E-News from KPMG's EU Tax Centre

[Latest CJEU, EFTA and ECHR](#)

[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 187 – December 7, 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:** AG opinion on Irish transfer pricing rulings about potential state aid infringement
- **CJEU:** CJEU decision on the compatibility of the Hungarian reorganization tax law with the Merger Directive
- **Council of the EU:** Statements on the progress made by the Inclusive Framework in respect of Pillar One and Pillar Two
- **European Parliament:** FISC exchange of views with Chair of the Code of Conduct Group
- **Croatia:** Consultation on legislative proposal to implement minimum taxation under Pillar Two
- **Hungary:** Bill to implement minimum taxation under Pillar Two enacted
- **Moldova:** Moldova implements public country-by-country reporting
- **UK:** Publication of the Autumn Finance Bill following the presentation of the Autumn Statement
- **Belgium:** Lower Court decision on the interpretation of the beneficial ownership concept in the context of a double tax treaty
- **Germany:** Lower Tax Court decision on the facts and circumstances that may be considered when applying the new German anti-treaty shopping rule

Latest CJEU, EFTA and ECHR

CJEU

AG opinion on Irish transfer pricing rulings about potential state aid infringement

On November 9, 2023 Advocate General (AG) Pitruzzella of the Court of Justice of the European Union (CJEU) rendered his opinion in case C-465/20 P. The case concerned two transfer pricing rulings issued by the Irish tax authorities in favor of two companies incorporated in Ireland, but tax resident in a different jurisdiction. The rulings endorsed the profit allocation methods related to the trading activity of the Irish branches of the two entities concerned.

On December 19, 2016, the European Commission (the Commission or EC) decided that the two rulings constituted unlawful State aid, incompatible with the EU internal market. Following appeals submitted by Ireland and the taxpayers – see Euro Tax Flash Issue 307 the General Court annulled the EC's decision - see E-News Issue 120. The Commission appealed the judgment of the General Court in front of the CJEU.

The AG concluded that the General Court committed a series of errors in law when it found that the European Commission (the Commission or the EC) had not shown to the requisite legal standard that the intellectual property (IP) held by the two plaintiffs was attributable to their Irish permanent establishments. The AG also took the view that the General Court erred in finding that the EC had not proven the methodological errors based on which the latter had concluded that the tax rulings were vitiated. Consequently, the AG recommended the CJEU to set aside the judgment and to refer the case back to the General Court for a new decision on the merits.

For more details, please refer to Euro Tax Flash Issue 528.

CJEU decision on the compatibility of the Hungarian reorganization tax law with the Merger Directive

On November 16, 2023, the CJEU issued its decision in case C-318/22. The case concerned a referral from the Budapest Regional Court on whether, *inter alia*, local rules applicable to domestic reorganizations should be interpreted consistently with the provisions of the Merger Directive (C-318/22) – see E-News Issue 161.

The plaintiff was a Hungarian company (ParentCo), which was the sole shareholder of a subsidiary (SubCo) which in turn held 100 percent of a lower-tier subsidiary. As part of a broader global restructuring within the group, two of the SubCo's business lines were spun-off and merged into the lower-tier subsidiary. The assets related to the two business lines were transferred at net book value, which was significantly below their market value. The related loss was reflected in the SubCo's balance sheet through a reduction of its retained earnings (and its shared capital remained unchanged).

The Hungarian tax authorities challenged the neutrality of the restructuring on the grounds that, under Hungarian tax law:

- The ParentCo should have reduced the book value (by reducing the nominal value of the shares) of its holding in the SubCo;

- the shareholding percentage of the ParentCo in the SubCo should have been reduced as a result of the spin-off.

Following an appeal filed by the plaintiff, the referring court asked the CJEU to clarify whether:

- the Hungarian rules applicable to partial divisions should be interpreted in a manner consistent with the Merger Directive; and
- whether the Merger Directive allows rules under which, in the case of a partial spin-off, the neutrality of the transaction is made subject to conditions relating to the reduction in the shareholding of the shareholder of the transferring company in that company, or to the reduction in the share capital of that company.

In its ruling, the CJEU observed that it is apparent from the reference for a preliminary ruling that the Hungarian legislature did not distinguish, in the provisions adopted to transpose the Merger Directive, between the tax treatment of purely domestic partial spin-offs and cross-border spin-offs. The CJEU also highlighted that the referring court interpreted this fact as meaning that the Hungarian legislature extended the regime provided under the Merger Directive to also cover purely internal transactions. Moreover, this fact was also subsequently confirmed by the Hungarian Government. The CJEU then recalled its settled case-law under which, in instances where the national legislature chooses to expand the reach of EU legislation to cover purely domestic cases, the EU law provisions should receive a uniform interpretation, regardless of whether they are applied to domestic or cross-border situations.

The CJEU noted that the Merger Directive does not make the tax neutrality of partial spin-offs subject to a reduction in the nominal value or the percentage holding of the transferring company's shareholder in the transferring company, or to the condition that the partial division results in a reduction in the transferring company's share capital rather than a reduction in its reserved profits.

In light of the above, the CJEU concluded that Hungary is not allowed to impose an additional condition as compared to the ones prescribed by the Merger Directive.

State aid

European Commission

Commission adopts partial six-month extension of Temporary Crisis and Transition Framework

On November 20, 2023, the European Commission adopted an amendment to the State aid Temporary Crisis and Transition Framework (the Framework), extending the application of specific provisions of the Framework by six months. The Framework was adopted on March 9, 2023 and introduced measures to respond to the crisis following Russia's aggression against Ukraine, initially applying until December 31, 2023 – please refer to Euro Tax Flash Issue 508.

The amendment allows EU Member States to grant, until June 30, 2024, limited amounts of aid to companies affected, directly or indirectly, by the crisis (section 2.1 of the Framework) and aid to

compensate companies for additional costs due to high energy prices (section 2.4 of the Framework). Such aid can take any form, including that of tax advantages.

The amendment was published in the Official Journal of the European Union on November 21, 2023.

EU Institutions

Council of the EU

Statements on the progress made by the Inclusive Framework in respect of Pillar One and Pillar Two

On November 9, 2023, during the meeting of the Economic and Financial Affairs Council of the EU (ECOFIN Council), EU Member States approved a Council statement as well as an accompanying statement from the European Commission reconfirming their political support for Pillar One and Pillar Two of the OECD's BEPS project .

In addition, the statements confirm the compatibility of the Safe Harbour rules and the Administrative Guidance that were agreed by the OECD/G20 Inclusive Framework with the EU Minimum Tax Directive. The Council statement further recognizes the need to ensure consistency and notes the intention of the EU Member States to follow the Administrative Guidance when transposing the EU Minimum Tax Directive into their national law in order to avoid divergences and inconsistencies in interpretation.

The EC encourages all Member States to proceed swiftly with the transposition of the EU Minimum Tax Directive and notes that it will continue to support the efforts of Member States in this regard.

For more information, please refer to Euro Tax Flash Issue 527.

