Latest CJEU, EFTA and ECHR

Infringement Procedures and Court Referrals

EU Institutions

OECD and other International Institutions

Local Law and Regulations

Local Courts

KPMG Insights

E-News from the EU Tax Centre

Issue 185 – October 23, 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:** Portugal's personal income tax rules on interest paid by foreign banks incompatible with EU Law
- **Council of the EU:** DAC8 formally adopted and October 2023 updates to the EU list of non-cooperative jurisdictions
- **OECD:** Release of Amount A MLC (Pillar One) and agreement on MLC for Subject to Tax Rule
- **Croatia:** Increased WHT rate on payments to non-cooperative jurisdictions and other tax law amendments
- **Hungary:** Legislative proposal to implement minimum taxation under Pillar Two
- **Ireland:** 2023 Finance bill measures (including Pillar Two legislation)
- **Romania:** Legislative proposal to implement minimum taxation under Pillar Two
- **France (court decision):** Ruling on the constitutionality of withholding tax on dividends paid to non-resident loss-making companies
- **Switzerland (court decision):** Decision on the relevance of OECD transfer pricing guidelines
- **Ukraine (court decision):** Decision regarding the beneficial ownership concept for interest payments (treaty benefits)

Latest CJEU, EFTA and ECHR

CJEU

Portugal's personal income tax rules on interest paid by foreign banks incompatible with EU Law

On October 12, 2023, the Court of Justice of the European Union (the CJEU or the Court) issued a decision in case C-312/22. The case concerns the compatibility of the Portuguese individual income tax rules on interest income with EU law.

The plaintiff was a Portuguese individual who received in 2005 interest income from bonds and debt instruments paid by a Swiss bank. Based on the personal income tax rules applicable in Portugal at that time, the interest income was aggregated in the overall taxable income derived by the plaintiff and subject to tax at a progressive rate of 40 percent. On the other hand, interest income paid by Portuguese banks or through a Portuguese intermediary was subject to a final withholding tax at a rate of 20 percent.

The plaintiff challenged the applicability of the 40 percent progressive tax rate, claiming it represented a restriction on the free movement of capital as taxpayers resident in Portugal are subject to a different tax burden depending on whether the interest income received was paid by Portuguese entities or by entities from third countries.. The case eventually reached the Supreme Administrative Court, which sought a preliminary ruling from the CJEU on whether the rules under dispute were compliant with EU law.

The CJEU gave its decision in light of the free movement of capital. The Court noted that the difference in treatment described above placed interest income from bonds and debt instruments issued in a state other than Portugal at a disadvantage compared to interest income from similar instruments issued in Portugal. The Court then recalled its settled case-law under which such differential treatment, based on the place of investment of the capital, discourages taxpayers in Portugal from investing outside the country, thereby impeding the free movement of capital.

As regards the comparability of the situations, the Court noted that, under Portuguese tax rules, a taxpayer resident in Portugal receiving interest income from investments made in another country is just as liable to tax as a Portuguese taxpayer who receives income from similar investments made domestically. In the Court's view, the difference in treatment (higher progressive personal income tax as compared to lower final withholding tax) does not reflect a difference in the situation of the taxpayers concerned as regards personal income tax. Consequently, the CJEU concluded that the disparity in treatment imposed by the rules under dispute concerned objectively comparable situations.

Based on the above and noting that no further justifications based on an overriding reason in the public interest were brought by the referring court or the Portuguese Government, the CJEU held that the disputed legislation is contrary to EU law.

Infringement Procedures and CJEU Referrals

CJEU Referrals

CJEU referral on the Portuguese stamp duty for financial transactions under a cash pooling agreement

On May 24, 2023, the Portuguese Supreme Administrative Court made a reference to the CJEU concerning the compatibility of the Portuguese stamp duty levied on short-term cash transactions where the borrower is a non-resident entity. The case is C-420/23 and the plaintiff is a Portuguese subsidiary of a multinational car parts manufacturing group.

Under Portuguese rules, short-term cash transactions are exempt from stamp duty if the borrower is a company tax resident in Portugal and the lender is tax resident either in Portugal or in the EU. However, stamp duty is levied for transactions where the borrower is tax resident in an EU Member State and the lender is tax resident in Portugal.

The plaintiff entered into a cash-pooling agreement with several other group companies, which were tax residents in other EU Member States. As a result of this cash-pooling arrangement, the plaintiff occasionally lent its surplus funds to certain companies within the agreement, that were EU residents. After a tax audit, the Portuguese tax authorities asserted that these transactions fell under Portuguese stamp duty rules and should be subject to taxation. The plaintiff contested this assessment, leading to various court proceedings, ultimately reaching the Portuguese Supreme Administrative Court. The court referred the case to the CJEU to determine the compatibility of the disputed rules with the principle of non-discrimination and the free movement of capital.

