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Editorial

During the frosty February weather, many of us have certainly been pleased by the good news of falling energy prices. Although recent developments in wholesale markets are positive, it is hard to predict whether the decline in prices will continue. The market is cautious, and the situation remains difficult for many companies. The government is trying to respond to the current situation by Government Decree No. 298/2022 Coll., laying down the rules for public aid: drawing support in the form of capped electricity and gas prices will bring not only benefits of lower costs but also obligations to be fulfilled on an ongoing basis. We discuss the topic in more detail in the Subsidies section, and we will also present more information during the webinar for which you may already register.

Another important piece of news is the amendment to Lex Ukraine IV, extending the temporary protection of Ukrainian refugees. Importantly, the amendment also extends all related benefits, such as free access to the labour market and health insurance coverage for a certain group of people. Foreigners must register on the website and then visit the office of the Department for Asylum and Migration Policy to have a visa sticker placed in their passport. Employers should keep in mind their notification obligation and inform the Labour Office about the extension of the temporary protection status of their employees.

Our selection of current case law also deserves your attention. In the article on the recent judgment of the Regional Court in Brno you'll find out how important robust documentation of services is for defending the tax deductibility of costs within intra-group relationships. And there are also other interesting verdicts that will affect practice. I believe that our summary will be useful to you.

I wish you an interesting read and a pleasant winter/spring break!

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Taxes

GFD Instruction D-59 from corporate income tax perspective

GFD Instruction D-59 replacing existing Instruction D-22 mainly brings clarifications resulting from the conclusions of available case law and coordination committees from recent years. Pertaining to corporate income tax, however, the instruction has not undergone any revolutionary changes compared to the previous version.

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Below we summarise the most significant changes:

- **Exemption from withholding tax on royalties and interest**. To claim the exemption, a decision on granting an exemption has to have been issued by the tax administrator. You can also apply for the exemption retrospectively (for periods for which the deadline for assessing tax has not yet expired).

- **Donations**. When assessing the minimum value of a donation (i.e., CZK 2,000), the contractual agreement between the partners is crucial. Where a legal entity undertakes to donate CZK 2,400 per year to a non-profit organisation and pay in monthly instalments of CZK 200, this donation can be considered an item deductible from the tax base. On the other hand, where a legal entity donates CZK 200 every month, the minimum value condition is not met, and the individual donations cannot be considered deductible items.

- **Relocation of assets without change of ownership**. The new instruction responds to the implementation of EU Council Directive 2016/1164 laying down rules against tax avoidance practices (ATAD). Specifically, it contains the methodology for Section 23g of the ITA regulating the taxation of the relocation of assets without a change of ownership.

- **Meal vouchers for employees**. The cost of a meal is not determined by the value of a meal voucher but by the employer's internal guideline. Therefore, employers can provide several meal vouchers for one meal (e.g., three meal vouchers worth CZK 30).

- **Depreciation**. The conditions for the commencement of tangible asset depreciation can also be met by a structure whose trial operation has been permitted or ordered by the building authority (if the structure has been completed according to the project documentation and the trial operation only tests the functionality and properties of the completed structure before permitting its permanent use).

- **Depreciation of technical improvements by a person other than the lessee**. The instruction responds to the

provisions of the ITA allowing for the depreciation of technical improvements of the assets let to be used by a person who is neither the lessee nor the user. The instruction provides for examples of such persons (sublessees, borrowers, or users under innominate contracts).

- **Tax loss carry back**. With the possibility of utilising tax losses in two previous taxable periods, the tax administrator's methodology has been extended to cover this issue. The instruction also clarifies the period during which tax can still be assessed when reporting tax losses. The commentary is in line with current case law and states that it is decisive whether it was possible to utilise a tax loss and not its actual utilisation.

Although GFD instructions headed by the letter D are not legally binding, we expect the tax administrators will nevertheless proceed accordingly when interpreting corporate income tax. We therefore recommend studying the instruction’s wording and reflecting the changes/interpretations in internal processes.

Subsidies

Capped energy prices: amendment to government decree with new obligations

An amendment to Government Decree No. 298/2022 Coll., on the determination of electricity and gas prices in an extraordinary market situation, came into effect on 4 February 2023. The amended decree sets out rules on the amount of public aid that individual entities may receive thanks to the capping of energy prices in 2023 and describes the control mechanisms when drawing public aid that were set up in the form of notifications to the Ministry of Industry and Trade.

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Drawing support in the form of capped electricity and gas prices will bring not only benefits such as a reduction in energy costs but also obligations that will need to be fulfilled on an ongoing basis. The good news is that the first milestone for which compliance will need to be demonstrated is April 2023.

Price capping is subject to the public aid limits set by the EU Temporary Crisis Framework (TCF), discussed in previous issues of the Tax and Legal Update. Member states are currently commenting on amendments to the TCF that should restrict the application of key public aid limits only to beneficiaries (or groups thereof) in the territory of one member state. And so we can't do anything but wait for the draft amendment to the TCF.

As this is a complex issue, we have prepared a webinar during which we will introduce to you the new rules arising from the amended government decree.

