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Tax & Legal

Taxes
Tips and tricks
Legal
World news
Subsidies
Case law
In brief

September 2023

Editorial

The month of September is peak back-to-work season, as most of us return from summer break to tackle overflowing in-boxes. Our articles in the Tax and Legal Update might normally be described as collections right out of *The Good, the Bad and the Ugly*, but this edition at least highlights a few business-friendly developments, which may provide us with some extra positive energy.

Taxation is a world of perpetual change and a complex machine with many parts moving at different speed. One of the notable current developments is the long-awaited EU Carbon Border Adjustment Mechanism, effective from 1 October 2023. Initially, it imposes reporting obligations for imports of certain carbon intensive products from most non-EU countries, and from 2026, mandatory registration and an extra financial burden due to the requirement to purchase certificates to pay for the indirect environmental cost of producing goods. This will represent a fundamental change to the system of global trade. It will be fascinating to observe how the EU's major trading partners such as the US and China will behave in response to the EU measures.

Much is unfolding on the domestic front as well. The government has recently unveiled its proposed revisions to the consolidation package, with one notable addition being the possibility to keep accounts in a foreign currency. In this newsletter, we aim to provide a concise overview of the key tax-related changes outlined in the amendment. We trust that you will find this information valuable.

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Taxes

Proposed changes to consolidation package

The governing coalition has agreed on amendments to the bill on the consolidation of public budgets (consolidation package with planned effect from 1 January 2024). The bill has already passed its first reading in the chamber of deputies. Below, we are summarising the main tax areas covered by the amending proposal. The final wording will be further discussed by the deputies and possibly in the senate.

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We have previously written about the consolidation package here.

Possibility to keep accounts in foreign currency

Starting **from January 2024**, entities will be able to keep their accounts in a foreign currency (euros, US dollars, or British pounds) if it is their functional currency. An entity's functional currency is only generally defined as the currency of the primary economic environment in which the entity operates, and its specification should be based on international accounting standards. More detailed rules will be set in an implementing decree.

The related amendment to the Income Tax Act does not contain any provisions adjusting the tax base in connection with accounting in a foreign currency. To determine the tax base, the accounting profit or loss in a foreign currency shall be used, and the tax shall also be calculated in the foreign currency. However, the financial administration's information system does not yet allow for the administration of taxes in foreign currencies, so in the tax return, the taxpayer will have to translate the tax using the exchange rate effective at the end of the taxable period. While it will be possible to pay the tax in the foreign currency, it will be recorded in the taxpayer's personal account in Czech crowns, in the amount that was credited to the financial administration's account (i.e., not in the amount stated in the tax return).

Possibility to tax only realised foreign exchange (FX) differences

Payers of income tax will be able to exclude unrealised FX differences from their tax base in the period when they arise (are recognised) and only include them in the tax base in the period when the FX difference is realised. If taxpayers choose this option, they must apply this method consistently for all FX differences (gains and losses) relating to all assets and liabilities and must inform the tax administrator of the application or non-application of this tax regime within a set deadline. The period for which a taxpayer chooses not to tax unrealised FX differences

should not be shorter than three taxable periods. When discontinuing this tax regime, any FX differences that have been excluded from the tax base and for which the profit or loss has not yet been adjusted will need to be taxed. The same applies when the company undergoes a transformation or enters into liquidation, among others.

Reporting of income flowing to a tax non-resident

The consolidation package also regulates the reporting obligation for income flowing to a tax non-resident from sources in the Czech Republic. Income from royalties, dividends and interest, including capital gains defined for taxation purposes similarly to dividends and interest, will be subject to the reporting obligation (even if exempt from tax or not subject to taxation in the Czech Republic). For interest income, the current exemption will be maintained if such interest income does not exceed **CZK 300 thousand** per calendar month.

Cancellation of registration obligation for payers of personal income tax and some other taxpayers

To reduce the administrative burden, the consolidation package proposes to abolish the registration obligation for payers of personal income tax (both residents and non-residents) and the registration obligation for payers of income tax where the tax is collected by withholding.

Reports on income tax paid and sustainability reports

For large multinational groups, the obligation to publish reports on income tax paid (public country- by-country reporting) has been moved from the new draft Accounting Act to the consolidation package. This obligation applies to taxable periods beginning **after 22 June 2024**.
Furthermore, the obligation of selected corporate groups to report on their sustainability, as laid down in the EU directive, has also been moved to the consolidation package and should be applicable for accounting periods starting **from 1 January 2024**.

Taxation of non-financial employee benefits

The amending proposal keeps the advantageous tax treatment of employee benefits but introduces an exemption limit at half of the average wage for the taxable period, which for the purposes of the Income Tax Act is the average wage determined under the law regulating social security contributions and announced annually by a government decree. **For 2023**, the average wage is set at C**ZK 40,324**, which means that defined non-financial employee benefits up to the aggregate limit of **CZK 20,162** should be exempt from tax on the employee's part. The limit should be assessed separately for each employer. Based on a transitional provision, the new limit for the exemption of non-financial benefits should apply to benefits provided by the employer after the effective date of the amendment. Non-financial benefits provided before the amendment's effective date are to be treated according to the original wording of the law.

Abolition of exemption for managers' accommodations

The draft abolishes the exemption for this form of remuneration provided to selected workers. A transitional provision should ensure that the abolition of the exemption shall not affect persons already residing in such accommodations prior to the effective date of the law.