European Commission

Response to European Parliament Pandora Paper resolution

On November 15, 2023, the European Commission published a response to the resolution on lessons learnt from the Pandora Papers and other revelations that was adopted by the European Parliament on June 15, 2023 – for previous coverage, please refer to Euro Tax Flash Issue 519. Key takeaways of the EC's response include:

- *Unshell:* The EC notes that it will be working together with the Spanish Presidency with a view to concluding negotiations this year on the crucial elements of the Unshell Directive proposal, including (i) robust criteria for the identification of the most manifest cases of shell entities within the EU, (ii) a common set of tax consequences attached to a non-rebutted finding of a shell in order to prevent fragmentation of the Internal Market, and (iii) exchange of information among Member States. The EC further notes that it is important to reach such agreement before taking further steps in the fight against tax evasion and aggressive tax planning.
- *SAFE:* In the EC's view, it is key that Member States reach political agreement in the Council on

the Unshell Directive before adopting and tabling a proposal in relation to the SAFE initiative.

- *FASTER:* The EC advises that one of the main purposes of the FASTER proposal is to tackle the issue of cum-ex and cum-cum cases that affected several Member States. According to the EC, the FASTER proposal provides for reporting requirements to give tax administrations visibility on who is entitled to what withholding tax rate. In addition, the EC notes that the FASTER proposal includes specific safeguards to exclude taxpayers from fast-track procedures when they have acquired the shares within two days of the ex-dividend date or when they are engaged in financial arrangements linked to the underlying shares.
- *Mandatory disclosure rules under DAC6:* The EC notes that it has started the work preparing the evaluation of the Directive on Administrative Cooperation (DAC). The evaluation will be submitted to the European Parliament once finalized and will consider the outcome and the experience from the first two years of DAC6 application.
- *EU list of non-cooperative jurisdictions:* The EC notes that it is working with the Member States on strengthening the requirements in the context of the EU list for zero or almost zero tax jurisdictions. While the scope of substance requirements in these countries is being expanded to include trusts and similar legal entities, the EC notes that it is also considering how to enhance transparency and exchange of information with these jurisdictions. The EC further notes that it proposed a new approach to the future transparency criterion focusing on reporting of beneficial ownership information.
- *Defensive measures against non*-cooperative jurisdictions: In the EC's view, the level of coordination of tax defensive measures can be strengthened. In this context, the EC notes that it is working with the Code of Conduct Group to put in place a monitoring process at EU level to improve clarity on whether and how tax defensive measures are effectively applied by Member States in practice.
- *Taxation of (high-net worth) individuals:* The EC highlights that it has already proposed extending the scope of the Code of Conduct on Business Taxation to include specific tax residency rules, special citizenship schemes, and measures to attract expatriates or wealthy individuals. However, these proposals were not taken up by the Code of Conduct Group during the discussions on the reform of the mandate of the Code of Conduct. In addition, the EC notes that it is discussing the impact of teleworking for cross-border workers on the allocation of personal income tax rights and tax residence in the EU with Member States and other stakeholders in order to find solutions that remove distortions to the Internal Market.

Updated Q&A on the Foreign Subsidies Regulation published

On November 22, 2023, the European Commission published updated non-binding Questions and Answers (Q&A) in respect of the application of the EU Regulation on foreign subsidies distorting the internal markets (Foreign Subsidies Regulation – FSR) - for more details on the FSR, please refer to Euro Tax Flash Issue 495.

The updated FAQs provide guidance on procedural and jurisdictional issues, including:

- interpretation of the term "undertaking creating a joint venture";
- determination whether the notification threshold in respect of turnover and foreign financial contributions is met;
- appropriate exchange rates to be used for reporting financial contributions;
- treatment of export financial measures which are in line with the OECD Arrangement on

"Officially Supported Export Credits";

- clarifications regarding the reporting exemption for tax benefits in the form of deferrals of payment of taxes or of social security contributions, tax amnesties and tax holidays as well as normal depreciation and loss-carry forward rules that are of general application.

For previous coverage, please refer to E-News Issue 179, and, for more information, please refer to the Commission's dedicated webpage.

Regulation integrating amendments to IAS 12 in view of Pillar Two

On November 9, 2023, the European Commission published a Regulation that modifies the application of International Accounting Standard 12 – Income Taxes (IAS 12) to incorporate amendments adopted by the International Accounting Standards Board (IASB) on May 23, 2023 – for more information, please refer to E-News Issue 178.

The amendments provide for a temporary exception from deferred tax accounting for Pillar Two taxes where the GloBE rules have been enacted or substantively enacted in a jurisdiction in which a group operates. In that case, companies would be required to disclose that they have applied the relief from deferred tax accounting. In addition, affected companies would be required to disclose information that helps users of its financial statements to understand their exposure to Pillar Two income taxes at the reporting date. In periods when Pillar Two legislation is in effect, in-scope companies would be required to provide separate disclosures of their current tax expense related to Pillar Two income taxes.

The Regulation entered into force on November 10, 2023 and is directly applicable in Member States.

For more information on financial disclosure requirements and impairment assessment in relation to Pillar Two taxes, please refer to a dedicated KPMG webpage.

European Parliament

FISC exchange of views with Chair of the Code of Conduct Group

On November 30, 2023, the European Parliament's Subcommittee on Tax Matters (FISC) held a public exchange of views with the Chair of the Code of Conduct Group on Business Taxation (CoCG), Ms. Maria Jose Garde.

Key takeaways of the discussions include:

- the group will assess tax measures of general application from January 1, 2024. Tax features of general application could include tax incentives for research or other broadly applied tax breaks;
- the CoCG is currently focusing on the design of the additional criterion 1.4 on the exchange of beneficial ownership information with a view to present a proposal in December;
- the EU listing approach may link to the Inclusive Framework Pillar 2 peer-review results once Pillar Two has been implemented locally;
- the CoCG is also currently reviewing the implementation of defensive measures applied by EU Member States against non-cooperative jurisdictions.

ECON meeting on draft report regarding FASTER Directive proposal

On November 7, 2023, members of the European Parliament's Committee on Economic and Monetary Affairs (ECON Committee) discussed a draft report proposing amendments to the FASTER proposal. Whilst the report is generally supportive of the text proposed by the Commission, it recommends further exploration of certain elements, including:

- requirement to issue the electronic tax residency certificate (eTRC) within three working days from submission of a request (as opposed to one working day as proposed by the EC);
- possible measures to facilitate self-processed withholding tax claims for small investors who engage directly with tax authorities without the intervention of certified financial intermediaries;
- comprehensive analysis of the developments in respect to service fees charged by financial intermediaries is needed;
- universal application of a relief at source system in all Member States;
- clarifications regarding the interaction between the tax consequences resulting from the Unshell proposal and the FASTER proposal;
- improvements for the protection of personal data of taxpayers;
- coordinated understanding of the term "comparable legislation" for the registration of third country financial intermediaries (which are required to register when they fulfill the criteria for large institutions set out in the Capital Requirements Regulation (CRR) or when they constitute central securities depositories providing withholding tax agent services. Other third country financial intermediary should be allowed to request a registration).

During the discussion, ECON members debated the suitability of the FASTER proposal to combat cum-cum and cum-ex constructions and the need of an EU-wide minimum WHT.

The report is scheduled to be voted on in the Committee on January 23, 2024. If approved, the report would then be voted on at a plenary session of the European Parliament, at which point it would represent the Parliament's opinion on the Directive (if agreed). However, it is important to note that the Parliament's opinion is not binding on the Council of the European Union (i.e., it would remain up to the 27 EU Member States to agree on the final text of the Directive).