Infringements

European Commission closes infringement procedures regarding DAC7 transposition

On October 18, 2023, the European Commission (the EC or the Commission) decided to close infringement procedures against four Member States regarding the failure to notify (or only partially notify) national measures transposing Council Directive (EU) 2021/514 (DAC7) into domestic legislation. These Member States are Italy, Lithuania, Luxembourg and Romania.

The EC had previously sent letters of formal notice to several countries on this topic (see E-News Issue 170). Belgium, Greece, Spain, Cyprus, Poland and Portugal also received reasoned opinions – the second step of the infringement procedures, for the same failure (see E-News Issue 181).

EU Institutions

Council of the EU

DAC8 formally adopted

On October 17, 2023, the Council of the EU formally adopted a Directive amending Directive 2011/16/EU on administrative cooperation in the area of taxation (DAC8).

The Directive introduces the exchange of information on crypto-assets, as well as of tax rulings for individuals and provides for certain additional amendments to other elements of the DAC (including disclosure requirements for cross-border arrangements). The Council had previously reached a consensus on the Directive in May 2023, but the European Parliament's non-binding opinion, adopted in September, was required for the Directive to be formaly adopted. For previous coverage, please refer to Euro Tax Flash Issue 512 and E-News Issue 183.

The final text of the Directive will be published in the Official Journal of the EU and will enter into force in the 20 days following its publication. The agreed Directive requires Member States to transpose the rules into domestic law by December 31, 2025. The rules would become applicable as of January 1, 2026 (with some exceptions).

For more information, please also refer to the Council press release.

October 2023 updates to the EU list of non-cooperative jurisdictions

On October 17, 2023, the ECOFIN Council adopted conclusions on the EU list of non-cooperative jurisdictions (Annex I) and the state of play with respect to commitments taken by cooperative jurisdictions to implement tax good governance principles (Annex II – so called "grey list").

The Council agreed to add Antigua and Barbuda to the list of non-cooperative jurisdictions (Annex I). In addition, Belize and the Seychelles were moved from the grey list (Annex II) to Annex I. While the British Virgin Islands and Costa Rica were moved from Annex I to Annex II, the Marshall Islands were removed completely from the EU list.

Following this latest revision, the EU list of non-cooperative jurisdictions therefore includes the following sixteen jurisdictions: American Samoa, Anguilla, Antigua and Barbuda, the Bahamas, Belize, Fiji, Guam, Palau, Panama, the Russian Federation, Samoa, the Seychelles, Trinidad and Tobago, Turks and Caicos Islands, the US Virgin Islands and Vanuatu.

In addition to the movements between Annex I and Annex II, the Council agreed to remove four jurisdictions from the grey list, as they had fulfilled their previous commitments (Jordan, Montserrat, Qatar and Thailand). According to the Code of Conduct Group (CoCG) report to the Council, the CoCG decided against adding Singapore to Annex II after the country adopted amendments to its foreign source income exemption regime (for more details, please refer to a KPMG Tax News Flash).

As a result, the grey list now includes the following fourteen jurisdictions: Albania, Armenia, Aruba, Botswana, the British Virgin Islands, Costa Rica, Curaçao, Dominica, Eswatini, Hong Kong (SAR), China, Israel, Malaysia, Türkiye and Vietnam.

For more information, please refer to Euro Tax Flash Issue 526.

European Commission

2024 Commission Work Programme released

On October 17, 2023, the European Commission released its 2024 Commission Work Programme. Key takeaways from a direct tax perspective include:

- The Work Programme does not include any dates for new direct tax (or related reporting) initiatives.
- Intention to reach agreement between EU Member States in respect of the Commission' Directive proposal to prevent the misuse of shell entities for tax purposes (Unshell) and the Commission's Directive proposal for a new EU common system for the avoidance of double taxation and prevention of tax abuse in the area of withholding taxes (FASTER),
- Advance the work on the Commission's Directive proposals for Business in Europe: Framework for Income Taxation (BEFIT), on Transfer Pricing and a new Head Office Tax system.

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

OECD and other International Institutions and Research Centers

Organisation for Economic Cooperation and Development – OECD

Release of Amount A MLC (Pillar One)

On October 11, 2023, the OECD released the text of a new Multilateral Convention to Implement Amount A of Pillar One (MLC) to reallocate profits of multinational enterprises to market jurisdictions. Key elements include:

- Amount A applies to MNEs with global revenues above EUR 20 billion and a pre-tax profit margin greater than 10 percent.
- Amount A reallocates 25 percent of the profit in excess of a 10 percent profit threshold to market jurisdictions (defined as the jurisdiction where the end-user is located).
- Under the so-called Marketing and Distribution Safe Harbour the allocation is adjusted where the market jurisdiction already taxes a portion of the profit.
- A formula identifies jurisdiction(s) obliged to relieve double taxation through either the exemption method or a foreign tax credit.
- The MLC provides that certain withholding taxes (including taxes withheld on interest, royalties and technical fees) are included in the Amount A profit determination and can reduce the profits allocated to a market jurisdiction under Amount A.
- The MLC includes a list of local Digital Service Taxes and relevant similar measures that would need to be removed and outlines criteria to prevent the introduction of such measures in the future.

