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Tax & Legal

Taxes

Legal

World news

Case law

In brief

March 2020

Editorial

The spreading of the coronavirus and its effect on the global economy has overtaken the news servers' headlines. Questions about the situation and its impact on business thus cannot be avoided. Crucial issues in this respect include the protection of employees' personal data concerning their health, the entitlement to paid or unpaid leave, or the possibility to work from home. In this issue of *Tax and Legal Update*, we therefore summarise our recommendations for similar situations.

The deputies' motion to amend the Code of Administrative Justice has passed through the first reading. Marginal as it may seem in terms of tax matters, if passed, the proposed amendment would affect the (in)admissibility of cassation complaints. This already existent concept would be further extended, with the aim to address the overburdening of the Supreme Administrative Court, and to reduce the time of the proceedings before this court; according to information recently voiced at a seminar on the issue, each judge has approximately 90 cases that remain unresolved each year.

The original intention was to also exclude some tax matters from the procedure before the SAC, which would significantly limit the possibility of their judicial review (the final decision would be taken already at level of regional or municipal courts). The agreed-upon compromise solution excludes only matters that were decided in the first degree by a single judge from the procedure before the SAC. This means that inadmissibility would not apply to tax matters: cassation complaints filed in tax matters would still be subject to a full-scope judicial review. Although the government issued an opposing standpoint, I believe that parliament will eventually pass the bill, also thanks to the support from the SAC.

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Taxes

Amendment to Tax Procedure Code heading to the Senate – summary of major changes

An amendment to the Tax Procedure Code has passed the Czech Chamber of Deputies in its third reading. According to the Minister of Finance, the amendment will allow for the implementation of an online tax authority, formed on the ground plan of a tax information box. The amendment introduces several changes that will affect the lives of almost all taxpayers. A positive piece of news is that after amending proposals the amendment now does not include some changes previously subject to heavy criticism.

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The major changes introduced by the amendment are as follows:

- The deadline for filing tax returns for annual taxable periods shall be automatically extended to four months if tax returns are filed electronically.
- Advances for VAT deduction will allow the tax authority to refund parts of excess deductions not subject to review.
- The deadline for refunding excess deductions (typically relating to VAT) will be extended from 30 to 45 days; under transitory provisions, the new deadline will apply to taxable periods for which the deadline for filing tax statements expires after the amendment’s effective date.
- A personal discussion over a tax inspection report will be replaced by a notice of termination of a tax inspection; a personal discussion on the commencement of a tax inspection by the delivery of a notice of commencement of a tax inspection specifying its scope.
- If the tax administrator has not called on the taxpayer to file an additional tax return before commencing a tax inspection, this will not result in the unlawfulness of the entire tax inspection.
- Entrepreneurs – individuals will be allowed to apply for the allocation of a new tax identification number that will not include their birth certificate number.
- The system of interest paid by both taxpayers and tax administrators will change in its entirety.

Based on the deputies’ amending proposals, the tolerance period for a late submission of a tax statement will not be cancelled. The deputies have only cancelled the tolerance period applicable to late tax payments. In practice, this means that the late filing of a tax return within five working days will not result in the imposition of a penalty; however, the related tax will have to be paid within the set deadline. Default interest will start to accrue as early as from the first day after the date on which the tax is payable. In the Ministry of Finance’s opinion, this is compensated by an increase in the minimum threshold from CZK 200 to CZK 1 000: if interest for one taxable period does not exceed the minimum threshold, taxpayers do not have to pay it.

Another novelty compared with the original proposal is the regulation of prescribed forms used for tax filings, responding to the Constitutional Court’s case law. The new regulation explicitly stipulates the scope of information that can be required by registration and tax assertion forms. The content and structure of individual forms is determined by the Ministry of Finance’s decree.

On 24 February, the amendment passed on to the Senate, which must respond within 30 days. Its effectiveness will depend on the course of other legislative processes; however, considering the speed in which it went through the second and third reading, we expect that it will be promulgated in the Collection of Laws soon.

Quick fixes: chain transactions and transport allocation

The Czech amendment to the VAT Act implementing quick fixes is still awaiting the second reading in the chamber. Its effectiveness is therefore being postponed once again. In the meantime, the European Commission has issued its explanatory notes on quick fixes. This issue of Tax and Legal Update comments on chain transactions.


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A chain transaction is understood to be a transaction involving two or more deliveries within one physical movement of goods. The basic rule is that only one delivery of goods, the one to which transport is assigned, can be exempt from tax. Problems arise when transport is arranged for by a middle party. Quick fixes introduce a simplification rule, according to which transport is primarily assigned to the first delivery of goods (i.e. the delivery between the seller and the middle party). Only when the middle party conveys to the seller their tax identification number issued by the member state in which transport begins, the transport concerned will be allocated to the delivery of goods between the middle party and the ultimate buyer. The first delivery is then considered a local supply liable to VAT applicable in the given country. However, even this simplification may cause some trouble, and the EC's explanatory notes give detailed guidance in respect of some of these.

