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E-News from the EU Tax Centre

Issue 193 – April 5, 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:

- **CJEU:** AG opinion finds Dutch interest deduction rule compatible with EU law
- **CJEU:** AG opinion on Swedish withholding tax treatment of foreign public sector pension institutions
- **CJEU Referrals:** Luxembourg referred to CJEU for failing to correctly transpose the interest limitation rules under ATAD
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- **Poland:** Draft public CbyC reporting bill approved by lower chamber of the Parliament and updated national list of non-cooperative jurisdiction
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- **UAE:** Consultation launched on minimum taxation rules (under Pillar Two)
- **Netherlands (court decision):** Dutch Supreme Court decision on the Dutch interest deductibility limitation and abuse of law

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Latest CJEU, EFTA and ECHR

CJEU

AG opinion finds Dutch interest deduction rule compatible with EU law

On March 14, 2024, Advocate General (AG) Nicholas Emiliou of the Court of Justice of the European Union (CJEU) rendered his opinion in case C-585/22. The case concerned the compatibility of the Dutch interest deduction limitation anti-profit shifting rule with EU law.

The AG recommends that the CJEU finds the rule under dispute as permissible under EU law. Whilst acknowledging that the rule in questions represents a de facto discrimination, the AG argued that the restriction on the freedom of establishment could be justified based on the aim to fight against tax avoidance. Further, the AG noted that the disputed rule is appropriate since it tests whether the interest is taxed at a reasonable rate, ensuring that taxation is not avoided altogether, which is consistent with the objective of fighting against tax avoidance. The AG also held that the restriction does not go beyond what is necessary to achieve its purpose since it was only targeted at wholly artificial arrangements and the consequences for transactions characterized as such were not excessive.

On the question of whether loans contracted at arm's length could still be considered purely artificial or fictitious arrangements, the AG recommends that the CJEU revisits its previous case-law on this topic.

For more information, please refer to Euro Tax Flash Issue 540.

AG opinion on Swedish withholding tax treatment of foreign public sector pension institutions

On March 21, 2024, AG Collins of the CJEU rendered his opinion in case C-39/23. The case concerns the withholding tax treatment of foreign public sector pension institutions.

The plaintiffs are three Finnish public sector pension institutions claiming a refund of the dividend withholding tax charged in Sweden. Under current Swedish law, public pension funds are treated as state agencies and are exempt from tax on dividend income, whereas non-Swedish pension funds are subject to a 15 percent dividend withholding tax. The plaintiffs argued that the Finnish pension funds are in a comparable situation to resident pension funds and consequently suffered from a differentiated treatment that represents a breach of EU law. The Swedish tax authorities and administrative courts had previously rejected similar claims; however, the Swedish Supreme Administrative Court referred the case to the CJEU on January 24, 2023 (for more information, please refer to E-News Issue 170).

Following settled case law, the AG first held that the different treatment of dividends received by resident and non-resident pension funds constitutes, in principle, a restriction of the free movement of capital, where the foreign public pension institution is in an objectively comparable situation to a domestic pension institution and provided that the restriction cannot be justified by overriding reasons in public interest.

The AG refrained from making a final assessment on whether the plaintiffs are in a comparable situation to Swedish public pension funds. However, the AG rejected the Swedish government's claim that non-resident public pension funds do not aim at promoting the financial stability and durability of the Swedish social security system and, as such, cannot be considered to be in a comparable situation. In this context,

the AG held that, by definition, each fund has the purpose of protecting the stability and durability of a distinct national pension system and that such an approach would make it impossible to compare even identical pension funds operating in different jurisdictions. Consequently, the AG concluded that a comparison can only be made in the context of the social security system in which each pension institution operates (i.e., not by reference to that of another Member State), taking into account also the principal characteristics of the organization as well as the purpose, functions and core tasks. The AG further held that ancillary matters, such as differences of purely technical nature, are not decisive for the comparability assessment.

As regards possible justification grounds, the AG considered the Swedish government's view that the tax exemption of Swedish pension funds was introduced in order to avoid the administrative burden of a circular flow of resources. However, the AG held that administrative convenience is not an overriding reason in the public interest and cannot justify an obstacle to a fundamental freedom enshrined in the Treaty on the Functioning of the European Union (TFEU). Instead, the AG referred to settled case-law, which provides that overriding reasons in the public interest include ensuring the effectiveness of fiscal supervision and combating tax evasion, preventing wholly artificial arrangements, preserving the coherence of tax systems and balancing the allocation of the power to tax in relations among Member States and between Member States and third countries. As regards the latter, the AG noted that the need to ensure balanced allocation of powers to tax does not justify the taxation of dividends received by non-resident pension funds, whilst providing an exemption for domestic pension funds.

Consequently, the AG recommended the CJEU to decide that the Swedish withholding tax treatment of foreign public sector pension institutions constitutes, in principle, a restriction of the free movement of capital, subject to the referring court's verification whether the Finish pension fund is objectively comparable to a Swedish public pension fund (based on the criteria established in the AG's opinion).

