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KPMG Insights

E-News from the EU Tax Centre

Issue 168 – January 11, 2023

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:** Italian tax withholding and reporting requirements for property intermediation services are generally not contrary to EU law
- **CJEU Referral:** Dividend income received by a non-resident insurance company (net taxation)
- **Council of the EU:** EU Minimum Tax Directive published in the Official Journal of the EU
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- **Hungary:** Windfall profits tax on pharmaceutical producers
- **Spain:** Implementation of public Country-by-Country Reporting
- **Switzerland:** Constitutional amendment to implement GloBE rules (Pillar Two) approved
- **Sweden (local case law):** License fees paid to companies not performing DEMPE functions are not deductible

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Latest CJEU, EFTA and ECHR

CJEU

Italian tax withholding and reporting requirements for property intermediation services are generally not contrary to EU law

On December 22, 2022, the Court of Justice of the European Union (CJEU or the Court) gave its decision in case C-83/21. The Court found that Italian legislation based on which providers of property intermediation services – including digital platform operators, are required to withhold tax and report certain data on short term rental transactions performed by individuals does not infringe the freedom to provide services.

However, in the Court's view, the obligation to appoint a tax representative resident in Italy represented a disproportionate restriction on the freedom to provide services and was precluded by EU law.

For more details, please refer to Euro Tax Flash Issue 502.

Compatibility of the Portuguese stamp duty with Directive 2008/7/EC concerning indirect taxes on the raising of capital

On December 22, 2022, the CJEU gave its decision in case C-656/21, regarding the compatibility of the Portuguese stamp duty rules with Directive 2008/7/EC concerning indirect taxes on the raising of capital (the Capital Duties Directive or the Directive). The plaintiff was a company managing several open-ended securities investment funds. Aiming to attract new capital, the plaintiff contracted four banks to market shares issued by the funds. The marketing services were subsequently recharged by the plaintiff to the funds, through management fees. Under the Portuguese law, the marketing services provided by the banks were subject to a 4 percent stamp duty. Furthermore, the recharge of the marketing services also fell within the scope of the rules and stamp duties therefore applied.

The Capital Duties Directive regulates the levying of indirect taxes on the raising of capital by certain companies and prohibits the levying of indirect taxes on contributions of capital (Article 5 of the Directive, but some exceptions apply). The plaintiff argued before the Tribunal Arbitral Tributário that the Portuguese stamp duty rules were in breach of the Capital Duties Directive. The Portuguese court decided to refer to the CJEU on whether levying stamp duty on:

- fees charged by banks to management companies of open-ended securities investment funds, for the supply of marketing services related to attracting new capital contributions, and
- fees subsequently re-charged by the management companies to the open-ended securities investment funds

is precluded by the Directive.

The CJEU first recalled its previous case-law based on which groups of persons with no legal personality and whose members provide capital with a view of generating profits fall within the scope of the Capital Duties Directive. As a result, in the Court's view, open-ended securities investment funds were also covered by the Directive.

The Court then noted that, in order to ensure that the Capital Duties Directive is effective in practice, Article 5 should be interpreted broadly. Therefore, the prohibition of taxing transactions for the raising of capital also extends to transactions not expressly listed, but which form an integral part of the overall capital raising

operation. Building from this consideration, the Court noted that publicizing the existence of investment instruments in a way that promotes the subscription of shares is a necessary business operation which must be regarded as integral to the issuance of those shares and therefore prohibited by the Capital Duties Directive.

Furthermore, the Court noted that the prohibition would not be effective in practice if a stamp duty applied when the marketing services were recharged by the management company to the open-ended funds. Therefore, the CJEU ruled that the Capital Duties Directive also precludes stamp duties applied to such recharges.

State aid

General Court

General Court upholds Commission's State aid decision regarding corporate tax exemption of port authorities in Spain

On December 14, 2019, the General Court (or the Court) issued a decision in case T-126/20 concerning the Spanish corporate tax exemption for port authorities.

Port authorities in Spain were partially exempt from corporate income tax on their main sources of revenue including port fees or income from rental or concession contracts. Furthermore, ports in the Basque Country benefited from a full corporate income tax exemption. The Commission opened an investigation and decided in January 2019 that the regime provides the ports a selective advantage that breaches EU State aid rules (the Decision).

Since the rules were in place prior to its EU accession, the regime was deemed as "existing State aid" and Spain was not required to recover the aid already granted. Following the Commission's Decision, Spain commitment to repeal the tax exemption from 2020 onwards. However, the Bilbao Port Authority (Autoridad Portuaria de Bilbao) challenged the Decision before the General Court.

First, the Court noted that by benefiting from partial or full exemption from corporate income tax, the Spanish ports were granted an advantage within the meaning of the State aid rules. The Court recalled that a tax exemption granted by virtue of the legal form of a company or the sector in which the company carries out its activity is generally selective. This conclusion is not influenced by the fact that the objective of the legislation is to favor entities considered socially useful. Furthermore, based on settled case-law, introducing selective tax regimes cannot be justified through objectives external to the system, such as preserving international competitiveness, protecting employment or favoring organizations considered socially useful.

