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August 2023

Editorial

This summer, massive fires are ravaging the southern European landscape, hitting popular holiday destinations and complicating many a tourist’s otherwise pleasant vacation. However, this is not the most serious problem: these natural disasters will have much more far-reaching consequences for people's livelihoods and the economy, especially in tourism-dependent regions. It is a warning that we must take seriously. Climate threats are among the risks that companies must anticipate and prepare for. Managing them will be one of the major challenges of the coming years.

The digital world also poses increasingly serious risks. A new law aims to help companies manage cyber threats and should enter into effect next year. It will apply to companies operating in key sectors. An overview of these areas, along with other details, is provided in the legal section.

Things are always happening around the Labour Code. This time, our legal experts inform you about how an amendment to the Labour Code changes the rules for scheduling shifts to make employers' operations easier. Development has not stopped regarding the minimum tax, with its implementation underway in the Czech Republic. We summarise the latest documents, which make it clear that the introduction of new rules and the determination of their tax and accounting implications may be a real challenge.

This summer, may you be able to recharge your batteries and may your travels be free of any complications.

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Taxes

Consolidation package may negatively affect VAT on lease and resale of cars above set limit

The government's consolidation package limits the right to deduct VAT for passenger vehicles in category M1 with a purchase price of over CZK 2 million. This will have a negative impact on the lease of passenger cars with a purchase price above the set limit, involving both finance and operating leases. The subsequent resale of these used vehicles will also be affected. Was this the legislators' intention, or did they just fail to fine-tune the proposed wording?

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The chamber of deputies has approved the government's draft consolidation package in the first reading. The second reading should be on the agenda at the beginning of September when possible amending proposals shall also be debated.

The regulation limiting the right to deduct VAT (by the purchase price of CZK 2 million) essentially copies the same limit in income tax area – concerning tax-deductible depreciation of fixed assets. In income tax, however, the limit explicitly does not apply to taxpayers who provide cars under finance lease arrangements. In its explanatory report, the government clarifies that the intention is to limit only the leased cars' end users and not their providers. The limit thus does not have to affect both parties to the lease contract. As the explanatory report further states, the lessors may also provide cars to end users buying a car for their personal use, and the regulation does not intend to limit such situations. In the case of operating leases, **the limitation of deductible expenses for income tax purposes only affects the lessor, with no limitation on the part of the lessee.**

The draft amendment to the VAT Act does not contain a similar exemption from the limitation of the right to deduct VAT for leasing companies. Given the current accounting classification of vehicles in the fixed assets category of leasing companies, **the right to deduct input VAT will be limited twice: on the part of the leasing companies and on the part of their customers**. Vehicles (with a purchase price of over CZK 2 million) provided under operating lease arrangements will also be, in principle, subject to double taxation from a VAT perspective.

Yet another issue to consider are the tax implications of the proposed limitation upon **the subsequent sale of a used car** at a selling price above CZK 2 million. Even if the right to deduct is not claimed on the full purchase price, the entire selling price of the used vehicle will be subject to value added tax.

We believe that the proposed wording of the amendment to the VAT Act resulting from the consolidation package will be fine-tuned during further debate in the chamber of deputies so that the basic principles of VAT neutrality

are not compromised, and double taxation does not occur.

The tax changes introduced by the consolidation package are summarised **here**.

Coordination Committee clarifies changes to VAT Act for real estate

The Coordination Committee of the General Financial Directorate and the Chamber of Tax Advisors of the Czech Republic has dealt with changes to the VAT Act in connection with new construction regulations. The changes will be effective from 1 January 2024 and concern the construction industry and the supply and lease of real property.

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The first part of Discussion Paper No. 606/03.05.23 defines 'apartment buildings' and 'family houses', as these terms have been taken over from the new Construction Act. The new definition no longer explicitly includes the condition of family houses and apartment buildings being designated for permanent housing under construction law. **The GFD confirmed that the definition of buildings for housing purposes has not materially changed** and therefore their intended use for permanent housing remains one of the characteristics of apartment buildings and family houses.

Furthermore, the GFD agreed with the Coordination Committee's conclusion regarding the transitional provisions on the concept of a family house. Newly, family houses can have a third floor not only under a pitched roof but also under a flat one. The definition of a family house has thus been broadened and the transitional provisions adopted in the context of this change have no real impact on practice.
To determine the correct VAT rate, it is necessary to determine the floor area that is crucial for meeting the definition of social housing.

The new Construction Act has its own definition of the floor area; the question therefore was whether the floor area will be calculated according to the Construction Act. The GFD refuted this interpretation and confirmed that the floor area calculation remains unchanged for VAT purposes and can still be determined based on the GFD's information published at the end of 2015.

