KPMG

E-News from KPMG's EU Tax Centre

Latest CJEU, EFTA and ECHR

State Aid

Infringement Procedures and CJEU Referrals

EU Institutions

OECD

Local Law and Regulations

Local Courts

KPMG Insights

E-News from the EU Tax Centre

Issue 124 – January 29, 2021

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.

Latest CJEU, EFTA and ECHR

CJEU decision on requests for mutual assistance concerning precautionary measures

On January 20, 2021, the Court of Justice of the European Union (CJEU) published its decision in the Heavyinstall case (C-420/19) on requests for mutual assistance concerning precautionary measures.

The case concerned Heavyinstall, an Estonian company with a permanent establishment in Finland, that did not declare or pay taxes in Finland. Finnish tax authorities, under the Mutual

Assistance Directive (2010/24), asked the Estonian tax authorities to establish precautionary measures to ensure Finland is able to recover the unpaid taxes and attached a decision issued by a Finnish court as the supporting document for its claim (as requested by the directive). In response, the Estonian tax authorities asked for an approval of the precautionary measures from the domestic administrative court, which disagreed with the conclusions of the Finnish court and denied the request. Following the appeal process, the Estonian Supreme Court requested a preliminary ruling on the interpretation of the Mutual Assistance Directive.

The CJEU held that an interpretation of the directive that would allow courts of the requested member state to question and carry out a fresh examination of the conditions of application of precautionary measures, is contrary to the principle of mutual trust between member states – which is of a fundamental importance in EU law and on which the directive is based. The court also concluded based on the text and the objectives pursued by the directive, that member states are in principle bound by the assessment performed by the authorities of the applicant member state as regards the necessity of the precautionary measures, in particular in the case where the assessment is outlined in a document in compliance with the directive and attached to the request.

CJEU judgement on Swedish interest deduction limitation rules

On January 20, 2021, the CJEU published its decision in the Lexel case (C-484/19) on the deductibility of interest paid to an associated foreign company – see E-news Issue 106.

The CJEU held that the exception to the ten percent rule in the Swedish interest deduction limitation rules, applicable between 2013 and 2018, is contrary to the freedom of establishment. The exception stated that interested related to intra-group financing can not be deducted if the main reason for the financing transaction is to create a significant tax benefit. The case concerns a Swedish company that was denied a deduction for interest expenses paid to a French group company, whereas it would have been allowed to deduct the interest expenses if the lender had been tax resident in Sweden (the companies would have been covered by the Swedish group contribution rules). In its analysis of the possible justifications for such a difference in treatment (i.e. the need to prevent tax avoidance or abuse, the need to ensure a balanced allocation of taxing rights between Member States, and a combination of the two) – which the CJEU rejected, the Court noted that, in the absence of any artificial transfer, the mere fact that a company wishes to deduct the interest in a cross-border situation cannot justify a measure infringing the freedom of establishment.

The ruling is likely to impact numerous companies that were denied interest deductions and which, in many cases, could now be able to refer to the ruling to obtain a deduction.

For more details please refer to a tax alert issued by the KPMG member firm in Sweden.

State Aid

Italy required to repeal the corporate tax exemptions for ports

The European Commission determined that Italy should abolish the corporate tax exemptions granted to its ports, in order to be compliant with the EU State aid rules.

In Italy, port authorities are fully exempt from corporate income tax, a regime which the European Commission considers to represent a selective advantage, which breaches EU Stated aid rules. The Commission requested that Italy abolish the tax exemption by January 1, 2022. Due to the fact that the port regime qualifies as existing Stated aid (the rules were already in place before Italy joined the EU), Italy is not required to recover the corporate income tax not paid in the past.

For more details please refer to European Commissions' press release.

Madeira Free Zone scheme not in line with the criteria approved by the European Commission

On December 4, 2020, the European Commission concluded that the Madeira Free Zone scheme (which expired in 2014) was not implemented in line with approved conditions.

The European Commission had previously approved successive versions of the Madeira Free Zone scheme – a regional state aid scheme providing corporate income tax reductions and other tax benefits for companies established in that area. Recent 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, in July 6, 2019 the Commission opened an in-depth investigation into the regime.

The results of the analysis performed determined that the tax benefits under the State aid scheme were granted to companies that have not made a real contribution to the development of the region, and were therefore breaching the conditions previously approved by the European Commission and the EU State aid rules.

Portugal will have to recover, from the companies that did not meet the conditions, the stated aid granted, plus interest.

For more details please refer to European Commissions' press release.

