Latest CJEU, EFTA and ECHR

Infringement Procedures and Court Referrals

State aid

EU Institutions

OECD and other International Institutions

Local Law and Regulations

Local Courts

KPMG Insights

E-News from the EU Tax Centre

Issue 177 – May 18, 2023

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:** Compatibility of French tax integration scheme rules with EU freedom of establishment
- **CJEU:** Advocate General opinion on Luxembourg tax rulings related to intra-group financing structures
- **General Court:** Case brought before the General Court seeking the annulment of the EU Minimum Tax Directive
- **Council of the EU:** Agreement on DAC8 compromise text
- **European Parliament:** Resolution proposing new taxes as own resources adopted
- **Czech Republic:** Public consultation launched on a legislative proposal to implement minimum taxation (Pillar Two)
- **Lithuania:** Solidarity contribution on banking sector adopted
- **Netherlands:** DAC6 guidelines updated
- **Poland:** Reporting of domestic arrangements to be reinstated in summer
- **Denmark (court decision):** Decision on beneficial ownership in relation to interest payments (Interest and Royalties Directive)

Latest CJEU, EFTA and ECHR

CJEU

Applicability of the Merger Directive to domestic reorganizations

On April 27, 2023, the Court of Justice of the European Union (CJEU or the Court) gave its decision in the case C-827/21. The ruling responded to the question whether national courts are required to interpret national legislation applicable to domestic reorganizations in a manner consistent with the provisions of the Merger Directive[1].

The Court held that the Merger Directive does not apply to purely internal reorganizations and, consequently, national courts are not required to interpret domestic provisions consistently with the Merger Directive. The decision also confirmed the conditions that should be met in order for local courts to be bound to interpret local regulations in accordance with EU law.

For more information, please refer to Euro Tax Flash Issue 510.

Compatibility of French tax integration scheme rules with EU freedom of establishment

On May 11, 2023, the CJEU gave its decision in joined cases C-407/22 and C-408/22. The cases concern the compatibility of French tax integration scheme rules with Article 49 of the Treaty on the Functioning of the European Union (TFEU).

Under French tax law, parent companies are allowed to deduct from their net profits the net revenues from holdings that are eligible for the tax regime for parent companies, with the exception of a fixed proportion of 5 percent of costs and expenses. A French parent company that has opted for tax integration with resident companies is entitled to neutralise the add-back of the fixed proportion of costs and expenses for certain eligible dividends, irrespective of whether the dividends were distributed by subsidiaries resident in France or in another Member State. However, that neutralisation was denied as regards dividends from subsidiaries located in another Member State that would have been eligible in a dometsic scenario, where the parent company that owned eligible subsidiaries in France had not elected to form a tax-integrated group with the latter.

Consequently, dividends received by a resident parent company (from eligible resident and non-resident subsidiaries) belonging to a tax-integrated group are deducted in full from its net profit and are therefore fully exempt from corporation tax in France. On the other hand, dividends received by a resident parent company (from eligible resident and non-resident subsidiaries) that is not part of a tax-integrated group are only partially exempt from corporation tax in France because of the 5 percent add-back into its profit. A resident parent company does not have the possibility of opting for the tax integration scheme with its subsidiaries located in other Member States unless it forms a tax-integrated group with at least one of the eligible resident companies.

The Court noted that the effect of such a difference in treatment is that a parent company that is not part of a tax-integrated group and that receives divideds from a subsidiary establsihed in another Member State is excluded from the benefit of the neutralisation. This treatment is liable to make it less attractive for that parent company to exercise its freedom of establishment, which is a restriction on that freedom and precluded by EU law. The Court rejected the argument that the situations of a parent that has opted in for a tax-integrated group and one that has not are not objectively comparable and noted that no justifications

based on an overriding reason in the public interest were brought by the referring court or the French Government.

Infringement Procedures and Court Referrals

Referrals

Case brought before the General Court seeking the annulment of the EU Minimum Tax Directive

On March 15, 2023, an action was brought before the General Court (Case T-143/23 – VF v Council). On the basis of Article 263 TFEU, the applicant seeks the annulment of Council Directive (EU) 2022/2523 (EU Minimum Tax Directive), in so far as:

- Article 17 of that Directive excludes from its scope income from a shipping activity covered by Member States' tonnage tax regimes authorized under State aid rules, other than 'international shipping income' and 'qualified ancillary international shipping income;
- Article 17 applies only if "the constituent entity demonstrates that the strategic or commercial management of all ships concerned is effectively carried on from within the jurisdiction where the constituent entity is located";
- the Directive does not lay down transitional measures for taxpayers that made substantial investments relying on a national tonnage tax regime.