Importantly, it is noted that the MLC reflects the current consensus among the Inclusive Framework (IF) members and that work needs to continue to reach agreement on specific outstanding areas (e.g. on the treatment of withholding taxes). Once the MLC has been finalized, it will be opened for signature and would enter into force once it has been ratified by at least 30 countries accounting for at least 60 percent of the ultimate parent entities (UPEs) of businesses expected to be in scope for Amount A.

The MLC is accompanied by an explanatory statement as well as an updated estimate of the economic impact of Amount A. In addition, the MLC is accompanied by an explanatory document, which contains further details on the application of tax certainty for Amount A.

For more information, please refer to a dedicated KPMG report.

Agreement on MLC for Subject to Tax Rule

On October 3, 2023, the OECD announced that Inclusive Framework (IF) members have concluded negotiations on the new Multilateral Convention (MLC) to Facilitate the Implementation of the Pillar Two Subject to Tax Rule (STTR). Key highlights include:

- The STTR was set out in the IF releases in July (for more details, please refer to E-News Issue 181).
- The STTR relaxes tax treaty restrictions such that it permits developing countries to impose a tax on certain outbound intra-group payments when those payments are subject to a nominal corporate income tax rate below 9 percent in the jurisdiction of the recipient (subject to certain preferential tax adjustments).
- The STTR would apply before a qualified domestic minimum top-up tax (QDMTT), qualified Income Inclusion Rule (IIR) and qualified Undertaxed Profits Rule (UTPR). As such, taxes paid under the STTR are taken into account as Covered Taxes when calculating the GloBE ETR.
- Jurisdictions can elect to implement the STTR by signing the MLC, or bilaterally amending their treaties to include the STTR when requested by developing IF members. According to the release, more than 70 developing IF members are entitled to request inclusion of the STTR in their treaties with other IF members.
- Each jurisdiction must identify the tax treaties in their treaty network that they wish to cover under the STTR. The STTR MLI applies with respect to a double tax treaty that both contracting jurisidctions (parties to the STTR MLI) have notified as an agreement that they wish to be covered by the STTR MLI, i.e. a Covered Tax Agreement (CTA). In such cases, the STTR is added as an annex to the Covered Tax Agreement.
- Following the completion of the neccasry domestic procedures, signatories are required to deposit the instrument of ratification with the OECD. The MLI enters into force on the first day of the month following the expiry of a three-month period beginning on the date of deposit of the second instrument of ratification, acceptance or approval. Different to the BEPS MLI, no reservations may be made by countries to this MLC.

For more information, please refer to KPMG's Tax News Flash and the OECD release.

Local Law and Regulations

Belgium

Proposed tax measures as part of the 2024 budget

On October 9, 2023, the Belgian Ministry of Finance announced a range of tax law amendments as part of the current budget discussions. Key measures from a direct tax perspective include:

- tightened application of Controlled Foreign Corporation (CFC) rules (shift to option A under the EU Anti-Tax Avoidance Directive (2016/1164), i.e. taxation of passive income subject to low taxation abroad unless the taxpayer can prove that sufficient substance is available locally);
- strengthened anti-abuse provision relating to deductible business expenses;
- tightened application of Cayman tax (taxation of income from certain offshore legal constructions);
- tightened conditions for operating real estate investment funds;
- application of a progressive rate for purposes of the Belgian bank tax;
- removing the deductibility of taxes on banks, credit institutions and investment funds for tax purposes;
- expansion and simplification of the investment deduction in respect of socially responsible and sustainable investments.

As a next step, the agreed measures will be translated into legislation, which is expected to be approved by the end of the year.

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

Belgian FAQ on DAC7 published

On October 18, 2023, the Belgian Tax Authorities published a set of frequently asked questions (FAQ) to provide guidance on on the Belgian DAC7 reporting framework for platform operators.

The new Belgian FAQ addresses the question which digital platform operators must report and provides guidance on the meaning of "seller", "reportable activity" and "reportable information". It also elaborates on the due diligence process and the submission requirements. Furthermore, it provides more insights on the application of penalties.

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

Bulgaria

Public consultation regarding the implementation of the EU Public Country-by-Country (CbyC) Directive

On September 26, 2023, the Bulgarian Ministry of Finance launched a public consultation to collect feedback on a draft bill to implement the Public CbyC Reporting Directive into local legislation.

Key takeaways include:

- The provisions of the Bulgarian public CbyC bill are closely aligned with the text of the Directive.
- The bill provides the possibility to apply the "safeguard clause", i.e. to allow in scope groups to temporarily omit for a maximum of five years information that would cause a significant competitive disadvantage to the companies concerned, provided they can justify the reason for the omission.
- Bulgaria intends to also adopt the website publication exemption, i.e. in-scope companies would be exempted from publishing the report on their websites, if the report is already made publicly available to any third party located in the EU, free of charge, on the website of the commercial registry.

