E-News from KPMG's EU Tax Centre

Key Insights of E-News Issue 196

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:

- **European Commission:** Reasoned opinion sent to six Member States for incomplete transposition of EU Minimum Tax Directive into national law
- **European Commission:** Letters of formal notice sent to Member States for failure to exchange information required under DAC7
- **European Commission:** Reasoned opinions sent to six Member States for incomplete transposition of the EU Public Country-by-Country (CbyC) Reporting Directive
- **OECD:** 2024 Progress Report on Tax Co-operation for the 21st Century
- **Belgium:** Royal decree published clarifying registration requirements under Pillar Two
- **Germany:** Consultation launched on draft tax return for Pillar Two purposes
- **Italy:** Ministerial decree published to implement transitional Safe Harbour provisions under Pillar Two
- **Spain:** Public consultation on the regulation implementing minimum taxation rules (under Pillar Two)
- **Switzerland:** Tax changes in Swiss cantons in response to Pillar Two implementation
- **United Kingdom:** Guidance on Pillar Two registration issued

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Latest CJEU, EFTA, ECHR

Key Insights

- AG opinion on the protection of legal professional privilege under the Directive on Administrative Cooperation

CJEU

AG opinion on the protection of legal professional privilege under the Directive on Administrative Cooperation

On May 30, 2024, Advocate General Juliane Kokott of the Court of Justice of the European Union (CJEU) rendered her opinion in case C-432/23.

The Luxembourg Higher Administrative Court issued a request for a preliminary ruling on the application of legal professional privilege in the context of an exchange of information on request on the basis of the Directive 2011/16/EU on administrative cooperation in the field of taxation (the "DAC").The Spanish authorities had sent a request to the Luxembourg authorities for information on a Spanish company, which would be required from its Luxembourgish lawyer. The lawyer refused to provide information about the client on the grounds that it was covered by legal professional privilege. The case was eventually brought before the Luxembourg Higher Administrative Court, which referred the matter to the CJEU.

The Advocate General concluded that the CJEU should answer the questions referred by the Luxembourg Court as follows:

- Legal advice provided by lawyers, even on matters of company law falls within the scope of the protection afforded by legal professional privilege as guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter').
- A decision of the local tax authorities ordering lawyers to disclose information (to be passed on to other Member States under the DAC regulations for exchanges of information on request) constitutes an interference with the right to respect for communications between lawyers and their clients that is guaranteed by Article 7 of the Charter.
- The DAC is compatible with Article 7 and Article 52(1) of the Charter, in so far as it does not include, beyond Article 17(4), any provision:
    i. which formally permits interference with the confidentiality of exchanges between lawyers and their clients in the context of the system of exchange of information on request, and
    ii. which itself defines the scope of the limitation on the exercise of the right in question.

  In other words, Article 17(4) of the DAC generally provides Member States sufficient discretion to protect the confidentiality of exchanges between lawyers and their clients and, thus, to fulfil the requirements of Article 7 of the Charter.

- However, according to the AG, Luxembourg tax law protects the confidentiality of exchanges between lawyers and their clients only where this does not relate to tax matters (unless an affirmative or negative response to questions would put their clients at risk of criminal prosecution). As a result, the AG argues that the Luxembourg law is in breach of Article 7 of the Charter since it does not enable the competent authority to strike a balance on a case-by-case basis between the objectives in the general interest, on the one hand, and the protection afforded by legal professional privilege, on the other.

On December 8, 2022, the CJEU ruled that the notification obligation provided by the second sentence of Article 8ab(5) – which required intermediaries subject to legal professional privilege to notify other intermediaries of their reporting obligation under DAC6 – was invalid, in light of the fundamental rights guaranteed by Article 7 of the Charter (for further information, please see Euro Tax Flash Issue 497). Article 8ab(5) was subsequently amended to bring the wording in line with the CJEU decision .

In addition, note that a previous AG opinion issued by Nicholas Emiliou in February 2024 raised concerns regarding whether granting Member States the freedom to decide which professionals benefit from waivers from legal professional privilege could distort the internal market and create "safe havens" for professionals involved in aggressive tax planning. AG Emiliou concluded that Member States should limit the application of legal professional privilege under DAC6 to lawyers and, in exceptional circumstances, to other professionals that are treated in the same way as lawyers (for more information, please refer to Euro Tax Flash Issue 539).

Infringement Procedures and CJEU Referrals

Key Insights

- European Commission closes infringement procedure against Hungary regarding transposition of ATAD
- Reasoned opinion sent to six Member States for incomplete transposition of EU Minimum Tax Directive into national law
- Letters of formal notice sent to Member States for failure to exchange information required under DAC7
- Reasoned opinions sent to six Member States for incomplete transposition of the EU Public Country-by-Country (CbyC) Reporting Directive
- Lithuanian request for a preliminary ruling on the interpretation of the anti-abuse measure in the Parent Subsidiary Directive
- Appeal against General Court's order on Madeira Free Zone scheme

Infringement Procedures

European Commission closes infringement procedure against Hungary regarding transposition of ATAD

On May 23, 2024, the European Commission closed the infringement procedure against Hungary regarding a failure to transpose several provisions of the Anti-Tax Avoidance Directive (ATAD) into its domestic legislation (infringement case number INFR(2023)2041).

