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E-News from the EU Tax Centre

Issue 190 – February 8, 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:

- **Infringements:** Failure to notify the transposition of the EU Minimum Tax Directive into national law
- **Council of the EU:** Belgian Presidency of the Council exchange of views with ECON on priorities in tax matters
- **Council of the EU:** DAC7 – Certain Member States decide to extend reporting deadlines
- **Belgium:** EU Public CbyC Reporting Directive transposed into local legislation
- **Germany:** Ministry of Finance published final guidance on German CFC rules
- **Netherlands:** DAC7 FAQ published
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- **Belgium (court decision):** Belgian Constitutional Court annuls several provisions transposing the EU mandatory disclosure rules
- **Netherlands (court decision):** Dutch Supreme Court rules that only the beneficial owner of dividends is entitled to claim a withholding tax credit
- **Poland (court decision):** Supreme Administrative Court clarifies limitation rule for debt financing costs

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Infringement Procedures and Court Referrals

Infringements

Failure to notify the transposition of the EU Minimum Tax Directive into national law

On January 25, 2024, the European Commission (the EC or the Commission) sent letters of formal notice to nine Member States that had not notified national measures transposing Council Directive (EU) 2022/2523 (the EU Minimum Tax Directive) into domestic legislation. These Member States are: Estonia, Greece, Spain, Cyprus, Latvia, Lithuania, Malta, Poland and Portugal.

The deadline for the Member States concerned to reply to the letters of formal notice and complete their transposition is two months. Otherwise, the Commission may decide to issue a reasoned opinion explaining why the Commission considers that the country is breaching EU law and requesting the country to inform the Commission of the measures taken, within a specified period (usually two months). If the country still does not comply, the Commission may decide to refer the matter to the Court of Justice of the EU (CJEU), which may impose penalties if it finds that the respective EU country has breached EU law.

As per the EC notice published on December 12, 2023, Estonia, Latvia, Lithuania, and Malta 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). These Member States are nevertheless required to legislate for Pillar Two (including the notification and information exchange requirements as set out in Article 50(2)) of the EU Minimum Tax Directive.

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

Failure to notify transposition of the Whistleblowers Directive with regard to medium-sized companies

On January 25, 2024, the EC announced that Estonia and Poland failed to notify measures to implement into local legislation certain provisions of the Directive 2019/1937 on the protection of persons who report breaches of Union law (the Whistleblowers Directive).

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. However, for medium-sized companies Member States had an additional two years to transpose the EU rules. Based on the EC's press release, Estonia and Poland have not communicated national measures regarding medium-sized companies.

The EC had already referred – on February 15, 2023, several Member States, including Estonia and Poland to the Court of Justice of the EU for failing to transpose the Whistleblowers Directive into local law – see E-News Issue 171.

Failure to notify the transposition of provisions strengthening the rules for joined audits (DAC7)

On January 25, 2024, the EC announced that Germany and Poland failed to notify the transposition of certain provisions of Council Directive (EU) 2021/514 (DAC7) into domestic legislation.

In addition to the reporting obligations for platform operators, DAC 7 also strengthened the rules for joint audits between Member States (in the area of taxation in general). Member States were required to complete transposition of those new rules on joint audits and notify the EC before the end of 2023. An infringement procedure is already pending against Poland, for failure to notify the implementation of DAC7 as a whole (see E-News Issue 189).

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

State aid

General Court considers German electricity production supporting system as not falling under the State aid definition

On January 24, 2024, the General Court of the Court of Justice of the European Union (General Court or the Court) issued its judgment in case T-409/21. The Court concluded that the German Combined Heat and Power Law (KWKG) on measures aimed at supporting electricity production via combined heat and power installations was compatible with the EU State aid rules.

The case concerned a decision of the European Commission (the Commission or EC), holding that the measures enshrined in the KWKG constituted State aid. Among others, the EC based its decision on the grounds that the measure at hand were financed through a compulsory contribution levied by the state. The KWKG measures include subsidies for the respective electricity producers that are financed by network operators via a pay-as-you-go system. The measures were notified to the EC, which approved them as being compatible with the internal market. Nevertheless, Germany contested this decision, alleging that Art 107 (1) Treaty on the Functioning of the European Union (TFEU) has been misapplied and that those referenced measures are not to be qualified as State aid under EU law.

In its decision, the General Court first recalled CJEU case law on State resources within the meaning of Art 107 (1) TFEU. This provision is aimed at safeguarding that aid granted by Member States or through State resources does not distort competition on the internal market by favoring certain undertakings or the production of certain goods. The Court stated that State resources are (i) funds derived from taxes or other compulsory levies that are managed and distributed in accordance with national law, or (ii) funds that remain under state control and are consequently available to competent national authorities.

When assessing the referenced measures, the General Court reiterated that a compulsory levy in this context is a mandatory charge (under national law), whereby the financial burden is de facto borne by a certain group of individuals. According to the Court, the Commission erred in law when it found that the measures enshrined in the KWKG constitute a compulsory levy, in absence of any information about the funding sources of the payments made as part of the KWKG measures. Rather, the KWKG only regulates how the funds raised from the KWKG-measures should be used. In this respect, the Court observed that the

network operators that are targeted by the pay-as-you-go system could also pass those costs on to their customers, therefore supporting the above conclusion.