Can VAT payers rely on the information on the real property type entered in the real estate register? According to the GFD, yes, as registration in the real estate register is crucial for the purposes of building assessment. The taxpayer would bear the burden of proof only for buildings that become a family house after the amendment and whose registration in the real estate register occurs before the application of the new definition of a family house. In the case of new buildings that have not yet been registered in the real estate register, payers should mainly rely on the project documentation and building permit, from which it should be clear that the conditions for a family house or apartment building have been met.

Tips and tricks

Informal communication with the tax administrator

Does the tax administrator write you emails? Do they call you? Although the Tax Procedure Code only regulates formal methods of communication (data box, letter mail, etc.), emails and phone calls are not uncommon, offering a flexible and faster way of communication between the taxpayer and the tax administrator. However, they are not without pitfalls during tax proceedings.

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Informal communication by the tax administrator via telephone or email is not regulated in the Tax Procedure Code. The tax administrator uses this type of communication to speed up tax proceedings, often to request additional information to the filed tax returns, and within very short deadlines. How to respond to such requests?

We recommend that you respond to email and telephone requests for sending documents or explanations via a data box. Unlike email, data boxes offer evidence of what has been delivered and to whom. This does not rule out, for the sake of good relations, sending the same document to the official concerned also by email, with a note that you have sent a message with the identical content by data box. It is also necessary to consider the internal rules for sending sensitive data: do your policies allow sending such data by email? There is no universal recipe here, and specific circumstances must always be considered. However, in our opinion, communication via the data box should be a given.

And what if the tax administrator calls and does not ask for documents to be sent by email but just wants an explanation of something? We recommend paying special attention here. Each phone call with the tax administrator is usually recorded in an official memo in which the tax administrator notes who they spoke to and what they talked about. Such a phone call's minutes are not sent to the other party for approval and are stored forever in the tax file.

Phone calls are also risky in that you never know who from your company the tax administrator may talk to. We know from experience that they sometimes call a person not fully informed of the issue. Aiming to comply, that person may provide incorrect or confidential information, which is then stored in writing as an official memo in the tax file. Its content can only be accessed upon request to inspect the file, and is quite difficult to defend against, as in practice you may often not even know that such an official memo exists.

What is the best way to respond in such a situation? Take time to reply, find out the necessary information internally, and send the response to the data box. We recommend that the information entered into your tax file be fully under your control. The solution is to modify your company's internal rules concerning who can interact with the tax administrator on behalf of the taxpayer. Others should refer to the authorised persons and leave the communication to them. This may effectively prevent the provision of incomplete or incorrect information.

Summer subsidy news

In July, the Ministry of Industry and Trade (MIT) informed about the early termination of the receipt of applications to participate in Call I of the Energy Savings programme. The expected Infrastructure Services call designed to support the construction of research, development and innovation infrastructure has also changed. Companies can now also submit applications under a call to participate in the Digital Economy and Society, Innovative Start-Ups and New Technologies programme, focusing on the digitisation of industry using 5G networks.

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Energy Savings – end of receipt of applications on 31 August 2023 and upcoming new call

In response to significant changes in the conditions of public aid generated by the updated wording of the EU general block exemption regulation (GBER), which we informed you about here, the MIT is terminating the receipt of applications for support in Call I Energy Savings as of **31 August 2023**. The call supported investments focused, e.g., on the use of renewable energy sources, the thermal insulation of buildings, the modernisation of electricity, gas, heat or cold distribution, and the improvement of the energy performance of buildings. Businesses that planned to apply for support do not have to worry that they will come away empty-handed, as the call will be revised by the MIT to meet the requirements of the revised GBER and will then be announced again **at the turn of 2023/2024**.

Infrastructure Services

On 1 August 2023, the MIT announced Call I of the Infrastructure Services programme under the Operational Programme Technology and Application for Competitiveness. Applications will be accepted from 9 August 2023 to 18 January 2024. Support will be open to companies of all sizes whose projects will be carried out anywhere in the Czech Republic outside the territory of the Capital City of Prague. The support will be directed to the expansion or construction of innovative infrastructure, the acquisition of new equipment, and the provision of innovative services to small and medium-sized enterprises. More detailed information on the call is currently being prepared.

Supporting the digitisation of industry

Under the National Recovery Plan, the MIT announced Call II Investment No. 8 Demonstrative Projects for the Development of Applications for Industrial Areas Using 5G Networks.

The aim is to increase the digital level of small, medium, and large enterprises through digitisation and robotisation of production technologies using 5G connectivity. The project must lead to a reduction in production costs, shorter production time, or increased safety in production.