The European Commission initiated these proceedings on July 14, 2023, by sending a letter of formal notice to Hungary pointing out divergent rules on the taxation of Controlled Foreign Companies (CFCs) as well as a problematic definition of "*associated enterprise*" which, for the purposes of applying the Directive, should also include subsidiaries under common control. For previous coverage, please refer to E-News Issue 181.

The infringement procedure was closed without further explanation.

Reasoned opinion sent to six Member States for incomplete transposition of EU Minimum Tax Directive into national law

On May 23, 2024, the EC decided to send a reasoned opinion to six Member Stats that had failed to notify the national measures transposing Council Directive (EU) 2022/2523 (EU Minimum Tax Directive) into domestic legislation. These Member States are Cyprus, Latvia, Lithuania, Poland, Portugal and Spain.

All EU Member States were required to bring into force the laws necessary to comply with the EU Minimum Tax Directive by December 31, 2023. As per the EC notice published on December 12, 2023, five EU countries, including Latvia and Lithuania, had 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). They 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.

No reasoned opinions were sent to Estonia, Greece and Malta that had previously also received letters of formal notice (see E-News Issue 190) but have transposed the Directive into national law in the meantime.

Cyprus, Latvia, Lithuania, Poland, Portugal and Spain have two months to reply and take the necessary measures. In the absence of a full communication of all national implementing measures, the Commission may decide to refer the case to the CJEU.

For more details, please refer to the Commissions' May 2024 infringement package.

Letters of formal notice sent to Member States for failure to exchange information required under DAC7

On May 23, 2024, the EC sent letters of formal notice to Germany, Hungary, Poland and Romania for failing to exchange timely information on income earned on digital platforms, as required under Council Directive (EU) 2021/514 (DAC7).

DAC7 provides for a first reporting deadline of January 31, 2024, for in-scope digital platform operators. Member States were required to exchange the received information within one month, i.e. by February 29, 2024. However, several Member States extended the reporting deadlines for DAC7 purposes – see E-News Issue 190.

In addition, the EC had previously issued reasoned opinions to several Member States for failures to transpose DAC7 into national law – see E-News Issue 189 for more information. The infringement procedure against Greece (INFR(2023)0014) was closed on May 23, 2024, without further explanation following the transposition of DAC7 into Greek law.

The letters of formal notice to Germany, Hungary, Poland and Romania have not been made publicly available by the EC. The deadline for Member States concerned to reply to the letters of formal notice and complete the exchange of information is two months. Otherwise, the EC may decide to issue a reasoned opinion.

For more details, please refer to the Commissions' May 2024 infringement package.

Reasoned opinions sent to six Member States for incomplete transposition of the EU Public Country-by-Country (CbyC) Reporting Directive

On May 23, 2024, the EC decided to send reasoned opinions to six Member States that had failed to transpose completely the EU Public CbyC Reporting Directive (the Directive) into domestic legislation. These Member States are Austria, Belgium, Cyprus, Italy, Finland and Slovenia.

All EU Member States were required to transpose the Directive into national law by June 22, 2023. The EC had previously sent letters of formal notice to fourteen Member States that had not notified national measures transposing the Directive into domestic legislation – see E-news Issue 181. Several of these Member States have transposed the Directive into national law since and have therefore not received a reasoned opinion. Note that, based on the information available as at the date of this publication, Belgium had completed the transposition process and Austria and Finland had issued draft public CbyC reporting legislation.

The six Member States have two months to reply and take the necessary measures. In the absence of a full communication of all national implementing measures, the Commission may decide to refer the case to the CJEU.

For more details, please refer to the Commissions' May 2024 infringement package. For more details on public CbyC reporting please refer to KPMG's EU Tax Centre's dedicated webpage.

CJEU Referrals

Lithuanian request for a preliminary ruling on the interpretation of the anti-abuse measure in the Parent Subsidiary Directive

On March 26, 2024, the Lithuanian Tax Disputes Commission (the Court) made a referral to the CJEU, requesting a preliminary ruling on the interpretation of the anti-abuse measure in the Parent Subsidiary Directive (PSD). The case is C-228/24.