Interested stakeholders are invited to send feedback by October 26, 2023.

Croatia

Increased WHT rate on payments to non-cooperative jurisdictions and other tax law amendments

On September 28, 2023, the Croatian Parliament passed various tax law amendments, generally effective from January 1, 2024. Key takeaways from a direct tax perspective include:

- The withholding tax rate on payments to non-cooperative jurisdictions is increased from 20 percent to 25 percent.
- The exemption from withholding tax on dividends, interest and royalties, which was previously granted solely to companies based in EU Member States, is now extended to companies that are tax residents in the European Economic Area (EEA) - Iceland, Liechtenstein and Norway.
- Market research and business consulting (auditing, tax consulting) services are exempt from withholding tax.

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

Cyprus

Legislative proposal to implement minimum taxation under Pillar Two

On October 3, 2023, the government of Cyprus launched a public consultation on a draft bill to implement the OECD's Pillar Two Model Rules as set out under the EU Minimum Tax Directive (for more details, please refer to Euro Tax Flash Issue 500).

According to the drft bill, the minimum tax rules would closely follow the text of the EU Directive, as well as subsequently released guidance agreed by the OECD/G20 Inclusive Framework. Key features of the proposal include:

- *IIR / UTPR:* The IIR would apply for financial years starting on or after December 31, 2023. The 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).

- *DMTT:* A domestic minimum top-up tax (DMTT) would apply from January 1, 2025 and would generally follow the general GloBE rules. However, the government would be empowered to amend the DMTT provisions through a separate decree.
- *Safe harbors*: The draft provides for a QDMTT safe harbor rule (i.e. IIR and UTPR Top-up Tax is deemed to be zero in Cyprus in relation to other jurisdictions that apply a QDMTT, subject to conditions). In addition, the draft includes a placeholder indicating that the government may issue a separate decree regulating the application of safe harbors that all EU Member States have consented to.
- *Additional OECD guidance:* The draft bill incorporates into the legislative text a limited number of additional elements of the OECD Administrative Guidance that adapt the OECD Model Rules / EU Directive rules.
- *Administration:* Each Constituent Entity would be required to file a GIR within 15 months after the end of the Reporting Fiscal Year (18 months for the transitional year), subject to certain exceptions. In addition, the draft requires local Constituent Entities to register (one time requirement), to file a tax return (in addition to the GIR) and to calculate their top-up tax liability therein (self-assessment return). The filing of the local tax return and payment of top-up tax would need to be done within 30 days following the submission deadline for the GIR.
- *Penalties:* Where taxpayers fail to comply with certain administrative requirements, penalties may apply of up to EUR 20,000. The amount of penalties would depend on the type of compliance failure and whether it is seen as a repeated violation. The draft also includes reference to the transitional penalty regime (i.e. no application of penalties in the transition phase).

Comments on the draft bill are requested by October 31, 2023.

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

Denmark

Government submits to the Parliament updated draft bill to implement minimum taxation under Pillar Two

On October 4, 2023, the Danish government submitted to the Parliament an updated draft bill to implement the OECD's Pillar Two Model Rules as set out under the EU Minimum Tax Directive. Key amendments compared to the draft bill issued in June include:

- According to the explanatory notes, the Danish DMTT is generally designed to reach the qualified status under the Inclusive Framework peer review process (in accordance with the OECD QDMTT guidance) and to be eligible for the QDMTT Safe Harbour.
- In addition to the transitional CbyC Reporting Safe Harbour, the updated draft also includes the transitional UTPR Safe Harbour. Furthermore, the draft includes a QDMTT safe harbor election (i.e. IIR and UTPR Top-up Tax is deemed to be zero in Denmark in relation to other jurisdictions that apply a QDMTT) that refers to stricter eligibility requirements and applies the "switch-off rule" as defined in the OECD's July Administrative (for more details, please refer to KPMG's dedicated report). Furthermore, the government would be empowered to lay down additional rules for simplified top-up tax calculation.
- Similar to the previous draft, penalties may apply where taxpayers fail to comply with certain administrative requirements. The amount of penalties follows the penalty scheme in the existing Danish tax law. The draft also includes reference to the transitional penalty regime (i.e. no application of penalties in the transition phase).

As a next step in the legislative process, the draft bill will be subject to approval by the Parliament. As such, amendments may still occur in the course of the legislative procedure.

For more information, please refer to E-News Issue 179 and a report prepared by KPMG in Denmark.

France

Additional tax measures in 2024 Finance Bill

On September 27, 2023, the French government published the draft 2024 Finance Bill. Key direct tax features include:

- *Tax incentive for green industry:* New credit is proposed to take advantage of relaxed EU State aid rules (see Euro Tax Flash Issue 508) intended to support EU Member States in their transition to a greener economy. Key features include:
  - A tax credit ranging from 20 percent to 60 percent of the cost of investments in qualifying tangible or intangible assets. Examples of qualifying assets include land, buildings, plant and machinery, patent rights, licenses, and intellectual property rights.
  - Conditions for eligibility include: (i) the investment should be carried out in France, and (ii) operate for at least five years and (iii) a ruling has to be obtained from the French Tax Authorities no later than December 31, 2025.
  - The tax credit would be deductible against the corporate income tax due for the company in the fiscal year in which the expenditure is incurred. Any excess credit would be refundable to the taxpayer.

