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Editorial

The first half of 2018 is over. At its end, the government passed and forwarded to the Chamber of Deputies bills to amend tax laws for 2019. Considering the length of the bills' next steps in the legislative process, passing them before the year end will be touch-and-go, and it is possible that the effective dates will have to be postponed by several months. The individual points of the proposed amendment to the Income Tax Act were covered in previous issues of Tax and Legal Update. In this issue, we continue with the proposed changes to value added tax.

Before them being discussed by the government, several rather fundamental changes were made to the proposed amendments. One of them is the change to the Tax Procedure Code defining the abuse of right. Within the commenting procedure, the originally proposed wide definition was narrowed to remain within the limits laid down by the current decision making practice of courts (case law) and the EU directive. Yet, it is clear that with having the concept now stipulated by law, the tax administrators' appetite to review transactions from the perspective of the purpose and meaning of a specific tax regulation will grow. In the years ahead, it will be for the courts to find the limits of such an approach.

Among the other articles in this issue, I would in particular like to bring to your attention the Regional Court in Hradec Králové's ruling on the taxation of employee benefits not provided by the legal employer but by third persons. The court's conclusions and their practical implications have been covered by Iva Krákorová a Mária Marhefková.

I wish you an inspiring read and a beautiful summer.



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What to expect in a transfer pricing inspection?

Not too long ago, transfer pricing was an issue tax administrators preferred to avoid, as their knowledge was limited in this respect. These times are over.



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In 2016 and 2017, more than 14 billion Czech crowns were additionally assessed (including the reduction of losses) based on tax inspections focusing on transfer prices. From 2012 to 2014, only a little over 1 billion had been additionally assessed. Tax administrators have now turned their focus on corporations that generate losses or incur significant expenses for intra-group services. Tax inspections usually begin with a request to submit transfer pricing documentation or to fill in an extensive questionnaire (approx. 60 questions) focusing on a corporation' functional and risk profile and on documentation supporting received services. Regardless of the extent of information provided by the corporation in response to the questionnaire and the quality of provided supporting documentation, the corporation may almost be certain that the tax administrator will subsequently and repeatedly request additional and more detailed information as well as other supporting materials.

Purposive selection

In many cases, the tax authority's reasonable arguments seem to have disappeared. In addition to the oversimplified interpretation of a corporation's functional and risk profile and a subsequent reclassification of a corporation to a contract manufacturer/contract distributor, the tax administrators increasingly often select and assess evidence with the single purpose of assessing additional tax.

In cases when no significant transactions have actually taken place within a group of companies, it is quite astonishing to see tax administrators treating a parent company as being responsible for poor results and incorrect business decisions of a local company, which is, in the tax authority's opinion, actually a contract manufacturer, and as such must generate at least a minimum profit. The tax authority subsequently will not hesitate to devise a fictitious transaction, assess additional tax and request that damage in form of losses incurred by a Czech company be settled by its parent company. No wonder that the company subject to inspection often and soon becomes convinced that the inspection's outcomes had been decided long before the inspection actually commenced.

Affected companies usually try to avoid any further interactions with the tax authority during appellate and subsequent court proceedings and decide to "sacrifice" one year, i.e. they pay the additionally assessed tax without any appeal. This, however, may be viewed by the tax authority as an invitation to inspect all other open years.

Attack is the best defence

All the above shows that attack remains the best form of defence as the nearly unlawful tax administrators' procedures and their simplified conclusions often meet with disagreement before the court. An alternative to defence before Czech courts is the involvement of a foreign tax administration via proceedings for mutual agreement upon a request filed by the company subject to inspection. It is up to each company to select the right strategy, but our experience has shown that if real economic arguments exist for a particular situation, it is better

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to defend and prove one's rights at court. The more judicial decisions on transfer pricing, the clearer the limits within which tax authorities and taxpayers operate will become.

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Last wave of subsidies for large enterprises?

A few of the last calls to participate in the Enterprise and Innovations for Competitiveness Operational Programme (OPEIC) were announced during the course of June, including favourite programmes such as Potential, Innovations and Applications. Large enterprises may also submit their applications if they meet a number of new conditions.