The explanatory notes also attempt to define the criteria for 'transport arrangement', in particular whether it is necessary to consider the risk of losses of goods during their transportation, the contractual structure of the arrangement with the carrier, or who pays for the given transport. The last-mentioned fact on its own does not suffice to fulfil the transport arrangement criteria.

Regarding the organisation of transport by a middle party, or on the middle party's behalf and for its account, the Commission's notes refer to the opinion of the CJEU's Advocate General, according to which it is crucial to assert who bears the risk of potential losses during transportation. To monitor only this criterion may in practice be problematic due to the distribution of risks under certain Incoterms delivery terms and conditions. In such cases, it is most appropriate to monitor which of the entities in a chain of transactions undertakes the necessary steps to ensure transport – either using their own means or via a contractual arrangement with a third party. This must be properly documented. The explanatory notes emphasise that the criterion of who pays for a given transport does not on its own suffice to determine the transport arrangement.

The explanatory notes also state that the middle party may in principle authorise anybody to transport the goods and involve any participant of a chain of transactions, including the ultimate customer. In such a case, conditions of a proper contractual arrangement must be met. The same applies to conditions for the delivery of goods to another member state. Similar situations are risky and, therefore, it is necessary to make sure that the right to dispose of the goods as the owner is not transferred to the ultimate customer in the state in which transport begins.

In the notes, the Commission also comments on the suspension of transport and the arrangement of transport using a greater number of means of transport. In this case, a thorough analysis of the transport concerned is essential: making sure that all parts of the transport are contracted by the middle party and that it really involves one indivisible transport.

To assign transport to the delivery of goods to the middle party, it is vital to convey the middle party's tax identification number issued by a state other than the state in which transport commences. The notes do not specify the form in which such a notification must be made but determine that this must be proven to the tax authority upon request. The Commission therefore recommends having written evidence proving that the tax identification number has been provided, either in an electronic or other form.

GFD publishes information on research and development allowances

In its information, the General Financial Directorate (GFD) comments on the amended regime for claiming research and development allowances, especially with respect to the new duty to notify the tax administrator of the intention to claim such an allowance, which is a key requirement. Without having met this duty, allowances may not be claimed in tax returns.

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Pursuant to the amendment to the Income Tax Act effective from 1 April 2019, it is possible to claim research and development allowances only if the taxpayer notifies the tax administrator of their intention to do so. The notification must contain the taxpayer's identification data and the research and development project's name and general area of focus. The law stipulates that research and development expenses are expenses incurred from the date such a notification is made to the tax authority.

According to the GFD's information, the correct designation of a project in the notification is essential for claiming a research and development allowance. The project's name should capture its area of focus, distinguishing it from the taxpayer's other research and development projects and showing the project's ability to be allocated to relevant project documentation. The notification should give the tax authority a certain idea about the essence of project.

However, pursuant to the amended VAT Act, the filing of a notification does not suffice to claim a research and development allowance; it is also necessary to prepare and approve relevant project documentation containing all essentials required by law, all this before submitting a tax return.

Employers' perspective on plug-in hybrid vehicles

Until recently, Czech tax and labour-law legislation lacked any regulation of plug-in hybrid vehicles. If employers provided such vehicles to their employees for both business and private purposes, the determination of the employee's non-monetary income relating to fuel consumed on private trips was problematic, along with several other issues. This topic was discussed by the Coordination Committee of the Chamber of Tax Advisors and the General Financial Directorate (GFD).

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Plug-in hybrid vehicles have both an electric and a combustion engine; switching between individual activating systems is automatic and the battery is recharged by the transformation of kinetic energy to electricity (i.e. recovery). If the employee uses a vehicle for private purposes and its battery is partially or fully recharged during this trip using electricity that is then consumed during a business trip, the question arises whether a non-monetary benefit arises to the employer. The GFD agreed that if the battery was recharged in this manner, no taxable gratuitous income arises to the employer.

The committee also dealt with the issue of determining the amount of non-monetary income from employment relating to fuel consumed by an employee for private purposes. The GFD confirmed that the price of electricity can be determined using the weighted average of purchase prices included in receipts submitted by the employee to the employer. If the employee recharges the vehicle using their own electricity grid, the price for which the battery has been recharged must be sufficiently documented. A recharge from the employee's own electricity grid does not constitute an economic activity from the VAT Act perspective. In the GFD's opinion, it is also possible to apply the average price of 1 kWh of electricity of CZK 4.80, published in the Ministry of Labour and Social Affairs' decree regulating the compensation of travel expenses on domestic business trips.