Applications for support will be accepted **from 31 July 2023 to 30 September 2023**. The funds for allocation are CZK 375 million, but an additional increase in the funds for allocation is possible. The maximum aid amount is CZK

10 million per one use-case (a comprehensive set of technical and technological elements supporting the implementation of the required functions using 5G networks). One project may contain multiple use-cases up to a maximum aid amount of CZK 50 million. The call offers three aid intensity options:

- large enterprises **can receive 20-50%** of their investment expenditure, depending on the region where they implement the project,
- irrespective of the place of implementation, large enterprises may **receive 15% of their operating expenses** (personnel expenses, expenses for tools, equipment, buildings and land to the extent of their use for the project, other operating expenses, or overheads) provided that the project is carried out in cooperation with an SME,
- under the de minimis regime (max. EUR 200,000), large enterprises can **receive aid equal to up to 80% of their investment expenditure and operating expenses** regardless of the place of implementation.

Amendment to Labour Code changes rules for scheduling shifts

Following a recent judgment of the Court of Justice of the European Union (CJEU), Czech lawmakers have decided to modify the rules on providing weekly rest to employees when scheduling shifts: the CJEU deduced that daily rest is not part of the weekly rest but must be added on top of it. This applies even where the member state provides for weekly rest longer than required by EU law. The Czech Labour Code does not consider this interpretation, and the judgment has thus made things quite difficult for Czech employers. The amendment should eliminate the discrepancy.

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A dispute referred to the CJEU by Hungarian courts concerned the interpretation of the EU Directive on certain aspects of the organisation of working time. According to its provisions, each employee is entitled to a minimum daily rest of 11 hours between shifts and a minimum weekly rest of 24 hours in each seven-day period. Therefore, to each weekly period of rest, the daily period of rest must be added.

The Czech Labour Code implements the directive as follows:

- daily rest is defined as continuous rest between two shifts and is set at 11 hours (for adult employees),
- for weekly rest, the law provides that employees are entitled to 35 hours.

The Labour Code has thus already responded to the directive's requirement, adding the daily rest period to the weekly rest period in the minimum scope of 24 hours.

However, according to the CJEU's interpretation, daily rest and weekly rest are two separate concepts that must be provided to employees on a separate basis. In the context of Czech law, this would mean that workers should be granted a weekly rest period of 35 hours, plus daily rest of 11 hours; each employee would thus be entitled to a total of 46 hours of weekly rest.

Weekly 35-hour rest maintained

The chamber of deputies responded rather quickly to this interpretation. As part of a major amendment to the Labour Code currently being debated, deputies came up with an amending proposal changing the provision on weekly rest to fully reflect the CJEU's interpretation. According to the new wording, the length of weekly rest is reduced to 24 hours, to which the 11 hours of daily rest shall be added. The 35-hour weekly rest rule is thus maintained. If the legislative process is completed as expected, the amendment should enter into effect on 1 January 2024.

Questions around daily rest

In the judgment, the CJEU also deduced that employees are entitled to daily rest even if their shift is not followed by further work. This means that an employee is entitled to rest even if, e.g., they take vacation after the end of

their shift. Legislators have not responded to this conclusion by changing the wording of the Labour Code, but employers should nevertheless follow this rule in practice.

Although the issues concerning the interpretation of the length of the weekly rest will be resolved for the future, it remains to be seen how Czech courts will approach the CJEU's interpretation and how they will take into account the current wording of the law, as some of the CJEU's conclusions are not entirely unambiguous.

Strengthening cybersecurity: new law to tighten rules for Czech companies

The bill submitted by the National Cyber and Information Security Agency (NCISA) sets new obligations in cyber security arising from the NIS 2 Directive. A conservative estimate is that the number of entities affected by the new obligations will rise from about 400 to at least 6,000.

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Although the Cyber Security Act already exists in the Czech Republic, following the adoption of the NIS 2 Directive, the NCISA decided to prepare a new law rather than amending the existing one. They chose a somewhat unusual approach: first, in January this year, they published the bill on their website and invited the public to comment. They received over a thousand comments and considered more than half. Only afterwards, the NCISA released the modified bill into the regular legislative process.

Who will be affected by the regulation?

The main objective of the law is to increase the resilience of Czech companies and entities to cyber-attacks, ideally to prevent situations such as those we witnessed during COVID, when a cyber-attack significantly restricted the operations of a Brno hospital. The regulation will apply to companies and entities active in sectors critical to the functioning of society. These include, e.g., energy, manufacturing, chemical and food industries, water and waste management, transport, financial markets, and healthcare. The regulation will mainly affect large and medium-sized enterprises operating in these sectors. However, smaller enterprises should also pay attention to the new law as the criteria determining whether an entity is subject to the regulation (total number of employees and annual turnover) will be calculated on figures that include related enterprises.

New obligations for regulated entities

If an enterprise meets the criteria of a regulated entity, it will first have to register with NCISA. The law also stipulates the duty of obliged entities to implement technical and organisational security measures. The extent of the measures that an entity must comply with will depend on whether it falls under a higher or lower obligations regime.