In support of its application for annulment, the applicant brought forward the following claims:

- infringement of the general principle of equal treatment;
- infringement of the general principle of proportionality because the effects of the contested Directive exceed what is necessary to achieve its purpose;
- infringement of the principle of proportionality because of the application of the rules under the Directive to purely domestic situations;
- infringement of the principle of protection of legitimate expectations and legal certainty; and
- infringement of Articles 115 and 107 TFEU.

The action was published in the Official Journal of the European Union on May 8, 2023. For more details, please also refer to the Commission's information note.

State aid

Advocate General opinion on Luxembourg tax rulings related to intra-group financing structures

On May 4, 2023, Advocate General (AG) Juliane Kokott of the Court of Justice of the European Union rendered her opinion in the joined cases C-451/21 P and C-454/21 P, concerning two sets of tax rulings granted by the Luxembourg tax authorities in connection with intra-group financing structures.

The AG concluded that the European Commission (Commission or the EC) and the General Court performed the selectivity analysis based on an incorrect reference framework. The AG also concluded that only manifestly incorrect tax rulings under national law may constitute a selective advantage. As a result, the AG recommends that the Court finds that the EC erred in finding that Luxembourg had granted unlawful State aid to the plaintiff, and consequently, should set aside the judgment of the General Court and annul the related EC decision.

For more details, please refer to Euro Tax Flash Issue 511.

Spanish scheme under the State aid Temporary Crisis and Transition Framework approved

On May 11, 2023, the European Commission approved a EUR 837 million Spanish scheme to support the production of batteries for the industrial chain of electric and connected vehicles to foster the transition to a net-zero economy. The scheme was approved under the State aid Temporary Crisis and Transition Framework (TCTF), that was adopted by the Comission on March 9, 2023, as part of the broader Green Deal Industrial Plan for the Net-Zero Age.

Under the Spanish scheme, which will be partially funded through the Recovery and Resilience Facility ('RRF'), the aid will take the form of direct grants and loans and will be available to companies producing batteries, their essential components and related raw materials.

For more details, please refer to the Commission's press release and Euro Tax Flash Issue 508.

Compatibility of Polish property tax exemption with EU State aid rules

On April 19, 2023, the Polish Supreme Administrative Court referred to the CJEU a question on whether the property tax exemption for railway infrastructure was compatible with the EU State aid rules (case no. III FSK 3/22). Under Polish tax law, in force between 2017 and 2021, real estate – such as land, buildings and other structures, forming part of railway infrastructure and made available to licensed carriers is exempt from property tax.

Whilst initially Polish tax authorities confirmed the exemption, they started to challenge the treatment on the grounds that the property tax exemption constituted unlawful State aid, on the grounds that Poland failed to notify the State aid scheme to the European Commission.

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

EU Institutions

Council of the EU

Agreement on DAC8 compromise text

On May 16, 2023, the Economic and Financial Affairs Council of the EU (ECOFIN) reached agreement on the proposal to extend the Council Directive 2011/16 on Administrative Cooperation (DAC) to cover the exchange of information on crypto-assets, as well as tax rulings for individuals (DAC8). The agreed text is largely in line with the initial proposal issued by the European Commission – see Euro Tax Flash Issue 498.

Key features include:

- *Crypto-assets and e-money*: extending the EU tax transparency rules to cover crypto-assets and e-money. In line with the initial EC proposal, DAC8 would apply to all crypto-assets service providers (CASPs), irrespective of whether they are regulated under the Markets in crypto-assets (MiCA) Regulation[1] or not. As a first step, in-scope CASPs would be required to collect and verify – in line with specific due diligence procedures, information from EU clients. Subsequently, certain information would be reported to the relevant competent authorities. Under a third step, this information would be exchanged by the recipient Member State with the tax authorities of the Member State where the reportable user is tax resident. The rules proposed are largely consistent with the OECD's Crypto-Asset Reporting Framework (CARF)[2] and aligned with the definitions included in the MiCA. For more details on the differences between CARF and DAC8, please refer to the related KPMG Insights piece.
- *Rulings issued to high-net-worth individuals*: extending the automatic exchange of advanced cross-border rulings to cover rulings issued in respect of individuals.
- *Reporting of the tax identification number (TIN):* DAC8 introduces new requirements, and strengthens existing requirements to collect and exchange information on TINs for a number of the reporting obligations introduced by the various versions of DAC.
- *Reporting of cross-border arrangements (DAC6):* Amendments were included to comply with the CJEU decision in case C-694/20 in relation to the obligations of reporting intermediaries which are bound by legal professional privilege (for previous coverage, please refer to Euro Tax Flash Issue 497).
- *Other:* extending the scope of the mandatory automatic exchange of information between Member States to cover non-custodial dividend income.

Note that a common system of minimum penalties for serious non-compliance offences, which was included in the earlier proposal by the European Commission and that would have been applicable both to existing and proposed disclosure requirements was removed in the agreed compromise text.

