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In brief

News in Brief, November 2022

Editorial

Last week, the never-ending story of the windfall tax came to a close. Whatever we may think of the reasons for its introduction and its structuring, the good news is that the parameters (if approved), or at least their possible variants, are now known and that the affected taxpayers may get ready.

In the Czech environment, however, the path to the planned revenues for the state budget has become very winding indeed. The collection of prepayments of the tax based on historical results will start already in 2023 and is sure to bring substantial revenues for that year's budget. However, the question remains how permanent these revenues will be, or whether they will be refunded to taxpayers upon the final tax assessment after the end of 2023.

This month’s Tax and Legal Update covers the parameters of the new tax in detail. The bill introducing it is already in its final stages. Yet, in terms of meeting the government's expectations, the crucial factor will be not only whether the companies concerned will continue to generate windfall revenues in 2023, but also how they will adapt to the new taxation, and whether they will exchange higher taxes for investments in the development of their businesses (using an interesting tax shield). For economists, this will offer the rare chance to test the Laffer curve in practice.



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Subsidies

Compensation for energy costs for large businesses: applications to be accepted from 15 November

On 2 November 2022, the Ministry of Industry and Trade published the first call for large businesses to apply for aid with respect to increased gas and electricity costs under the European Commission's Temporary Crisis Framework (TCF). Applications will be accepted from 15 November 2022 to 31 January 2023. CZK 30 billion is available for allocation, but the amount may further be adjusted. The call may end before this date, especially if the allocation is exhausted. Applications should therefore be prepared and submitted as soon as possible.



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Support for the increased costs of natural gas and electricity is intended for businesses that have at least one point of consumption and transmission, except for businesses:

- whose business activity according to the CZ-NACE classification of economic activities falls within the sectors in which the windfall tax is proposed to be applied (regardless of whether this tax will be introduced);
- whose electricity and gas prices are capped under Government Decree No. 298/2022 Coll.

Businesses will be able to apply for **support for eligible costs**, which are determined as the product of:

- the volume of natural gas and electricity units purchased by the company during the eligible period, i.e., from 1 February 2022 to 31 October 2022 and
- the increase in the unit price for these energies, which is determined as the difference between the unit price paid in the eligible period and twice the unit price paid on average by the company for the reference (comparative) period from 1 January 2021 to 31 December 2021.

Applicants may prove eligible costs on a monthly or a cumulative basis for the entire eligible period. At the same time, the amount of natural gas and electricity in September and October 2022 used to calculate eligible costs must not exceed 70% of the beneficiary's consumption for the same period in 2021.

The support will take the form of a **subsidy** provided to the beneficiary's bank account based on a decision to grant a subsidy issued by the support provider.
The basic amount of aid for all businesses will be **30%** of eligible costs, up to a maximum of CZK **45 million.** Simultaneously, a maximum subsidy of EUR 2 million shall apply to groups of partner and related companies de⊠ned according to the recommendation of the European Commission.

For **energy-intensive businesses** (with energy costs accounting for at least 3% of the production /turnover value) or businesses in selected sectors (energy-intensive businesses with more than 50% of their turnover for 2021 falling into the selected CZ-NACE sectors, e.g., production of paper, chemicals, hollow glass, copper and

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other), the following main condition shall also apply:

- The applicant has incurred **an operating loss** in the eligible period, at least half of which is due to heightened natural gas and electricity costs.

Upon meeting selected conditions, energy-intensive businesses may qualify for aid of up to **50%** of eligible costs, or up to **70%** in the case of businesses operating in selected sectors, but only up to the lesser of 80% of operating losses or CZK 200 million. Where corporate groups are concerned, a limit of EUR 25 million applies to groups in which energy-intensive businesses apply for aid and EUR 50 million to groups in which businesses operating in selected sectors apply for aid.

Other conditions of the programme include, e.g., the obligation to keep documentation related to the aid for 10 years, during which the relevant authorities may also carry out inspections. At the same time, all members of the company's statutory body must declare that, at the time of the application for aid, they will fully (and not only temporarily) waive any increases in their remuneration (including all components and variables thereof) for the current fiscal period without compensation.

Applications will be administered through the **Ministry of Industry and Trade's Agenda Information System** or a similar system.

Each application shall be accompanied by:

- affidavit of the applicant for aid
- statement of eligible costs
- if eligible costs are reported on a monthly basis, an independent auditor's report on an assurance engagement.

If the applicant is applying as an energy-intensive business or a business operating in a selected sector, they must also attach:

- an adjusted income statement
- an energy performance statement
- an independent auditor's report on an assurance engagement
- or a statement of information provided by a business operating in a selected sector.

