KPMG

E-News from KPMG's EU Tax Centre

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Issue 151 – March 29, 2022

KPMG's EU Tax Centre compiles a regular update of EU and international tax developments that can have both a domestic and a cross-border impact, with the aim of helping you keep track of and understand these developments and how they can impact your business.

Latest CJEU, EFTA and ECHR

CJEU decides that Portuguese taxation of dividends received by foreign UCITS is contrary to EU law

On March 17, 2022, the Court of Justice of the European Union ('CJEU' or 'Court') rendered its decision in case C-545/19. The case concerns the compatibility with EU law of the Portuguese withholding tax levied on dividends paid by Portuguese companies to foreign undertakings for collective investment in transferable securities ('UCITS'). In contrast to the opinion of the Advocate General ('AG'), the Court concluded that the Portuguese legislation under dispute is contrary to the free movement of capital.

For more information, please refer to the Euro Tax Flash issue 469.

EU Institutions

EUROPEAN COMMISSION

European Commission announces support for a temporary tax on windfall profits

On March 8, 2022, the European Commission announced that Member States can consider temporary tax measures on windfall profits and exceptionally decide to capture a part of these returns for redistribution to consumers. Windfall profit taxes will likely be imposed by way of a one-off tax on the excess profits made by energy companies due to the recent increase in gas prices. It was further announced that such measures need to fulfil certain criteria to ensure that they are proportionate, limited in time and that they avoid undue market distortions.

For more information please refer to the press release of the European Commission.

EUROPEAN PARLIAMENT

FISC public hearing on the reform of the Code of Conduct Group's

On March 17, 2022, 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. Lyudmila Petkova.

The discussion focussed on the state of play of the proposal for a revised mandate of the CoCG, which did not receive unanimous approval during the ECOFIN Council meeting on December 7, 2021 (for more information please refer to Euro Tax Flash issue 461). In addition, the exchange dealt with the EU listing process of non-cooperative jurisdictions in light of the latest revision of the list on February 24, 2022 (for more information please refer to Euro Tax Flash issue 466).

Key takeaways of the discussions between Ms. Petkova and Members of the Parliament (MEPs) include:

Background information on the blocked reform of the mandate of the CoCG

- According to Ms. Petkova, the reform of the mandate of the CoCG was not approved due to unresolved technical details in respect of the enlarged definition of harmful tax regimes to cover features of tax systems that have general application and that may have harmful effects.
- In particular, discussions focused on the link between the OECD's Pillar Two solution on a minimum level of taxation and those general characteristic of tax systems.

Importance of review of preferential personal income tax regimes

- Ms. Petkova agreed with the European Parliament's previous demands for a review of preferential personal income tax regimes, special citizenship schemes or measures designed to attract highly mobile wealthy individuals and digital nomads, which could lead to significant distortions to the single market.
- However, she noted that the CoCG has not been mandated to carry out this review and will therefore continue focusing on harmful tax regime in the area of business taxation.
- In addition, Ms. Petkova referred to discussions on enlarging the mandate of the OECD's Forum on Harmful Tax Practices (FHTP) to cover the review of these regimes.

Extending the geographical scope and listing criteria

- Ms. Petkova confirmed that the CoCG held discussions on the geographical extension and on additional criteria in respect of the screening of third countries at its meeting on March 16, 2022.
- Additional criteria that were discussed include measures to ensure a minimum level of taxation in line with the OECD Pillar Two solution, beneficial ownership and abuse of shell companies.

Limited mandate to review the exchange of information

- As regards the exchange of information (EOI), Ms. Petkova noted that the CoCG only assesses EOI with third country jurisdictions focusing on whether the exchange is codified in the legislation of the third country and whether the exchange is actually carried out.
- The quality of EOI is not part of the review.
- The CoCG is also not mandated to assess EOI between Member States and that this is dealt with by other working groups of the Council.