Whilst rejecting all other arguments raised by the Commission, the Court stated that the fact that the KWKG is a state initiative pursuing a public policy objective and the fact that the law defines the allocation method of the funds raised does not indicate the existence of a transfer of state resources. Those circumstances rather give an indication that those measures are imputable to the state.

Considering the above, the General Court concluded that the Commission wrongfully found that the measures at issue constituted aid being granted through State resources. Therefore, the Court annulled the Commission's decision.

EU Institutions

Council of the EU

Belgian Presidency of the Council exchange of views with ECON on priorities in tax matters

On January 22, 2024, Belgium's Minister of Finance had an exchange of views with Members of the European Parliament's Committee on Economic and Monetary Affairs (ECON Committee). The discussion focused on how Belgium intends to drive forward EU tax initiatives during its presidency of the Council. Key insights provided include:

- *Pillar One:* According to the Belgian Minister of Finance, the intention of the Presidency is to put the EU into a leading position in the discussions about Pillar One of the OECD's global corporate tax plan. Thereby, negotiations with countries outside the EU should continue while trying to protect the work that has been done by the OECD.
- *Unshell Directive:* The Belgian Minister of Finance stated that the proposed Unshell Directive could contribute to combating tax avoidance. Whilst acknowledging the European Parliament's interest in the proposed Unshell Directive, the Belgian Minister pointed out that unanimity is required for adoption of the proposed Directive. The Minister further stated that there are still some legal and technical issues to be solved before entering the final stage of negotiations.

For more information on the priorities of the Belgian Presidency of the Council, please refer to E-News Issue 189.

EU Public Country-by-Country (CbyC) Reporting Implementation – state of play

As at the date of this publication, nineteen EU Member States – *Belgium, Bulgaria, Croatia, the Czech Republic, Greece, Denmark, France, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Spain*, and *Sweden*, had finalized the internal legislative process required for implementation of the EU Public CbyC Reporting Directive. In *Poland* and *Finland*, draft legislation was released but has not yet been adopted. To the best of our knowledge, the remaining six EU Member States – *Austria, Cyprus, Estonia, Italy, Malta,* and *Slovenia*, have not officially initiated the transposition process.

The European Commission has sent letters of formal notice (the first step of the infringement proceedings) to all Member States that failed to notify the transposition of the Directive by the June 22, 2023, deadline.

For more details on the EU Public CbyC Reporting Directive domestic implementation through the EU countries, please refer to Euro Tax Flash Issue 537.

For more details, please refer to KPMG's dedicated Public CbyC Reporting tracker.

DAC7 – Certain Member States decide to extend reporting deadlines

Council Directive (EU) 2021/514 (DAC7) allows Member States' tax authorities to collect and automatically exchange information on income earned by sellers on digital platforms. The rules impact both EU platform operators, as well as non-EU entities, if facilitating either reportable commercial activities of EU sellers/providers or rental of immovable property located in the EU. The reporting obligations apply with respect to cross-border and local commercial activities. Platform operators falling within the scope of DAC7 are required to collect and verify information from sellers/providers operating on their online platform, in line with certain due diligence procedures.

Member States had until January 1, 2023, to implement DAC7 into national law and the first reporting deadline expired on January 31, 2024. However, to the best of our knowledge, as at February 8, 2024, the following Member States had announced that the deadline for reporting period 2023 has been extended under the domestic DAC7 transposition:

- Irish Revenue announced a new reporting deadline of February 7, 2024.
- The Italian tax authorities announced a new reporting deadline of February 15, 2024.
- The Cyprus tax department announced a new reporting deadline of February 16, 2024.
- The Luxembourg tax authorities announced a new reporting deadline of February 19, 2024.
- The Greek government announced a new reporting deadline of February 26, 2024.
- The German Federal Tax Office (BZSt) announced a new reporting deadline of March 31, 2024.
- The Spanish Council of Minister announced a new reporting deadline of April, 6, 2024.

For more information on the implementation of DAC7, please refer to Euro Tax Flash Issue 532.

European Commission

KPMG responds to European Commission public consultation on BEFIT proposal

On January 24, 2024, KPMG member firms in the EU submitted a response to the European Commission's (EC) public consultation on the BEFIT initiative. Key takeaways include:

- KPMG member firms welcome the EC's ambition to simplify compliance requirements, promote tax certainty and reduce risks of double taxation.
- Nevertheless, KPMG member firms believe that the implementation of the BEFIT proposal in its current form and within the timeline proposed would not contribute to the achievement of this ambition.
- Key concerns of KPMG member firms include the creation of new layers of complexity, incompatibility of key BEFIT design elements with the design of the Pillar Two rules, timing (particularly in light of the implementation timeline of the GloBE rules and the overall impact of BEPS 2.0, which can only be analyzed once the rules have been in place for sufficient time), the

potential negative impact on investment, further pressure on the (already) limited resources of MNEs and tax administrations, etc.

