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E-News from the EU Tax Centre

Issue 171 – February 22, 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:

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Latest CJEU, EFTA and ECHR

CJEU

[CJEU concludes that the UK group transfer rules are not contrary to EU law](#)

On February 17, 2023, the Court of Justice of the European Union (CJEU or the Court) rendered its [decision](#) in case C-707/20. The case concerns the compatibility with EU law of UK¹ rules on group transfers.

The Court found that the disputed rules do not infringe the freedom of establishment in so far as the difference in treatment between intra-group domestic transfers and intra-group cross-border transfers of assets for a consideration can be justified by the need to maintain a balanced allocation of taxing powers. In the Court's view, immediate taxation of the transfers was a proportionate measure and the UK was not required to allow for the possibility of tax deferrals for realized capital gains.



Infringement Procedures and CJEU Referrals

Referrals

[Commission refers eight Member States to the CJEU over the protection of whistleblowers](#)

On February 15, 2023, the European Commission [decided](#) to refer eight Member States to the CJEU for failure to transpose and notify measures to implement into local legislation Directive 2019/1937 on the protection of persons who report breaches of Union law (the Whistleblowers Directive). These Member States are the Czech Republic, Estonia, Germany, Hungary, Italy, Luxembourg, Poland and Spain.

Under the Whistleblowers Directive, Member States are required to introduce a mechanism to protect individuals reporting or revealing information on law breaches. The scope of the Directive explicitly includes breaches of corporate tax rules and arrangements that are aimed at obtaining a tax advantage that defeats the object or purpose of the applicable corporate tax law. Member States had to transpose the rules into local legislation by December 17, 2021.

For more information, please refer to the European Commission's [press release](#).



¹ The CJEU remains competent for judicial procedures concerning the UK where registered before the end of the transition period (i.e. December 31, 2020).

EU Institutions

Council of the EU

Updates to the EU list of non-cooperative jurisdictions

On February 14, 2023, the ECOFIN Council adopted [conclusions](#) on the EU list of non-cooperative jurisdictions (Annex I) and the state of play with respect to commitments taken by cooperative jurisdictions to implement tax good governance principles (Annex II – so called “grey list”).

The Council agreed to add the Marshall Islands to the list of non-cooperative jurisdictions (Annex I) and to move three jurisdictions from Annex II to Annex I: British Virgin Islands, Costa Rica and the Russian Federation.

Following this latest revision, the EU list of non-cooperative jurisdictions therefore includes the following sixteen jurisdictions: American Samoa, Anguilla, the Bahamas, British Virgin Islands, Costa Rica, Fiji, Guam, Marshall Islands, Palau, Panama, Russian Federation, Samoa, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands, Vanuatu.

In addition, Albania, Aruba and Curaçao were added to the grey list while four jurisdictions were removed from the grey list as they had fulfilled their previous commitments (Barbados, Jamaica, North Macedonia and Uruguay).

As a result, the grey list now includes the following eighteen jurisdictions: Albania, Armenia, Aruba, Belize, Botswana, Curaçao, Dominica, Eswatini, Hong Kong, Israel, Jordan, Malaysia, Montserrat, Qatar, Seychelles, Thailand, Turkey and Vietnam.

For more details, please refer to Euro Tax Flash [Issue 506](#).

Code of Conduct Group work program under the Swedish Presidency

On February 6, 2023, the Council published the new [work program](#) of the Code of Conduct Group (Business Taxation) for the first half of 2023 under the Swedish Presidency. Key work items include:

- assessment of jurisdictions under consideration of the results of the 2022 peer reviews of the Global Forum on Transparency and Exchange of Information for Tax Purposes (“Global Forum”) in respect of the automatic exchange of information (criterion 1.1) and the exchange of information on request (criterion 1.2);
- review of progress made by jurisdictions in relation to amending or abolishing preferential tax regimes – e.g. foreign source income exemption regimes (criterion 2.1) – and the implementation of substance requirements under the OECD Forum on Harmful Tax Practices (FHTP) global standard on substantial activities for no/nominal tax jurisdictions (criterion 2.2);
- review of progress made by jurisdictions with regards to the application of the Country-by-Country Reporting (CbCR) minimum standard (criterion 3.2);
- discussions on the future criterion 1.4 on the exchange of beneficial ownership information;
- enhancing the effective application of national tax defensive measures towards non-cooperative jurisdictions;
- discussion on a gradual extension of the geographical scope;
- evaluation of the possible impact of Pillar 2 on the work of the Code of Conduct Group, including on the EU listing criteria.

