E-News from the EU Tax Centre

Issue 189 – January 18, 2024

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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- **General Court:** General Court dismisses EU Minimum Tax Directive challenge
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Latest CJEU, EFTA and ECHR

CJEU

CJEU decision on Portuguese additional solidarity tax on the banking sector

On December 21, 2023, the Court of Justice of the European Union (the CJEU) issued its decision in case C-340/22. The case concerns the compatibility of the Portuguese additional solidarity tax on the banking sector with EU law.

On July 24, 2020, Portugal introduced an additional solidarity tax on the banking sector (Adicional de Solidariedade sobre o Sector Bancário or ASSB). Both credit institutions tax resident in Portugal and Portuguese branches of credit institutions resident in other Member States are liable to pay the ASSB. The tax is levied on the adjusted liabilities and notional value of off-balance sheet derivative financial instruments of credit institutions. Certain elements, such as own funds and comparable debt instruments, can be deducted from the ASSB taxable base. Since entities without legal personality are not able to issue own funds, it was a concern that branches are not able to deduct such elements (as opposed to Portuguese credit institutions or Portuguese subsidiaries of credit institutions resident in other Member States).

The plaintiff, a Portuguese branch of a French credit institution, challenged the legality of the ASSB on the grounds that the tax breaches EU law. The questions eventually referred to the CJEU by the competent Portuguese court concerned i) whether the ASSB was not compliant with Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms; and ii) whether the difference in treatment between credit institutions resident in Portugal and branches of non-resident credit institutions represents a restriction on the freedom of establishment. The case was referred to the CJEU, which asked the Advocate General (AG) to express his opinion solely on the freedom of establishment point. On July 13, 2023, AG Pikamäe recommended that the CJEU finds the measure under dispute as being in breach of EU law – see E-News Issue 181.

When analyzing the first question, the CJEU held that Directive 2014/59/EU does not aim to harmonize the taxation of credit institutions within the EU. Consequently, the Directive cannot constitute a barrier to establishing a tax like the ASSB, the Court said.

With regard to the second question, the CJEU first recalled its settled case-law, based on which the freedom of establishment precludes a difference in tax treatment of non-resident companies operating through a subsidiary or a branch in the host Member State, compared to the treatment of resident companies that are in a comparable situation. The Court also reiterated that a compulsory levy which provides for a criterion of differentiation that is apparently objective, but that disadvantages between resident and non-resident companies, represents indirect discrimination and is prohibited under EU law.

The Court then noted that, based on the information provided by the referring court, branches of non-resident companies are unable to deduct own funds or comparable dept instruments from the ASSB tax base. Whilst the measure at hand applies without distinction to resident and non-resident credit institutions, the difference in the taxable base results in a less favorable treatment for non-resident credit institutions wishing to establish themselves in Portugal through a branch. The CJEU concluded that the ASSB triggers indirect discrimination against non-resident credit institutions, which is prohibited by the freedom of establishment.

The CJEU continued by analyzing and subsequently rejecting all possible justifications for the restriction identified. The Court first rejected Portugal's plea that the restriction could be justified by the need to preserve the coherence of the domestic tax system. Under settled case-law, such a justification could be accepted only if a direct link is established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy. In the Court's view, no evidence was brought to support the fact that the advantage of deducting own funds from the ASSB tax base is offset by additional taxes levied on resident credit institutions.

Furthermore, the CJEU also rejected a justification based on the balanced allocation of the power to impose taxes between Member States. The Court noted that Portugal chose not to tax resident and subsidiaries of non-resident credit institutions with regards to the deductible items. In the Court's view, and in line with the AG's opinion, a justification based on taxing rights to support a less favorable treatment of branches would be therefore inconsistent with waiving the taxing rights.

Consequently, the CJEU concluded that the legislation under dispute represents a restriction on the freedom of establishment and is contrary to EU law.

General Court

General Court dismisses EU Minimum Tax Directive challenge

On December 15, 2023, the General Court dismissed an action (case T-143/23) brought against Council Directive (EU) 2022/2523 (EU Minimum Tax Directive or the Directive). The challenge was based on Article 263 of the Treaty on the Functioning of the EU (TFEU) and dealt principally with the interaction between the provisions of the Directive on the exclusion of income from shipping activities and Member States' tonnage tax regimes authorized under State aid rules.

Article 17 of the EU Minimum tax Directive introduces an exclusion for international shipping income and qualified ancillary international shipping income, provided that the entity demonstrates that the strategic or commercial management of all ships concerned is effectively carried on from within the jurisdiction where it is located.

The plaintiff is a Dutch multinational company carrying out geotechnical services and ship management activities that is subject to corporate income tax in the Netherlands under the Dutch tonnage tax regime. The challenge before the General Court relates to the requirement for a specific location of strategic or commercial management as per Article 17 of the Directive, and the absence of transitional measures for taxpayers who invested based on EU-approved tonnage tax schemes. The applicant held that – in the absence of transitional of grandfathering rules for benefits granted under existing schemes, the application of the EU Minimum Tax Directive will offset the benefits of the tonnage tax regime and will therefore alter the rights it acquired prior to the adoption of the Directive. For previous coverage, please refer to E-News Issue 177.

The Court recalled that, under Article 263 TFEU, individuals and legal entities are allowed to institute proceedings for annulment of the following three types of acts: i) acts addressed directly to that person, ii) acts which are of direct and individual concern to them, and iii) regulatory acts of direct concern which do not entail implementing measures. The Court then noted that, as the EU Minimum Tax Directive is addressed to the Member States (and not to companies) and is not a regulatory but a legislative act, it could only be challenged by the applicant based on point ii) above. Under settled case-law, the two criteria – i.e., direct and individual concern, are distinct and cumulative.