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The Potential programme, providing support to investments in research and development, will start accepting applications on 1 October 2018. The level of provided support continues to be 50% of eligible expenses and an individual subsidy per one project may amount to up to CZK 30 million. A large enterprise as an applicant (under one identification number - IČO) may only file one application.

The Applications programme will accept applications starting 28 August 2018. Support will primarily be provided in respect of operating expenses incurred for development projects relating to industrial research and experimental development. The level of provided support may amount to up to 70%, depending on the supported activities and the level of cooperation. A subsidy's maximum amount has been limited to CZK 40 million.

Within the Innovations programme, it will be possible to apply for support to introduce new products/processes and other innovations from 26 September 2018. The maximum amount of a subsidy per one project is CZK 40 million with a limit of 25% for large enterprises.

Within the above programmes, large enterprises may only receive support for projects that meet one of the following conditions:

- Intervention field code 063 Cluster support and business networks primarily benefiting SMEs, i.e. projects carried out by large enterprises in direct collaboration with a SME that participates in the total eligible project expenses. The extent and form of collaboration must be supported with appropriate documentation at the time of filing an application.
- Intervention field code 065 Research and innovation infrastructure, processes, technology transfer and cooperation in enterprises focusing on the low carbon economy and on resilience to climate change, i.e. projects focusing on low carbon economy and on resilience to climate change. In practice, this should involve projects with the main or one of the main goals being a positive impact on the environment, such as the reduction of CO2 and other harmful emissions (e.g. production or development of spare parts for electric vehicles, etc.).

In the Potential and Applications programme, one of the above intervention fields must be met. In the Innovations programme, there is no choice and projects must fall within intervention field code 065.

In addition, a call to participate in the Establishment and Operation of Shared Services and Data Centres within the ICT and Shared Services Programme has also been announced. Applications will be accepted from 28 August 2018. The level of provided support for large enterprises may amount to 25%. The maximum subsidy per one

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project is CZK 100 million.

A large enterprise as one applicant (under one identification number) may only file one application within each individual programme. Considering the restricted amount of funds for allocation, it is absolutely vital to file an application for support as soon as possible on or after the application acceptance date, since the support provider may terminate the acceptance procedure early, once total funds for allocation have been exhausted. But it may not do so earlier than fourteen days after the opening of the acceptance procedure.

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2019 amendment to VAT Act: other three important changes

A draft amendment to the VAT Act has been submitted to the Chamber of Deputies. Below we present three significant changes.



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Issue of credit notes and debit notes
A change that may make the declaring of corrective tax documents in VAT ledger statements easier is the specification of the date of supply as another mandatory essential of corrective tax documents (i.e. credit notes and debit notes). Currently, some credit or debit note issuers and recipients have problems with what date they should state in the VAT ledger statements as the date on which they must declare tax. It often happens that the dates in the issuer's and the recipient's VAT ledger statements do not match, resulting in a call for explanation from the financial administration. The amendment should remove these ambiguities. Under the new amendment, the date of making a correction should be stated as the date of supply in a corrective tax document.

For the sake of completeness, we draw attention to the fact that the new concept of having to make every effort to issue and deliver standard tax documents, discussed in the last issue of Tax and Legal Update, also refers to the area of tax base corrections. If the tax base is to be reduced, the taxpayer must disclose the appropriate correction in the taxable period in which every reasonable effort to deliver a document to the recipient was made.

Tax base correction as a result of doubtful receivables
Unfortunately, the amendment does not significantly extend the variety of options to correct the tax base as a result of doubtful receivables. Apart from the death of a debtor and the existing insolvency options, the amendment only adds enforcement proceedings. It continues to be possible to correct the tax base only with respect to B2B transactions, i.e. receivables arising from transactions between businesses.

The new draft amendment also allows for the correction of the tax base due to inappropriately long insolvency and enforcement proceedings where more than five years have elapsed from the date of supply.