No mandate to review and discuss European Parliament's resolutions and letters

- Ms. Petkova noted that the CoCG is not mandated to review resolutions that are adopted by the European Parliament or to respond to letters sent by MEPs.
- Accordingly, the proposals included in the European Parliament's resolution of October 7, 2021 asking the Council and the European Commission to reform the EU policy on harmful tax practices have not been discussed by the members of the CoCG (for more information on the resolution please refer to E-News issue 140).

Increased transparency in respect of the decision-making process by the CoCG

- According to Ms. Petkova, the CoCG has increased the volume of documents made publicly available in order to allow for more transparency on the CoCG's decisions-making process.
- Publicly available documents include, for example, reports to the Council, guidelines applied to the screening and monitoring of jurisdictions, general review of preferential tax regimes and letters of commitments by third country jurisdictions.
- It is envisaged to restructure the CoCG's web page to allow for an easier access to the published documents.

For additional information please refer to the European Parliament's press release.

Draft report requests amendments to the proposal for an EU Minimum Tax Directive

On March 14, 2022, MEPs issued a draft report on the proposal for an EU Minimum Tax Directive. While the report generally approves the Commission's proposal, it calls on the Commission to make several amendments to its proposal.

Key amendments requested by MEPs include:

- Increase of the minimum tax rate from 15 percent to 21 percent;
- Option to apply lower revenue thresholds for MNE groups and large-scale domestic groups;
- Removal of the exclusion for pension funds, investment funds and real estate investment vehicles;
- Removal of the exlcusion of international shipping income;

- Limitation of the time periods in respect of the rules on refundable tax credits and the recapture of deferred tax liabilities;
- Limitation of transitional rules;
- Inclusion of an anti-avoidance clause to disregard an arrangement or a series of arrangements for top-up tax calculation purposes, which are not genuine and are put in place for the essential purpose of obtaining a tax advantage that defeats the object or purpose of this Directive;
- Inclusion of a review clause to assess and reconsider certain exemptions and derogations, in particular, regarding distribution tax systems, the substance-based income exclusion and the relevance of the revenue threshold for MNE Group and large-scale domestic groups.
- Power to adopt acts should be delegated to the Commission to ensure to integrate future amendments to the OECD Model Rules into EU law, if necessary.

The vote in the committee is currently scheduled for April 28, 2022.

OECD and other International Institutions

OECD

Peer review report on the prevention of tax treaty shopping under BEPS Action 6

On March 21, 2022, the OECD released the fourth peer review report on the prevention of treaty shopping under BEPS Action 6. The report includes results of the peer review of each of the 139 jurisdictions that were members of the OECD/G20 Inclusive Framework (IF) on BEPS on May 31, 2021.

The report notes that the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) has continued to significantly expand the implementation of the Action 6 minimum standard for the jurisdictions that have ratified it. By contrast, jurisdictions that have not signed or ratified the MLI have generally made no or little progress in implementing the minimum standard. Accordingly, the report concludes that the ratification of the MLI is an effective tool for the implementation of the minimum standard.

In addition, the report includes recommendations to jurisdictions that must formulate a plan for the implementation of the minimum standard, and to those that have signed the MLI but have not yet completed the steps for the entry into effect.

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

Public consultation on tax transparency framework for crypto-assets

On March 22, 2022, the OECD published a public consultation document concerning a new global tax transparency framework for crypto-assets. The framework provides for the collection and exchange of tax-relevant information between tax administrations, with respect to persons engaging in certain transactions in crypto-assets. In addition, the public consultation document includes proposed amendments to the common reporting standard (CRS) for the automatic exchange of financial account information among countries.

Interested parties are invited to send comments by April 29, 2022. A public consultation meeting will be held at the end of May 2022.

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

Local Law and Regulations

Belgium

Final extension of Covid-19-related agreement on the taxation of cross-border workers

On March 22, 2022, Belgium and Germany agreed on a final extension of the special tax agreement in respect of cross-border workers during the COVID-19 pandemic until June 30, 2022. Based on the agreements, working days worked from home because of measures to combat the coronavirus pandemic are considered to be spent in the contracting state in which cross-border commuters would normally have carried out their work.

