E-News from KPMG's EU Tax Centre

Key Insights of E-News Issue 199

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 decision on the validity of DAC6 and on the notification obligations of non-lawyers
- CJEU: AG opinion on Polish tax exemption applicable to externally managed UCITS
- Belgium referred to CJEU for failing to eliminate discriminatory conditions for tax exemption of remuneration received from savings deposits
- United Nations - Revised draft terms of reference for a framework convention on international tax cooperation
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CJEU

CJEU decision on the validity of DAC6 and the notification obligations to non-lawyers

On July 29, 2024, the Court of Justice of the European Union (CJEU or the Court) gave its decision in case C-623/22. The case concerns the validity of Council Directive 2018/822 (DAC6) amending Directive 2011/16/EU on administrative cooperation (the DAC), as transposed into Belgian legislation, in light of rights guaranteed by European Union law and the European Convention on Human Rights.

The CJEU concluded that none of the concerns raised by the referring court could impact the validity of DAC6. The Court also held that, whilst several key concepts introduced by DAC6 are broad, they are nevertheless "determined in a sufficiently clear and precise manner" and do not constitute a breach of the Charter of Fundamental Rights of the EU (the Charter).

Regarding the CJEU's judgment of December 8, 2022 in case C-694/20 *Orde van Vlaamse Balies and Others*, the CJEU clarified that its decision applies only to persons that pursue their professional activities under one of the professional titles referred to in Article 1(2)(a) of the Directive to facilitate practice of the profession of lawyer[1]. In the Court's view, this solution, i.e. notification only to the client if that client is an intermediary or, where there is no such intermediary, that client is the relevant taxpayer, does not extend to other professionals who might also be authorized to provide legal representation.

For more details, please refer to EuroTaxFlash Issue 544.

AG opinion on Polish tax exemption applicable to externally managed UCITS

On July 11, 2024, Advocate General (AG) Kokott of the CJEU issued her opinion in case C-18/23. The case concerns whether a tax exemption applicable only to externally managed non-resident undertakings for collective investment in transferable securities (UCITS) in Poland, is compatible with the free movement of capital.

Under Polish rules, open-ended investment funds and special investment funds set up under the Polish Law on investment funds are exempt for corporate tax purposes. In addition, the Polish Tax Code provides for a tax exemption in respect of Polish-generated income for closed-ended UCITS domiciled in an EU or EEA jurisdiction, subject to certain conditions. One of the conditions is that the fund must be managed by entities authorized by the competent financial market supervisory authorities

[1] Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, as subsequently amended.

of the state where the undertakings have their registered office (i.e., externally managed). It should be noted that, under Polish law, the establishment of internally managed investment funds is not permitted.

The case at hand concerns a specialized investment fund in the legal form of a société anonyme (S.A.; public limited company) incorporated under Luxembourg law (the Fund, or the applicant). According to its statutes, the Fund was managed by its board of directors (i.e., internally managed). The board of directors was authorized by the competent Luxembourg supervisory authority to manage the Fund, was registered as an alternative investment fund manager, and was included in the list of managers. The Fund applied for an advance tax ruling from the Director of the National Tax Information Office in Poland, claiming that the income it generated in Poland should benefit from the the exemption mentioned above.

The Polish tax authorities refused to issue the advance tax ruling, arguing that only externally managed investment funds could benefit from the tax exemption, and that the Fund's management did not meet this requirement. Following legal proceedings initiated by the Fund, the Regional Administrative Court expressed doubts about the compatibility of Polish law with the EU fundamental freedoms and the UCITS Directive and referred the case to the CJEU.

The AG analyzed whether the Polish rules under dispute would result in a restriction or discrimination regarding the free movement of capital. With respect to the existence of a restriction, the AG noted that taxes and duties reduce the attractiveness of investments and that, in the absence of harmonization within the EU, Member States are free to exercise their taxation powers. Examining taxes based on non-discriminatory restrictions would subject all national taxable events to EU law, thereby challenging the sovereignty of Member States in tax matters. Therefore, the AG took the view that the rules at hand must be assessed only in light of the prohibition of discrimination – i.e., whether the difference in treatment constituted an infringement of the prohibition of discrimination under Article 63 of the Treaty on the Functioning of the EU (TFEU) which guarantees the free movement of capital.

The AG recalled that discrimination involves unequal treatment of comparable cases, disadvantaging non-residents compared to residents. The AG ruled out the existence of direct discrimination, as the tax exemption under dispute is granted irrespective of the domicile of the investment fund. The AG noted that all forms of discrimination that lead to the same result are prohibited, i.e., not only overt or direct discrimination, but also all covert or indirect forms of discrimination. The AG therefore also analyzed the existence of an indirect discrimination, and concluded that there is no indirect difference in the treatment of taxpayers, based on the following grounds:

- The spirit and purpose of the prohibition of indirect discrimination - the AG noted that externally managed investment funds benefit from the tax exemption, whereas internally managed investment funds are unable to claim a tax exemption, irrespective of the domicile of those investment funds. The AG further noted that the option for the authorization of only internally or externally managed investment funds is provided for under EU law and therefore not a distinction specific to the Polish market. The AG therefore concluded that it cannot be assumed that the Polish legislation systematically favors national investment funds.
- The lack of discriminatory effect of the criterion of differentiation chosen by Poland.
- The autonomy of the Member States in the taxation of investment funds, in the absence of harmonisation under EU law. In the AG's view, in light of the option granted to Member States under the UCITS Directive, finding that there is indirect discrimination in the case at hand would infringe Poland's fiscal autonomy.

In an alternative line of reasoning, the AG analyzed a scenario where the Court might disagree with the AG's opinion and consider that the rules entail indirect discrimination. In this scenario, it would be necessary to examine whether the situations in the main proceedings are objectively comparable, considering the aim pursued by the national provisions. The AG noted that the decision to authorize and exempt only externally managed investment funds in Poland is based on reasons of investor protection.

As such, in Poland's view, only the external management of an investment fund by a management company with legal capacity can adequately ensure the separation of investment assets from the assets of the management company. Poland also took the view that this separation of asset spheres also results in a separation of investment risks and economic risks associated with establishing and managing investment funds. Based on these considerations, the AG concluded that externally managed investment funds domiciled in Poland and internally managed investment funds domiciled abroad are not in an objectively comparable situation.