The plaintiff, a Lithuanian company active in the video games industry, received dividends from its UK subsidiary (UK Sub) in 2018 and 2019. During this period, the UK Sub acted as the distributor for games developed by the plaintiff, as well as for other independent game developers. Once the plaintiff was able to secure direct agreements with various computer game distribution platforms, the UK Sub's activities ceased, leading to the subsidiary's eventual liquidation in 2019. Following a tax inspection, the Lithuanian tax authorities denied the applicability of the dividend participation exemption under PSD, on the grounds that the UK Sub was not a genuine entity. The tax authorities based their conclusion on the following points:

- lack of human resources: the tax authorities argued that the UK Sub did not have sufficient human resources to manage its operations. In fact, despite the high volume of game downloads, the UK Sub only employed one manager who also managed seven other companies;
- no physical premises and no real economic activity: the tax authorities took that view that the UK Sub did not engage in real economic activity in the UK. As such, the UK Sub was registered at an address shared by a large number of third-party companies, and lacked data on immovable property, fixed assets, websites, or email addresses used for its operations;
- insufficient resources for operations: the tax authorities argued that given the large number of games, customers, sales channels, and high sales volumes, significant human resources (financial staff, data analysts, IT specialists) and material resources (premises, hardware, software) were required. Nevertheless, these resources were not available in the UK Sub.

The plaintiff challenged the tax authorities' assessment, arguing that the resources of the UK Sub were appropriate for its activity, specifically the distribution of electronic games. The plaintiff argued that no physical premises were necessary, and that the manager was sufficient to handle standard contracts for game distribution and advertising sales. Additionally, the plaintiff emphasized that the UK Sub was established for valid commercial reasons and that it was essential as a sales channel. As such, it was not possible to distribute games directly from Lithuania via two of the largest computer game distribution platforms. Additionally, the plaintiff argued that the overall tax burden in the UK was higher than it would have been in Lithuania.

In the context of the two contradictory positions taken above, the Court asked the CJEU to provide its interpretation with regard to the application of the anti-abuse rule in the PSD. Specifically, the Court asked the CJEU to clarify whether:

- it is consistent with the anti-abuse rule in the PSD to deny the applicability of the participation exemption for dividends received, even when the payer i) is not a mere intermediary, and ii) its establishment was justified by commercial reasons;
- the anti-abuse rule in the PSD could be interpreted to mean that recognizing a subsidiary as an arrangement alone is sufficient to determine that a parent company obtained a tax advantage that defeats the purpose of the PSD. Additionally, the Court asked whether the fact that the UK Sub's profits were subject to corporate income tax in the UK should be considered relevant in challenging the finding of a tax advantage or arrangement.

Appeal against General Court's order on Madeira Free Zone scheme

On May 21, 2024, an appeal filed by three Portuguese companies against a General Court order was published in the EU Official Journal (case C-9/24). The case concerns the Madeira Free Zone State aid scheme.

The Madeira Free Zone State aid scheme – providing corporate income tax reductions and other tax benefits for companies established in the region, was initially approved by the European Commission (EC or the Commission) in 1987 as compatible regional aid. The scheme was subject to several successive amendments and approvals by the EC. The final successor of the scheme – i.e., Regime III, was authorized by the Commission through two decisions which covered the period January 1, 2007 – December 31, 2014. The approvals explicitly linked the amount of aid granted to jobs created / maintained in the region and to activities carried out locally.

Following concerns triggered during its standard monitoring of the implementation of State aid decisions, on December 4, 2020, the EC concluded that Regime III was not implemented in line with approved conditions. In particular the Commission argued that the tax benefits were granted with respect to income that was not derived from activities carried out in the Autonomous Region of Madeira and to companies that did not create or maintain jobs in the region. As a result, the Commission concluded that the aid scheme under dispute was in breach of EU State aid rules (the Decision). The EC required Portugal to recover aid granted to companies that did not meet the approved conditions. Portugal decided to appeal the EC's Decision (case T-95/21) and on September 21, 2022, the CJEU ruled that the Commission was correct to conclude that Regime III was not implemented in line with approved conditions. Consequently, the General Court dismissed the appeal brought by Portugal against the Commission's Decision – see EuroTaxFlash Issue 485.

In parallel, the three Portuguese companies also challenged the EC's Decision in front of the General Court (joined cases T-718/22 and T-723/22). On October 27, 2023, the General Court held that the grounds relied on by the applicants raised questions similar or identical to those on which General Court has already ruled in case T-95/21 described above. Therefore, the General Court issued an order dismissing the appeals as manifestly lacking any legal basis.

In their subsequent appeal to the CJEU in case C-9/24, the companies argued that the General Court erred in law by concluding that the 'job creation' criterion was not met. The companies also argued that the Commission's decision infringes on the principles of legal certainty and legitimate expectations. The appeal emphasized that the applicants believed Regime III was fully compatible with the internal market because it was authorized by the Commission and replaced Regime II, which had always been considered compatible with EU law.