We will present the key conditions and documents related to the capping of electricity and natural gas prices, and address crucial questions such as:

- How can businesses receive aid of more than EUR 2 million? And what are the conditions for receiving even higher aid?
- How to monitor the maximum permissible financial benefit limit? When, to whom, and how will the drawing of aid have to be notified?
- For which obligations will businesses need to prepare starting April 2023?

The webinar is free of charge and will be broadcast on YouTube.

New subsidy programmes in 2023

The new year offers new opportunities for subsidy support: several calls and public tenders target projects focused on research and development, energy savings, construction of photovoltaic power plants, and applied research in transport.

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For the **Operational Programme Technology and Application for Competitiveness (OP TAC)**, calls have been prepared under the popular **Potential** or **Application** programmes. Moreover, the deadline for filing applications under the current call, already announced on 15 August 2022, has been extended in the Application programme. Applications for support can now be submitted until 28 February 2023. At the same time, it is possible to submit applications under the Energy Savings programme until the end of November 2023. An Infrastructure Services programme aimed to support the expansion of innovative infrastructure, the acquisition of new equipment, or the improvement of capacities for the joint use of technologies is also being prepared. The above calls are intended for large enterprises; but the upcoming call under the Application programme is available to large enterprises only under the condition that they implement the project while effectively cooperating with small and medium-sized enterprises (SMEs).

The deadlines for submitting applications, the dates of call announcements, and funds for allocation under these calls are as follows:

- **Energy Savings**: applications accepted until 30 November 2023, funds for allocation of CZK 10 billion
- **Potential**: call announced on 1 June 2023, applications accepted from 15 June to 30 September 2023, funds for allocation of CZK 1 billion
- **Infrastructure Services**: calls under this programme to be announced in the second quarter of 2023, funds for allocation of CZK 2.5 billion
- **Application**: next call to be announced in the last quarter of 2023, funds for allocation of CZK 2 billion.

For the OP TAC, new calls under the **Circular Solutions in Enterprises** and **Water Savings** programmes are expected to be announced in August. These calls target SMEs and mid-caps, i.e., enterprises with a middle market capitalisation and between 250 and 3 000 employees, where the limit is assessed on a group level. Funds for allocation for each of the calls will be CZK 500 million.

Other new calls are to be expected under the **National Recovery Plan**. In February 2023, the Ministry of Industry and Trade plans to submit to the government suggestions for new investments and reforms leading to the announcement of new calls as well as an increase in the allocation of funds for the entire NRP. This will be followed by the publication of a timetable and the announcement of specific calls.

Projects focusing on the construction of photovoltaic power plants (PPPs) may apply for support under the **Modernisation Fund**, specifically in the **RES+** No. 1/2022 call, until 15 March 2023. This call will provide support to PPPs with an installed capacity of up to and including 1 MWp. Another call supporting the construction of PPPs is expected to be announced in the middle of 2023, focusing on plants with an installed capacity of over 1 MWp. In addition to support for photovoltaic power plants, you can also apply for support for the modernisation of energy systems and energy efficiency, in particular under the **ENERG ETS No. 1/2022** and **ENERG ETS No. 2/2022** calls.

Entities operating EU ETS installations in the territory of the Czech Republic can apply for support under these calls. Applications can be submitted until the end of June 2023.

Finally, it will be possible to obtain support under the Technology Agency of the Czech Republic's programmes. Already the 10th call under the **TREND programme**, sub-programme 1, is expected to be announced in March 2023, aimed to support research and experimental development projects of entities that already have experience with their own research and development activities. Another call will be announced under the TREND programme in the autumn. This time under sub-programme 2, which is usually designed for entities without research and development experience.

In April this year, the first call under the **TRANSPORT 2030 programme**, the successor of DOPRAVA 2020+, is scheduled to be announced. Projects dealing with applied research in connection with the development of the transport sector will be able to apply for support.

Further information on individual programmes and calls is summarised here.

Should you be interested in support from any of the above programmes, please do not hesitate to contact us. We will be happy to assess the suitability of your projects and their compliance with the specific conditions of the call. We will keep you informed about the announcements of individual calls.

Subsidies

Companies can get support for employee education and training

The Operational Programme Employment+ has announced a call for employers who want to support their employees in education and training so that workers may adapt their skills to changes or a more suitable working environment. Enterprises based in Prague will also be able to apply for this type of support.

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The Operational Programme Employment+ (OPE+) offers more than a hundred calls in the 2021 to 2027 programming period. It focuses not only on the future of work, social inclusion, and innovation, but also on material and technical assistance.

For enterprises of all sizes, the Ministry of Labour and Social Affairs will soon announce Call 47 concerning the further professional training of employees. The ministry originally planned to announce the call in February and start accepting applications from February to April, but according to the latest information, the call is still in preparation.

Available information on Call 47 – Corporate Education and Training:

- **CZK 1 billion** will be distributed among applicants.
- The application will need include annexes concerning, e.g., the size of the enterprise or a statement of the number of employees.
- It will not be necessary to submit a business plan or other annexes usually time-consuming to prepare.
- Applications will be submitted through monitoring system MS2021+, allowing applicants to provide all information online.
- Aid is anticipated to be provided in the de minimis regime.