  For previous coverage, please see E-News Issue 178.
- *Other measures:* The postponement of the abolishment of the Business Value Added contribution over an additional four-year period (previously to be abolished in 2024). The draft Bill proposes a phased repeal of the contribution, with its ultimate abolishment in 2027.

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

Hungary

Legislative proposal to implement minimum taxation under Pillar Two

On October 17, 2023, the Hungarian Ministry of Finance launched a public consultation on a draft bill to implement the OECD's Pillar Two Model Rules as set out under the EU Minimum Tax Directive.

The minimum tax rules would closely follow the text of the EU Directive as well as subsequently released guidance agreed by the OECD/G20 Inclusive Framework. Key features of the proposal include:

- *IIR / UTPR:* The IIR would apply for financial years starting on or after December 31, 2023. The 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).

- *DMTT:* A DMTT would apply for financial years starting on or after December 31, 2023. The draft notes that the Hungarian DMTT is generally designed in accordance with OECD QDMTT guidance. In addition, the draft clarifies that the Hungarian DMTT computation would need to be based on the local financial accounting standard in accordance with the OECD QDMTT Safe Harbour guidance.
- *Safe harbors*: The draft incorporates into the legislative text the agreed transitional CbyC Reporting Safe Harbour. In addition, the draft provides for a QDMTT safe harbor provisions (i.e. IIR and UTPR Top-up Tax is deemed to be zero in Hungary in relation to other jurisdictions that apply a QDMTT, subject to conditions).
- *Additional clarifications:* The draft bill makes reference to the OECD Commentary, GloBE Implementation Framework and the OECD Administrative Guidance as a relevant source for interpreting the local legislation.
- *Administration:* Each Constituent Entity would be required to file a GIR (subject to certain exceptions) and pay any top-up tax liability within 15 months after the end of the Reporting Fiscal Year (18 months for the transitional year).
- *Accompanying measures:* The draft includes further amendments to the Corporate Income Tax Act, Local Business Tax Act and Accounting Act.

Comments on the draft bill are requested by October 25, 2023.

Ireland

Release of 2023 Finance Bill

On October 19, 2023, the Minister for Finance published the 2023 Finance Bill. Key direct tax measures include:

- *Pillar Two implementation:* following on from a second public consultation, the 2023 Finance Bill includes proposed legislation regarding the implementation of Pillar Two (for previous coverage, please see E-News Issue 181). The legislation continues to closely follow the OECD Model Rules and the EU Direcitve. The legislation provides the following additional information:
    - *DMTT*: According to the explanatory notes, the Irish DMTT is generally designed to reach the qualified status under the Inclusive Framework peer review process (in accordance with the OECD QDMTT guidance) and to be eligible for the QDMTT Safe Harbour. In particular, the legislation clarifies that the DMTT computation would need to be based on a local financial accounting standard with reference to the OECD QDMTT Safe Harbour guidance.
    - *Additional OECD guidance*: The draft bill makes reference to the OECD Commentary and the OECD Administrative Guidance as a relevant source for interpreting the local legislation.
    - *Administration:* Each Constituent Entity would be required to file a GIR and pay any top-up tax liability within 15 months after the end of the Reporting Fiscal Year (18 months for the transitional year). An option is provided to transfer the obligation to file the GIR to another Constituent Entity.
    - *Penalties:* In case of incomplete, non-compliance or delayed fulfillment of GIR filing requirements, a penalty of EUR 10,000 per month will be charged (max penalty EUR 480,000).

  - *Accompanying measures:* The general anti-avoidance rules will be applicable to the new Pillar Two legislation. CFC rules are amended to allow for a credit for a Pillar Two QDMTT paid by a CFC in another jurisdiction. Furthermore, provisions are amended to enable double tax relief for a foreign Pillar Two QDMTT arising on foreign dividends or foreign branch profits taxable in Ireland. However, foreign tax credit relief will not be available with respect to top-up tax incurred under a foreign IIR or UTPR.

- *Outbound payments*: the inclusion of legislation which is aimed at the prevention of double non-taxation in respect of outbound payments of interest, royalties and distributions to associated entities resident in jurisdictions on the EU list of non-cooperative jurisdictions or no-tax / zero tax jurisdictions. This legislation will restrict the operation of certain domestic withholding tax exemptions in respect of in-scope payments, in addition to requiring reporting of such.