Obliged entities subject to the higher obligation regime will have to report all cyber-attacks, while entities subject to the lower obligation regime will have to notify NCISA of all attacks with a significant impact on the provision of regulated services. One of the most discussed measures is the proposed obligation of selected entities to check the security of their suppliers.

Threat of heavy sanctions

For breaches of certain obligations, the law stipulates a fine of up to CZK 250 million or 2% of an entity's net global annual turnover. The bill also envisages a new sanction – suspension of the performance of executive functions. This reflects the requirement of the NIS 2 Directive to increase the responsibility of the senior management of

entities under higher obligations to ensure cybersecurity.

Recommended steps

The law should be effective from October 2024. Due to the complexity of the issue, it is advisable to start preparing now. The first step should be to assess whether your company is at all subject to the new regulation. Our team will be happy to help you with the assessment, and with the preparation for and implementation of the new regulation, if relevant.

Changes in competition law: anti-trust office may use police wiretaps

On 29 July 2023, an amendment to the Act on the Protection of Competition entered into effect, significantly strengthening the powers of the Czech anti-trust authority, the Office for the Protection of Competition. Among other things, it provides for the possibility of using police wiretaps and introduces fundamental changes concerning diversions from regular proceedings.

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The most controversial change introduced by the amendment concerns **the use of police wiretaps**. The Office will newly be entitled to use recordings of police wiretaps as evidence in detecting prohibited cartel agreements. However, the recordings must have been taken by the police during investigations of anti-competition crimes after the effective date of the amendment. The new wording of the act does not authorise the Office for the Protection of Competition to wiretap or to order wiretapping. The decision to make wiretaps available to the Office should be made by law enforcement authorities (police, public prosecutors, and courts); the Office for the Protection of Competition should be just a passive recipient of the recordings taken by the police. Nevertheless, the amendment still significantly strengthens the position of the Office.

Another change with a major practical impact concerns the required essentials of the mandate (authorisation) to carry out on-site investigations. The Office for the Protection of Competition will no longer have to precisely identify the competitor's business premises in which the investigation is to take place but it will suffice to identify the competitor being investigated. This will limit the competitors' options to avoid and possibly hinder on-site investigations.

As regards proceedings before the Office for the Protection of Competition, the amendment introduces the possibility to **conceal an informant's identity**. The Office may agree to keep their identity confidential if requested by the informant no later than when reporting the possible anti-competitive conduct and if their legitimate interests may be endangered or harmed. If the Office grants the request, it is obliged to keep the informant's identity confidential before, during, and after the proceedings.

The amendment also fundamentally changes diversions from regular proceedings, such as **settlement.** While until now the competitor's fine was automatically reduced by 20% if they settled, from now on the Office will have the discretion to reduce the fine by 10 to 20%. In this respect, the Office will consider, e.g., the length and complexity of the proceedings. The late filing of an application to reduce the fine by means of settlement may therefore become more expensive for competitors. Another inconvenience is that even if settlement is used, the Office for the Protection of Competition will be entitled to impose a ban on public contracts for up to 1 year on the competitor.

The leniency programme has also undergone changes. What is important for the competitors is that the amendment extends the programme to cover also vertical agreements. Furthermore, it introduces the possibility to reserve (book) the order of their application: it gives the (potential) applicant for leniency the possibility to

protect the order of their application and thus benefit from the leniency programme. The Office then sets a deadline for the competitor to submit the documents supporting the application. All documents submitted within this time limit shall be deemed to have been submitted at the time when the application to reserve an order has been submitted.

The amendment brings **further changes** pertaining to, e.g., fines, liability of competitors' associations, acceptance of obligations, and prioritisation. The Office has also issued a new decree on the details of applications for leniency and for international cooperation, regulating specific requirements for information or documents for leniency application purposes.

The amendment to the Act on the Protection of Competition, which mainly aims to transpose the ECN+ Directive into Czech law, has been debated since 2020. It has only passed now, after the implementation deadline expired.

New blockchain framework for capital markets

Blockchain, or distributed decentralised database technology, is currently finding increased use in many areas of law and business. Capital markets are no exception, and one of the most interesting developments is the introduction of a pilot regime of distributed ledger technology (DLT) in market infrastructure.

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An amendment to the Capital Market Undertakings Act and the Insurance Act implements into Czech law Regulation (EU) No. 2022/858 on a pilot regime for market infrastructures based on DLT, effective from 23 March 2023. The amendment is currently in the chamber of deputies and is to come into effect the day after its publication in the Collection of Laws.

By introducing a temporary pilot regime for financial services based on distributed ledger technology (DLT), the regulation removes regulatory barriers to the issuance, trading, and settlement of crypto assets constituting financial instruments as defined in the Capital Market Undertakings Act.

