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April 2022

Editorial

The first quarter of the year is almost over. It has brought a situation that, I dare say, nobody expected a few months ago. Until recently, there were no laws that would make it possible to respond to the arrival of large numbers of refugees from Ukraine. Now, three new laws have entered into force. Employers can now hire new Ukrainian workers, Ukrainian children can attend Czech schools, and refugees have access to medical care. We also have had our first practical experience, and we shall share them with you.

One of the tools to weaken the Russian aggression are sanctions. However, many companies in Europe will also suffer as a result. The EU has been making efforts to mitigate the negative effects and has made it possible to provide state aid to affected businesses; this may increase the resilience of many companies. Read on for more details.

Perhaps the biggest impact so far has been the fall of Russian Sberbank. Gradually, it becomes clear just how extensive the consequences of the fall will be. The situation is particularly difficult for municipalities who entrusted Sberbank with their accounts. Yet, concluding a new banking contract does not always have to involve a lengthy procurement procedure. In today's Update, our lawyers present to you three more flexible alternatives.

The conflict is all around us: the media are full of negative news, and businesses are cancelling advertising campaigns because they do not want them to be associated with violence. However, even hard times can bring new opportunities: in the upcoming months, we can look forward to several subsidy programmes that will give opportunities to large and smaller companies. Useful projects can be created that would otherwise struggle to find their way into the world. Thus, I trust that, eventually, such good news will prevail in the end.

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Legal

Czech response to arrival of Ukrainian refugees – three new laws

The ongoing Russian invasion of Ukraine has caused an unprecedented influx of refugees seeking shelter and safety in the Czech Republic. Czech legislation was not prepared for such a situation: although authorities managed to respond quickly and flexibly, it became clear that a new legal framework was inevitable. The government thus drafted three new laws to address the situation. All have now been promulgated in the Collection of Laws of the Czech Republic and entered into effect on 21 March 2022.

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Temporary protection in the Czech Republic

Act No. 65/2022 Coll., on Certain Measures in Connection with the Armed Conflict in Ukraine, incorporates the decision of the EU Council of 4 March 2022 and lays down the conditions for granting 'temporary protection' to foreigners who come to the Czech Republic in connection with the conflict in Ukraine. The act defines the range of persons who may be granted temporary protection: namely Ukrainian nationals and their family members who resided in Ukraine before 24 February 2022, but also other persons, such as holders of international protection in Ukraine or holders of valid permanent residence permits in Ukraine who have been prevented from returning to their home country by a threat of real danger, pursuant to the Czech Foreigners' Residence Act. Temporary protection cannot be granted in more than one EU member state.

A person who has been granted temporary protection is regarded as a holder of a long-term visa for tolerated stay pursuant to the Foreigners' Residence Act. The law also ensures the simple and smooth transition to temporary protection status, by stipulating that tolerance visas issued from 24 February 2022 in connection with the conflict in Ukraine until the law's effective date shall be automatically regarded as having granted temporary protection.

Furthermore, the law defines special rules for the provision of healthcare and awards foreigners enjoying temporary protection the status of an insured person under public health insurance.

Employment and social security

The second law is Act No. 66/2022 Coll., on Measures in the Area of Employment and Social Security in Connection with the Conflict in Ukraine. It stipulates that for the purposes of the Employment Act, foreigners under temporary protection shall be regarded as foreigners with a permanent residence permit. This status gives them free access to the labour market and exempts them from the obligation to obtain a work permit. At the same time, it entitles foreigners with temporary protection humanitarian benefits of CZK 5,000, paid by the respective regional branch of the Labour Office of the Czech Republic. In the event of an emergency concerning (the lack of) income, property or a social distress, the same benefit can be awarded to foreigners for up to five months following the month of having been granted temporary protection.

Education

The last law, Act No. 67/2022 Coll., on Measures in the Area of Education in Connection with the Armed Conflict in Ukraine, provides access to schools and children's groups to refugee children, and deals with related issues. The act specifies the conditions under which it is possible to modify educational programmes for individual students, and the possibilities of admitting new students in the currently running school year and in the next one.

All of the above laws will expire on 31 March 2023. It is possible that before that date, the legislators will further adjust the individual regulations to best fit the current situation. At the moment, it is not clear how the concept of temporary protection will be approached in the future, or how it will be possible to switch from this regime to one of standard residence titles. This area will also have to be further addressed in the future.

Legal

Practical commentary on legislation concerning refugees from Ukraine

In connection with the Russian invasion of Ukraine, three laws were published in the Collection of Laws on 21 March, regulating the residence, employment, benefits, and education of Ukrainian refugees. From a practical point of view, what must they do upon arrival in the Czech Republic, and what situations are employers currently facing?