OECD and other International Organisations

Key Insights

- 2024 Progress Report on Tax Co-operation for the 21st Century
- Updated guidance on the implementation of Country-by-Country Reporting

OECD

2024 Progress Report on Tax Co-operation for the 21st Century

On May 24, 2024, the OECD released the 2024 Progress Report on Tax Co-operation for the 21st Century, which builds on the 2022 Report on Tax Co-operation for the 21st Century and the 2023 Progress Report. Key takeaways include:

- *Common risk assessment and control framework*: The report notes that the use of a tax control framework for MNEs participating in cooperative compliance programs can significantly reduce the need for reviews and audits of their tax returns with respect to the GloBE rules. However, it stresses that practical and design issues must be considered, including consistency in implementation, guidance on developing a tax control framework, and ensuring relevant technical skills are available. In addition, the report notes that the efficiency and efficacy of the Pillar Two risk assessment and audit could be enhanced by developing common and coordinated approaches. According to the report, this work could build on existing guidance and experiences from multilateral risk assessment programs (e.g., ICAP).
- *Dispute resolution mechanism*: The report highlights the risk that the inconsistent application of the agreed minimum tax rules by jurisdictions could create uncertainty for businesses and result in double or under-taxation. To avoid same, the report stresses the need for a dispute resolution mechanism, which precisely sets the circumstances under which an inconsistency in the application of the rules is eligible for the dispute resolution mechanism. According to the report, a procedure for resolving the disputes effectively and timely would need to be developed and could be based on one or more of a multilateral instrument, a model bilateral instrument or, where feasible, through domestic law based on common template. In this context, the report notes that many external stakeholders have expressed support for a multilateral instrument, which is considered to provide greater legal certainty.
- *Revaluation of existing anti-abuse measures*: The report highlights that the implementation of Pillar Two offers an opportunity to streamline and eliminate redundant tax rules targeting issues already addressed by other international tax measures. Specifically, it could render certain anti-hybrid and anti-abuse rules partially obsolete, as Pillar Two addresses the underlying policy concerns. In this context, it notes that adjustments to the scope of work of the Forum on Harmful Tax Practices (FHTP) could also be considered. Additionally, the report points out that jurisdictions with varying domestic mandatory disclosure rules may find some hallmarks for specific transactions overlapping with Pillar Two, prompting a revaluation of these rules.
- *Exchange of information*: the report notes that progress continues to be made on ensuring the availability of information for tax administrations (i.e., current work on beneficial ownership, crypto-asset reporting framework, etc.) and moving towards real-time, technology-based solutions for greater and faster information exchange.
- *Implications for developing countries:* the report highlights the importance of making sure that developing countries are well positioned to take advantage of the changes in the international tax architecture. This includes ensuring that developing countries can make the most of the opportunities arising from Pillar Two, as well as in other areas such as

VAT and tax administration. It also entails the provision of capacity building as well as ensuring that the priorities of developing countries are better reflected in the Inclusive Framework's agenda.

For previous coverage on the 2023 Progress Report, please refer to E-News Issue 177.

Updated guidance on the implementation of Country-by-Country Reporting

On May 27, the OECD published additional guidance on the implementation of BEPS Action 13 on Country-by-Country (CbyC) Reporting. The updated document clarifies the treatment of payments received from other constituent entities for the purposes of "profit (loss) before income tax", "income tax accrued (current year)" and "income tax paid (on cash basis)".

Whilst the BEPS Action 13 report already stated that dividends from other constituent entities are excluded from revenues, it did not provide specific instructions on whether they should be included in the three lines mentioned above. The current guidance clarifies that, consistent with the previous guidance, such payments are to be excluded from the pre-tax results, to the extent they are treated as dividends in the payer's tax jurisdiction.

The guidance ensures a consistent treatment of payments in the payer and in the recipient jurisdictions in a CbyC report, as well as consistency with the Pillar Two Administrative Guidance published in December 2023.

Local Law and Regulations

Key Insights

- Belgium: Royal decree published clarifying registration requirements under Pillar Two
- Germany: Consultation launched on draft tax return for Pillar Two purposes
- Guernsey: Statement on Pillar Two implementation issued
- Isle of Man: Statement on Pillar Two implementation issued
- Italy: Ministerial decree published to implement transitional Safe Harbour provisions under Pillar Two
- Jersey: Statement on Pillar Two implementation issued
- Kenya: 2024 Finance Bill proposal including plans to introduce minimum taxation rules under Pillar Two
- Netherlands: General coalition agreement: tax measures unveiled
- Norway to introduce deductibility limitations on losses against related entities
- Spain: Public consultation on the regulation implementing minimum taxation rules (under Pillar Two)
- Switzerland: Tax changes in Swiss cantons in response to Pillar Two implementation
- United Kingdom: Guidance on Pillar Two registration issued

Belgium

Royal decree published clarifying registration requirements under Pillar Two

On May 21, 2024, the Belgian tax administration released information regarding the GloBE registration requirement, which was recently introduced (for more information, please refer to E-News Issue 195). Details of the registration process have been implemented through a Royal Decree, which was published in the Belgian Official Gazette on May 29, 2024.