Finally, the AG analyzed a second alternative scenario in which, despite the AG's recommendation, the CJEU might find that: i) the Polish rules trigger indirect discrimination between resident externally managed investment funds and non-resident internally managed investment funds, and ii) the two are in an objectively comparable situation. Under this scenario, the AG argued that the difference in treatment would be justified by an overriding reason in the public interest, specifically effective investor protection, and that the discrimination would be proportionate.

It should be noted that AG opinions are not binding on the CJEU. It remains to be seen if the CJEU follows the AG's recommendation.

Infringement Procedures and CJEU Referrals

Key Insights

- Additional letter of formal notice sent to Hungary for failure to transpose correctly the Anti-Money Laundering Directive
- Letter of formal notice sent to the Netherlands to bring its rules on taxation of investment funds in line with EU law
- Belgium referred to CJEU for failing to eliminate discriminatory conditions for tax exemption of remuneration received from savings deposits

Infringement Procedures

Additional letter of formal notice sent to Hungary for failure to transpose correctly the Anti-Money Laundering Directive

On July 25, 2024, the European Commission (EC or the Commission) decided to send a letter of formal notice to Hungary regarding the incorrect transposition of the Anti-Money Laundering Directive (AMLD). In the letter, the Commission expressed concerns that the Hungarian legal framework fails to ensure the completeness of the National Beneficial Ownership Register, as it does not include in its scope private equity funds.

This follows a previous letter of formal notice sent to Hungary in September 2023, which addressed issues related to the licensing of virtual asset service providers.

Hungary has two months to respond to the letter of formal notice. If the response is deemed unsatisfactory, the Commission may decide to send a reasoned opinion.

For more details, please refer to the EC's July infringement package.

Letter of formal notice sent to the Netherlands to bring its rules on taxation of investment funds in line with EU law

On July 25, 2024, the Commission decided to send a letter of formal notice to the Netherlands for failing to extend the Dutch tax levy reduction scheme to foreign investment funds, provided they are comparable to domestic investment funds.

Dutch law allows investment funds to reduce the dividend tax payable on dividends they receive from companies in which they hold shares by offsetting the tax paid by the Dutch company distributing the dividends. This reduction is applied against the dividend tax due (and similar foreign taxes). However, foreign investment funds cannot offset the dividend tax paid by Dutch companies on dividends they distribute. Therefore, in the EC's view, the Dutch tax levy reduction scheme disadvantages foreign investment funds, makes it less attractive for foreign investment funds to offer services to Dutch investors and to invest in shares of Dutch resident companies. The Commission believes that this scheme restricts the free movement of capital, which is prohibited under both the Treaty on the Functioning of the European Union and the Agreement on the European Economic Area.

The Netherlands has two months to respond to the letter of formal notice. If the response is deemed as unsatisfactory, the Commission may decide to send a reasoned opinion.

For more details, please refer to the EC's July infringement package.

CJEU Referrals

Belgium referred to CJEU for failing to eliminate discriminatory conditions for tax exemption of remuneration received from savings deposits

On July 25, 2024, the Commission referred Belgium to the CJEU for maintaining discriminatory conditions for the tax exemption of remuneration received from savings deposits.

The referral follows a reasoned opinion sent by the Commission in July 2023. The Belgian Income Tax Code provides for a tax exemption of income from savings of Belgian taxpayers deposited in credit institutions established in Belgium. Foreign saving deposits – in credit institutions in other EU/EEA jurisdictions, also benefit from this favorable regime, provided they meet the same criteria as the ones set out for Belgian savings deposits. However, In the EC's view, the criteria are extremely restrictive and specific to the context of the Belgian domestic market and in practice foreign savings deposit can not meet them. Thus, in the EC's view, Belgian taxpayers' *de facto* benefit from the exemption only in respect of income from savings deposits in Belgian credit institutions.

The discriminatory nature, in practice, of the conditions above was confirmed on June 23, 2022 by a Belgian Supreme Court decision – see related TaxNewsFlash. On March 27, 2023, the CJEU also confirmed the incompatibility of Belgian legislation with the freedom to provide services in case C-34/22.

As Belgium did not satisfactorily address the Commission's concerns, the EC decided to refer the case to the CJEU.

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

EU Institutions

Key Insights

- European Commission: Public consultation on the Anti-Tax Avoidance Directive (ATAD)
- European Commission: Public consultation on the common template end electronic reporting forms for EU public country-by-country reports
- KPMG responds to European Commission public consultation on the DAC

European Commission

Public consultation on the Anti-Tax Avoidance Directive (ATAD)

On July 31, 2024, the European Commission opened a call for evidence to evaluate the Anti-tax Avoidance Directive (ATAD).

The aim of the consultation is to collect information on the implementation of the Directive, on the extent to which its objectives have been achieved, and whether the measures need to be amended in the future. The evaluation will examine three areas, as follows:

- *Implementation:* implementation of the ATAD in the EU, including an analysis of the policy options exercised by Member States where the Directive provided flexibility.
- *Functioning:* an evaluation of the effectiveness of ATAD, both qualitatively and quantitatively, as a minimum standard for countering aggressive tax planning. This assessment will explore how different policy choices impact the effectiveness of these measures in achieving their objectives and the added value of the ATAD compared to what individual Member States could have achieved independently.
- *Future-proofing:* the future-proofing of the ATAD measures, specifically their suitability and ongoing relevance in light of the introduction of the EU Minimum Tax Directive.

Interested stakeholders are invited to respond and provide feedback by September 11, 2024.

Public consultation on the common template end electronic reporting forms for EU public country-by-country reports

On August 1, 2024, the Commission opened a public consultation on the common template and electronic reporting forms for the reports to be prepared under the EU Public Country-by-Country (CbyC) Reporting Directive. Interested stakeholders are invited to provide feedback by August 29, 2024.

KPMG responds to European Commission public consultation on the DAC

On July 30, 2024, KPMG[2] member firms in the EU submitted a response to the EC's public consultation on the Directive on Administrative Cooperation (the DAC). Comments in the KPMG submission focused on the Council Directive (EU) 2018/822 of May 25, 2018, amending the Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to cross-border arrangements in order to disclose potentially aggressive tax planning arrangements (commonly referred to as DAC6).