The regulation introduces three specific licensing regimes for DLT market infrastructures:

- DLT multilateral trading facility (MTF)
- DLT settlement system
- DLT trading settlement system.

Central securities depositories and securities brokers will be able to obtain a licence to operate individual DLT market infrastructures.

In the pilot regime, the regulation limits the range of financial instruments that can be admitted to trading or recorded on DLT market infrastructures. Thus, under the pilot regime, the regulation applies to shares with a **market capitalisation lower than EUR 500 million**, bonds or other forms of securitised debt or financial market instruments with **a value of less than EUR 1 billion**, and to units of collective investment undertakings where the market value of the assets under management must be **less than EUR 500 million**. The total value of all market instruments held on DLT market infrastructures **may not exceed EUR 6 billion**.

The amendment changes the definition of a financial instrument in the Capital Market Undertakings Act. Under the new provisions, all currently legally regulated investment instruments issued using DLT will also be considered investment instruments.

The implementation of DLT in practice will place significant demands on operators of DLT market infrastructures, from the development of a detailed business plan and detailed investor information, through the adoption of cyber security measures, the calculation of the monthly average value of asset holdings, to the operational risk management in place and timely transition strategies once the value of DLT financial instruments reaches **EUR 9 billion**.

On the other hand, as the regulation introduces a pilot regime for DLT market infrastructures, it allows the Czech National Bank to exempt operators from the requirements of the current capital markets regulation (MiFID II, MiFIR, Regulation (EU) No 909/2014, on improving securities settlement in the European Union and central securities depositories).

Major changes to Foreigners' Residence Act

Apart from implementing the EU Blue Card Directive into Czech law, the amendment to the Act on the Residence of Foreign Nationals introduces other fundamental changes from 1 July 2023.

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Permanent residence

The conditions for granting permanent residence permits to foreigners who have met the requirement of five years of continuous residence in the territory of EU member states as Blue Card holders have changed. Permanent residence shall be granted to a foreigner who as a Blue Card holder has resided in the Czech Republic for at least two years. Furthermore, the time of stay for the purpose of scientific research and studies and the time over which the applicant was a holder of international protection in another EU member state shall also be included in that period. At the same time, a foreign national's absence from the territory may not exceed 12 consecutive months, and in total 18 months (previously 560 days). However, if the holder of a Blue Card issued by another EU member state has resided in its territory for less than 12 (previously 18) months, this period will not count towards the continuity of residence.

Long-term residence permits for family reunification

A less welcome change is the abolition of the possibility to apply for a long-term residence permit for the purpose of family reunification by an adult dependent foreigner. Before the amendment, such foreign nationals, largely students at foreign universities with parents residing in the Czech Republic based on a long-term residence permit, could reunify with the main applicant for residence. Under the new rules, they will have to find another purpose of stay (e.g., study), or use short-term visas to travel to the Czech Republic.

Collecting the residence card

The statutory deadline for a foreign national to visit to the Ministry of Interior's office to take biometric data in connection with collecting a residence card has been extended from three days to 30 days from their arrival in the Czech Republic.

Embassy jurisdiction for filing applications

It will be more difficult for foreigners to file applications based on local consular jurisdiction. If a third-country national wants to apply for a visa, long-term residence, or permanent residence at an embassy of the Czech Republic in the country where they hold a valid long-term or permanent residence permit, they can now only do so if they have resided in that country continuously for at least two years. The reason is to prevent the abuse of local consular jurisdiction.

Changes in access to health insurance

From 1 January 2024, all foreigners under the age of 18 who have a valid long-term residence permit regardless of its purpose shall participate in public health insurance. If a holder of a long-term residence permit has arranged private health insurance for foreigners valid until 31 December 2023, they are obliged to report to the public health

insurance company of their choice within 8 days of the end of the validity of their insurance and register for public health insurance. If a holder of a long-term residence permit has arranged longer private health insurance, they shall become a participant in public health insurance the day after the end of the private health insurance.

Finally, please note that all proceedings initiated prior to the effective date of the amendment to the Act on the Residence of Foreign Nationals (i.e., before or on 30 June 2023) will be completed in accordance with the previous wording of the act.

Changes to rules for issuing Blue Cards

Effective 1 July 2023, significant changes have been made to the Act on the Residence of Foreign Nationals. The amendment primarily implements the EU Blue Card Directive and reflects some operational requirements. Any changes simplifying the procedure for those interested in the Blue Card are welcome, as they will make this type of residence permit more attractive.

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The Blue Card is a dual residence permit – it combines residency and labour-law aspects for highly qualified jobs. The Blue Card is less used by foreigners in the long term than the employment card, which is a similar type of residence permit. With the changes, the EU is aiming to make the labour market more attractive to highly qualified workers from third countries.