In addition, the amendment also contains an option to correct the tax base as a result of reorganisation, following the case law of the Court of Justice of the European Union, on the condition that the receivables at issue are part of the approved reorganisation plan and had been included in the tax base.

Restricted option to tax real estate leases
Another change likely to be in effect no earlier than in 2021 but nevertheless important enough to mention affects taxpayers who lease real property for its further economic use. Currently, such taxpayers may decide to tax these leases. But from 2021, this will in some cases no longer be possible. An explanatory report to the amendment states

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that this is to prevent any potential abuse or gaining significant cash flow savings and advantages. From 2021, the taxation of leases would only be allowed in respect of structures whose area of more than 60% is not intended for permanent residence.

Other changes to VAT will be discussed in *Tax and Legal Update's* next issue.

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Reporting cross-border transactions

On 5 June 2018, DAC 6 was published in the EU Official Journal. It introduces a new reporting duty and automated information exchange for cross-border arrangements motivated by obtaining a tax advantage.



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The term 'cross-border arrangement' has not been defined, and any arrangement will be subject to the reporting duty if it meets at least one of the characteristic features ('hallmarks') listed in the annex to the directive. Some hallmarks will be tested together with the main benefit of the transaction: the main benefit test will be met if it is determined that obtaining a tax advantage was the main benefit or one of the main benefits of the arrangement. Some hallmarks will render the arrangement reportable even without it meeting the main benefit test. The reported information will then be automatically exchanged between member states.

Examples of hallmarks rendering an arrangement reportable if the main benefit test is also met:

- an arrangement with a taxpayer or participant being under a confidentiality obligation requiring them not disclose how such an arrangement may secure a tax advantage vis-à-vis other intermediaries or tax authorities
- an arrangement whereby a participant in the arrangement takes contrived steps consisting of acquiring a loss-making company, discontinuing the main activity of such company and using its losses to reduce their tax liability, including transferring those losses to another jurisdiction or accelerating the use of those losses
- an arrangement having the effect of converting income into capital, gifts or other categories of revenue taxed at a lower level or exempt from tax.
- an arrangement including circular transactions resulting in the round-tripping of funds, namely through involving interposed entities without any other primary commercial functions or transactions that offset or cancel each other or that have other similar features.

Examples of hallmarks rendering an arrangement reportable even without meeting the main benefit test:

- An arrangement which may have the effect of undermining the reporting obligation under the laws implementing union legislation or any equivalent agreements on the automatic exchange of financial account information, including agreements with third countries, or which takes advantage of the absence of such legislation or agreements.
- An arrangement involving a non-transparent legal or beneficial ownership chain with the use of persons, legal arrangements or structures that have some characteristic features, for instance, not carrying out a substantive economic activity supported by adequate staff, equipment, assets and premises.

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- Hallmarks concerning transfer pricing, including:
    - an arrangement involving the use of unilateral safe harbour rules
    - an arrangement involving the transfer of hard-to-value intangibles
    - an arrangement involving an intragroup cross-border transfer of functions and/or risks and/or assets, if the transferor's or transferors' projected annual earnings before interest and taxes (EBIT) during the three-year period after the transfer are less than 50% of the projected annual EBIT of such transferor or transferors had the transfer not been made.

A number of questions and the setting of relevant rules remain for the member states. This concerns, e.g., determining relevant sanctions or rules regulating the reporting duty if it conflicts with the intermediaries' confidentiality; in such cases, the duty to report shall rest with the taxpayers.

Timing is of key importance. The new directive entered into force on 25 June 2018. The member states have to implement it by **31 December 2019** and apply its provisions starting from **1 July 2020**. However, the reporting duty will already apply to arrangements whose first steps were taken after the directive entered into force (i.e. after 25 June 2018); these have to be reported by 31 August 2020. This means that all present and planned cross-border transactions have to be viewed from this perspective and assessed as to whether they are subject to the reporting.