ECON report on the BEFIT Directive proposal

On November 21, 2023, members of the European Parliament (MEPs) issued a draft report on the proposal for a Council Directive on Business in Europe: Framework for Income Taxation (the BEFIT Directive) – for more information on the proposed BEFIT Directive, please refer to Euro Tax Flash Issue 521. Whilst the report is generally supportive of the text proposed by the Commission, a number of amendments are recommended, including:

- amendments to the scoping provisions: lower scope revenue threshold of EUR 40 million after the transitional period (constant revenue threshold of EUR 750 million based on EC proposal), lower materiality thresholds of 3 percent and EUR 40 million (5 percent and EUR 50 million based on EC proposal) and lower ownership threshold of 50 percent (75 percent based on EC proposal);
- deduction limitations for exceeding borrowing costs (the lower of the two amounts between 75 percent of the exceeding borrowing costs and 20 percent of the EBITDA) and royalty expenses (where the corresponding income is subject to an ETR below 9 percent at the level of the recipient) and application of CFC rules. The EC proposal makes reference to the ATAD interest

deduction limitation rules and does not provide for a royalty deduction limitation rule;

- amendments to the depreciation rules and clarification that Member States cannot go beyond the deprecation specified in the EC proposal;
- limiting the possibility to carry-forward BEFIT losses for a maximum of five years (no limitation based on EC proposal);
- requirement for Members States to refrain from offering output-based tax incentives, e.g., patent boxes (no limitation based on EC proposal);
- lowering the threshold for low-risk and high-risk zones from 10 percent to 5 percent;
- permanent allocation formula that gives equal weight to the factors of sales, labor, and assets and applies from 2035 (the EC proposal only provides for transitional allocation rules);
- reference to the need to ensure confidentiality and security, which is proposed to be added to the BEFIT administration rules;
- minimum penalties of 0.1 percent of the turnover of the BEFIT group for failing to file the BEFIT Information Return (no specific penalty regime is included in the EC proposal).

The report is scheduled to be voted on in the Committee on February 22, 2024. If approved, the report would then be voted on at a plenary session of the European Parliament, at which point it would represent the Parliament's opinion on the Directive (if agreed). However, it is important to note that the Parliament's opinion is not binding on the Council of the European Union (i.e. it would remain up to the 27 EU Member States to agree on the final text of the Directive).

OECD and other International Institutions and Research Centers

Organisation for Economic Cooperation and Development – OECD

OECD publishes Corporate Tax Statistics 2023

On November 21, 2023, the OECD published the latest annual Corporate Tax Statistics report, which covers more than 160 countries and jurisdictions and includes two years of aggregated Country-by-Country (CbyC) reporting data, as well as a new accompanying working paper entitled 'Effective Tax Rates of MNEs: New evidence on global low-taxed profit'.

Key takeaways from the OECD publications include:

- 37.1 percent of global net profits are taxed at an effective tax rate below 15 percent.
- High-tax jurisdictions (i.e., jurisdictions with average effective tax rates of above 15 percent) account for more than 50 percent of global profits that are taxed below 15 percent. In addition, those jurisdiction account for more than 20 percent of very low-taxed profits (i.e., those taxed at an effective tax rate below 5 percent).
- Misalignment of profits and real economic activity based on a median value of MNE revenues per employee in investment hubs that amounts to USD 1.71 million (approximately EUR 1.57 million), as compared to USD 0.29 million (approximately EUR 0.26 million) for all other

jurisdictions.

- Tax incentives for research and development are increasingly used by OECD jurisdictions with 33 out of 38 offering tax relief on R&D expenditures in 2021, compared to 19 in 2000.
- 21 out of the 33 OECD countries that offer tax incentives offer refundable (payable) tax credits or equivalent incentives.
- Among the 43 IP regimes found to be not harmful, the tax benefit offered ranges from a full exemption to a reduction of about 40 percent of the tax rate that would have otherwise applied. The most common reduction is a 50 percent reduction. The reduced rates range from 0 percent (in 13 jurisdictions) to 18.75 percent (Korea).

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

Commitments to implement global tax transparency standard for crypto-assets by 2027

On November 10, 2023, the OECD welcomed the commitment made by 48 jurisdictions to implement the OECD's global tax transparency framework for the reporting and exchange of information with respect to crypto-assets - the Crypto-Asset Reporting Framework (CARF).

According to the joint statement, these jurisdictions intend to work towards swiftly transposing the CARF into domestic law and activating exchange agreements in time for exchanges to commence by 2027, subject to national legislative procedures. In addition, the signatory jurisdictions to the Common Reporting Standard (CRS) will implement amendments to same as agreed by the OECD. For previous coverage, please refer to the E-News Issue 179.

According to the OECD press release, the Global Forum has established a dedicated *"CARF Group"* to take the work forward. The release further notes that crypto-asset reporting issues were scheduled to be discussed at the Global Forum's 16th Plenary Meeting in Lisbon (from November 29 to December 1, 2023).

Proposed changes to the Commentary on Article 5 of the OECD Model Tax Convention

On November 16, 2023, the OECD published a public discussion draft in view of potential amendments to the Commentary on Article 5 of the OECD Model Tax Convention (MTC) in respect of the taxation of activities in connection with the exploration and exploitation of extractible natural resources.

While onshore exploitation activities (e.g. a mine) will generally constitute a permanent establishment under Article 5 of the MTC, the discussion paper notes that offshore exploration and various service activities connected with offshore exploration or exploitation may be of short duration and may not take place at a geographically fixed place of business, which would mean they were not performed through a permanent establishment within the meaning of the MTC. As such, the proposed changes would introduce an alternative provision that would allocate greater taxing rights to source jurisdictions by providing for a lower permanent establishment threshold in connection with the exploration and exploitation of extractible natural resources. The threshold would be crossed after a non-resident enterprise had operated in a jurisdiction for more than 30 days within a 12-month period.

Comments on the draft are requested by January 4, 2024.

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

OECD publishes Mutual agreement procedure (MAP) statistics for 2022

On November 14, 2023, the OECD released the latest mutual agreement procedure (MAP) statistics covering 133 jurisdictions and almost all MAP cases worldwide. Key takeaways include:

- The number of new MAP cases opened in 2022 increased by almost 3 percent compared to 2021.
- The number of MAP cases closed in 2022 decreased by almost 4 percent compared to 2021, but still represents a significant increase compared to 2020 (by almost 9 percent) and 2019 (by 3.5 percent).
- MAPs closed in 2022 fully resolved the issues at stake in 73 percent of cases, while only 2 percent were closed without any agreement, which is consistent with the 2021 figures.
- On average, the time to close MAPs was 25.3 months compared with 26 months in 2021, gradually approaching the 24-month target.

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

Global Forum publishes new EOIR peer review reports

On November 8, 2023, the Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum) published six peer review reports and two supplementary reports on the implementation of the exchange of information on request (EOIR) standard. Key takeaways include:

- Botswana, Dominica, Latvia, Pakistan, Poland, Serbia and Thailand received a "Largely Compliant" rating.
- For Mauritania, the peer review report highlights the need for further improvements, particularly in the case where there is a change in beneficial owners, and on the availability of beneficial ownership information for bank accounts. It is noted that the EOIR implementation will be reviewed and an overall rating will be assigned in a Phase 2 review.