The committee also discussed how to determine the amount of consumed fuel. Data that can now be ascertained from a vehicle's on-board computer are very limited. The amount of consumed electricity can be determined as a multiple of the total volume of consumed electricity in a calendar month and the ratio of private and business trip mileage for a given calendar month. Individual trips must be recorded using a journey log in a thorough and provable manner. If a more exact method is available to determine the amount of consumed fuel/electricity (due to the vehicle's facilities), the data ascertained using this method must be used.

Benefit cards considered vouchers under VAT Act

At the Coordination Committee’s meeting, the Chamber of Tax Advisors agreed with the General Financial Directorate (GFD) on the VAT treatment of benefit cards. Benefit cards enable their holders to acquire pre-defined benefits from pre-defined benefit providers; however, the specific benefit and its provider is selected by card holders themselves.

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In most cases, benefit cards represent non-monetary components of remuneration paid to employees who, after submitting their cards, may, e.g., enter selected sports centres.

The chamber’s representatives chose three model situations for assessment:

- benefit cards intended for one type of benefit
- benefit cards serving as a payment tool
- benefit cards giving the holder the right to draw benefits from individual providers.

The GFD agreed with the Chamber of Tax Advisors and decided to consider benefit cards vouchers pursuant to Section 15 of the VAT Act, even if no paper form is involved.

Where only one type of benefit can be obtained, it is a single-purpose voucher. Where various benefits can be drawn, it is a multi-purpose voucher. Simultaneously, the handing over of a benefit card to the holder, and the payment for the card by the card payer do not constitute a financial service.

We draw attention to the fact that the Coordination Committee did not discuss VAT on fuel or payment cards. Hence, we do not comment on the recent CJEU C-235/18 (Vega International) judgment.

First European regulation of online platforms

An EU regulation on promoting fairness and transparency for business users of online intermediation services will enter into effect on 12 July 2020. It will be the first law in the EU regulating platform-to-business (P2B) relationships.


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Regulation (EU) 2019/1150 of the European Parliament and of the Council primarily aims to create a safe and transparent environment for small and medium-size businesses using online platforms, which provide unique opportunities in relation to international markets and constitute the basis for carrying out business activities for more than a million of corporations.

According to a survey, these platforms are used by more than 40% of small and medium-size businesses in the EU. The potentially unfair and harmful commercial practices of certain providers have resulted in unresolved disputes and, especially, significant losses incurred by the companies affected by these practices.

The regulation will be directly applicable to the entire ecosystem of online platforms operating in the EU, including, e.g., online e-commerce marketplaces, online software application services, online social media services, price comparison websites, etc. This will not only affect online giants but also the smallest start-ups providing online intermediation services.

The regulation will to some extent apply to online search engines (especially where transparency is concerned); however, it will not affect online shops serving as a direct contact between a business and a customer, provided that the business sells products directly and does not act as an intermediary between the customer and a third party (e.g. online supermarkets, e-shops selling specific brands).

Major changes introduced by the regulation and their impact on relationships between online platforms and businesses:

- **Ban on certain unfair and harmful practices:**
  - The restriction, suspension or termination of services without explanation is not allowed.
  - Changes to business terms and conditions must be comprehensible and communicated in advance (at least 15 days).
- **Higher transparency of online platforms**
  - Platforms must disclose parameters according to which products on their websites are assessed.
  - If a platform offers on its website its own products apart from other products, it must describe any differences in the treatment of its own products compared with other products.
- **New dispute resolution methods:**
  - Platforms must create internal systems for solving complaints; this rule does not apply to small businesses (turnover of less than EUR 10 million and less than 50 employees).
  - Platforms will have to offer businesses a chance to resolve any problems using mediators.
- **Access to data**:

    - Platforms will have to describe in their business terms and conditions under what conditions and to what data (personal and other) businesses will have access.
- **Enforcement:**
    - Organisations and associations having legitimate interests in representing businesses will be allowed to enforce the settlement of any incompliance with the rules stipulated by the regulation before a court.

It is too early to evaluate the overall impact of the regulation on individual stakeholders and the digital market. However, it is evident that the digital environment is developing continuously. The regulation takes this into account and plans to monitor and assess its impact not only on the online platform economy on a regular basis.

The regulation is directly applicable in all member states. The platforms concerned have less than five months until it becomes effective, so it is high time they updated their business terms and conditions.

Legal

Amendment to the Labour Code (Part II): delivery rules

The Labour Code stipulates documents that only have legal effect once they have been delivered to the employee's own hands. Apart from documents concerning the establishment, change or termination of employment, these include, e.g., itemised wage statements, or notices of the removal of a manager from their managerial position. Delivering under labour law may indeed be a nightmare. In this part of the series of articles on the extensive amendment to the Labour Code, we will investigate how delivering of documents should be simplified from July of this year.