The Directive will be formally adopted once the European Parliament have given their non-binding opinion. The Parliament's Committee on Economic and Monetary Affairs (ECON) has tabled several amendments to the text. The proposed changes are tentatively scheduled to be adopted by ECON on May 30, 2023, and the

[1] The MiCA regulation, adopted by the Council on May 17, 2023, regulates the issuance and trading of crypto-assets within the EU.

[2] Approved in August 2022, the CARF is designed as a global initiative that aims to ensure transparency with respect to crypto-asset transactions and contains model rules that can be transposed into domestic legislation, as well as commentary to help administrators with implementation. For more details please refer to a tax alert prepared by KPMG in the UK.

file is expected to be voted in the Parliament's plenary sitting on July 10, 2023. The Direcive will be publsihed in the Official Journal of the EU after formal sign off by the Council.

With the exception of the TIN related provisions above, Member States would need to transpose the Directive by December 31, 2025. The rules would become applicable as of January 1, 2026 (with some exceptions).

European Commission

Updated work program until September 2023

On May 17, 2023, the European Commission published its updated work program for the period from May 24, 2023 to September 12, 2023. Key takeaways from a direct taxation perspective include:

- the launch of the Commission's proposal for tackling the role of enablers involved in facilitating tax evasion and aggressive tax planning in the European Union (SAFE) – previously scheduled for June 7, 2023 – was removed from the Commission's work agenda (for previous coverage, please refer to E-News Issue 169);
- the launch of the Commission's proposal for new EU common system for the avoidance of double taxation and prevention of tax abuse in the area of withholding taxes (FASTER) – previously scheduled for June 7, 2023 – is now targeted for June 28, 2023;
- the launch of the Commission's proposal for ""Business in Europe: Framework for Income Taxation (BEFIT)" has been scheduled for September 12, 2023.

Public consultation summary report on BEFIT initiative published

On May 8, 2023, the European Commission published a report providing a summary of the online contributions made by stakeholders on the EC's questionnaire on the design of BEFIT. For previous coverage, please refer to E-News Issue 170.

Key takeaways in relation to the proposed BEFIT building blocks include:

Scope

- A majority of survey respondents consider it as very effective or effective to have a threshold for mandatory application with a possibility for groups/companies (including SMEs) below the threshold to opt in.
- Most respondents considered a threshold for groups with over EUR 750 million of consolidated group revenues as effective or very effective.

Tax Base

- Most of the survey respondents believe that for calculating the tax base making limited adjustments to a company's financial accounts is effective or very effective.
- Favored adjustments include those related to tax credits on income already taxed outside the EU (other than exempt income), non-deductibility of corporate taxes and similar profit-based taxes as well as anti-abuse rules on common issues such as a general anti abuse rule (GAAR), controlled foreign company (CFC) rules, interest deduction limitation and hybrid mismatches.
- A majority agreed on including cross border loss relief provisions.

Allocation of taxable profits

- A majority agreed or partly agreed with the idea of a formulary apportionment.
- Over 40 percent of the respondents agreed or partly agreed with the approach of taking intangible assets into account.
- Many respondents to the survey do not support a higher weighting factor for sales by destination in the formula.

Allocation of profits to related entities outside the BEFIT group

- Respondents favored keeping the current approach to the application of the transfer pricing rules while underlining that simplifications should be envisaged.
- The majority of respondents agreed or partly agreed with the idea of streamlining how tax authorities assess the risk of certain transactions in accordance with the OECD's arm's length principle.

Administration

- Taxpayers and administrations expressed mixed views as to whether the BEFIT initiative is suitable to achieve the objective of reducing compliance and administrative costs.
- A majority considered that filing simplifications would be the most useful in terms of reducing the compliance and administrative burden.

The planned adoption by the European Commission of a legislative proposal is expected for the third quarter of 2023.

Important to note is that the summary report appears to have taken into account only survey responses and does not reflect input provided through written submissions. For more information on KPMG's submission, please refer to Euro Tax Flash Issue 504.

European Parliament

Resolution proposing new taxes as own resources adopted

On May 10, 2023, Members of the European Parliament (MEPs) adopted a resolution outlining their position on the revenue side of the EU budget and new "own sources" for same. The resolution proposes a variety of new sources of income, including:

Corporate taxation (BEFIT)

- The resolution calls on the Commission to propose a common corporate tax framework, based on a common tax base and the allocation of profits between Member States by using formulary apportionment (BEFIT).
- The resolution notes that this framework should provide for a scope that is broader than envisioned under the OECD Pillar One initiative and should be used as a new source for the EU budget.

Financial Transaction Tax (FTT) and related measures

- The resolution calls on the Commission and the Member States involved in the ongoing enhanced cooperation process to reach an agreement on the FTT before the end of June 2023. The resolution considers an EU-wide FTT to have the potential to raise high revenues that can be used to repay the NextGenerationEU debt and fund the EU's priorities.
- The resolutions calls on the Commission to assess the feasibility of an excise duty on the repurchase

of shares by corporations to generate additional EU revenue, while disincentivizing foreign shareholders engaging in this practice.