It is important to note that the Code of Conduct Group (Business Taxation) will take into account the peer review recommendations when updating the EU list of non-cooperative jurisdiction (section 1.2) in February 2024. For more information, please refer to Euro Tax Flash Issue 526.

For more information, please refer to the OECD release.

Philippines and Kuwait join Inclusive Framework on BEPS

On November 10 and 15, 2023, the OECD announced that the Philippines and Kuwait, respectively, joined the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting as its 144th and 145th members.

By joining the Inclusive Framework, both jurisdictions have committed to complying with the BEPS minimum standards and to participating in the two-pillar solution to address the tax challenges arising from the digitalization of the economy. This brings the total number of Inclusive Framework jurisdictions committing to Pillar One (reallocation of profits to market jurisdictions) and Pillar Two (introduction of a global minimum taxation) to 141 jurisdictions.

United Nations

UN adopted revised draft resolution on tax cooperation

On November 22, 2023, the UN General Assembly adopted a draft resolution to promote inclusive and effective international cooperation on tax matters at the United Nations - for previous coverage, please refer to E-News Issue 184.

The resolution provides for the establishment of an ad hoc committee of no more than 20 members that is to be elected based on balanced geographical representation. The committee is asked to draft a framework convention with a view to agree on measures against illicit financial flows and taxing income from cross-border services.

As a next step, the ad hoc committee should finalize its work by August 2024 and provide a progress report by September 2024 (next session of the UN General Assembly).

For more information, please refer to the UN press release.

Local Law and Regulations

Austria

Government bill to implement minimum taxation under Pillar Two submitted to Parliament

On November 24, 2023, the Austrian 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 October include:

- certain additional items of the July Administrative Guidance (for example, treatment of (non-) marketable transferable tax credits, clarifications on substance-based income exclusion (SBIE) and currency conversion);
- clarifications on the identification of the group entity that is considered to be liable for filing and payment of the top-up tax;
- changes to the Austrian Commercial Code to provide for a temporary mandatory exception from accounting for deferred taxes arising from Pillar Two, in accordance with the amendments to IAS 12.

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

For previous coverage, please refer to E-News Issue 184.

Belgium

Legislative proposal to implement minimum taxation under Pillar Two submitted to Parliament

On November 13, 2023, the Belgian Government submitted to Parliament draft legislation 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. Key features include:

- *Income Inclusion Rule (IIR)/ Undertaxed Profits Rule (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. The UTPR top-up tax would be collected as an additional top-up tax.
- *DMTT:* A DMTT would apply for financial years starting on or after December 31, 2023. The DMTT is to be generally calculated in accordance with the regular GloBE rules. However, the DMTT would need to be imposed with respect to 100 percent of the Top-up Tax calculated for local Constituent Entities (i.e. it cannot be limited to the UPE's ownership percentage in the local Constituent Entities). In line with OECD Guidance on qualified DMTTs, foreign covered taxes (e.g. CFC taxes) that would be allocated to local constituent entities under the regular GloBE rules, would also need to be excluded for Belgian DMTT purposes.
- *Safe harbors:* The draft incorporates the agreed transitional CbyC Reporting Safe Harbour. The QDMTT Safe Harbour and the Transitional UTPR Safe Harbour as agreed in the July Administrative Guidance have not been incorporated yet.
- *Additional OECD guidance:* The draft bill incorporates into the legislative text a number of elements of the February Administrative Guidance that adapt the OECD Model Rules / EU Directive rules but does not contain provisions from the July Administrative Guidance, which are expected to be incorporated at a later stage.
- *Administration:* The GloBE Information Return (GIR) would need to be filed within 15 months after the end of the Reporting Fiscal Year (18 months for the transitional year). In addition, separate tax returns would need to be filed with shorter filing deadlines applicable for DMTT purposes. The draft also requires advance payments for the DMTT and the IIR top-up tax.
- *Penalties:* The penalties for non-compliance with the administration of the GloBE rules will range from EUR 2.500 to EUR 250.000 depending on the type of violation.

The draft is expected to be adopted by December 31, 2023.

Croatia

Consultation on legislative proposal to implement minimum taxation under Pillar Two

On November 6, 2023, the Croatian Minister 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. Key features include:

- *IIR/UTPR:* The IIR would be applicable for fiscal years starting after December 31, 2023. The UTPR would generally be applicable one year later, i.e. for financial year starting after

December 31, 2024. The UTPR top-up tax would be collected as an additional top-up tax.

- *DMTT:* A DMTT would apply for financial years starting after December 31, 2023. The DMTT would generally follow the regular GloBE rules for calculating the ETR and Top-up Tax liability.
- *Safe harbors:* The draft legislation includes the transitional CbyC Reporting Safe Harbour and UTPR Safe Harbour in line with the OECD guidance. Furthermore, it provides for a permanent QDMTT Safe Harbour that is aligned to article 11 (2) of the EU Minimum Tax Directive (i.e. IIR and UTPR top-up tax is deemed to be zero in Croatia in relation to other EU jurisdictions that apply a QDMTT, subject to conditions).
- *Additional OECD guidance:* The draft bill does not yet incorporate into the legislative text elements of the February and July OECD Administrative Guidance that modify the OECD Model Rules / EU Directive rules.
- *Administration:* The GIR would need to be filed within 15 months after the end of the Reporting Fiscal Year (18 months for the transitional year). In addition, a local tax return (DMTT) would need to be filed within the same deadline or within 30 days following the submission deadline for the GIR (IIR/UTPR).
- *Penalties:* The penalties for non-compliance with the administration of the GloBE rules would range from EUR 3,000 to EUR 100,000 depending on the type of violation.

The consultation period ended on November 20, 2023. As a next step, the draft bill is expected to undergo an expedited procedure in the Parliament with a view to enact the rules by December 31, 2023.

Finland

Consultation launched on the text of the Amount A MLC (Pillar One)

On November 9, 2023, the Finnish Ministry of Finance launched a consultation on the text of a new Multilateral Convention to Implement Amount A of Pillar One that was published by the OECD on October 11, 2023 - for more information, please refer to E-News Issue 185 and to a dedicated KPMG report.

The consultation document provides some further background and explanations in this context and asks stakeholders to provide input on whether Finland should sign the Amount A MLC. The consultation period closed on December 4, 2023.

Germany

Parliament adopts updated draft bill to implement minimum taxation under Pillar Two

On November 10, 2023, the German Parliament adopted the 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 October include:

- a QDMTT Safe Harbour election in accordance with the July 2023 Administrative Guidance conditions (i.e., IIR and UTPR Top-up Tax will be deemed to be zero in Germany in relation to other jurisdictions that apply a QDMTT that meets the requirements of the July guidance);
- the transitional UTPR Safe Harbour and certain additional items of the July Administrative

Guidance (for example, treatment of marketable transferable tax credits, clarifications on SBIE and currency conversion);

- an authorization for the Federal Ministry of Finance to issue an ordinance to further clarify the application of Safe Harbours that fall in the scope of Article 32 of the EU Minimum Tax Directive as well as an ordinance to clarify the administrative requirements (scope, detailed structure and exchange of information of the GIR).