Infringement Procedures & Referrals to CJEU

Referral on the compatibility of UK intra-group transfers rules with EU law

On December 14, 2020, the UK Upper Tribunal decided to refer to the CJEU a question regarding the compatibility of the domestic intra-group transfer rules with the free movement of capital. The case – which might be the last referral to the CJEU from a UK court in a tax matter, concerns a UK tax resident company that transferred capital assets in the form of intellectual property rights and shares to other group companies, resident in Switzerland and the Netherlands. Both disposals were deemed taxable at the moment they took place but would have benefited from UK intra-group transfer tax relief if undertaken between UK taxpayers (UK Group Transfer Rules).

The First-tier Tribunal held that transfers between group companies have to be analyzed in light of the freedom of establishment, which is only relevant for transactions between companies resident in EU / EEA member states / EEA.

The decision was appealed by the taxpayer and the Upper Tribunal decided to submit a request for a preliminary ruling with the CJEU, essentially asking the Court whether the EU free movement of capital is relevant in this case and, more broadly, in relation to the UK Group Transfer Rules and whether the disputed rules were in breach of either one of the two freedoms.

Compatibility of German tax rules on real estate funds with EU law

On October 21, 2020, reference was made to the CJEU by the German Federal Fiscal Court for a preliminary ruling in the L Fund case (C-537/20). The case involves a Luxembourg closeed-end fund, with no legal personality, that received income from renting and selling real estate properties in Germany. Under the German tax rule applicable at that time, German real estate funds are treated as corporate tax payers, but exempt from corporate income tax. On the other hand, non-resident real estate funds do not benefit from the corporate tax exemption and the revenue is taxable at fund level.

The referring court requested clarifications regarding the compatibility with the free movement of capital of the German tax treatment of revenues realized by non-resident real estate funds from immovable property located in Germany.

Compatibility of the German cross-border loss relief with EU law

On October 21, 2020, reference was made to the CJEU by a German court for a preliminary ruling in the W case (C-538/20). The case concerns a German taxpayer with a permanent establishment in the UK that incurred losses, which cannot be deducted in Germany as the double treaty concluded between the two countries includes the exemption method to avoid double taxation.

The referring court requested clarifications regarding the compatibility with the freedom of establishment of the German rules on the deductibility of losses from foreign permanent establishments located in another member state.

Compatibility with EU law of German rules on reimbursing dividend withholding tax on portfolio investment

On November 3, 2020, reference was made to the CJEU by a German court for a preliminary ruling in the ACC Silicones case (C-572/20). The case involves a UK company that received dividend income from a portfolio investment in Germany. Under German law applicable at that time, dividends distributed to parent companies not qualifying for the withholding tax exemptions under the EU Parent-Subsidiary Directive were subject to tax withheld at source. German shareholders are allowed to either offset o receive reimbursement of the tax, while non-resident shareholders are granted a reimbursement provided certain conditions are met. Among others, these criteria include proof that none of the shareholders with direct or indirect shareholding were able to offset the dividend tax withheld.

The referring court requested clarifications regarding the compatibility with the free movement of capital of the German rules for reimbursing the dividend tax withheld at source.

EU Institutions

EUROPEAN COMNISSION

Taxation of the digital economy, EU public consultation launched

Following its commitment to put forward a proposal for an EU-wide digital levy as a new EU own resource, in January 2021, the European Commission (EC) launched an initiative for "A fair & competitive digital economy". The European Commission, on January 14, 2021, invited interested parties to provide feedback on an inception impact assessment (i.e. the roadmap for this initiative) and on January 18, 2021, opened a public consultation in the form of a questionnaire asking stakeholders to provided their views on, among other items, the current challenges of taxation in the digitalized economy; possible solutions to address these challenges; the appropriate level for solving the issues (e.g., national, EU, beyond the EU or a combination of various levels); the scope of the digital levy; and the most appropriate options to determine where the revenues generated from digital activities are to be taxed..

Read TaxNewsFlash Europe for further details.

COUNCIL OF THE EU

Own resources decision adopted by the Council of the EU

On December 14, 2020, the Council adopted the own resources decision. Among others, the decision include a roadmap for the implementation of new EU own resources, including the carbon border adjustment mechanism, a digital levy, the EU Emissions Trading System, a Financial Transaction Tax, a financial contribution linked to the corporate sector or a new common corporate tax base – see E-news Issue 123.

In the short term, the decision introduces from January 1, 2021, a new contribution due by member states based on the volume of non-recycled plastic packaging waste.

In order to produce effects, the decision must be ratified by all Member States, in accordance with their respective constitutional requirements. Once ratified, its provisions will apply retroactively starting January 1, 2021.

EU's long-term budget adopted by the Council of the EU

On December 17, 2020, the Council adopted the final regulation on the Union's long-term budget (the multiannual financial framework – MFF). The budget covers seven years and, together with the EU's COVID recovery fund (Next Generation EU), is focused on supporting the EU's recovery from the COVID-19 pandemic and its long-term priorities. It also includes clear commitments to own resources proposals.