Changes to refreshments provided at workplace and business lunches

According to the legislators' interpretation, the provision of light refreshments at the workplace (not reaching the scope of a full breakfast, lunch or dinner) in the context of performance of dependent activity should not constitute an employee's taxable income but the provision of working conditions at the workplace. Business lunches or breakfasts with business partners in which employees participate as part of the performance of their work duties should be viewed similarly.

Limitation on exemption of income from sale of securities and shares (ownership interests)
For the exemption of income from the sale of securities or shares after the expiry of the 'time test' only up to **CZK 40 million** per taxable period, the draft newly proposes to postpone the effectiveness of this measure by one year, i.e., to 1 January 2025.

Simplified records for agreements to perform work

Compared to the original proposal, the record-keeping of agreements to perform work outside employment should be simplified. Details are being prepared by the Ministry of Labour and Social Affairs.

Changes in payment of social security premiums for concurring agreements to perform work with more than one employer

If agreements to perform work outside employment concluded with more than one employer overlap and the cumulative limit for participation in the social security insurance scheme is exceeded, the employee and not the employer will be obliged to pay their share of insurance premiums **equal to 7.1%** to the relevant Social Security Administration.

Unlike under the previous wording of the bill, employees will not have the obligation to notify their employers of their further agreements to perform work concluded with other employers. Whether the obligation to participate in the social security insurance scheme has arisen in each month because the cumulative limit has been exceeded will be evaluated retrospectively by the Czech Social Security Administration, which will then notify all employers and the employee.

A new obligation will be introduced for employers: to notify an employee working under an agreement to perform work outside employment, no later than on the day of commencement of work, of a possible obligation to pay social security premiums.

Please note that a similar change has not yet been proposed for health insurance premiums even though the obligation to pay health insurance premiums for agreements to perform work is directly linked to the Sickness Insurance Act. Due to the absence of the regulation in the Health Insurance Act, employers will have to deal with retrospective payment of health insurance premiums for themselves, and for the employees. How the employer shall, retrospectively, collect the health insurance premiums from the employee or whether late payment of health insurance premiums will be sanctioned by health insurance companies remains unresolved.

VAT

The VAT rate for newspapers and periodicals should be unified by reclassifying newspapers from the **21%** rate to the lower rate of **12%**.

Excise duties

The draft proposes a slower increase (in terms of rates and time span) in the excise duty on electronic cigarettes, including nicotine pouches. In contrast, the excise duty on alcohol should increase.

Real estate tax

The coalition's amending proposal cancels the plan to distribute real estate tax revenue between the municipal and state budgets and returns to the currently existing model of one real estate tax. The increase in real estate tax revenues is to be implemented through an increase in tax rates, which is proposed on average at **1.8 times the current tax rates**. For example, tax on paved areas used for business purposes is to be increased from CZK 5 per sqm to CZK 9 per sqm, and tax on taxable buildings and units serving for business in industry, construction, transport and energy from CZK 10 per sqm to CZK 18 per sqm. As a result of this measure, the state expects to increase the total real estate tax revenue from **CZK 12.4 billion** in 2022 to **CZK 22.4 billion** in 2024. The increase in revenue of CZK 10 billion for municipalities will be compensated by the state by reducing the allocation of shared taxes.

Gambling tax

An increase of the minimum tax for one slot machine to **CZK 13,400** has been proposed. The allocation of gambling tax revenues to individual budgets is also to change – the state's share should increase to **55%**, and the remainder should be distributed to municipalities based on set criteria (number of inhabitants, number of permitted slot machines).

GFD extends range of goods donations subject to VAT on minimum value

The General Financial Directorate (GFD) has issued its long-awaited Information on the Application of VAT on Gratuitous Supplies of Goods. It will now be possible to donate perishable food and non-food goods with a minimum expiry date under more favourable tax conditions. In addition, the GFD also allows donations to charitable institutions or directly to persons in need.

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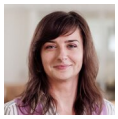

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The GFD's Information from 1 August 2023 cancels its Information from 2014 that applied only to food donations to food banks.

If a VAT payer has legitimately claimed the right to deduct VAT on the donated goods (i.e., if, when acquiring the goods, the payer did not yet know that they would later donate these goods), then they must pay output VAT. (This does not apply to samples or gifts of low value used for economic activity.) The donor is therefore faced with the question of how to determine the tax base for the payment of VAT.

The information distinguishes several options for determining the tax base, depending on the method of acquisition of the goods. If the donor of the goods:

- originally purchased the goods, then the tax base is primarily the current residual value of the goods at the date of donation (i.e., the acquisition cost of the goods possibly increased by the costs of modification/improvement/modernisation of the goods and decreased by the value of physical wear and tear and obsolescence at the date of donation). Under certain circumstances, however, it is also possible to derive the tax base from the actual market value that considers the state of the goods at the date of their donation.
- obtained the goods other than by purchase (e.g., when donating their own products), then the tax base is primarily the price of similar goods (market value) at the date of donation. However, if the goods are unique in their own way and cannot be found on the market (i.e., it is not possible to determine their market value), then the tax base is the total cost of acquiring the goods by the donor at the date of donation, including any costs of modification, improvement, or modernisation.

When determining the tax base, donors should also consider the type of goods in question, their condition at the time of donation, and the situation on the market for these goods or the stage of their sales process. The GDF's information makes it possible to use a minimum or almost zero tax base in specific situations. Unsurprisingly, these involve donated foods that are no longer saleable or difficult to sell (e.g., with an approaching expiry date/best before date, with unsatisfactory or damaged packaging, ready-made food unsaleable due to the end of opening hours, etc.). However, the GFD now allows the same approach also for non-food goods with a minimum best-before-date or perishable goods such as cosmetics, drugstore and pharmaceutical goods, animal feed, construction chemicals, or flowers.