KPMG supports the EC's initiative to analyze whether the functioning of DAC6 is fit for purpose, and to consider the outcome and the experiences from the first years of DAC6 application. Such analysis should balance the advantages provided by DAC6 with the potential risk of putting the EU at a significant competitive disadvantage internationally, considering the compliance costs that relate to tax reporting obligations within the EU. KPMG recommends that:

- the EC should assess how DAC6 disclosure information is being processed and used by local tax administrations. We would welcome a review in this respect by the European Court of Auditors and the use of the resulting conclusions for the purpose of narrowing the scope of the Directive to those provisions and data points that are proven to materially assist tax authorities;
- the EC should re-evaluate whether the current framework provides for proportionate reporting obligations, i.e., whether the scope of reportable arrangements is sufficiently targeted and well defined. Based on our experience, taxpayers and intermediaries are required to make a significant number of disclosures of purely commercial transactions or arrangements that are not associated with any tax considerations, as well as disclosures of arrangements that are already known to the tax authorities;
- the EC should consider establishing a whitelist of arrangements that would not fall in scope of DAC6 reporting requirements and extending the main benefit test to all applicable hallmarks with a view to ensuring that only arrangements that are primarily designed to obtain a fiscally unintended tax advantage are reported;
- the EC should streamline local data collection under the DAC.

We believe that efforts should continue to be made to simplify tax systems and reduce the related administrative burden within the EU, wherever possible. In this context, KPMG also encouraged the EC to assess the effectiveness, efficiency, and ongoing relevance of the recently adopted amendments to the DAC, which have not been part of the current evaluation (i.e., DAC7 and DAC8).

Council of the EU

ECOFIN approves the EU's position for the second substantive session of the UN Ad Hoc Tax Committee

On July 16, 2024, the first Economic and Financial Affairs Council (ECOFIN) meeting chaired by the Hungarian Presidency of the Council took place in Brussels. The main results of the meeting are available on the Council's website.

Amongst other topics, the Council discussed and approved the EU's position for the forthcoming and second substantive session of the United Nation's (UN) Ad Hoc Tax Committee responsible for drafting the terms of reference for a UN framework convention on international tax cooperation.

The agreed position:

[2] The response paper was produced on behalf of KPMG member firms located in the EU forming part of KPMG's Europe, the Middle East & Africa (EMA) region. "We", "KPMG", "us" and "our" refer to the network of independent member firms operating in the EU.

- strongly supports a consensus-based and well-defined decision-making process;
- emphasizes that discussions on tax cooperation should align with ongoing efforts in other international forums, considering potential synergies and leveraging existing tools; and
- prioritizes technical analysis over the immediate development of action measures.

This second substantive session of the ad hoc committee takes place in New York, from July 29 through August 16, 2024. Based on the provisional agenda of the session, the committee will address both substantive and procedural elements of the draft terms of reference, in their mission to enhance inclusiveness in the international tax cooperation field.

European Parliament

FISC Subcommittee holds constitutive meeting and sets out priorities

On July 23, 2024, the European Parliament's Subcommittee on Tax Matters (FISC) held its constitutive meeting and elected its new bureau. Pasquale Tridico (Italy, the Left) was elected as the new Chair.

The FISC also issued a special newsletter highlighting their key priorities, as follows:

- create a fairer and more balanced taxation system, whilst addressing tax evasion;
- addressing unfair tax burden. The FISC will advocate for a fairer and more progressive tax system;
- combating organized tax fraud, such as VAT carousel fraud;
- striking the right balance between taxing labor and other income sources, financial rents, technology, capital, and asset, in light of the artificial intelligence developments.

OECD and other International Organisations

Key Insights

- OECD: OECD Secretary-General Tax Reports to G20 Finance Ministers and Central Bank Governors
- OECD: Selection documentation package requirements for International Compliance Assurance Programme
- United Nations: Revised draft terms of reference for a framework convention on international tax cooperation

OECD

OECD Secretary-General Tax Reports to G20 Finance Ministers and Central Bank Governors

On July 25, 2024, the OECD published the Secretary-General Tax Report to the G20 Finance Ministers and Central Bank Governors providing updates on the latest developments in international tax reforms, including on the OECD's BEPS initiatives, tax transparency efforts and other G20 tax deliverables. Key updates include:

- *Pillar Two*: the report outlines that approximately 40 jurisdictions have already implemented or are planning to implement the global minimum tax with effect from January 2024 or 2025. The document also highlights progress on the Subject-to-Tax Rule (STTR). It is expected that a first high-level signing ceremony of the Multilateral Convention to facilitate the implementation of the STTR will be held on September 19, 2024.
- *Pillar One*: the report notes that the members of the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework) have secured near full consensus on the Multilateral Convention to implement Amount A (MLC). The members of the Inclusive Framework are working to resolve remaining gaps on a framework for Amount B.
- *BEPS Project implementation*: the report provides updates on the OECD's monitoring of the effective implementation of BEPS minimum standards including those under Action 5 on Harmful Tax Practices, Action 6 on Tax Treaty Abuse, Action 13 on County-by-Country Reporting and Action 14 on Mutual Agreement Procedures.
- *Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum):* the report provides a progress update on several areas such as the crypto-asset reporting framework (CARF), the automatic exchange of information (AEOI), the exchange of information on request (EOI), as well as progress made at regional level (Africa and Latin America).

At the request of the G20, the following additional reports were also drafted and released on July 25, 2024:

- *Taxation and Inequality*: the report examines how tax systems can either mitigate or increase inequality – particularly in terms of income and wealth distribution, and identifies opportunities for potential reforms. The report also addresses specific challenges of tax policy and compliance related to high-net-worth individuals.
- *Beneficial Ownership and Tax Transparency – Implementation and Remaining Challenges*: the report explores the critical role of beneficial ownership transparency in the fight against tax evasion and illicit financial flows. The report also outlines the progress made in implementing beneficial ownership requirements, the status of implementation across various jurisdictions and analyzes peer review results regarding the effectiveness of Exchange of Information

on Request. The document also highlights best practices for enhancing beneficial ownership transparency and highlights the capacity-building initiatives designed to help jurisdictions develop robust beneficial ownership systems.

- *Bringing Tax Transparency to Crypto-Assets – An Update*: the report provides an update on the work to implement the CARF and current state of play. Fifty-eight Global Forum members have already announced their intention to start exchanges under the CARF in 2027.
- *Strengthening International Tax Transparency on Real Estate:* the report sets out the building blocks to bring increased tax transparency to real estate.

Selection documentation package requirements for International Compliance Assurance Programme

In July 2024, the OECD released the Selection Documentation Package, which serves as the initial component of the documentation requirements for the International Compliance Assurance Program (ICAP). ICAP is a voluntary risk assessment and assurance programme to facilitate open and co-operative multilateral engagements between multinational groups (MNEs) willing to engage actively and transparently and tax administrations in jurisdictions where they have activities.