Key takeaways include:

- *Registration deadline:* in-scope groups must register within 30 days after the start of the fiscal year for which the group falls within the scope of the Belgian Law on minimum taxation. However, the first notification deadline is set 45 days after the publication of the Royal Decree in the Belgian Official Gazette (i.e. July 13, 2024).
- *Registering entity:* the obligation to register lies with the Belgian UPE or, if there is no UPE, with the Belgian constituent entity. If multiple entities are required to register, one of them will be designated by the others for registration purposes. The registration obligation also applies if the group does not have a Belgian UPE.
- *Required information:* the registration template requires details of the MNE group, particulars related to their Consolidated Financial Statements including currency, financial year, and accounting standard and certain contact details. In addition, there is a requirement to provide information on the ownership structure, including a list of all parent-type entities and characterization of same for GloBE purposes (e.g., Ultimate Parent Entity, Partially Owned Parent Entity, Intermediate Parent Entity). These details will be based on the position at the beginning of the in scope fiscal year (January 1, 2024 for a calendar year commencement).
- *Registration process:* registration must be done through the registering entity's account on MyMinfin, where the notification form is available. The required information must be submitted in XML format.

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

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

Germany

Consultation launched on draft tax return for Pillar Two purposes

On May 28, 2024, the German Ministry of Finance published for consultation a draft outline of the local minimum tax return that is to be filed alongside the GIR. The following information would be required:

- *Start and end of fiscal year.*
- *General information:* identification of the entity liable for top-up tax (generally, the minimum tax group leader) including information on the legal form, whether it qualifies as a permanent establishment and a characterization for GloBE purposes (UPE, local minimum tax group leader (local parent entity, designated entity, economically most significant local entity), stand-alone local constituent entity).
- *Notification of top-up tax liability:* Amount of top-up tax liability for the fiscal year (no calculation required).
- *GIR information:* date when GIR was filed, indication whether GIR was filed in Germany or in foreign jurisdiction, indication whether stated top-up tax liability is aligned with the information submitted in the GIR.
- *Constituent Entity information:*
    - identification of respective local Constituent Entity including the name, tax identification number, legal form and an indication whether it qualifies as permanent establishment;
    - sum of IIR top-up tax liability for the respective entity;
    - sum of UTPR top-up tax liability for the respective entity;
    - sum of DMTT liability for the respective entity;
    - indication whether respective local CE has joined the group in the fiscal year.
- *Notification of cross-border arrangement (DAC6):*
    - DAC6 registration number (Arrangement ID) of respective disclosed arrangement;
    - DAC6 disclosure number (Disclosure ID) of respective disclosed arrangement;
    - identification of cross-border arrangement (if Arrangement ID and Disclosure ID are not available yet).
- Identification of tax advisor / person involved in tax return preparation.

The local tax return for IIR, UTPR and DMTT purposes must be filed within 15 months after the end of the Reporting Fiscal Year (18 months for the transitional year), i.e. same deadline as for GIR. According to the parliamentary explanatory notes, the return needs to be filed even where there is no top-up tax liability for the respective fiscal year (so-called "zero return"). For previous coverage, please refer to E-News Issue 182.

Comments to the publication are requested by June 14, 2024.

Guernsey

Statement on Pillar Two implementation issued

On May 21, 2024, the Government of Guernsey issued a statement on Pillar Two implementation announcing its plans to introduce a qualified domestic minimum top-up tax (QDMTT) from January 1, 2025, as well as the intention to implement an IIR from the same date.

According to the release, Guernsey will engage with the business community on specific design elements of the QDMTT.

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

Isle of Man

Statement on Pillar Two implementation issued

On May 20, 2024, the Isle of Man Government issued a statement on Pillar Two implementation announcing its plans to introduce a QDMTT from January 1, 2025. According to the release, the decision on whether to introduce an IIR will be made later in 2024.

For more information, please refer to a report prepared by KPMG in the Crown Dependencies and our previous coverage in E-News Issue 191.

Italy

Ministerial decree published to implement transitional Safe Harbour provisions under Pillar Two

On May 28, 2024, a ministerial decree was published in the Italian Official Gazette implementing the transitional CbyC Reporting Safe Harbour for Pillar Two purposes, which was not included in the law published on December 28, 2023 implementing the EU Minimum Tax Directive (for previous coverage, please refer to E-News Issue 189).

Key takeaways include:

- *CbyC Reporting Safe Harbour:* The decree implements the transitional CbyC Reporting Safe Harbour that was agreed as part of the OECD publication from December 2022 on Safe Harbours and Penalty Relief. The decree also contains further clarifications on the application of the three Safe Harbour tests and provides for the elements of the December 2023 Administrative Guidance, including the anti-hybrid arbitrage rules that would apply to transactions entered into after December 15, 2022.
- *UTPR Safe Harbour:* The decree further includes clarifications on the application of the transitional UTPR Safe Harbour in accordance with the July 2023 Administrative Guidance, including a reference to the corporate tax rates published in the OECD's Statutory Corporate Income Tax Rates table.
- *Other Safe Harbour provisions:* Details on the permanent calculation simplifications for Non-Material Constituent Entities and the QDMTT Safe Harbour are not included in the decree.