- KPMG member firms note that some positive elements of the BEFIT proposal could be introduced on a standalone basis (e.g., the cross-border sharing of losses) or addressed directly by Member States.

For more details, please refer to Euro Tax Flash Issue 536.

Commission adopts proposal for negotiating mandate with third countries with respect to DAC8 amendments

On January 17, 2024, the Commission adopted a recommendation for a Council decision to open negotiations for amendments of five agreements on the automatic exchange of financial account information. Those agreements concern exchanges with the Swiss Confederation, the Principality of Liechtenstein, the Principality of Andorra, the Principality of Monaco, and the Republic of San Marino.

In the recommendation, the Commission explains that, due to the upcoming changes in the OECD Common Reporting Standards (CRS), which will be implemented in the EU through DAC8 from January 1, 2026, it is necessary to align those agreements accordingly so that a smooth automatic exchange of financial account information is ensured with the referenced countries. According to the EC, the exchanges are also of relevance for the interaction between the CRS and the Crypto-Asset Reporting Framework (CARF), also included in DAC8, and for the developments made in respect of data protection in the EU.

For more information on DAC8, please refer to Euro Tax Flash Issue 532.

European Parliament

ECON Committee adopted report on the FASTER Directive proposal

On January 23, 2024, the ECON Committee adopted its report on the "Faster and Safer Relief of Excess Withholding Taxes" (FASTER) Directive proposal. The initial proposal, issued by the European Commission on June 19, 2023, aims to establish more efficient and secure withholding tax procedures.

Whilst the report generally supports the Commission's proposed text, it recommends further exploration of specific elements, including:

- Examination of the universal application of a relief at source system in all Member States, subject to evaluation every five years by the Commission once the FASTER Directive is implemented. Note that under the EC's FASTER proposal Member States have a choice between relief at source and a quick refund system.
- Exploration of additional measures to facilitate self-processed withholding tax claims for small investors, who engage directly with tax authorities.
- Comprehensive analysis of developments regarding service fees charged by financial intermediaries involved in the new withholding tax procedures.
- Coordinated understanding of the term "comparable legislation" for the registration of third-country financial intermediaries.

- Clarifications regarding the interaction between the tax consequences resulting from the Unshell proposal and the FASTER proposal.

In terms of next steps, the report will be voted on during a Plenary session of the European Parliament, at which point it would represent the Parliament's opinion on the Directive (if agreed). The Committee Report is tentatively scheduled for the Parliament's plenary on February 26, 2024. However, it is important to note that the Parliament's opinion is not binding on the Council of the European Union (i.e., it would remain up to the 27 EU Member States to agree on the final text of the Directive).

ECON meeting on draft report regarding HOT Directive proposal

On January 22, 2024, the European Parliament's ECON Committee discussed a draft report proposing amendments to the proposal for a Council Directive establishing a Head Office Tax system for micro, small and medium sized enterprises (HOT Initiative).

Whilst the draft report generally supports the Commission's initiative, it goes beyond the proposed provisions and recommends a number of amendments, including:

- shortening the deadline for the transposition of the proposed Directive from January 1, 2026, to January 1, 2025;
- testing the eligibility requirements for SMEs to benefit from the HOT regime (i.e. turnover, residency, SME classification) only in the previous year (as opposed to the last two years as foreseen in the Directive proposal);
- extending the period for SMEs to apply for this scheme to two months before the end of the fiscal year preceding the fiscal year in which that SME wishes to start applying the HOT rules (as opposed to three months as foreseen in the initial Directive proposal);
- implementation of an indefinite duration of the application of the new rules (as opposed to a limited duration of five years with the possibility to renew the option as foreseen in the Directive proposal).

The report is scheduled to be voted on in the ECON Committee on February 22, 2024. If approved, the report would then be voted on during a plenary session of the European Parliament, at which point it would represent the Parliament's opinion on the Directive (if agreed). However, it is important to note that the Parliament's opinion is not binding on the Council of the European Union (i.e., it would remain up to the 27 EU Member States to agree on the final text of the Directive).

Resolution on DEBRA proposal adopted

On January 16, 2024, Members of the European Parliament (MEPs) adopted a resolution on the proposal for a Council Directive laying down rules on a debt-equity bias reduction allowance and on limiting the deductibility of interest for corporate income tax purposes (DEBRA). The resolution proposes amendments to the European Commission's (EC) initial text. Key takeaways include:

- The resolution calls for medium-sized groups and for undertakings that are not small and medium-sized enterprises (SMEs) to be excluded from the scope of the provision limiting the deductibility of exceeding borrowing costs (debt financing costs in the EC's proposal). Furthermore, the resolution states that this rule should only be introduced as of 2027, considering the current crises.