For more information, please refer to the [website](#) of the Code of Conduct Group.

European Commission

Public consultation on the implementation of the Foreign Subsidies Regulation

On February 6, 2023, the European Commission launched a [public consultation](#) on a draft implementing regulation to clarify practical and procedural aspects related to the application of the Foreign Subsidies Regulation (Regulation (EU) 2022/2560) on foreign subsidies distorting the internal market.

More specifically, the draft implementing regulation clarifies the information required in the notification forms for concentrations and public procurement procedures, rules on the calculation of time limits and on access to the file, as well as the rights of the parties.

The consultation runs until March 6, 2023.

For more information, please refer to E-News [Issue 169](#) and the Commission's [press release](#).



OECD and other International Institutions

Organisation for Economic Cooperation and Development – OECD

Public comments received on the GloBE Information Return consultation document (Pillar Two)

On February 16, 2023, the OECD released [comments](#) received on the GloBE Information Return (GIR) consultation document (for previous coverage, please refer to E-News [Issue 168](#)).

The OECD received a total of 87 responses, including a [response letter](#) submitted by KPMG International, which provides the following key comments:

- KPMG strongly support the efforts of the Inclusive Framework on BEPS to develop a standardized reporting framework and centralized filing system.
- The reporting mechanism should not require an MNE to report to multiple jurisdictions.
- Disclosure should be on a jurisdictional basis and not a Constituent Entity basis.
- The Inclusive Framework should explore segmenting the information reported in the GIR, i.e. GloBE information should only be provided to those who strictly need to evaluate a specific and clearly identifiable risk of underpayment of a GloBE-based tax liability.
- The GIR should provide foundational information only and detailed information should be contained in supporting workpapers held by the MNE.
- Information should not be required beyond what is necessary (e.g. for the use of a safe harbor where such a safe harbor is applied or where a QDMTT reduces the GloBE liability in other jurisdictions to zero).

For more information, please refer to KPMG's [Tax News Flash](#) and the OECD [release](#).

Public comments received on the consultation document on Tax Certainty (Pillar Two)

On February 16, 2023, the OECD released [comments](#) received on the Tax Certainty for the GloBE Rules consultation document (for previous coverage, please refer to E-News [Issue 168](#)).

The OECD received a total of 87 responses, including a [response letter](#) submitted by KPMG International, which provides the following key comments:

- KPMG believes that tax certainty is a critical factor for the Pillar Two project and cannot be underestimated.
- A register of requests and the responses should be maintained and should form part of the (authoritative) Administrative Guidance.
- Further guidance is required to ensure consistent application of the GloBE Rules and avoid double taxation (e.g. on the interaction of domestic anti-avoidance regimes (such as GAAR) and the GloBE rules, on the implications of non-qualified status of a local IIR, UTPR or DMTT, etc.).
- Clarity is needed on how 'further' guidance is intended to apply for a given fiscal year (i.e. static vs. dynamic approach). In this context, the Inclusive Framework should clearly indicate which GloBE rule items have been modified through new guidance, when the guidance was issued, and when the Inclusive Framework treats it as taking effect.
- It should be made clear that an MNE, where it follows the latest Inclusive Framework mandated version of the Administrative Guidance for a given year in arriving at its top-up tax positions, should be relieved from penalties or interest.
- An effective dispute resolution mechanism should be initiated to safeguard the access to justice as envisaged by the OECD.
- A multilateral convention would only provide for full legal protection in case of an enforceable procedure, where taxpayers would have the option to enforce the competent authorities to enter into an agreement, and if necessary to start binding arbitration.
- Taxpayers should have access to a mutual agreement procedure and should be able to initiate this, not only in case of double taxation but also in case of taxation not in accordance with the GloBE rules.

For more information, please refer to KPMG's [Tax News Flash](#) and the OECD [release](#).



Local Law and Regulations

Denmark

[Ruling on taxable presence risks where a managing director works from home](#)

On November 21, 2022, the Danish tax authorities [issued](#) a binding statement providing clarifications on when a managing director's work from home constitutes an effective place of management or a permanent establishment in Denmark for a foreign company. In the case concerned, a managing director of two Norwegian companies worked from home in Denmark for 3 days a week and 2 days a week from the office in Norway. Due to long working hours in Norway, the managing director spent 65 percent of the time in

Norway and 35 percent in Denmark. The managing director held 20 percent of the shares in the Norwegian companies.