Focusing on the second criterion, the Court reiterated the case-law with regards to cases when a person (individual or legal entity) could be considered individually concerned by a measure not addressed to them. Specifically, this occurs when the person is impacted due to specific attributes which are peculiar to them or factual circumstances which differentiate them from all other persons and thereby making them distinct in a similar manner to the person addressed by the measure. In the Court's view, this is not the case of the applicant, since Article 17 of the EU Minimum Tax Directive applies to all economic operators that satisfy certain objective conditions and, in particular, those carrying out an activity in the maritime sector, irrespective of the EU Member State in which those operators are established and of tax scheme they benefit from (general corporate income tax or authorized tonnage tax).

The Court also reiterated its case-law based on which, where a measure affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of persons. This would particularly be the case when the measure alters rights acquired by those persons before the measure was adopted.

However, the Court took the view that the plaintiff was not able to prove that it was part of a limited class of persons affected by the Directive. The General Court emphasized that the applicant did not bring any evidence on the identity of the persons that benefit from the Dutch tonnage tax scheme and are therefore capable of being affected by Directive. Moreover, the Court held that benefits of the tonnage tax scheme are not a required right specific to the applicant or to a limited class of persons. Instead, other taxpayers could benefit from similar schemes in other Member States or could start benefiting from the scheme after the Directive was adopted.

The Court thus concluded that the applicant was not individually concerned by the EU Minimum Tax Directive, without further need to analyze the direct concern. The taxpayer has the right to appeal the General Court's ruling before the CJEU.

Infringement Procedures and Court Referrals

Infringement Procedures

European Commission closes infringement procedures regarding DAC7 transposition

On December 20, 2023, the European Commission (the EC or the Commission) decided to close infringement procedures against four Member States regarding the failure to (partially) notify national measures transposing Council Directive (EU) 2021/514 (DAC7) into domestic legislation. These Member States are Croatia, Estonia, Portugal and Latvia (the latter with respect to the partial transposition of DAC7).

These proceedings were initiated on January 27, 2023 and targeted a total of 14 Member States that had failed to fully or partially notify the Commission of national measures transposing DAC7 into domestic legislation – see E-News Issue 170. The Commission subsequently entered into the second stage of the infringement procedure with regards to certain Member States and sent reasoned opinions to Belgium, Greece, Spain, Cyprus, Poland, and Portugal in July 2023. The EC had already decided on October 18, 2023, to close the infringement procedures against Italy, Lithuania, Luxembourg, and Romania.

As at the date of this publication, infringement procedures are still active against Belgium, Cyprus, Greece, Spain, and Poland. However, to the best of our knowledge, Poland and Spain are the only two Member States that have not finalized the internal legislative process required for implementation of DAC7.

EU Institutions

Council of the EU

Priorities of the Belgian Presidency of the Council of the European Union released

On December 8, 2023, the Belgian Minister of Foreign Affairs presented the priorities of the Belgian Presidency of the Council of the EU for the first semester of 2024. In the field of direct taxation, the Programme of the Presidency:

- prioritizes measures aimed at curbing tax evasion, tax avoidance, aggressive tax planning and harmful tax competition. To this end, the Presidency intends to update the EU's list of non-cooperative jurisdictions, to drive initiatives to reduce compliance costs and the burden for cross-border investors, and addressing tax abuse related to withholding taxes;
- welcomes the Business in Europe Framework for Income Taxation (BEFIT) package;
- outlines the intention of exploring the usefulness of more unified tax rules in other fields over the longer term, e.g. in relation to mobile workers;
- confirms that the Presidency will support the implementation of the Unshell Directive and will back the SAFE initiative;
- commits to conduct work to ensure greater tax transparency and reinforce the exchange of relevant information within the EU, in particular concerning the effective functioning of the Minimum Tax Directive.

Pillar Two implementation in the EU – State of Play

As at the date of this publication, eighteen EU Member States – *Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Romania, Slovakia, Slovenia* and *Sweden*, had finalized the internal legislative process required for implementation of the EU Minimum Tax Directive.

As per a notice published by the European Commission on December 12, 2023, *Estonia, Latvia Lithuania, Malta* and *Slovakia* have notified the EC of their intention to elect for a delayed application of the IIR and UTPR (in accordance with Article 50 of the EU Minimum Tax Directive).

Another five EU countries that have not opted for deferral or that do not qualify for deferral – *Cyprus, Greece, Poland, Portugal* and *Spain*, have missed the transposition deadline and are expected to finalize the implementation of the rules in the course of 2024.

For more details on the EU Minimum Tax (Pillar Two) Directive domestic implementation through the EU countries, please refer to Euro Tax Flash Issue 535.

For more details, please refer to KPMG's dedicated Pillar Two State of Play tracker.

European Commission

EU Pillar Two FAQs

On December 22, 2023, the European Commission published non-binding "frequently asked questions" (FAQs) on the interpretation of the EU Minimum Tax Directive (2022/2523) that constitute the outcome of informal discussions between the EU Member States and the Commission Services.

The FAQs reinforce the reference to the OECD's work under Recital 24 of the Preamble to the EU Minimum Tax Directive and confirm that the Commentary to the OECD Model Rules could be used as a source of illustration or interpretation to ensure consistency in application of the rules across Member States, to the extent that those sources are consistent with the Directive and EU law. Reference to the OECD Model Rules, the Commentary, and the Administrative Guidance is made throughout the FAQs in the context of the interpretation of certain Directive terms and provisions. Since the third tranche of Administrative Guidance was released just a couple of days before the publications of the FAQ, i.e., on December 18, 2023, the FAQs do not refer to those recent supplementary provisions and clarifications.