On the other hand, donors cannot use a tax base close to zero if they donate currently tradable goods (laptops, mobile phones, office supplies, etc.) even if they have charitable intentions. In these cases, the tax base will continue to equal their market value.

At the same time, donors should remember that they must be able to prove how they determined their tax base. Thus, not only preparing arguments but also (photo)documentation of the condition of the donated goods is a must. And if donors already know when purchasing goods that they will donate these specific goods, then they cannot claim their right to deduct VAT and need not deal with any output VAT.

Taxes

VAT in Digital Age (ViDA): digital reporting and e-invoicing

The draft ViDA Directive modernises the indirect tax system across the European Union, aiming to increase EU tax revenues, digitalise reporting, defend against tax fraud more effectively, and move towards a definitive VAT system that will view cross-border transactions similarly as domestic ones. In this article, we summarise the issue of digital reporting and electronic invoicing (e-invoicing).

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The draft ViDA Directive has experienced some legislative delays and it is highly unlikely that it will be transposed (in whole or in part) into Czech legislation from 1 January 2024. The October ECOFIN session of finance ministers is expected to shed more light on the legislative process. The first milestone of the draft is the introduction of the possibility for EU member states to implement mandatory electronic invoicing for intra-community supplies. At the same time, electronic and traditional physical documents will be put on an equal footing.

Electronic documents

Currently, any information carrier converted into digital form (e.g., a scan of a tax document in PDF format) is considered an electronic document. To implement digital reporting, the directive needs to reformulate the definition of electronic documents: only a machine-readable document in the proposed XML or UBL format will be considered an electronic document. At the same time, the draft envisages a greater number of mandatory essentials of electronic documents, such as the counterparty's bank account to which the consideration will be paid.

Digital reporting

Over the last few decades, around half of the EU member states have adopted different measures for national digital reporting, with different control mechanisms to combat tax fraud. Some countries have implemented into their legislation VAT ledger statements, some SAF-T reporting, and others real-time invoicing or clearance e-invoicing with, which is the highest possible control mechanism.
The draft ViDA Directive also anticipates the introduction of e-invoicing on a general basis. This is the most effective but costly solution.

E-invoicing

E-invoicing should be introduced at the intra-community level. This is currently prevented by Article 232 of the directive on the common system of value added tax, which requires the counterparty's consent to the exchange of

electronic documents. This article will be deleted from the VAT Directive and consent will no longer be required.

The main subject of the comment procedures on the draft are the implementation costs. A central VIES (VAT Information Exchange System) register, should be established to process, evaluate, and cross-check the reported data. This automatic clearance will be a control mechanism that will verify in real time all essentials and the format of the digital tax document. If these essentials are correct, the system will automatically approve the document. The automatic clearance option is costly, thus it is possible that it will not be implemented. In such cases, it will be the tax administrator who will upload the data to the VIES within a one-day deadline. Taxpayers will be obligated to issue a tax document within two days of the date of supply.

Electronic invoicing would ultimately promote automation and reduce the administrative burden for taxpayers. It may in fact introduce the automatic pre-filling of VAT reports based on the data that taxpayers continuously submit to the tax authorities. The draft also proposes to abolish EC Sales Lists and the possibility to issue summary tax documents.

Tips and tricks

How long can tax administrators review the correctness of declared tax?

Imagine this scenario: The tax authority found certain discrepancies in your tax return. There is a risk that the asserted tax could be increased. But the inspection is dragging on for years with no end in sight. How long can the tax authority change the tax you have declared? On what conditions? And what if, the other way round, you find out that the tax you paid should have been lower?

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The key term in this respect is the deadline for assessing tax. This period is three years, after which the assessed tax cannot be changed, which applies even if the taxpayer finds that the tax should have been lower. The deadline may be extended under certain conditions. However, it will always expire no later than ten years after its commencement.

How is the deadline determined?

The deadline for assessing tax begins to run on the day when the deadline for filing a regular tax return expires. If the taxpayer had no obligation to file a tax return, the time limit begins to run on the day on which the tax became due. The specific characteristic of this time limit is that it is not governed by the general rules for calculating time under the Tax Procedure Code. The first day of the deadline for assessing tax is already the date of expiry of the deadline for filing the tax return, not the following day. Nor shall this period be extended if it expires on a public holiday, Saturday or Sunday.

In which cases can the deadline change?

The deadline for assessing tax can be modified in three different ways: it can be extended, suspended, or interrupted.

The time limit is extended by one year at a time if, e.g., an additional tax return has been filed or a notification of a decision on tax assessment or a notification of a decision on an appeal has been made in the last twelve months prior to the expiry of the current deadline. Suspension of a time limit means that the time limit does not run for a certain period, i.e., for the duration of court proceedings, criminal prosecution for a tax crime, or proceedings on an issue necessary for the correct tax assessment (e.g., probate proceedings). If the time limit is interrupted, it starts to run again from the beginning; in practice, interruption occurs in particular when a tax inspection is initiated, or a regular tax return is filed.

There are also exceptions in which the tax may be altered even after a three-year or ten-year period. These are

cases where a tax crime has been committed or where the taxpayer has filed an additional tax return for a lower tax before the expiry of the deadline, but the deadline for assessing the tax expired before the end of the tax proceedings. In this case, the tax may be increased or decreased regardless of the deadline for assessing tax.

What about paying the tax?