Below we present selected conditions that applied to previous calls aimed at supporting corporate training, since similar conditions should apply to the new expected call.

Supported activities: professional training of employees, e.g., in IT, soft and managerial skills, language training, accounting, economics or legal courses, or any other technical and vocational training.

Aid intensity: EU funding intensity has been set at 85%.
The minimum amount of total eligible project costs has been set at CZK 500 thousand, with the maximum being CZK 10 million. Since the call currently in preparation will be open to companies that plan to implement their projects in Prague, OPE+ representatives expect the overall aid intensity to be slightly lower than in previous calls.

Eligible costs: Aid will be determined by the number of man-hours on completed training courses. These courses have had a maximum duration eligible for reimbursement in hours, which in previous calls was around 16-20 hours. The unit cost per activity ranged from around CZK 200 to CZK 600 depending on the type of training. The

resulting aid was then calculated as the product of the number of hours and the unit cost of the activity.

We will know the exact terms and conditions once the call is announced. If you are interested in more information, please do not hesitate to contact us.

Tips and tricks

Court proceedings after decision on appeal

What happens in a tax dispute once the appellate proceedings are closed, and what to expect if you file a lawsuit against the Appellate Financial Directorate's decision? In this article, we shed some light on the judicial proceedings that may follow.

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Once you receive the decision on the appeal, you should promptly consider whether to continue the dispute in court, and if so, proceed with preparing the lawsuit. The two-month deadline for filing a lawsuit may seem long, but, unlike in appellate or cassation complaint proceedings, it is not admissible to file a lawsuit without the plaintiff's argumentation and statement of claims. Therefore, it is advisable to start working on it as soon as possible.

Proceedings before a regional court are governed by the principle of concentration of proceedings. This means that you may neither submit any further evidence once the deadline for filing the lawsuit expires, nor add to or expand the argumentation. In practice, it is possible to draw the court's attention to the new judgments of other courts, but completely new arguments cannot be presented. It is therefore necessary to state everything that you contest about the decision already in the lawsuit. The only thing that the court has to deal with ex officio, i.e., even if it is not stated in the lawsuit, is the expiry of the deadline for determining the tax. In all other matters, the court is bound by the claims stated, meaning that it will only deal with what is stated in the lawsuit. And this does not apply just to the regional court: the lawsuit also delineates the playing field for a cassation complaint against the regional court's judgment, as in the cassation complaint, it is not possible to come up with a new line of argumentation that has not already been included in the lawsuit.

What happens to the lawsuit after it has been filed? First, the court will send you a notice to pay the court fees, unless they have already been paid. Unlike in civil disputes, the court fee is not based on the disputed amount but is always CZK 3,000 (for any action against a decision). The court will also inform you about the composition of the panel of judges: should you have any concerns about the bias of specific judges, you may demand their exclusion from decision-making. The court will also send the lawsuit to the defendant (i.e., the Appellate Financial Directorate) for comments. If the defendant uses this opportunity, the court forwards their statement to the plaintiff and the plaintiff may also comment on it. This may be repeated several times. The court also often asks the parties to agree to issuing a decision without a hearing. The court may decide on the lawsuit without a hearing if both parties agree (at least tacitly). If the parties insist on an oral hearing, it must take place. In practice, however, it is a mere formality and judges usually form their decisions based on written submissions.

Interestingly, proceedings before a regional court do not necessarily always end with the issuance of a judgment. In practice, although exceptionally, during the proceedings and under the strength of the presented arguments and case law, the appellate body may admit that they have erred in their assessment of the case and grant the plaintiff's

claim. In such a case, the appellate body asks the court to set a reasonable deadline, reviews their decision and issues a new one to the plaintiff's satisfaction. The court then discontinues the proceedings. Although this procedure by the appellate body is far from frequent, our tax litigation team has recently managed to achieve this result several times.

Temporary protection period extended; foreigners must register online

In the November 2022 issue of Tax and Legal Update, we informed you about a government bill extending temporary protection of Ukrainian refugees by one year. During January, the amendment successfully passed through all stages of the legislative process, and, with its effective date, the Ministry of the Interior of the Czech Republic launched the process to extend temporary protection. The extension of temporary protection is taking place in a coordinated manner in the European Union.

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The draft amendment (referred to as **Lex Ukraine IV**) discussed by the government at the end of November 2022 envisaged two possible scenarios, both extending the temporary protection for another year. One option assumed an automatic extension, the other made the extension conditional upon the foreigner's registration via the internet portal of the Ministry of the Interior of the Czech Republic and a subsequent visit to the respective office of the Department for Asylum and Migration Policy to have a visa sticker placed in one's passport. In the end, the second, more demanding option was chosen, also to keep track of temporary protection holders residing in the Czech Republic.