Based on these considerations the Court found that the Commission correctly identified the regime under dispute as representing illegal State aid and dismissed the action raised by the plaintiff.

Infringement Procedures and CJEU Referrals

CJEU Referrals

Dividend income received by a non-resident insurance company (net taxation)

On December 14, 2022, the Dutch Court of Appeals in Hertogenbosch (CoA) issued a judgment in which it referred preliminary questions to the CJEU. The case concerns a UK-based life insurance company that received dividend income from the Netherlands. The UK company was represented by KPMG.

The dividend income received by the plaintiff was subject to 15 percent Dutch dividend withholding tax. However, had the UK insurance company been a resident of the Netherlands, the Dutch tax burden on the dividend income would have been zero. The reason for this is, that the Dutch dividends were received as part of unit linked products that were offered to UK pension schemes. In the equivalent domestic scenario, the dividend income would have been offset by the same amount as an increase in the obligation to pay to unit linked policy holders.

The Dutch CoA is seeking clarification concerning the interpretation of, in particular, the CJEU's judgment in the case C-17/14 and whether this applies in general to all cases where a non-resident receives dividend income from another Member State.

For more details, please refer to Euro Tax Flash Issue 499.

Other Referrals

EU windfall profit tax challenged in front of the General Court

In light of the EU Regulation of October 6, 2022 on an emergency intervention to address high energy prices (Regulation), Member States were required to implement a solidarity contribution on surplus profits in the fossil sector, or equivalent measures, by December 31, 2022 (for more information, please refer to E-News Issue 163).

On December 28, 2022, the German and Dutch subsidiaries of a US headquartered oil and gas group challenged the solidarity contribution in front of the General Court. The plaintiffs argued that the solidarity contribution represents a tax measure, which is a right reserved for individual Member States. The plaintiffs also disagreed with the legal basis used for enacting the Regulation, i.e. Article 122 of the Treaty on the Functioning of the European Union (TFEU), which allows the Council to adopt emergency measures through qualified majority without involving the European Parliament. On a related note, the common procedure used in tax matters is governed by Article 115 TFEU and is subject to unanimous approval at Council level.

EU Institutions

Council of the EU

EU Minimum Tax Directive published in the Official Journal of the EU

On December 15, 2022, the Council of the EU reached unanimous agreement to implement the EU Minimum Tax Directive. The final text of the Directive was published in the Official Journal of the EU exactly one year after the initial proposal was released by the European Commission. Council Directive (EU) 2022/2523 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union therefore entered into force on December 23, 2022.

The agreed Directive requires Member States 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 this date. The Undertaxed Profits Rule (UTPR) will be applied for fiscal years beginning on or after December 31, 2024.

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

For more details, please refer to Euro Tax Flash Issue 500.

DAC7 implementation – state of play

On March 22, 2021, the Council of the European Union adopted rules revising the Directive on administrative cooperation in the field of taxation (the DAC) allowing Member States' tax authorities to collect and automatically exchange information on income earned by sellers on digital platforms. Member States had until December 31, 2022 to transpose – Council Directive (EU) 2021/514 (DAC7) into national law. The Directive applies from January 1, 2023 and the first reporting of data will be required by January 31, 2024.

To the best of our knowledge, as at December 31, 2022, the following Member States had transposed DAC7 into national law. Some Member States have also already provided guidance in respect of the application of the rules in practice.

- *Austria:* On July 19, 2022, the bill to transpose DAC7 into domestic law was published in the Official Gazette. The law entered into force on July 20, 2022. For more details, please refer to E-News Issue 159.
- *Belgium:* On December 30, 2022, Belgium published a law transposing DAC7 into domestic law. For more details, please refer to E-News Issue 163.
- *Bulgaria:* On December 16, 2022, Bulgaria published a law transposing DAC7 into domestic law. For more details, please refer to E-News Issue 166.
- *Croatia:* On December 22, 2022, the bill to transpose DAC7 into domestic law was published in the Official Gazette.
- *Czech Republic:* On December 7, 2022, the bill to transpose DAC7 into domestic law was published in the Official Gazette. For more details, please refer to E-News Issue 154. In addition, on December 19, 2022, the Czech tax authorities issued guidance in form of a Q&A document providing clarifications on common issues in relation to, for example, the scope of DAC7 as well as the administration of the rules.
- *Denmark:* On September 6, 2022, the Danish Minister of Taxation issued an Executive Order implementing DAC7 into Danish law. For more details, please refer to E-News Issue 163. In addition, on November 2, 2022, the Danish tax authorities published guidance providing clarifications on the application of the DAC7 reporting requirements as implemented into Danish

law. The guidance provides general information about the reporting framework under DAC7 and an overview of the registration, notification and reporting requirements for Danish, EU and non-EU reporting platform operators.