It is necessary to distinguish the tax payment deadline from the tax assessment deadline. The deadline for tax payment is the time limit during which the tax authority is entitled to recover the assessed tax. Its basic length is six years, but it ends no later than 20 years after its beginning or 30 years if the tax has been secured through the right of pledge recorded in a public register (e.g., land register). The period begins to run on the date the tax is due and is not extended if its last day falls on a Saturday, Sunday or holiday. This deadline can be modified as a result of acts within enforcement or insolvency proceedings.

How to defend yourself?

If the tax authority increases your tax after the tax assessment deadline, such a decision is unlawful. In such a case, it is necessary to defend yourself and file an appeal against the order to pay tax in a timely manner, i.e., within 30 days of its receipt.

Czech Republic opening up to digital nomads

On 1 July 2023, the government launched Digital Nomad, its new economic migration programme. The programme is intended to facilitate the stay of IT professionals and their family members from selected countries in the Czech Republic.

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The programme targets highly qualified and top-class IT workers from Australia, Japan, Canada, Korea, New Zealand, Great Britain, the US, and Taiwan who plan to stay in the Czech Republic for the purpose of work for more than 90 days.

The programme distinguishes between two types of digital nomads: employees working in the Czech Republic for their foreign employer remotely through telecommunication means, or freelancers (self-employed) holding a Czech trade license.

In both cases, the IT specialists must prove university or college education in the natural sciences, technology or mathematics or three years of experience in IT, as well as income of at least 1.5 times the gross annual salary in the Czech Republic.

Inclusion in the programme

A digital nomad does not need to apply to be included in the programme through their employer, as is the case for other government programmes. They can file the application themselves at the Ministry of Industry and Trade.

If all requirements are met, the ministry will confirm the applicant's inclusion in the programme, usually within five working days. The applicant then can apply for a visa for a stay of over 90 days. Depending on the digital nomad type, foreigners shall apply either for ‘other purpose’ visas (employees of a foreign company) or for business purpose visas (freelancers). Family members of these specialists then can apply for a family visa. The application should be processed within a shortened period of 45 days.

Decisions on the inclusion in the programme shall be issued for a maximum of one year for employees of a foreign company; for freelancers, the validity of such a decision will not be limited.

If a digital nomad is interested to settle in the Czech Republic for a longer period than allowed by the visa, they must first apply for an extension of their inclusion in the programme and then for a long-term residence permit for the same purpose for which they had applied for their previous visa.

The benefits of the new programme for the Czech Republic are indisputable. In the digital era, it will bring in

foreign know-how, encourage the development of activities of foreign technology teams in the Czech Republic, and promote the Czech Republic in IT communities abroad. Fiscal benefits in the form of tax and other payments are also expected.

Setting up a group's whistleblowing system correctly

For some entities, the Act on the Protection of Whistleblowers entered into effect on 1 August this year. However, its wording still raises questions so far not answered, not even by the methodological guidance of the Ministry of Justice. One of the most discussed topics is the sharing of internal whistleblowing systems within corporate groups; this means uncertainty for many subsidiaries, as their foreign parent entities often want to administer the internal whistleblowing system more or less centrally, with solutions adopted at the highest possible level.

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What do the law and the methodology say?

The Whistleblower Protection Act allows companies (except for public procurers) with no more than 249 employees to share a whistleblowing system or use an internal whistleblowing system set up by another entity. The Ministry of Justice's methodology further elaborates on this only to distinguish between the sharing of an internal whistleblowing system and its outsourcing; the difference between these is primarily in the functional (data) separation of individual whistleblowing channels in the case of outsourcing.

The benefits of fully sharing a whistleblowing system within a group are thus available only to companies with a maximum of 249 employees. For companies exceeding this limit, the use of a single technical solution for a whistleblowing system is allowed only if at least the individual group companies' data are functionally separated in the system.

European Commission's standpoint

Further guidance on how to set up a group whistleblowing system for medium-sized companies (with a maximum of 249 employees) is provided by the European Commission's non-binding interpretation standpoint.

According to the Commission, it is possible to have a central whistleblowing system alongside a local whistleblowing system that is functionally separate for a single group company. Whistleblowers may then choose whether to make their notification directly to the subsidiary or centrally to the parent company. There may be various reasons for whistleblowing centrally: for example, the whistleblower may have more confidence that they will be granted adequate protection by the parent company; also, the matter being notified may concern more than one group entity or the group as a whole.

Apart from the requirement for two separate systems, the standpoint lists further requirements for the possibility of dual whistleblowing and sharing of resources. When notifying the parent company, the whistleblower should

first be informed that their notification will be dealt with by a relevant person at the parent company. They should then be able to object to this and demand that their notification be dealt with locally. Even if they fail to do so, any feedback to the whistleblower and the resolution of the matter itself should be done locally.

Shared whistleblowing in practice

Unfortunately, neither Czech law nor the methodology so far show how to best set up whistleblowing at a subsidiary in the context of a corporate group. This holds especially true if the parent is a foreign company. Although the European Commission's interpretation standpoint provides more specific guidance, it is still a non-binding opinion, and practice in the Czech Republic may develop in a different direction. Caution in setting up internal whistleblowing systems within corporate groups is therefore in order. In the light of the above, you should primarily keep in mind the requirements of Czech legislation and not simply give in to a parent company's pressure to centralise whistleblowing.

New class action act – what will it look like?

The bill on collective proceedings is heading to the chamber of deputies. This is the umpteenth attempt to comply with the requirements of the EU directive on representative actions for the protection of the collective interests of consumers, which requires the establishment of an effective and efficient procedural mechanism for representative (collective) actions.