It should be noted that AG opinions are not binding on the CJEU.

Infringement Procedures and Court Referrals

CJEU Referrals

Luxembourg referred to CJEU for failing to correctly transpose the interest limitation rules under ATAD

On February 20, 2024, an action was brought in front of the CJEU by the European Commission (EC) against Luxembourg (Case C-138/24) for incorrectly transposing the interest deduction limitation rules provided in the Anti-Tax Avoidance Directive (ATAD).

Article 4(7) of the Directives provides that Member States can exclude certain financial undertakings (listed under Article 2(5) of the Directive) from the scope of the interest deduction limitation rules. However, Luxembourgish legislation contains a derogation for securitization special purpose vehicles, which are not financial undertakings within the meaning of Article 2(5) of ATAD.

In July 2023, the EC had announced its decision to refer Luxembourg to the Court of Justice of the EU for failing to correctly transpose the interest limitation rules under ATAD, subsequent to a reasoned opinion

being sent to the Member State (see E-News Issue 181). In its referral, the EC is asking the CJEU to declare that Luxembourg has failed to fulfil its obligations under ATAD and to order it to pay the costs.

For more details, please refer to the entry in the Official Journal of the EU.

EU Institutions

European Commission

Communication on pre-enlargement reforms and policy reviews

On March 20, 2024, the European Commission (the Commission) adopted a Communication on pre-enlargement and policy reviews to contribute to the ongoing discussion process about the internal reforms needed to prepare for the accession of additional European countries to the Union.

The Communication notes that in a larger Union, reaching an agreement will be even more challenging due to the unanimity requirement in tax matters in the Council, with increased risks of decisions being blocked by a single Member State. Therefore, the Commission is inviting the other institutions to consider introducing qualified majority voting for the legislative process in EU tax matters.

In this context, the Communication refers to the so-called ‘passerelle’ clauses foreseen in the EU treaties. Under the ‘passerelle’ clauses, the decision making process can switch from unanimity to qualified majority voting in the Council in cases where the clause is unanimously activated by a decision from the Council of the EU or the European Council. To accommodate strategic national interests by individual Member States, the Communication proposes that activating the ‘passerelle’ clause could be accompanied by European Council conclusions. Such conclusions could provide for the possibility for one or several Member States to invoke exceptional national interest grounds to continue discussions to reach a satisfactory solution, or to seize the European Council to deliberate on the matter.

For more information, please refer to the Commission’s dedicated press release.

OECD and other International Institutions and Research Centers

Organisation for Economic Cooperation and Development – OECD

OECD releases sixth peer review report on prevention of treaty shopping

On March 20, 2024, the OECD published the sixth annual peer review report on the implementation of Action 6 – Prevention of Treaty Abuse, of the BEPS project. As a reminder, Article 6 of the BEPS Multilateral Instrument (MLI) aims at amending treaty preamble language by including an express statement that the purpose and object of tax treaties is to eliminate double taxation without creating opportunities for non-

taxation or reduced taxation through tax evasion and tax avoidance. As this statement reflects the minimum standard for protection against the abuse of tax treaties under BEPS action 6, Contracting States are only permitted to opt out with respect to covered tax agreements that already satisfy the minimum standard.

The March 2024 report includes aggregate results of the peer review, background information on treaty shopping, as well as detailed information on the implementation of the minimum standard for each member of the Inclusive Framework (IF). Key takeaways include:

- As of May 31, 2023, around 1,360 agreements concluded by IF members complied with the minimum standard, which represents an increase of around 30 percent as compared to 2022.
- On average, around 55 percent of the treaty networks of jurisdictions for which the MLI started to take effect as of January 1, 2023, are compliant with the minimum standard in 2023. By contrast, around 85 percent of the agreements do not comply with the standard where they are concluded by jurisdictions which did not sign or ratify the BEPS MLI.
- In the context of the 2022 peer review, 19 jurisdictions were recommended to take steps to have the BEPS MLI take effect with respect to their agreements listed to be covered. Eight of these jurisdictions have since completed the steps in this regard: Armenia, Côte d'Ivoire, Mexico, Papua New Guinea, Romania, Tunisia and Vietnam.
- In the 2023 peer review, 12 jurisdictions have been recommended to complete the steps to have the BEPS MLI take effect, including Argentina, Colombia, Germany, Jamaica, Kenya, Morocco, Namibia and North Macedonia.

On the same date, the OECD released the 2024 revised peer review documents, which provide the basis on which the peer review process will be run as of 2024.

For more details, please refer to an OECD press release.