For more details on the EU's long term budget see E-news Issue 123

January 2021 informal ECOFIN videoconference January 2021

On January 19, 2021, Finance Ministers of the EU Member States attended an informal ECOFIN videoconference, which included a presentation from the Portuguese Presidency of the Council of its priorities for economic and financial affairs. Among others, the Portuguese Presidency will focus on addressing the “challenges of European taxation”, including the fair and efficient taxation of the digitalized economy, as well as on strengthening good governance mechanisms, on global tax transparency and the fight against avoidance through the use non-cooperative jurisdictions – see the programme of the Portuguese Presidency for more details.

In a live event after the virtual meeting, the Portuguese Presidency encouraged Member States to timely ratify the Council’s decision on own resources, which is a step required before the first disbursement from the Recovery and Resilience Facility (i.e. an instrument aimed at granting large-scale financial support to facilitate the sustainable recovery of Member States). In his remarks, the European Commission’s Executive Vice-President – Valdis Dombrovskis, confirmed that the Commission will put forward in June proposals on a carbon border adjustment mechanism and for the revision of the Energy Taxation Directive. Mr. Dombrovskis noted that the Commission will present its Action Plan on business taxation for the 21st century and the digital levy proposal soon.

EUROPEAN PARLIAMENT

Resolution on EU list of non-cooperative jurisdictions

On January 21, 2021, the European Parliament adopted a resolution asking the Council and the European Commission to reform the EU list of non-cooperative jurisdictions for tax purposes (the EU blacklist). The members of European Parliament recognized the “positive impact” the list has had since its introduction but expressed concerns regarding the transparency and efficiency of the current process and requested an update of the listing criteria and a more coordinated approach to defensive measures.

For more details, please refer to Euro Tax Flash issue 440.

Joint conclusions of the EU Institutions on legislative priorities

On December 17, 2020, the President of the European Parliament signed the joint declarations of the European Parliament, the Council of the European Union and the European Commission on EU policy objectives and priorities for 2021 and more broadly for the current parliamentary term (2020-2024). The Council and the Commission had already signed the statements earlier that week.

2021 priorities

Among other, the priorities set out by the three institutions for this year include the following commitments in the area of taxation:

- the implementation of the new own resources (in line with the long-term budget agreement);
- fight against money laundering, tax fraud, evasion and avoidance, while ensuring “fair taxation” (digital taxation is specifically listed);

- transparency on the taxation of multinational companies;
- fair competition within and beyond the EU.

In line with the long-term budget agreement secured by EP negotiators, the three institutions are committed to implementing the roadmap on new own resources.

2020 – 2024 legislative priorities

For the first time, the three institutions also agreed on common multiannual priorities. The joint declaration issued in this respect reiterates the commitment to the implementation of the own resources roadmap, as well as the fight against tax evasion, tax avoidance and other financial crimes.

European Parliament group calls for the prioritization of the public Country-by-Country Reporting initiative

On November 27, 2020, members of the European Parliament's Greens-EFA Group signed a joint letter, asking the Portuguese Presidency of the Council to treat the public Country-by-Country Reporting (CbCR) proposal as a priority and to support the efforts of reaching an agreement between Member States on this topic.

The CbCR proposal was published by the European Commission on April 12, 2016, as a supplement to the Commission's Anti-Tax Avoidance Package. The proposal is intended to make public certain tax information reported by multinationals on a country-by-country basis – see ETF 278. On March 27, 2019, the European Parliament approved the proposal (as amended based on their first vote from 2017 – see ETF 331), and the draft was sent to the Council for approval – see E-news Issue 95. The proposal has been in deadlock ever since, due to disagreements on its legal basis, which determines whether the proposal should be subject to the ordinary legislative procedure – requires qualified majority voting in the Council, or based on the special legislative procedure – the common procedure used in tax matters and subject to unanimous approval at Council level.

In their letter, the signatories highlighted the importance of the proposal in the context of fighting against tax avoidance and aggressive tax planning and stated their belief that there is now sufficient support within the Council to reach qualified majority and therefore adopt public CbCR.

OECD

Multilateral Convention developments

Germany, Pakistan and Barbados deposited their instruments of ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) on December 18, respectively December 21 in the case of Barbados. For these three jurisdictions, the MLI will enter into force on April 1, 2021.

On January 15, 2021, Estonia deposited its instrument of ratification. The MLI will enter into force for Estonia on May 1, 2021. The total number of jurisdictions which have ratified, accepted or approved the MLI now stands at 61.