This package is required at the time of applying to ICAP and includes a submission checklist, a multinational group information form, an MNE covered risk overview, and a template for providing the proposed covered tax administrations with details of all Advance Pricing Agreements (APAs) and/or tax rulings involving the MNE Group.

The Main Documentation Package, which must be submitted before the commencement of the risk assessment, will be published at a later date, along with the Outcome Letter from each Covered Tax Administration.

United Nations

Revised draft terms of reference for a framework convention on international tax cooperation

On July 18, 2024, the UN's Ad Hoc Tax Committee published a proposal for the revised draft terms of reference for a UN framework convention on international tax cooperation. The framework convention aims to establish a new governance system for international tax cooperation. For previous coverage, please refer to E-News Issue 190.

The document aims to assist in the negotiation of the UN Framework Convention on International Tax Cooperation by defining key objectives and guiding principles. The revised draft does not introduce any major changes compared to the zero draft proposal published on June 7, 2024 (please refer to E-News, Issue 197).

This revised draft will serve as the basis for discussions and negotiations during the second session of the Ad Hoc Tax Committee, scheduled to take place from July 29 to August 16, 2024.

Local Law and Regulations

Key Insights

- Austria: Amendments to Pillar Two bill and loss carryforward rules published in the Austrian Official Journal
- Austria: EU Public Country-by-Country Reporting Directive transposed into local law
- France: French Government restricts access to beneficial ownership register
- Luxembourg: New tax relief package presented by the Government

Austria

Amendments to Pillar Two bill and loss carryforward rules published in the Austrian Official Journal

On July 19, 2024, Law No. 113 was published in the Austrian Official Journal. Key takeaways include:

- *Loss carry forward:* the law disallows the carrying forward of losses from a group parent entity if the losses originate prior to the establishment of the group (pre-group losses). The restriction applies only in certain conditions, i.e., if the losses include previously deductible depreciation on the lower going concern value and disposal losses on investments in companies that were part of another group at the time of the depreciation or disposal.
- *Minimum Taxation Reform Act update*: the amendment of the Minimum Taxation Reform Act to incorporate the latest OECD guidance on the temporary Safe Harbor rules for the Pillar Two global minimum tax in December 2023.

EU Public Country-by-Country Reporting Directive transposed into local law

On July 17, 2024, legislation transposing the EU Public Country-by-Country (CbyC) Reporting Directive (the Directive) was published in the Austrian Official Gazette.

Key takeaways include:

- The provisions of the Austrian law are largely aligned with the text of the Directive.
- Adoption of the ‘safeguard clause’, i.e. 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. The Austrian Commercial Registry Court has the authority to scrutinize the use of the omission (procedural costs and a fee up to EUR 20,000 could apply). If the Court determines that the MNE was not entitled to omit information, the court can request the representatives of the Austrian entity to publish the complete CbyC report.
- The threshold applicable to in-scope branches is a net turnover of EUR 10 million in the last two reporting years.
- Austrian subsidiaries or branches of groups headquartered outside the EU/EEA are exempt from the CbyC disclosure requirement in Austria if the ultimate parent company prepares and publishes the report on its website and assigns another EU/EEA subsidiary or branch to file the report locally (the Directive only prescribes this exemption for reports filed in an EU Member State). However, Austrian subsidiaries and branches must notify the Austrian Commercial Registry Court of their use of this exemption.

- Austria opted for the website publication exemption, i.e. to exempt companies from publishing the report on their websites, if the report is already made publicly available to any third party located in the EU, free of charge, on the website of the Austrian Commercial Registry Court.
- Failure to publish public CbyC reports or submitting them incorrectly or late may result in penalties of up to EUR 10,000. Furthermore, representatives of non-compliant companies could face fines of up to EUR 100,000.

The law entered into force on July 18, 2024, and the public disclosure rules apply to financial years starting on or after June 21, 2024.

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

Belgium

Request filed by the American Free Enterprise Chamber of Commerce to annul the rules implementing the UTPR

On July 18, 2024, the Constitutional Court announced that the American Free Enterprise Chamber of Commerce filed a request to annul the rules implementing the UTPR (articles 35 and 36 of the Law to Implement the Minimum Tax Directive) on 1 July 2024.

The Undertaxed Profits Rule (UTPR) allocates top-up tax amongst Constituent Entities to the extent the low tax income of a Constituent Entity is not subject to a qualified domestic minimum top-up tax (QDMTT) or the Income Inclusion Rule (IIR) - that imposes top-up tax on a parent entity in respect of low-taxed income of constituent entities within a multinational group. Member States were generally required to start applying UTPR for fiscal years beginning on or after December 31, 2024.

No further information or underlying documentation has been published yet.

Cyprus

Consent to agreement on Safe Harbors (Pillar Two) in line with the Administrative Guidance

On July 24, 2024 the Cypriot Government published a press release announcing its consent to the design and application of the Pillar Two Safe Harbors as envisaged in the OECD Safe Harbor and Penalty Relief and the OECD July, December and June Administrative Guidance.

The EU Minimum Tax Directive includes a specific article that deals with safe harbor provisions (other than the EU QDMTT safe harbor), under which top-up tax shall be deemed to be zero in a jurisdiction where the effective level of taxation of the local constituent entities fulfils the conditions of an international set of rules and conditions which all Member States have consented to (Article 32 of the EU Directive). Whilst Administrative Guidance is subject to consent within the Inclusive Framework and therefore most EU Member States are considered to have consented to the guidance once released, Cyprus is the only EU Member State that is not a member of the OECD/G20 Inclusive Framework. Separate consent from Cyprus is therefore a confirmation that the conditions of Article 32 of the Directive have been met. Cyprus has also previously confirmed its consent to the transitional CbyC Safe Harbor (June 2023) and the transitional UTPR Safe Harbor and the permanent QDMTT Safe Harbor (October 2023) (please, refer to the e-news Issue 186 for our previous coverage).

For an overview of the Cypriot Pillar Two minimum tax bill, please refer to the report prepared by KPMG in Cyprus.

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

France

French Government restricts access to beneficial ownership register

On July 29, 2024, the French Government announced that public access to the beneficial ownership register will be limited to individuals with a legitimate interest. This change took effect on July 31, 2024.

Under the new regulations, unrestricted access to the register is available only to competent authorities and entities subject to due diligence requirements, such as financial institutions. Businesses can create user accounts to access beneficial ownership data as necessary for their due diligence and customer verification obligations. Other parties interested in accessing the register will need to submit a request accompanied by supporting documentation to demonstrate their legitimate interest.