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Under currently valid legislation, employers must deliver documents to their employees primarily in person, at their workplace or residence, or wherever the employees can be found, or through an electronic communication network or service. Only if this is not possible may employers deliver the documents by post; and case law implies that one attempt to deliver at the workplace may not be deemed sufficient. Under the proposed amendment, it would suffice that the employer has attempted to deliver the document at the workplace. If such an attempt fails, the employer may proceed to deliver the documents by post or choose another manner of delivery provided for in the Labour Code, such as a data box.

Under the currently valid legal regulation, employers must deliver documents to employees' last known address. Employers may learn such addresses not just from the employee, but also, e.g., from sick notes, or even from other employees. Hence, it may be quite an administrative burden for employers to investigate which of the employee's addresses they should consider the last known address. Under the new rules, the responsibility for notifying their employer of their correct and up-to-date address for delivering will be with the employees, who will otherwise face the risk of documents being delivered to them to an address where they do not reside, and still having the legal effects.

The amendment also unifies the deadline for collecting the document at the post office (if the addressee was not present at their address during attempted delivery) with the deadlines applied by the Czech Post. The fiction of delivery will thus take effect upon the elapse of 15 calendar days, rather than 10 working days as under current legislation.

If the employee refuses to accept the document, the mail carrier must still warn them about the consequences of such a refusal. Yet, under the new rules, it will no longer be necessary to take a written record of this, as this in practice was causing problems.

Changes will also concern the electronic delivery of documents. The amendment introduces special conditions for employers delivering to data boxes: under the new rules, it would suffice to obtain the employee's written consent for delivering to a data box. Such consent may be granted in each specific case, or as general consent. If the employee does not log in their data box within 10 days from the delivery of the document to the data box, the document will be deemed delivered; no special confirmation of receipt will be necessary. We yet have to see how this delivery method will fare in practice.

The proposed changes to delivering documents under labour law are certainly a step in the right direction. However, delivering to employees by post or electronically will still be rather complex, even after the amendment's effect. It seems that we will still have to recommend that our clients deliver documents to their employees preferably in person and in front of a witness, wherever possible.

New Real Estate Brokerage Act to enhance consumer rights

The Real Estate Brokerage Act entered into effect on 3 March 2020. Potential buyers, sellers or users of real property will gain a range of new rights.

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A real estate brokerage agreement that a realtor concludes with a party interested to buy, sell, lease or acquire the right to use real property must be in writing. Furthermore, it must not be contained in the same deed as the real property contract (i.e. the contract whereby the ownership title to real estate is transferred or the right to use and/or enjoy the profits of real estate is established). The agreement also has to contain essentials stipulated by law, such as the identification (at least in general terms) of the subject of the transfer/use/enjoyment of profits; the purchase price/rent/other consideration or the manner of its determination (at least in general terms) if the real property contract is for consideration, and any commission or the manner of its determination.

A real estate brokerage agreement that has not been concluded in writing, does not include the required essentials, or is a part of same deed as the real property contract may be rendered invalid. However, such invalidity may only be invoked by the interested party, not by the broker.

No later than on the day of concluding a real estate brokerage agreement, the real estate broker must provide the interested party (other than the real estate owner) with an extract from the Real Estate Register concerning the subject of the real estate brokerage. The extract must not be older that three working days, otherwise the interested party may withdraw from the agreement within 14 days from its conclusion.

The interested party may also withdraw from the real estate brokerage agreement if the real estate broker fails to meet their statutory duty to provide information about:

- concrete defects and limitations of the subject of the transfer, the use or enjoyment of profits as per public registers, as well as those that the realtor was or should have been aware of due to their professional qualification;
- the amount of commission or the manner of determining it, should another brokerage agreement have been concluded on the same subject of transfer.

Special protection will be awarded to consumers, i.e. interested parties who enter into contractual relationships outside their business or profession. Apart from the above, the following shall also apply:

- The real estate brokerage agreement cannot impose a duty to enter into a real property contract or an agreement on future real property contract.
- If the real estate brokerage agreement has been concluded for an indefinite term, the termination notice period shall be a maximum of one month.
- Exclusive real estate brokerage may only be agreed-upon for a fixed term, no longer than 6 months (may be extended repeatedly, no earlier, however, than 30 days before the agreed upon term expires).
- Advance payments for commission shall not amount to more than two thirds of the agreed-upon

commission.

- If, due to the realtor’s inactivity, error or failure to provide necessary collaboration, a real property contract is only concluded after the obligation under the real estate brokerage agreement had terminated, the realtor may not demand commission from the interest party.
- A consumer’s debt cannot be settled or secured by a bill of exchange/promissory note or a cheque.