The amendment to the Foreigners' Residence Act introduces the following changes concerning the Blue Card, among others:

Blue Card validity for up to 3 years
Under the new rules, a Blue Card can be issued with a validity of up to three years, reducing the frequency of foreigners' visits to the Czech Ministry of Interior's Department of Asylum and Migration Policy. Blue Card renewal will continue to be possible, even repeatedly, for a maximum of three years each time.

Professional experience suffices instead of a diploma
Before 30 June 2023, the applicant's qualifications had to be supported by a diploma from a university or college with a length of study of at least three years. Newly, workers in the field of information and communication technologies can substitute such diploma by proving the relevant professional experience.

Alternative to employment contracts
It is now possible to replace an employment contract, which had to be obligatorily attached to the application for the issuance of a Blue Card, by a contract on a future contract. The minimum term of these contracts has been reduced from 12 to six months.

Change of employer or job position without the ministry's consent
The amendment also facilitates the process of changing one's employer or job position for Blue Card holders: consent with the change by the Ministry of Interior of the Czech Republic where the applicant has held a Blue Card for less than two years is no longer necessary. Now it is sufficient to notify the ministry of the change within three working days of the change.

Shorter processing time
Shortening the deadline for issuing a Blue Card if the foreign national holds a Blue Card in another EU country may also help to make it more attractive. In such cases, the amendment shortens the time limit from the previous 90 to 30 days, or to 60 days in particularly complex cases. If family members are applying for long-term residence permits with the main applicant, the decision shall be issued to them together with the decision on the Blue Card application.

Employer's debt-free status
Under the new rules, one of the reasons for revoking a foreigner's Blue Card is their employer not being debt-free. In such a case, the ministry will notify the foreigner who then has three months to find a new employer if they have been a Blue Card holder for less than two years; if they have held a Blue Card for at least two years, they have six months to find a new employer.

New calculation of unemployment period
While providing a more flexible approach to Blue Card applicants, the amendment also tightens the conditions concerning a Blue Card holder's unemployment: the Blue Card will be cancelled if the aggregate period of a foreign national's unemployment during the validity of the Blue Card exceeds 3 months and if they have been its holder for less than two years; if the foreign national has held a blue card for at least two years, the card will be cancelled once the unemployment period exceeds 6 months.

Minimum tax: current OECD and Czech developments

In July, the OECD published details on the content of the top-up tax information return, and additions to the administrative guidance. The Czech Ministry of Finance then published the outcome of the comments filed during the comment procedure and submitted a modified version of the law for the government's deliberation. Here is an overview of the key points of these documents.

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Top-up tax information return

The OECD document contains a detailed description of the structure of the top-up tax information return in the form of data inputs. This is the data that corporate groups will need to obtain and provide.

The top-up tax information return will have three basic parts:

- information on the multinational group and individual companies and permanent establishments from the model rules perspective
- overview of safe harbours and exemptions applied at various jurisdictions
- calculation of the effective tax rate (including detailed information on deferred tax), calculation and allocation of top-up tax for individual constituent entities and jurisdictions.

For taxable periods beginning no later than 1 January 2028 and under certain conditions, it will be possible to file a simplified top-up tax information return for jurisdictions that either do not report top-up tax or do not need to allocate top-up tax to multiple constituent entities. A more detailed commentary on the top-up tax information return is provided **here**.

OECD administrative guidance

The second part of the administrative guidance (the first part was published in February 2023) adds to and modifies the commentary on the model rules from February 2022. The document focuses mainly on the following areas:

- rules on qualified domestic top-up tax (QDMTT)
- safe harbour for qualified domestic top-up tax (QDMTT Safe Harbour)
- new temporary safe harbour for undertaxed payment rule (Transitional UTPR Safe Harbour) - the jurisdiction of the ultimate parent entity with a nominal tax rate of 20% will be deemed to have profits sufficiently taxed unless the jurisdiction has introduced model rules
- additional guidance on tax credits
- additional guidance on currency conversion
- additional guidance on substance-based income exclusion.

A more detailed commentary on the second part of the administrative guidance is available here.

Bill on top-up taxes

The processing of the comments resulted in some changes and wording modifications as well as argumentative confirmation of the existing wording. This has led to the following alterations:

- The obligation to register for top-up tax (domestic and allocated) has been deleted.
- The explicit provision that the obligation to file a top-up tax return does not arise if the top-up tax liability does not arise has been added.
- An exemption for taxpayers regarding their obligation to file a top-up tax information return on the domestic top-up tax if this information return for the given reporting period was filed by another payer of domestic top-up tax has been added.
- The particulars of the top-up tax information return will be laid down in a decree.
- It has been confirmed that tax credits resulting from investment incentives and R&D allowances will remain under the regime of unqualified tax credits with the potential to reduce the effective tax rate.
- Pension companies are excluded entities.
- The impossibility of using a safe harbour based on CbC reporting shall only apply to multinationals, not large national groups.
- The bill now clarifies that a deferred tax asset resulting from a loss that has not been recognised for prudential reasons may be treated as a tax-deductible expense in the subsequent utilisation of the loss.