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Controversial amendment to Tax Procedure Code published in Collection of Laws

In early June, a long-awaited and widely discussed amendment to the Tax Procedure Code was published in the Collection of Laws. The amendment expands the information duty towards tax administrators and implements – with a few months' delay – the EU Directive on Administrative Cooperation in the Field of Taxation (DAC 5), ensuring access to data ascertained under the AML Act and enabling banks to obtain a wider variety of information about taxpayers.



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With the new regulations, the tax administrators will be allowed to request information about persons authorised to dispose of funds in bank accounts, persons who have deposited funds in accounts, payment recipients, and those who have established safe deposit boxes. During the legislative process and after heavy criticism, the amendment underwent a number of changes, eventually excluding from the reporting duty information on remote-access services and their utilisation as well as information about the equipment used for these services.

The entirely new information duty following from DAC 5 will affect liable persons in the light of the AML Act. The tax authority may ask various entities for any information and documentation they obtained while identifying and checking clients in compliance with this act. The amended regulation mainly affects regulated advisors, in addition to financial institutions, and in many ways exceeds the requirements of EU legislation (with the exception of selected professions), since EU legislation only requires access to information for international tax administration purposes but the amendment plans to use such information also for domestic tax administration purposes. The amendment authors argued that it is hard to separate the administration of taxes for domestic and international purposes. For certain professions such as attorneys, auditors, bailiffs, tax advisors and notaries whose obligation to maintain confidentiality is traditionally protected, the new information duty only applies to ensure international cooperation in the administration of taxes. Only the General Financial Directorate and not every tax authority will be allowed to request information from these professions, aiming mainly to ensure the right to legal assistance.

However, this is not the only amendment associated with DAC that may have to be adopted in the future. DAC 6 is discussed in a separate article. Moreover, the European Commission has officially criticised the Czech Republic for the incorrect implementation of DAC 2, introducing the automatic exchange of information about financial accounts, known also as the Common Reporting Standard (CRS) or GATCA (a global version of FATCA).

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Taxation of listed investment funds is changing

In mid-June, the Chamber of Deputies passed a draft amendment to the Income Tax Act that alters the definition of a basic investment fund. The amendment regulates conditions under which funds whose shares have been accepted for trading on an EU regulated market will be taxed at a 5% income tax rate.



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The original draft amendment proposed by the Senate of the Czech Republic underwent a number of significant changes, especially as a result of amending motions submitted by the budget committee. The amendment introduces new conditions that must be met by investment funds whose shares have been accepted for trading on an EU regulated market to continue to qualify as a basic investment fund and to be taxed at 5%. The rules for other basic investment funds remain unchanged, i.e. for unit funds, investment funds and sub-funds of joint-stock companies with variable capital that invest more than 90% of the value of their assets into statutory investment and financial instruments as well as for comparable foreign investment funds.

Under the new regulations, investments funds listed for trading on an EU regulated market will qualify as basic investment funds only if:

- no entity subject to corporate income tax – excepting the World Bank, International Monetary Fund, European Investment Bank, other international financial organisations, states, central banks or corporate entities controlled by these entities – has a share of 10% or more in the fund's registered capital; and
- they do not carry out trade under the conditions prescribed by the Trades Licensing Act.

Shares of related parties are summed up for the purpose of the first test. This condition should be met even if the permitted amount of a share in the registered capital is exceeded over the period shorter than a half of the taxable period. The amendment is yet to be passed by the senate and signed by the president. It therefore cannot be excluded that it will be further amended. The new rules should become effective from 2019.

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Spouse's consent to share transfers not just a formality

A share in a business corporation held by a spouse forms part of the community property of spouses ('community property'), with some exceptions. Although the other spouse does not become a shareholder (they cannot attend or vote at general meetings and do not have the right to information about the company but only the right to the asset that the share/interest represents), the acquisition of a share in a company is usually subject to the spouse's consent. In practice, this restriction is often underestimated, if not outright ignored. Here, however, ignorance is not bliss.



