the interest-free loans represented in fact equity injections and agreed with the FTA’s findings that, by waiving its right to receive interest, the taxpayer indirectly transferred profits to its Romanian subsidiaries. In this respect, the Court noted that the plaintiff could only be in the position to successfully challenge this presumption if it were able to prove a benefit triggered by the interest waiver. Nevertheless, in the case under dispute, the Romanian subsidiaries lacked the administrative authorizations required for developing wind farms. Moreover, the plaintiff was not able to prove that the subsidiaries were in serious financial difficulties at the time the loans were granted.

Germany

No exit tax resulting from amendment of income tax treaty

On August 10, 2022, the Fiscal Court of Münster held that an amendment of an income tax treaty do not represent a taxable event for the purposes of provisions on exit taxation of hidden reserves in assets (13 K 559/19 G,F).

In the case concerned, a German taxpayer owned shares in a Spanish real estate company. Following an amendment to the treaty between Germany and Spain with effect from January 1, 2013, gains on the disposal of shares in a real estate company became taxable in the source state (Spain). Prior to the amendment, the country of residence (Germany) had the sole right to tax under the old treaty. The treaty amendment led the German tax authorities to assess tax on a deemed share disposal (exit taxation), which was appealed against by the German taxpayer.

The court ruled that the mere change in the legal situation cannot trigger a taxable event. The potential restriction of Germany's right to tax due to an amendment of the treaty cannot be attributed to the taxable entity. Rather, the taxable entity must actively participate in excluding or restricting Germany's right to tax.

The case has been referred to the German Federal Tax Court (I R 41/22).

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

Exempt dividends and capital gains excluded from EBITDA under German interest limitation rules

On October 11, 2022, the Berlin-Brandenburg tax court ruled that the EBITDA calculation for the German interest limitation rules does not include tax-exempt dividends and capital gains regardless of whether the recipient is a corporation or a partnership that is held by corporate entities (8 K 8034/21).

Under the German interest limitation rules, interest expenses exceeding interest income (exceeding borrowing costs) are deductible only up to 30 percent of the taxpayer's EBITDA. Non-deductible exceeding borrowing costs may be carried forward and deducted in future tax years.

In tax year 2017, a German partnership incurred exceeding borrowing costs of approximately EUR 13 million. The income generated by the partnership included mainly dividends and capital gains that were attributable to its corporate members and, thus, tax exempt under the German participation exemption. For calculating the 30 percent EBITDA threshold, the tax authorities excluded the tax-exempt dividends and capital gains from the partnership's earnings. The taxpayer lodged an appeal, arguing that the German participation exemption of dividends and capital gains is technically a tax exemption that does not impact the relevant financial accounting earnings of a partnership. In addition, the plaintiff argued that such approach would limit the application of the equity escape clause.

The court held that it would not be systematic to add tax-exempt dividends and capital gains generated by partnerships to the EBITDA while the same would be excluded from the EBITDA at the level of a corporate taxpayer. In addition, the court noted that it was a conscious decision of the legislature to exclude tax-exempt dividends and capital from the EBITDA calculation while recognizing such income as increases of a company's equity for purposes of applying the escape clause.

The case has been referred to the German Federal Tax Court (IV R 30/22).

Poland

Royalty payments to beneficial owner outside EEA not eligible for withholding tax exemption

On November 22, 2022, the Supreme Administrative Court of Poland (Court) issued its decision in case II FSK 614/20 concerning the application of the EU Interest and Royalties Directive (IRD), as transposed into Polish law. The Court held that the provisions of the IRD do not apply to situations where at least one potential beneficiary is a third party located outside the European Economic Area (EEA), not listed in the Annex to the Directive.

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

KPMG Insights

EU Tax Perspectives webcast – December 14, 2022

The European Union's institutions have been very busy in the past few months, discussing EU implementation of international initiatives but also initiating EU-specific proposals and moving ahead with existing projects.

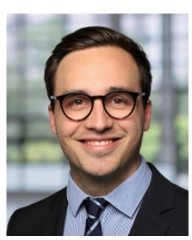
On December 14, 2022, a panel of KPMG specialists will share their insights on some of the latest developments from across the EU affecting multinational groups operating in Europe. The "EU tax perspectives" webcast will focus on:

- BEPS 2.0 in the EU: State of play on the implementation of the EU Minimum Tax Directive (Pillar Two) and the EU's response to Pillar One
- State of play of various initiatives from the European Commission's Communication on Business Taxation, including Unshell (ATAD 3), DEBRA and BEFIT
- Harmful tax practices: updates on the work of the Code of Conduct Group
- Other developments, including adoption by Member States of upcoming initiatives, such as DAC7 and public CbyC reporting

Please access the event page to register.

Raluca Enache
Associate Partner
KPMG's EU
Tax Centre

Ana Puscas
Manager
KPMG's EU
Tax Centre



Marco Dietrich
Manager
KPMG's EU
Tax Centre

Christiana Loizou
Senior Manager
KPMG's EU
Tax Centre

Nevena Arar
Assistant Manager
KPMG's EU
Tax Centre

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