The MLI became effective on 1 January 2021 for over 600 treaties concluded among the 60 jurisdictions. See the full list of the signatories and parties to the MLI (PDF 188 KB) provided by the Organisation for Economic Cooperation and Development (OECD), as of January 15, 2021.

OECD publishes guidance on the transfer pricing implications of COVID-19

On December 18, 2020, the OECD released guidance on the application of the arm's length principle in the context of the Novel Coronavirus (COVID-19). The report published represents the consensus view of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (Inclusive Framework).

The report recognizes that the unique economic environment arising from COVID-19 has created challenges for transfer pricing analyses. The guidelines address several practical issues currently faced by taxpayers and clarifies the various factors that should be considered in making arm's length pricing determinations. The report is structured around four priority areas, as follows:

- comparability analysis;
- losses and the allocation of COVID-19 specific costs;
- government assistance programs;
- advance pricing agreements.

For more information on the questions answered and clarifications brought by the OECD guidance, please refer to a summary prepared by KPMG.

The OECD continues to move ahead on BEPS 2.0

As previously reported, the OECD released reports described as "Blueprints" concerning solutions to the tax challenges arising from digitalization of the economy – see E-news Issue 122 – and the public was invited to submit comments. KPMG submitted their observations in response to the Blueprints; all comments received by the OECD can be accessed here.

A public virtual consultation meeting took place on 14-15 January 2021, where panels discussed key questions identified in the consultation documents and raised in the written submissions received as part of the consultation process. Key points raised by stakeholders in the feedback submitted and during the virtual meeting relate to the complexity of the Blueprints, the administrative burden and practical issues when applying the new rules. The OECD acknowledged these concerns and also noted the early involvement of the new US administration in the process is key in shaping the proposals.

Day 1 was devoted to discussions around Pillar 1 – profit allocation and taxing nexus – where a main concern was the lack of clarity and high complexity. Other points discussed were the infectiveness of the double taxation relief proposals in the absence of mandatory binding dispute resolution provisions, as well as that the provisions are not sufficient to exclude small or low-risk entities.

The second day of the public consultation was dedicated to Pillar 2, focused on global minim taxation. The complexity of the provisions was again raised by stakeholders, whilst the use of consolidated financial accounts as the starting point for the tax base was supported by most. One of the points of divergence between the Inclusive Framework and the stakeholders was the use of deferred tax accounting, strongly supported by the latter but explicitly rejected in the Blueprint.

Further information, including replays of the discussion, can be found on the dedicated page for the event

The discussion was continued during the 11th Meeting of the Inclusive Framework on BEPS, which took place on January 27 – 28, 2021.

Implementation status of the hard-to-value intangibles approach

The OECD published jurisdiction-specific information on legislation and administrative practices applicable to transactions involving hard-to-value intangibles (HTVI). The data covers 40 countries and was collected as part of the monitoring process of the implementation of the HTVI approach agreed by the OECD/G20 Inclusive Framework.

The HTVI approach was the outcome of BEPS Action 8, and is intended to address the negative effects of information asymmetry by providing that tax administrations can consider ex post outcomes as presumptive evidence about the appropriateness of ex-ante pricing arrangements, while taxpayers can disprove such presumptive evidence by demonstrating the reliability of the information supporting the pricing methodology adopted at the time the controlled transaction took place..

For more details please refer to OECD's press release.

First peer review of the Automatic Exchange of Financial Account Information – report published

On December 9 2020, the OECD publish the first peer review report on the Automatic Exchange of Financial Account Information in tax matters (AEOI) standards, which assesses the legal frameworks set up by the 100 jurisdictions that committed to exchanging information since 2017-2018. The peer review concluded that 88% of these jurisdictions were deemed to have satisfactory legal frameworks in place.

The report notes that the information exchanged during 2019 related to 84 million financial accounts with a total value of around EUR 10 trillion, and that 105 jurisdictions were due to exchange information in 2020.

A second stage of the peer review, expected to be completed in 2022, will assess the effectiveness in practice of the AEOI implementation in the countries included in this first peer review.

For more information please refer to OECD's release.

Updated guidance on tax treaties and the impact of COVID-19

On January 21, 2021, the OECD released updated guidance on the impact of COVID-19 on tax treaties, with the aim of providing additional certainty for individual and corporate taxpayers affected by travel restrictions and other business disruptions.

The paper revises the previous recommendations issued in April 2020 – see E-news Issue 117 – concerning the interpretation of the OECD Model Tax treaty and related Commentary on the creation of permanent establishments, determining the tax residence of a company and taxing employment income in cross-border situations where exceptional measures are imposed or recommended by governments.

For corporate tax purposes, the updated guidance:

- provides additional examples of how certain jurisdictions addressed the impact of COVID-19;
- outlines the OECD's views on the permanent establishment implications (both from a fixed place of business and dependent agent perspectives) in a post COVID-19 world, where remote work may continue despite travel restrictions being lifted;
- revisits its previous conclusions on construction permanent establishments.