On 30 January 2023, the ministry launched its new **Foreigners Reservation System** (FRS) for online appointments, which allows all temporary protection holders to register to extend their status. By registering in the system and completing a simple form, their temporary protection will be extended until 30 September 2023. At the same time, the foreigners can choose the date when they are to appear at the office of the Ministry of the Interior of the Czech Republic to obtain the visa sticker. That will further extend their temporary protection until 31 March 2024. The assigned date can only be changed once. Also, employers should not neglect their notification obligation under the Employment Act and inform the Labour Office about the extension of their employees' temporary protection status.

The system does not allow including more than one adult person under one registration. Each adult person must provide a unique email address. Joint registration is only possible for minors.

All benefits such as free access to the labour market or health insurance coverage shall also be extended.

By registering for the extension of temporary protection and obtaining a new visa sticker, all benefits granted under this residence permit shall be also extended. Foreigners will thus continue to have free access to the labour market, education, and public health insurance. If foreigners do not register for the extension on time (by 31 March 2023 at the latest), their temporary protection will expire, and they will have to submit a new application. The same scenario awaits those who fail to appear to the MOI office to obtain a new visa sticker by 30 September 2023. These situations must also be monitored by employers, as the foreigners whose temporary protection has

expired lose free access to the labour market, and their continued employment would thus be contrary to the law. The solution would be to submit a new application for temporary protection.

To conclude, please note that the amendment does not affect the (prohibition of) transition to standard residence permits, or the (inadmissibility of) 'secondary migration' – i.e., granting temporary protection in the Czech Republic to persons who have already applied for it in another EU member state. The long-term scenario or future developments are still not clear and will have to be resolved in further amendments to this act.

Setting up company faster and easier from January

Founders of limited liability companies may now obtain a trade license even after the company has been incorporated/registered in the Commercial Register. Things should also be made easier by an official memorandum of association template, which leaves out some important information, however. What else has changed in the establishment of the company?

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On 15 January 2023, Act No. 416/2022 Coll., amending certain acts in connection with the use of digital tools and processes in company law and the functioning of public registers, entered into force, in part. It follows the amendment to the Rules of Notarial Procedure, under which a founder of a company does not have to appear before a notary in person, but a real-time audio-visual connection suffices. For newly established limited liability companies, the obligation to have a special account with a bank was also abolished, so registered capital can be paid in another manner if it does not exceed CZK 20,000.

Trade license only after the establishment of a legal entity

One of the most important changes effective from 15 January 2023 is that newly established legal entities no longer have to obtain a trade license prior to being registered in the public register. The founder of a legal entity can choose at which stage to report a trade or apply for a trade licence: it is up to them whether they do so before or after filing for the registration in the public register. It is, however, advisable not to delay obtaining a trade license once the company is registered: if the trade is not reported or the trade licence applied for within 1 year of its establishment, the court may dissolve the company with liquidation.

Fewer documents required

Another simplification consists in reducing the number of documents required by the Trade Licensing Office. Until recently, legal entities had to attach to the report on carrying out a trade or the application for a trade licence documents proving their legal title to using the premises; this was abolished by the amendment, as they have the same obligation when being recorded in a public register.

Ministry of Justice publishes official memorandum of association template

The establishment of a limited liability company should be further simplified by an official memorandum of association template published by the Ministry of Justice on its website. The template contains mandatory essentials but does not regulate some of the non-mandatory provisions that memoranda of association usually

provide for – e.g., the powers of the general meeting. Therefore, should a company use the template without any modifications, the decision to liquidate the company or to appoint a liquidator would remain in the hands of the members, not the general meeting, which could be impractical for the members in some situations.

Impediments to exercising an office and registration of disqualified persons

The amendment not only facilitates the establishment of companies but also regulates the impediments to exercising an office of a member of an elected body of a business corporation. Newly, these obstacles will be stipulated explicitly in the Corporations Act and without reference to the condition of a clean criminal record under the Trade Licensing Act and impediments to carrying out a trade. Another novelty will be the registration of persons disqualified from exercising the office of a member of an elected body of a business corporation, to be maintained by the Ministry of Justice. It will include persons who have been disqualified by a court order, convicted of a criminal offence constituting an impediment to exercising an office, or whose assets have been declared bankrupt. This register will be non-public and will be accessible to courts and notaries. The legislative changes concerning the impediments to exercising an office of an elected body of a business corporation and their registration will enter into effect on 1 July 2023.

Class actions coming soon but not for all

Shortly before Christmas last year, the Ministry of Justice presented a bill on collective proceedings. The new legislation, which could enter into force as early as this year, will allow consumers to assert their identical claims against the same person in a single class action. The bill is now heading for debate in the chamber of deputies.

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At present, several persons can to some extent assert similar rights jointly by using the concept of accession to proceedings. However, the legal regulation lacks complexity and does not constitute an effective instrument for asserting such claims. In practice, the situation is often resolved by assigning/transferring the claims to entities that specialise in the enforcement of consumer claims, or by concluding commission agency contracts.

From the perspective of the EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers, this not sufficient. The directive requires EU member states, thus also the Czech Republic, to put in place an effective and efficient procedural mechanism for representative (collective) actions, which would boost consumer confidence, empower them to exercising their rights, contribute to fairer competition and create a level playing field for traders operating in the EU internal market. According to the directive, the relevant national legislation is to be adopted by 25 June 2023.