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Scope of use of collective proceedings

The bill envisages collective proceedings to be used solely for consumer claims against entrepreneurs. This is the minimum transposition required by the directive, making the Czech concept fundamentally different from the class action lawsuits known in the Anglo-American legal environment, which can be used to assert claims in various areas of law, including labour and environmental law. The widespread opinion based on foreign experience is that the Czech Act on Collective Proceedings should not be limited to consumer disputes.

Plaintiff's remuneration

Collective action on behalf of a group of consumers can only be filed by a qualified non-profit organisation recorded in the list of entities authorised to file representative actions under the Consumer Protection Act. Such an entity shall act as the plaintiff in the proceedings and bear all obligations this entails, as well as the risk of failure in the proceedings. For this, the organisation shall be awarded remuneration from the amount won, in an amount that adequately covers its costs and risks. However, the exact amount of this remuneration is still subject to disputes: in the wording of the bill discussed by the government in August, two options were considered, i.e., 5% and 25% of the awarded amount; in the end, the government approved the 5% option. Supporters of this lower option have warned that too high a fee may lead to speculative actions, while its opponents fear that a low fee will not cover the costs of smaller proceedings, which will therefore not be initiated.

Opt-in or opt-out mode for consumers

Collective proceedings can generally be conducted either in the opt-in mode, where participants must actively register, or in the opt-out mode, where all potentially harmed parties are considered participants until they opt-out. Unlike previous proposals, the current wording of the bill applies the more moderate opt-in mode. The opt-in mode was chosen mainly because it respects every consumer's choice, following the premise that 'the law aids the vigilant'. Supporters of the opt-out regime argue that consumers cannot be required to monitor notices of initiated proceedings on a regular basis and register on time.

Many points of the law (in particular those mentioned) will continue to be further debated in the chamber of deputies, which means that the wording of the bill may still undergo fundamental changes.

Preventive restructuring – a new solution for companies in financial difficulties

In August, the senate approved a bill on preventive restructuring. It aims to help entrepreneurs avoid bankruptcy and enable them to deal with serious financial difficulties promptly and without public involvement.

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With more than a year's delay, the act transposes the EU directive and introduces into Czech law the missing concept of preventive restructuring. Until now, only two possible ways for companies to resolve their financial difficulties, i.e., reorganisation or bankruptcy, were regulated by the Insolvency Act. However, a prerequisite for the application of these instruments is the debtor's insolvency or at least imminent insolvency.

Preventive restructuring, on the other hand, allows to address economic difficulties in time to prevent insolvency and to maintain and restore the operation of an entrepreneur's business establishment. Preventive restructuring starts with the creation of a remediation project, followed by a detailed restructuring plan including the economic strategy of the restructuring, austerity measures to be taken, and proposed solutions; the entrepreneur shall consult their restructuring plan with their key creditors.

Due to the extremely sensitive content and detailed information on the entrepreneur and their business establishment, neither remediation projects nor restructuring plans shall be published. Unlike insolvency proceedings whose course is recorded in a comprehensive and detailed manner in a public insolvency register with the participation of all creditors, preventive restructuring allows the entrepreneur to complete the process behind closed doors, only involving selected creditors, thus keeping sensitive information about the business secret. With preventive restructuring, the effects of negative publicity otherwise associated with insolvency and the negative psychological effect of bankruptcy should be minimised.

Compared to reorganisation, which is only allowed for companies with more than 50 employees or a turnover exceeding CZK 50 million, preventive restructuring will be available to more entities that need to resolve their financial difficulties. The act shall enter into force on the day following its publication in the Collection of Laws.

GDPR: personal data can again flow freely from EU to US

In July, the European Commission adopted a key decision establishing the EU-US Data Privacy Framework. Its main aim is to ensure that personal data flowing into the US are protected in a way that is comparable to that guaranteed by EU countries. The framework will make life easier for organisations that transfer personal data to US companies.

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The EU-US Data Privacy Framework is the European Commission's third attempt to set rules for transferring personal data from the EU to the US. Previous attempts, known as Privacy Shield and Safe Harbour were overturned by the Court of Justice of the European Union (CJEU) at the initiative of activist Maximilian Schrems and the organisation noyb (none of your business), primarily on the grounds of a lack of a personal data protection guarantee on the US part.

The new framework provides safeguards reflecting the concerns and ideas voiced by the CJEU, mainly as regards access by US intelligence services to the personal data of EU citizens. The US authorities' access to EU personal data will now be limited to what is necessary and proportionate for the purpose of protecting national security. In the event of a breach of the rules of handling personal data, several independent and impartial redress mechanisms are now available to EU citizens, one of them being the possibility of recourse to the newly established Data Protection Review Court.

Following the example of Privacy Shield, this setup also allows for the free flow of personal data to US companies certified under the framework's rules. To become certified, a company must demonstrate that it meets data protection requirements and commits to compliance with the framework's principles. Therefore, before initiating the process of transferring personal data to the US, we recommend that you check whether the company to which you are to transfer the data is on the list of certified companies. The list can be found here.

DSA not just for big players

From 25 August 2023, large companies such as Google, Facebook, and LinkedIn must comply with new rules for handling illegal content and using targeted advertising. The rules are part of the EU's Digital Services Regulation known as the Digital Services Act (DSA). Although the DSA is now mainly talked about in connection with large players in the digital services market, smaller companies should also pay attention.