- The resolution aims to add definitions for the terms "large undertaking", "medium-sized group" and "large group".
- The resolution proposes to allow the equity allowance for ten consecutive tax periods for SMEs or medium-sized groups and to limit same for any large undertaking or group to seven consecutive tax periods, subject to a cap of 30 percent of the taxpayer's EBITDA in both cases.
- The resolution calls for a carry forward mechanism for equity allowances exceeding the cap of 30 percent of the EBITDA for a maximum of three tax periods.
- The resolution further intends to limit the carry forward mechanism for deductible allowances on equity exceeding the taxpayer's taxable income to three tax periods for large undertakings or large groups, while foreseeing no such limit for SMEs or medium-sized groups.

Resolutions adopted by the European Parliament do not have a binding effect on the Council and the EC. However, those resolutions must be taken into account by the EC and Member States when proposing or agreeing to new rules.

For more information on the DEBRA proposal, please refer to Euro Tax Flash Issue 532.

OECD and other International Institutions

Organisation for Economic Cooperation and Development – OECD

OECD publishes aggregated statistics on International Compliance Assurance Programme

On January 29, 2024, the OECD released its first aggregated statistics on the Forum on Tax Administration's International Compliance Assurance Programme. ICAP is a voluntary risk and assurance program that provides a framework for a multilateral risk assessment of multinational enterprises (MNEs) between multiple tax authorities, with the aim to improve multilateral tax certainty.

The issued statistics deal with the 20 ICAP cases, which have been completed by October 2023 (since the launch of the program in 2018). Key insights include:

- 22 tax administrations participate in ICAP, including the following EU countries: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, and Spain.
- On average, the time from submitting an ICAP request to obtaining the respective outcome letter amounted to 61 weeks, which is significantly shorter than completing an APA or a MAP, according to the OECD release. In this context, the statistics also indicate that involving a greater number of tax administrations does not necessarily take more time than a request where a smaller number of participating tax administrations are involved.
- With regards to 40 percent of the ICAP cases, the respective MNEs were assessed as having 'low risk' outcomes in all relevant core risk areas. Another 40 percent of the cases included assessments with a mix of 'low-risk' and 'not low-risk' outcome in one or two core areas. In only 20 percent of the cases, MNEs received 'not low-risk' outcomes in more than two risk areas covered.

- In approximately 30 percent of the cases, one or more issues identified benefitted from issue resolution within ICAP, avoiding the need for audits or MAPs. Additionally, it was observed that in some cases, MNEs and the tax authorities decided to go into APA procedures concerning identified risks.
- In terms of core risk areas, permanent establishments were considered 'low-risk' by the highest proportion of tax administrations, followed by tangible assets and services. Conversely, financing and intangible assets had the highest proportion of 'not low-risk' outcomes.

For more information, please refer to the OECD's dedicated website.

OECD publishes working paper on the Global Minimum Tax and the taxation of MNEs

On January 9, 2024, the OECD released a working paper assessing the expected impact of the global minimum tax (Pillar Two) on the taxation of MNEs, based on data for the years 2017 to 2020. Key takeaways include:

- It is expected that around 90 percent of in-scope MNEs will be subject to Pillar Two by 2025.
- Pillar Two is estimated to reduce the level of global low-taxed profit (i.e., subject to an effective tax rate lower than 15 percent) from 36 percent to 7 percent of all profit over ten years. According to the working paper, this 81 percent reduction in global low-taxed profit is mainly attributable to the application of top-up-taxes but also to the reduction in profit shifting.
- Shifted profit is estimated to fall by half due to reduced profit shifting incentives as a result of Pillar Two implementation.
- It is further estimated that investment hubs could lose around 30 percent of their tax base.
- Global corporate income tax revenues are estimated to increase by USD 155-192 billion per year (approximately EUR 144-179 billion), which would represent 6.5 percent to 8.1 percent of global corporate income tax revenues. The estimate has been revised downwards slightly due to updated calculation methodology, as the OECD had previously announced expected revenues gains of around USD 220 billion (approximately EUR 205 billion) in January 2023 – see E-News Issue 169).
- According to the working paper, non-tax factors are expected to play a greater role in investment decisions, as the average tax rate differential across all jurisdictions (which is the absolute difference between each unique jurisdiction) is estimated to fall by around 30 percent.

For more information, please refer to a dedicated OECD webpage and KPMG's dedicated Talking Tax episode 5.

United Nations – UN

United Nations publishes webpage on framework convention on international tax cooperation

On December 22, 2023, the General Assembly of the United Nations (UN) approved a resolution for the "*promotion of inclusive and effective international tax cooperation at the United Nations*". The resolution establishes a newly created intergovernmental Committee for the purpose of drafting terms of reference for a UN framework convention on international tax cooperation.

The UN has now published a dedicated webpage, which includes information on the next steps. Key takeaways include:

- Chairs of the UN regional groups were invited to transmit up to four nominations per group to the secretariat until January 15, 2024, with the aim of forming a bureau of 20 members.
- Substantive sessions with member jurisdictions are tentatively set in New York from April 26 to May 8, 2024 and from July 29 to August 16, 2024, pending approval by the Committee during an organizational session in February.
- According to the resolution, the aim is to finalize the Committee's work by August 2024.

For previous coverage, please refer to E-News Issue 187.