As a next step, the law requires approval of the Bundesrat (Federal Council) and publication in the Official Gazette, before it enters into force.

For more details, please refer to E-News Issue 182 and a report prepared by KPMG in Germany.

Draft guidance on defensive measures against non-cooperative jurisdictions

On November 30, 2023, the German Ministry of Finance published draft guidance on the application of defensive measures against non-cooperative jurisdictions – for background information, please refer to a report prepared by KPMG in Germany.

According to the draft guidance, the decree listing the non-cooperative jurisdictions subject to the German defensive measures is to be revised at the end of each calendar year to reflect the Council conclusions on the EU list of non-cooperative jurisdictions. In addition, the draft guidance provides additional guidance on various elements of the German Tax Haven Defence Act, including:

- clarifications on the concept of 'residency' in a non-cooperative jurisdiction;
- clarifications on the type of taxes, taxpayers and transactions impacted by the German defensive measures
- clarifications on the (temporal) application of the different applicable German defensive measures;
- clarifications on the relationship to other regulations (e.g. provisions in the German Foreign Tax Act, interest and royalty deduction limitation provisions)

Feedback by associations is requested by January 9, 2024.

Greece

Implementation of the EU Public CbyC Reporting Directive

On November 15, 2023, legislation implementing into Greek national law the provisions of the EU Public Country-by-Country Directive was published in the Official Gazette. Key takeaways include:

- The provisions of the Greek bill are closely aligned with the text of the Directive.
- Greece did not adopt the "safeguard clause", i.e. to allow in scope groups to temporarily omit for a maximum of five years information that would cause a significant disadvantage to the companies concerned, provided they can justify the reason for the omission.
- Greece opted for the website publication exemption, i.e. to exempt companies from publishing the report on their websites, if the report is already made publicly available to any

third party located in the EU, free of charge, on the website of the commercial registry.

These new provisions will apply for financial years beginning after June 22, 2024, and failure to comply will result in fines between EUR 10,00 and EUR 100,000.

For a state of play of the implementation of the EU Public CbyC Reporting Directive, please refer to KPMG's dedicated implementation tracker.

Hungary

Bill to implement minimum taxation under Pillar Two enacted

On November 30, 2023, the bill to implement the OECD's Pillar Two Model Rules as set out under the EU Minimum Tax Directive was published in the Official Gazette. Key amendments compared to the draft bill issued in October include:

- indication that the minimum tax rules shall be interpreted in accordance with the OECD Model Rules, Commentary, GloBE Implementation Framework and Administrative Guidance where those materials are compatible with the local minimum tax rules;
- clarification that the QDMTT liability would need to be imposed with respect to 100 percent of the Top-up Tax calculated for local Constituent Entities (i.e. it cannot be limited to the UPE's ownership percentage in the local Constituent Entities);
- the bill clarifies that the permanent QDMTT Safe Harbour would need to be applied in accordance with the July Administrative Guidance (i.e., IIR and UTPR Top-up Tax will be deemed to be zero in Hungary in relation to other jurisdictions that apply a QDMTT that meets the requirements of the July guidance);
- additional elements of the July Administrative Guidance (for example, treatment of marketable transferable tax credits). However, the law does not include the agreed transitional UTPR Safe Harbour;
- In addition to the provisions related to the implementation of the GloBE Rules, the bill also provides for the introduction of a new R&D tax credit. The credit would generally amount to 10 percent of eligible R&D expenses (capped at a certain amount per taxpayer and per project, depending on the type of activity) and subject to variations in case of joint research projects with higher education institutions. Taxpayers are entitled to receive a cash refund where the credit has not been used against the corporate income tax liability within a period of four years. According to the bill, the credit will be considered a refundable tax credit under the GloBE rules.

For previous coverage, please refer to E-News Issue 185.

New defensive measure against non-cooperative and low-tax jurisdictions adopted

On November 21, 2023, the Hungarian Parliament adopted a bill to introduce various tax amendments, including a new defensive measure against non-cooperative and low-tax jurisdictions.

The new provisions deny the deduction of interest and royalty payments to entities or individuals that are tax resident in a jurisdiction included on the EU list of non-cooperative jurisdictions or that is considered to be a zero- or low-tax.

The rules will be effective as of January 1, 2024 and will not apply where the taxpayer is able to prove that the transaction was performed for valid commercial reasons, reflecting economic reality.

Italy

Clarifications on DAC 7 reporting obligations issued

On November 20, 2023, the Italian Revenue Agency issued implementing provisions on the application of the Italian reporting rules implementing the Council Directive (EU) 2021/514 (DAC7). Key takeaways include:

- clarifications regarding the scope of 'relevant activities', which might be required to be reported;
- the content and ways of submission to comply with the notification and reporting requirements for reporting and excluded platform;
- clarifications that reportable information is to be declared by January 31 of the following year, i.e. the first declaration is required by January 31, 2024 in respect of information concerning 2023.

For previous coverage on the Italian DAC7 implementation, please refer to E-News Issue 175.

Tax measures included in international tax reform draft decree

Since August 2023, the Italian government has issued several decrees providing for a number of direct tax measures and amendments, including:

- *Implementation of Pillar Two:* For more details, please refer to E-News Issue 183.
- *Repeal of the notional interest reduction (NID) regime:* Proposed repeal of the current NID regime that allows for an equity allowance of 1.3 percent of qualifying net equity. While the repeal would generally become effective from January 1, 2024, companies would be allowed to make use of any residual NID excess without time limitation.
- *Reform of Italian tax residency criteria for corporations:* Introduction of new tax residency criteria in form of the place of effective management and the place where day-by-day management mainly occurs (in addition to the existing criteria of having a registered office).
- *Extension of capital gain exemption regime to EU and EEA companies:* Proposed extension of the application of the domestic 95 percent capital gains participation exemption relating to substantial participations in non-resident EU or EEA companies (without an Italian permanent establishment), subject to certain conditions.
- *Temporary incentive for certain activities relocated to Italy:* Introduction of a temporary 50 percent exemption for CIT and regional tax purposes in relation to income derived from activities relocated from non-EU/EEA countries to Italy, subject to certain conditions and recapture regulations. The exemption would be available for the fiscal year in which the

activity is relocated to Italy and for the subsequent five fiscal years.

- *Amendments to CFC rules:* Amendments to the computation of the effective tax rate under Italian CFC rules with a view to align the CFC regime with the domestic rules transposing the EU Minimum Tax Directive.

The publication of the draft decrees was prompted by the delegation law for the revision of tax system that was published in August 2023 (see E-News Issue 182). The decrees are still to be reviewed by the Chamber of Deputy and may therefore be subject to change.

For more information, please refer to a report made by KPMG in Italy.