- *Finland:* On December 29, 2022, the Finnish President ratified the law transposing DAC7. For more details, please refer to E-News Issue 164.
- *France:* On December 31, 2021, the Finance Law for 2022 was published in the French Official Gazette, which included the transposition of DAC7. In addition, on December 28, 2022, the French tax authorities published a decree providing procedural guidance to comply with the DAC7 reporting requirements. The decree entered into force on January 1, 2023.
- *Germany:* On December 28, 2022, the bill to transpose DAC7 into domestic law and to modernize the tax procedures law was published in the Official Gazette The bill entered into force on December 29, 2022. For more information, please refer to E-News Issue 167.
- *Hungary*: On November 4, 2022, the bill to transpose DAC7 into domestic law was published in the Official Gazette. The rules apply with effect from January 1, 2023.
- *Ireland:* DAC7 was transposed into national law as part of the Finance Act 2021. The rules apply with effect from January 1, 2023. For more information, please refer to a report prepared by KPMG in Ireland. In addition, on December 27, 2022, the Irish tax authorities issued clarifications in relation to registration and compliance requirements for digital platform operators.
- *Latvia:* On December 23, 2022, Latvia published a law transposing DAC7 into domestic law. The rules apply with effect from January 1, 2023. For more details, please refer to a report prepared by KPMG in Latvia.
- *Netherlands:* On December 20, 2022, the upper house of Parliament adopted the 2023 Tax Plan package and various other tax bills, including the transposition of DAC7. The bill was published in the Official Gazette on December 27, 2022. For more information, please refer to a report prepared by KPMG in the Netherlands. In addition, on December 27, 2022, a decree was published implementing data collection and due diligence obligations.
- *Slovakia:* On July 4, 2022, the Slovak President signed a law transposing DAC7 into domestic law. The rules apply with effect from January 1, 2023. For more information, please refer to a report prepared by KPMG in Slovakia.

The following Member States are yet to transpose the provisions of the Directive into domestic law: Cyprus, Estonia, Greece, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia, Spain, Sweden.

Sweden announces program for Council presidency

On December 14, 2022, the Swedish Prime Minister announced the priorities for the upcoming Swedish Presidency of the Council of the EU during the first half of 2023. From a direct tax perspective, key priorities include:

- work on measures aiming to prevent tax evasion, tax avoidance, aggressive tax planning and harmful tax competition, such as updating the EU list of non-cooperative jurisdictions;
- enhancing tax transparency and reinforcing the exchange of relevant information within the EU;
- strengthening EU administrative cooperation on taxation.

For more information, please refer to the draft work program and the dedicated website of the Swedish Presidency.

Joint Declaration on EU legislative priorities for 2023 and 2024

On December 15, 2022, the European Parliament, the Council of the EU and the European Commission signed the joint declaration on EU legislative priorities for 2023 and 2024. The declaration sets out key

legislative proposals that are already under discussion at the level of the European Parliament and the Council or that will be brought forward by the European Commission in 2023.

Besides giving priority to initiatives aimed at delivering on the European Green Deal, achieving the digital transition and enhancing the EU's resilience, the joint declaration highlights the aim of achieving progress on the global tax reform.

For more details please refer to the Council's press release.

Provisional agreement on the "Fit for 55" package

On December 17, 2022, the European Commission, the Council of the EU and the European Parliament reached a provisional agreement on the reform of the EU emissions trading system (ETS) that was initially introduced in 2005 and provides for a carbon market based on a system of cap-and-trade of emission allowances for energy-intensive industries and the power generation sector.

The announcement followed the provisional agreement on the carbon border adjustment mechanism (CBAM) that was reached on December 13, 2022 (for previous coverage, please refer to E-News Issue 167) and depended on co-legislators agreeing on the EU ETS reform. Based on the December 17 agreement, ETS free allowances for sectors covered by the future carbon border adjustment mechanism (CBAM) will be gradually phased out over a period from 2026 to 2034, while CBAM will be phased in proportionately.

The Council of the EU and the European Parliament will have to formally approve both agreements before they become final.

For more details, please refer to a report prepared by KPMG and to the Council's press release.

OECD and other International Institutions

OECD

Release of three components of the GloBE Implementation Framework (Pillar Two)

On December 20, 2022, the OECD released three components of the GloBE Implementation Framework: guidance on Safe Harbors and Penalty Relief and public consultation papers on the GloBE Information Return and on Tax Certainty. An expected fourth component on Administrative Guidance has not been released and is expected to be released in early 2023.

Guidance on Safe Harbors and Penalty Relief

The Safe Harbors and Penalty Relief section contains three elements: agreement on the design of a Transitional Safe Harbor based on data reported under country-by-country reporting (CbCR) requirements; a regulatory framework for the development of a potential Permanent Safe Harbor and a common understanding for a Transitional Penalty Relief regime.