Local Law and Regulations

Belgium

EU Public CbyC Reporting Directive transposed into local legislation

On January 26, 2024, legislation implementing into Belgian national law the provisions of the EU Public Country-by-Country Reporting Directive (the Directive) was published in the Official Gazette. Key takeaways from the new legislation 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.
- Website publication / filing with the Belgian National Bank is due 12 months after the financial year end.
- Belgium extended the scope of the disaggregated data disclosures (i.e., country-by-country instead of aggregated data) to cover all jurisdictions on the Belgian tax haven list (in addition to those listed on the EU list of non-cooperative jurisdictions, as required under the Directive).
- 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.

For more details, please refer to KPMG's dedicated Public CbyC Reporting tracker.

Germany

Ministry of Finance published final guidance on German CFC rules

On December 22, 2023, the German Ministry of Finance (BMF) published final guidance on the application of German CFC rules, as amended by the ATAD Implementation Act in 2021, adapting the existing BMF guidance of May 14, 2004. Some of the key clarifications include:

- *Catalogue of active income:* any low-tax income is subject to the CFC rules if the income is derived through a type of activity that is not expressly defined as active (i.e., the passive income test). The guidance clarifies that a gain from the disposal of assets is considered as active income, to the extent that the assets were used to generate active income. In addition, the guidance notes that individual activities with a significant economic impact are not to be grouped together but are to be assessed separately, even if they have an economic connection with other activities.
- *Change of control criterion:* according to German CFC rules, the control of the foreign company also exists if the taxpayer is directly or indirectly entitled to more than half of the profit or liquidation proceeds of that company. The guidance clarifies that a shareholder position is not required in this context, and control can also be established through other contractual agreements such as hybrid financial instruments.
- *Motive test:* German CFC rules do not apply where taxpayers can demonstrate that at the level of an EU/EEA subsidiary a substantial economic activity is carried out with appropriate resources and by sufficiently qualified personnel, on an independent and autonomous basis. The guidance specifies the criteria of "substantial economic activity" and "material and personnel resources". In addition, the guidance notes that the motive test is excluded to third country-companies (based in non-EU/EEA jurisdictions) and also in cases where the substantial economic activity is predominantly provided by third parties (e.g. based on business management contracts). The updated clarification in the final guidance emphasizes that outsourcing to related parties within the jurisdiction does not lead to an exclusion from the motive test, a detail which was not provided in the previous draft.
- *Low taxation*: the guidance further clarifies that a foreign company is not considered to be low taxed (i.e., effective tax rate of less than 25 percent) on the sole ground that its tax liability is settled by another company that belongs to the same tax group or consolidated group. The guidance further clarifies that where a foreign company generates low-taxed passive income and belongs to a tax group, the German CFC tax charge needs to be determined separately for this company.

Notably, the final guidance continues to focus on a low tax threshold of 25 per cent and does not refer yet to the reduced low tax threshold of 15 per cent, which was recently implemented in the Minimum Tax Directive Implementation Act.

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

Italy

Legislative Decree introduces penalty protection relating to hybrid mismatch disputes

On December 28, 2023, a legislative decree implementing a reform of the domestic rules relating to international taxation was published in the Italian Official Gazette (overview on entire reform covered in E-News Issue 189).

This reform also introduced new penalty protection rules on disputes with the Italian Revenue Agency relating to hybrid mismatches. If the agency claims additional taxes or penalties or rejects certain tax credits, a penalty will not be imposed if the taxpayer, during an inspection or audit, provides documentation demonstrating a specific analysis of potential hybrid mismatches.

The detailed requirements for this documentation are yet to be outlined in a decree from the Minister of Economy and Finance. The documentation should allow the tax authority to verify the application of rules to neutralize hybrid mismatches.

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

Latvia

Legislative proposal to implement minimum taxation under Pillar Two

On January 30, 2024, the Latvian government published draft legislation to implement the EU Minimum Tax Directive. Key takeaways include:

- Latvia is considering making use of the option to defer the application of the Income Inclusion Rule (IIR) and Undertaxed Profits Rule (UTPR) – as per Article 50 of the EU Directive.
- Latvia would not transpose the entire EU Directive at this stage but only those administrative aspects that are required for the application of Article 50. As such, the draft only includes notification and information exchange requirements to enable a designated foreign constituent entity to submit the GloBE Information Return.
- Provisions on IIR and UTPR are not included in the draft and it has been indicated that the government plans to start applying the rules for fiscal years starting on or after December 31, 2029.
- However, it has not yet been clarified whether the government plans to also apply a Domestic Minimum Top-up Tax (DMTT) at a later stage.

For a state of play of the implementation of Pillar Two, please refer to KPMG's dedicated implementation tracker.

Malta

Immediate deduction in respect of intellectual property and intellectual property rights

On December 28, 2023, the Commissioner for Tax and Customs issued a notification allowing an immediate deduction for capital expenditures on intellectual property or intellectual property rights against royalty income.