Liechtenstein

Bill to implement minimum taxation under Pillar Two adopted by Parliament in second reading

On November 10, 2023, the Parliament in Liechtenstein adopted in the second reading the bill to implement the OECD's Pillar Two Model Rules. Key features include:

- the bill only includes basic provisions regarding the scope, top-up tax calculation, collection method, filing and administrative procedures and otherwise relies on a direct reference to the OECD Model Rules;
- while the QDMTT and IIR would generally apply for financial years starting on or after January 1, 2024, the bill authorizes the government to defer the application to January 1, 2025 depending on the implementation timeline in other countries;
- the bill further authorizes the government to set the application start date for the UTPR but clarifies that the rule would not apply earlier than for financial year starting on or after January 1, 2025;
- the bill clarifies that the QDMTT would need to be computed based on the UPE's Financial Accounting Standard and imposed with respect to 100 percent of the top-up tax calculated for local constituent entities (i.e. it cannot be limited to the UPE's ownership percentage in the local constituent entities);
- the bill authorizes the government to issue a separate regulation to provide for a temporary simplified top-up tax calculation following the Inclusive Framework agreement on Safe Harbours and Penalty Relief from December 2022.

For final enactment, the bill needs to be approved and signed by the Prince of Liechtenstein.

For previous coverage, please refer to E-News Issue 174.

Luxembourg

Amended draft bill to implement minimum taxation under Pillar Two submitted to Parliament

On November 13, 2023, the Luxembourg government submitted to the Parliament amendments to the 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 August include:

- the Luxembourg QDMTT computation requires the use of the local financial accounting subject to the conditions set out in the July Administrative Guidance. Investment Entities and Insurance Investment Entities are excluded from the scope of the QDMTT;
- the agreed transitional UTPR Safe Harbour and the permanent Safe Harbour rules which include the permanent Simplified Calculation Safe Harbour for Non-material Constituent Entities;
- a permanent QDMTT Safe Harbor in accordance with the July Administrative Guidance (i.e., IIR and UTPR Top-up Tax is deemed to be zero in Luxembourg in relation to other jurisdictions that apply a QDMTT, subject to conditions);
- additional items of the February and July Administrative Guidance (for example, portfolio shareholding election, equity gain or loss inclusion election, special allocation rules for blended CFC regimes, the excess negative tax carry-forward election, clarifications on SBIE).

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 a report prepared by KPMG in Luxembourg and E-News Issue 182.

Proposed tax measures in government coalition agreement 2023-2028

On November 20, 2023, the newly formed Luxembourg government released the 2023-2028 coalition agreement, including the tax measures envisaged for the next five years. These measures must be incorporated into draft legislation and approved by Parliament before they enter into force. Key takeaways on corporate taxation include:

- The government aims at further developing Luxembourg's double tax treaty network.
- To ensure accurate transposition of EU directives into domestic legislation, the government defends the principle of "the whole directive and nothing but the directive". The agreement also shows commitment to the principle of unanimity in EU tax matters, while ensuring that the specificities of each member state are factored in.
- In order to strengthen the competitiveness of the economy and the financial sector, it is envisaged to adjust, in the medium term, the corporate income tax and municipal business tax rates to bring them closer to the average of the tax rates applied in the OECD countries.
- The new government also aims at exploring tax reductions for small and medium-sized enterprises.
- The investment tax credit system would be supplemented to support companies investing in the sustainable and digital transition as well as in research and development.

Moldova

Moldova implements public country-by-country reporting

On November 9, 2023, a bill introducing public CbyC reporting was published in the Moldavian Official Journal. Key takeaways include:

- The provisions of the draft bill are aligned to a certain extent with the EU Public CbyC Reporting Directive and would require multinational groups to publish income tax information where:

  - the ultimate parent entity (UPE) is located in Moldova and the total consolidated revenue of the group exceeds MDL 1,6 billion (approximately EUR 827 million), and
  - the UPE of a group with consolidated revenues exceeding the threshold above is located outside Moldova but operates in Moldova through subsidiaries or branches of a certain size.

- CbyC disclosure would be required for all jurisdictions in which the group operates.
- Moldova adopted a provision similar to the "safeguard clause", i.e. to allow in scope groups to temporarily omit for a maximum of five years information that would cause a significant disadvantage to the companies concerned, provided they can justify the reason for the omission.
- The data points to be reported are largely in line with those under the EU Public CbyC Reporting Directive.
- The information needs to be published in the management report accompanying the entity's financial statements.
- The reporting rules would apply starting January 1, 2025.

For previous coverage, please refer to E-News Issue 185.

Netherlands

Netherlands publishes decree on interest deduction limitation rule stemming from ATAD

On November 28, 2023, Decree no. 2023-22492 was released by the Dutch State Secretary for Finance, providing clarifications on the application of the interest deduction limitation rule stemming from the Anti-Tax Avoidance Directive (ATAD). Key clarifications include:

- The term "interest" is defined in its economic context, encompassing legal interest received as damage compensation and the depreciation of an accrual amount. Conversely, interest on tax due, late payment interest, and payments subject to deduction restrictions under other provisions of the Corporate Income Tax Act are excluded from the rule's scope.
- The term "loan" includes savings deposits but excludes tax debts or payment reductions for settling a debt at once.
- The expression "interest charges" covers penalty interest and expenses for guarantees, excluding currency gains or losses and commitment fees.
- Contracts comparable to a loan are those specifying both a principal amount and a repayment obligation, along with an obligation to pay interest or a similar payment obligation (e.g., financial lease agreements).
- Adjusted profits must incorporate the amortization of purchased goodwill. Depreciations or the reversal of write-downs that are not included in taxable profits are not considered. Write-downs to the lower business value or the reversal of same before the sale of business assets are factored into the adjusted profits calculation.

The decree entered into force on November 29, 2023.

Reservations against proposed EU Head Office Tax system Directive

On November 24, 2023, the Dutch government issued concerns regarding the EU Head Office Tax system (HOT) proposal, (for more details, please refer to Euro Tax Flash Issue 522). Key takeaways include:

- doubts regarding the actual size of the benefits achieved by the HOT proposal, especially because only a limited number of Dutch SMEs operate cross-border via a permanent establishment (PE);
- concerns about creating incentives for potential arbitrage restructuring, for example, by making use of the EU Merger Directive;
- concerns about domestic policy choices and potentially also domestic anti-abuse measures being disregarded when calculating the taxable profits of domestic Pes;
- concerns that the HOT proposal might not be compatible with double tax treaties based on the OECD Model Tax Convention;
- concerns about potential competitive distortions between for in-scope enterprises and enterprises which operate only domestically;
- concerns about the exclusion of SMEs with holding structures;
- concerns regarding the administrative aspects of the proposal including the proposed exchange of information and possibilities to verify the information.

Norway

Amended proposal to implement minimum taxation under Pillar Two submitted to Parliament

On November 24, 2023, the Norwegian government submitted to the Parliament an updated draft bill to implement the OECD's Pillar Two Model Rules. Key takeaways compared to the draft bill issued in June include:

- While the IIR and DMTT remain scheduled to apply from January 1, 2024, UTPR provisions have not been included in the draft bill and will be incorporated at a later stage.
- The draft bill does not include the OECD Safe Harbour provisions (CbyC Safe Harbour and QDMTT Safe Harbour), nor most of the elements of the Administrative Guidance, which are expected to be incorporated subsequently via a separate regulation.
- The draft bill provides for a 19 percent tax refund for certain eligible expenses related to R&D projects. According to the draft bill, the regime should qualify as a Qualified Refundable Tax Credit.