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The new laws are covered in the article Czech response to arrival of Ukrainian refugees – three new laws. As for residence status, it is first necessary to register and apply for temporary protection at a regional assistance centre. Please note that by mid-April at the latest, the Prague assistance centre will be moving from the Congress Centre to Vysočany. The registration and the application for temporary protection shall be arranged within 30 days of arrival. Compared to standard international protection, the deadline for processing the application is significantly shorter for temporary protection, and the granting of this status also gives rise to all further options and benefits brought by the newly adopted laws.

One of the advantages of temporary protection undoubtedly is the possibility to perform work (employment) without the need to obtain a work permit from the Labour Office of the Czech Republic. Persons having this status not only have free access to the labour market, but also the right to register with the Labour Office to access the instruments of an active employment policy such as job seeker registration or retraining. However, employers are still obliged to report the hiring of such a foreigner, no later than on the day they start the employment. To this end, the Ministry of Labour and Social Affairs has adjusted the relevant form, adding the box "holder of temporary protection – Ukraine" in the section identifying the foreigner. Please note that the free access to the labour market does not apply to foreigners who would have been under the circumstances granted temporary protection but are already holding another permit in the Czech Republic, such as a work permit or an employee card.

All legislation concerning the Ukrainian crisis and its consequences has been adopted with effect until 31 March 2023, and the temporary protection status is also granted until then. Employers should reflect this in the term of employment contracts with persons under temporary protection. Similarly, we recommend keep this deadline in mind also in respect of employee benefits, such as accommodation, e.g., where employers conclude lease or similar contracts.

Further amendments to the legislation are very likely: whether concerning employment, such as the recognition of professional qualifications of persons under temporary protection (Lex Ukraine has so far only dealt with proof of qualification for childcare in children's groups), or residence after the expiry of Lex Ukraine.

Donations to Ukraine: Does VAT obligation arise?

The General Financial Directorate has issued summary information on VAT implications of making donations to support Ukraine. While for income tax, Czech laws can be amended to respond flexibly, the situation is rather more complicated for VAT, as the possibilities to deduct VAT are based primarily on harmonised EU legislation.

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For **financial donations**, the procedure is simple: they are not subject to VAT and their provision is of no consequence from a VAT perspective. According to the GFD, for in-kind donations a general principle applies: if the payer purchases goods for the purpose of donating them, they do not have the right to deduct VAT. The subsequent gratuitous provision of the in-kind donation is not subject to VAT, i.e., no output tax is applied.

A different situation arises if the payer had purchased the goods **for their economic activity** and claimed the right to deduct VAT. If the goods are subsequently donated to a humanitarian or charitable organisation which transports them to Ukraine, the donation is exempt from tax with the right to deduct, meaning that the payer shall not be obliged to pay VAT on the grounds of the gratuitous supply. The VAT Act does not define humanitarian or charitable organisations, but, according to the GFD, it is possible to rely on the Ministry of Justice's information and data from public registers or similar records kept under the law of the relevant state. The payer should have evidence available to support compliance with the conditions for exemption: for instance, a declaration by a humanitarian or charitable organisation that the goods will be or have been exported to Ukraine will suffice.

If goods for which the payer had claimed the right to deduct tax upon their acquisition are subsequently donated in the Czech Republic to a person other than a humanitarian or charitable organisation, the payer is obliged to declare and pay output tax. The payer is also liable to tax if they export the donated goods (for which they had claimed input VAT) to Ukraine themselves or through another carrier; the reason is that the conditions for the exemption of exports are not met, as the goods are not supplied by the seller for consideration.

The GFD did not comment on the situation in which the payer **first relocates the goods to Ukraine by themselves or through an appointed carrier**, and only then donates them to a third party. In our opinion, in this case one may argue that the right to dispose of the goods as their owner was not transferred during the relocation, meaning that the relocation from the Czech Republic to Ukraine is not subject to Czech VAT. We are now discussing these conclusions with the tax administration.

To conclude: when making donations to Ukraine, we recommend carefully assessing whether an obligation to pay tax arises in this respect.

Legal

Fall of Sberbank and guidelines for public procurers

The collapse of Russian Sberbank must also be dealt with by public procurers who have been using its services. It is not always necessary to conclude new banking contracts (e.g., credit or current accounts) via a procurement procedure: the law also defines situations where it is possible to conclude banking contracts in a more straightforward way.

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The Ministry for Regional Development and the Office for the Protection of Competition have issued a joint opinion on concluding banking contracts in connection with the fall of Sberbank. The document summarises situations in which entities awarding public contracts may avoid standard procurement procedures and make use of some exceptions foreseen in the law, as otherwise they would be under the general obligation to award public contracts in a procurement procedure.