The Income Tax Act already permits such deductions over a minimum of three years. However, following the notification, taxpayers have the option to accelerate the deduction by claiming it in full in the year the expense is incurred or when the intellectual property is first used to generate income. If a taxpayer has unclaimed deductions from a previous three-year deduction period as of the year 2023, they can claim these in full in the year of assessment 2024.

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

Netherlands

DAC7 FAQ published

On January 1, 2024, the Dutch tax authorities published frequently asked questions (FAQs), providing clarifications on the application of the Dutch reporting obligations and procedures under DAC7 (e.g. clarification of certain terms, reporting exemptions and exclusions, reporting location, relevant activities, data collection and verification). More specifically, the FAQs provide clarifications on, for example:

- The definition of the term “goods”, i.e., tangible assets, in line with Directive 2006/112/EC (the VAT Directive), providing clarification regarding, amongst others, the categorization of vouchers or energy;
- the treatment of non-EU property rental, i.e., being in scope of DAC7 when done by EU sellers;
- the treatment of mixed activities, which should preferably be treated separately. In case the activities are inseparably linked, the entire activity shall be reported unless the reportable part of the activity is subordinate to the overall activity;
- reporting procedures, concerning the provision of data and information about sellers via the tool Digipoort;
- information about the option to submit a concrete (not hypothetical) case to the DAC7 team within the Dutch tax authorities for the possibility to obtain the tax authorities’ view on desired issues.

Spain

Legislative proposal to implement minimum taxation under Pillar Two

On December 19, 2023, the Spanish government published draft legislation to implement the OECD’s Pillar Two Model Rules as set out under the EU Minimum Tax Directive.

The minimum tax rules would closely follow the text of the EU Directive as well as subsequently released guidance agreed by the OECD/G20 Inclusive Framework. Key features of the proposal include:

- *General:* The IIR would apply for financial years starting on or after December 31, 2023. The UTPR would generally be applicable one year later, i.e., for financial year starting on or after December 31, 2024. However, the UTPR would apply for financial years starting on or after December 31, 2023, where the UPE of the group is located in an EU Member States that opted for the IIR and UTPR deferral (Article 50 of the Directive). A DMTT would apply for financial years starting on or after December 31, 2023.
- *Safe harbors*: The draft incorporates into the legislative text the agreed transitional CbyC Reporting Safe Harbour and the transitional UTPR Safe Harbour. In addition, the draft provides for a QDMTT safe harbor rule (i.e., IIR and UTPR Top-up Tax are deemed to be zero in Spain in relation to other jurisdictions that apply a QDMTT, subject to conditions).
- *Additional OECD guidance*: The draft bill makes reference to the OECD Commentary and the OECD Administrative Guidance as a relevant source for interpreting the local legislation. In addition, the draft incorporates into the legislative text limited elements of the OECD February Administrative Guidance that adapt the OECD Model Rules / EU Directive rules (e.g., the excess net tax expense carry-forward election).
- *Administration:* Each Constituent Entity would be required to file a GIR within 15 months after the end of the Reporting Fiscal Year (18 months for the transitional year), subject to certain exceptions. Any top-up tax would need to be declared and paid within the same deadline. In addition, local Constituent Entities would be required to submit a top-up tax return (self-assessment) and to pay top-up tax within 25 calendar days following the 15th month after the end of the tax period (18 months for the transitional year). The self-assessment filing and payment of tax liability would need to be carried out, where appropriate, by only one entity of the group that is designated by the legislator.

For a state of play of the implementation of Pillar Two, please refer to KPMG's dedicated implementation tracker.

Sweden

Memorandum proposes changes to loss deduction rules for ownership changes

On January 22, 2024, the Swedish Ministry of Finance published a memorandum proposing changes to the rules on deductions of prior year losses. Key takeaways include:

- The deductible amount of prior year losses after a change in ownership would be increased to 300 percent (from the current 200 percent) of the cost of acquiring control of a loss-making company.
- An exception to this loss deduction limitation rule would be introduced if an individual (or certain other entities) gains direct control over a loss-making company, provided it already had indirect control prior to the ownership change.
- The "herd rule" would be simplified to provide that the loss deduction limitation applies when several independent individuals acquire shares with at least 20 percent (currently 5 percent) of all votes in a loss-making company over three (currently five) tax years and collectively acquire shares with more than 50 percent of all votes.
- The provision regarding capital contributions that have fully or partially resulted in a change in ownership, in cases where the acquirer has received an asset of real and special value through such contribution, is amended. This adjustment now extends to capital contributions made to a

company within the same group as the loss-making entity, encompassing not only contributions directly provided to the deficit company.

The new rules would enter into force January 1, 2025.

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

Local Courts

Belgium

Belgian Constitutional Court annuls several provisions transposing the EU mandatory disclosure rules

On January 11, 2024, the Belgian Constitutional Court (the Court) issued four judgments (1/2024, 2/2024, 3/2024, 4/2024), annulling several aspects of the federal, Walloon, Brussels and French Community legislation, which transposed the EU mandatory disclosure rules (DAC6) into domestic law. The CJEU had previously ruled – on December 8, 2022, on the compatibility with EU law of the requirement for intermediaries, who are subject to legal professional privilege, to notify other intermediaries of their reporting obligation under DAC6 (case C-694/20). The CJEU held that the notification obligation is invalid in light of the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union (the Charter) – specifically the right to respect for communications between a lawyer and their clients. For more details, see Euro Tax Flash Issue 497.