- As an additional option to raise EU revenue, the resolutions calls on the Commission to evaluate a common and standardized withholding tax framework.

Tax on cryptocurrencies

- The resolution suggests the introduction of an EU-wide tax on crypto-assets that would accrue to the EU budget.
- In this context, the resolution calls on the Commission to assess the impact of different taxation options (e.g. tax on capital gains resulting from crypto-asset activities, tax on crypto-asset transactions or tax on the mining and trading of crypto-assets).

EU Digital Levy and related measures

- The resolution reiterates that a legislative proposal should be submitted for a digital levy or similar measure, which can serve to generate revenues by 2026 where an agreement at international level on a Pillar One solution is not reached by end of 2023.
- The resolutions asks the Commission to also consider other sources of revenue from large corporations that operate in the EU where the Pillar One negotiations are not concluded in a reasonable time frame.
- The resolution welcomes the debate over the contribution of large digital content providers to EU network costs and calls on the Commission to identify and assess (financial) measures to optimize the data traffic in the EU with a view to limit the carbon footprint thereof.

EU 'fair border mechanism'

- The resolution calls on the Commission to perform an impact assessment of a 'fair border mechanism', which would require companies importing goods into the EU to pay workers employed in non-EU countries in their global supply chain a daily wage that is above the relevant poverty line. Where wages in non-EU countries are below a fixed threshold, companies would have to pay a charge amounting to the difference between this threshold and the actual remuneration of their workers.
- According to the resolution, the proceeds of those charges should accrue to the EU budget.

It is now for the European Commission to put forward its proposal for a second basket of own resources, expected later this year.

For more information, please refer to the press release of the European Parliament and E-News Issue 176.

OECD and other International Institutions

Organisation for Economic Cooperation and Development – OECD

2023 Progress Report on Tax Co-operation for the 21st Century

On May 11, 2023, the OECD published the 2023 progress report on tax cooperation in preparation for the May 2023 meeting of the G7 Finance Ministers and Central Bank Governors in Japan.

The report focuses on the solutions for a simple, collaborative and digital administration of common international tax rules as outlined in the 2022 progress report (for more details, please refer to E-News Issue 155) and describes how these principles shall be embedded in the OECD's two-pillar solution as well as other reporting regimes (e.g. the Common Reporting Standard (CRS) or the Crypto Asset Reporting Framework (CARF)).

In relation to the two-pillar solution, key takeaways from the report include:

- *One stop shop approach:* A standardized information return (GloBE Information Return – GIR) shall be filed centrally by the Ultimate Parent Entity (UPE) or a designated filing entity. Such single, comprehensive return shall be shared with the relevant tax administrations to ensure that each tax administration receives the information for assessment. Same principles shall apply for the Amount A tax return and the common documentation package (Pillar One).
- *Digital communication*: It is envisioned to develop appropriate mechanisms to allow tax administrations to automatically exchange GloBE information, including a framework of bilateral or multilateral competent authority agreements and IT-solutions (in particular a dedicated XML schema). Similar infrastructure shall be provided for the information exchange in relation to Amount A.
- *Collaborative approach*: Under Amount A, it is envisioned to have a scope certainty review, advance certainty review and comprehensive certainty review performed by a review panel comprised of representatives of affected parties that is coordinated by the lead tax administration (typically the tax administration of the UPE). Throughout the review process an active engagement with groups is foreseen (e.g. in the form of multilateral meetings or calls with representatives from the group). Offering advance certainty in a collaborative manner is also being considered in relation to applying the GloBE rules.
- *Risk assessment:* A centralized review in the certainty process shall result in a common and synchronized advance risk assessment. In addition, it is being considered to develop a coordinated framework for information requests and simultaneous audits based on risks identified in the submitted GIR information.
- *Dispute resolution*: Options for resolution of disputes have been given consideration in previous consultation documents for Amount A and the GloBE rules to address the fact that tax administration will not always take the same position despite the existence of dispute prevention mechanisms.

For more information, please refer to E-News Issue 163 (Public consultation on administration and tax certainty aspects of Amount A) and E-News Issue 168 (Public consultation documents on the GloBE Information Return and Tax Certainty for the GloBE Rules).

Local Law and Regulations

Czech Republic

Public consultation launched on a legislative proposal to implement minimum taxation (Pillar Two)

On May 15, 2023, the Czech Ministry of Finance launched a consultation on a draft bill to implement the OECD's Pillar Two Model Rules as set out under the EU Minimum Tax Directive (2022/2523).