- *Research and Development (R&D) tax credit*: the R&D tax credit has been enhanced to maintain the net value of the existing credit for companies in light of the implementation of Pillar Two rules. Key features include:

  - the R&D tax credit rate is to be increased to 30 percent (previously 25 percent) in respect of 2024 expenditure;
  - the R&D tax credit available to be refunded to a company as part of its first year R&D tax credit instalment has increased to EUR 50,000 (previously EUR 25,000); and
  - these changes are in addition to the amendments to the R&D tax credit in 2022 to ensure that the R&D tax credit is considered a qualified refundable tax credit for Pillar Two purposes.

- *Bank levy:* introduction of a revised bank levy for 2024. Key features include:

  - the bank levy will apply to banks which received financial assistance from the State during the banking crisis;
  - further information regarding the calculation methodology which will be used to arrive at the estimated EUR 200 million levy is pending; and
  - the Minister for Finance confirmed that the bank levy will be reviewed again next year to ensure it remains appropriately calibrated.

For more information, please refer to a dedicated webpage created by KPMG in Ireland.

Italy

Windfall tax on banks adopted by Parliament

On October 9, 2023, the Italian Parliament ratified the decree (No. 104/2023) introducing a once-off windfall tax on banks. Key amendments compared to the draft decree adopted by the government in August include:

- the contribution would be limited at 0.26 percent of the value of risk-weighted assets reported for the fiscal year preceding January 1 (as opposed to the previous limitation at an amount equal to 0.1 percent of the total value of assets);
- alternatively, qualifying banks have the option to allocate to the capital reserve at least 2.5 times the amount of the contribution that would otherwise be payable. In loss situations, banks are allowed to

allocate the previous year’s profits to the capital reserves;

- amendment of the Italian general anti-avoidance rule to cover the new windfall tax,
- formal legal prohibition to pass on windfall tax liability to clients.

The law entered into force on October 10, 2023. For previous coverage, please refer to E-News Issue 182.

Moldova

Draft bill to implement Public CbyC Reporting rules

The Moldovan Government has submitted a draft bill to the Parliament to adopt measures in line with the EU Public CbyC Reporting Directive. If approved, the draft law would come into effect on January 1, 2025.

Netherlands

Anti dividend stripping measures proposed

On September 19, 2023, the Dutch government proposed new dividend stripping rules in the 2024 budget . Key features include:

- A change in the division of the burden of proof so that those who invoke a concession (for example, a refund or credit) are required to convincingly demonstrate that they are the ultimate beneficiary.
- Legally stipulating a ‘registration date’ for dividends on shares traded on a regulated market. This will establish who is entitled to a credit, reduction or refund of dividend tax on the legally set record date.
- The new measures would apply as of January 1, 2024.

For more information, please see a report prepared by KPMG in Netherlands.

Updated dividend withholding tax decree published

On September 18, 2023, the Dutch State Secretary of Finance published Decree (No. 2023-20399) in the Official Gazette, regarding the process for bundled dividend withholding tax (DWT) refund requests. Key takeaways include:

- Clarification that at least 25 beneficiaries are required for a representative to submit a bundled DTW refund request.
- Updates to the sample agreement between the tax authority and the representative included in an Appendix to the Decree, which enables bundled DWT requests to be made.
- Inclusion of a section with frequently asked questions in a second Appendix regarding the terms and conditions of the sample agreement.

Poland

New draft explanation on withholding tax

On September 28, 2023, the Polish Ministry of Finance published a new draft explanation to clarify the interpretation and application of selected withholding tax provisions. Key features include:

- Provision of limited clarification of WHT provisions, focusing primarily on the interpretation of the concept of beneficial ownership in the Polish Corporate Income Tax Act, including provisions implementing the Interest and Royalties Directive, the Parent-Subsidy Directive and the basis of double tax treaties.
- Details regarding a due diligence framework of the payor examining the beneficial owner criterion.
- Clarification that for purposes of applying the reduced withholding tax rate provided for in a given double tax treaty, it is reasonable to apply the definition of the beneficial owner in force under the corporate income tax law.

Comments are invited regarding the public consultation on the draft explanation until an extended deadline of October 24, 2023.

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

Romania

Legislative proposal to implement minimum taxation unde Pillar Two

On October 4, 2023, the Romanian government launched a public consultation on a draft bill to implement the OECD's Pillar Two Model Rules as set out under the EU Minimum Tax Directive.

The minimum tax rules would closely follow the text of the EU Directive as well as subsequently released guidance agreed by the OECD/G20 Inclusive Framework. Key features of the proposal include:

- *General:* The IIR would apply for financial years starting on or after December 31, 2023. The 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). A DMTT would apply for financial years starting on or after December 31, 2023.
- *Safe harbors*: The draft incorporates into the legislative text the agreed transitional CbyC Reporting Safe Harbour. In addition, the draft provides for a QDMTT safe harbor rule (i.e. IIR and UTPR Top-up Tax is deemed to be zero in Romania in relation to other jurisdictions that apply a QDMTT, subject to conditions).
- *Additional OECD guidance:* The draft bill makes reference to the OECD Commentary and the OECD Administrative Guidance as a relevant source for interpreting the local legislation.
- *Administration:* Each Constituent Entity would be required to file a GIR within 15 months after the end of the Reporting Fiscal Year (18 months for the transitional year), subject to certain exceptions. Any top-up tax would need to be declared and paid within the same deadline.