France

France publishes a revised list of non-cooperative jurisdictions

On March 16, 2022, the French tax authorities published a decree in the Official Journal, which removed Dominica from the national list of non-cooperative jurisdictions and which entered into force on the same day.

Following its latest revision, the French list includes the following jurisdictions and territories: American Samoa, Anguilla, the British Virgin Islands, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the U.S. Virgin Islands, and Vanuatu.

For details on defensive measures adopted by EU Member States against non-cooperative jurisdictions, please refer to KPMG's Summary of proposed or enacted measures.

Greece

Draft bill proposes introduction of a group escape clause in respect of interest deduction limitation rules

On March 15, 2022, the Greek Government issued a draft bill that provides for the introduction of a group escape clause in respect of the interest deduction limitation rules that were implemented in Greece as part of the transposition of the Anti-Tax Avoidance Directive (2016/1164 – ATAD 1).

The proposed group escape clause is in line with ATAD 1 and provides taxpayers with the option to deduct exceeding borrowing costs where they are a member of a consolidated group for financial accounting purposes, taking into account the group's ratio of equity over total assets.

As a next step, the draft bill needs to be approved by the Parliament.

Italy

Draft legislation provides for a windfall profit tax of 10 percent

On March 18, 2022, the Italian Government announced plans to impose a windfall profit tax of 10 percent on certain energy companies. Such windfall profit tax would likely be a one-off tax on the excess profits made by energy companies due to the recent increase in gas prices. The measure is intended to raise funds to finance a package of measures to provide relief from rising inflation and energy prices.

It is understood that the levy will be calculated on the increase in profit that energy companies reported between October 2021 and March 2022, compared to the profits generated between October 2020 and March 2021. The levy shall apply where companies report an increase of EUR 5 million or more.

Luxembourg

Extension of Covid-19-related agreement on the taxation of cross-border workers

On March 23, 2022, the Ministry of Finance of Luxembourg announced that it agreed with Belgium, France and Germany to extend the special tax agreement in respect of cross-border workers during the COVID-19 pandemic until June 30, 2022. Based on the agreements, working days worked from home because of measures to combat the coronavirus pandemic are considered to be spent in the contracting state in which cross-border commuters would normally have carried out their work.

Spain

Approval of a tax reform bill implementing ATAD 2 and revising penalty regime

On March 9, 2022, the Spanish Parliament approved a tax reform bill that includes the following measures:

- The introduction of the Anti-Tax Avoidance Directive (2017/952 – ATAD 2). Before, the Spanish government had published a decree transposing the hybrid mismatch rules of ATAD 2 into domestic legislation, with the exception of provisions related to reverse hybrids (for previous coverage please refer to E-News issue 128).
- Amendments to the penalty regime in respect of failures to report assets held abroad including the repeal of the requirement to sanction such failures at 150 percent of the value of the assets, represent a disproportionate measure. The amendments are the result of the CJEU's decision in case Commission vs Spain (C-788/19), which was published on January 27, 2022 and which held that hat the penalty regime would restrict the free movement of capital (for more information please refer to E-News issue 147).

The above measures apply from March 11, 2022.

United Kingdom

Qualifying Asset Holding Company (QAHC) legislation finalized as part of the Finance Act 2022

As previously covered in E-News issue 150, the Finance Bill 2022 was published in the Official Gazette on February 24, 2022. The Bill included the introduction of a new Qualifying Asset Holding Company (QAHC) regime, the legislation on which has now been finalised. The QAHC has been designed to facilitate the use of UK companies in structures used by certain institutional investors and funds to hold assets across a range of private market investment strategies. The QAHC regime sets out to achieve this by creating a streamlined and beneficial tax regime for eligible companies that notify into the regime.

For more information on the QAHC regime please refer to guidance published by HMRC as well as a report prepared by the KPMG member firm in the UK.