The proposal closely follows the text of the EU Directive (for more details, please refer to Euro Tax Flash Issue 500) and also incorporates certain items that were subsequently released by the OECD Inclusive Framework. Key features of the proposal include:

General

- The Domestic Minimum Top-up Tax (DMTT) and the Income Inclusion Rule (IIR) would apply for financial years starting on or after December 31, 2023.
- The Undertaxed Profits Rule (UTPR) would generally be applicable one year later, i.e. for financial year starting on or after December 31, 2024. However, the UTPR would apply for financial years starting on or after December 31, 2023 where the UPE of the group is located in an EU Member States that opted for the IIR and UTPR deferral (Article 50 of the Directive).
- The draft takes into account the OECD Commentary and elements of the GloBE Implementation Framework (e.g. transitional safe harbors).

DMTT

- The Czech DMTT would generally be calculated in accordance with the general GloBE rules. However, foreign covered taxes (e.g. CFC taxes) that would be allocated to Czech constituent entities under the regular GloBE rules, need to be excluded for Czech DMTT purposes.
- The QDMTT definition provides that the income or loss for the jurisdiction can be computed using an acceptable financial accounting standard or an authorised financial accounting standard that differs from the one used in the Consolidated Financial Statements provided that it is adjusted to prevent any material competitive distortions.
- The draft provides for a QDMTT safe harbor rule. The QDMTT safe harbor would require a QDMTT to be computed in accordance with the UPE's acceptable financial accounting standard or IFRS as adopted by the EU.

Administration

- Taypayers would be required to register for the top-up tax no later than 15 days from the date on which they became liable for same.
- For DMTT purposes, the taxpayer would be required to submit a self-assessment tax return as well as a GloBE Information Return (GIR) no later than 10 months after the end of the tax period.
- For IIR and UTPR purposes, the taxpayer would need to file a GIR no later than 15 months after the last day of the reporting fiscal year. In addition, the taxpayer would need to submit a self-assessment tax return no later than 22 months after the end of the tax period.
- It would not be possible to extend the deadline for filing the GIR and tax returns.

- Failures to comply with the administration of the GloBE rules can be sanctioned with a fine of up to CZK 1,500,000 (approximately EUR 63,400).

Comments on the draft bill are requested by June 12, 2023.

Ireland

Updated guidelines for CFC rules and defensive measures against non-cooperative jurisdictions

On March 16, 2023, the Irish Revenue released eBrief No. 072/23, which refers to amendments introduced by Finance Act 2022 concerning defensive measures aimed at countries identified by the EU as non-cooperative. The changes are reflected in Chapter 11 of the Tax and Duty Manual regarding the Controlled Foreign Company (CFC) Rules (Part 35b-01-01).

Key features of same are:

- a limit on the tax exemptions available to Irish resident companies that have a CFC in a listed territory;
- definition of "listed territory" for the purposes of these measures making reference to the EU list of non-cooperative jurisdictions;
- clarification that defensive measures will apply for a jurisdiction where the jurisdiction was on the list for the prior year (e.g. defensive measures will apply to CFCs, resident in jurisdictions that were added to the list in 2022, for accounting periods commencing on or after January 1, 2023);
- requirement for companies to disclose various transactions with persons in a listed territory in their Irish corporate tax return, such as transactions involving interest / royalty payments and dividends.

For more information on defensive measures adopted by EU Member States against non-cooperative jurisdictions, please refer to KPMG's dedicated website.

Kenya

Finance Bill 2023 includes proposal for tax on digital assets and content creation

On May 4, 2023, the Kenyan government published the Finance Bill 2023. Key direct tax proposals include:

- The Bill proposed the introduction of a 3 percent digital asset tax (DAT) that would be paid on income derived from the transfer or exchange of digital assets (e.g. cryptocurrencies, non-fungible tokens, and other similar tokens) with effect from September 1, 2023. Non-resident owners of the platform through which digital assets are exchanged or transferred will be required to register under the simplified tax regime, similar to the existing regime under Digital Services Tax.
- The Bill proposes to reduce the corporate tax rate applicable to branches from 37.5 percent to 30 percent.
- The Bill proposes to charge WHT at 15 percent on digital content monetization. This includes offering payment for entertainment, social, literal, artistic, educational or any other material electronically through any medium or channel with effect from July 1, 2023.

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

Lithuania

Solidarity contribution on banking sector adopted

On May 16, 2023, legislation was published in the Official Gazette of Lithuania that introduces a new temporary solidarity contribution on surplus profits generated by companies in the banking sector. Key features of the measure include:

- the contribution will apply to banks and credit institutions operating in Lithuania;
- the contribution will be levied at a rate of 60 percent on surplus net interest income generated in 2023 and 2024;
- surplus net interest income is 50 percent of the net interest income (interest income minus interest expenses), which exceeds the average net interest income of the previous four years (i.e. 2018 to 2021 for 2023 and 2019 to 2022 for 2024);
- the contribution will be reported annually until the 15th day of the sixth month following the end of the taxable year;
- advance contribution will be reported and paid quarterly.