OECD release eight new peer review reports on transparency and exchange of information on request

On March 28, 2024, the Global Forum on Transparency and Exchange of Information for Tax purposes (Global Forum) published new peer review reports on transparency and exchange of information on request (EOIR) for eight countries. Key takeaways include:

- Armenia has a legal and regulatory framework in place that broadly ensures the availability of, access to, and exchange of information for tax purposes. The report nevertheless states that improvements are required especially on the availability of legal and beneficial ownership information but also regarding the tax administration's access powers. The report concludes that an overall rating will be assigned in the Phase 2 review later this year.
- Bulgaria, Cameroon, Georgia, Kenya, Malta and Romania were rated as '*largely compliant*' with the EOIR standard. Except for Malta, which was rated as '*partially compliant*' in its last peer review in 2020, all these countries were already rated as '*largely compliant*' in their last peer reviews in 2016.
- Egypt was rated as '*partially compliant*' with the EOIR standard for what was its first peer review (the country joined the Global Forum in 2016). While the report acknowledges Egypt's efforts to comply with the standard (i.e., prohibition of the issuance of bearer shares, new requirements on beneficial ownership information, lifting of bank secrecy for the exchange of information), it notes that further improvements are required, especially for the implementation of beneficial ownership requirements.

Please note that the ratings published by the Global Forum are relevant in the context of the EU list of non-cooperative jurisdictions for tax purposes. Criterion 1.2 of the EU listing process requires that a tested jurisdiction should possess at least a "Largely Compliant" rating by the Global Forum with respect to the OECD EOIR standard. Those jurisdictions that have been rated '*not compliant*' or '*partially compliant*' may therefore be scrutinized by the EU (where they are in the geographical scope of the EU listing exercise).

Local Law and Regulations

Belgium

Draft amendments to minimum taxation rules (under Pillar Two)

On March 6, 2024, the Belgian government submitted to the Parliament a draft tax reform bill providing for changes to the existing minimum taxation rules (under Pillar Two) that were published on December 28, 2023. Key takeaways include:

- *Safe Harbours:* following the OECD July and December Administrative Guidance, the draft includes the transitional Undertaxed Profits Rule (UTPR) Safe Harbour, the permanent Qualified Domestic Minimum Top-up Tax (QDMTT) Safe Harbour and permanent Simplified Calculation Safe Harbour for Non-material Constituent Entities. In addition, the draft contains the anti-hybrid arbitrage rules in relation to the transitional Country-by-Country (CbyC) Reporting Safe Harbour that would apply to transactions entered into after December 18, 2023.
- *Incorporation of additional Administrative Guidance:* the draft bill incorporates further provisions from the OECD February, July and December Administrative Guidance (for example, special allocation rules for blended CFC regimes (such as US GILTI), treatment of marketable transferrable tax credits, election to include portfolio shareholding income).
- *Corrections*: the draft provides some amendments to existing provisions with a view to align with the wording of the EU Directive (for example, the application of the Income Inclusion Rule (IIR) at the level of a Partially-Owned Parent Entities (POPE) and the exclusion for the initial phase of international activity).
- *Administration:* the bill would introduce a requirement to file a local form about the amount of Income Inclusion Rule (IIR) and UTPR (in addition to existing requirements). Whilst the DMTT tax return would need to be filed within 11 months following the end of the fiscal year, the IIR and UTPR tax returns would need to be submitted within the GloBE Information Return (GIR) filing deadlines. In addition, the bill would establish the legal basis for a registration requirement in the Belgian Commercial Register to obtain a separate TIN for the GloBE compliance obligations.

The above changes would apply for fiscal years starting from December 31, 2023.

For previous coverage, please refer to a report prepared by KPMG in Belgium and E-News Issue 187.

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

Belgian Parliament considers reform of investment deduction regime

The draft tax reform bill that was submitted by the Belgian government to the Parliament on March 6, 2024, further proposes a reform of the current investment deduction regime with a view to promote investments in the green transition.

As per the proposed law, the following deduction rates would apply to investments made as from January 1, 2025:

- *Standard deduction*: the current basic deduction of 8 percent, with a broad scope and open to individuals and SMEs, would be replaced by a standard deduction of 10 percent. It would be further increased by 10 percent for investments in digital fixed assets. Eligible digital investments would include software and equipment for digital payment and billing systems, invoicing systems, digital accounting systems, digital CRM systems, digital e-commerce platforms and systems for securing digital information and communication technology.
- *Thematic deduction*: a specific deduction of 40 percent for individuals and SMEs and 30 percent for other companies would be newly introduced for investments related to the efficient use of energy and renewable energies, carbon-free transport and environmentally friendly investments (including digital support investments linked to these three categories). The list of eligible investments would be updated every three years by the Council of Ministers (in cooperation with the regions).
- *Technology deduction:* the current increased investment deduction for patents and investments in environmentally friendly research and development would be amended by way of offering a one-time and immediate deduction of 13.5 percent (as compared to 20.5 percent in 2024) and a spread deduction of 20.5 percent (as compared to 27.5 percent in 2024). The new percentages would be fixed and no longer subject to indexation. As a reminder, this deduction can also be claimed as an R&D tax credit which is refundable after 4 years (so qualifying for purposes of the Global Minimum Tax).