The Danish tax authorities concluded that the work from Denmark would not trigger a taxable presence in form of an effective place of management since the day-to-day management was mainly performed in the office in Norway where all other employees were located. However, the Danish tax authorities ruled that the managing director's work from home would create a permanent establishment in Denmark for both companies. According to the tax authorities, the managing director had a significant position in both companies given his job function and the interest he held in the companies. In addition, the managing director could not be easily replaced and it was important for him to work from Denmark. As a result, the Norwegian companies were deemed to have a relevant interest in being present in Denmark.

Ireland

[Guidance on interested deduction limitation rule updated](#)

On February 2, 2023, the Irish tax authorities [published](#) an updated Tax and Duty Manual providing guidance on the interest limitation rule that was introduced as part of the implementation of the EU Anti-Tax Avoidance Directive (ATAD). The manual was updated to reflect amendments made to the Finance Act 2022 in December 2022 (for previous coverage, please refer to E-News [Issue 168](#)) and includes updates to the following guidance sections:

- section 4.1 - interest equivalent;
- section 4.4 - legacy debt;
- section 5 - relevant profit or relevant loss;
- section 9 - long-term public infrastructure project;
- section 11.4 - further rules regarding deemed borrowing cost;
- section 12 - carry forward of total spare capacity.

For more details, please refer to the e-brief [issued](#) by the Irish tax authorities.

North Macedonia

[Draft law for the implementation of a temporary windfall profit tax published](#)

The North Macedonian government has submitted to the Parliament draft legislation to introduce a temporary solidarity (windfall profits) tax on the fossil sector. Key features of the proposed tax include:

- application to corporate income tax taxpayers with revenues of more than MKD 615 million (approximately EUR 10 million) in 2022;
- the tax would be levied at a rate of 30 percent on excess profits generated in 2022;
- excess profits would be calculated as the taxable profits in 2022 (for corporate income tax purposes) that are above 20 percent of the average taxable profits generated in the fiscal years 2018, 2019 and 2021;
- alternatively, excess profits would be calculated as the average taxable profits generated in 2021 and 2022 that are above 20 percent of the average taxable profits generated in the fiscal years 2017, 2018 and 2019;
- the payment of the windfall profit tax would be due on May 31, 2023.

For more information, please refer to a [report](#) prepared by KPMG in North Macedonia.

Poland

[Draft law for the implementation of DAC7 published](#)

On February 8, 2023, the Polish government [published](#) draft legislation to transpose the EU Directive on Information Exchange in the Digital Platform Economy (DAC7) into national law. The bill would require digital platform operators to provide the Polish tax authorities with information about certain users (“sellers”) on their platform.

The bill is expected to enter into force on May 1, 2023. Comments on the bill can be submitted until March 1, 2023.

For more information, please refer to a [report](#) prepared by KPMG in Poland.

Portugal

[Municipal surcharge rates for the year 2023](#)

On January 31, 2023, the Portuguese tax authorities [published](#) the municipalities surcharge rates for 2023. The municipal surcharge is levied by certain municipalities and applies to resident companies and permanent establishments of non-resident companies established within the respective municipality. The surcharge is levied at a rate of up to 1.5 percent on the annual taxable profits.

Spain

[New list of non-cooperative jurisdictions published](#)

On February 10, 2023, the Spanish government [published](#) a new list of jurisdictions that are considered to be non-cooperative or to have harmful tax regimes (for previous coverage, please refer to E-News [Issue 169](#)). The new list is based on the following assessment criteria for non-EU jurisdictions:

- results of the peer review performed by the Global Forum on the effectiveness of the exchange of tax information;
- lack of an effective exchange of tax information with Spain;
- absence of a legal framework (e.g. mutual assistance agreements) in respect of the information exchange for tax purposes;
- existence of harmful tax regimes;
- existence of tax regimes that facilitate offshore structures which attract profits without real economic activity or through the existence of low or zero taxation or through their lack of transparency.

The new list of non-cooperative jurisdictions has replaced the previous national list with effect from February 11, 2023 and includes the following jurisdictions:

American Samoa, Anguilla, Bahrain, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Dominica, Fiji, Gibraltar, Guam, Guernsey, Isle of Man, Falkland Islands, Jersey, Mariana Islands, Palau, Samoa, Seychelles, Solomon Islands, Trinidad and Tobago, Turks and Caicos, Vanuatu, and U.S. Virgin Islands.