The FAQs also include clarifications in relation to provisions in the EU Minimum Tax Directive that are specific to EU implementation and not derived from the OECD Model Rules (e.g., the deferral option as per Article 50 of the EU Directive and the scope of the Safe Harbour placeholder in Article 32 of the Directive). In addition, the FAQs provide for certain clarifications that relate to specific EU considerations (e.g., Acceptable Accounting Standards in EU Member States, treatment of tax schemes approved under an EC State aid assessment, the treatment of domestic windfall taxes on surplus profits).

For a detailed overview of the FAQs, please refer to Euro Tax Flash Issue 533.

Increased thresholds for determining size classes for companies

On December 21, 2023, a European Commission delegated act amending the size thresholds for companies under the EU Accounting Directive (Directive 2013/34/EU), was published in the Official Journal of the EU.

The classification of companies or groups into micro, small, medium-sized or large companies is made based on an assessment of three criteria as follows:

- two monetary size criteria: balance sheet total and net turnover, and
- the average number of employees.

Companies are assigned to the appropriate size group for the purposes of the EU Accounting Directive when they do not exceed two out of the three criteria relevant for that group. The Commission is tasked with reviewing these criteria at least every five years to account for inflation.

The delegated act amends the monetary size thresholds for micro, small, medium-sized and large companies by 25 percent. The new thresholds are therefore as follows:

Micro undertakings do not exceed the limits of at least two of the three following criteria:

- balance sheet total: EUR 450,000 (previously EUR 350,000);
- net turnover: EUR 900,000 (previously EUR 700,000);
- average number of employees: 10 (unchanged).

Small undertakings do not exceed the limits of at least two of the three following criteria:

- balance sheet total: EUR 5 million (previously EUR 4 million);
- net turnover: EUR 10 million (previously EUR 8 million);
- average number of employees: 50 (unchanged).

Member States are allowed to define thresholds exceeding the balance sheet and net turnover thresholds, limited to EUR 7.5 million for the balance sheet total and EUR 15 million for the net turnover.

Medium undertakings (are not micro-undertakings or small undertakings) do not exceed the limits of at least two of the three following criteria:

- balance sheet total: EUR 25 million (previously EUR 20 million);
- net turnover: EUR 50 million (previously EUR 40 million);
- average number of employees: 250 (unchanged).

Large undertakings are those that exceed at least two of the three following criteria:

- balance sheet total: EUR 25 million (previously EUR 20 million);
- net turnover: EUR 50 million (previously EUR 40 million);
- average number of employees: 250 (unchanged).

Member States are required to implement the new thresholds by December 24, 2024. The new provisions are applicable for financial years beginning on or after January 1, 2024. Member States have the option to apply the thresholds retroactively, for financial years beginning on or after January 1, 2023.

The category to which an undertaking is assigned is relevant for several EU provision, including the scope of the reporting requirements for non-EU headquarter multinationals under the EU Public Country-by-Country Reporting Directive, as well as the Corporate Sustainability Reporting Directive.

Local Law and Regulations

Bahrain

Draft corporate income tax law expected in March 2024

KPMG in Bahrain reported that in December 2023, the Bahrain Government and the Financial and Economic Affairs Committee of the Council of Representatives discussed plans of widening the scope of taxes and the potential introduction of a corporate income tax (CIT) regime in Bahrain. The draft CIT law is expected to be presented to the legislative authority in March 2024.

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

Belgium

EU Public CbyC Reporting Directive adopted

On December 21, 2023, Belgium's Chamber of Representatives adopted the draft law transposing the EU Public Country-by-Country ("CbyC") Reporting Directive (the Directive) into local law. The law requires promulgation to enter into force.

Key takeaways include:

- The provisions of the Belgian bill are largely aligned with the text of the Directive.
- Adoption of the website publication exemption, under which in-scope companies or branches are exempt from publishing the report on their websites, if the report is already made publicly available to any third party located in the EU, free of charge, on the website of a commercial registry.
- Failure to comply with the disclosure requirement will result in administrative fines between EUR 50 and EUR 10,000, with potential further consequences in the event of fraudulent intent.

The public disclosure rules will apply to financial years starting on or after June 22, 2024. Website publication / filing with the Belgian National Bank is due 12 months after the financial year end.

For more details, please refer to a report prepared by KPMG in Belgium. For more details on public CbyC reporting please refer to the dedicated KPMG webpage.

Belgium enacts amendments to CFC and anti-abuse rules

On December 29, 2023, a bill amending the Belgian controlled foreign corporations (CFC) and anti-abuse rules was published in the Official Gazette.

The bill includes amendments to the Belgian CFC rules, shifting from model B (transactional approach) to model A (categorical approach – passive income) under the EU Anti-Tax Avoidance Directive (ATAD). As such, whilst the previous regime only targeted income derived from non-genuine arrangements put in place for the essential purpose of obtaining a tax advantage, the new regime focuses on the taxation of non-distributed passive income of low-taxed entities. For more details about the new CFC rules, please refer to E-News Issue 188.

In addition to the CFC amendments, the bill also limits the scope of two existing anti-abuse provisions:

- Article 54 of the Belgian Tax Code, which targets the deductibility of certain interest payments, patent use fees, manufacturing fees and service remuneration; and

- Article 344 of the Belgian Tax Code, which provides the tax authorities with the possibility to deny the enforceability of transactions involving shares, bonds, debt claims, copyrights, patents, manufacturing processes, trademarks, or cash.