- *Penalties:* Penalties may apply where taxpayers fail to comply with the administrative requirements. The amount of penalties follows the penalty scheme in the existing Romanian tax procedural law.

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

Rwanda

Corporate income tax rate reduced

On September 14, 2023, Rwanda published new legislation in the Official Gazette. Key features include:

- The standard corporate income tax rate is to be reduced from 30 percent to 28 percent.
- Provides for the ability of taxpayers to request a three month extension to the deadline to submit certified financial statements and corporate tax declarations. If authorization is received, taxpayers will (i) submit provisional financial statements to the tax authority, and (ii) pay the relevant tax liability by the relevant deadline.

The above amendments are effective from the date of publication (i.e. September 14, 2023).

Slovakia

Guidance on proving status of beneficial owner of income

On August 24, 2023, the Slovakian Financial Directorate published guidance regarding the substantiation of the status of beneficial owner of income. The guidance provides recommendations for taxpayers, but is not legally binding. Key features include:

- indicators of risk level for individual transactions;
- categorization of transactions according to risk level into three categories (containing brief descriptions and examples);
- methodology and standard required to prove the status of the beneficial owner for individual categories;
- examples of (i) an affidavit and (ii) a questionnaire applicable for certain categories of transactions;
- examples of other documents proving the identity of the beneficial owner.

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

Local Courts

Belgium

Constitutional Court annuls the retroactive application of the Belgian harmonized bank tax

On September 21, 2023, the Belgian Constitutional Court (the Constitutional Court) published a decision (no. 130/2023) concerning the retroactive applicability of the Belgian harmonized bank tax.

The tax under dispute was introduced by a bill that came into effect on August 21, 2023. This harmonized bank tax replaced several previous taxes, including annual taxes on credit institutions, collective investment vehicles, credit and insurance companies, as well as limits on tax deductions for certain losses and a financial stability contribution for banks. The bill specified that the new tax would be applicable for the 2016 tax year onwards, i.e. starting on January 1, 2016 and based on the tax base as of December 31, 2015.

The plaintiff challenged the retroactive nature of this law, arguing that it would violate constitutional provisions of equal treatment and the principle of non-discrimination when combined with the general principle of not applying laws retroactively. The Constitutional Court upheld the plaintiff's position and invalidated the provisions with respect to the 2016 tax year.

France

Ruling on the constitutionality of withholding tax on dividends paid to non-resident loss-making companies

On October 6, 2023, the French Constitutional Court (the Constitutional Court) issued a decision (No. 2023-1063 QPC) on the constitutionality of the French withholding tax applicable to cross-border dividend distributions.

Following the Sofina judgement[1] (C-575/2017, see Euro Tax Flash Issue 386 for previous coverage), the French legislation was amended and, starting January 1, 2020, non-resident companies incurring losses can claim a temporary refund of the withholding tax levied in France (subject to certain conditions). However, loss-making companies that are tax resident outside the EU and have direct investments in France are not eligible for the temporary refund. The French Supreme Administrative Court (Conseil d'État) requested the Constitutional Court to rule on whether the different treatment applicable to non-resident and resident loss-making companies (pre-2020 and after the legislative change took place) complies with the constitutional principle of equality before the law - see E-News Issue 182.

The Constitutional Court noted that French-sourced dividends distributed to loss-making companies established abroad is subject to withholding tax only in the case of companies that are tax resident in a third country. In the plaintiff's view, such difference in treatment between a French / EU recipient and a third country recipient breached the principle of equality before the law.

The Constitutional Court held that, in their view, the principle of equality does not prohibit the legislator from regulating different situations differently or from departing from equality on grounds of general interest.

[1] The case concerned the compatibility with EU law of the French withholding tax levied on dividends paid by French companies to non-resident loss-making companies. Under the French law applicable at that time, French-sourced dividends paid to non-resident companies were subject to withholding tax (irrespective whether they were profitable or loss-making). By contrast, loss-making French companies were only taxed on the amount of the dividends they receive once they become profitable again. The CJEU concluded that the French legislation is contrary to the free movement of capital.

However, in both cases, the resulting difference in treatment needs to be directly linked to the intended purpose of the law that establishes it. The objective of the rules under dispute was to ensure the collection of taxes on income distributed from French sources received by entities that do not have their tax domicile or registered office in France. In light of this objective, loss-making companies situated outside France are in a different situation when compared to French companies. The Constitutional Court proceeded by concluding that neither EU law (including the Sofina judgment) nor the established case law of the Conseil d'État precluded the application of withholding taxes in the case of loss-making companies residing outside the EU with direct investments in France.

Based on the above, the Constitutional Court rejected the plaintiff's appeal and upheld the constitutionally of the rules under dispute.