The announcement follows the November 22, 2022, decision of the CJEU in joined cases C-37/20 and C-601/20. The CJEU held that, in light of the fundamental rights guaranteed by the EU Charter of Fundamental Rights, the provision of Directive (EU) 2018/843 (AMLD 5) requiring Member States to provide access to beneficial ownership data to any member of the general public was invalid as it infringes on privacy and data protection rights.

For more detailed information, please refer to EuroTaxFlash Issue 494.

Greece

Greece enacts solidarity contribution on profits of energy and mining companies

On July 19, 2024, Greece enacted a mandatory temporary solidarity contribution on companies primarily engaged in the energy and mining sectors, in line with Council Regulation (EU) 2022/1854. Key takeaways include:

- The contribution applies to qualifying companies (i.e. those generating at least 75 percent of their turnover from coal and lignite mining, extraction of crude oil, natural gas pumping, or manufacture of coking and refining products).
- The contribution is levied at a rate of 33 percent on excess profits generated in 2023.
- Excess profits are calculated as the taxable profits in the fiscal year 2023 that are above 20 percent of the average taxable profits of the last four fiscal years starting on or after January 1, 2018.
- The contribution may be deducted as an expense for the calculation of the taxable profits for the fiscal year 2024.

A similar tax was applicable for profits generated in 2022 - please refer to E-news Issue 178.

Hungary

Hungary increases financial transaction tax

The following amendments were made to the Hungarian financial transaction tax:

- The Hungarian financial transaction tax will be increased from 0.3 percent to 0.45 percent, with maximum tax per payment transaction increased from HUF 10,000 (approximately EUR 25) to HUF 20,000 (approximately EUR 50).
- The financial transaction tax on cash withdrawals will be increased from 0.6 percent to 0.9 percent.
- An additional financial transaction tax will be introduced on transactions involving the conversion between different currencies at a rate of 0.45 percent, capped at HUF 20,000 (approximately EUR 25) per payment.

The changes are effective starting August 1, 2024.

Lithuania

Changes in corporate income tax rates enacted

On June 20, 2024, a new defense fund package was approved by the Lithuanian Parliament and was signed by the President on June 28, 2024. Key takeaways for tax include:

- The standard corporate tax rate will be increased from 15 percent to 16 percent, and the reduced corporate tax rate (for small companies based on certain requirements) will be increased from 5 percent to 6 percent.
- The standard tax rate for dividends will also be increased to 16 percent (from 15 percent).

- Qualifying profits from commercialization of patentable inventions and software will be increased to 6 percent (from 5 percent).
- Certain sectoral corporate income tax exemption for health care institutions and life insurance companies are repealed.

The changes will become effective on January 1, 2025.

For more information please refer to the announcement of the Lithuanian Ministry of Finance and a report prepared by KPMG in Lithuania.

Luxembourg

New tax relief package presented by the Government

On July 17, 2024, the Luxembourg Finance Minister presented a new package of tax measures benefiting both individuals and companies. A bill was filed with the Luxembourg Parliament on the same day. This bill includes 16 new tax measures, which intend to boost and strengthen the competitiveness of businesses and the country, attract new talent, and provide households with financial relief.

In the field of corporate taxation, key measures include:

- A reduction of the Luxembourg corporate income tax ("CIT") rate with one percentage point applicable as from the fiscal year 2025. For example, for companies with a taxable income above EUR 200,000, the CIT rate will decrease from 17 percent to 16 percent. This would result in an aggregate rate of 23.87 percent for companies that are resident in Luxembourg-City.
- An exemption from subscription tax for actively managed undertakings for collective investment in transferable securities exchange traded funds, which would be applicable on the first day of the trimester which follows the date of entry into effect of the law.
- Amendments for family wealth management companies (société de gestion de patrimoine familiale or "SPF"), with the overall goal of reducing the abusive use of this vehicle. Such amendments would become applicable as from the date of entry into force of the law.

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

Netherlands

Dutch Government publishes first interpretation on Supreme Court's Box 3 cases

On July 18, 2024, the Dutch Government published clarifications on the procedure to address the Box 3 legislative conflicts of the current Box 3 tax, following different judgements of the Dutch Supreme Court from June 2024. Box 3 taxes income from savings and investments under the Dutch personal income tax act and is subject to discussion in the Netherlands. The current Box 3 regime based on the Box 3 Bridging Act, applicable as from January 1, 2023, is a response of the Dutch legislator to the Christmas judgement of the Dutch Supreme Court in December 2021. The current regime still employs flat-rate returns, but more closely aligns with the actual asset composition and makes a distinction between the fixed return on savings, other investments and debts.

In the June 2024 judgements, the Supreme Courts decided that the current Box 3 tax is also contrary to certain provisions/rights contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) because the deemed (flat-rate) returns are still being used, which means that the deemed (flat-rate) return may be higher than the actual return.

Key take aways of the announcement are:

- The actual return includes both direct returns (such as interest, rent and dividends) and indirect returns (such as (un)realized capital gains on the property value (*Waarde Onroerende Zaken, "WOZ"*) value of second residences).
- The actual return on the capital within the tax-free allowance will be taken into account for the determination of the actual return as well as the actual return on assets and liabilities that only form part of the box 3 assets after the reference date of January 1.
- The actual return will be determined on an annual basis and no relief for losses from previous years will be granted.

As decided by the Supreme Court, it is up to the taxpayers to demonstrate that their actual return per year is lower than the fixed return. The Dutch tax authorities are working on an online form, which will become available in the summer of 2025.

For more information on the June 2024 judgements, please refer to a report prepared by the KPMG member firm in the Netherlands.

Nigeria

Windfall tax imposed on foreign exchange transaction gains of banks

On July 23, 2024, the Nigerian Senate passed a bill introducing a new measure to tax the realized profits of banks from foreign exchange transactions for the 2023 financial year. This legislation imposes a one-time tax of 50 percent on these profits. Banks have the option to pay this tax in installments, contingent upon the approval of an installment plan by the Federal Inland Revenue Service by December 31, 2024.