Under the new rules, the scope of the two articles above would be limited with respect to payments or transactions with non-residents or foreign permanent establishments (PEs), where:

- there is a direct or indirect link of mutual interdependence between the parties (which can be economic, managerial or structural), and
- the non-resident or foreign PE is not subject to tax on such payments or transactions or benefits from a significantly favorable tax regime.

However, the anti-abuse rules do not apply where: i) the actual tax borne by the non-resident or foreign PE is at least half of the tax that would have been due in Belgium, or ii) the payments are made for legitimate business reasons that reflect economic reality.

The new rules apply as of January 1, 2024.

Bilateral agreement with Netherlands signed to clarify permanent establishment in case of remote working

On November 23, 2023, Belgium and the Netherlands signed a Competent Authority Agreement (the Agreement) concerning the interpretation of Article 5 (Permanent Establishments) of the Belgium-Netherlands Income Tax Treaty. The Agreement provides guidance to employers in Belgium and the Netherlands on evaluating whether employees working remotely from their home country (i.e., for the employer resident in the treaty partner jurisdiction) trigger a permanent establishment for their employer in that jurisdiction.

The Agreement focuses on three types of remote working arrangements:

- *Occasional working from home:* under the guidelines, such work does not create a permanent establishment due to the lack of continuity;
- *Regular working from home with the option to work at the employer's location*: under the guidelines such work generally does not trigger a permanent establishment because the employee is not required to work from home and can also choose to work at the workplace provided by the employer.
- *Consistent working from home*: may create a permanent establishment depending on whether the employer has actual control over the workplace as well as the activities conducted at the location.

Additionally, as a practical guideline, the Agreement establishes that if an employee works 50 percent or less of his or her working time from home during a year, there is no permanent establishment in any case. If 50 percent or more of the working time is spent working from home in a year, the presence of a permanent establishment depends on the factors mentioned in the Agreement.

The Agreement is applicable from December 8, 2023.

For more information, please refer to the tax alert prepared by KPMG in Belgium.

Bulgaria

EU Public CbyC Reporting Directive transposed into local legislation

On December 19, 2023, legislation implementing into Bulgarian national law the provisions of the EU Public Country-by-Country (CbyC) Reporting Directive (the Directive) was published. Key takeaways include:

- The provisions of the Bulgarian legislation are closely aligned with the text of the Directive.
- The consolidated net turnover threshold for in-scope multinationals (MNEs) is BGN 1.5 billion (approximately EUR 766 million), in each of the last two consecutive financial years.
- The threshold applicable to branches of non-EU MNEs is a net turnover of BGN 16 million (approximately EUR 8 million), in each of the last two consecutive financial years.
- Bulgaria adopted the "safeguard clause" to allow in scope groups to temporarily omit, for a maximum of five years, information that would cause a significant competitive disadvantage to the companies concerned, provided they can justify the reason for the omission.
- Bulgaria did not opt for the website publication exemption.

The legislation will apply as of January 1, 2025.

Czech Republic

EU Public CbyC Reporting Directive transposed into local legislation

On December 13, 2023, legislation to implement the EU Public CbyC Reporting Directive (the Directive) was published in the Czech Republic. Key takeaways include:

- The provisions of the Czech public CbyC bill are closely aligned with the text of the Directive.
- The minimum consolidated net turnover which brings MNEs in scope of the Directive was set at CZK 19 billion (approximately EUR 773 million) for Czech headquartered MNEs and the CZK equivalent of EUR 750 million for non-EU headquartered MNEs in each of the last two consecutive financial years.
- The threshold applicable to branches is a net turnover of CZK 200 million (approximately EUR 8.3 million), for the last two consecutive financial years.
- Adoption of the "safeguard clause" to allow in scope groups to temporarily omit, for a maximum of five years, information that would cause a significant competitive disadvantage to the companies concerned, provided they can justify the reason for the omission.

The legislation will apply to financial years starting on or after June 22, 2024.

Denmark

Proposed amendments to the list of jurisdictions subject to defensive tax measures

On December 19, 2023, the Danish government released a bill aimed at aligning the list of jurisdictions subject to the Danish defensive tax measures with the October 17, 2023 update of the EU list of non-cooperative jurisdictions.

Subject to the adoption of the bill, Antigua, Barbuda, Belize and the Seychelles will be added to the list, while the British Virgin Islands, the Marshall Islands and Costa Rica will be removed. Additionally, the explanatory comments to the bill state that Russia has been added to the list separately following the termination of the Double Tax Treaty, with effect from January 1, 2024.

The bill is expected to be adopted in January 2024 and to enter into force on February 1, 2024.

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.

France

List of companies subject to financial transaction tax in 2024

On December 20, 2023, the French tax authorities published the list of French companies whose shares will be in scope of the financial transaction tax in 2024. This list encompasses 121 companies with a market capitalization exceeding EUR 1 billion on the reference date (December 1, 2023). Compared to last year's version, the 2024 list includes two new companies, and the total number of in-scope companies has decreased by nine.

The acquisition of shares issued by in-scope companies is subject to a financial transaction tax levied at 0.3 percent of the acquisition price. The corresponding financial intermediary is responsible for the calculation and the levy of the tax.

For more information on Financial Transaction Taxes in the EU, please refer to the EU Tax Centre's dedicated website.