Exception for credits and loans

The first exception concerns credits and loans. If the contracting entity wishes to apply for a credit or a loan with a bank, they shall not be obliged to award the respective contract in a procurement procedure: they may conclude the contract with the bank directly. If, however, the banking services also include supplies other than the provision of a credit or loan, and such other supply would otherwise have to be awarded in a procurement procedure (a 'mixed contract'), the contracting entity must award the contract for such supply via a procurement procedure, either separately or together as one public contract.

Small-scale public contracts

Another exception to the obligation to award a banking contract in a standard procurement procedure concerns small-scale public contracts (i.e., contracts with an estimated value of up to CZK 2 million). If the contracting entity wishes, for instance, to conclude a new contract on a current account, it shall not be necessary to do so via a procurement procedure if the total amount of the consideration for the opening and maintenance of such an account (e.g., fees, commissions, interest and other related payments to the bank) does not exceed CZK 2 million in four years. In practice, this exception will mainly apply to current and savings accounts.

Use of negotiated procedure without prior publication

A third way to avoid the standard procurement procedure is to use a negotiated procedure without publication. This is the least transparent type of procurement procedure, and strict conditions are stipulated for its use. One of them is its use has become necessary due to 'extremely urgent circumstances' which the contracting entity could not have foreseen and did not cause, and that due to a lack of time it is impossible to observe the time limits for

standard (more transparent) types of procurement procedures. The ministry and the Office for the Protection of Competition admit that using this procedure may indeed be necessary due to the termination of the provision of services by some banks with ties to Russia, which is also the case of Sberbank. However, to be able to use the negotiated procedure without prior publication, contracting entities must initiate the procurement procedure as soon as possible, without undue delay. A contract can then be concluded only for the period until a standard procurement procedure can be carried out.

EU allows state aid for businesses affected by war

The war in Ukraine and the associated sanctions against Russia have hit the European economies hard. The European Commission has therefore adopted a Temporary Crisis Framework allowing member states to provide state aid to affected businesses to mitigate any negative economic impact.

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The Temporary Crisis Framework of 23 March 2022 complements the existing list of instruments under which EU member states can provide ☒nancial support to businesses affected by the economic impact of the war in Ukraine. Using three types of support, the crisis framework allows, inter alia, to ensure sufficient liquidity and to compensate for the additional costs incurred due to exceptionally high gas and electricity prices.

Limited-amount support schemes

The framework introduces support schemes allowing affected businesses to receive up to EUR 400,000. The support does not have to be related to energy price increases and can be provided in any form, including direct grants.

Liquidity support through state guarantees and subsidised loans

To ensure that banks will continue to lend to all businesses affected by the current crisis, entities will also be able to obtain subsidised state guarantees and benefit from loans at subsidised interest rates. Banks should thus not have to worry about the return on ☒nancial resources when lending to businesses affected by the crisis. However, aid is in both cases limited to a maximum loan amount.

Aid to compensate for high energy prices

Member states will also be able to partially compensate affected energy-intensive businesses for higher costs associated with the increases in gas and electricity prices. Support can be provided in any form, including direct grants. Aid granted to an individual enterprise may not simultaneously exceed 30% of eligible costs and EUR 2 million. In the case of operating losses, aid may be increased to up to EUR 25 million for energy-intensive users and to EUR 50 million for enterprises operating in special sectors (e.g., metal production).

In effect until 31 December 2022, the crisis framework will be available to member states in addition to other state aid instruments (e.g., support to compensate for the damage caused by extraordinary events). Should the current problems continue, the framework's effectiveness may be extended, as in the case of the temporary framework adopted in connection with the COVID-19 pandemic.

Leaseback: change in VAT treatment

Within the Coordination Committee of the Czech Chamber of Tax Advisors and the General Financial Directorate, the financial administration confirmed that they will start applying the Court of Justice of the European Union's interpretation to leaseback transactions, so that they now will be regarded as single transactions from a VAT perspective.

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The Coordination Committee discussed the application of value added tax to selected ☒nance lease arrangements, in particular sale-and-leaseback transactions.

Under a leaseback arrangement, the leasing company acquires an asset from the future lessee into its ownership while the asset becomes the subject-matter of a ☒nance lease contract. The leasing company does not normally take physical possession of the leased item.

Historically, a leaseback arrangement has been treated as two separate transactions from a VAT perspective: the acquisition of the leased item by the leasing company from the future lessee, and the ☒nance lease of that item to the same person. The submitters of the discussion paper to the Coordination Committee proposed to proceed in accordance with CJEU judgment C-201/18 Mydibel and treat the leaseback as a single transaction for VAT purposes.

The GFD confirmed the opinion of the paper submitters that from a VAT perspective, a leaseback is not a supply of goods by the (future) lessee to the leasing company and back but instead is the provision of a service to the lessee by the leasing company, usually a ☒nancial service.

As far as current practice is concerned, the conclusions of the Coordination Committee should be applied to contracts concluded after the paper's date of publication on the GFD website.