For more details, please refer to OECD's release.

OECD's Forum on Tax Administration agrees on global actions to increase tax certainty

During its virtual plenary meeting held on December 7-8, 2020, the OECD's Forum on Tax Administration (FTA) agreed on several tax administration actions targeted at increasing tax certainty and the digital transformation of tax administrations.

The agreement includes, *inter alia*:

- a commitment to set out a roadmap on the digital transformation of tax administrations. The work in this area will start from a discussion document published during the meeting, i.e. Tax Administration 3.0: The Digital Transformation of Tax Administration, and will take place in early 2021;
- moving the International Compliance Assurance Programme (ICAP) from the current pilot phase to an established program covering transfer pricing risks. The ICAP pilot allows multinationals to increase tax certainty, before tax audits, by working collaboratively with the relevant tax administrations on non-binding risk assessments of certain tax issues. The program currently works on a voluntary basis and covers transfer pricing, permanent establishment and other international tax risks (e.g. hybrid mismatch arrangements, withholding taxes and treaty benefits). More details are expected in early 2021.

For more information please refer to OECD's release.

Local Law and Regulations

Austria

Transposition of the interest limitation rule under ATAD

On December 20, 2020, legislation to transpose the interest limitation rule introduced by the EU Anti-Tax Avoidance Directive (2016/1164) – ATAD – into Austrian domestic law was published in the Official Gazette. The new rules apply starting January 1, 2021.

The European Commission had previously issued a reasoned opinion to Austria demanding the transposition into national law of the EBITDA-based limitations on interest deductibility – see E-news Issue 112.

For more information, please refer to KPMG's TaxNewsFlash.

Belgium

Guidance on the technological requirements of the DAC6 reporting

On November 23, 2020, the Belgian Tax Authorities published guidance on the technological requirements of the Directive (EU) 2018/822 on mandatory disclosure rules ("DAC6") reporting.

The guidance, which includes an user guide and related validation rules, details the principles that the intermediary / relevant taxpayer must comply with in order to file a valid disclosure.

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

Draft legislation introducing anti-abuse provisions for countries falling under the EU list of non-cooperative jurisdictions and amending the earnings stripping rules

The Belgian federal government submitted to Parliament draft laws including provisions for the implementation of the EU list of non-cooperative jurisdictions ("EU List") and changes to the current earning stripping rules. For more information on the EU list of non-cooperative jurisdictions please refer to KPMG's EU Tax Centre's Euro Tax Flash 435.

Anti-abuse provisions for companies falling under the EU list of non-cooperative jurisdictions

If enacted, a presence on the EU List would have the following repercussions for Belgian tax purposes:

- *Cayman tax impact*: legal entities established in a jurisdiction falling under the EU List would be deemed as legal constructions subject to the so-called "Cayman tax" – a look-through tax under which income received by certain low-taxed offshore structures might be taxed in the hands of the Belgian founders;
- *CFC impact*: a foreign company on the EU List could be considered as a controlled foreign corporation ("CFC") regardless of the control and taxation tests. Under the current Belgian law, CFC provisions apply only if the two tests above are cumulatively met;

- *Dividend tax impact*: dividends from companies established in a jurisdiction on the EU List would not qualify for the dividends-received deduction regime;
- *Reporting obligations*: current reporting requirements for payments to tax havens would be extend to companies established in a jurisdiction on the EU List.

Changes to the earnings stripping rules

Under the draft law, companies issuing real estate certificates and leasing and factoring companies would no longer be excluded from the earnings stripping rules. In addition, certain changes are proposed regarding the calculation of excessive borrowing cost and EBITDA.

The European Commission had previously issued a letter of formal notice to Belgium requesting the correct implementation of ATAD I, as it deemed that the national implementation of the interest limitation rules ("earning stripping rules") deviate too far from the provisions of ATAD – see E-news Issue 120.

For more information on the above please refer to a tax alert prepared by the KPMG member firm in Belgium.

Cyprus

DAC6 Notices

On January 5, 2021 the Cyprus Tax Department issued two notices regarding the DAC6 reporting requirements. The first notice provided general guidance on the DAC6 reporting requirements, including what information should be submitted, and confirmed that the required legislation is expected to be adopted before the end of January 2021.

The second notice announced the launch of the registration for intermediaries and taxpayers using the Government Internet Security Webgate (Ariadne). However, it is noted that the submission of DAC6 information will be voluntary until the required legislation is adopted and the requirements become mandatory.