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

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

Jersey

Statement on Pillar Two implementation issued

On May 22, 2024, the Government of Jersey issued a statement on Pillar Two implementation announcing its plans to introduce an IIR and a Domestic Minimum Tax from 2025.

Instead of a top-up tax, the Domestic Minimum Tax would be introduced as a multinational corporate income tax (MCIT) alongside the existing 0/10 corporate income tax system. According to the release, the MCIT will align with the GloBE model rules, so that in-scope MNEs pay an effective rate of 15 percent on their taxable profits.

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

Kenya

2024 Finance Bill proposal including plans to introduce minimum taxation rules under Pillar Two

On May 13, 2024, the 2024 Finance Bill proposal was sent to the Parliament in Kenya. Key takeaways include:

- *Domestic Minimum Top-up Tax (DMTT):* the draft suggests implementation of a 15 percent DMTT from January 1, 2025. The draft aims to align with the GloBE rules but remains high-level and general in its current form, indicating that more detailed regulations (e.g., safe harbour provisions, administrative clarification for DMTT filing and payment) will be needed to ensure full compliance with the OECD standards. The IIR and UTPR are not covered by the draft.
- *Significant economic presence tax:* The Bill proposes the abolition of the digital service tax (DST) and its replacement with a significant economic presence (SEP) tax, that will apply to non-resident person whose income from the provision of services is derived from or accrues in Kenya through a business carried out over a digital marketplace. The SEP tax would be applied at an effective tax rate of 6 percent (30 percent of the taxable profit, which will be 20 percent of the gross turnover). This would substantially increase the tax on income generated through digital marketplaces, currently subject to tax at 1.5 percent under the DST regime.

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

For a state of play of the implementation of Pillar Two, please refer to the dedicated implementation tracker in KPMG's Digital Gateway. For an overview of digital service taxes, please refer to KPMG's dedicated summary of the taxation of the digitalized economy.

Netherlands

General coalition agreement: tax measures unveiled

On May 15, 2024, the new four-party coalition published a general agreement containing tax measures.

With regard to corporate tax and dividend tax, key takeaways include:

- The interest deduction limitation rule for corporate income tax purposes provides for a threshold of EUR 1 million or 20 percent of the adjusted profit (EBITDA), whichever is higher (Section 15b Corporate Income Tax Act 1969, which transposes into national law the Anti-Tax Avoidance Directive 2016/1164 - ATAD). The coalition agreement plans to increase the EBITDA percentage from 20 percent to 25 percent.
- As part of the 2024 Tax Plan it was previously agreed to abolish, from 2025, the share redemption tax relief for listed companies for dividend tax purposes. The coalition agreement plans to introduce a reverse measure to retain such relief.

The agreement also includes various measures on payroll tax and personal income tax, environmental taxes and VAT.

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

Norway

Norway to introduce deductibility limitations on losses against related entities

On May 14, 2024, the Norwegian Ministry of Finance published a draft bill for public consultation, aiming to limit deductions on losses from accounts receivable and interest claims towards related companies. Related companies are defined as entities where one has at least a 90 percent ownership in the other, whether directly, indirectly, or through other entities under the same control.

The rule aims to ensure overall consistency with the participation exemption regime, which exempts gains and losses on equity investment from taxation. Under the current regime, gains from the sale of equity are tax exempt but losses on related loans remain deductible for tax purposes. Under the draft bill, losses from accounts receivable and interest claims towards related companies would become non-deductible as a general principle, but several exceptions could apply.

The Norwegian Ministry of Finance invited interested stakeholders to submit their comments before August 5, 2024. If approved, the rules could enter into force from 2025.

Spain

Public consultation on the regulation implementing minimum taxation rules (under Pillar Two)

On May 16, 2024, the Spanish authorities released a consultation document on the regulation to implement the law to transpose the EU Minimum Tax Directive.

Whilst the document does not provide for a draft text of the regulation, it highlights the relevant aspects to be clarified under consideration of existing OECD guidance as well as the consultation feedback, including:

- clarifications on the scope and taxpayers subject to the top-up tax,
- clarifications on the calculation of the GloBE income and amount of adjusted covered taxes,
- peculiarities in relation to insurance companies,
- procedural aspects in relation to the filing of the GloBE Information Return and local tax returns,
- clarifications on the determination whether local top-up tax collection rules are to be considered “qualified” for GloBE purposes.

Comments from taxpayers and professional organizations which would be most impacted by the GloBE rules were requested by May 31, 2024. This will be followed by the publication of the draft Royal Decree. A new period for comments and public consultation will then begin (and should not be shorter than 15 business days).