The bill should now be discussed by the government. However, it is not yet clear how and in what timeframe the changes resulting from the second part of the administrative guidance and the top-up tax information return will be incorporated.

New GBER public aid rules in force since July

At the end of June, the European Commission officially issued an amendment to the GBER, aiming to simplify and streamline the provision of aid for the EU's green and digital transition. Below, we summarise the most important changes.

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For many years, the **General Block Exemption Regulation (GBER) has been the basic legislative framework for the provision of permissible public aid in the EU**. Under the GBER rules, individual member states can grant national public support (such as investment incentives or subsidies) without having to apply for individual exemptions. The Czech Republic can thus define specific support programmes based on the GBER parameters.

The amended GBER has been in force since the beginning of July this year and will be effective until the end of 2026. Its wording is already available in the official languages of all EU member states. The preparation of the consolidated regulation is expected to take place in the autumn of this year.

The amendment **increases the threshold for the mandatory notification of the European Commission of investment projects from the original EUR 100 million to EUR 110 million.** This is in response to significant price increases in inputs and related inflation. The threshold for determining the aid intensity in individual regions of cohesion of the Czech Republic has increased accordingly, from the original EUR 50 million to EUR 55 million.

In research and development, the amendment introduces a few simplifications, including an increase in the maximum aid limits and an increase in aid for projects with international cooperation. Projects to support testing and experimental infrastructure are now also included.

The amendment to the GBER also introduces another exemption, allowing member states **to regulate the prices of energy** (electricity, gas and heat produced using natural gas or electricity), thus building on selected provisions of the Temporary Crisis and Transformation Framework for high energy prices.

A significant increase in aid will also be provided to many **activities in the environmental and energy sectors** aimed at introducing renewable energy sources, electromobility, decarbonisation and renewable hydrogen-based technologies, and increasing energy efficiency. The amendment will have the most significant impact on environmental aid, with increases in the aid intensity itself and in the thresholds for mandatory notification, and with the introduction of aid for completely new measures:

- The GBER now also considers hydrogen a renewable energy source, under certain circumstances. Therefore, investments in equipment and technologies using hydrogen but also in infrastructure for its transport, etc., can receive support. In addition, renewable hydrogen and high-efficiency cogeneration of heat and electricity can also receive investment support.
- In environmental area, the amendment makes it possible to increase the aid intensity, which also applies to studies and advisory services in the environmental protection and energy, or projects focused on the

circular economy. Support can now also be provided in the form of relief from environmental taxes at the local level.
- A major innovation is the investment support for the acquisition of clean or zero-emission vehicles for road, rail, inland waterways, and maritime transport, etc.

Case law

SAC: advertising services and the right to deduct VAT

In judgment 8 Afs 111/2022–36, the Supreme Administrative Court (SAC) assessed how far a taxpayer had discharged their burden of proof in a case involving received advertising services that were to be rendered within motorcycle races, among other things by placement on the jersey of a racer who due to injury had only been racing for three months out of the year.

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The tax administrator examined the extent of received advertising services on which the taxpayer claimed input VAT. The taxpayer was also asked to prove the identity of the supplier declared in the VAT returns.

Referring to judgment C-154/20, Kemwater ProChemie, the taxpayer argued that the tax administrator's request to prove the identity of the supplier of advertising services was based on outdated case-law: in the referred judgment, the Court of Justice of the EU confirmed that to **exercise the right to deduct, it is not necessary to prove the identity of the supplier but to prove that had they acted in the capacity of a taxable person at the time of the supply**. The SAC agreed with this argument.

The tax administrator also questioned the taxpayer's right to deduct VAT on the received services, arguing that the racer on whose jersey the advertisement was placed had been injured and unable to race. Therefore, advertising services could not have been provided to the taxpayer in the agreed-upon extent. However, the SAC considered all evidence produced by the taxpayer, which proved that the racer had indeed participated in motorcycle races despite his injury and had displayed the taxpayer's logo. Similarly, the racer had also worn the jersey during his physiotherapy and gym sessions, posed for photographers, and given interviews to journalists. All evidence was thus proven to be consistent.

The SAC therefore concluded that although the racer had been injured during the season, the evidence submitted clearly showed that **the taxpayer's promotion continued in the manner envisaged by the contract** although not directly on the track during races.