Please note that the various deductions cannot be applied on a cumulative basis.

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

France

Tax credit for companies investing in listed green industries enters into force

On March 13, 2024, a decree setting the date of entry into force of the newly introduced tax credit for companies investing in listed green industries was published in the Official Journal.

As per the decree, the tax credit entered into force on March 14, 2024, and companies can now benefit from it, subject to prior approval from the French Tax Authorities. Any excess tax credit is immediately refundable to taxpayers.

The publication of the decree was accompanied by the release of a ministerial order which establishes the list of equipment, essential components and raw materials used in activities contributing to the production of batteries, solar panels, wind turbines or heat pumps falling within the scope of the tax credit.

For previous coverage, please refer to E-News Issue 189.

Germany

Tax reform bill enacted

On March 27, 2024, the tax reform bill to strengthen growth opportunities, investment and innovation as well as tax simplification and tax fairness (Growth Opportunity Act) was published in the Official Gazette. Key takeaways include:

- *Amendments to transfer pricing rules:* The bill provides for tightened transfer pricing rules in respect of intra-group financing transaction based on the following three tests:
    - *Capacity test:* requirement for the taxpayer to provide evidence that they can pay both the interest and principal of the loan throughout its entire term.
    - *Purpose test:* requirement for the taxpayer to provide evidence that they need the financing and that there is a legitimate business purpose for the loan.
    - *Interest rate test:* requirement that the interest rate is based on refinancing conditions that would apply between unrelated parties and based on the credit rating of the entire group (unless the taxpayer can argue that a higher interest rate is at arm's length based on relevant facts).

  The previously proposed introduction of an interest rate barrier rule to deny the deduction of interest expenses that are subject to a rate exceeding a legally defined maximum has not been implemented.

- *Amendments to the interest limitation rule (ILR):* The alignment of the definition of the term “interest” with the EU Anti-Tax Avoidance Directive (ATAD) had already been enacted end of 2023 (see E-News Issue 189). The initially proposed conversion of the de-minimis threshold of EUR 3 million into an allowance available at group-level (anti-fragmentation rule) has not been implemented.

- *Amendments to tax loss deduction rules:* The bill allows losses to be offset up to EUR 1 million plus 70 percent (currently 60 percent) of current income in the years 2024 to 2027 for individual and corporate income tax purposes only (i.e., the 60 percent limitation would remain for local trade tax purposes). A previous proposal to temporarily suspend the current loss carry forward limitations in the year 2024 to 2027 and to increase the threshold to EUR 10 million after 2027 has not been implemented.

- *Amendments to depreciation rules:* The bill introduces a temporary declining-balance depreciation for movable assets (forming part of the balance sheet fixed assets) of up to 20 percent (25 percent in the initial proposal). This applies for assets acquired between March 31, 2024, and January 1, 2025, and is capped at twice the applicable straight-line depreciation rate. In addition, the bill introduces a declining-balance depreciation of 5 percent (6 percent in the initial proposal) for residential buildings where construction begins after September 30, 2023, and before October 1, 2029, or where the acquisition is made within this period.

- *Amendments to research allowance:* The bill expands the existing research allowance by broadening the definition of qualifying expenses, increasing the annual amount of qualifying expenses from EUR 4 million to EUR 10 million (12 million in the initial proposal) and increasing the portion of eligible costs for contract research from 60 percent to 70 percent. For small and medium-sized companies, the allowance rate increases from 25 percent to 35 percent of qualifying expenses.

- *Election for corporate income taxation:* The proposal extends the scope of the option for corporate income taxation to all types of partnerships, including limited partnerships.

Note that several provisions of the initial government proposal were removed in the course of the legislative process. This includes the proposal to expand the German mandatory disclosure rules for cross-border tax arrangements (DAC6) to also cover reporting of certain domestic tax arrangements. The proposed introduction of a 15 percent investment premium in relation to the costs of investment in certain defined assets that serve to improve energy efficiency in the company was also removed.

The law generally comes into force on March 28, 2024. Note, however, that the application of certain measures may have retroactive effect.

For more information, please refer to a report prepared by KPMG in Germany and our previous coverage in E-News Issue 183.

Guidance on shareholder data reporting requirement for listed companies

On February 22, 2024, the German Federal Central Tax Office (BZSt) published a communication manual with respect to the requirement for listed companies based in Germany to report information on the identity of their shareholders to the BZSt. The requirement was introduced by the German Withholding Tax Relief Modernization Act and applies to profit distributions to shareholders after December 31, 2024.