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

Norway

Proposed changes to reporting requirements for digital platforms

On June 28, 2024, the Norwegian Ministry of Finance published draft legislation to amend the reporting requirements for digital platforms. The aim is to bring the rules in line with the OECD Model Rules for Reporting by Platform Operators with respect to Sellers in the Sharing and Gig Economy (MRDP or Digital Platform Information – DPI). Key takeaways include:

- The reporting obligation, which is currently limited to real estate rental and taxi/transportation services, would be extended to include the sale of services and goods.
- Digital platforms would be required to report to tax authorities no later than January 31 of the year following the calendar year in which the seller is identified as a Reportable Seller. The exchange of information should occur before the end of February and no later than the end of April, in accordance with the Model Rules.
- The changes are proposed to enter into force from 2026, with the first reporting due in 2027. Transitional rules are provided for 2026, meaning that the DPI rules will be fully effective in 2027 (reporting in 2028).
- The proposed changes are open for public consultation until October 1, 2024.

Disclosure requirements for platform operators were introduced in the EU through an amendment to the Directive on Administrative Cooperation (DAC7), which provides for relief from the reporting obligations in the EU for non-EU platform operators that report outside the EU. Such relief is available where the EC has determined that Member States receive equivalent information from that non-EU jurisdiction which applies similar reporting regimes (e.g., under the OECD's MCAA).

For a state of play of the implementation of the DAC7, please refer to Euro Tax Flash Issue 532.

Türkiye

Pillar Two legislation gazetted

On August 2, 2024, Pillar Two legislation was published in the Official Gazette of Turkey after the corresponding draft bill was submitted to the Turkish Grand National Assembly earlier in July 2024.

The bill is generally in line with the OECD GloBE Rules. Key takeaways include:

- *General:* The IIR and DMTT would apply for financial years starting on or after January 1, 2024. The UTPR would generally be applicable one year later, i.e., for financial year starting on or after January 1, 2025.
- *Safe Harbors*: The draft bill includes Transitional CbCR Safe Harbors rules and Transitional UTPR Safe Harbor in line with the OECD Model Rules and Administrative Guidance. For the future permanent Safe Harbors, the draft mentions that the President and the Ministry of Treasury and Finance of Turkey are authorized to determine the conditions for the application and the procedures and principles for their implementation.
- *Additional OECD guidance*: the draft incorporates into the legislative text limited elements of the OECD Administrative Guidance that adapt the OECD Model Rules (e.g., treatment of marketable transferable tax credits).
- *Administration:* Each Constituent Entity would be required to file a GloBE Information Return (GIR) within 15 months after the end of the reporting Fiscal Year (18 months for the transitional year). In addition, local Constituent Entities would be required to submit a top-up tax return (self-assessment) and pay the top-up tax (if any) within the same deadline. The deadline for declaring and payment of DMTT would be within 12 months after the end of the Reporting Fiscal Year.

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

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

UAE

Clarifications issued on the future implementation of a framework for advance pricing agreements

On June 12, 2024, the Federal Tax Authority of the UAE issued clarifications on the future implementation of the advance pricing agreements (APA) framework in the UAE.

The authorities clarified that the start date for receiving applications for APAs and procedures related to the submission of applications and the issuance of APAs will be announced in the fourth quarter of 2024.

United Kingdom

Draft amendments to the Pillar Two legislation published

On July 29, 2024, a draft bill was published by HMRC's to amend the Act implementing the UK's Pillar Two legislation adopted earlier in July 2023.

The draft bill aims to introduce into existing legislation an anti-arbitrage provision as envisaged by the OECD December Administrative Guidance. The provision prevents multinational groups that have entered into certain hybrid arbitrage arrangements from qualifying for the Transitional Country-by-Country Reporting (CbCR) Safe Harbor. The new rule mandates adding back the so-called "disqualifying" expenses when computing the aggregate profit or loss of the group members in a jurisdiction, reducing the group's ETR for the Transitional CbCR Safe Harbor test.

The bill is anticipated to take effect from March 14, 2024, applying to disqualified tax expenses attributable to profits accruing on or after March 14, 2024.

For our previous coverage, please, refer to the E-news Issue 196.

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

HMRC publishes webpage to help businesses prepare for complying with GloBE rules in the UK

On July 19, 2024, the HMRC published guidance on "how to prepare for the Multinational Top-up Tax and the Domestic Top-up Tax". This guidance does not include new elements on the implementation of the GloBE rules in the UK.

The new webpage contains:

- A description of the multinational top-up tax (i.e., the IIR) and the domestic top-up tax.
- A contact point, to help businesses prepare for complying with MTT and DTT and meet their UK obligations.
- A description of the online registration service, which is being released in stages.
- Links to the HMRC's draft guidance and to OECD publications.

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

Local courts

Key Insights

- Norway: Supreme Court rules that Norwegian interest limitation rule violates the EEA Agreement
- Poland: Supreme Court decision: obligation of tax advisors to report potentially aggressive tax schemes violates legal professional privilege
- UK: Supreme Court dismisses appeal on deductibility of advisors fees
- UK: Tribunal clarifies scope of 'imported loss' rule

Czechia

Supreme Administrative Court decides on statutory representative liable for corporation's tax arrears

On June 18, 2024, the Supreme Administrative Court of Czechia ruled that a statutory representative of a corporation could be held liable for the corporation's tax arrears (10 Afs 4/2024-38). Although the Czech Tax Procedure Code has allowed the tax authorities to impose such liability for several years, this authority had not been exercised. This ruling marks the first instance where the Supreme Administrative Court has endorsed this approach and outlined the basis rules for its application.

For more information, please refer to the TaxNewsFlash and a report prepared by the KPMG member firm in Czech Republic.

France

Withholding tax on service fees paid to a non-resident in relation to non-genuine services

On May 31, 2024, the Highest Administrative Supreme Court in France (*'Conseil d'Etat'*) ruled that withholding tax is not applicable on service fees paid to a non-resident if the service is considered as non-genuine by the French tax Administration. If so, the fees will be considered as deemed distribution income and subject to withholding tax on distributed income.

Article 238 A of the French tax Code provides that service fees paid in France by a non-resident established in a jurisdiction with a low tax regime are non-deductible for tax purposes, except if the non-resident can prove that the fee correspond to a genuine transaction and that it is not abnormal or excessive. Where the recipient is established in a non-cooperative jurisdiction, it also has to prove that the main purpose or effect of the operation related to the payment was not to shift profits to a non-cooperative jurisdiction.

The Conseil d'Etat ruled that in case the service fees are considered as non-deductible by the French tax Administration under article 238 A, they cannot be subject to the withholding tax on services provided by article 182 B of the French tax Code as that provision is only applicable to genuine services. The article provides for a 25 percent tax rate for non-residents, increased to 75 percent for non-resident established in a non-cooperative jurisdiction.