Tips and tricks

What evidence to keep should tax authority come knocking?

By the time the tax authority arrives, it may be too late to think about what documents the taxpayer should have kept. Hence, let's look at the specific evidence that the tax authority may require during various tax inspections, as there are fundamental differences between inspections focusing on the tax deductibility of expenses, claiming the right to deduct, restructuring, transfer pricing, or on an alleged abuse of right.

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Regardless of whether the burden of proof lies with the tax authority or the taxpayer in a particular case, it is worthwhile to keep documents that the taxpayer may use to prove an asserted claim.

At first, the taxpayer may argue that it is sufficient to provide the tax authorities with accounting documents, extracts from records or transport documents, i.e., evidence that any taxpayer usually has at their disposal. However, in an actual tax inspection, these standard documents may not be sufficient. Keeping a wider range of evidence can make the taxpayer's life significantly easier. Let's look at some examples from our practice and pass on some tips.

First tip: routine transactions

For major but also routine transactions, you'll do best to note what the nature and purpose of the transaction was and, in this regard, to collect and maintain all relevant documentation of an appropriate quality. Certain transactions such as advertising campaigns and mediation activities are especially difficult to prove. In such cases, it is advisable to carefully archive contracts, tender documentation, handover reports and even online administrator account statements. The documents must be carefully prepared so that they do not contradict each other and reflect the actual state of delivery.

Second tip: transfer pricing

Another special area is transfer pricing where it is particularly advisable to have your own documentation available, i.e., a thorough analysis to justify the setup of transactions between related parties. It is useful to archive controlling department calculations and related email communications as well as have internal regulations at your disposal when referring to them. And then there are management fees, where the taxpayer must prove not only the performance of a transaction but also the benefit from the services, e.g., by providing employee worksheets and, in the second case, an internal calculation of similar costs.

Third tip: restructuring

In restructurings where a tax saving is realised, the tax administrator often examines whether there has been an abuse of right. It is then up to the taxpayer to obtain supporting evidence as to the economic sense of the whole

project and its broader context at the group level, be it through an impact analysis of the restructuring prepared by an independent agency or properly kept minutes of management meetings.

Evidence should already be collected once the transaction or taxable supply takes place, because when the tax authority comes to inspect, it will be virtually impossible to provide comprehensive evidence due to the considerable time lag.

As time goes on, it will be increasingly difficult to remember all details of the supply, to track down the necessary emails and to contact the people involved who may already be doing something else. So those who honour the Scout’s motto "Be prepared!" can save themselves a lot of trouble in a tax inspection.

Subsidies

First call under National Recovery Plan

The Ministry of Industry and Trade has announced the first call under the National Recovery Plan. The aim of the Photovoltaic systems with/without accumulation call is to support projects that will increase the installed capacity of photovoltaic sources and consequently lead to an increase in electricity production from renewable sources throughout the Czech Republic.

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The acceptance of applications for support to photovoltaic power plants started on 22 March 2022 and will be carried out through the MS2014+ application from 22 March to 30 June 2022. If the funds designated for allocation to support a given activity are used up before 30 June 2022, the acceptance of further applications will be discontinued, but no earlier than 30 days after the call has been launched.

Only one point of realisation, i.e., one point of consumption or transmission, can be included in the project. The applicant may submit only one application per point of consumption or transmission. The project must be completed by 30 November 2023.

Funds will be allocated to the two following activities:

- activity where the applicant is the owner of the real property or has the entire property leased; CZK 3 billion to be allocated in this case
- activity where the applicant leases only part of the real property for the purpose of installing a photovoltaic power plant; here, the aid amount will be CZK 1 billion.

The aid intensity shall be 35% of total eligible expenses for photovoltaic systems, 50% for accumulation systems, 5% less in the territory of the capital city of Prague.

Who can apply and for how much?

Support will be provided to photovoltaic power plants on business buildings, including shelters used, e.g., for cars, construction equipment or storage of materials, with an installed capacity of 1 kWp to 1 MWp inclusive. Support for electricity accumulation can only be granted if the accumulation is part of the investment in a new photovoltaic power plant and used exclusively to optimise the use of the produced electricity.

Support cannot be obtained for the installation of a photovoltaic power plant on residential or family houses or buildings for family recreation, installations located on the ground, photovoltaic power plant installations carried out by public entities, including companies that are wholly owned by such entities, and research, development, or pilot projects.

As eligible expenses, the MIT will consider costs incurred for the installation of a photovoltaic power plant itself, including energy accumulation, project documentation and engineering activities relating to construction.
If you are interested in this call, we will be happy to provide you with more information and check if you can use it

for your planned activities.

Subsidies

TREND programme announces two more calls

The Technology Agency of the Czech Republic (TA CR) has published the preliminary parameters of the 6th and 7th public call to participate in the TREND programme focusing on providing support to industrial research and experimental development. The calls are scheduled to be announced on 27 April 2022.