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Under the general rule, in matters that are not of a common nature spouses either act jointly, or the other spouse's consent is required. The 'common nature' of the matter depends on the specific circumstances of the couple, and ranges from a sale of a second-hand car, to the sale of a painting worth millions. Apart from this, the other spouse's consent is also specifically required in situations where a part of the community property is to be used for one of the spouses' business activity, and the value of what is to be thus used exceeds a level appropriate to the property circumstances of the couple. Hence, this includes the acquisition of a share in a company: according to the Supreme Court's case law, it seems that consent is almost always required, regardless of the amount of potential consideration.

If one spouse does not consent to the acquisition of a share in a business corporation, then they (and only they) may later invoke the invalidity of the purchase. This undoubtedly may have a negative effect on the marriage as well as on the company involved.

What then are the consequences of effecting a transfer without the other spouse's required consent? If the spouse who did not give consent to the controversial purchase does not challenge the act, nothing really happens, and whatever was acquired by such act (e.g. the share in the corporation) will become part of the community property. If, however, the spouse invokes the invalidity of the legal act, then the value that had been a part of the community property before the transaction, i.e. usually a sum of money (the purchase price paid), will be subject to the settlement of the community property between spouses (for instance in the event of divorce). Thus, according to a theory currently gaining ground, the community property will be viewed as still including the money used to purchase the share, meaning that from the viewpoint of the non-consenting spouse, the value of the community property will include both the share in question, and the purchase price paid for it; the non-consenting spouse would thus get from the community property not just half of the purchase price paid, but also half of the purchased share. And this situation is far from ideal for the other spouse.

We thus recommend that spouses and those participating in a company with them or purchasing a company from them should not overestimate the strength of their marital union and pay proper attention to obtaining the other spouses' consent with using a part of the community property for business, in particular with transferring a share in a corporation.

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The end of the present EU VAT system approaching?

Late in May this year, the European Commission submitted a proposal to amend the VAT Directive, outlining the definitive (final) VAT system. The new system should unify the principles applicable in the VAT area across the European Union, simplify cross-border trading, and help tackle tax evasion.



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The present system of VAT has been implemented as just temporary, and for 25 years, Europe has been waiting for a definitive system. Last month, the Commission took another major step towards this goal and submitted a proposal amending the VAT Directive ('the Directive').

Proposed definitive VAT system

The significance of the changes to VAT that the new system will bring is best illustrated by the fact that the proposed amendment affects nearly a half of the Directive's articles.

An important change is the simplification and, we may say, an entirely new understanding of the taxation of cross-border sales of goods. Presently, intra-community supplies have to be viewed from two perspectives: the supplier's, and the supply recipient's. The exemption of supplies of goods to another member state is always reviewed on the supplier's part; on the recipient's part, it is reviewed as to whether it involves an intra-community acquisition. This artificial splitting, i.e. viewing a single transaction from two perspectives, should now be eliminated: under the proposed amendment, an intra-community supply would be viewed as a single taxable supply to be taxed by the supplier, in the country where the dispatch/transport of the goods ends.

A fundamental principle of the definitive VAT system should thus be that the seller shall be liable for the collection of tax even for intra-community supplies. The seller will therefore have to charge the tax at the tax rate applicable in the state where the transport of goods is to be completed already when setting the price. This approach will not apply if the recipient is a certified taxable person (CTP), in which case the present concept, i.e. the possibility of exempt supplies and intra-community acquisitions, shall be preserved.

Connected with the proposed mechanism is a one-stop shop – a single on-line portal that could be used by taxpayers for the taxation of intra-community supplies. The portal should be available to suppliers from the EU and to those from outside the EU, provided that they have an EU-established intermediary that would be liable for their European VAT-related liabilities.

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The new rules are proposed to enter into force on 1 July 2022.

Because of the long-term time horizon for the approval and implementation of the definitive VAT system, the Commission has also proposed a package of measures to remedy the most pressing issues in the VAT area by way of quick fixes.

Four quick fixes

Although the quick fixes have not been approved by the finance ministers at the June ECOFIN session, we expect them to be passed at some point in the future. The measures should concern:

- call-off (consignment) stock arrangements
- linking transport to a specific supply in a chain transaction
- proving transport of goods between member states
- verifying the recipient's VAT status in VIES for the purposes of VAT exemption of intra-EU supplies.