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The DSA is based on the principle that "what is illegal offline should be illegal online". From this follow its main objectives, i.e., to combat illegal content, services and goods, and to increase the transparency of targeted advertising and algorithms. For digital service providers, this means, among other things, that they must put in place a mechanism on their platforms allowing users to report illegal content. The provider must then investigate the illegality. If they then conclude that the content is indeed illegal, they should remove it from their platform. This intended moderation of (illegal) content has provoked the most heated public debate due to concerns about any excessive deletion of content, possibly leading to unwanted censorship and restrictions on the freedom of speech by digital service providers.

Other fundamental changes concern advertising, which has become an integral part of digital platforms. The DSA bans targeted advertising aimed at minors, and targeting ads based on sensitive data that the platform has about its users (e.g., their sexual orientation, skin colour, or religion). It will also be forbidden to use ‘dark patterns’, i.e., manipulating elements on the websites misleading users and making them click on something they do not really want. Thanks to the DSA, the functioning of algorithms should be more transparent, and users shall have at least some control over it. The new rules will affect everyday life by, e.g., letting users choose the chronological order of their feeds on social networks, rather than having it arranged by an algorithm.

Companies that fail to comply with the DSA’s rules face heavy fines of up to six percent of their annual global turnover. For now, less than twenty online platforms and search engines used by more than 45 million EU users per month have to abide by the rules. However, from mid-February 2024, the new rules will to some extent apply also to smaller companies that provide digital services, such as cloud and web hosting, online marketplaces, or sharing economy platforms. Companies should therefore start preparing for the upcoming changes now, to make sure that their digital services comply with the DSA rules come February.

Single environmental opinion: small step towards more straightforward construction proceedings

The permitting of projects under environmental regulations will soon be easier, which may also accelerate construction proceedings. These changes will come about through a single environmental opinion (jednotné enviromentální stanovisko, or JES).

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For all projects that are subject to permits under the Building Act or to environmental impact assessments (EIA), and for other projects, it will now be possible to obtain a single environmental opinion (jednotné enviromentální stanovisko, or JES). It will encompass project permit steps relating to permitting a project under ten different environmental laws: the Water Act, the Agricultural Land Protection Act, the Waste Act, etc. Instead of many standpoints, opinions or decisions of individual authorities in environmental protection, a single binding opinion will be issued to permit projects.

How will it work?

To obtain a single environmental opinion, an application has to be filed with a relevant authority, i.e., the Ministry of the Environment, the regional authority, the municipal authority of the municipality with extended competence, or the district authority. In addition to the mandatory essentials, applications shall include all documentation needed for project permits under the Building Act. If the relevant authority concludes that the application is correct, it shall request other relevant authorities under environmental legislation to provide their opinion. These authorities will have to reply to the inquiring authority within a set deadline.

If the other authorities state that the project is admissible, and the requesting authority does not find the project inadmissible, it must issue a JES within 60 days of filing the application. In more complex cases, this period may be extended by a maximum of 30 days.
The single environmental opinion can also be applied for as part of the EIA process (if the project is subject to the environment impact assessment) – it will then be issued together with the EIA opinion.

An application template should be published by the Ministry of the Environment before the Act on the Single Environmental Opinion enters into effect.

The act shall enter into effect on 1 January 2024, but until 30 June 2024, it will only apply to selected structures – motorways, railways, water reservoirs, gas storage facilities, etc. For other constructions, it will be possible to apply for the single environmental opinion from 1 July 2024.

Technical amendment to Act on Investment Companies and Investment Funds

At the beginning of August, the Ministry of Finance submitted to the government a draft amendment to the Act on Investment Companies and Investment Funds. The ministry thus responds to the requirements of capital market participants (changes concerning entities under Section 15, SICAVs) and regulates some technical and interpretation issues that arose in the previous transpositions of EU directives. At the same time, it aims to make some forms of investment funds more attractive. The proposed effective date is 1 July 2024.

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Stricter regulation of asset managers under Section 15

The amendment introduces the stricter regulation of managers of funds governed by Section 15 of the Act, as this manner of investing has become rather popular with the public, which thus needs to be better protected and informed.

Asset management comparable to management of an investment fund allows investors to invest in less traditional, typically riskier projects and managers to manage assets under more relaxed regulatory conditions. However, these managers do not have CNB licences, and their asset management activities are not supervised by the CNB.

Under the amendment, the manager's name will have to include the words 'venture capital entity', and the use of the word 'fund' in their name will be prohibited. The amendment extends the information obligations: before concluding a contract, investors must be informed about the risk of the investment, the amount of the remuneration, the investment horizon, the investment strategy, and the fact that the asset manager is not subject to CNB supervision.

The amendment further restricts the range of potential investors: it stipulates a minimum investment of EUR 125,000 and the obligation to fill in an investment questionnaire to obtain information about the investor's financial background, investment objectives, knowledge in and experience with investments. However, the minimum investment threshold may not be met where the manager manages assets for up to 20 investors; this is intended in particular for family-type investments.

Making investment funds more attractive

The amendment aims to encourage establishing the types of investment funds that are currently not very common, such as closed-end joint-stock companies or limited partnerships for investment certificates.

Sub-funds not only for SICAVs

Current legislation allows the establishment of sub-funds only for joint-stock companies with variable registered capital (SICAV). Under the amendment, they may also be established by limited partnerships for investment certificates and closed-end joint-stock companies as well.

SICAF

If an investment fund is established as a closed-end joint-stock company (as opposed to a SICAV), the fund's business name may include the designation ‘investment fund with fixed capital’ or the abbreviation ‘SICAF’, making it easier to recognise, especially for foreign investors.