Key takeaways with respect to the reporting obligation include:

- *Reporting timeline:* the notification must be made immediately at the time when the profit distribution resolution is adopted, i.e., usually at the annual general shareholders' meeting.
- *Reportable information:* the reported information must include, amongst others, name, address, date of birth, tax number, email address, number of shares held, and the start date of the shareholding of the shareholder concerned. The shareholders must be informed about the notification.
- *Data format:* the information is to be submitted to the BZSt in XML-format.
- *Fines:* Whilst the law currently does not provide for fines in case of non-compliance, this may change in the future.

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

Liechtenstein

Ordinance on the application of the minimum taxation rules (under Pillar Two) published

On March 28, 2024, Liechtenstein published in the Official Gazette an ordinance on the application of the existing minimum taxation rules (under Pillar Two) that were previously published in the Official Gazette on December 22, 2023. Key takeaways include:

- *Timeline:* the IIR and DMTT apply for fiscal years starting on or after January 1, 2024. The government is authorized to set the start date for the UTPR not earlier than for financial years starting on or after January 1, 2025.

- *OECD materials:* the ordinance clarifies that the legislation must be interpreted and applied in accordance with the OECD Commentary and Administrative Guidance. In addition, the ordinance clarifies that Liechtenstein applies the transitional CbyC Reporting Safe Harbour and the Permanent Safe Harbour rules that were agreed as part of the OECD' Safe Harbours and Penalty Relief release in December 2022.
- *Covered Taxes:* the ordinance clarifies that foreign taxes will be considered as covered taxes where they are qualified as such as part of the OECD peer review.
- *Administration:* the ordinance clarifies that the GloBE Information Return (GIR) needs to be filed no later than 15 months after the end of the fiscal year (18 months for the transitional year). In addition, a local tax return needs to be filed in accordance with the requirements and annual deadlines set by the Liechtenstein tax authorities. Supplementary documents need to be submitted in German and English language.

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

Luxembourg

Q&A on deferred tax expenses in the transitional period (under Pillar Two)

On March 25, 2024, non-binding guidance in the form of an FAQ document was issued by the tax authorities in Luxembourg. The Q&A is dedicated to the recognition and disclosure of deferred tax assets (DTAs) and liabilities (DTLs) in the transitional period under the Pillar Two rules in Luxembourg.

Key takeaways include:

- The FAQ confirms that the disclosure of all DTAs/DTLs that relate to the transition year, can be made in the annual Luxembourg GAAP financial statements of the Constituent Entity, and/or in the Consolidated Financial Statements of the UPE. If the DTAs/DTLs are disclosed in the consolidated accounts, they would need to be reliably and consistently traceable to the Luxembourg Constituent Entity. In this respect, the FAQ also makes a reference to the Q&A published by the Accounting Standard Commission, which clarifies certain aspects of the disclosure from an accounting perspective.
- The FAQ advises that all DTAs/DTLs should be reflected or disclosed in the accounts for the year preceding the transition year (i.e., December 31, 2023, for taxpayers in scope with financial year lasting from January 1, 2024 till December 31, 2024).
- The FAQ clarifies that the DTAs/DTLs can be reflected (i.e., booked) in the financial statements or disclosed in the notes to the financial statements, each of the options alone is sufficient.

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

Poland

Draft public CbyC reporting bill approved by lower chamber of the Parliament

On March 20, 2024, the draft bill transposing the EU Public Country-by-Country (CbyC) Reporting Directive (the Directive) into local legislation was approved by the lower chamber of the Polish Parliament. Key takeaways include:

- The provisions of the Polish public CbyC bill are closely aligned with the text of the Directive.
- The consolidated net turnover threshold for MNEs in scope is PLN 3.5 billion (approximately EUR 812 million) in each of the last two consecutive financial years for Polish headquartered MNEs and EUR 750 million for non-EEA headquartered MNEs.
- The Polish CbyC disclosure rules cover all EEA countries, i.e., in addition to the EU Member States, information will also be required on a jurisdiction by jurisdiction basis with respect to operations in Iceland, Liechtenstein and Norway.
- 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 disadvantage to the companies concerned, provided they can justify the reason for the omission.
- Existing criminal liability under the Accounting Act is proposed to be extended to cases of non-compliance with the public CbyC rules.

Based on the current text of the draft law, the public disclosure rules would apply to financial years starting on or after June 22, 2024.

As a next step in the legislative proceedings, the bill will need to be approved by the Senate and published in the Official Journal before it enters into force.

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

Updated national list of non-cooperative jurisdictions

On March 4, 2024, the Minister of Finance issued a notice updating the Polish list of non-cooperative jurisdictions. Following the update, this list includes six jurisdictions, namely Fiji, Guam, Palau, Trinidad and Tobago, the Russian Federation and American Samoa.

In principle, this update follows the review of the EU list of non-cooperative jurisdictions (Annex I) and the state of play with respect to commitments taken by cooperative jurisdictions to implement tax good governance principles (Annex II – so called "grey list"), adopted by the General Affairs Council, on February 20, 2024 (see Euro Tax Flash Issue 538).