A definitive VAT system that would be more resilient to tax fraud and at the same time more simple for all parties involved is thus taking on a more exact shape. While it may seem that there remains plenty of time, the new system will bring substantial changes, and the taxpayers have to get ready for them.

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MLI enters into force

On 1 July 2018, the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent BEPS ('Multilateral Instrument' or 'MLI') entered into force. On that date, three months have elapsed from the end of the calendar month in which the MLI was ratified by the fifth contractual state; this condition was met in March 2018, when the MLI was ratified by Slovenia.



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The Multilateral Convention, or Multilateral Instrument, is one of the actions within the OECD BEPS (Base Erosion and Profit Shifting) initiative. Its main objective is to implement, swiftly and with a multiple effect, new provisions into international tax treaties to prevent their abuse for shifting profits to jurisdictions with zero or very low taxation.

The Czech Republic signed the MLI on 7 June 2017 in Paris, and it was approved by the government in February of this year. The Czech Republic has only adopted the MLI in the minimum standard, i.e. the rule to prevent treaty abuse (the principal purpose test) and the rule allowing for the effective resolution of disputes by mutual agreement (dispute resolution). As the MLI is by its nature a 'presidential treaty', it has to be ratified by the president with consent of both chambers of parliament.

The MLI shall have an effect on concrete treaties starting from the calendar year following the ratification by both states with respect to withholding taxes, and starting from taxable periods beginning on or after the elapse of six months following its entry into force with respect to all other taxes. The timing of the ratification process in the CR is not yet known. Although the MLI has so far been only approved by the government and is yet to be ratified, we recommend already taking into consideration the provisions that it is to implement in tax area. Some of them (namely the anti-abuse rule) may, once in force, affect cross-border arrangements being implemented now.

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Brexit: three customs arrangement options after Britain leaves the EU

If the present agreement remains unchanged, Great Britain will leave the European Union upon the lapse of the transition period, on 1 January 2021. At that time, it will most likely have to give up one of the greatest economic advantages of EU membership: the single free market, and the related customs union. Leaving the customs union will have far-reaching effects on cross-border trade chains that have been built over decades. Below, we have outlined three possible options of the new arrangement.



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The customs union was created in 1958 as a part of the European Economic Community (EEC), later becoming the present European Union. All member states of the EU are thus at the same time also members of the customs union. Generally speaking, a customs union is an agreement of several countries by which they undertake to apply common trade policy to non-member countries mainly in terms of tariff and non-tariff measures. The customs union has lifted customs duties, quotas, and other barriers to free trade within the EU, and applies a single customs tariff vis-à-vis third countries.

In the context of Brexit, the customs union remains one of the issues yet to be resolved. The following scenarios are possible:

Britain remaining in the customs union
This scenario would mean for Britain to adopt the same tariffs vis-à-vis third countries that are currently applied by the EU and, at the same time, not to introduce customs checks at borders when trading with EU states. This solutions seems the least probable from the British government's perspective, as Britain, being still a member of the EU customs union, cannot yet conclude other bilateral trade agreements.

Full exit and new agreements
The second scenario would mean Britain leaving the customs union, which would necessitate concluding new treaties not just with the EU, but also with other countries of the world. Even the rules regulating trade between members of the World Trade Organisation (WTO) view the EU as a single unit, meaning that once Britain ceases to be its member, it will have to negotiate its own deal with the WTO. Finally but importantly, this scenario touches on the very sensitive issue of creating a controlled border between Ireland and Northern Ireland, which both refuse.

Closer partnership
Britain may be inspired by other countries that are not EU members but have a partnership agreement with the EU, such as the European Free Trade Association or the customs union with Turkey.