Local Courts

France

Court decision regarding the beneficial ownership concept for royalty payments

On February 8, 2022, the Court of Appeals of Versailles issued its decision in a case concerning royalties paid to a Dutch company. The plaintiff is a French taxpayer, part of a furniture retail group, that concluded a franchise agreement with a Dutch entity. Following a tax audit, the French tax authorities noted that the Dutch company paid 70 percent of the royalties received to a foundation set up in Liechtenstein. Based on these facts, the tax authorities held that the Dutch company was not the beneficial owner of the royalties, and that it was interposed in the structure with the aim of reducing the withholding tax burden in France. Consequently, the relief available under the relevant double tax treaty was partially denied (i.e. for the amount of royalties paid to Liechtenstein).

The Court of Appeals upheld the decision of a lower court and ruled in favor of the taxpayer. In short, the Court held that the Dutch company was the beneficial owner of the royalties, based on criteria including the date when the entity was set-up, the existence of own premises and personnel, and proof that the entity was involved in developing the brand (e.g. existence of a test store, as well as of a training center for the staff of the franchises). The Court also considered that the flat rate of 70 percent of royalties passed on to Liechtenstein is the price paid by the Dutch company for the right to use the relevant trade mark, and in the absence of this right it would not be able to undertake the franchisor activity.

India

Mere access to Indian premises does not constitute a permanent establishment

On March 9, 2022, the Delhi Bench of the Income-tax Appellate Tribunal (the Appellate Tribunal) held that the mere access of technical staff to local premises does not constitute a permanent establishment in India. The case concerned a Japanese company that provided technical support to its Indian subsidiary. Among others, the services entailed the physical presence of expat engineers in India, for periods longer than six months, who guided the set-up of a production line. The domestic tax authorities held that, based on the double tax treaty concluded between India and Japan – that follows the OECD Model, such services create a permanent establishment in India for the Japanese company.

The Appellate Tribunal noted that, for the purpose of the fixed place of business test, the Japanese company would need to have the right to use, as well as control over the local premises. However, in the case under dispute, even though the engineers had access to the Indian factory, it was only for the limited purpose of rendering the technical services agreed between the two companies. Therefore, the mere fact that the Japanese company had access to the premises of the Indian company did not create a permanent establishment exposure for the former.

Furthermore, the Appellate Tribunal held that there was no supervisory permanent establishment of the taxpayer in India, since no activities performed by the employees qualified as supervisory services, and the employees were not rendering any services in connection with a building site, construction project, installation project or assembly project.

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

KPMG Insights

The next chapter for BEPS Pillar 2 and the possible implications for multinationals

As part of the Future of Tax & Legal webcast series, KPMG International will hold sessions on April 6 and April 7, 2022, focusing on the next chapter for BEPS Pillar 2 and the possible implications for multinationals. With the OECD detailed Commentary released on March 14, 2022, this webcast should be a chance to consider a more detailed analysis of what these developments mean for multinational organizations and explore key considerations and actions for tax leaders.

Please access the event page to register.

EU Financial Services Tax perspectives

As part of the Future of Tax & Legal webcast series, KPMG International will hold a session on March 30, 2022, focusing on the question whether the European tax landscape will become even more volatile in the future. In this context, a panel of KPMG firms' tax specialists from across Europe will share their insights on some of the latest developments impacting asset managers, banks and insurers with a focus on:

- EU Commissions Shell Entities Directive proposals;
- BEPS 2.0 a closer look at the ambitious timetable set out by the OECD, the potential cost to business and compliance challenges in managing reporting obligations; and
- European withholding tax developments.

Please access the event page to register.

Restructuring – Tax and Legal Considerations

As part of the Future of Tax & Legal webcast series, KPMG International held a session focusing on the tax and legal aspects of restructuring financially troubled companies on January 25, 2022. The topics covered addressed tax and legal issues relevant to debtor companies, creditors and acquirors of financially distressed assets including debt modification, bankruptcy, stressed asset dispositions and internal reorganization. A replay of the webcast is available here.

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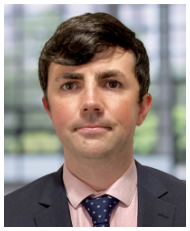

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