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The sixth call named Technology Leaders will be open to companies with experience in carrying out in-house research and development (R&D) and to companies with experience in purchasing R&D services from research organisations that have not yet developed their own R&D activities. Further details:

- The competition period will run from 28 April to 16 June 2022.
- Projects must last between 12 and 60 months.
- The project end date is 31 December 2027.
- The maximum support amount per project is CZK 25 million.

The seventh call named 5G aims to support research and development of 5G and higher technologies. The call is open to enterprises and research organisations. However, only enterprises can be the main applicants. Further details:

- The competition period will run from 28 April to 13 June 2022.
- Projects must last between 12 to 36 months.
- The project end date is 31 December 2025.
- The maximum support amount per project is CZK 15 million.

The results of the two calls will be announced on 31 December 2022; projects can begin on the following date and by March 2023 at the latest. The maximum aid intensity is up to 70% of total eligible costs, which are to be personnel expenses including stipends, but also sub-deliveries, indirect costs, and other direct costs. Applicants must provide evidence of a minimum two-year accounting history.

Under the conditions of both calls, projects carried out must result in one of the following outputs: an industrial design, a utility model, a prototype, a functional sample, software, semi-production, or a proven technology. In combination with these outputs, more specific methodologies or patents will also be acceptable.

The main applicant may submit only one project proposal in each call. It is not possible to submit the same proposal for both calls. If the applicant does so, both proposals will be excluded from the competition. Further terms and conditions will be published on the day the calls are announced.

If you are interested in the TREND programme, we will be happy to provide you with more information.

Implementation of the directive on digitalisation in company law

Following the EU Digitalisation Directive, the chamber of deputies is currently debating a bill to amend corporate law legislation. The main aim of the new legislation is to simplify and speed up the establishment of corporations, and to strengthen cooperation between the public registers of EU member states.

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The proposed changes will mainly affect the Business Corporations Act, the Act on Public Registers, and the Trade Licensing Act. The proposed effective date is 1 July 2022 (except for a few sections concerning mainly the register of foundations).

The first significant change is the **introduction of a register of disqualified persons**: a non-public register of all persons disqualified from exercising an office of a member of an elected body of a business corporation. The register will only be accessible to notaries and courts that will perform a check before entering the person in the commercial register. The registers should be interconnected across the EU. The explanatory memorandum assumes that the new members of business corporations' bodies will no longer have to submit extracts from their criminal records, which will significantly speed up the process of establishing a company or registering a new member.

A welcome novelty is the possibility to **establish a company without first notifying the Trade Licensing Office of its trade**. At present, a company that wants to do business under the Trade Licensing Act must notify the Trade Licensing Office of its trade and wait for its confirmation. Only then can it file for being recorded in the commercial register. Under the new rules, these processes would be independent of each other. If the trade is the sole purpose of the company, and the company fails to obtain the necessary permit within the set deadline, the court may dissolve the company.

The **establishment of limited liability companies** will also be facilitated by publishing a model memorandum of association on the Ministry of Justice's website.

The proposed changes will greatly simplify standard corporate affairs. However, their use in practice may at first be different from what the legislator envisages in the explanatory memorandum. Furthermore, the applicability of some of the proposed amendments will also depend on the directive's transposition in other EU member states. As the legislative process has only just began, we may still see changes to the wording of the bill.

Telemarketing only with consent

Call centre operators wanting to pass on marketing messages have less than three months left to call people on phone numbers in public telephone directories. This option will end on 1 July 2022; after then, people can only be contacted via such phone numbers if they have given their consent. The change responds to the largely negative public attitude towards marketing phone calls, with most people not wishing to be bothered by unsolicited marketing communications. The prohibition on the communication of marketing information will apply to both natural and legal persons, regardless of their business.

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The amendment to the Electronic Communications Act tightens the previous regulation under which it was possible to contact persons at telephone numbers listed in the public directory unless they informed (usually their operator) that they disagreed with receiving marketing messages. Now, vice-versa, they will have to inform their operator or the person maintaining the public directory that they wish to receive marketing messages.

Public directories are currently maintained by private entities (e.g., the Yellow Pages) that obtain telephone numbers and other identi⊠cation data from mobile operators or other providers of person-to-person information transfer services (so-called interpersonal communication service providers). Should other contact details (e.g., email address) be included in the public list, the restriction on marketing communications also applies to these communication channels. However, there is currently no comprehensive public list in which the contact details of all persons who have consented to telemarketing communications can be traced. In addition, restrictions will also apply to lists of randomly generated numbers.