- *Transitional CbCR safe harbors:* Inclusive Framework members have agreed on a short-term exemption from detailed ETR and top-up tax computations by deeming the jurisdictional top-up tax to be zero. The basic idea of such short-term exemption is to test CbCR data (revenue and income) and financial accounting data (tax expenses) against the de minimis threshold, an agreed effective minimum rate (15 percent (2023 and 2024), 16 percent (2025), 17 percent (2026)) and substance-based income that is excluded from the GloBE tax base (routine profits). The transitional safe harbors are applicable for fiscal years beginning on or before December 31, 2026 but will not include fiscal years that end after June 30, 2028.
- *Permanent calculation simplifications:* the Inclusive Framework is also considering the use of a permanent simplified calculation of the GloBE tax base and covered taxes for testing the de minimis threshold, the effective minimum rate (15 percent) and routine profits. These simplified calculations are to be provided as part of the agreed Administrative Guidance. There is also discussion of the use of a simplified calculation for non-material constituent entities which are entities that are not included in the consolidated accounts solely by virtue of size or materiality.
- *QDMTT safe harbor:* the Inclusive Framework is further considering the use of a QDMTT safe harbor that would deem the top-up tax in a jurisdiction to be zero where the respective jurisdiction has introduced a QDMTT. The Inclusive Framework will consider such a safe harbor as part of the Administrative Guidance on the QDMTT.
- *Penalty relief regime:* In the transition period no penalties or sanctions should be applied in connection with the filing of a GloBE Information Return where a tax administration considers that an MNE has taken 'reasonable measures' to ensure the correct application of the GloBE rules.

Public consultation document on the GloBE Information Return

The consultation paper on the GloBE Information Return focuses on the identification of a comprehensive set of data points that MNE groups may need to collect in order to calculate the GloBE top-up tax liability. Data point categories comprise: general information, corporate structure, ETR and top-up tax computations, and top-up tax allocation and attribution.

The consultation document notes that the Inclusive Framework will continue work on the development of centralized filing requirements and the appropriate mechanisms to allow tax administrations to automatically exchange GloBE information collected, including a framework of bilateral and multilateral competent authority agreements and IT-solutions to support the exchange of information, in particular a dedicated XML schema.

The Inclusive Framework seeks feedback on the information to be collected, calculated, reported and exchanged under the GloBE Information Return as well as on possible simplifications where an MNE Group should not be required to collect all data points, or where it could collect different data points.

Public consultation document on Tax Certainty for the GloBE Rules

The consultation paper on Tax Certainty for the GloBE rules seeks input on various dispute prevention and dispute resolution methods.

- *Dispute prevention:* The paper notes that, as a starting point, the Globe Model Rules, Commentary and Administrative Guidance to come should form a good foundation for consistency of interpretation. It notes that the multilateral review process for recognizing the 'qualified' status for the IIR, UTPR and DMTT will add to this consistency. It states that potentially policy issues (but not specific factual issues) could be brought to the Inclusive Framework and the various Working Parties to be clarified through Agreed Administrative Guidance. The paper also notes that common

risk assessment mechanisms such as the International Compliance Assurance Program and APAs could be extended or used as a base to develop a mechanism for GloBE purposes to give rise to greater certainty.

- *Dispute resolution*: The paper focuses on the possibility to adapt Mutual Agreement Procedures (MAP) so that an MNE could refer a matter to a competent authority in a jurisdiction where actions in that jurisdiction are potentially not in line with the GloBE Rules. The competent authority would then be empowered to resolve the issue with the other jurisdictions concerned and implement the agreement not withstanding domestic time limits. Other options considered involve the use of a Multilateral Convention, exchange of information mechanisms, use of tax treaties and the creation of a reciprocal dispute resolution mechanism in domestic law along with the implementation of the GloBE rules.

Comments on the consultation documents are requested by February 3, 2023.

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

Public consultation on the removal of Digital Services Taxes under Amount A (Pillar One)

On December 20, 2022, the Inclusive Framework issued a public consultation document seeking public comments on draft rules requiring the removal of Digital Services Taxes (DSTs) and other relevant similar measures following the implementation of Amount A under Pillar One. This consultation document covers the last building block of Amount A.

Under the proposed rules, jurisdictions would no longer be allowed to apply DSTs and similar measures that are listed in an annex to the Multilateral Convention (MLC) for Amount A and that meet the following conditions:

- the tax is determined primarily by reference to the location of customers or users, or other similar market-based criteria;
- the application of the tax is ring-fenced to foreign and foreign-owned businesses; and
- the tax is not treated as an income tax under domestic law (and therefore outside the scope of treaty obligations).

The consultation document notes that the definition of DSTs and other relevant similar measures would not include, among others, value-added taxes, transaction taxes, withholding taxes that are treated as covered taxes under tax treaties, or rules addressing abuse of existing tax standards.

The proposal further provides for a mechanism to exclude jurisdictions from Amount A tax allocations where they impose a DST or similar tax listed in the annex of the MLC. Such annex will be agreed upon by the Inclusive Framework as part of the continued negotiation of the MLC.

The OECD's press release stresses that the draft rules do not reflect consensus from the Inclusive Framework on BEPS regarding the substance of the document. Comments on the consultation document are requested by January 20, 2023.

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

Sixth annual peer review report on the exchange of information on tax rulings (BEPS Action 5)

On December 14, 2022, the OECD issued the sixth annual peer review report on compliance of Inclusive Framework members with the exchange of information on tax rulings in line with the BEPS Action 5 minimum standard.