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

Slovenia

Amended proposal to implement minimum taxation under Pillar Two submitted to Parliament

On November 24, 2023, the Slovenian 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:

- the persons liable for DMTT in Slovenia, noting that investment entities are excluded from the scope of the DMTT;
- clarification of how groups should calculate and allocate the DMTT liability across local entities;
- a requirement for the Slovenian Ministry of Finance to issue guidelines for calculating the DMTT, as well as the form, detailed content and method of submission of the GIR, within six months of the draft law's entry into force;
- the updated draft does not include the UTPR Safe Harbour, nor most of the elements of the February and July Administrative Guidance.

As a next step in the legislative process, the draft bill requires approval of the Slovenian Parliament. As such, amendments may still occur in the course of the legislative procedure.

For previous coverage, please refer to E-News Issue 182.

Corporate tax changes adopted by Slovenian government

On November 10, 2023, the Slovenian government adopted a bill amending the Corporate Income Tax Act. Key measures include:

- temporary increase of the corporate income tax rate from 19 percent to 22 percent;
- temporary introduction of a new 0.2 percent tax on the value of all assets of Slovenian banks and branches of foreign banks in Slovenia (capped at 30 percent of the banks' profits and subject to certain reductions).

Both measures would apply for a temporary period of five years, from 2024 to 2028.

Ukraine

Ukraine Adopts Windfall Tax for Banks in 2024

On November 21, 2023 the Parliament of Ukraine adopted a draft law introducing a windfall tax for Ukrainian banks. Key elements include:

- windfall profits of banks for the fiscal year 2023 shall be taxed at a corporate income tax rate of 50 percent,
- starting from January 1, 2024, the corporate income tax rate for banks will be raised from 18 to 25 percent.

The law replaces a previous draft, which had proposed a temporary increase in the corporate income tax rate for Ukrainian banks from 18 to 36 percent for fiscal years 2024 and 2025, and the denial of loss carry-forwards – see E-News Issue 186.

United Arab Emirates

Guidance on the taxation of foreign source income

On November 16, 2023, the UAE federal tax authorities released clarifications and examples with regards to the taxation of foreign source income. Key elements of the guidance include:

- The definition and examples of foreign source income.
- Clarifications about the taxable persons that are subject to tax on foreign sourced income.
- Information on the timing of taxation of foreign source income.
- Guidance of how to determine the taxable income and exempt income in respect of foreign source income.
- The definition of the concept of foreign tax credit and comments on the applicability of such relief.

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

United Kingdom

Publication of the Autumn Finance Bill following the presentation of the Autumn Statement

On November 29, 2023, following the presentation of the Autumn Statement by the Chancellor of the Exchequer, on November 22, 2023, the Government released the Autumn Finance Bill 2023. Key takeaways include:

- *Amendments to Pillar Two legislation:* Modifications to the already enacted legislation on multinational top-up tax and domestic top-up tax rules to incorporate technical amendments including those reflecting provisions in the July Administrative Guidance (for example, the treatment of marketable transferable tax credits, clarifications on SBIE and currency conversion, the QDMTT Safe Harbour). In addition, the draft legislation provides for clarifications in respect of the transitional CbyC Reporting Safe Harbour allowing groups to take advantage of same where no formal CbyC Report is prepared, subject to certain conditions. A new clause also expands the authorization for the UK government to amend legislation to ensure alignment with future OECD guidance. For previous coverage, please refer to E-News Issue 184.
- *Offshore receipts in respect of intangible property (ORIP):* The ORIP rules will be repealed in respect of income arising from December 31, 2024, alongside the introduction of the UK's UTPR in a future Finance Bill, given the expectation that the UTPR will more comprehensively discourage the arrangements that ORIP was aimed at.
- *Full expensing:* The previously temporary accelerated depreciation mechanism introduced in the Spring Budget 2023 for plant and machinery expenditure (providing a 100 percent first-year allowance for main pool expenditure and a 50 percent first-year allowance for special pool expenditure), would be made permanent, i.e., extended beyond the initial deadline of

April 1, 2026.

- *R&D tax credits:* The Research and Development Expenditure Credit (RDEC) and the SME R&D relief would be merged into a single tax credit regime calculated at rate of 20 percent for periods beginning on or after April 1, 2024. The notional taxation of the credit in loss-making entities would be at the small profit rate of 19 percent. In addition, loss-making R&D-intensive SMEs with qualifying R&D expenditure constituting 40 percent (or 30 percent for accounting periods beginning on or after April 1, 2024) or more of total expenditure, would remain entitled to an 86 percent enhanced deduction on qualifying expenditure and remain eligible to claim a 14.5 percent refundable tax credit.

For more details, please refer to the press release from HM Treasury and a report prepared by KPMG in the UK.

Local Courts

Belgium

Lower Court decision on the interpretation of the beneficial ownership concept in the context of a double tax treaty

On October 27, 2023, the Lower Court of Leuven (the Court) ruled that the beneficial ownership requirements for interest payments, as prescribed by the double tax treaty (DTT) concluded between Belgium and the Netherlands, must be interpreted in light of the Interest and Royalties Directive (IRD).

The plaintiff was a Belgian company which paid interest on five loans granted by its Dutch subsidiary ("BV2") in 2017. The plaintiff claimed a withholding tax exemption based on Article 11 of the DTT concluded between Belgium and the Netherlands. The tax authorities rejected the claim on the grounds that BV2 was not the beneficial owner of the interest.

The tax authorities took the view that the beneficial ownership criterion prescribed in Article 11 of the DTT should be interpreted in light of the IRD and the OECD Model Convention. Additionally, the tax authorities argued that the Netherlands was used as a transit country to channel interest income to foreign creditors, and that the Dutch company had limited powers in respect of that income stream. The Belgian company argued, inter alia, that the provisions of the IRD should not be taken into consideration as the dispute concerned a claim made under a DTT.

The Court confirmed that the notion of 'beneficial owner' in the DTT should be interpreted in light of the Interest and Royalties Directive based on the following grounds:

- according to the 1998 OECD Commentary, the concept of beneficial owner was introduced to prevent abuse of the treaty and the term beneficial owner used in the IRD Directive should be interpreted in the same sense for the application of the DTT between Belgium and the Netherlands;
- the parliamentary documents show that the IRD was explicitly taken into account in the discussions on the DTT;

- the two jurisdictions concerned were involved in the creation of the IRD, which was negotiated during the same period as the negotiations for the DTT. Moreover, as EU Member States, both countries are obliged to ensure compliance with EU law.

The Court stated that BV2 had failed to demonstrate that it qualifies as the beneficial owner of the interest paid by the Belgian company, and rather acted as an intermediary of the US company. The Court therefore rejected the withholding tax relief claim of the Belgian company.

Germany

Lower Tax Court decision on the facts and circumstances that may be considered when applying the new German anti-treaty shopping rule

On June 21, 2023, the Lower Tax Court of Cologne (Court) ruled that the facts and circumstances of a group of companies should be considered for the purpose of applying the motive test under the German anti-treaty shopping rules. Under these rules, taxpayers that have suffered withholding tax on German-sourced payments can apply for a refund of the WHT paid in excess of the applicable DTT, if they meet certain substance requirements or prove that none of the main purposes of the relevant group structure is to obtain a tax advantage, defined in accordance with the aforementioned rule.