Two types of collective claims will be enforceable by collective action:

- fulfilment of an obligation (in practice, this will mainly involve the payment of an outstanding monetary claim)
- determining whether a legal relationship or right exists (in practice, this may include, e.g., the right to return goods or the liability for defects in a product or service).

However, collective actions shall not be filed by just anyone who has a legal interest in the matter but solely by a non-profit entity qualified to file collective actions, typically a consumer organisation.

For a specific person (i.e., a consumer) to become a party to collective proceedings, they will have to register for the proceedings within a set deadline (‘opt-in’). On this point, the bill differs from previous legislative proposals that usually envisaged the opposite approach, i.e., that specific persons are parties to a collective action until they deregister (‘opt-out’). Such an approach had been subject to criticism, as it goes against the basic principles of private law, such as the autonomy of will or the principle that the law aids the vigilant (those who actively care for their rights). In addition, the opt-out regime carries a higher risk of harassing actions - collective actions filed with the intention to harm a competitor.

Who will finance the collective proceedings and what about the reward from a won claim settlement?

Under the bill, the plaintiff (the non-profit organisation) and not the persons registered shall bear the costs of the proceedings, and the risk of failure of the case. This setup is intended to motivate non-profit organisations to only

litigate proceedings where they have a chance of success, to conduct these proceedings properly, and to obtain the most favourable judgment for the members of the group. At the same time, it is a form of protection for consumers who have only limited rights in the proceedings and limited possibilities to influence its development. As compensation for the costs, risk, and time that the non-profit organisation invests in the proceedings, the court may, at its request, award it a reasonable reward from the won claim settlement. This point is also subject to criticism, as remuneration must be set properly, so that, on the one hand, it compensates the non-profit organisation for the risks and costs but, on the other hand, is not so high as to motivate the initiation of collective proceedings for profit.

Collective proceedings are a tool that should enable consumers to effectively assert even smaller claims that would not be worth enforcing individually (especially small claims of up to CZK 10 thousand). On the other hand, it can present a considerable risk to entrepreneurs in the event of non-compliance with their obligations and, as such, could lead to a greater emphasis on improving the quality of products and services as well as compliance with legal regulations. However, the bill is only at the beginning of the legislative process and may still undergo several amendments.

Introduction of carbon border tax imminent

The EU has reached an agreement on the introduction of a carbon border adjustment mechanism. The purpose is to level the prices of products subject to carbon fees (allowances) within the EU with the prices of comparable goods imported from outside the EU.

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The carbon border tax will apply to cement, aluminium, fertilisers, electricity generation, hydrogen, iron and steel, as well as their compounds and selected downstream products such as bolts and screws.

According to the current legislative proposal, only entities using an authorised declarant established in the EU will be entitled to import goods subject to carbon border adjustment mechanism into the EU. These declarants will then submit declarations containing information on the imported goods on an annual basis.

Companies importing the specified products will be subject to a **reporting obligation** from October 2023. Currently, there is a system of emission allowances allocated free of charge for these productions to prevent the transfer of the production of these products outside the EU. However, these emission allowances will gradually be subject to charges over the next few years, and from 2026 the carbon border tax will serve as the tool to prevent the transfer of production outside the EU.

In 2034, the free-of-charge allocation of emission allowances is expected to end, and full **charging for imports** to begin. The specified products will thus be subject to the same burden regardless of whether they have been manufactured in the EU or imported, in compliance with World Trade Organisation rules.

The publication of the final version of the related legislation is expected shortly.

Regulation on foreign subsidies: new obligations to affect mergers and public procurement

Until now, the EU has not had the instruments to prevent distortions of the EU market due to foreign subsidies or to prevent an unfair advantage for subsidised companies from third countries. This should change with new Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, which complements EU rules prohibiting state aid by member states. The regulation introduces an extensive notification obligation and makes it possible to prevent mergers or participation in procurement procedures.

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Definition of foreign subsidies and internal market distortion

Foreign subsidies are deemed to exist when an undertaking operating on the EU market directly or indirectly receives a ☒nancial contribution from a third country that confers certain benefit on such an undertaking. This contribution can take various forms (e.g., capital injections, grants, loans, tax incentives, debt forgiveness, tax exemptions, or supplies or purchases of goods and services) and may be provided not only by public authorities of a third country but in certain circumstances also by private entities. Where such a foreign subsidy is likely to improve an undertaking's competitive position in the internal market and negatively affect competition, the Commission will now be able to take extensive measures to prevent distortions of the internal market.

New notification obligation for concentrations

The regulation introduces a **new notification obligation for concentrations** (e.g., mergers or acquisitions of shares), thus complementing the existing provisions in the Merger Regulation. Thus, the Commission will always have to be notified, in advance, of a concentration if:

- one of the merging undertakings, the acquired undertaking or the joint venture is established in the EU and generates a turnover in the EU of at least EUR 500 million; and
- financial contributions of at least EUR 50 million were granted from third countries in the three years prior to the merger or acquisition.