Should the real estate brokerage agreement contain any of the above listed prohibited clauses, the arrangement will be invalid and unenforceable against the interested party.

We believe that the Real Estate Brokerage Act will meet its purpose, which is to protect consumers and improve the quality of services in the real estate sector. Hopefully, it will prevent or at least significantly limit the unfair practices currently followed by real estate brokers.

Coronavirus – new challenge for employers

The spreading of the coronavirus infection puts companies in a difficult position. HR specialists in particular worry about how to effectively protect employees while keeping their business in operation. The situation is further complicated by the spring-term holidays and employees returning from affected regions, as well as by growing panic. How to proceed, then?

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Above all, it is advisable to monitor the current situation and recommendations issued by the authorities, and to keep employees informed – in particular about proper hygiene and sanitation practices to lower the risk of infection, the symptoms of the disease, and any high-risk areas. Employees should also be informed about how to proceed if symptoms occur or if they have returned from problematic locations. As part of preventive measures, employers should provide workplaces with disinfectants and recommended protective gear, and limit business travel abroad to a necessary minimum. Finally, employers should communicate with trade union representatives, works councils and OSH (occupational safety and health) representatives, if in place.

It is also appropriate to consult the situation with a medical service provider, namely to agree in advance how to proceed if any employee shows the symptoms of the disease, has been in contact with an infected person or has returned from high-risk locations. Generally, if an employer has doubts as to an employee's capacity to work, they may send them for a medical check-up. However, many physicians have now adopted special measures to limit the spreading of the virus in patients' waiting rooms – and employers should therefore find out about any such measures adopted by their medical services provider. It is also recommendable to consult with a medical professional what other preventative measures to take.

If an employee is displaying infection symptoms, especially if they've just returned from an affected region or may have been in contact with an infected person, the employer should demand they consult their medical condition with a physician without delay. If the physician finds the employee temporarily incapable to work or orders a quarantine, this constitutes an obstacle to work on the part of the employee, with entitlement to wage compensation in the amount of 60% of average earnings.

For professions that can be carried out using remote access, working from home may be a way to isolate employees from their colleagues. Working from home, however, cannot be ordered: the employee must consent to work outside their regular workplace; the same applies to unpaid leave of absence. Another solution is to order such an employee to take a vacation – however, under the Labour Code, the employee must be notified to take a vacation at least 14 days in advance, unless they consent to a shorter notice period. Cases that do not involve the temporary incapacity to work, quarantine or home office, with the employer simply not allowing employees to work at their workplace for preventative reasons, shall be viewed as an obstacle to work on the employer's part, with full wage compensation.

Should such preventive measures lead to a high absence rate, employers cannot but mobilise their remaining workforce. For instance: adjust shift and vacation schedules (which, however must be done at least two weeks in advance, unless a shorter period has been agreed with employees) or order employees to work overtime (within the limits stipulated by law). If it becomes necessary to rescind already approved vacations, the employer must compensate the employee for any costs incurred.

The spreading of the infection also complicates employing foreigners. Since the beginning of February, the Czech embassy in Beijing and the general consulates in Shanghai, Chengdu and Hong-Kong have suspended accepting applications for visas and residency permits, conducting the relevant proceedings, and issuing decisions, including granting visas. This prevents the filing of new applications for permits, as well as the issuance of decisions on applications previously filed. The Czech embassies in China now only allow the filing of applications for short-term visas for family members of Czech citizens. And it is possible that the measures will tighten even more: for instance, the same prohibition may be extended to other countries, or the approval of applications will be conditional upon producing a certificate of being virus-free.

OECD releases Transfer Pricing Guidance on Financial Transactions

The OECD released the long-awaited final version of a report on the pricing of related party financial transactions, which is part of BEPS Action Plans 4, 8-10 and will be implemented into the OECD Transfer Pricing Guidelines. The report focuses on intra-group loans, guarantees, cash-pooling and various risk insurance arrangements.

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The report contains a comprehensive description of how to determine and assess transfer prices for financial transactions. It also provides guidance to the tax authorities on how to put forward arguments during tax inspections, especially where the economic substance of a particular financial transaction is not properly supported.

The main points of the report are as follows:

- **Economic substance of a provided loan:** The report explicitly specifies areas that should be considered during a particular transaction. Emphasis is put on the economic substance of a financial transaction and the functional and risk profile of the parties to the transaction. The tax authority may seek inspiration in the methodological framework relevant for the financing classification assessment, considering various perspectives such as short-term vs. long-term financing, debt vs. capital financing, and other parameters.

According to the report, e.g., creditors who do not have the necessary personnel, functions and assets/debt capacity at their disposal to manage credit risk, may only be entitled to no more than a risk-free interest rate. The remaining part of interest should then be allocated to the entity that is actually exercising control over this risk. This may involve, for example, shared service centres that perform the treasury management function within groups of companies on a central basis.