The measure complements the previously introduced solidarity contribution on surplus profits generated by companies in the oil, gas, coal, and refinery industries (for previous coverage, please refer to E-News Issue 169).

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

Netherlands

DAC6 guidelines updated

On April 28, 2023, new guidance on the Dutch mandatory disclosure rules (DAC6) was published, replacing an earlier version from 2020. Key updated clarifications include:

- *Arrangement:* The guidance clarifies that an adjustment to an existing arrangement can also lead to a new notifiable cross-border arrangement. This may be the case, for example, if the participants in the arrangement (or their legal form or tax residence) changes or if the form of financing changes.
- *Participant:* To qualify as a participant, a person must have a certain degree of involvement in the arrangement. This involvement can be evidenced, for example, by making a board decision, or being subject to accounting or tax consequences. The guidance also notes that there may also be a cross-border arrangement with one participant, giving the example of a transfer between a head office and its permanent establishment abroad.
- *Intermediary:* The guidance describes activities for which a person does not qualify as an (secondary) intermediary (e.g., preparing and filing a tax return, or preparing or updating transfer pricing documentation). In principle, these activities do not lead to a notification obligation.
- *Main benefit test:* The prior guidance stated that if the main advantage of an arrangement is obtaining a tax benefit that is fully in line with the intention of the legislator (i.e. with the policy intent), the main benefit test is not met. The new guidance removed that provision and states that the fact that a tax benefit is in line with the intention of the relevant scheme can be taken into account for the main benefit test, but it is not determinative.

- *Hallmarks:* The guidance includes new examples of the conversion of income into assets, gifts or other income categories that are taxed at a lower rate, as well as relating to the cross-border transfer of functions and/or risk and/or assets within the group when the estimated earnings before interest and taxes (EBIT) of the transferor during the three-year period after the transfer is reduced by at least 50 percent .

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

2023 Spring Memorandum published

On April 28, 2023, the Dutch Spring Memorandum 2023 was published, which highlights various proposed tax changes.

This includes two measures to tackle dividend stripping more effectively from January 1, 2024, i.e. the laying down in law of a registration date and the adjustment of the division of the burden of proof in order to improve the evidentiary position of the tax inspector.

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

Poland

Reporting of domestic arrangements to be reinstated in summer

On May 2, 2023, the Polish Minister of Health published a draft decree revoking the state of health emergency relating to the coronavirus (COVID-19) pandemic effective May 16, 2023. In this context, he announced the intention to end as of July 1, 2023 the deferral that has been in place since March 2020 with respect to reporting so called “domestic” arrangements (i.e. both domestic as well as cross-border arrangements that are reportable based on Polish specific hallmarks / rules).

According to the announcement, a full reporting obligation should be reinstated from approximately beginning of August. The reporting obligation would apply also to historic “domestic” arrangements (i.e. relating to the whole deferral period starting from March 2020).

For more information, please refer to a KPMG TaxNewsFlash.

Romania

Amendments in respect of the solidarity contribution on the fossil sector

On May 12, 2023, the Romanian President signed legislative amendments regarding the calculation of the solidarity contribution that was introduced on December 28, 2022 (for more details, please refer to E-News Issue 168).

The amendment introduces a new solidarity contribution applicable to companies active in the oil extraction and oil refinery sectors that are outside the scope of the solidarity contribution already in force (i.e. companies active in these sectors, but deriving revenues from such activities that represent less than 75 percent of total turnover). The additional solidarity contribution will be computed as a flat fee of RON 350 (approximately EUR 71) per ton of refined oil.

The amendments will take effect three days after that publication in the Official Gazette.

Slovakia

Increase of solidarity contribution on fossil sector

On March 22, 2023, the government in Slovakia published legislative amendments to increase the solidarity contribution on taxable profits generated by companies in the oil, gas, coal, and refinery industries. The solidarity contribution was introduced on December 22, 2022 and was prompted by the EU Regulation on an emergency intervention to address high energy prices. The solidarity contribution rate is increased from the original 55 percent to 70 precent with effect from May 1, 2023 for tax periods beginning in 2023.

For more details, please refer to E-News Issue 168.

South Africa

SARS publishes draft legislative amendments for renewable energy tax incentives

On April 21, 2023, the South Africa Revenue Service (SARS) launched a public consultation on draft legislative amendments regarding incentives announced in the 2023 budget.

Key direct taxation element of same includes the expansion of the renewable energy tax incentive whereby taxpayers who are conducting businesses will be able to claim a 125 percent deduction for qualifying capital expenditure on qualifying renewable energy projects, brought into use for the first time on or after March 1, 2023 and before March 1, 2025.

Comments on the draft law were requested by May 15, 2023. For further information, please see the draft explanatory memorandum on the draft law and the press release by the National Treasury.