No matter which way Britain chooses, one thing remains sure – without negotiating trade agreements, importers and exporters will suffer most, as they will carry the costs of the newly applied tariff and non-tariff measures. What this may look like in practice we can now see with the USA imposing customs duties on steel and aluminium

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Case law

CJEU setting stricter rules for on-call time of workers

The Court of Justice of the EU (CJEU) dealt with a dispute between a Belgian firefighter and his employer regarding the employee' entitlement for being on call (stand-by duty). The court held that that if the employee had to respond to the employer's call and arrive at the workplace within eight minutes, it restricted the employee's freedom to such an extent that it should be viewed as working time rather than as stand-by time. This can also be applied to the Czech legal environment.



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Stand-by time means a time on top of the employee's regular working hours during which the employee does not work but is ready to arrive at the workplace and start working if urgently needed by the employer. Such time is viewed as a period of rest, but employees still have to observe certain restrictions so that they can start working if needed. Employees cannot, for instance, take long-distance trips or drink alcohol. For each hour of the stand-by time, employees are entitled to at least 10% of their average earnings. Being on call is typical for rescue corps, maintenance workers or IT helpdesk staff.

The conditions of the stand-by duty, i.e. the required location of employees, the manner of contacting them and the time limit for arriving at the workplace, can be negotiated freely. Since 2007, the Czech Labour Code only prohibits stand-by duty from taking place at the employer's workplace; professional literature further deduced that stand-by duty cannot be taking place in such proximity to the workplace that it would interfere with the employee's personal life to the extent comparable to a stand-by duty at the workplace.

The CJEU has now set more concrete limits. It held that if an employee has to be on call with an arrival time of up to eight minutes, this would constraint them in pursuing their personal interests to the extent that is comparable with the duty to be present at the workplace. The court ruled to this effect despite the fact that the employee's home was in fact located within the arrival time distance. The stand-by time that is subject to such strict conditions has to be considered working time, with all it entails.

What does this mean for Czech employers? The Labour Code does not limit the extent of stand-by duty, and employers often order employees to be on call for rather long periods of time. If stand-by time were not viewed as a period of rest, it would have to be taken into account when determining working hours available, and when applying limits for overtime work. Moreover, employees would be entitled to full remuneration, rather than the ten percent pay.

To avoid these negative effects, employers should proceed with caution when setting the conditions of on-call duty. The 8-minute criterion cannot be seen as generally applicable – the CJEU only opined on the specific circumstances of the case in question. It is, nevertheless, recommendable to negotiate the conditions of being on call so as to restrict employees as little as possible, while still meeting employers' operational needs. The CJEU would consider a situation where the employee has to be contactable without being required to be actually present

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at the workplace to be acceptable (as stand-by time). For many employees, however, on-call duty defined as narrowly as this would not meet its purpose.

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Users may be responsible for Facebook's activity

The recent judgement of the Court of Justice of the EU (CJEU) will not please many administrators of 'fan pages' hosted on Facebook: in its ruling in case C 210/16 ULD vs. Wirtschaftsakademie, the CJEU concluded that the administrator is in the position of a personal data controller, and therefore responsible for the processing of fan page's visitors' personal data.



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The dispute started when the German Data Protection Authority ordered Wirtschaftsakademie, a company providing educational services through its website, to deactivate its fan page on Facebook. The German authority supported its decision by claiming an infringement of the information duty, as the visitors of the fan page were not warned that their personal data were being processed. The processing, comprising placement of cookies on the visitor's hard disks and their subsequent use, was done solely by Facebook, and the fan page administrator neither had any control over the processing, nor any access to the personal data. Facebook only allowed the fan page administrator to view anonymised statistical reports.

The case eventually appeared before the German Federal Administrative Court, which referred to the CJEU to clarify whether Wirtschaftsakademie may indeed be considered a data controller.

In terms of responsibility for personal data processing, it is of key importance to determine the position of the entity. Generally, entities may be in the position of a personal data controller (e.g. an employer in relation to its employees), a personal data processor (e.g. an external accounting firm hired by the employer), or may not process personal data at all. The personal data controller has the primary responsibility for data processing, while there may be several controllers for a single processing, in which case they are jointly responsible. Under the GDPR, and under the previous regulation, the controller is the entity which, alone or jointly with others, determines the purposes and means of the processing of personal data.