France enacts Finance Act for 2024

On December 30, 2023, the French Finance Act for 2024 was published in the Official Gazette. In addition to implementing the EU Minimum Tax Directive, the bill includes several direct tax measures that may impact businesses. Key takeaways include:

- *Tax incentive for green industry*: introduction of a new tax credit for companies investing in listed green industries. The credit rate will be in a range of 20 percent to 45 percent of the qualifying expenditures and will be subject to prior approval from the French Tax Authorities. Any excess credit will be refundable to the taxpayer. Relying on the relaxed EU state aid rules, this new incentive has been approved by the EC on January 8, 2024. For previous coverage, please see E-News Issue 185.

- *Alignment of the Parent-Subsidiary regime with EU Law*: in order to align the Parent-Subsidiary regime with a recent decision from the CJEU on the compatibility of the French tax integration scheme with the EU freedom of establishment (see Euro Tax Flash Issue 514), the bill extends for fiscal years starting on or after December 31, 2023, the application of the 99 percent participation exemption to dividends paid by an EU 95 percent-held company to a French company. The exemption is available regardless of whether the latter is a member of a French tax-consolidated group or not, provided that – if the EU-95 percent held subsidiary would have been established in France, both companies could have constituted such a group for at least one year.
- *Implementation of a plan to step-up the fight against tax fraud*: the French Finance Act for 2024 implements several measures announced by the French Government earlier in 2023. In particular, the bill strengthens the Transfer Pricing documentation requirements and makes them enforceable against taxpayers in the event of discrepancies with the policy applied.
- *Postponement of the abolishment of the Business Value Added contribution*: this contribution was previously due to be abolished in 2024; however, the Government finally decided to spread it over an additional four-year period, until 2027.

For more details, please refer to a dedicated report from KPMG in France.

Germany

Updated list of non-cooperative jurisdictions

On December 20, 2023, a decree to update the list of non-cooperative jurisdictions for the 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 17, 2023 (please see E-News Issue 185), the updated list includes the following 16 jurisdictions: American Samoa, Antigua and Barbuda, Anguilla, the Bahamas, Belize, Fiji, Guam, Palau, Panama, Russia, Samoa, Seychelles, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands, Vanuatu.

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.

Germany aligns interest deduction limitation rules with ATAD

On December 29, 2023, legislation aligning the German interest deduction limitation rules with the EU Anti-Tax Avoidance Directive (ATAD) was published in the Official Gazette. Key amendments include:

- The definition of '*interest expenses* for the purpose of the rules is broadened to include, in addition to remuneration for borrowed capital, economically equivalent expenses and other expenses related to the raising of debt capital (within the meaning of Article 2 of the ATAD). Symmetrical amendments were made to the definition of '*interest income'.*
- Interest expenses and income from the financing of certain public infrastructure projects are excluded from the definition of interest.
- The interest deduction limitation rules are not applicable when the net interest expense of a company is less than EUR 3 million or in the case of companies which are not affiliated with any

other persons within the meaning of Section 1 of the Foreign Tax Act and which do not have foreign permanent establishments.

- In the event that a partial operation is discontinued or transferred, any unused EBITDA carry-forward and any unused interest carry-forward are proportionately lost.

It should be noted that several provisions were initially part of the Growth Opportunities Act, which is yet to be adopted, as some measures are to be further discussed in 2024. For previous coverage on the Growth Opportunities Act, please refer to a report prepared by KPMG in Germany.

The new rules apply for financial years beginning after December 14, 2023 and not ending before January 1, 2024.

Greece

List of jurisdictions with preferential tax regimes jurisdictions relevant for 2022

On December 19, 2023, the Greek Public Revenue Authority issued a Circular, outlining the jurisdictions identified as having preferential tax regime status for the 2022 tax year.

The list is relevant for specific tax regulations, such as limitations on the deductibility of expenses incurred in relation to residents of a jurisdiction on the list.

For the fiscal year 2022, the list includes 42 jurisdictions - as listed below, with the only amendment being the addition of Tokelau (as compared to the 2021 list):

- Albania, Andorra, Anguilla, Bahamas, Bahrain, Barbados, Belize, Bermuda, Bonaire, Bosnia and Herzegovina, British Virgin Islands, Bulgaria, Cayman Islands, Cyprus, Gibraltar, Guernsey, Hungary, Ireland, Isle of Man, Jersey, Kosovo, Kyrgyzstan, Liechtenstein, Macau, Maldives, Marshall Islands, Moldova, Monaco, Mongolia, Montenegro, North Macedonia, Paraguay, Qatar, Saba, Saudi Arabia, St. Eustatius, Timor-Leste, Tokelau, Turkmenistan, Turks and Caicos Islands, United Arab Emirates, and Vanuatu.

In addition to this, the Greek list of non-cooperative countries for fiscal year 2022 was already published in the Official Gazette on October 25, 2023. For previous coverage, please refer to E-News Issue 186.

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.

Ireland

Guidance on registering for DAC7 reporting obligations published

On December 21, 2023, the Irish Revenue updated its Tax and Duty Manual – Registration Guidelines for EU Directive 2021/514 (DAC7). The manual now offers guidance on how to register for complying with the reporting obligations for platform operators, as well as entailing general guidance on filing a DAC7 return. The relevant reporting tool will start to operate in January 2024.

The DAC7 rules became effective on January 1, 2023, with initial registration required by November 30, 2023. The first reporting deadline is January 31, 2024.

For more information, please refer to eBrief No. 267/23 and E-News Issue 186.