The review covered 131 jurisdictions and included the following key findings:

- while 73 jurisdictions are considered to be fully in line with the standard, 58 jurisdictions received recommendations "to improve their legal or operational framework to identify the relevant tax rulings and exchange information."
- over 23,000 tax rulings in scope of the transparency framework have been identified between 2010 and end of 2021, with 1,800 tax rulings being issued in 2021.
- almost 50,000 exchanges of information took place by December 31, 2021.

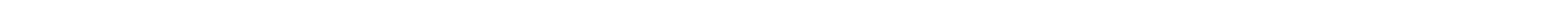
For more information, please refer to KPMG's Tax News Flash and the OECD press release.

Progress report on harmful tax practices

On January 5, 2023, the OECD published new conclusions reached by the Forum on Harmful Tax Practices (FHTP), as part of their on-going review of the implementation of the BEPS Action 5 minimum standard on harmful tax practices. The update includes the following assessments:

- Albania's industries incentive regime was concluded as potentially harmful given insufficient requirements for substantial activities.
- Armenia made commitments to amend its free economic zones regime and the tax treatment of information technology projects.
- Cabo Verde's Maio special economic zone regime was concluded to be not harmful.
- Honduras' employment and economic development zones regime was abolished without providing for any grandfathering period.
- Hong Kong (SAR)'s profits tax concessions for ship agents, ship managers and ship brokers was concluded to be not harmful.
- Jamaica's special economic zones regime was concluded to be not harmful following amendments to introduce substance requirements. A grandfathering period applies until March 30, 2023.
- North Macedonia's technological industrial development zone was concluded to be not harmful following amendments to introduce substance requirements without providing for any grandfathering period.
- Pakistan's export regime on IT was abolished without providing for any grandfathering period.

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



Local Law and Regulations

Austria

Temporary solidarity contribution on the fossil sector approved

On December 29, 2022, Austria published the bill for the introduction of a solidarity contribution on surplus profits generated by companies in the oil, gas, coal, and refinery industries, prompted by the EU Regulation on an emergency intervention to address high energy prices.

The bill entered into force on December 30, 2022.

For more information regarding the key features of the Austrian solidarity contribution, please refer to E-News Issue 166.

Belgium

Temporary tax on certain companies in the oil and refinery industries approved

On December 22, 2022, Belgium published in the Official Gazette the bill for the introduction of a temporary tax on certain companies in the oil and refinery industries, prompted by the EU Regulation on an emergency intervention to address high energy prices. Key aspects of the proposal include:

- registered oil companies that are actively operating in the refining sector, having refining capacity in Belgium will be subject to a contribution of EUR 6.90 per ton of crude oil imported between January 1, 2022 and December 31, 2023;
- registered oil companies that have been defined as primary participants for diesel, gasoline and petrol for the year of 2022 by the Royal Decree of February 5, 2019 will be subject to a contribution of EUR 7.80 per cubic meter of product released for consumption, between the period of January 1, 2022 and December 31, 2023.

Tax measures in the 2023 and 2024 budget approved

On December 20, 2022, the Belgian Parliament adopted tax measures announced in the budget for 2023 and 2024 (for previous coverage, please refer to E-News Issue 166). Key corporate tax measures include:

- abolition of the notional interest deduction;
- a temporary change to the minimum taxable income limitation, which has been applicable since 2018 for companies with a taxable income that exceeds EUR 1 million. Under the current rules, the deduction of certain tax attributes – including losses carried forward, dividends-received-deduction (DRD) carried forward, etc., is limited to 70 percent of the carry forward amount exceeding EUR 1 million. The proposed change would temporarily reduce the deductibility percentage from 70 percent to 40 percent;
- changes to the method of calculating the foreign tax credits related to royalties.

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

Bulgaria

Temporary solidarity contribution on the fossil sector enacted

On December 13, 2022, Bulgaria published in the Official Gazette the law introducing a solidarity contribution on surplus profits generated by companies in the oil, gas, coal, and refinery industries.

In addition, the Bulgarian tax authorities released the following clarifications on December 21, 2022:

- advance contributions are to be paid without a need to file the annual tax return beforehand;
- the filing and payment deadline in relation to the annual contribution for 2022 is June 30, 2023;
- the annual contribution for 2022 is to be recognized as an expense for the fiscal year 2022.

For more information regarding the key features of the Bulgarian solidarity contribution, please refer to E-News Issue 165 and to a report prepared by KPMG in Bulgaria.

Croatia

Revised proposal for a temporary extra profits tax approved

On December 16, 2022, the Croatian Parliament approved the law introducing an extra (windfall) profits tax prompted by the EU Regulation on an emergency intervention to address high energy prices. Compared to the initial proposal (please see E-News Issue 166), the bill provides for the following clarifications and amendments in relation to the extra profits tax base calculation:

- exclusion of preceding fiscal years (2018-2021) where in-scope taxpayers incurred a tax loss;
- exclusion of income derived from the sale of long-term assets to related parties where the disposal was made before October 31, 2022;
- exclusion of gains and losses realized from the sale/disposal of shares in associated entities where a two-year minimum holding requirement is met;
- exclusion of non-realized valuation losses in relation to financial assets (except loans and receivables) which are not deductible for corporate income tax purposes;
- inclusion of business restructurings (e.g. mergers);
- inclusion of tax incentives obtained based on the Investment Promotion Act.