United Kingdom

Proposed amendments to Finance Bill 2023 regarding legislation to implement minimum taxation (Pillar Two)

On April 14, 2023, the UK Government published a number of amendments to Finance Bill 2023 in respect of the draft Pillar Two legislation (see E-News Issue 174 for previous coverage). Key features of the amendments include:

- Amendment to Clause 174 to remove an unnecessary step in the calculation of covered taxes for the purposes of the multinational top-up tax, to ensure the correct allocation of covered taxes in relation to permanent establishments, hybrid entities, controlled foreign companies and distributions.
- Amendment to Clause 223 to prevent a double restriction of certain covered taxes in relation to investment entities and so ensure the correct allocation of covered taxes in relation to such entities.
- Various amendments to the transitional provisions (i.e. Schedule 16) to (i) provide clarification regarding the application of the anti-avoidance provisions in relation to intra-group transfers, specifically highlighting that the provisions will apply to all transfers from transferors until they are fully subject to Pillar Two rules, and (ii) to clarify the position in relation to the figures which have to be used for the purpose of the transitional safe harbor (i.e. the figures must come from a qualifying country-by-country report).

Proposals to simplify and modernize tax system and enhance compliance

On April 27, 2023, the UK Government published a series of tax policy and consultation documents as part of its work to deliver a modern, simple and fairer tax system. Key direct taxation announcements include:

- *International tax changes:* a consultation will be issued in May 2023 with a view to simplifying and updating legislation in relation to diverted profits tax, transfer pricing legislation and permanent establishments.
- *Reserved Investor Fund (RIF):* a consultation was launched regarding the introduction of a RIF, which would be structured as an unauthorised co-ownership contractual scheme and is expected to be treated as a 'transparent' fund and the main tax features are expected to be based on the Authorised Contractual Scheme tax regime. Comments are requested by June 9, 2023.
- *Decentralised Finance Lending:* a consultation was launched regarding the tax treatment of crypto-asset transactions in Decentralised Finance lending and staking with a view to creating a taxation regime that better aligns with the underlying economic substance of such transactions and reducing the administrative burden on taxpayers. Comments are requested by June 22, 2023.

For more information, please see a report prepared by KPMG in the UK in respect of same.

Local Courts

Denmark

Decision on beneficial ownership in relation to interest payments (Interest and Royalties Directive)

On May 4, 2023, the Danish Supreme Court (Supreme Court) issued a ruling in two cases on the withholding tax exemption under the Interest and Royalties Directive (2003/49/EC). The ruling relates to cases N Luxembourg 1 (C-115/16) and X Denmark (C-118/16), two of the four joined Danish cases on the concept of beneficial ownership in respect of cross-border interest payments. All cases involved back-to-back financing transactions, under which a Danish resident subsidiary was financed by its non-resident parent company via a series of loans granted to intermediary holding companies resident in another EU Member State.

In both cases, the Danish company had requested an exemption from the Danish withholding tax levied on the payments made to the EU company, based on the Interest and Royalties Directive. The Danish tax authorities denied the exemption, arguing that the company receiving the income was a conduit structure and could not be considered the beneficial owner of the payment.

The cases made their way through the Danish courts and were eventually referred to the CJEU. The CJEU concluded on February 26, 2019 that it is for the referring courts to assess whether the arrangements under review constitute an abuse under EU law, taking into account in particular the existence of conduit companies (for more details, please refer to Euro Tax Flash Issue 396).

In both cases, the Supreme Court found that the direct recipient of the payment was not the beneficial owner of the interest. Moreover, the Supreme Court was not able to identify the beneficial owner due to the limited proof brought by the taxpayers.

The Supreme Court had previously ruled in the two Danish cases – T Denmark (C-116/16) and Y Denmark (C-117/16) on the withholding tax exemption benefit under the EU Parent-Subsidiary Directive. See E-News Issue 169 for more details.

France

Suspension of DAC6 notification obligation for LPP intermediaries

On April 14, 2023, the French Supreme Administrative Court (the Court) published a decision in relation to the notification requirements for intermediaries, who are subject to legal professional privilege, to notify other intermediaries of their reporting obligation under DAC6.

The decision of the Conseil d'État in June 2021 included the referral to the CJEU in relation to the following questions:

- Does Article 8ab(5) of DAC6 infringe the right to a fair hearing guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in so far as attorneys assisting clients in a legal proceeding are not excluded from the scope of filing obligations; and
- Does Article 8ab(5) of DAC6 infringe the rights in respect of correspondence and private life guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in so far as attorneys evaluating the legal situation of their clients are not excluded from the scope of filing obligations?

The referral to the Court of Justice of the European Union (CJEU) regarding the French case was removed from the CJEU registry following the CJEU's decision of December 8, 2022 (for more details, please refer to Euro Tax Flash Issue 497) – see E-News Issue 175.