The concentration cannot be implemented before such a notification, or, more precisely, before the expiry of the period during which the Commission is making its assessment.

New notification obligation for participation in public procurement procedures

Participants in the public procurement procedure will also be obliged to notify if:

- the estimated value of the public contract is at least EUR 250 million excluding VAT
- the contributions received by the public procurement procedure participant (including its subsidiaries and parent companies, main contractors and subcontractors) from a third country in the last three years amount to at least EUR 4 million.

When submitting a proposal or request to participate in a public procurement procedure, participants shall notify the contracting authority of any foreign subsidies **exceeding EUR 4 million**. If they do not reach this threshold, they have to send to the contracting authority an affidavit listing the foreign subsidies and confirming that these are not subject to notification obligation. Failure to comply with this obligation may result in them being excluded from the procurement procedure on the Commission's initiative.

If the Commission suspects foreign subsidies, it may require the entity concerned to submit a notification of a concentration or a notification of the existence of foreign subsidies regardless of the above thresholds (i.e., require to be notified in the event of any concentrations or procurement procedures).

For breaches of the notification obligation, the Commission may impose a **fine of up to 10% of the undertaking's total turnover**. In addition, to remedy the distortion, the Commission may impose commitments or redressive measures on the undertaking, such as a reduction of market presence, divestment of assets, dissolution of a concentration, or repayment of a foreign subsidy incl. interest.

With some exceptions, the regulation will apply from 12 July 2023, but will also apply to foreign subsidies granted in the five years prior to that date.

Case law

Proving services provided by parent company and principle of legitimate expectation

In recent judgment No. 30 Af 57/2021-76, the Regional Court in Brno reminded us how important robust documentation of services is in defending the tax deductibility of expenses. The core of the dispute involved a taxpayer claiming in their income tax return the costs of consulting services provided by the parent company consisting of management and advisory services, negotiations, and reporting. The court also expressed its view on an entity's legitimate expectations from the outcomes of previous inspections.

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The service contract at issue was designed as variable, with services being provided on demand for a fee set per person per day. After evaluating evidence provided by the taxpayer, the tax authority stated, among other things, that the services had been provided by the taxpayer's executive director/statutory representative, which the tax authority perceived as the exercise of an office of a statutory body. The tax authority also argued that the submitted documentation was not formally perfect (as it did not contain orders and relevant delivery protocols, etc.) and that the documentation did not show the actual outcome of the services in question. Thus, the added value for the taxpayer had not been properly demonstrated. As part of its search activity, the tax authority did not hesitate to contact the foreign tax administrator via an international request for information to verify the actual provision of services in another member state (Austria).

The Regional Court dealt in detail with the taxpayer's position regarding the evidence, conceding that it was reasonable to expect that the documents in intra-group relationships would be less formal than between two unrelated persons. On the other hand, the court stated that an ordinary meeting or exchange of information between the owner and the entity owned does not usually give rise to a tax-deductible expense because it does not go beyond the normal relationship on the part of the owner. Above all, the court agreed with the tax authority in its assessment that in most of the presented cases it was not possible to link the invoiced activity to its specific outcome, nor was it clear how the plaintiff got hold of the documents and whether they did not create them themselves.

Based on the result of the international request for information, **the court found that the meagre result of this administrative act also indicated that the actual delivery and acceptance of services had not taken place at all**. Thus, in the court's view, the plaintiff failed to discharge their burden of proof and the costs incurred for the intra-group services were correctly assessed as tax non-deductible.

The court also ruled on the question of legitimate expectations. The plaintiff objected that in the tax inspection focusing on the previous taxable periods, the deductibility of expenses included in invoices received from the parent company had not been disputed. However, the Regional Court held that while in the previous tax inspection

only invoices had been assessed, in the present case the complete documentation was being assessed. Therefore, **there could be no legitimate expectation of an identical assessment**, as these were two different matters.

It can be concluded that **appropriately prepared and continuously maintained documentation remains a basic prerequisite for defending the tax deductibility of expenses**, specifically documentation and record-keeping of outcomes proving the actual provision of services, and documentation of the benefit for the taxpayer together with an adequately set methodology for calculating remuneration, i.e., transfer pricing.

Regional Court on deductibility of interest on acquisition loan and abuse of law

In judgment 55 Af 4/2020–137, the Regional Court in Prague dealt with a company that claimed interest on a bank loan for the purchase of a share in a Czech company with which it was subsequently to merge by acquisition. The loan was provided by an independent consortium of banks at the level of the entire investment group, and the debt was then transferred to a Czech company that made the purchase. The tax authority denied the deductibility of interest on the bank loan, as it considered the restructuring transaction to have been carried out for the sole purpose of obtaining a tax advantage. However, the Regional Court assessed the situation differently and also stated that the tax administrator had incorrectly assessed the fulfilment of the objective condition for the application of the abuse of law concept.

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The situation of the corporate group to which the company belonged was bad, both in terms of liquidity and financial position. It was not possible to start negotiations with Czech banks because they would not have seen any positive potential in the company in the Czech Republic. The entry of an investor at the global level aimed to support the company and other group companies and ensure their further development. The subsequent transfer of the loan to operating entities in all countries was the only solution, as it is precisely at operating entities that revenues are generated and assets are managed.