The measures entered into force on December 23, 2022.

Finland

Revised proposal for a temporary electricity profits tax

On December 29, 2022, the Finnish government released a revised proposal for the introduction of a solidarity contribution on surplus profits generated by certain energy companies prompted by the EU Regulation on an emergency intervention to address high energy prices.

Compared to the initial proposal (please see E-News Issue 167), the revised text provides for a 30 percent rate (previously 33 percent) to be applied on net taxable profits for income tax purposes (subject to some exceptions) that are generated by certain electricity companies in the tax year 2023 and that exceed a 10 percent (previously 5 percent) return on the company's equity as stated in its balance sheet.

In addition, the revised law proposal provides for 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. The tax would be applied in addition to the corporate income tax and would not be tax deductible.

Revised interest limitation rules

On December 9, 2022, the Finnish President signed a law limiting the application of the equity escape clause under the interest deduction limitation rules that were introduced as part of the implementation of the EU Anti-Tax Avoidance Directive (ATAD). The equity escape rule provides taxpayers with the option to deduct exceeding borrowing costs where they are a member of a consolidated group for financial accounting purposes, taking into account the group's ratio of equity over total assets. Under the revised rules, the equity escape does not apply if the interest paid to significant shareholders is 20 percent or more of the interest paid to third parties. The law is effective from January 1, 2023.

France

Tax measures in 2023 Finance Bill enacted

On December 31, 2022, the Finance Bill for 2023 was published in the Official Gazette following an examination by the constitutional Council. In line with the Budget proposal (please see E-News Issue 164), the bill 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 – i.e. 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.

Germany

2022 Annual Tax Act enacted

On December 16, 2022, the German Federal Council (Bundesrat) adopted the 2022 Annual Tax Act, including the introduction of a temporary solidarity contribution and revised non-resident taxation rules in relation to German-nexus IP (for previous coverage, please refer to E-News Issue 167).

The 2022 Annual Tax Act was published in the Official Gazette on December 20, 2022 and entered into force the next day.

Updated list of non-cooperative jurisdictions enacted

On December 21, 2022, the decree to update the list of non-cooperative jurisdictions for purposes of the German law to combat tax avoidance and unfair tax competition was published in the Official Gazette.

In line with the conclusion adopted by the Council of the EU on October 4, 2022 (please see E-News Issue 163), the updated list includes the following twelve jurisdictions: American Samoa, Anguilla, the Bahamas,

Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands, Vanuatu.

The decree entered into force on December 22, 2022.

Hungary

Windfall profits tax on pharmaceutical producers

On December 23, 2022, the Hungarian government published a decree to expand the scope of windfall profit taxes to the pharmaceutical industry, applicable for the years 2022 and 2023.

The windfall profits generated by pharmaceutical producers are subject to the following progressive rates:

- turnover of up to HUF 50 billion (approximately EUR 125 million): 1 percent;
- turnover between HUF 50 billion and HUF 150 billion (approximately EUR 275 million): 3 percent;
- turnover above HUF 150 billion: 8 percent.

The 2022 windfall tax on pharmaceutical producers is due by May 20, 2023. For the tax year 2023, an advance payment is to be made by November 20, 2023 based on the expected tax liability for 2023.

The new decree entered into force on December 24, 2022.

Updated list of non-cooperative jurisdictions enacted

On December 28, 2022, a decree to update the list of non-cooperative jurisdictions for tax purposes was published in the Official Gazette.

In line with the conclusion adopted by the Council of the EU on October 4, 2022 (please see E-News Issue 163), the updated list includes the following twelve jurisdictions: American Samoa, Anguilla, the Bahamas, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands, Vanuatu.

The decree came into effect on December 29, 2022

Ireland

Finance Act 2022 enacted

On December 15, 2022, the Irish President signed into law the Finance Act 2022. For more information regarding the key business tax measures, please refer to E-News Issue 164 and a report prepared by KPMG in Ireland.

Italy

Tax measures in Budget Bill 2023 enacted

On December 29, 2022, the Budget Law for 2023 was published in the Official Gazette. Key corporate income tax measures include:

- *Solidarity contribution on the fossil sector*: companies with at least 75 percent of their turnover attributable to operations in the fossil fuel sector will be subject to a contribution levied at 50 percent of excess profits generated in the fiscal year 2022. Excess profits are calculated as the taxable profits that are above 10 percent of the average taxable profits for the period 2018-2021. The new contribution replaces the previous windfall tax applied in 2022 (for more details, please refer to E-News Issue 166).
- *Deduction limitation in relation to the list of non-cooperative jurisdictions*: expenses incurred from transactions with companies / professionals based in a non-cooperative jurisdiction will only be deductible up to the normal free market value. Exceptions apply e.g. in the case of genuine transactions carried out for real business purposes or transactions with non-residents covered by the CFC rules.
- *One-off substitute tax on undistributed profits subject to a privileged tax regime:* under the Italian participation exemption dividends received by Italian companies from foreign subsidiaries generally benefit from a 95 percent corporate income tax exemption. However, partial (12 percent) or full taxation (24 percent) is triggered if the paying subsidiary benefits from a low-tax regime. The new rules will allow a voluntary one-off reduced taxation (9 percent or 6 percent if certain conditions are met), to be computed on qualifying undistributed earnings.