France

DAC6 Tax Authority webpage

On December 14, 2020, the French tax authorities launched a webpage dedicated to relevant legal sources and technical documentation as well as FAQs regarding DAC6 reporting. In addition, the page provides an e-mail address for further information: dac6@dgfip.finances.gouv.fr.

Ireland

Updated DAC6 Guidance and filing clarifications

On December 18, 2020, Irish Revenue announced that the DAC6 XSD file and the DAC6 XSD User Guide are available on the Revenue website and clarified that where a DAC6 Return is submitted by uploading an XML file, the submission should be made using the updated DAC6 XSD file (converted to an XML file).

On December 22, 2020, Irish Revenue published eBrief No. 235/20 announcing the publication of the Tax and Duty Manual Part 33-03-04 which provides step by step guidance on how to set up a DAC6 reporting obligation and file a DAC6 return on ROS.

On December 23, 2020, Irish Revenue published eBrief No. 238/20 announcing an updated version of Tax and Duty Manual Part 33-03-03, which provides general guidance on the operation of the EU mandatory disclosure regime and now also covers section C Hallmarks (Specific hallmarks related to cross-border transactions).

Italy

Digital services tax update

On January 15, 2021, the Italian government announced that the deadlines for the Italian digital services tax due for 2020 have been extended, as follows:

- payment of the tax is now due by March 16, 2021 (previously the deadline was February 16, 2021);
- the related tax return should be submitted by April 30, 2021 (previously March 31, 20210.

The Italian tax authorities also published the final text of the decree implementing the digital services tax. The new provisions bring additional guidance and clarifications on the definition of taxable persons and services in scope, as well as further details on tax compliance and reporting requirements.

For more information, please refer to KPMG's TaxNewsFlash and to a tax alert prepared by the KPMG member firm in Italy.

DAC6 implementation published in Official Gazette

On November 30, 2020, the Italian Ministry of Economy and Finance published a ministerial decree establishing additional rules and guidance for the local implementation of Council Directive (EU) 2018/822 on mandatory disclosure rules (DAC6). For background on the previous law implementing DAC6 in Italy please refer to a KPMG's TaxNewsflash.

The new ministerial decree provides information about some of the hallmarks of cross-border arrangements subject to DAC6 and the criteria to be followed when assessing whether such arrangements are tax-driven.

Subsequently, the Italian tax authority issued draft DAC6 guidance , which was subject open to public comments until January 15, 2021. The final version of the guidance is yet to be published.

For more information, please refer to a tax alert prepared by the KPMG firm in Italy.

Regulations implementing tax dispute resolution mechanisms and MAP processes

In December 16, 2020, the Italian tax authority issued regulations to implement new tax dispute resolution mechanisms and mutual agreement procedure (MAP) processes following the transposition of Directive (EU) 2017/1852 into domestic law.

The regulations describe, from an Italian perspective, the process under which taxpayers can discuss the case with the local tax authorities in advance of filing a MAP request; templates, list of documents and technical explanations for the requests; as well as details on the timeframe of the MAP procedures and the implementation of the outcome.

For more details please refer to KPMG's TaxNewsFlash.

Luxembourg

Finance Bill for 2021 passed by the Parliament

On December 17, 2020, Luxembourg's Parliament passed the 2021 budget law that includes several tax measures concerning the real estate sector, the fiscal unity regime, a CO2 tax and a reduction in the subscription tax for investment funds. For more details on the expected tax changes see E-news Issue 122 .

Application of Luxembourg's participation exemption regime for Gibraltar companies

On December 1, 2020, the Luxembourg tax authorities issued a circular that excludes companies incorporated in Gibraltar from the companies eligible for the benefits of the EU Parent-Subsidiary Directive for the purpose of applying the Luxembourg participation exemption regime. The new rules are effective from January 1, 2021.

The rules were issued as a response to CJEU's ruling in the GVC Services (Bulgaria) case (C-458/18) – see E-news Issue 117.

Read a tax alert prepared by the KPMG member firm in Luxembourg for more information.

Netherlands

Tax package for 2021 adopted by the Upper House of Parliament

On December 15, 2020, the Upper House of the Dutch Parliament adopted the 2021 Tax Plan package, with two motions. The 2021 Tax Plan had already been adopted by The Lower House of Parliament on November 12, 2020 – see E-news Issue 123.

Under the adopted motions, the government:

- will need to provide feasibility assessments for future tax measures presented to the Parliament;
  was tasked with investigating a more neutral treatment of businesses that are subject to tax as individual income taxpayers or as corporate income taxpayers (as the 2021 Tax Plan package is thought to create new differences between the two
  For more details, read a report prepared by the KPMG firm in the Netherlands.

Rules for refunding Dutch dividend withholding tax based on the Sofina case

On December 4, 2020, the Dutch government published a decree detailing the rules for Dutch dividend withholding tax refunds, in light of the Sofina case (C-575/17) – see KPMG's EU Tax Centre's Euro Tax Flash.