Ruling on where a set of warehouses could constitute a permanent establishment

On December 23, 2022, the Spanish tax authorities [issued](#) a ruling providing clarifications on the application of the permanent establishment article in the double tax treaty between Spain and Ireland (1994). The case concerned an Irish company engaging in the purchase, import, distribution and sale of products to related and – occasionally – to third parties. The Irish company imported products that were stored in leased Spanish warehouses. These products were subsequently distributed to other companies in several jurisdictions, including Spain, by a Spanish subsidiary under the Irish company's directions, supervision and risk.

The Spanish tax authorities concluded that, in principle, the set of warehouses through which the Irish company carried out all or part of its activities of importation, logistics and distribution of goods, could constitute one or more permanent establishments in Spain. Furthermore, the Spanish tax authorities concluded, based on the OECD Model Tax Convention commentary of 2014, that the set of activities performed by the Irish company in Spain were not of a preparatory or auxiliary character.

Further to the above, the Spanish tax authorities noted that in order to verify whether a permanent establishment exists in Spain with economic and geographic coherence, an analysis of the functions and risks assumed in Spain needs to be performed for the Irish company and the Spanish subsidiary, respectively.

Sweden

Pillar Two implementation report published

On February 7, 2023, an interim report on the implementation of the EU Minimum Tax Directive was submitted to the Swedish government. The interim report proposes the introduction of the GloBE Rules in correspondence with the EU Directive, while adapting to certain Swedish specifics.

Key takeaways from the interim report include:

- The implementation law would consist of 10 chapters and approximately 280 sections including both substantive and procedural rules.
- The implementation law would become effective on January 1, 2024 with the Income Inclusion Rule (IIR) to apply to tax years beginning after December 31, 2023 and the Undertaxed Profits Rule (UTPR) to apply after December 31, 2024.
- The interim report proposes to apply the UTPR in form of an additional tax instead of an adjustment through a denial of deduction.
- The interim report proposes the implementation of a Domestic Minimum Top-up Tax.
- The interim report proposes a filing procedure that would include the submission of a tax report (similar to the GloBE Information Return) and a supplementary tax return. Group entities would be required to notify the Swedish tax authorities that another group entity has submitted the tax report (similar to the notification requirements under Country-by-Country Reporting).
- The interim report also proposes administrative penalties to sanction non-compliance with the reporting requirements (e.g. in form of delayed or incorrect filing).

It is important to note that official draft legislation is yet to be published and that the interim report misses certain GloBE elements (e.g. safe harbor provisions).

For more details, please refer to a [report](#) (in Swedish) prepared by KPMG in Sweden.

Draft bill to transpose Public Country-by-Country Reporting

On February 9, 2023, the Swedish Ministry of Justice published a [draft law](#) to transpose the EU Public Country-by-Country Reporting Directive into domestic law (the Directive).

The draft bill is largely in line with the Directive, however the minimum consolidated net turnover which brings multinational groups in scope of the Directive was set at SEK 8 billion (EUR 724 million). Sweden intends to apply the rules earlier than the deadline set under the Directive, i.e. for financial years starting on or after May 31, 2024 instead of June 22, 2024.

For more details, please refer to the government's [press release](#) and a [report](#) (in Swedish) prepared by KPMG in Sweden. For more information on the Country-by-Country Reporting Directive, please refer to the EU Tax Centre's dedicated [website](#).

United Kingdom

Guidance on new Mandatory Disclosure Rules published

On February 3, 2023, the HMRC published [guidance](#) on reporting cross-border arrangements under the new Mandatory Disclosure Rules (MDR) for Common Reporting Standard Avoidance Arrangements and Opaque Offshore Structures (for previous coverage, please refer to E-News [Issue 169](#)).

The new guidance provides clarifications on the scope of the new reporting requirements as well as on the administration of the rules, including timing and filing procedure.

For more information, please refer to a [report](#) prepared by KPMG in the UK.

Guidance on alternative dispute resolution

On February 1, 2023, the HMRC [published](#) new guidance on an alternative dispute resolution (ADR) process in order to resolve a tax dispute between HMRC and taxpayers outside of the tribunal or court.

Based on the new guidance, parties in dispute can call on the services of an impartial and neutral HMRC mediator, who will help them explore ways of resolving the dispute without the need for formal proceedings, if possible. The ADR process can be used in respect of an HMRC decision that taxpayer can appeal against (e.g. in the course of a compliance check).