The Law entered into force on January 1, 2023.

Latvia

Updated list of non-cooperative jurisdictions

On December 23, 2022, the Latvian government updated its domestic list of non-cooperative jurisdictions. In line with the conclusion adopted by the Council of the EU on October 4, 2022 (please see E-News Issue 163), the updated list includes the following twelve jurisdictions: American Samoa, Anguilla, the Bahamas, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands, Vanuatu.

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

Luxembourg

Clarifications in respect of reverse hybrid mismatch rule

On December 15, 2022, the Luxembourg Parliament passed the 2023 Budget law that includes clarifications on the application of the reverse hybrid mismatch rules that were introduced as part of the ATAD implementation and are effective from tax year 2022.

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

Netherlands

2023 Tax Plan and other tax bills adopted

On December 20, 2022, the upper house of the Dutch Parliament adopted the 2023 Tax Plan package and various other tax bills, including:

- introduction of a temporary solidarity contribution;

- transposition of DAC7;
- introduction of a minimum carbon price for industrial emissions;
- limitation of excessive borrowing under the Own Companies Act.

The measures were published in the Official Gazette on December 27, 2022.

For more information, please refer to E-News Issue 165 and a report prepared by KPMG in the Netherlands.

Withholding tax treatment in hybrid situations clarified by the Dutch Ministry of Finance

On December 6, 2022, the Dutch Ministry of Finance published a decree clarifying the withholding tax treatment where dividend, interest or royalty payments are received by a foreign hybrid entity (i.e. non-transparent for Dutch tax purposes and transparent for foreign income tax purposes). According to the Decree, a hybrid entity is considered to be the beneficiary of such payments and entitled to domestic withholding tax relief where it can be substantiated that the hybrid entity has taken into account the income for foreign tax purposes.

Updated list of non-cooperative jurisdictions

On December 27, 2022, an updated list of jurisdictions that have a statutory corporate income tax rate of less than 9 percent or are on the EU's list of non-cooperative jurisdictions was published in the Official Gazette. The list reflects the changes to the EU list as adopted by the Council of the EU on October 4, 2022 (please see E-News Issue 163). The list includes the following jurisdictions:

American Samoa, Anguilla, the Bahamas, Bahrain, Bermuda, British Virgin Islands, Cayman Islands, Fiji, Guam, Guernsey, Isle of Man, Jersey, Palau, Panama, Samoa, Trinidad and Tobago, Turkmenistan, Turks and Caicos Islands, the United Arab Emirates, US Virgin Islands, Vanuatu.

The list is relevant for Dutch CFC purposes as well as for the envisaged Dutch conditional withholding taxation (for previous coverage see E-News issue 129).

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.

Portugal

Temporary solidarity contribution approved

On December 22, 2022, the Portuguese Parliament approved the bill for the introduction of a temporary solidarity contribution on the energy and food distribution sectors.

For more information regarding the key features of the Portuguese solidarity contribution, please refer to E-News Issue 167).

The measures were published in the Official Gazette on December 30, 2022.

Romania

Temporary solidarity contribution enacted

On December 28, 2022, Romania issued a bill introducing a temporary solidarity contribution prompted by the EU Regulation on an emergency intervention to address high energy prices. The contribution will apply to certain companies operating in the crude oil, natural gas, coal and refinery sectors. The contribution applies for tax years 2022 and 2023 and is levied at 60 percent of revenues that exceed the average profits of the last four years (i.e. 2018, 2019, 2020 and 2021) by more than 20 percent.

The contribution will co-exist with the domestic windfall tax on of energy companies (for more details, please refer to E-News Issue 161) and will be due by June 25, 2023 and June 25, 2024, respectively.

Slovakia

Temporary solidarity contribution approved

On December 22, 2022, the Slovak Parliament approved the proposal for the introduction of a solidarity contribution on taxable profits generated by companies in the oil, gas, coal, and refinery industries prompted by the EU Regulation on an emergency intervention to address high energy prices. Key features of the proposal include:

- the contribution would be levied at a rate of 55 percent on profits generated in the tax period beginning on or after January 1, 2022;
- the tax base would be the same as the one for corporate income tax purposes (i.e. no limitation to surplus profits).

Amendments to transfer pricing rules and introduction of interest limitation rules

On December 6, 2022, the Slovak Parliament approved a law providing for changes to Slovakia's income tax act 2022 (for previous coverage, please refer to E-News Issue 163). The bill includes the following key corporate tax measures:

- amendments to Slovakia's transfer pricing rules, with effect from January 1, 2023;
- introduction of interest limitation rules in line with ATAD 1, with effect from January 1, 2024.