The transfer of the debt to the Czech company was the main requirement of the consortium of banks, otherwise the transaction would not have been financed. The banks found it more acceptable to charge the loan to an operating entity generating active income from business activities and managing assets, as it was more likely for such an entity to make regular interest payments and easier for banks to recover any outstanding amounts.

The tax administrator pointed to the manner in which the obligation to repay the loan and related costs was transferred to the Czech company that had purchased a share in a functioning company with the knowledge that a merger by acquisition would take place in the near future and that this merger could have occurred even without the purchase of the business share, as both companies were managed by the same company or investment group. The company did not carry out any business activity nor did it dispose of any assets or funds. Foreign related parties had sold it the share in a Czech company, which would not have been possible if these parties had not been related to it. According to the tax administrator, the company did not prove that it had incurred the interest and financial costs related to the loan for the purchase of the business share in accordance with the law, thereby unduly reducing its tax base. At the same time, the tax administrator claimed that there had been an abuse of law involved.

The Regional Court stated that drawing the loan indeed appeared to have been irrational: the purpose could not have been to develop the company's own business activity, as the company did not carry out any such activity at that time. However, the court saw the main economic reason for the described transactions in allowing the takeover of the group by a new investment group. The court also pointed out that the conditions for granting the

loan were set by the lending banks, so that it could hardly be assumed that the banks would have deliberately set the conditions so as to create an artificial structure. The Regional Court therefore annulled the tax administrator's decision for unlawfulness. It also concluded that the decision incorrectly assessed the fulfilment of the conditions for the application of the abuse of law concept.

However, the Appellate Financial Directorate has filed a cassation complaint with the Supreme Administrative Court.

Case law

CJEU: Is it necessary to pay VAT stated in tax document?

The Court of Justice of the European Union has refuted the Austrian court's belief that any person who indicates tax on a tax document is liable to pay that tax. If the service recipients are only end costumers not entitled to deduct VAT, incorrectly invoiced VAT does not have to be paid.

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An Austrian company was operating an indoor playground in 2019. Throughout the year, it incorrectly charged end customers the standard VAT rate of 20% while paying the tax to the tax authority. Finding that it had incorrectly applied the standard VAT rate, the company filed an additional tax return using a reduced rate of 13% and applied for a refund of the difference in the VAT rates.

The Austrian tax administration rejected the additional tax return claiming that the company was obliged to pay VAT equivalent to the amount it collected from customers. Moreover, the issued tax documents had not been corrected and therefore it was not possible to refund the overpaid VAT to the specific service recipients. According to the Austrian tax administration, if the incorrectly paid tax were to be refunded by the tax authority, the company would be unjustly enriched as its customers had borne the cost of the higher VAT rate.

The CJEU sided with the company

The Austrian court referred a question to the CJEU whether, in accordance with Article 203 of the VAT Directive, the tax document issuer is obliged to pay the VAT stated in the tax document even if the service recipients are end customers without the right to deduct VAT, i.e., in a situation where there is no risk of loss of tax revenue.

The CJEU ruled in favour of the company, stating that Article 203 of the VAT Directive must be interpreted as meaning that, in the absence of a risk of loss of tax revenue, the company is not liable to pay the part of the VAT erroneously invoiced. However, in practice, this conclusion is applicable only where the beneficiaries are end customers who cannot exercise the right to deduct input VAT.

Case law

CJEU challenges transaction benefiting from simplified procedure for triangular transactions

The Court of Justice of the EU ruled on the use of the simplified procedure for triangular transactions. If documents issued by the middle party under the scheme do not comply with the VAT Directive, the scheme cannot be used, according to the court.

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Recently, the CJEU heard a rather controversial case concerning VAT and trade in cars. In 2014, when Great Britain was still a member of the EU, an Austrian company bought luxury cars in there and immediately sold them to an entity registered in the Czech Republic which then transported the purchased cars directly from Great Britain to the Czech Republic using the simplified procedure for triangular transactions.

Upon inspection, the Austrian tax administrator found that the tax documents issued by the Austrian company (middle party) to the Czech customer did not contain a clear identification of the supply recipient as the person who should settle the tax. The tax documents read 'Exempt intra-Community triangular transaction'. However, the tax authority argued that this notation, in conjunction with the directive, was inconclusive and could not be relied upon to conclude that the recipient was liable to pay the tax. Consequently, the triangular transaction scheme could not be applied.

The CJEU sided with the Austrian tax authority and held that Article 226 of the VAT Directive makes a distinction between, on the one hand, a reference to the relevant provisions of the directive or national legislation when special schemes are applied and, on the other hand, a clear identification of the supply recipient who is subsequently responsible for settling the tax. For this reason, it is necessary not only to explicitly state on tax documents that they involve a simplified triangulation scheme but also to clearly define the last entity in the chain that shall settle the tax. For this purpose, the documents should include the sentence: "Tax shall be paid by the customer."