The Court had already decided in 2023 to annul certain aspects of the Flemish decree, inter alia, with respect to the notification requirement for intermediaries subject to legal professional privilege.

In the judgments at hand, the Court:

- annulled certain provisions in the Walloon and French Community legislation, which imposed a retroactive reporting obligation for arrangements implemented before the respective decrees entered into force. The Court found that the retroactive effect was not necessary to achieve the objective of general interest.
- held that the Walloon, Brussels and French Community DAC6 transposition had to be invalidated with regards to the obligation for intermediaries subject to legal professional privilege to make periodical declarations of marketable arrangements.
- applied the above decision of the CJEU and annulled provisions in the federal, Walloon, Brussels, and French Community transposition of DAC6, governing the reporting obligation of intermediaries under legal professional privilege.

Furthermore, the Court stated that it would wait for the CJEU's judgement in the pending case C-623/22 to assess other concerns regarding the domestic DAC6 transpositions. This includes, inter alia, whether the use of key terms / deadlines that are not sufficiently clear and precise infringe the principle of legality in

criminal cases and the general principle of legal certainty and the right to respect for private life. The Advocate General's opinion in case C-623/22 is expected on February 29, 2024.

Germany

Tax-neutral transfer of assets between partnerships with identical shareholding (Federal Constitutional Court)

On January 12, 2024, the Federal Constitutional Court (the Court) issued a decision in case 2BvL 8/13, concerning the book value of a transfer of assets between sister partnerships.

According to the respective section in the German Income Tax Act under review, transfers of assets between different businesses owned by the same taxpayer are treated as tax neutral. Additionally, the section permits tax-neutral asset transfers between a partnership and its partners, as well as between the partners of a partnership, subject to certain conditions. However, the current wording of this section does not encompass tax-neutral asset transfers between different partnerships with the same partnership structure (i.e., the same partners with the same ownership interest percentage in both partnerships).

In the case at hand, the Court deemed this provision inconsistent with German Constitutional law, as it violates the principle of equality. The Court argued that asset transfers between partnership with the same partnership structure would be subject to taxation based on the difference between the current and book values of the assets, placing them at a disadvantage compared to the other tax-neutral transfer scenarios. The Court considered the exclusion from tax neutrality arbitrary, as it would be possible to achieve the same tax-neutral result through a combination of asset transfers allowed by the same provision. However, this combination results in higher transfer costs and legal and economic risks, because it might be perceived as an abuse. In addition, this combination could potentially lead to adverse consequences during a later-stage insolvency procedure.

In the Court's view, no objectively plausible reasons were evident to justify such unequal treatment of asset transferred between partnerships with identical shareholding.

Consequently, the Court required the legislature to enact new regulations retroactively for transfer processes after December 31, 2000.

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

Netherlands

Dutch Supreme Court rules that only the beneficial owner of dividends is entitled to claim a withholding tax credit

On January 19, 2024, the Dutch Supreme Court ruled that only the beneficial owner of a dividend distribution can claim a tax credit in relation to such distribution.

In the case at hand, a Dutch company (Dutch Co) part of a banking group applied a commercial strategy over several years, which involved the acquisition of shares in Dutch funds, entering into contracts on future exchanges with these shares as underlying value and lending them to its UK-based parent company (UK Co). Dutch Co argued that because the share-secured loans were constantly repaid before dividend distributions, it was entitled to credit the dividend withholding taxes (WHT) against its taxable income. In

practice, the shares were acquired and placed in a securities deposit account in France, registered in the name of Dutch Co, and lent to UK Co. The latter always repaid the shares immediately before the dividend distributions and placed them back into Dutch Co's securities account. After the dividend distributions, Dutch Co again lent the same class and number of shares to UK Co.

Following a challenge from the Dutch tax authorities and subsequent legal proceedings, the case was referred to the Amsterdam Court of Appeals, which found that the conditions to claim tax credits in relations to those dividend distributions were not met. The Amsterdam Court of Appeals ruled that Dutch Co should not be considered the legal owner in the absence of a valid deed of transfer of legal ownership, and that Dutch Co is unlikely to be the ultimate beneficial owner of the dividends. The taxpayer appealed the decision, which was referred to the Supreme Court.

The Supreme Court clarified that only the beneficial owner of the dividends can claim a tax credit in relation to the dividend WHT and stated that the beneficiary of the income is presumed to be the ultimate beneficial owner, as long they can dispose freely of the dividend and do not act just as a manager or agent (except in certain specific cases of dividend stripping).

Furthermore, the Supreme Court noted that the holding of these shares is a property law matter which, under Dutch international private law, must be determined in accordance with the legal system of the country on whose territory the account containing the securities is held. Therefore, the case was referred to the Court of Appeals in The Hague, which will have to determine if under French law on cashless securities, Dutch Co must be considered as the holder of the shares at the time the dividends were distributed.