However, please note that the Polish list of non-cooperative jurisdictions does not feature those jurisdictions on the EU list that are already listed on the national tax haven list. The latter was last updated on March 29, 2019, and refers to the following jurisdictions: Andorra, Anguilla, Antigua and Barbuda, Bahrain, British Virgin Islands, Cook Islands, Curacao, Dominica, Grenada, Hong Kong (SAR, China), Liberia, Macau, Maldives, Marshall Islands, Mauritius, Monaco, Nauru, Niue, Panama, Saint Lucia, Samoa, Sark, Seychelles, Sint-Maarten, Tonga, US Virgin Islands, Vanuatu.

Different national tax defensive measures are applied depending on whether a jurisdiction is included on the national tax haven list or the Polish list of non-cooperative jurisdictions. Defensive measures may include CFC taxation, 19 percent tax on shifted profits, limitation of participation exemption, broader scope of withholding taxation, DAC6/MDR reporting and increased Transfer Pricing documentation.

For additional information, please refer to a report prepared by KPMG in Poland.

For more details on the EU listing exercise, please refer to KPMG's summary of defensive measures applied by EU Member States against non-cooperative jurisdictions.

Sweden

Draft amendments to minimum taxation rules (under Pillar Two)

On March 19, 2024, the Swedish Ministry of Finance released draft amendments to the existing minimum taxation rules (under Pillar Two) that were previously published on December 14, 2023.

Key takeaways include:

- *Safe Harbours:* in line with the OECD July and December Administrative Guidance, the draft includes the transitional UTPR Safe Harbour, the permanent QDMTT Safe Harbour and permanent Simplified Calculation Safe Harbour for Non-material Constituent Entities. In addition, the draft contains anti-arbitrage rules in relation to the transitional CbyC Reporting Safe Harbour that would apply to transactions entered into after December 15, 2022.
- *DMTT:* The draft provides for a changed approach in respect of the accounting standard that is to be used for DMTT computation purposes. Instead of the accounting standard used for purposes of the Consolidated Financial Statements of the UPE, the draft requires for the DMTT computations to be based on a local financial accounting standard (subject to conditions in line with the OECD July Administrative Guidance). The draft further provides clarifications in respect of the currency that is to be used for DMTT computation purposes.
- *Incorporation of additional Administrative Guidance:* the draft bill would incorporate further provisions from the OECD February, July and December Administrative Guidance (for example, special allocation rules for blended CFC regimes (such as US GILTI), treatment of marketable transferrable tax credits, election to include portfolio shareholding income, excess net tax expense carry forward, election to exclude income attributable to debt releases, election to include income and losses from equity investments).
- *Administration*: the amendments clarify that if the fiscal year ends before March 31, 2025, a GIR does not need to be submitted before June 30, 2026 (in line with the OECD December 2023 Administrative Guidance). For fiscal years that end on March 31, 2025 or later, the deadlines for submission of the GIR for that tax year shall be 15 months after the end of the tax year. The local top-up tax return would need to be submitted within one month after submission of the GIR.
- *Additional measures:* the draft provides for an amendment of Swedish CFC rules to allow for a credit for DMTT paid by a CFC in another jurisdiction.

Public comments on the draft bill are requested by May 20, 2024. The legislative changes would apply to fiscal years beginning after the amendments have been incorporated to the Swedish law (i.e., for financial years starting after January 1 2025). However, there is a possibility for groups to elect to apply the amendments retroactively for fiscal years starting on or after December 31, 2023.

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

UAE

Consultation launched on minimum taxation rules (under Pillar Two)

On March 15, 2024, the UAE Ministry of Finance launched a public consultation on the implementation of Pillar Two based on the OECD Model Rules. The consultation questionnaire seeks input from stakeholders on a number of policy options that the UAE government may consider as it adopts the Pillar Two Rules. Key takeaways include:

- *General:* the questionnaire explores the potential application of an IIR, UTPR and DMTT for both UAE headquartered MNE Groups and foreign MNE Groups operating in the UAE and its impact on investment decisions (no indications in respect of application timelines).
- *DMTT design:* the questionnaire explores whether the DMTT should be designed with the aim to be eligible for the QDMTT Safe Harbour. In addition, the questionnaire seeks feedback on a potential exclusion of (Insurance) Investment Entities, Joint Ventures and Minority-owned Constituent Entities from the DMTT, the treatment of stateless and flow-through entities for DMTT purposes, the allocation of the DMTT liability to one local entity or across all local Constituent Entities as well as the potential requirement for DMTT calculations to be based on IFRS.
- *Administration*: the questionnaire explores the need for separate returns to be filed in addition to the GIR and any local tax returns and seeks feedback on local filing and payment deadlines, record-keeping requirements as well as penalties for non-compliance.
- *Accompanying measures:* the questionnaire also explores the introduction of (GloBE compliant) tax incentives to maintain competitiveness and attract businesses to establish a presence in the country.