Instead, fees paid in respect of a non-genuine service qualify as deemed distributed income and, as such, must be subject to the withholding tax on distributed income provided by article 119 bis, 2 of the French tax Code, which provides for the same tax rates.

In the case at hand, a French resident entity paid consulting fees to an entity established in the British Virgin Islands, which was at that time listed as a non-cooperative jurisdiction. However, as the fees were not transferred to the British Virgin Islands, but to a Luxembourgish bank account of the entity established in the British Virgin Islands, the standard rate was applicable.

Norway

Supreme Court rules that Norwegian interest limitation rule violates the EEA Agreement

On June 26, 2024, the Norwegian Supreme Court (the Supreme Court) ruled that the Norwegian interest limitation rule limits the freedom of establishment under the EEA agreement and is therefore in violation of the EEA agreement (HR-2024-1168-A).

The case concerns a Norwegian company that was financed with a mix of equity and loans from its direct parent established in Luxembourg. The interest deduction claimed by the Norwegian company in 2014 and 2015 was disallowed by the Norwegian tax authorities under the Norwegian interest limitation rule, which allows for a maximum deduction determined as a percentage of tax EBITDA. However, the company argued that the interest limitation rule violated the freedom of establishment under the EEA agreement and should therefore not apply in the case at hand.

Under the Norwegian group contribution regime, value transfers can be made between group companies, subject to certain conditions, including that both the contributor and the recipient are liable to tax in Norway. Based on the regime the transferor may claim a tax deduction, while the contribution is deemed to be taxable income for the recipient. As such, by receiving group contributions, the recipient's income (EBITDA) would increase, hence increasing the ability to deduct interest costs under the interest limitation rule. At the same time, the transferor's maximum deduction will be reduced. As Norwegian entities with a foreign shareholder could not make use of the group contribution regime, they did not have the same opportunity as recipients of group contributions to increase their EBITDA and therefore the maximum limit for the purposes of the interest limitation rule.

The case was previously referred to the EFTA Court for an opinion. The EFTA Court ruled on June 1, 2022 (E-3/21) in favor of the taxpayer, i.e., that the Norwegian interest limitation rule restricts the freedom of establishment. The EFTA Court further concluded that the restriction may be justified where it serves the legitimate objective of preventing wholly artificial arrangements leading to tax avoidance. However, it remained for the referring court to determine whether the Norwegian law on interest limitation rules provides the taxpayer with the opportunity to demonstrate that the transaction took place on terms corresponding to what would have been agreed had the relationship between the parties been one at arm's length, in order to meet the proportionality test. For more details, please refer to E-news Issue 156.

The Norwegian State challenged the opinion of the EFTA Court before the Supreme Court. However, the Supreme Court followed the judgement of the EFTA Court and agreed that the Norwegian interest limitation rule, in combination with the group contribution rules, is a restriction of the freedom of establishment in the EEA. The Supreme Court ruled that the Norwegian tax rules should be assessed without considering the tax legislation in other countries (e.g., the earning stripping rules based on the EU Anti-Tax Avoidance Directive (ATAD)).

The Supreme Court also ruled that it can only deviate from an opinion of the EFTA Court if there are significant reasons to do so. As regards the question of whether the restriction goes beyond what is necessary to pursue the objective of preventing wholly artificial arrangements, the Court noted that national groups are given the opportunity to neutralize the effect of the interest rate limitation rule, whilst multinational groups are not given the opportunity to show that their loan transactions are commercial and done at arm's length. The Court further noted that there were no other rules that gave the company the opportunity to neutralize or limit the consequences of the interest rate restriction. The Court therefore rejected the appeal.

Poland

Supreme Court decision: obligation of tax advisors to report potentially aggressive tax schemes violates legal professional privilege

On July 23, 2024, the Polish Constitutional Court (the Court) ruled that the provisions implementing DAC6 into national legislation are unconstitutional.

The Polish ruling was based on the argument that the disputed provisions require tax advisors to disclose information on certain arrangements, even when such information is protected by legal professional privilege. The Constitutional Court also highlighted that the Polish Tax Code lacked clear conditions and procedures for exempting tax advisors from this privilege in specific circumstances. It should be underlined that the application of the Polish ruling' is limited only to certified tax advisors (being members of the Polish Certified Tax Advisors Association).

The Polish mandatory disclosure rules became applicable on January 1, 2019, i.e., in advance of the July 1, 2020, deadline set by DAC6. In addition to the disclosures required under the EU Directive, the Polish rules also apply to other types of arrangements, including non-cross border (i.e., domestic) arrangements. With regard to this requirement, the Court also ruled that the obligation to report non-cross-border tax schemes implemented before January 1, 2019, is unconstitutional.

The decision is final and cannot be appealed. More detailed information on the exact implications of this ruling in Poland should be known once the justification to the ruling is published.

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

UK

Supreme Court dismisses appeal on deductibility of advisors fees

On July 16, 2024, the UK Supreme Court (Supreme Court) issued a decision in case [2024] UKSC 25. The Supreme Court ruled that adviser fees incurred for the disposal of subsidiary businesses are non-deductible because they are considered to be of a capital nature.

The plaintiff, a UK holding company, incurred adviser fees related to the disposal of its Dutch subsidiary businesses. The central issue raised before the Supreme Court was whether these adviser fees constituted expenses of a capital nature, and therefore were non-deductible under the exclusion set out in section 1219 of the Corporation Tax Act (CTA) 2009.

The plaintiff considered that the exclusion for capital expenditure for investment companies applies more narrowly than the exclusion for capital expenditure for trading companies under s53(1) CTA 2009, and that the purpose of the exclusion for expenses of management was only to ensure no deduction is available for acquisition costs of investments and a limited category of fixed capital assets (such as the company's office building).

The Supreme Court held that, whereas capital asset can be identified, the starting point is to assume that expenditure on its disposal should be regarded as capital expenditure. The Supreme Court considered that the advisers were engaged specifically for the purpose of advising on the divestment of the Dutch subsidiary and were engaged only after the decision to divest had been made. The Supreme Court considered that the decision to divest was made around the time that the UK holding company's management had approved and initiated a plan to sell the Dutch business in June 2009. The plaintiff considered that the June 2009 decision only indicated a direction of travel and was not a decision to divest. The Supreme Court however based their decision on the First-tier Tribunal's (FTT) findings. Although it was accepted that it was not certain that the Dutch business would actually be sold and the advisers considered a range of options for the Dutch business (such as winding it down), this did not make the advisory expenditure revenue in nature.