Finally, it should be mentioned that the last party in the chain, i.e., the Czech entity, became uncontactable during the proceedings and never settled the tax. Nevertheless, the CJEU's conclusions on triangulation scheme are fully in line with the directive and confirm that to use the simplified procedure, it is necessary to state both texts on the document: a reference to the directive or national legislation that the transaction involves a triangular transaction as well as the sentence "Tax shall be paid by the customer", clearly identifying the person who is to settle the relevant tax.

In Brief, February 2023

Last month’s tax and legal news in a few sentences.

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DOMESTIC NEWS

- The government is to discuss an amendment to the Labour Code that transposes the EU directive and introduces other changes, in particular changes to agreements for work outside employment, the regulation of distance work including the tax implications of the newly introduced lump-sum reimbursement of selected employee expenses, and the extension of the employer's information obligations. More detailed information HERE.
- The government is to discuss an amendment to the Investment Incentives Act and the related government decree. The most important changes are the simplification of the approval process, in which the government will be involved only for strategic investments, and the extension of incentives provided in the form of subsidies for the acquisition of assets.
- The government has instructed the Minister of Finance to extend the effectiveness of the extraordinary tax measures for citizens and ☒rms that have decided to support Ukraine. The possibility to deduct gratuitous supplies from the tax base was in effect in 2022; the government intends to give donors and recipients of donations the possibility of tax relief for this year as well.
- The government has approved a draft amendment to the VAT Act implementing Council Directive (EU) 2020/284 on the introduction of requirements for payment service providers after incorporating public comments. The proposed effective date is 1 January 2024.
- The government has approved a bill introducing preventive restructuring measures for entrepreneurs in temporary ☒nancial difficulties. The bill transposes into Czech law some provisions of the EU Directive on Restructuring and Insolvency. The Czech legal system has so far lacked a regulation of a certain in-between stage where an entrepreneur is not yet bankrupt but an agreement with all creditors is no longer possible for various reasons.
- On 3 February 2023, the Czech Republic signed a treaty with Sri Lanka on the avoidance of double taxation in the field of income taxes. Once it is implemented, which can be expected from 2024, the original treaty from 1978 will cease to apply.
- On its website, the ☒nancial administration has published information about an amendment to the Energy Act introducing the levy on surplus market revenues. The Energy Regulatory Office is the administrator of this levy. The information on paying taxes to the accounts of the tax authorities is available HERE. The account of the tax authority for the Vysočina Region designated for payment of the levy on surplus market revenues is available in the Questions and Answers section.
- Regarding the number of questions and uncertainties in connection with the establishment of data boxes for entrepreneurs by operation of law, the ☒nancial administration points out that the specific method of communication depends on the nature of the document being delivered, its content and on the expressed will of the addressee of the document being delivered. See the GFD’s earlier Instruction D-7 available on the financial administration's website: GFD Instruction D-7 D.
- From February, employers can take advantage of discounts on social insurance premiums for employees working part-time (students, workers up to 21 years of age, newly retrained, disabled, caring for a child up to 10 years of age, or even persons over 55 years of age). Employers will pay 5% less in social security

contributions. Further reductions in insurance premiums are planned for working pensioners. Read the details HERE.
- The Ministry of Industry and Trade reports on progress in the implementation of the EU's Single Digital Gateway for citizens and businesses. This involves the creation of an EU-wide online gateway through which citizens and businesses can access relevant information, electronic procedures and assistance services in areas such as business, social security, tax and many others, on an EU level. Under the leadership of the MIT, all ministries in the Czech Republic and all EU countries are participating in the project. Once the regulation has been fully implemented in the member states, citizens and businesses will get comprehensive information and access to specific electronic procedures from their homes to the whole EU.
- In January, the first meeting of the Expert Working Group on Expert Witness Law was held at the Ministry of Justice. In the summer, the MoJ already submitted a draft amendment to the Decree on Expert Witness Fees to the legislative process, aiming to raise the remuneration of experts to a level appropriate to the demanding nature and social necessity of the profession.

FOREIGN NEWS

- The European Commission has published its work programme for the first half of 2023. Regarding taxation measures, the Commission is expected to discuss in June a proposal for tackling the role of enablers involved in facilitating tax evasion and aggressive tax planning in the EU (SAFE) and a proposal for a new common EU system for the avoidance of double taxation and prevention of tax abuse in the area of withholding taxes (FASTER).
- The European Parliament has approved a report on a directive laying down rules to prevent the misuse of shell entities for tax purposes (the Unshell Directive). The report generally supports the wording proposed by the Commission but contains several amending proposals. However, these proposals are not binding on the EU Council. Negotiations on the final wording will continue between member states in 2023.
- The OECD/G20 Inclusive Framework on BEPS has released technical guidance to assist governments with implementation of the landmark reform to the international tax system which will ensure that multinational enterprises (MNEs) will be subject to a 15% effective minimum tax rate. The agreed technical guidance will be incorporated into a revised version of the Commentary on the Model Rules to be issued later in 2023. The EU has already adopted the relevant directive ensuring the uniform application of this reform across the EU from 2024.

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