Case law

VAT treatment of unauthorised electricity consumption

In Case C-677/21 Fluvius Antwerpen, the Court of Justice of the European Union (CJEU) ruled on whether a supply of electricity that is unvoluntary and a result of a third party's unlawful conduct constitutes a taxable supply of electricity carried out within an economic activity of a public entity.

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Fluvius Antwerpen is a Belgian municipal association which distributes electricity to persons who do not have a contract with a commercial distributor. For VAT purposes, it is therefore regarded a body governed by public law. Between 7 May 2017 and 7 August 2019, an individual (a natural person) unlawfully took electricity from the association. After having discovered this, the association issued a tax document including VAT. The individual did not pay, and the case proceeded to the Magistrates' Court in Antwerp.

The court had doubts as to whether the unlawful taking (unvoluntary supply) of electricity was subject to VAT.

The court thus referred a question to the CJEU: whether the taking (consumption) of electricity constitutes a supply of goods in the sense of a transfer of the right to dispose of the goods as its owner for consideration and whether the unlawful consumption of electricity falls within the economic activity of the association (and if so, whether it is a negligible activity).

Unlawful consumption of electricity subject to VAT

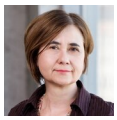
The CJEU ruled that unlawful consumption is a supply of goods for consideration and is subject to VAT. It is clear from the nature of electricity that the person who consumed it could and did dispose of it as its owner. As for the consideration, the CJEU noted that under the directive there must be a direct link between supply and consideration. Usually, such direct link is established by contract (which did not exist in this case) but must be nevertheless given a broader meaning. Thus, since the association was able to establish the quantity of electricity consumed, for which it also invoiced the relevant price, there was a direct link between the consumption and the consideration. As for the characteristics of an economic activity, the CJEU observed that it was an activity that is regular in nature and is carried out for consideration. The questions referred to the CJEU were not about the classification of energy distribution as an economic activity but rather about the assessment of distribution that was unvoluntary and isolated.

The CJEU also added that the risk of loss or theft is a typical commercial risk, which clearly indicates that the public entity was acting as a person engaging in an economic activity. However, under Belgian law, the economic activity of a body governed by public law is outside the scope of VAT if carried out on such a small scale as to be negligible: meaning of a minimal scale in space or time and, consequently, of no significant impact on the competition. However, according to the CJEU, considering the association's scope of activity, it can be concluded that energy distribution was not a marginal activity and could not be separated from the association's principal activity.

In brief

News in brief, June 2023

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



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DOMESTIC NEWS

- The government's amendment to the Act on Extraordinary Waivers of Penalties on Social Security Insurance No. 181/2023 was published in the Collection of Laws.
- In its third reading, the chamber of deputies approved an amendment to the Labour Code (Print No. 423), transposing EU legislation and regulating telework and rules for workers under agreements outside employment. Some amending proposals submitted in the second reading were also approved. However, the senate subsequently returned the bill with further amending proposals.
- According to information from the Ministry of Labour and Social Affairs, from 1 July humanitarian benefits shall be regarded as allowances for costs associated with both living and housing needs. Solidarity household allowances will no longer be paid. This results from an amendment to Lex Ukraine.
- The government approved an increase of CZK 50,000 in the parental allowance and a reduction in its drawing period to three years. It also approved a modification enabling the further digitisation and simplification of administration in the state social aid agenda.
- The chamber of deputies discussed the consolidation package in the first reading on 14 July 2023. The deadline for discussion in committees was shortened to 50 days. The second reading will therefore probably not take place until the beginning of September.
- On 27 July 2023, the senate approved an amendment to the Excise Duty Act that restores the excise duty rate on diesel fuel to its original level of CZK 9.95 per litre. The amendment was promulgated in the Collection of Laws on 31 July 2023 and entered into effect on 1 August 2023.
- The Ministry of Finance issued a report on the activities of the financial administration and customs administration for 2022.
- Financial Bulletin 9/2023 contains a list of countries exchanging country-by-country reports (CbCR) in accordance with the Act on International Cooperation in Tax Matters.

FOREIGN NEWS

- The European Commission has published its Annual Tax Report for 2023, providing an overview of the state of taxation and tax systems in the EU.
- The Commission is evaluating the application of EU Council Regulation 2022/1854, on emergency intervention to address high energy prices. It will report its main findings to the Council by 15 October 2023. The regulation introduced the possibility to apply contributions and levies relating to windfall profits and revenues in selected sectors as a result of the energy crisis.
- In addition to the final documents on Pillar 2, the OECD has released for comment draft rules for the application of tax on intra-group payments for management services, interest, royalties and similar payments where the recipient of the payment is from a country with a nominal tax rate of less than 9%, and a draft document for the determination of the arm's length fee for marketing and distribution services

under Pillar 1 (changes to taxing rights on the sale of goods and services).

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