The Supreme Court differentiated between the position of a 'Holdco', which holds shares as capital assets, and a company which has a trade of dealing in shares or investment assets. Based on this distinction, the court limited the permissible deductible management expenses for holding companies more narrowly than for those for a company which has a trade of dealing in shares or investment assets. Although not expressly confirmed, the scope of deductible management expenses would presumably continue to include expenses, including advisory expenses, which are incurred up to the time of the decision to dispose of an investment.

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

Tribunal clarifies scope of 'imported loss' rule

On June 13, 2024, the First-tier Tribunal (FTT) issued its decision in case [2024] UKFTT 542 (TC) and rejected the deductibility of loan relationship debits recognized after a company migrates to the UK. The basis for the decision is rule s327 Corporation

Tax Act (CTA) 2009, which broadly denies relief for any 'loss' on a loan relationship that is 'referable' to a time when that relationship was not subject to UK tax (essentially a time at which the relevant company would not be chargeable to UK corporate income tax on profits arising from the relationship).

The case concerned a Guernsey loan note issuer which was part of a securitization structure providing financing to a UK care home business. The business needed to redeem the loan notes to facilitate the disposal of some of the assets acting as security. The issuer was migrated to the UK and provided with sufficient equity funding to enable it to carry out the redemption. The terms of the loan notes included a 'Spens' (or 'make whole') clause, which permitted early redemption at a premium, comprising a 'compensatory' element (corresponding to the difference between the market and face value of the notes, effectively compensating investors for the loss of future cashflows) and a 'penalty' element. As a consequence of the early redemption, the company also recognized the unamortized portion of a discount on the original issue of the loan notes and of the initial transaction costs incurred when the structure was established.

HMRC argued that (with the exception of the 'penalty' element of the early redemption premium) these costs should be disallowed as 'referable' to the pre-migration period. The key question for the Tribunal was what it meant for costs to be 'referable' to that period - a concept not further defined in the legislation. For the FTT, what mattered was *"whether the loss (or the relevant part) would have arisen but for an expense which was incurred during the pre-migration period or some change or event occurring after the loan relationship came into existence but during the pre-migration period".* The Tribunal rejected the deduction on the grounds that the disputed amounts were referable to the pre-migration period because the 'compensatory' element and the unamortized portion of the discount were wholly attributable to changes in market conditions between the inception of the loan and the company's migration, and the initial transaction costs had clearly been incurred pre-migration.

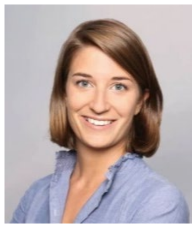
For more information, please refer to the report prepared by KPMG in the UK.

KPMG's EU Tax Centre team

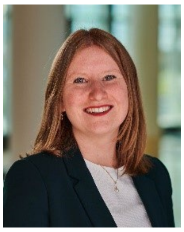
Raluca Enache
Associate Partner
Head of KPMG's EU
Tax Centre

Ana Pușcaș
Senior Manager
KPMG's EU Tax Centre

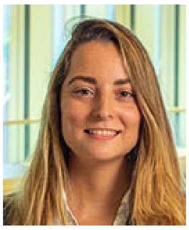
Marco Dietrich
Senior Manager
KPMG's EU Tax Centre



Alexandra Baudart
Manager
KPMG's EU Tax Centre



Rosalie Worp
Manager
KPMG's EU Tax Centre



Elena Moro Fajardo
Assistant Manager
KPMG's EU Tax Centre

Nina Matviienko
Assistant Manager
KPMG's EU Tax Centre

Key EMA Country contacts

Ulf Zehetner
Partner
KPMG in Austria
E: UZehetner@kpmg.at

Kris Lievens
Partner
KPMG in Belgium
E: klievens@kpmg.com

Alexander Hadjidimov
Director
KPMG in Bulgaria
E: ahadjidimov@kpmg.com

Maja Maksimovic
Partner
KPMG in Croatia
E: mmaksimovic@kpmg.com

Margarita Liasi
Principal
KPMG in Cyprus
E: Margarita.Liasi@kpmg.com.cy

Ladislav Malusek
Partner
KPMG in Czechia
E: lmalusek@kpmg.cz

Stine Andersen
Partner
KPMG in Denmark
E: stine.andersen@Kpmg-law.Com

Joel Zernask
Partner
KPMG in Estonia
E: jzernask@kpmg.com

Jussi Järvinen
Partner
KPMG in Finland
E: jussi.jarvinen@kpmg.fi

Patrick Seroin Joly
Partner
KPMG in France
E: pseroinjoly@kpmgavocats.fr

Gerrit Adrian
Partner
KPMG in Germany
E: gadrian@kpmg.com

Antonia Ariel Manika
Director
KPMG in Greece
E: amanika@cpalaw.gr

Gábor Beer
Partner
KPMG in Hungary
E: Gabor.Beer@kpmg.hu

Colm Rogers
Partner
KPMG in Ireland
E: colm.rogers@kpmg.ie

Lorenzo Bellavite
Associate Partner
KPMG in Italy
E: lbellavite@kpmg.it

Steve Austwick
Partner
KPMG in Latvia
E: saustwick@kpmg.com

Vita Sumskaite
Partner
KPMG in Lithuania
E: vsumskaite@kpmg.com

Olivier Schneider
Partner
KPMG in Luxembourg
E: olivier.schneider@kpmg.lu

John Ellul Sullivan
Partner
KPMG in Malta
E: johnellulsullivan@kpmg.com

Robert van der Jagt
Partner
KPMG in the Netherlands
E: vanderjagt.robert@kpmg.com

Michał Niznik
Partner
KPMG in Poland
E: mniznik@kpmg.pl

António Coelho
Partner
KPMG in Portugal
E: antoniocoelho@kpmg.com

Ionut Mastacaneanu
Director
KPMG in Romania
E: imastacaneanu@kpmg.com

Zuzana Blazejova
Executive Director
KPMG in Slovakia
E: zblazejova@kpmg.sk

Marko Mehle
Senior Partner
KPMG in Slovenia
E: marko.mehle@kpmg.si

Julio Cesar García
Partner
KPMG in Spain
E: juliocesargarcia@kpmg.es

Caroline Valjemark
Partner
KPMG in Sweden
E: caroline.valjemark@kpmg.se

Stephan Kuhn
Partner
KPMG in Switzerland
E: stefankuhn@kpmg.com

Matthew Herrington
Partner
KPMG in the UK
E: Matthew.Herrington@kpmg.co.uk

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