The restriction will only apply to calls where there is no relationship between the contacting and the contacted person, i.e., the contacted person is not a customer of the contacting person. Thus, the amendment does not affect existing relationships between businesses and customers. If a customer has already given consent to the business, the business can continue to contact the customer based on this consent even if the customer has not consented to such contact according to the public list. Businesses can therefore still contact their existing customers and offer them their products and services. If a contact is based on a source other than the public list, the contacting person will have to demonstrate how the contact was obtained and that they are entitled to treat the contact in this way.

In effect, the amendment will significantly restrict telemarketing in the Czech Republic, as businesses will only be able to contact people who have previously consented to be contacted (either individually or via a public list) or are existing customers and still have the option to refuse.

One-stop-shop and VAT in the digital age

The Council of the EU and the European Commission are preparing further steps on VAT to simplify cross-border transactions and the import of goods into the EU for end consumers. The digitisation of VAT reports, electronic invoicing and harmonisation in other areas are also on the way. Amendments to the VAT Directive are expected to be published this autumn with their implementation in individual member states planned for late 2023 or early 2024.

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Following the March ECOFIN Council, the Commission has prepared an extension of the One-Stop-Shop (OSS) as the preferred option to simplify the collection of VAT on cross-border supplies of goods. The Commission's proposal for an amendment to the EU VAT Directive, to be published in the autumn, includes the application of the OSS to all supplies of goods and services to end consumers and to selected supplies of goods business-to-business. Gradually, the applicability of the OSS should be extended to all cross-border business-to-business supplies of goods.

As for the **imports of goods into the EU**, the Council invited the Commission to analyse the impact of a possible mandatory application of the OSS regime for distance sales of imported goods (specifically the Import One-Stop-Shop, IOSS). After evaluating the current IOSS, the Commission is also to thoroughly investigate the possible cancellation of the current shipment threshold to make IOSS widely applicable, since the use of IOSS is currently voluntary and only possible for shipments up to a threshold of EUR 150.

The Commission is also seeking to **harmonise the reverse charge mechanism** for supplies of goods and services by businesses not established in the EU and to harmonise the appointment of an intermediary or tax representative under the various modules of the OSS.

Finally, the Council of the EU looks forward to the Commission's **VAT in the Digital Age initiative**, which includes e-billing, real-time electronic transaction reporting, and VAT treatment of platform economy (including the sharing economy in transport and accommodation). We will look at this initiative in more detail in the next Tax and Legal Update.

The one-stop-shop scheme will play a key role in the future not only in the electronic sale of goods to end consumers. The EU hopes that its widespread application will contribute to the development of the single market, which will also be helped by the simplification of the administrative procedure relating to multiple VAT registrations in individual member states. At the same time, gradual steps are being taken towards the long-discussed final system where VAT will be paid by the supplier in the state where the transport of goods ends, even in the case of business-to-business sales.

Case law

How to respond to inaction by tax administrator?

Proceedings before the tax authorities often take longer than taxpayers would like. However, like all proceedings before public administration authorities, these proceedings are subject to certain rules. In relation to tax proceedings, the Ministry of Finance has published a guideline on setting time limits for tax administration. In this context, the Supreme Administrative Court (SAC) has issued a judgment dealing with what can be considered a reasonable time limit for decision-making by the Appellate Financial Directorate (AFD).

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In its recent judgment, the SAC addressed the Appellate Financial Directorate's inaction in relation to the six-month time limit for issuing a decision on the appeal in the AFD's cassation complaint against the regional court's judgment. This time limit starts to run at the moment the file is returned to the AFD, does not run for the duration of the completion of supporting documents, and upon request its duration may at a maximum be doubled by the superior authority.

According to the SAC, if the AFD has not taken any action within the time limit (six months) set for reaching a decision, it is considered to be in a state of permanent inactivity that cannot be remedied even if it again starts to act. If the AFD has been inactive in this way and has not issued a decision on the appeal, the court must, according to the SAC, always uphold the inactivity action. If the regional court upholds the inactivity action, it will itself set a new time limit within which the AFD must make a decision.

In practice, it is quite difficult to know whether the tax administrator is taking any specific actions in a case. However, every action must be recorded in the administrative file. If nothing happens for a long time during the tax administrator's inspection procedures, the best option is to consult the file. If the taxpayer feels that the time limits set by the Ministry of Finance have already expired, we suggest submitting a complaint for inaction under the Tax Procedure Code. The tax administrator should then inform the taxpayer about the status of the proceedings. If the tax administrator's actions are not satisfactory even after the complaint, the taxpayer may bring an action for failure to act / inactivity under the Code of Administrative Justice.

Case law

What constitutes a tax inspection?

Recently, the Supreme Administrative Court (SAC) repeatedly commented on which tax administration procedures should be regarded as a tax inspection. The court's answers may have a major impact on the success or failure of tax proceedings. The court indicated that if in certain situations the limits of on-site investigations are exceeded, a subsequent tax inspection may then be held inadmissible as a repeated tax inspection.