Limited partnership for investment certificates

For limited partnerships for investment certificates, the amendment relaxes the otherwise rather strict rules for profit distribution as stipulated by the Corporations Act. The memorandum of association may provide for a different distribution of profit and loss, i.e., for example, that the profit or loss will be borne solely by the company and not by the general partner.

CJEU issues another judgment on fixed establishments for VAT purposes

The Court of Justice of the European Union (CJEU) has held that where a customer receives services based on an exclusive contract for the provision of services in a state other than the state in which their business is located, the resources of the provider of these services cannot be regarded as the customer's resources, and therefore no fixed establishment arises for the customer.

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In the present case (Judgment C-232/22), Cabot Switzerland, established in Switzerland, concluded a tolling contract with Belgian Cabot Plastics. Both companies are part of one corporate group and are financially related. Based on the tolling contract, Cabot Plastics uses its equipment exclusively for the benefit of Cabot Switzerland (processing raw materials into products used in the manufacture of plastics). In addition, it provides other services such as storage of products, technical checks, administrative support in customs procedures, etc.

The Belgian tax authorities took the view that because of Cabot Switzerland's exclusive use of Cabot Plastics' technical and human resources, Cabot Switzerland had a VAT fixed establishment in Belgium. The tax authorities thus held that all services provided by Cabot Plastics were subject to tax in Belgium.

The case was brought before the CJEU, which held that the basic rule for determining the place of supply is the place where the service recipient has established its business. This is an objective criterion for determining the place of supply. An exception to this general rule is taxation at the place of a fixed establishment but only if the application of the general rule is not rational and double (non)taxation could occur.

The CJEU concluded that Cabot Plastic as the provider of technical and personnel resources remained responsible for these resources and provided the services at its own risk. A contract for the provision of services, even an exclusive one, does not in itself mean the resources of the service provider become those of its customer. The same resources cannot be used simultaneously on both sides of the transaction, i.e., for the provision of services by Cabot Plastics and at the same time for receiving services by Cabot Switzerland.

The CJEU therefore concluded that Cabot Switzerland was receiving services in Switzerland and that Cabot Switzerland did not have an appropriate human and technical resources structure in Belgium. The court thus confirmed its previous conclusions, e.g., in Case C-333/20 Berlin Chemie, to which reference was made in the present case.

Subsidies

How to receive a grant to build research and innovation infrastructure?

Are you planning to build development infrastructure that can be shared with other businesses or universities? Then you may be interested in Call I of the Infrastructure Services programme under the OP TAC announced by the Ministry of Industry and Trade. Support can be received to develop and build open research and innovation infrastructure or to provide services to innovative businesses.

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Applications for support under this programme will be accepted from 9 August 2023 to 18 January 2024. Large enterprises may also apply. One of the conditions of the programme is the applicants' cooperation with research organisations. The funds for allocation are one billion Czech crowns. The following activities may be subject to support:

- Activity A) Provision of services to innovative SMEs.
- Activity B) Expansion of premises and modernisation of open research and innovation (R&I) infrastructure, including the acquisition of new equipment or the construction of new open R&I infrastructure.

Activity B

The aid intensity varies according to the type of R&I infrastructure being built or upgraded:

- For the expansion or construction of new research infrastructure, the aid intensity is up to 50 % of eligible costs.
- For the extension or construction of new R&I infrastructure meeting the definition of testing and experimental infrastructure, the aid intensity is 25 % of eligible costs. This may be increased by five percentage points if at least 80% of the annual capacity of this infrastructure is allocated to SMEs.

The maximum subsidy amount is **CZK 50 million**. If a project includes construction work, the subsidy can reach up to **CZK 150 million**. Eligible costs are costs incurred for fixed assets, intangible assets, and project documentation.

One of the conditions set out in the call for applicants and research centres is the allocation of at least 30% of annual R&I infrastructure capacity to SMEs.

Projects can be implemented throughout the Czech Republic, but not in Prague. Applicants may submit only one project proposal per activity.

If you are interested in this type of support, we will be happy to review your activities' compliance with the conditions of the programme.

Subsidies for large enterprises: what to expect

So far, 2023 has not been as rich in subsidy programmes for large enterprises as previous years. By the end of the year, however, several interesting calls also available to large enterprises will be announced. Below is an overview.

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Within the **OP TAC**, we are expecting, e.g., calls supporting projects focused on water savings in businesses, building renewable energy sources, or research and development under the popular Application programme. At the same time, the call in the Energy Savings programme whose original call was closed prematurely on 31 August 2023 should be re-announced.

It is also likely that calls will be launched in the **RES+ programme** under the Modernisation Fund which can be used to receive support for the construction of photovoltaic power plants. Finally, a call supporting research and development in the TREND programme under the auspices of the Technology Agency of the Czech Republic is to be announced.

As mentioned above, these calls are also intended for large enterprises. However, large enterprises will be able to apply for support under the **Applications programme** only if they meet the condition of cooperation with an SME, unless they meet the definition of a mid-cap (an enterprise with 250 to 3,000 employees, with the threshold being assessed within the group).

Should you be interested, we will be happy to provide you with more detailed information or check the suitability of a specific call for your planned activities and other specific conditions. We will inform you about the announcement of individual calls.

Case law

Proving management services and legitimate expectations

In August, the Supreme Administrative Court closed a case concerning the tax deductibility of management services. It explained in detail the taxpayer's obligations when proving services and what the taxpayer can reasonably expect with respect to their previous successful defence of expenses in a previous corporate income tax inspection.