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

Spain

Temporary solidarity contribution enacted

On December 27, 2022, Spain published the law introducing a solidarity contribution on surplus profits generated by companies in the energy and banking sectors (for previous coverage, please refer to E-News Issue 165). Key features of the solidarity contribution include:

- 1.2 percent levy on the net turnover generated in 2022 and 2023 by the following energy companies:
    - main operators in the electricity, natural gas, fuel, and liquefied petroleum gas sectors provided that the total net turnover in 2019 exceeded EUR 1 billion and the net turnover derived from the qualifying energy activity exceeded 50 percent of its total net turnover in

any of the years 2017, 2018 or 2019; and
    - companies that perform activities in the oil, gas, coal and refinery sectors, where at least 75 percent of turnover is generated in the field of the extraction, mining, refining of petroleum or manufacture of coke oven products.
- 4.8 percent levy on the net interest income and net commissions generated in 2022 and 2023 by financial institutions operating in Spain provided that the income from interest and commissions derived in 2019 was equal to or exceeded EUR 800 million.

The contributions are not tax deductible for corporate tax purposes.

The new law entered into force on December 29, 2022.

Tax incentives for start-up companies enacted

On December 22, 2022, the law to promote the start-up ecosystem (widely known as the "Start-ups law") was published in the Spanish Official Gazette.

The new law provides for a set of tax incentives aimed at attracting talent and investment in start-up companies, including a favorable personal income tax regime for the delivery of shares or stock options to start-up employees and tax credits for investing in newly or recently created companies, to be granted under certain conditions.

The law entered into force on December 23, 2022 with its main tax-related provisions effective from January 1, 2023.

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

Implementation of public Country-by-Country Reporting

On December 22, 2022, Spain published a law in the Official Gazette to transpose the EU Public Country-by-Country (CbyC) Reporting Directive into domestic law. In line with the EU Directive, the new law requires 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 Spain 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 Spain 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, i.e. non-EU headquartered groups. Exceptions will apply if the non-EU ultimate parents publish the CbyC report on their website within 6 months from the balance sheet date and designate a subsidiary in another Member State to file the report with the local commercial register.

The CbyC report must be approved and published within 6 months from the closing date of the financial year to which they refer (the Directive provides for a 12-month deadline) and must be submitted with the Spanish Mercantile Registry.

Reduced corporate income tax rate for small companies as part of 2023 State Budget

On December 23, 2022, Spain published the 2023 State Budget law 31/2022 in the Official Gazette. From a corporate income tax perspective, the law introduces a reduced corporate tax rate of 23 percent (regular

rate: 25 percent) applicable to companies with a net turnover of less than EUR 1 million in the previous fiscal year.

Switzerland

Constitutional amendment to implement GloBE rules (Pillar Two) approved

On December 16, 2022, the Swiss Parliament approved the proposal of the Swiss Federal Council to amend the constitution to implement the OECD's Pillar Two Model Rules providing for a global minimum tax. The amendment of the constitution will be subject to a public referendum in June 2023.

If the constitutional amendment is confirmed by public vote, it is expected that the Federal Council will implement global minimum taxation with effect from January 1, 2024.

The actual implementation is to be executed by the Federal Council by means of an ordinance. On August 17, 2022, a draft ordinance governing technical details was published for consultation. A separate draft governing the relevant procedures is set to follow once the OECD administrative guidance is released.

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

United Kingdom

Report on the UK digital services tax

On November 23, 2022, the National Audit Office published a report on its evaluation of the DST applied in the UK since April 1, 2020 (for more details, please refer to E-News Issue 117). The report examines the implementation and operation of the DST in the first year of application. According to the report, the DST is a temporary solution to taxing the digitalization of the economy and is expected to be replaced by Amount A of the OECD Pillar One proposal.

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

Local Courts

Sweden

License fees paid to companies not performing DEMPE functions are not deductible

On February 1, 2022, the Administrative Court of Gothenburg (Court) issued a ruling in a case concerning license fees paid to group companies owning intangible property.

The plaintiff was a Swedish company ('AB') which was assigned by a Maltese group company (MaltaCo) to develop a business concept. The concept was subsequently licensed by MaltaCo, which became the legal owner of the trademark. Since AB would use the trademark in its local business activities, a license arrangement was introduced.

The Swedish tax authorities (STA) challenged the deductibility of the license fees paid by AB to MaltaCo, on the grounds that the latter did not perform any development, enhancement, maintenance, protection, or exploitation (DEMPE) functions.

The Court's ruling referred to the OECD's Transfer Pricing Guidelines and upheld the position taken by the tax authorities. In particular, the Court noted that, since the owner and licensor of the trademark did not perform any DEMPE functions, an unrelated party would not pay a license fee.

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 shared their insights on some of the latest developments from across the EU affecting multinational groups operating in Europe. The "EU tax perspectives" webcast focused 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 for a replay of the session.

Plastic taxes – A European perspective

The use of environmental taxes to drive the sustainability agenda is on the rise and new regulations and legislation are being introduced on a global scale at a rapid pace. While a "plastic tax" is not a new concept, it is quickly becoming a legislative discussion point in several regions and countries as governments implement various environmental protection methods to combat climate change and tackle waste and pollution.

Please refer to a report prepared by KPMG in the Netherlands that provides an overview of the of plastic taxes applied in the European Union.

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 Mana KPMG's EU Tax Centre

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