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In case 7 Afs 231/2021, the SAC dealt with a tax administrator initiating a tax inspection of corporate income tax in which they verified the lawfulness of claiming a research and development allowance for tax years 2013 and 2014. Previously, an on-site investigation had been carried out at the taxpayer for the same purpose for tax years 2010, 2012, 2013 and 2014. Following the commencement of the tax inspection, the taxpayer sought protection against unlawful interference by the tax administrator, arguing that what was going on was an inadmissible repeated tax inspection.

Within the on-site investigation, the taxpayer had provided the tax administrator with calculations and explanations and produced a considerable number of documents concerning the allowance. The SAC stated that the purpose of an on-site investigation is to obtain preliminary or background information, i.e., to 'map the terrain', but not to ascertain, verify, or determine a tax liability. Indeed, that is what a tax inspection is for: in its course, the tax base or other circumstances relevant to the correct assessment of tax are determined or verified; and a different scope of taxpayer rights also corresponds to this.

The limits set by the regulation of on-site investigation are crossed if instead of than merely finding the underlying information and 'mapping the terrain', the tax administrator already ascertains and verifies the correctness of the determination of a tax liability. However, according to the SAC, the fact that complete accounting records were requested does not in itself mean that the limits of on-site investigation have been crossed. The SAC also referred to judgment No. 4 Afs 14/2017, where the court held that the limits of on-site investigation had been crossed, even though a rather small number of documents was requested and a rather small extent of circumstances investigated.

The SAC agreed with the taxpayer that in this case, the tax administrator's procedure was in fact a tax inspection and not an on-site investigation. However, the SAC pointed out that these conclusions only apply to the present factual situation, given inter alia the relation between the quantity of documents requested and received, and the extent of the area inspected. The conclusions thus can neither be generalised nor applied to all tax inspections initiated after an on-site investigation.

Still, the decision provides important guidance on where the line between an on-site investigation and a tax inspection lies. Hence, if a tax inspection is initiated on the same subject matter as a previous on-site investigation, it is certainly appropriate to pay attention to whether the on-site investigation did not already meet the characteristics of a tax inspection. If yes, the on-going tax inspection should be considered repeated and hence

unlawful.

Case law

Supreme Court on payment of advances for profit shares

In its recent judgment (No. 27 Cdo 3330/2020), the Supreme Court (SC) sheds light on the ambiguities concerning the payment of advances for shares in profit. Although the judgment concerns the Business Corporations Act as effective until 31 December 2020, its conclusions may also be applied to the current wording of the act.

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The fundamental question that the court dealt with was whether the payment of an advance for a profit share may be decided on by a sole shareholder rather than by the company's board of directors. The law does not explicitly entrust the decision on the payment of an advance to any of the company's bodies, therefore the decision belongs to the company's board of directors (in the monistic system, to the management board). The Supreme Court further admitted that the statutes may confer this power to the general meeting. If an advance payment is decided on by the general meeting although the statutes do not confer this power on it, in each individual case it is necessary to assess:

- whether the decision may be just a general meeting's instruction to the board of directors to decide on the payment of an advance
- whether it is a decision on a matter outside the power of the general meeting and shall thus be viewed as if it was not adopted
- whether the decision is a one-time amendment to the statutes (i.e., whether it may in itself include the shareholders' will to amend the statutes to the effect that in this single case the general meeting is given the power to decide on the payment of an advance.

According to the Supreme Court, each case must be considered on an individual basis. Yet, subject to certain conditions, it is possible for the general meeting to decide on the payment of the advance even if the statutes do not confer this power on it. Such a decision then gives rise to the shareholder's claim to the payment of an advance for a share in profits.

The Supreme Court further established that the decision to pay an advance for a profit share or to distribute profits does not fall within a company's business management.

The court also commented on the concept of sufficient funds for the distribution of profits. This provision was contained in Section 40 (2) of the Business Corporations Act, as effective until 31 December 2020. The Supreme Court concluded that the term 'sufficient funds' must be understood as resources. In its opinion, an advance for a share in profits is paid for a share in a company's own resources that originate from profits, and it is thus logical that the amount of these resources is also the limit for any advance payments.

The judgement also expressly confirmed the possibility to offset a shareholder's claim (receivable) to the payment of an advance against a company's claim (receivable).

Although the Supreme Court's conclusions are not surprising to the professional public, this case law will be very beneficial in practice. The court's opinion can also be applied to payments of advances for shares in profits of limited liability companies.

Case law

Are warranty-period repairs services provided for consideration?

In the Suzlon Wind Energy Portugal case (C-605/20), the Court of Justice of the European Union (CJEU) dealt with the issue of re-invoicing warranty repair costs.