Please note that the Spanish draft legislation was published on December 19, 2023 (please refer to E-News Issue 190) and has yet to passed into law. As a result, the European Commission has launched an infringement procedure against Spain for failure to transpose the Minimum Taxation Directive by December 31, 2023 (please refer to our summary above).

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

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

Switzerland

Tax changes in Swiss cantons in response to Pillar Two implementation

Several cantons have changed their tax rates, or launched projects aimed at improving their attractiveness as a location, in response to enactment of the Pillar Two global minimum tax in Switzerland effective January 1, 2024 (please refer to a previous report prepared by KPMG in Switzerland).

Key takeaways include:

- The Canton of Schaffhausen, which had applied a corporate tax rate of less than 13.8 percent in 2023, introduced a progressive corporate tax rate from 2024. Profits higher than CHF 15 million (approximately EUR 15.3 million) will be subject to an effective tax rate (including federal taxes) of 15 percent from 2024.
- The Canton of Geneva raised its effective corporate tax rate (including federal taxes) from 14 percent to 14.7 percent and eliminated the municipal business tax in exchange.
- The Canton of Grisons submitted a draft bill for consultation that seeks to reward companies whose activities (1) increase added value created within the canton, (2) strengthen research, development, and innovation, or (3) improve environmental sustainability.
- The Canton of Zug announced its intention to support companies directly through a system of subsidies with extensive delegation powers afforded to the government council.
- The government council of the Canton of Zurich intends to cut its cantonal corporate tax rate from 7 percent to 6 percent. Whilst this is not directly connected to the introduction of the minimum tax rate and had already been announced at an earlier date, it should be noted that the effective corporate tax rate in Zurich is currently higher than the minimum rate of 15 percent.

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

United Kingdom

Guidance on Pillar Two registration issued

On May 20, 2024, HMRC published a practical guidance on Pillar Two registration requirements in the UK. The Notice has the power of tertiary (i.e. 'force of law') legislation and would apply to registering for Pillar Two top-up taxes in the UK. Key takeaways include:

- *Registration requirement and timeline*: Any in-scope group or single entity must register to report for Pillar Two top-up taxes in the UK using the online service. The registration deadline is within six months from end date of the first accounting period when the group is covered by Pillar Two. Groups with entities located in the UK and other jurisdictions must register to report for both DMTT and IIR (multinational) top-up tax. Groups with entities located in the UK only must register to report for DMTT only. In addition, HMRC must be notified of any changes to registration details within six months of the change occurring using the online service.
- *Reporting entity*: Only the ultimate parent entity (UPE) or a designated entity within the group can act as the filing member (reporting entity) to use the online service for registration.
- *Registration information*: the filing member must submit information to HMRC including details in respect of the UPE or filing member, the location of the group entities, the start and end date of the group's accounting period, contact details and address of the group.

For more information, please refer to a report prepared by KPMG in the UK and our previous coverage in E-News Issue 192.

Local courts

Key Insights

- France: Mutual assistance for recovery of tax claims: retroactivity of British law does not allow French tax authorities to refuse assistance to the applicant authority
- Netherlands: Supreme Court decision on the tax classification of a financial instrument
- Spain: Spanish Court clarifies the burden of proof of tax residence for individuals
- United Kingdom: First-tier Tribunal denies insufficiently supported claims over R&D tax incentives

France

Mutual assistance for recovery of tax claims: retroactivity of British law does not allow French tax authorities to refuse assistance to the applicant authority

On April 4, 2024, the French Supreme Judiciary Court (Cour de cassation) ruled that the principle of non-retroactivity of a non-criminal tax law does not allow the French requested authority to refuse assistance, as it does not undermine French public policy (Cour de cassation, Chambre commerciale, 4 avril 2024, n° 21-10.579).

Article 14 of the Recovery Directive states that disputes concerning the claim, the initial instrument permitting enforcement in the applicant Member State or the uniform instrument permitting enforcement in the requested Member State, and disputes concerning the validity of a notification made by a competent authority of the applicant Member State would fall within the competence of the relevant bodies of the applicant Member State. However, the requested authority may, exceptionally, decide not to grant its assistance to the applicant authority. Enforcement of the request for recovery of the claim may thus, inter alia, be refused if it is shown that such enforcement is liable to be contrary to the public policy of the Member State of the requested authority (case C-233/08), para. 42; case C-34/17), para. 47; case C-95/19), para. 76).

Under settled case law of the French Supreme Judiciary Court, the non-retroactivity of non-repressive tax laws does not constitute a principle of public policy under Article 6(1) of the European Convention for the Protection of Human Rights, Article 1 of the First Additional Protocol thereto, or Article 49 of the Charter of Fundamental Rights of the EU. Additionally, the Constitutional Council does not recognize it as having constitutional value. Consequently, the French tax authorities can not refuse to recover a claim based on foreign law with retroactive effect on any of these grounds.