The Court confirmed the CJEU decision and held that the domestic provisions implementing Article 8ab(5) of DAC6 are invalid in so far as they require intermediaries subject to LPP to notify other intermediaries who are not their clients. This obligation is considered to infringe upon the taxpayers' right to confidentiality with their lawyers (to which they are entitled based on Article 7 of the Charter of Fundamental Rights of the European Union and article 8 of the European Convention on Human Rights).

However, the Court did not invalidate the requirement of LPP intermediaries to report cross-border arrangements where a client's consent has been obtained (i.e. consent from a client should release lawyers from their LPP, and therefore it is justified in light of the objects of general interest).

Italy

Withholding tax on dividends paid to US collective investment funds breaches EU law

On April 17, 2023, the first-tier tax court of Pescara (the Court) issued a series of decisions confirming that the Italian tax treatment of dividends paid to six US mutual investment funds is discriminatory and breaches EU law.

The Court held that the funds were entitled to a refund of the difference between the rate of 15 percent (or 27 percent) and the Italian substitute tax, that would have applied to Italian investment funds on the annual increase in net asset value in that period. The Court stated that the differing treatment of US investment funds and Italian pension funds may hinder investments, thus resulting in a restriction on the free movement of capital.

These decisions are consistent with previous Supreme Court decisions finding in favor of non-EU collective investment funds (see E-News Issue 158).

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

KPMG Insights

A new golden age for renewable energy

Wind power production is a fast-growing business both onshore and offshore. It is expected that production will continue to grow in the future, and increase its share of the global energy mix, as countries all over the world seek to reduce emissions from fossil energy production.

In most countries wind power production is subject to ordinary Corporate Income Tax (CIT) varying from 12.5 percent (Ireland) to up to 40 percent (India). Most countries levy CIT on wind power production in the area between 20 percent and 25 percent.

The Norwegian Government has recently proposed to introduce a resource rent tax on onshore wind power from 2023 at a rate of 40 percent, bringing the effective tax rate to approximately 62 percent.

On the contrary, several countries have introduced incentive schemes such as accelerated tax depreciation for wind power assets, in addition to other grants and subsidies. The main incentive behind such rules is to increase renewable energy production and to speed up a transition from fossil energy to green power production and illustrates commitments to achieve net zero emission goals.

In light of the current increased power and energy prices, several countries have recently introduced windfall taxes also on renewable power production. Compensation by way of local taxes is a meant to secure support from local municipalities affected by construction and operation of wind farms. This is commonly obtained through levy of property tax.

KPMG's publication, Taxation of Wind Power, provides an overview of the taxation in 40 countries at the forefront of wind power investment and use. All major wind power producers are included, as well as a few countries that have the potential to become large producers through investments in areas such as offshore wind.

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

KPMG's EU Tax Centre team

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

Ana Puşcaş
Manager
KPMG's EU Tax Centre

Marco Dietrich
Manager
KPMG's EU Tax Centre

Jack Cannon
Manager
KPMG's EU Tax Centre

Nevena Arar
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

Paul Suchar
Partner
KPMG in Croatia
E: psuchar@kpmg.com

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

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

Elli Ampatzi
Senior Manager
KPMG in Greece
E: eampatzi@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

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

Ladislav Malusek

Steve Austwick

Julio Cesar García

Partner
KPMG in the Czech Republic
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

Partner
KPMG in Latvia
E: saustwick@kpmg.com

Birute Petrauskaite
Partner
KPMG in Lithuania
E: bpetrauskaite@kpmg.com

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

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

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

Partner
KPMG in Spain
E: juliocesargarcia@kpmg.es

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

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

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

Key links

- Visit our website for earlier editions

Privacy | Legal

You have received this message from KPMG International Limited and its related entities in collaboration with the EU Tax Centre. Its content should be viewed only as a general guide and should not be relied on without consulting your local KPMG tax adviser for the specific application of a country's tax rules to your own situation.

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

If you wish to unsubscribe from Euro Tax Flash mailing list, please e-mail KPMG's EU Tax Centre mailbox (kpmgeutaxcentre@kpmg.com) with "Unsubscribe Euro Tax Flash" as the subject line. For non-KPMG parties – please indicate in the message field your name, company and country, as well as the name of your local KPMG contact.

If you have any questions, please send an e-mail to kpmgeutaxcentre@kpmg.com. KPMG's EU Tax Centre, Laan van Langerhuize 9, 1186 DS Amstelveen, Netherlands

© 2023 Copyright owned by one or more of the KPMG International entities. KPMG International entities provide no services to clients. All rights reserved.

KPMG refers to the global organization or to one or more of the member firms of KPMG International Limited ("KPMG International"), each of which is a separate legal entity. KPMG International Limited is a private English company limited by guarantee and does not provide services to clients. For more detail about our structure please visit home.kpmg/governance.

The KPMG name and logo are trademarks used under license by the independent member firms of the KPMG global organization.