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An Indian company operating in the wind energy sector provided its EU-based related-through-capital companies with a two-year warranty covering manufacturing defects of components. They supplied wind turbine blades to a Portuguese company. Within the two-year warranty period, cracks requiring repair appeared on the blades. The Portuguese company themselves purchased the necessary materials and arranged for the repair in their own name and for their own account. Subsequently, by issuing debit notes, they recharged the costs to the Indian seller without Portuguese VAT, while claiming the right to deduct VAT on the invoices received from local subcontractors.

Not charging local VAT on the debit notes issued was challenged by the Portuguese tax administrator. The company argued that it was a mere refund of costs of the warranty repair, and not a generation of income, i.e., in their view, the transaction was outside the scope of VAT. However, according to the CJEU, this would apply only if the Portuguese company had acted in and for the seller's (the Indian company's) name and account when arranging the repair, recorded the costs on their balance sheet, and, above all, not claimed the right to deduct input VAT. Also, the related invoices would have to be issued directly to the Indian company.

The CJEU noted that a provision of services is deemed to be everything that is not classified as a supply of goods. Both the CJEU and the tax administrator also considered the contractual arrangement in form of a contract for the provision of services between the Portuguese and the Indian companies, whereby the buyer undertook to perform services aiming to repair the wind turbines.

On the criterion of whether a consideration was received, the CJEU commented that debit notes themselves can be regarded as consideration for provided services. The fact that no margin was charged on the costs is irrelevant. The CJEU thus concluded that the disputed transactions must be regarded as a provision of services for consideration; therefore, local VAT should have been charged on the debit notes issued by the Portuguese company.

There are only a few judgments dealing with warranty repairs and the re-invoicing of costs; hence the current decision might help in distinguishing whether a specific case involves the provision of repair services or a mere passing-on of costs.

News in brief, April 2022

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

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DOMESTIC NEWS

- The government has submitted a bill to the chamber of deputies for next year's complete abolition of the electronic reporting of sales.
- The Minister of Finance has decided to waive road tax prepayments for all vehicles and all taxpayers. The ministry is also currently preparing an amendment to the Road Tax Act abolishing the road tax for passenger cars and vans weighing up to 12 t for 2022. This measure is part of the Oil Trio, which also includes the abolition of the mandatory blending of biofuels into fuel (estimated price per litre of about CZK 2), and the introduction of a system to control the profit margins of fuel distributors.
- The Minister of Finance has also decided to waive VAT-related default interest for February 2022 to August 2022, or for the first quarter of 2022, or the second quarter of 2022, for VAT payers whose predominant part of income for the taxable period in question comes from the transport business. This must be reported to the competent tax authority when filing the regular or supplementary VAT return for the tax period concerned, all on the condition that the tax to which the interest relates must be paid by 31 October 2022 at the latest.
- The GFD has issued information on the employment of Ukrainian citizens coming to the Czech Republic in connection with the war in Ukraine. It mainly concerns the application of tax credits and tax reliefs for children in 2022. Employers will treat these persons in the same way as other employees, taking into account whether the employee is a Czech tax resident or a non-resident and whether they sign a payroll tax statement.
- The financial administration has launched a service that temporarily replaces the functions of the original Tax Information Box. The service "Viewing selected data" will allow access to selected information from personal tax accounts and taxpayers' files maintained by the tax authority and will be available for a temporary period of nine months. This will give taxpayers more time to log in to the modernised Tax Information Box Plus.

FOREIGN NEWS

- The OECD has published a commentary to the rules for introducing a global minimum tax (Pillar 2) aiming to provide multinational groups and tax administrations with a uniform and common interpretation. The OECD has also published draft model rules for domestic legislations on defining the range of companies to which Pillar 1 (redistribution of profits to market countries) will apply. For more information, see the OECD's news and KPMG's TaxNewsFlash.
- At its meeting on 15 March 2022, the Economic and Financial Affairs Council of the EU (ECOFIN) failed to reach a political agreement on the revised proposal for an EU minimum tax directive, which harmonises the introduction of a global minimum tax (OECD Pillar 2) across the EU. The compromise text included the deferral of the deadline for introducing the tax from 1 January 2023 to 31 December 2023, or up to 31 December 2027 if there are no more than ten ultimate parent entities in the given member state. Further information can be found here.

- The Ministers of Finance have reached political agreement on a general approach for the revised proposal for an EU carbon border adjustment mechanism (CBAM) aimed at reducing carbon emissions outside the EU. The Council has agreed to introduce a central registry to be set up at EU level to centralise CBAM declarants (importers). A de minimis exemption for consignments with a value of less than EUR 150 has also been envisaged, aiming to reduce administrative complexity. For more information, please refer to the EU Council's press release.
- The European Commission has announced that member states may consider temporary tax measures (e.g., in the form of a one-off tax) to tax unexpected profits generated by energy companies as a result of recent gas price increases.

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