Ireland enacts several tax measures in Finance Act 2023

On December 29, 2023, Ireland enacted the Finance Act 2023. The Act, which also implements the EU Minimum Tax Directive, include several direct tax measures that may impact businesses. Key takeaways include:

- *Research and Development Tax Credit (RDTC)*: Increase in the rate of the RDTC from 25 percent to 30 percent. In addition, the amount of RDTC that can be refunded as part of the first year RDTC instalment is doubled (i.e. from EUR 25,000 to EUR 50.000). It should be noted that the RDTC was already amended by the Finance Act 2022 with the aim of making it a qualified refundable tax credit for Pillar Two purposes.
- *Defensive tax measures*: Inclusion of defensive tax measures in respect of outbound payments of interest, royalties and distributions to associated entities resident in jurisdictions on the EU list of non-cooperative jurisdictions or no-tax / zero tax jurisdictions. These new provisions, that will generally apply to payments from April 1, 2024, restrict the operation of certain domestic withholding tax exemptions in respect of in-scope payments, in addition to requiring reporting of such.
- *Bank Levy:* A revised bank levy will be introduced for 2024 and apply to banks which received financial assistance from Ireland during the banking crisis. It is expected to generate approximately EUR 200 million in revenue and will be revised during 2024 to ensure it remains calibrated for future years.

For more details on Ireland Budget 2024, please refer to a dedicated KPMG Ireland webpage.

Italy

Legislative decree implementing international tax reform published

On December 28, 2023, legislation implementing a reform of the domestic rules relating to international taxation was published in the Official Gazette. The reform provides a number of direct tax measures and amendments including:

- implementation of Pillar Two (details covered in E-News Issue 183);
- introduction of a new tax residency criteria;
- extension of capital gain exemption regime to EU and EEA companies;
- temporary incentive for certain activities relocated to Italy, featuring a temporary 50 percent exemption for CIT and regional tax purposes;
- amendments to CFC rules to align the computation of the effective tax rate with Pillar Two provisions.

For more detailed information on the different tax measures, please refer to E-News Issue 187.

Luxembourg

Law to increase the investment tax credit enacted

On December 28, 2023, Luxembourg enacted a law to reform the investment credit, effective from January 1, 2024. The main features of the law include:

- *Introduction of a new investment tax credit*: for investments in digital transformation, ecological, and energy transition. This credit is calculated based on both the acquisition cost of assets and qualifying deductible expenses.
- *Amendment of the tax credit for global investment*: increasing the basic tax rate from 8 percent to 12 percent and eliminating the EUR 150,000 threshold.

The new tax credit entered into force with respect to tax year 2024.

For a detailed overview of the amended investment tax credit, please refer to E-News Issue 181.

Malta

Malta issues tax rules for holders of nomad residence permits

On December 7, 2023, the Maltese Minister of Finance published legislation on nomad residence permits, governing the income tax treatment of non-EU nationals, who have obtained a nomad residence permit and are working remotely from Malta.

An eligible applicant for a nomad residence permit will be subject to income tax at a rate of 10 percent, applicable on income derived from pre-defined 'authorized work', subject to double tax relief. Authorized work includes services performed by a third-country national either having a contract of employment with a non-Maltese company or being self-employed and providing services for clients who do not reside in Malta, and which do not have a Maltese fixed place of business. Additionally, the services need to be provided remotely.

Eligible applicants are not liable to income tax before the end of a 12-month period starting from the date of issuance of the nomad residence permit (or from January 1, 2024, whichever is later), unless the applicant files a declaration with the Residency Malta Agency stating that during that period the residence was not merely of a casual nature.

Eligible applicants are required to register for income tax purposes and to file income tax returns.

Updated guidelines on the notional interest deduction rules published

On December 20, 2023, the Maltese Commissioner for Revenues published an updated version of the guidelines on the notional interest deduction (NID) rules (Version 1.1). Key updates include:

- *Approval for claiming the NID:* shareholders or partners in a company are required to give their approval for the entity to claim the NID. This approval is subject to conditions and must be given at the earlier of the date on which the company files its income tax return for the respective year or on the date on which one of the shareholders or partners ceases to be a shareholder or a partner.

- *Deduction and carry-forward of the NID:* the updated guidelines clarify that a NID available on certain items of risk capital is not allowed as a deduction for income tax purposes and is therefore also not to be carried forward to subsequent years of assessment. In this regard, such items of risk capital refer to situations in which a company is not employed in a trade or business and the corresponding risk capital does not result in any income in the relevant year of assessment.
- *Claiming of a NID against foreign-sourced income arising from immovable property:* the updated guidelines clarify that risk capital employed in acquiring foreign-sourced rental income is also eligible for a NID for Maltese income tax purposes.

Netherlands

EU Public CbyC Reporting Directive transposed into local legislation

On December 29, 2023, legislation implementing into Dutch national law the provisions of the EU Public Country-by-Country Directive (the Directive) was published in the Official Gazette. Key takeaways from the new legislation include:

- The provisions of the Dutch public CbyC bill are closely aligned with the text of the Directive.
- The bill provides the possibility to apply the "safeguard clause".
- Companies would be required to publish the reports on their website, as the Netherlands did not grant an exemption from publication where the reports are made available free of charge on the website of the local commercial registry.
- The threshold applicable to branches of non-EU MNEs is a net turnover of EUR 12 million.

The public disclosure rules will apply to financial years starting on or after June 22, 2024.

For more details on public CbyC reporting please refer to the dedicated KPMG webpage.

Netherlands updates the list of low-tax and non-cooperative jurisdictions for tax purposes

On December 29, 2023, 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. As part of the update, the United Arab Emirates were removed from the list while Antigua and Barbuda, Belize, Russia and Seychelles were added. The list now includes the following jurisdictions:

American Samoa, Anguilla, Antigua and Barbuda, Bahamas, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Fiji, Guam, Guernsey, Isle of Man, Jersey, Palau, Panama, Russia, Samoa, Seychelles, Trinidad and Tobago, Turkmenistan, Turks and Caicos Islands, U.S. Virgin Islands, Vanuatu.