Switzerland

Federal Administrative Court decision on the relevance of OECD transfer pricing guidelines

On September 6, 2023, the Swiss Federal Administrative Court (the Administrative Court), issued a decision (A-4976/2022) on whether the Swiss tax authorities have to consider the OECD transfer pricing guidelines when conducting transfer pricing adjustments.

The plaintiff was a Swiss public company (A AG), which outsourced financial advisory services to two related parties (B Ltd and C AG) in 2015 and 2016. The Swiss cantonal tax authorities considered the corresponding business expenses as overpaid and performed a transfer pricing adjustment for the respective fiscal years.

A AG appealed to the Administrative Court in 2022. In their view, the financial advisory services were priced in compliance with the arm's length principle. In that respect, similar invoices from B Ltd. to third parties were used in support of the comparable uncontrolled price (CUP) method. However, the Swiss tax authorities challenged this approach and argued that the cost-plus method should have been applied due to insufficient data available for applying other methods, i.e. the CUP method.

The Administrative Court noted that the hierarchy of methods of the OECD transfer pricing guidelines leads to more appropriate results compared to scenarios where the hierarchy is not applied. In this regard, the Administrative Court argued that only in cases where no effective comparison is feasible or where no comparable transaction is available for relying on the CUP method, other standard methods, i.e. the cost-plus or the resale price method, can be applied. Whilst acknowledging that the OECD transfer pricing guidelines' nine-step process is not mandatory for the Swiss tax authorities, the Administrative Court's took that view that it provides a typical and consistent methodology for the purposes of the comparability analysis.

The Administrative Court concluded that the tax authorities could not assume that providing the financial advisory services in-house is significantly less cost-efficient than sourcing them from third parties, without performing a comparability analysis for this purpose. In the Administrative Court's view, by resorting to the cost-plus method without attempting to apply the CUP method, the tax authorities failed to comply with the OECD transfer pricing guidelines. In this respect, the Administrative Court clarified that the methodology of the OECD transfer pricing guidelines needs to be considered when making such an adjustment.

Ukraine

Decision regarding the beneficial ownership concept for interest payments (treaty benefits)

On October 4, 2023, the District Administrative Court of Chernihiv (the Court) issued a decision denying the reduced withholding tax rate under the Ukraine-Cyprus tax treaty. The denial of treaty benefits was related to interest paid by an Ukrainian company to its Cyprus lender, and was based on the grounds that the latter was not considered the beneficial owner of such income.

The Court justified its decision by noting that the Cyprus lender lacked the authority to dispose of such interest income, as the loan to the Ukrainian entity had been refinanced with a UK bank. Consequently, the lender was bound by its contractual obligations with the bank and did not have the discretionary power to determine the utilization of the interest income, even though 20 percent of it was retained by the Cyprus entity.

The decision, which confirmed the assessment of the tax authorities, is in line with previous case law of the Ukrainian Supreme Court.

KPMG Insights

Where are we on BEPS 2.0?

On November 9, 2023, a webcast will bring together our leading global experts to speak about the latest developments and releases in respect of the OECD's BEPS 2.0 project.

The webcast will provide an update on the recent OECD releases on Pillar 1 Amounts A & B, the Subject to Tax Rule, Guidance on the GloBE rules and a status report on where various jurisdictions are on Pillar 2.

Please access the event page to register.

Illustrative disclosures – Guide to annual financial statements

KPMG's 2023 guides to annual financial statements are now available. They comprise Illustrative disclosures and a Disclosure checklist in accordance with IFRS Accounting Standards.

These updated guides reflect standards in issue at August 31, 2023 that are required to be applied by a company with an annual reporting period beginning on 1 January 2023.

In particular, they illustrate amendments to:

- IAS 12 *Income Taxes* relating to the initial recognition exemption and Pillar Two top-up taxes; and
- IAS 1 *Presentation of Financial Statements* relating to disclosure of material rather than significant accounting policies. Please also refer to our high-level visual guide for further guidance.

For more information, please refer to a dedicated KPMG web article.

EU tax perspectives session

On October 4, 2023, KPMG held a new EU tax perspectives session as part of the Future of Tax & Legal webcast series.

European Union (EU) Member States and institutions continue to have full agendas that include the implementation of international initiatives and the advancement of upcoming EU-specific proposals. Against this backdrop a panel of KPMG specialists will share their insights on some of the latest developments from across the EU affecting multinational groups operating in Europe. The session will focus on:

- BEPS 2.0 in the EU: state of play on the implementation of the EU Minimum Tax Directive (Pillar Two)
- Business in Europe: Framework for Income Taxation (BEFIT): Commission’s proposal and the way forward
- Unshell (ATAD 3): state of discussions and what can be expected in the future
- Navigating the EU Public Country-by-Country Reporting Directive: implementation across the EU and practical insights
- Looking ahead: state of play and updates on other EU tax initiatives.

For a replay of the session, please access the event page.

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Key links

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