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

Poland

Supreme Administrative Court clarifies limitation rule for debt financing costs

On January 10, 2024, the Polish Supreme Administrative Court issued a judgment (case file II FSK 449/21) regarding the method of determining the maximum surplus of debt financing costs that a company can consider as tax-deductible expenses in a given taxable year. The relevant provision under dispute had been subject to various interpretations by tax authorities and regional courts, as it includes two distinct limits for deducting debt financing costs: a threshold of PLN 3,000,000 (approximately EUR 690,500) and 30 percent of EBITDA.

Tax authorities interpreted the provision to allow the deduction of debt financing costs up to PLN 3,000,000, provided this amount does not exceed 30 percent of EBITDA. Consequently, the entire cost must be referred to the 30 percent limit.

In contrast, the Regional Administrative Court primarily based its decision on the linguistic interpretation of these provision and ruled that only when the debt financing costs exceeded PLN 3,000,000 should the exceeding portion over PLN 3,000,000 be referred to 30 percent of EBITDA. The initial PLN 3,000,000 of debt financing costs, therefore, could be deducted without regard to the 30 percent limit.

The Supreme Administrative Court upheld the lower court's decision and dismissed the authority's cassation appeal. It based its decision on established jurisprudence, including the judgments of October 20, 2021 (case file II FSK 949/20), and October 26, 2021 (case file II FSK 979/21).

Spain

Spanish Constitutional Court declares certain measure of 2016 tax reform unconstitutional

On January 18, 2024, the Spanish Constitutional Court issued a press release regarding a ruling which annulled certain tax provisions introduced by Royal Decree-Law 3/2016 (RDL 3/2016). The Court held that RDL 3/2016 was not compliant with the Spanish Constitution as it infringed the substantive limits with regard to the type of legal act in question (i.e., a decree-law). Specifically, the Court referred to its previous case-law based on which a decree-law is not allowed to alter neither the general rules governing taxes, nor any of the essential elements thereof that affect the determination of the tax burden.

The RDL 3/2016 introduced restrictions on deductions and credits for corporate income tax purposes, including:

- limits on the offset of net operating losses and on the deduction of deferred tax assets;
- limits on the use of tax credits for double tax relief; and
- the reversal in equal parts over five years of impairment losses on shares deemed deductible for corporate income tax purposes between 2002 and 2013.

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

KPMG Insights

Implementation of Pillar Two – State of play and observations on domestic implementation

Pillar Two is happening. More than 30 jurisdictions around the world have either implemented the Global Anti-Base Erosion (GloBE) rules or have published draft legislation, with more expected to follow in 2024. While implementing legislation generally closely follows the OECD Model Rules, Commentary and subsequent Administrative Guidance, important variations arise with respect to:

- the timing of application of the three charging mechanisms: Domestic Minimum Top-up Tax (DMTT), Income Inclusion Rule (IIR) and Undertaxed Payments Rule (UTPR);
- whether jurisdictions opt to implement a DMTT, the timing of its application, the accounting standard the DMTT is based on, and the related administrative details (filing, allocation of liability, etc.);
- the extent to which OECD Administrative Guidance is reflected in domestic legislation; and
- administration, including filling requirements and deadlines, other than those related to the GloBE Information Return.

On February 22, 2024, a panel of KPMG tax specialists will discuss their observations on local implementation, practical tax and accounting considerations that in-scope groups should keep in mind when preparing for compliance with Pillar Two, as well as what more we can expected from the OECD Inclusive Framework going forward.

Please access the event page to register.

Beneficial ownership, governance and substance trends across the EU

The fight against tax avoidance and profit base erosion has been high on the agenda of international bodies – including the Organisation for Economic Co-operation and Development and the European Commission, as well as local tax authorities for the last decade. At EU level, approaches to abuse of double tax treaties and EU Directives have also been influenced by the decisions of the Court of Justice of the EU in the so-called "Danish cases". The Commission is also attempting to take steps towards establishing a common minimum standard on criteria for denying treaty or EU Directive benefits to companies lacking economic substance and which are at risk of being misused for the purpose gaining tax advantages through the Unshell proposal.

With these developments in mind, KPMG's EU Tax Centre conducted an internal survey across the network of KPMG firms based in Europe to identify common trends and key challenges for taxpayers in four main areas:

- beneficial ownership;
- substance;
- corporate governance;
- the wider anti-treaty shopping and anti-tax abuse frameworks applicable at a local level, with a particular focus on WHT-related measures; and
- the practice of the tax authorities in BO and substance matters, and level of certainty taxpayers can obtain.

The survey covered responses from 27 European jurisdictions and includes survey information valid as at September 2023. A recent blog post outlines key findings and trends identified as a result of the survey.

KPMG EU Financial Services tax perspectives webcast

On February 6, 2024, KPMG held a new EU Financial Services tax perspectives session as part of the Future of Tax & Legal webcast series.

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?

Our panel of KPMG tax specialists shared 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.

For a replay of the session, please access the event page.

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.

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