The update entered into force on January 1, 2024.

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.

Tax plan 2024 enacted

On December 27, 2023, the Netherlands enacted the 2024 Tax Plan along with a number of separate legislative (tax) proposals. Key amendments in the field of corporate income tax include:

- *Interest deduction limitation rules*: amended by removing with effect from January 1, 2025, the EUR 1 million threshold, which is available as an alternative to the EBITDA test. The interest expenses of real estate entities will therefore only be deductible within the limit of 20 percent of the EBITDA, irrespective of the resulting amount.
- *Dividend-stripping rules:* tightened by requiring a 'registration date' (also called a 'record date') for dividends on shares traded on a regulated market (e.g. a stock exchange), with the aim to establish who is entitled to a credit, reduction or refund of dividend tax on the legally set record date. Another measure entails changing the division of the burden of proof in favor of the tax authorities. The proposed changes mean that the burden of proof rests on those who invoke a concession (for example, a refund or credit) to convincingly demonstrate that they are the ultimate beneficiary. For the interpretation of the term 'ultimate beneficiary' the OECD Model Convention, the corresponding OECD Commentary and the case law of the Court of Justice of the European Union (CJEU) are deemed relevant.
- Mutual funds and comparable foreign entities will no longer be subject to corporate income tax from 2025.

For a detailed overview of the 2024 Tax Plan, please refer to a report prepared by KPMG in the Netherlands.

Dutch tax authorities publish a position paper on the application of dividend withholding tax on share repurchases under double tax treaties

On December 21, 2023, the Dutch tax authorities published a position paper addressing the dividend withholding tax (WHT) treatment with respect to share repurchases, applicable in cases where the relevant double tax treaty (DTT) does not allocate the taxing right over such repurchase to the Netherlands.

In the case presented, a company bought back shares from a number of individuals that had substantial shareholdings and were residents in another jurisdiction. Under the Dutch tax law, the amount paid on a repurchase of shares in excess of the average capital paid on such shares is included in the proceeds for dividend tax purposes and subject to WHT.

The transaction was deemed a capital gain for the purposes of applying the DTT, which gave rise to the question whether the absence of a taxing right under the DTT should be considered when levying dividend withholding tax.

The Dutch tax authorities took the view that the distributing company is not required to withhold dividend tax due to the fact that the taxing right over the repurchase of shares is not allocated to the Netherlands under the Capital gains article of the DTT. Moreover, the position paper specifies that if dividend tax was nevertheless withheld, an objection, or a request for an ex officio reduction can be submitted.

Spain

Updated list of companies in scope of the financial transaction tax published

On December 13, 2023, the Spanish Tax Agency has published a list of Spanish companies whose shares are in scope of the financial transaction tax in 2024. This list encompasses 51 companies that have a market capitalization exceeding EUR 1 billion on the reference date (December 1, 2023), and are listed on a regulated Spanish or EU stock market, or on an equivalent stock exchange in a third country.

The acquisition of qualifying shares issued by in-scope companies is subject to a financial transaction tax of 0.2 percent of the consideration for the transaction. The levy of the tax is due regardless of the residency of the purchaser.

For more information on Financial Transaction Taxes in the EU, please refer to the EU Tax Centre's dedicated website.

Türkiye

Bill amending local participation exemptions and increasing support for exports published

On December 28, 2023, a bill reforming the Turkish participation exemption and increasing support for exports was published in the Official Gazette. Key amendments include:

- *New participation exemption rules*: applicable for corporate taxpayers that do not meet the criteria for the standard participation exemption regarding investments in companies located outside of Türkiye. The new rules stipulate a 50 percent exemption on dividend income derived from a foreign company, provided that the taxpayer holds a minimum of 50 percent of the foreign company's paid-up capital. Additionally, the dividend income must be repatriated to Turkey by the corporate tax return filing deadline for the respective period. A similar provision is applicable to individuals.
- *Increase of the corporation income tax deduction for exports*: the corporate income tax deduction applicable to income generated from exporting to non-residents specific services, which are solely utilized outside the country, has been increased to 80 percent (from the previous 50 percent). However, the deduction is contingent upon the requirement that all generated income is repatriated to Turkey. Similar rules apply for individuals.
- *The reduction of the corporate tax rate (by 5 percentage points) for export income:* was extended to manufacturing and supplying companies. The tax discount applies to income generated by such companies through export activities conducted in collaboration with foreign trade capital companies or sectoral foreign trade companies under an intermediary export contract.

These new rules apply in respect of income received from January 1, 2023.

Local Courts

Belgium

Belgian Supreme Court decision on the application of the EU principle of prohibition of abuse

On November 30, 2023, the Supreme Court of Belgium (the Supreme Court) issued a decision concerning the application of the EU principle of prohibition of abuse in the context of the EU Parent-Subsidiary Directive (PSD).

The plaintiff was a Belgian company that distributed dividends to its Luxembourg-based parent company in 2012. No tax was withheld based on the PSD. However, the Belgian tax authorities challenged the applicability the WHT exemption provided by the PSD. Specifically, the tax authorities noted that a series of other transactions, including mergers, capital reductions, and the sale of shares, occurred around the same time as the dividend distribution. In their view, the transactions were deemed to form an artificial arrangement aimed at avoiding the dividend WHT.