In 2017 and 2018, the CJEU decided that the old version of the anti-treaty shopping rule was contrary to EU Law (cases C-504/16, C-613/16 and C-440/17). The rule was therefore amended in 2021 and applied to all pending cases. However, to prevent unfavorable retroactive effects when the new anti-treaty shopping provisions would disadvantage taxpayers, a more favorable review was to be granted if payments were received before the enforcement date of the new version, allowing the continued application of the old rules in such cases.

In the case at hand, the plaintiff was a Cyprus-based taxpayer in the international shipping industry applying for a refund of the WHT paid on interest income during tax years 2010 and 2011. The claim was based on the DTT concluded between Cyprus and Germany. Whilst the plaintiff lacked substance under the disputed German rules, a sister company also located in Cyprus did meet the substance criteria.

Initially the Court upheld the refund claim based on the fact that the rejection was based on the old version of the rule, now considered contrary to EU Law. Following an appeal, the Federal Fiscal Court of Germany (Bundesfinanzhof) questioned the direct transposition of CJEU's case law and stressed the need for an in-depth analysis and a comprehensive examination of the group relationships. The case was therefore referred back to the Court.

In the judgment at hand, the Court held that the plaintiff was entitled in accordance with the new version of the anti-treaty shopping rule to the refund, as none of the main purposes for the plaintiff's involvement was to obtain a tax advantage and thus the counter-evidence prescribed by the domestic rules could be provided. In the Court's views, under the new version of the anti-treaty shopping rules, it is possible to take all companies in the group into account when examining the counter-evidence. Characteristics of a group company in the same country (in particular the characteristics of an actively operating sister company) could therefore be included in for the counter-evidence.

For more details, please refer to an alert prepared by KPMG in Germany.

Lower Tax Court clarifies application of the double deduction rule for partnerships

On August 31, 2023, the Lower Tax Court of Muenster (the Court) rendered a decision clarifying that, in the context of the double deduction rule for partnerships under German legislation, no double deduction occurred where interest expenses incurred by a Dutch resident partner (BV) are deductible at the level of the German limited liability partnership (KG), but are not recognized at the level of the Dutch company in accordance with the Dutch tax consolidation regime.

In Germany, the debt-capital used by a corporation to finance the participation in a German partnership qualifies as a 'special business asset' and the corresponding interest payments are regarded as 'special business expenses', which are deductible at the level of the partnership. To avoid any mismatch where the partner is a foreign corporation established in a State that does not recognize 'special business assets' and allows the deduction of such interest expenses at the level of the partner, the double deduction rule for partnerships (distinct from the general anti-hybrid rules derived from ATAD) provides that 'special business expenses' are not deductible in Germany if they also reduce the tax base in the foreign State.

In this case, a Dutch resident company (BV), which was part of a tax consolidated group in the Netherlands with its parent company, was the sole partner in a German KG. The BV borrowed funds from its parent company, which were then used to finance the German KG. In the Netherlands, the intra-group interest income and expenses were not recognized under the tax consolidation regime, while in Germany the expense was deducted.

The German tax authorities challenged the deduction in Germany, arguing that a deduction took place both in Germany and in the Netherlands.

The Court ruled in favor of the taxpayer on the grounds that there had been no reduction in the tax base in the Netherlands. In the Court's view, the BV and its parent company were treated as a single entity under the Dutch tax-consolidation regime, canceling out any intercompany transactions. Additionally, the Court clarified that the non-inclusion of interest income in the Netherlands should not be taken into consideration, as the double deduction rule for partnerships does not impose such a requirement.

The Court has authorized an appeal to the Federal Fiscal Court of Germany (Bundesfinanzhof), which could be lodged by the German tax authorities.

Luxembourg

Constitutional Court declares flat minimum net wealth tax partly unconstitutional

On November 10, 2023, the Constitutional Court of Luxembourg issued a ruling assessing the constitutionality of certain provisions of the net wealth tax ("NWT") law. Companies in Luxembourg are subject to a minimum NWT, depending on their balance sheet size, resulting in a tax liability ranging from EUR 535 to EUR 32,000. Exceptions exist for companies holding predominantly financial assets, transferable securities, cash, and specific receivables. According to the NWT law, these companies are subject to a minimum flat tax of EUR 4,815 provided they:

- hold over 90 percent of their total assets in the aforementioned categories; and
- possess a total balance sheet value exceeding EUR 350,000.

The case referred to the Constitutional Court involved a company subject to the minimum NWT of EUR 4,815 based on its assets' composition and total balance sheet value. Had the composition of the balance sheet been slightly different (i.e., less than 90 percent of financial assets), the company would have been subject to EUR 1,605 of minimum NWT. The company argued that penalizing companies on the sole basis of a differently structured balance sheet would be contrary to the principle of equality under the Luxembourgish Constitution.

In brief, the Constitutional Court ruled that the different treatment violates the constitutional principle of equality, with no justification. The Court further ruled that, pending legislative reforms, taxpayers subject to minimum NWT of EUR 4,815 should instead be subject to minimum NWT according to the main rule (i.e., depending on balance sheet size), if more favorable.

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

KPMG Insights

EU Tax Perspectives session

On December 13, 2023, KPMG will hold 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 not only implementation of international initiatives but also advancing discussions on EU-specific proposals that are subject to unanimous approval by the Member States.

The December edition of the webcast will look back on some of the highlights of the year and discuss the state of play of the various initiatives that are currently being implemented or considered by the EU Member States. The end of the year will also mark a change in the Presidency of the Council of the EU, with Belgium taking over from Spain from January 1, 2024.

A panel of KPMG specialists will share their insights on the current landscape and how it is expected to change in 2024, with a focus on:

- BEPS 2.0 in the EU: state of play on the implementation of the EU Minimum Tax Directive (Pillar Two), Pillar One developments and the future of digital service taxes
- EU harmonization and coordination initiatives: Business in Europe: Framework for Income Taxation (BEFIT), the Transfer Pricing Directive, the Withholding Tax Relief Framework (FASTER)
- Unshell (ATAD 3): state of play and possible timeline
- Other key EU initiatives: the October update of the EU list of non-cooperative jurisdictions, a possible review of the Directive on Administrative Cooperation, the Foreign Subsidies Regulation
- Looking ahead: the direction of EU tax policy in light of the upcoming European Parliament elections and the change in the Council's Presidency

To register for the session, please access the event page.

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.

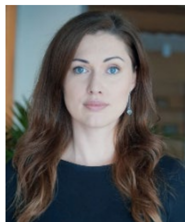
KPMG's EU Tax Centre team

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

Ana Pușcaș
Senior Manager
KPMG's EU
Tax Centre

Marco Dietrich
Senior Manager
KPMG's EU
Tax Centre

Elena Moro Fajardo
Assistant Manager
KPMG's EU
Tax Centre



Nina Matviienko
Assistant Manager
KPMG's EU
Tax Centre

Erwan Cherfaoui
Junior Associate
KPMG's EU
Tax Centre

Maximilian Frolik
Intern
KPMG's EU
Tax Centre

Key EMA Country contacts

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

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

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

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

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

Ladislav Malusek
Partner
KPMG in 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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