The provisions in the decree are relevant for foreign entities (set up in another Member State or in a qualifying third country) who received Dutch portfolio dividends, provided they are the beneficial owners of the investment and they meet specific criteria, i.e.:

- the tax withheld would have exceeded the corporate income tax payable if the foreign entity had been tax resident in the Netherlands;
- the recipient is not allowed to reduce / credit the withholding tax under its applicable domestic law / double tax treaties;
- the corporate income tax payable by the foreign legal entity in later financial years would have been lower than the dividend withholding tax had the recipient been tax resident in the Netherlands.

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

Poland

Significant corporate income tax changes effective January 1, 2020

On November 30, 2020, amendments to the Polish corporate income tax regime were published. Changes include, *inter alia*:

- extending the scope of corporate income tax to certain tax-transparent entities (such as partnerships that were previously taxed only at the partner level);
- the introduction of an alternative corporate income tax regime – referred to as the "Estonian solution". Under the new rules, corporate taxpayers that satisfy certain conditions will not be required to pay corporate income tax until the profits are distributed;
- new tax policy disclosure requirements, based on which certain taxpayers have to report on the implementation of their tax strategy;
- limits to the possibility to offset tax losses after certain restructuring transactions – see a tax alert prepared by the KPMG member firm in Poland;
- transferring the obligation to settle the capital gains tax due by the non-resident seller for the sale of shares in real estate companies, to the Polish real estate company – see E-news Issue 123.

Most of the changes above are effective starting January 1, 2021. For more information please refer to KPMG's TaxNewsFlash.

New deferral of key amendment to the Polish withholding tax regime

On December 30, 2020 a decree was published in Poland which defers a key change to the Polish withholding tax regime until the end of June 2021. The measure deferred relates to an obligation to collect withholding tax regardless of relief at source being available under a double tax treaty or a domestic exemption in Polish law based on an EU directive.

The withholding tax provisions were originally scheduled to be effective January 1, 2019 but had been postponed several times (most recently to December 31, 2020).

For more information please refer to KPMG's TaxNewsFlash.

Protocol to amend double tax treaty with the Netherlands is signed

On October 29, 2020 a Protocol to amend the existing double tax treaty concluded between Poland and the Netherlands was signed. *Inter alia*, the Protocol introduces:

- a "real estate clause", under which the right to tax profits from the sales of shares in real estate companies could be taxed in the country where the real estate property is located ;
- a "principle purpose test" – an anti-abuse clause under which no favorable provisions of a tax treaty may be relied on in a situation when obtaining the treaty benefit was one of the principal purposes of a given transaction;
- amendments to the definition of permanent establishment.

The Protocol must be ratified by Poland and the Netherlands to enter into force. For more information please refer to KPMG's TaxNewsFlash.

Retail sales tax effective January 1, 2021

The Polish government confirmed that it does not intend to further delay the effective date of Poland's retail sales tax. Introduction of the new tax (under legislation enacted in July 2016) had already been postponed several times due to the ongoing dispute between Poland and the European Commission over the compatibility of the tax with EU regulations – see E-news Issue 122.

The tax applies to revenue from retail sales exceeding a monthly threshold of PLN 17 million (approximately EUR 4 million) and is based on a progressive tax rate structure, with the highest rate being 1.4%.

For more information please refer to a tax alert prepared by the KPMG member firm in Poland.

Portugal

DAC6 Form published

Ordinance no. 304/2020, of December 29, 2020 approved the form "Modelo 58" for disclosing reportable domestic or cross-border arrangements, as provided for by Law no. 26/2020 of 21 July, that implemented DAC6.

Romania

DAC6 guidance published

On January 13, 2021, the Romanian tax agency issued a guide for the application of mandatory disclosure rules (DAC6). The guide includes interpretation of relevant terms, practical examples and instructions on completing and filing the reporting form.

Spain

DAC6 implementation published in Official Gazette

On December 29, 2020, Spain published in the Official Gazette the law providing for the local implementation of DAC6. In line with the EU Directive, the law applies for cross-border arrangements from July 1, 2020, as well as for arrangements where the first step of implementation was carried out between 25 June 2018 and 30 June 2020.

DST return filing and payment postponed

The Spanish DST entered into force on January 16, 2021. However, due to the lack of definitive approval of the DST Regulation and self-assessment form, as well as delays in implementing the IT platform required for the submission, on January 14, 2021, Spain's tax authority announced that the deadline for filing the return and paying the DST for the first quarter of 2021 (originally due on April 30, 2021) has been postponed until the second quarter of 2021 (i.e. the period between 1 and 31 July 2021).