The case under dispute can be referred to an HMRC mediator either by HMRC or by the taxpayer. Whether the case is suitable for ADR must be decided by the HMRC mediator within 30 days. Once the mediation has started, the aim is to conclude the process within 4 months.



Local Courts

Czech Republic

[Lower court decision on the deductibility of interest related to acquisition loan and abuse of law](#)

The Regional Court in Prague issued a decision in a case concerning the deductibility of interest on an acquisition loan (judgment 55 Af 4/2020-137). The plaintiff concluded a loan agreement for the purpose of purchasing shares in a Czech company, with which it was subsequently merged by acquisition. The loan was provided by an independent consortium of banks at the level of the entire investment group, and the debt was then transferred to a Czech company that made the purchase. The tax authorities denied the deductibility of interest on the bank loan, on the grounds that the restructuring transaction was carried out for the sole purpose of obtaining a tax advantage.

The Court found that the main business reason behind the merger transaction was to facilitate the takeover of a group of companies by a new investment group. The court also noted that it was the consortium of lending banks that required the plaintiff to transfer the debt to the Czech company. In the Court's view, it could not be assumed that the banks would create an artificial structure. The tax authorities appealed the judgment to the Supreme Administrative Court.

For more details, please refer to the [report](#) prepared by KPMG in the Czech Republic.

[Lower court decision on documenting the tax treatment of services rendered by related parties](#)

The Regional Court in Brno (the Court) issued a decision in a case concerning the deductibility of consultancy services provided by a parent company (No. 30 Af 57/2021-76). Following a tax audit, the tax authorities considered that the plaintiff failed to provide adequate documentation to support the deductibility of services received. The tax authorities also submitted a request for information to the Austrian tax authorities to verify whether the services were effectively rendered from Austria. Based on the results of the investigations and the limited supporting documentation available locally, the tax authorities denied the deductibility of these expenses. The taxpayer challenged the inspection notice in front of the regional court.

The Court acknowledged that it was reasonable to expect that the documentation related to intra-group transactions would be less formal as compared to transactions between third parties. However, the Court noted that in the case under dispute it was not clear whether the services were actually performed and whether the plaintiff actually received the supporting documentation from the parent company or instead created it themselves. Therefore, the Court concluded that the plaintiff failed to comply with its burden of proof and upheld the findings of the tax authorities.

For more details, please refer to the [report](#) prepared by KPMG in the Czech Republic.



KPMG Insights

Preparing for Pillar 2

As part of the Future of Tax & Legal webcast series, KPMG International held a webcast on February 15 and 16, 2023 providing updates on recent developments in respect of the OECD's Pillar 2 solution.

The OECD has released further Administrative Guidance on nearly 30 issues concerning the implementation of the GloBE rules. A number of these are likely to be critical to the implementation projects for in scope MNEs. These include rules surrounding the Qualifying Domestic Minimum Top-up Tax and the manner in which CFC taxes are to be treated. This session outlined this new guidance.

Please access the Future of Tax & Legal [webpage](#) for a replay of the sessions.

Pillar One: Where Next?

2023 is the year of implementation for the OECD's Pillar Two global minimum tax rules. But agreement has yet to be reached on Pillar One – the other half of the OECD's BEPS 2.0 package.

Within the world of Pillar One, the future for Amount A (the proposed reallocation of taxing rights over a small set of large, highly profitable companies) and Amount B (a transfer pricing simplification project that would apply to small and large businesses alike) is much less certain.

On February 28, 2023, KPMG LLP will hold a one-hour webcast on where Pillar One may go next, focusing on:

- Status of Amount A, Amount B, and the removal of digital services taxes
- Expected developments in 2023
- Implications for the future of the international tax system and how countries apply transfer pricing rules.

Please access the [event page](#) to register.

EU Carbon Border Adjustment Mechanism: Preparing for the new regulation

The implementation of the European Union's (EU) Carbon Border Adjustment Mechanism (CBAM) on October 1, 2023 is expected to reshape global trade at large. It is imperative that businesses understand and prepare for the changes that the mechanism will bring about.

On February 14, 2023, a panel of KPMG professionals provided insights into the inner workings of CBAM, explored the effect that these measures have on organizations situated both within and outside of the EU, and delved into why the decarbonization of production, whether it's within the EU or abroad, is expected to be a key source of competitive advantage for selling into the EU market.

Please access the [event page](#) for a replay of the session.





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