The Supreme Court upheld the decision of the court of appeal, which ruled that the WHT exemption should be denied based on the EU principle of prohibition of abuse. Key takeaways from the decision include:

- When assessing whether there is an abuse, tax authorities can take into consideration not only the relevant transaction but also other transactions that take place with the final motive of avoiding tax (including transactions performed between other parties at the level of the beneficial owner of the income stream).
- Even if an intermediary structure has been set up for genuine economic reasons, the use of the structure can be devoid of economic reasons and serve to obtain a tax advantage.
- The anti-abuse principles developed by the CJEU over the years (e.g., the so-called Danish cases[1]) prevail on other fundamental EU rules such as the principle of legal certainty and the principle of legitimate expectations and apply regardless of when the abuse took place.

For more information about anti-avoidance trends within the EU, please refer to KPMG's summary of the beneficial ownership trends across the EU.

Poland

Supreme Administrative Court decision on the applicability of the R&D tax incentive

On December 14, 2023, the Polish Supreme Administrative Court (the Court) rendered its judgment in a case concerning the applicability of the Polish research and development (R&D) tax incentive. Under Polish law, the incentives apply in cases where the activities are 'carried out directly' by that taxable person. The Court rejected the approach taken by the Polish tax authorities, which denied the applicability of the incentive due to the fact that R&D activities were conducted by a team of developers engaged by the taxpayer's contractor.

[1] Joined cases N Luxembourg 1 (C-115/16), X Denmark (C-118/16) and C Danmark 1 (C-119/16) and Z Denmark case (C-299/16) on the Interest and Royalties Directive and joined cases T Danmark (C-116/16) and Y Denmark (C-117/16) on the Parent-Subsidiary Directive

In the Court's view, the term 'carried out directly' is to be interpreted as prohibiting the use of other (intermediary) entities through which the taxpayer would run its activities. Moreover, the Court noted that in many cases, the very nature of R&D work requires team cooperation involving several or even more entities, including, first and foremost, individuals.

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

Portugal

Supreme Administrative Court decides that transactions cannot be recharacterized under transfer pricing rules

On November 8, 2023, the Portuguese Supreme Administrative Court (the SAC) issued a decision in which it held that Portuguese transfer pricing rules did not allow for a recharacterization of a transaction, but only for a re-quantification. The case concerned a Portuguese company (PortCo) which transferred a dividend receivable from its subsidiary to an indirect shareholder for the acquisition of other companies. The Portuguese tax authorities (PTA) recharacterized the transfer of the dividend receivable into a loan, for which PortCo should have received arm's length interest. The Administrative and Tax Court of Porto dismissed the PTA's position in 2021, which led the PTA to appeal to the SAC.

The SAC considered that the intra-group financing cannot be compared to the financing of a company by a third-party bank, and that the Portuguese transfer pricing rules did not allow for a recharacterization of a transaction, but only for a re-quantification.

As per the SAC, a recharacterization of the transaction would only be possible under the Portuguese general anti-abuse clause, which requires the PTA to prove that the arrangement was put in place for securing a tax advantage. The SAC considered that the PTA did not present evidence allowing the Court to conclude that securing a tax advantage was the purpose of the transaction.

As a result of the above, the SAC upheld the position of the taxpayer and dismissed the appeal.

KPMG Insights

KPMG EU Financial Services tax perspectives webcast – February 6, 2024

Countries across the EU and Europe continue to operate in an extremely unsettled environment. As geopolitical tensions persist, together with a slower growing economy, many financial services institutions face significant regulatory pressures. As organizations seek to transform their tax function through the use of new technologies and efficiently managing and utilizing data to drive new business models, will the tax landscape in Europe become even more volatile in the future, and what does this mean for financial services institutions?

Join us as our panel of KPMG tax specialist share their insights with respect to some of the latest proposals that are likely to impact financial services institution in the year ahead including:

- Pillar 2 implementation across Europe – state of play, including implications for those jurisdictions unable to enact legislation into local law prior to January 1, 2024.
- Update on European tax legislation enactment as it pertains to Financial Services groups including EU FASTER proposals and ATAD 3 – practical issues and challenges.
- Other key country developments – with a focus on France, Germany, and Ireland.

Please access the event page to register.

Talking tax series

With tax-related issues rising up board level agendas and developing at pace, it's more crucial than ever to stay informed of the developments and how they may impact your business.

With each new episode, KPMG Talking Tax delves into a specific topic of interest for tax leaders, breaking down complex concepts into insights you can use, all in under five minutes. Featuring Grant Wardell-Johnson, KPMG's Global Head of Tax Policy, the bi-weekly releases are designed to keep you ahead of the curve, empowering you with the knowledge you need to make informed decisions in the ever-changing tax landscape.

Please access the dedicated KPMG webpage to explore a wide range of subjects to help you navigate the ever-evolving world of tax.

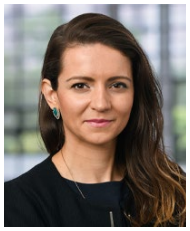
Illustrative disclosures – Guide to annual financial statements

KPMG's 2023 guides to annual financial statements are now available. They comprise Illustrative disclosures and a Disclosure checklist in accordance with IFRS Accounting Standards. These updated guides reflect standards in issue at August 31, 2023 that are required to be applied by a company with an annual reporting period beginning on 1 January 2023. In particular, they illustrate amendments to:

- IAS 12 Income Taxes relating to the initial recognition exemption and Pillar Two top-up taxes; and
- IAS 1 Presentation of Financial Statements relating to disclosure of material rather than significant accounting policies. Please also refer to our high-level visual guide for further guidance.

For more information, please refer to a dedicated KPMG web article.

KPMG‘s EU Tax Centre team



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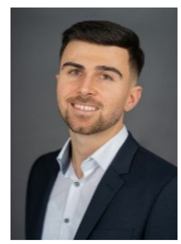

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