The United Kingdom

Brexit Update - Trade and Cooperation Agreement formally signed

On December 30, 2020, the EU and the UK signed the Trade and Cooperation Agreement ("EU-UK Agreement"), which sets out the terms of their future cooperation. The agreement reached comes as a result of nine rounds of formal negotiations, which started back in March 2020.

The EU-UK Agreement is applicable on a provisional basis starting January 1, 2021. Among other, the agreement includes a good governance clause, under which parties commit to uphold the taxation standards on exchange of tax information, anti-tax avoidance, and public tax transparency agreed upon at the level of the OECD, as well as reiterate their support for the OECD Base Erosion and Profit Shifting Action Plan.

For more details please refer to KPMG's ETF 438 and to a tax alert prepared by the KPMG member firm in the UK.

Brexit - implications for the application of the EU mandatory disclosure rules

Prior to the signature of the EU-UK Agreement, the UK was expected to continue to apply mandatory disclosure rules in line with Directive on Administrative Cooperation (DAC6) and according to the deferred timeline it had opted for.

However, according to the Agreement, the UK chose to subscribe to the OECD mandatory disclosure standard rather than the EU rules. In practice, this means that the UK applies a curtailed version of the EU MDRs for a limited period of time. Subsequently, legislation will be introduced to reflect the new UK mandatory disclosure rules and replace the reduced DAC6 reporting current applicable.

For more details please refer to KPMG's ETF 439 and to a tax alert prepared by the KPMG member firm in the UK.

Wealth tax update – recommendations published

On December 9, 2020, the Wealth Tax Commission (WTC) published its recommendations on whether the UK should have a wealth tax.

The report, which was not commissioned by the UK Government, concludes that the UK could benefit from introducing a wealth tax and suggests a one-off tax, which is considered less distortive and more efficient from an administrative and compliance perspective. The scope of the tax, as proposed by WTC, would include all assets owned by UK individuals with a personal wealth above GBP 500,000 per person.

For more details please refer to a tax alert prepared by the KPMG member firm in the UK

Local Courts

Finland

Administrative court decision on dividends distributed to non-resident corporate funds

In October 2020, a Finnish administrative court issued decisions in four cases involving dividends distributed to US open-ended funds, organized as corporations under the US law.

The court held that the US-based open-ended funds (with legal entity) are comparable with Finnish contractual-based funds (without legal personality) and are therefore entitled under EU law arguments to receive tax exempt dividends. The decision is also interesting for European based investment funds set up as legal entities (including some SICAVs), which have been benefiting from limited tax benefits in Finland as compared to other non-resident investment funds without legal personality.

For more details please refer to KPMG's TaxNewsFlash.

France

Revised approach to determining dependent agent permanent establishments

In a decision dated December 11, 2020, the French high administrative court ("*Conseil d'Etat*") held in favor of a broad interpretation of the "dependent agent" test, revising its previous approach to assess permanent establishments for corporate income tax purposes.

Under previous case-law, for a permanent establishment to be created it was necessary for the dependent agent to have the authority to legally bind its principal towards the customers. Settled case-law also confirmed that provisions of a double tax treaty should not be interpreted in light of OECD commentaries released after the date when the relevant tax treaty was signed.

However, in the case at hand, the Conseil d'Etat ruled that:

- the permanent establishment provisions of the relevant double tax treaty (signed in 1968) must be interpreted in the light of recent OECD commentary (2003 and 2005), and

- a permanent establishment could be created by an entity soliciting and receiving orders (which are then routinely approved by the principal), as well as a person authorized to negotiate in a country, all the details of a contract (which is then signed by the principal in the other country).

It is not clear if the change in interpreting the French concept of permanent establishment is only intended as an anti-abuse instrument, allowing the tax authorities to target "extreme situations". The decision is likely to have impact on the taxation of the digitalized economy and taxpayers with pending permanent establishment cases in France may need to reassess their strategy in light of this ruling.

Read a tax alert from the KPMG member firm in France for further insights on the corporate income tax and VAT impact of the decision.

KPMG Insights

COVID-19 Resources

KPMG publishes an overview of tax developments being reported globally by KPMG firms in response to the Novel Coronavirus (COVID-19). For further insight into the potential tax, legal and mobility implications of COVID-19, please refer to the dedicated KPMG page.

DAC6 Resources

KPMG's EU Tax Centre publishes an overview of latest developments and country summaries on the implementation of the Mandatory Disclosure Requirements (MDR of DAC6), including a DAC6 transposition and reporting overview. KPMG's DAC6 Summary and Observations memo is also available for download. For further information on how KPMG can assist you in meeting the demands of the EU MDR regime, please refer to the dedicated KPMG page.

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Director, KPMG's EU Tax Centre

Key links

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