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At the heart of the dispute was the provision of management services by a parent company to a subsidiary. The tax administrator was not satisfied with the merely formal orders for the services, many of which lacked a specific output. The same scope of services was invoiced on a quarterly basis, and the outputs of the services were not linked to the times stated in the invoices. The lack of evidence was also compounded by the taxpayer not proving how they had obtained the documents supporting the provision of the services: a small portion of them was part of submitted email communication, but for most of them, there seemed to be no record.

The taxpayer raised (in vain) the objection of a breach of their legitimate expectations, stating that in a tax inspection for 2009, the tax administrator had assessed the cost of management services as tax deductible. As this was the taxpayer's main line of argumentation, the Supreme Administrative Court explained at length that *"an administrative practice that establishes a legitimate expectation is a stable, uniform and long-term activity (or inactivity) of public administration bodies that repeatedly confirms a certain interpretation and application of legal regulations. Such practice is then binding upon an administrative authority. It may be changed if the change is prospective, the parties concerned have had the opportunity to become acquainted with it, and it is duly justified by serious circumstances"* (resolution of the extended panel dated 21 July 2009, file No. 6 Ads 88/2006132, no. 1915/2009 Coll. SAC). The court also referred to the Court of Justice of the EU, according to which a legitimate expectation may also arise from the provision of specific assurance by the competent authority.

The SAC concluded that the complainant had not received any specific assurance from the tax administrator within the meaning of the CJEU's case law. In the tax inspection of the 2009 taxable period, the tax administrator did not inspect the same extent of documents as in the present case, as it did not involve 'identical services' as the complainant had consistently claimed, but services of an 'identical or similar nature'. It can hardly be said that by this single tax inspection the tax administrator had established a stable administrative practice vis-à-vis the complainant, giving rise to their legitimate expectation that in subsequent taxable periods, the costs of services would be accepted as tax deductible solely based on invoices submitted.

The judgment confirmed that if taxpayers want to deduct the costs of management services from their corporate income tax base, they must be able to prove that they factually received the services, that they were beneficial to them, and that their price corresponded to the arm's length price. Related records must be continuous, and it is not possible to rely on documentation or experience from tax inspections in previous years.

Case law

Abuse of rights in real estate leases and VAT

The Municipal Court in Prague ruled on the distinction between leases of real estate and accommodation services, and its implications for VAT treatment. The court concluded that the case in question involved an abuse of rights.

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The dispute concerned a business transaction where a company purchased housing units for the purpose of leasing them to another company. The other company then subleased the units to a third company, which provided them to its employees for use. The sublessee classified the letting of the housing units to employees as an accommodation service and paid output VAT. All three companies then claimed the right to deduct VAT.

The heart of the dispute was whether there was an arrangement of relations between the companies for the purpose of obtaining a tax advantage, and whether the conduct by the owner of the housing units constituted an abuse of rights. In this respect, the municipal court dealt with the question whether the case in fact involved a (taxable) accommodation service, or rather a (VAT exempt) lease of real estate. The Supreme Administrative Court previously ruled 'lease' to mean the transfer of the right to use real estate in a way as if the tenant were its owner, for an agreed-upon period of time, and for consideration. The lease of real estate is a relatively passive activity that does not include any other additional services.

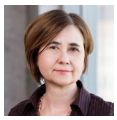
The municipal court took into account that the employees had been using the housing units for a long time (at least several months). The fee had been agreed as per bed per day, but the employees could use the entire housing unit, including accessories, and had their permanent residence at the address. They were not provided with services typical of an accommodation service, such as cleaning or the provision of sanitary supplies, nor were they charged a local accommodation fee. The entrance to the apartment building was equipped with bells for the individual housing units, also not typical for an accommodation service. The court also pointed out that the real estate register listed the units as apartments.

The court therefore assessed the service as a lease relationship, as the company had not proved the provision of additional services to users of the housing units, and thus agreed with the tax administrator. At the same time, the court concluded that the entire chain of transactions had been artificially created to obtain a tax advantage, and that the conditions for abuse of rights as defined by the judgment of the European Court of Justice C-255/02 (Halifax) had been met. The court thus confirmed the tax administrator's decision to reject the right to deduct VAT.

In brief

News in Brief, September 2023

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



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DOMESTIC NEWS

- Decree 264/2023 Coll., on the percentage share of individual municipalities in the national gross revenue from value added tax and income taxes, was published in the Collection of Laws.
- Decree 258/2023 Coll., amending Decree No. 71/2011 Coll., on the form, structure, and manner of keeping and providing data that a bank and a branch of a bank from a state other than an EU member state is obliged to keep and provide to the Financial Market Guarantee System, was published in the Collection of Laws.
- An amendment to Act No. 565/1990 Coll., on local fees, was published under No. 252/2023 Coll. and is effective from 1 January 2024.
- The Czech Republic is now among countries in which large multinational and national corporate groups will have to pay at least a minimum income tax of 15%. The bill on top-up taxes to ensure a minimum level of taxation of large multinational and large national groups passed its first reading in the chamber of deputies in August.
- The chamber of deputies discussed in its first reading a bill amending certain laws in connection with the development of the financial market and the promotion of old-age security. The main proposed measures are the long-term investment product and some changes to Pension Pillar III.
- The Ministry of Finance has updated the list of treaties on the avoidance of double taxation on income and property taxes effective in the Czech Republic.

FOREIGN NEWS

- The European Commission approved an implementing regulation on the detailed rules for reporting on the carbon border adjustment mechanism (CBAM) during its transitional phase from 1 October 2023 to 31 December 2025. The deadline for the first report is 31 January 2024. The Commission has also issued two guidance documents explaining the new rules.

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