In the case in question, the CJEU, as expected, confirmed that Facebook was in the position of the personal data controller. Yet, surprisingly, it also held that the administrator of a fan page hosted on Facebook may be a data controller as well. According to the court, by setting up the page (for instance determining the target audience and the purpose of promoting its activities), the administrator participated in determining the purpose and means of processing the fan page's visitors' personal data, jointly with Facebook.

In this ruling, the CJEU interpreted the definition of a personal data controller very extensively. This puts fan page administrators in a rather difficult position: they may be held responsible for personal data processing done by Facebook while not having any influence over it. And, as we already know from the Cambridge Analytica case, Facebook is not all too worried about sticking to rules.

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Case law

When does the super-gross salary concept apply to benefits from third persons?

The Regional Court in Hradec Králové has recently dealt with the income tax implications of employee benefits provided by third persons. The court's decision affects the determination of employees' super-gross wages.



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The Regional Court in Hradec Králové *(Judgement Ref. No. 52 Af 48/2017-44)* had to decide whether the tax administrator had rightfully assessed additional tax on income from employment to a company that had provided benefits to employees of another entity, Česká pošta (Czech postal company). When performing their employment duties, the employees of Česká pošta also offered the products of the company in question based on a contract with Česká pošta and simultaneously could participate in the company's motivation programme, receiving various forms of non-monetary benefits based on their sales efforts. The company taxed these non-monetary benefits as the income of Česká pošta employees generated in connection with employment, but without increasing the tax base to the super-gross salary. The tax administrator challenged this procedure, claiming that the income tax prepayments should have been calculated from the income increased by relevant social security and health insurance contributions, i.e. from the super-gross wage.

The Regional Court agreed with the tax administrator's opinion. According to the court, the current legal regulation of social security and health insurance offers wider definitions of employers and employees: an employee is not only a person active based on a specific legal relationship but also a person whose income is liable to tax on income from employment, irrespective of the legal nature of such an activity. Since 2014, any person who provides income that is liable to tax on income from employment, provided that such income is generated from the activity performed for this person, has been regarded as an employer, which undoubtedly occurred in this particular case, according to the court.

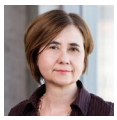
The company filed a cassation complaint against the Regional Court's decision with the Supreme Administrative Court. If the SAC confirms the above interpretation, it would mean that relevant social security and health insurance contributions would have to be paid on benefits paid by third persons. When preparing motivation programmes for employees, it is therefore necessary to pay appropriate attention to the above issue to minimise any potential adverse tax implications.

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In brief

Latest news - July 2018

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



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- At the end of May and at the beginning of June, two motions to amend the Act on the Regulation of Advertising were submitted at the Chamber of Deputies, primarily aiming to ban the advertising of consumer loans. Whereas an amendment filed by KDU-ČSL proposes only a ban on consumer loan advertising, an amendment submitted by communist deputies is against promotion of all banking and non-banking loans. A penalty of up to CZK 2 million could be levied for the violation of these bans.

- In June, German and French ministries of finance adopted a common position on the proposal for a directive establishing a common corporate tax base (the CCTB Directive). The material proposes a number of changes aiming to accelerate discussions about this proposal and to bring about rapid agreement on the adoption of a directive on the EU level.

- A list of contractual states applying the Common Reporting Standard (CRS) for the reporting of information about accounts, which is the duty applicable to financial institutions under the Act on International Cooperation in the Field of Taxation, was published in the Minister of Finance's Financial Bulletin No. 5/2018.

- The EU's General Data Protection Regulation (GDPR) has been in effect for more than one month. One of the main reasons businesses had been preparing for this regulation quite intensively is the sanctions that may be charged, amounting to up to EUR 20 000 000 or 4% of the global annual turnover of a business. The Czech Personal Data Protection Office has recently announced that it will proceed with forethought when imposing penalties, as their main goal will be to rectify unlawful situations rather than immediately charging penalties. If they have not yet done so, personal data controllers and processors should make use of this lenient approach and implement GDPR as soon as possible, as they still might do so without the risk of being severely penalised.

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