Public comments are requested by April 10, 2024.

Emirate of Dubai introduces tax on foreign bank income

On March 7, 2024, the government of the emirate of Dubai issued a law introducing a tax on the income of foreign banks operating in Dubai. Key elements include:

- The law provides for an annual tax of 20 percent on the taxable income of foreign banks operating in the emirate (including those situated in special development zones and free zones).
- The law does not apply to foreign banks licensed to operate in the Dubai Financial Center in respect of income arising from business conducted within or through that financial center.
- In respect to the calculation of the taxable income, the law foresees that rules and regulations approved by the Dubai Department of Finance need to be taken into account, as well as the provisions of the domestic corporate income tax law and related decisions.
- Where in-scope banks are subject to UAE corporate income tax, same would be credited against the new bank tax.
- The timeline and forms for filing tax returns are yet to be clarified by the Dubai Department of Finance.

It is expected that the law applies for financial years starting after March 8, 2024, subject to further details being published in this respect.

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

Local Courts

France

French domestic rules on horizontal tax groups do not conflict with the non-discrimination clause contained in the French-Swiss Double Tax Treaty

On March 1, 2024, the Administrative Court of Appeal of Paris (the Administrative Court of Appeal) rejected the claim that French domestic rules on horizontal tax groups were contrary to the non-discrimination clause included in the Double Tax Treaty (DTT) between France and Switzerland.

Under French tax law, two or more sister companies which are held by a common parent company resident in the EU or in the European Economic Area (EEA) can create a horizontal tax group. In this scenario, one of the French resident companies meeting all the required conditions can opt to create a horizontal tax group and becomes the head of this group. Both the parent company and all the intermediate companies must be subject to an equivalent of French corporate income tax in an EU or EEA Member State.

In the case at hand, a French company (B Co) owned by a Swiss parent company (Hold Co) established a vertical tax group with its fully owned French subsidiary (C Co). The Swiss parent company also held a third French company (E Co) through a Swiss intermediate holding company (D Co). B Co subsequently filed a claim to incorporate E Co into its tax group (thus moving from a vertical tax group to the creation of a horizontal tax group), which was denied by the French tax authorities on the grounds that Switzerland is not part of the EU or of the EEA.

B Co argued that the domestic requirement relating to the state of residence of the parent-company was contrary to the non-discrimination principle contained in article 26 (5) of the French-Swiss DTT.

The Administrative Court of Appeal rejected the claim, stating that the group was not impeded to create a horizontal tax group because Hold Co was a Swiss resident, but because E Co was owned by an intermediate Swiss company which was not subject to an equivalent of French corporate income tax in an EU or EEA member state.

In addition, the Court ruled that the non-discrimination clause contained in article 26 (5) of the French-Swiss DTT does not prevent France from reserving the possibility of creating a horizontal tax group to French companies held by parent entities resident in an EU or EEA member state and excluding French companies held by parent entities resident in a third state such as Switzerland.

This decision can still be subject to an appeal in front of the French Administrative Supreme Court (Conseil d’Etat).

Netherlands

Dutch Supreme Court decision on the Dutch interest deductibility limitation and abuse of law

On March 22, 2024, the Dutch Supreme Court ruled that refusing an interest deduction under the Dutch interest deduction limitation anti-profit shifting rule (Article 10a of the Corporate Income Tax Act 1969 or Article 10a CITA) is justified where there is a series of transactions between affiliated entities performed with the decisive aim of avoiding the rules.

The case at hand involved an investment fund which set up a Dutch company (the plaintiff) for the purpose of acquiring a Dutch group. The plaintiff had four indirect shareholders established in Guernsey – Guernsey Ltd I (a related party for the purpose of Article 10a CITA) and Guernsey Ltd II, III and IV (unrelated parties for the purpose of Article 10a CITA).

The acquisition was funded through a series of external loans granted to the plaintiff as follows:

- loans granted by Guernsey Ltd II, III and IV;
- loan granted by another company (Guernsey V). The latter company did not have any shareholding rights in the taxpayer but was held by the same shareholders as the plaintiff;
- loan from a banking syndicate, for which it paid a one-time "*arrangement fee*" of 4 percent of the credit facility.

Under Dutch rules, the deductibility of interest expenses incurred with respect to loans contracted from related parties – for the purposes of internal reorganizations or external acquisitions, is restricted (subject to certain conditions). A dispute arose, amongst others, on whether the interest paid by the plaintiff to the Guernsey entities could be considered as deductible for Dutch corporate income tax purposes. Following several proceedings, the case reached the Dutch Supreme Court (the Supreme Court).

The Supreme Court recognized that Article 10a CITA generally does not apply if the loan was obtained from an entity that is not associated with the taxpayer as defined in this Article. However, as an exception, Article 10a CITA would still apply:

- if the contracting of the loan from an unrelated party is part of a series of transactions between affiliated entities; and
- if that series of transactions arose with the decisive aim of avoiding the interest deductibility limitation rules.