- **Debtor's credit rating:** The report also mentions possible methods to assess a debtor's credit risk. When evaluating creditworthiness, it is also necessary to consider the level of implicit support provided by the group based on the debtor's position within such a group. The credit rating of a strategically significant company should, e.g., approximate the credit rating of the group to which the company belongs, whereas a less significant company should be viewed more like a stand-alone debtor (stand-alone rating).
- **Offers from external banks:** The use of an (indicative) offer from an external bank as a comparable transaction to an intra-group loan is seen as problematic in the report, as an offer from a bank does not represent a transaction that has actually been carried out and, therefore, does not meet the criteria for applying the comparable uncontrolled price method.
- **Cash-pooling:** Cash-pooling structures should be analysed from an overall perspective, focusing on the evaluation of functions and risks as well as benefits for participants. If the cash-pool leader only performs

coordination activities and does not bear any significant risks, the leader's remuneration should also be "administrative", i.e. should correspond to the limited risks assumed and functions performed. At the same time, the report does not exclude the possibility that the cash-pooling leader's scope of activities may be wider and, as a result, the related remuneration may be determined based on other approaches stipulated in the report, but only if such a pricing model is properly documented and any non-standard activities are well-supported.

Following the issuance of the OECD report, it can be expected that the tax authorities will pay increased attention to financial transactions. We recommend reviewing the setup of the existing intra-group financing structure, focusing on whether the distribution of functions and risk controls correspond to the distribution of interest income among recipients. We also recommend performing a review/update of transfer pricing documentation, making sure that the economic substance forms the basis for setting the contractual conditions of intra-group financial transactions and related remuneration.

BEPS 2.0: progress and setbacks

The preparation of BEPS 2.0, new rules for the taxation of the digital economy, has made some progress. Preliminary consensus has been reached on Pillar 1, defining a new rule according to which income will be taxed in the state of sale even if the seller has no physical presence there. However, the USA's requirement that the new rule be only applied on a safe harbour basis complicates the matter, as it is unacceptable for the majority of other states. This may threaten the project's planned completion deadline, set for the end of 2020.

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In the December issue of *Tax and Legal Update*, we discussed the OECD's BEPS 2.0 proposal, aiming to amend the existing rules for the taxation of income based on physical presence (Pillar 1), and introduce a minimum tax for multi-national groups of companies (Pillar 2).

Taxable income will be allocated to the state of sale via a three-tier mechanism (Amount A, Amount B and Amount C), reflecting the existing profit allocation principles based on physical presence. Newly defined Amount A, however, will enable the taxation of profit generated by a foreign company even if it has no in-country physical presence contributing to the generation of income from a sale. To some extent, this principle may replace the digital tax that has recently been introduced by many countries. However, Pillar 1 rules would not only apply to income from digital services, which is the income targeted by digital tax (the performance of targeted advertising campaigns, the use of multilateral digital interfaces, or the sale of user data), but also to income from the sale of goods and services generated directly in the state concerned. Unlike the digital tax that is usually applied on an entire income, the new Pillar 1 rules would enable the taxation of only the profit amount allocated to the state of sale determined based on Pillar 1 rules. Pillar 1 rules should also apply to corporations that are part of groups with a turnover exceeding EUR 750 million. This shift within Pillar 1 was supported by the ministers of finance and governors at the G20 summit in Saudi Arabia.

A big question mark hangs over the USA's position in this matter. As early as in December 2019, the USA proposed to transform Pillar 1 into a safe harbour regime, which would allow corporations to choose whether they want to proceed in accordance with Pillar 1 or with current transfer pricing rules (the safe harbour model does not affect Pillar 2). According to the OECD representatives, the USA stand alone in pursuing this model. Consequently, the OECD announced in the report that it is ready to consider the proposal but will not do so before the completion of the original Pillar 1 plan. This should occur in July, which means a considerable delay, as the original deadline was set for the end of January.

It is not at all certain whether the BEPS 2.0 project will be completed by the end of 2020 as was declared at the G20 summit. This may influence countries that consider the implementation of digital tax or its cancellation if they have already implemented it. Their decisions are conditional on a consensus at the OECD level.

DAC7 at last? European Commission targets digital platforms and sharing services

With the implementation of DAC6 underway in Europe, the European Commission has now submitted an initiative that may bring the seventh revision of the Directive on Administrative Cooperation in the Field of Taxation. It focuses on digital and shared services platforms. Its aim is the fair taxation of income generated via digital platforms, in terms of all taxes. This means that, unlike its predecessors, DAC7 would most likely cover both direct taxes and VAT.