In the case at hand, the British tax authorities issued a tax claim based on a retroactive law regarding tax reliefs received by a taxpayer in 2004 and 2005. They requested assistance from the French tax authorities, who refused based on the CJEU cases mentioned above. The Supreme Judiciary Court ruled that the British law was not contrary to French public policy and that the French authorities could not refuse to grant assistance. The Court emphasized that the tax claim could have been contested before the British courts, as Article 14 of the Recovery Directive stipulates that the applicant Member State is competent to handle disputes concerning a claim.

Netherlands

Supreme Court decision on the tax classification of a financial instrument

On May 17, 2024, the Dutch Supreme Court (the Supreme Court) rendered a judgment on the tax qualification of a financial instrument – 'obligation remboursable en actions' (ORA), that was issued by a company established in France in 2007. The case concerned the question whether an ORA should be classified as equity (capital) or debt capital (loan) under Dutch tax law.

ORAs typically had a 50-year term, after which they would be converted into ordinary shares of the company. The nominal amount of an ORA matched the issue price of a new share at the time of issuance. Holders had the option to exchange ORAs for shares in the company, and the majority of ORAs were converted into ordinary shares in the French company by the holders shortly after issuance.

The Supreme Court recalled that for tax law purposes, the civil-law form of lending funds typically determines whether the lending is considered a loan or the provision of capital. The Supreme Court emphasized that the key criterion for classifying ORAs is the presence or absence of a repayment obligation. Given the characteristics of ORAs, the Supreme Court took the view that there is no repayment obligation for the purposes of the civil law. As such, holders can only become shareholders and can not receive cash under normal circumstances. Consequently, the Supreme Court held that ORAs should be treated as equity, not debt, for civil law purposes and, therefore, for corporate income tax purposes as well.

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

Spain

Spanish Court clarifies the burden of proof of tax residence for individuals

On December 18, 2023, the Central Economic-Administrative Court (the Court) issued a resolution clarifying the burden of proof required to establish tax residence concerning withholding taxes on employment income.

The case concerned the residency status of an individual seeking a refund of withholding taxes paid on employment income. Despite providing various documents such as an employment contract with a foreign football club, a residence visa, and passport photos, the individual did not submit a certificate of residence.

The Court clarified that when a taxpayer presents a certificate of tax residence from another country, the burden shifts to the Spanish tax authorities to prove the taxpayer's residency in Spain. Conversely, if the taxpayer fails to provide such a certificate, the burden falls on them to demonstrate their residency elsewhere and non-residency in Spain.

In the case at hand, the Court concluded that the documents provided were insufficient to prove that the taxpayer was resident in another country and that they were not a resident in Spain.

United Kingdom

First-tier Tribunal denies insufficiently supported claims over R&D tax incentives

On April 25, 2024, the First-tier Tribunal (FTT) rejected an appeal against HMRC's previous decision to deny claims related to research and development (R&D) tax incentives.

In the case at hand, the plaintiff claimed R&D tax incentives in respect of GBP 200,000 of R&D expenditure, leading to a reduction in corporate income tax of GBP 50,000. After examining the claim, HMRC rejected it and required repayment of the corporate income tax reduction. The company filed a claim, which the FTT has dismissed in full on the grounds that:

- the plaintiffs failed to prove that the persons responsible for the assessment of R&D eligibility met the standard of 'competent professional' required by the law. In particular, the FTT recalled that such assessment must be made by an individual with expertise in the relevant field of science or technology, as evidenced by relevant experience, skills and qualifications;

- the technological advancement pursed by the plaintiff did not represent a broader advancement in the overall knowledge or capability within a particular field (which is required by the guidelines). Instead, in the FTT's view, it was merely an advancement of the plaintiff's own technological capacities;
- the company's assessment of R&D eligibility and apportionment percentages for individual employees, based on their time spent on R&D activities, was not sufficiently supported with relevant documentation;
- the plaintiff failed to justify the costs actually incurred and the quantum of the claims.

For more details, please refer to a tax alert prepared by KPMG in the UK.

EU Financial Services Tax Perspectives Webcast – June 11, 2024

On June 11, 2024, KPMG will hold a new EU Financial Services Tax perspectives session as part of the Future of Tax & Legal webcast series.

Countries and regions across Europe continue to operate in an ever-changing environment. In a year that will see several jurisdictions run national parliamentary elections, the potential outturn may result in multi-national institutions operating in a very different environment. With tax so often intertwined in negotiations and debates on policy, trade, strategy and business transformation, will the landscape across Europe and beyond become even more volatile in the future, and what could this mean for financial services? Please join us as our panel of KPMG tax professionals share their insights with respect to some of the latest proposals that are likely to impact financial services institutions in the year ahead, including a closer look at:

- The current geopolitical environment, "the year of the elections" and the potential impact of future tax policy across financial services.
- European Union (EU) FASTER proposals – state of play, including reporting obligations and broader implications for countries across the EU.
- Pillar 2 implementation – a financial services institution's' journey.

Please access the event page to register.

Talking tax series

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

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

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

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