Based on this reasoning, the Supreme Court held that the interest on the loan from Guernsey Ltd V should not be deductible as the incorporation of such company and the provision of a loan through it were part of a series of transactions aimed at avoiding affiliation within the meaning of Article 10a CITA.

The Supreme Court also confirmed that the deduction of interest on loans from Guernsey Ltd II, III, and IV should not be refused based on this rule, as there was no affiliation with the plaintiff, and there was no series of transactions between affiliated entities decisively aimed at thwarting the association under Article 10a.

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

Portugal

Portuguese tax arbitration court judgment on discriminatory effect of withholding tax on interest income

On November 24, 2023, the Portuguese tax arbitration court issued a judgment in case 400/2023-T on the withholding tax treatment of interest payments towards non-resident financial institutions. The case concerned a German bank which received interest payments from a Portuguese source. The interest payments were subject to a 15 percent withholding tax in accordance with the applicable double tax treaty between Germany and Portugal.

The plaintiff argued that this withholding tax treatment constitutes an infringement on the freedom to provide services and the free movement of capital since interest income of non-resident taxpayers was taxed based on its gross amount. At the same time, interest income derived by a resident taxpayer was taxed on a net basis (i.e., the taxpayer was allowed to deduct expenses related to the income). The Portuguese tax authorities argued that the calculation of the net amount was only possible upon the presentation of supporting documents, which clearly showed the expenses incurred in generating the income in question. In other words, it was argued that the burden of proof for the calculation of the net value of the interest income lies with the taxpayer.

The tax arbitration court ruled that taxing non-resident financial institutions on interest income without providing them the possibility to deduct business expenses directly related to the activity in question constitutes an unequal and discriminatory treatment. This assessment is in line with CJEU case law, particularly referring to case C-18/15 (for more information, please refer to Euro Tax Flash Issue 295).

It should be noted that the tax arbitration court held that the burden of proof in relation to the eligibility of professional and operating expenses to be taken into account in the calculation of the tax base lies with the tax authorities. This requires the authorities, on the one hand, to obtain additional information which is in the possession of the taxpayer, and, on the other hand, to conduct an exchange of information with other tax authorities when required. Referring to case C-18/15, the tax arbitration court recalled that the mere fact that proof is more difficult to obtain in a cross-border scenario does not authorize a Member State to absolutely refuse deductions which it grants to residents.

KPMG Insights

EU Tax Perspectives webcast – April 9, 2024

On April 9, 2024, KPMG will hold a new EU tax perspectives session as part of the Future of Tax & Legal webcast series.

During the session, our speakers will provide insights into the state of play of implementation for recently adopted measures and delve into pressing issues arising from these initiatives, offering practical guidance for businesses navigating the changing tax environment.

Moreover, this webcast will touch upon the anticipated direction of travel of pending files, assessing the likelihood of adoption before the term of the current European Commission ends. Additionally, KPMG professionals will share invaluable insights on what multinational companies operating within the EU should be mindful of in light of these developments.

The session will focus on:

- BEPS 2.0 in the EU: state of play on the implementation of the EU Minimum Tax Directive (Pillar Two), practical issues and spotlight on offshore jurisdictions;
- The February update of the EU list of non-cooperative jurisdictions;
- The EU Foreign Subsidies Regulation: general trends observed in the first notified cases and the EC's feedback after the first 100 days;
- The Withholding Tax Relief Framework (FASTER): state of discussions, practical challenges and what can be expected in the future;
- Looking ahead: state of play and updates on other key EU direct tax initiatives, including the Unshell Directive proposal, BEFIT, the Transfer Pricing Directive, EU public country-by-country reporting and the review of the Directive for Administrative Cooperation.

Please access the event page to register.

Global minimum top-up taxes in financial reports - FAQs

Many countries have amended their local laws to introduce a global minimum top-up tax under the new OECD rules known as 'Pillar Two'.

To help you in preparing your financial statements, a dedicated KPMG web article and accompanying video answer your questions on the following key issues.

- *Disclosures:* To compensate for the potential loss of information resulting from the mandatory deferred tax accounting relief, companies are required to provide relevant disclosures in their financial statements from 31 December 2023 onwards.
- *Impairment assessment:* Companies may need to reflect the impact of upcoming changes in tax laws in their impairment assessments.

- *Interim reporting:* To determine how to reflect the current top-up tax and what information to disclose, companies need to consider the status of Pillar Two implementation in the countries where the group operates at the interim reporting date. This is because different countries are at different stages of implementing the legislation.
- *Recharges of Pillar Two taxes:* Companies within a group may enter into 'recharge arrangements' for Pillar Two taxes that are levied on one company, but triggered by another company. IFRS® Accounting Standards do not specifically address the accounting for these recharge arrangements in a company's separate financial statements, and companies will need to develop an accounting policy, to be applied consistently.

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.

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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