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The aim of the initiative submitted for public consultation by the European Commission is to identify entities that generate income via digital platforms and ensure that such income is properly taxed. A survey carried out in the EU has shown that services provided through online platforms with an international reach are growing. At the same time, numerous entities do not report the income, with member states losing significant tax revenues for their state budgets.

The initiative aims to give local tax administrators access to information on income generated via digital platforms, allowing them to control the taxation of this income in a quick and efficient manner thanks to cooperation among national financial administrations. The system should be based on an analysis of the existing national rules for collecting data on the digital economy in individual member states. Currently, an analysis is being prepared to assess and evaluate the potential impact a new reporting duty may have on both local tax administrators and businesses. The European Commission hopes that a uniform information standard will reduce the costs of setting up and operating information systems that member states would otherwise have to develop themselves. The new system should enable the fast and efficient exchange of information, cover all taxation areas, prevent data duplicity, and gather information in accordance with the GDPR.

So, will there be DAC7 and a new reporting duty? We have to wait and see. The European Commission will leave it up to further debate whether to introduce the outlined measures, and in what form – a wide range of options is available, from recommendations to member states, to a new directive. Public consultation will run for 8 weeks and feedback can be given through the European Commission's website. Next steps in this matter are planned for July 2020.

‘Keeping of assets’ for investment incentive purposes – to own, or not to own?

The Supreme Administrative Court (SAC) held that to prove compliance with the condition of ‘keeping the assets’, it should suffice that the investment incentives recipients prove that the assets were kept in the supported region, regardless of the ownership title to such assets. The case in question involved an investment incentives recipient who was demerged by spin-off.

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A company was granted investment incentives in 2007 and claimed tax relief in that year and then in 2008 and 2010. Subsequently, in 2012, the company took part in a demerger by spin-off, whereby the demerged company was not dissolved and continued its activity. However, all assets supported by the investment incentive were transferred by operation of law to one of the newly established companies.

The tax administrator concluded that this constituted a breach of the condition of ‘keeping the supported investment’ stipulated by the Investment Incentives Act. Therefore, it disregarded the tax relief claimed by the company, and assessed tax in the full amount plus a penalty.

Contrariwise, the SAC concluded that the term ‘keep the assets’ is not defined by legislation. Grammatically interpreting the relevant provision, the court deduced that while the recipient was obliged to keep the assets in the supported region, nothing implied that this would mean the obligation to also retain the ownership of the assets. As a basis for its decision, the SAC took the wording of Section 6a(2) of Act No. 72/2000 Coll., on Investment Incentives, as amended on 5 September 2019. The court also pointed out that the duty of the investment incentives recipient to use the assets and keep them in their ownership and at the place of the investment project was only stipulated by the amended version of the law effective from 6 September 2019.

In the context of applicable legislation, it is also necessary to keep in mind the EU rules of public support that have a direct effect: they regulate the conditions directly concerning the provision of public support and impose specific requirements for selected types of assets in terms of public support.

However, this obviously ground-breaking judgment dealing with the specific case of demergers by spin-off, entails certain pitfalls. Although according to the SAC it is sufficient to keep the supported investment in the region regardless of the ownership title to the relevant assets, investment incentive recipients still have the duty to prove the existence of the assets in the region – meaning they have to be able to maintain certain control over the assets.

Taxpayers who may be involved in a business transformation should therefore bear in mind the different parameters and specificities of various types of transformation and assess each case on an individual basis – not just because of the differences of opinions between the tax administrator and the SAC in this specific case, but also because of the uncertainty regarding the tax administrators’ approach to similar situations in the future.

How to time resignation to comply with due managerial care

According to the Supreme Court (SC), members of a corporation's elected body may resign from their offices and the corporation cannot stop them. However, if they do so at a time unsuitable for the corporation, they shall be liable for the damage they have caused to the corporation by doing so. This means that the duty of due managerial care also applies to acts terminating the office of a member of a corporation's body.

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The Corporations Act explicitly prohibits the members of a corporation's elected bodies to resign from their offices at a time unsuitable for the corporation. The act, however, does not stipulate the legal consequences of such a ban, leaving this issue to case law. Lower-degree courts have repeatedly adjudicated that resignations from office at an unsuitable time were invalid. In other words, they allowed corporations to force disloyal members of their bodies to remain in office, even against their will.

However, the SC construed that the purpose and meaning of the prohibition to resign at an unsuitable time does not necessarily require that such an (unlawful) resignation should be invalid. Therefore, the members' office shall indeed terminate upon their resignation, but they will be liable for damage caused to the corporation by this. Although the commentaries leave certain hope that some cases of resignation might be treated as invalid, it would have to be exceptional cases requiring a special approach by the courts.

In view of the liability connected with due managerial care, it is advisable to pay attention to the timing of a resignation. Problems may arise in situations where the company is in financial difficulties or finalising negotiations on a significant business opportunity. Such situations usually require the involvement of a statutory body member or their professional insight. In cases like these, it may also be hard for the company to find a replacement for the resigning member, as any substitutes may lack their predecessor's key knowledge of the current situation.

However, the loyalty duty to the corporation is not boundless. Its limits may be the justified interest of the body's member in terminating their office. The SC concluded that such an interest is equally important as the corporation's interest of being able to respond adequately to the member's resignation. The corporation should therefore take all measures necessary to prevent possible damage, within a statutory deadline of one month after being delivered the resignation notice, or another deadline stipulated by the memorandum of association, deed of foundation or executive service agreement.

Usually, a new member is elected, but it is also possible to redistribute the resigning member's responsibilities among the remaining members of the elected body. If the corporation fails to do so, it shall bear the consequences of its inactivity. The situation will be quite different though if the corporation is unable to prevent the harmful consequences – for instance, if nobody is willing to take up the office of its statutory body because the corporation is facing bankruptcy, which the resigning member must have been aware of. Regardless of the timing of the resignation, members of the corporation's body should also not be liable for consequences when other important interests clearly prevail over the corporation's protection: this may include serious health problems preventing the members from exercising the office.

In brief

Latest news, March 2020

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

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DOMESTIC NEWS IN BRIEF

- The financial administration published an attachment to EC sales lists for the reporting of transfers of own goods to another member state within the simplification procedure applicable to consignment stock arrangements. The duty to fill in this attachment applies to all entities that have decided to apply the direct effect of the EU VAT Directive and proceed in accordance with these simplification rules as early as from January 2020.
- The implementing regulation regarding the special mini-one-stop-shop (MOSS) regime was published in the EU Official Journal. According to the regulation, effective from 1 January 2021, this regime should extend to persons liable to tax and carrying out distance sales of goodsAn amendment to the Corporations Act was published in the Collection of Laws under No. 33/2020 and will enter into effect on 1 January 2021.
- An act to avoid double taxation in relation to Taiwan was published in the Collection of Laws under No. 45/2020 and will be effective from 2021.
- The General Financial Directorate published information defining the method of confirming documentation on the sale of goods when refunding VAT to third-country individuals upon the export of goods.
- The financial administration disclosed information on a new reporting duty from 1 July 2020 in relation to reportable cross-border arrangements (DAC6).
- The financial administration published an overview of goods and services to which a reduced 10% VAT rate will apply from 1 May 2020.
- On 18 March, the budget committee will discuss motions to amend the Act on Digital Tax. Based on information that has been made available to us, the Ministry of Finance is considering the postponement of the act's effectiveness to 1 January 2021 and the reduction of the digital tax rate to 5%.

FOREIGN NEWS IN BRIEF

- The European Commission has launched a public consultation on data collection and exchange of tax information on the digital platform economy. The consultation is examining whether recommendations from the consultation could be included as a possible amendment to the Directive on Administrative Cooperation (2011/16) (DAC). Such an amendment is needed to provide tax administrations with information to identify taxpayers that generate revenues through the digital platform economy.

- Uruguay, Cyprus, Qatar, and Saudi Arabia have ratified the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). MLI entered into force for Mauritius and Latvia and has been signed by North Macedonia. Russia had reservations when signing the MLI. The MLI was passed by the Kazakh parliament. The Czech Republic is also among the states that have already ratified the MLI (for the Czech Republic, the MLI will enter into force three months after depositing the instrument of ratification with the OECD). In total, the MLI has been signed by 94 jurisdictions and has entered into force for 36 jurisdictions.

- The European Commission has sent formal notice letters to fifteen EU member states (Belgium, Cyprus, Czech Republic, Estonia, France, Greece, Italy, Luxembourg, Latvia, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom) for their failure to transpose EU Directive 2018/822 on mandatory disclosure rules (DAC6) into domestic law.

- The EU Council has revised the EU list of non-cooperative jurisdictions for tax purposes. In addition to the 8 jurisdictions that were already listed, the EU also decided to include the following jurisdictions in its list: Cayman Islands, Palau, Panama and Seychelles. These jurisdictions did not implement the tax reforms to which they had committed by the agreed deadline.

- The Council has adopted two VAT rules reforms. The first reform concerns the detection of tax fraud in cross-border e-commerce transactions. The new rules will enable member states to collect records made electronically available by payment service providers such as banks in a harmonised way. In addition, a new central electronic system will be set up for the storage of payment information and for the further processing of this information by national anti-fraud officials. The second reform concerns VAT rules applicable to small businesses. The new rules will reduce the administrative burden and compliance costs for small enterprises and help create a fiscal environment which will help SMEs grow and trade across borders.

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