The preparation of these applications will therefore be time-consuming.

Applications meeting formal evaluation criteria will be recommended for support. We will be happy to assist you in reviewing the eligibility of your application for support.

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Deputies pass windfall tax

The chamber of deputies today have approved the introduction of a tax on windfall profits for 2023 to 2025, in the form of a bill submitted by the Minister of Finance. All amending proposals were withdrawn or rejected.



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The deputies accepted only a legislatively technical amending proposal clarifying that income from activities qualifying for the windfall tax shall be determined as the annual total net turnover from the qualifying activities under the Accounting Act.

According to the reasoning given during the discussion in the chamber, this amending proposal was adopted primarily to clarify and confirm that only income from the activities qualifying for the windfall tax, and not all income of the taxpayer, is relevant for meeting the CZK 2 billion limit. The total relevant income is based on the annual total net turnover from these qualifying activities only. The bill will now be considered by the senate.

The parameters of the approved tax are summarised here.

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Subsidies

Compensation for energy costs for businesses: basic parameters

The expected aid for companies facing increased natural gas and electricity costs due to extraordinary energy price increases is imminent. The government has specified the terms of the programme with an expected allocation of up to CZK 30 billion and has announced a call with specific parameters to take place in the first half of November. However, these parameters are still to be adjusted according to the amended Temporary Crisis Framework, approved by the European Commission as a building stone of the programme on 28 October 2022.



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According to the latest information from mid-October, the support for the increased costs of natural gas and electricity is intended for businesses operating in all sectors of the Czech economy, except for sectors where the introduction of a windfall tax is being considered. Entities and enterprises with capped electricity and gas prices according to Government Decree No. 298/2022 Coll. will also be excluded from the compensation's scope.

Businesses will be able to apply for support for eligible costs determined using:

- the volume of natural gas and electricity units purchased by the company in the eligible period, i.e., from 1 February 2022 to 31 December 2022 (the revised framework extends the eligible period to 31 December 2023) and
- the increase in the unit price for these energies, which is determined as the difference between the unit price paid in a given month of the eligible period and twice (1.5 times under the revised framework) the unit price paid by the company on average for the so-called reference (comparative) period from 1 January 2021 to 31 December 2021.

Businesses will thus be eligible for support if their energy costs increase at least twofold (or 1.5-fold under the revised framework).

The support will take the form of a **subsidy for eligible costs** provided to the beneficiary's bank account on the basis of a decision to grant the subsidy issued by the aid provider. For all businesses, the basic subsidy will be at least 30% of eligible costs (50% under the revised framework), up to a maximum of EUR 45 million (CZK 100 million under the revised framework).

The revised framework also includes the possibility to grant public aid amounting to **40% of eligible costs**, up to EUR 100 million. However, the EBITDA (including aid granted) for the eligible period cannot exceed **70% of the EBITDA** for the comparative period.

For **energy-intensive businesses** where energy costs account for at least 3% (of the production/turnover value), the following will apply:

- obligation to prove an operating loss with relevant documentation; at least half of the loss must be due to

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the cost of natural gas and electricity (the revised framework only includes a requirement to document a decrease in EBITDA of at least **40%** in the eligible period or negative EBITDA compared to 2021).
- entitlement to **50%** (**65%** under the revised framework) of eligible costs.
- Where turnover from activities in particularly affected sectors such as the production of paper, chemical fibres, hollow glass, copper and other listed in Annex I of the Temporary Crisis Framework accounts for more than **50%** of the company's total turnover for 2021, the aid may reach up to **70%** of the eligible costs for all the activities of the company (**80%** under the revised framework).

The proposed maximum aid amount for energy-intensive businesses is EUR 200 million, limited to **80% of the business's operating loss**. The revised framework provides for maximum aid of EUR 50 million or EUR 150 million (if the business operates in selected sectors). At the same time, however, it lays down the condition that the EBITDA (including the aid granted) for the eligible period cannot exceed **70% of the EBITDA** for the comparative period.

The programme specifies other conditions, such as the obligation to keep the documentation related to the aid for ten years, during which time the relevant authorities may carry out inspections. At the same time, the company's management must declare that, at the time of submitting the application for support, they fully (and not only temporarily) **waive any increases in their remuneration** (and components thereof including any variables) for the current fiscal period without compensation. Other conditions such as a commitment to determine a pathway to reduce the carbon footprint of energy consumption or the introduction of energy efficiency measures may be added according to the revised framework.

Applications should be administered through **the Ministry of Industry and Trade's Agenda Information System** or a similar system.

The specific parameters of this support programme will be described in the call expected to be announced in the first half of November.

Update: The Programme has been announced by the Ministry of Industry and Trade on 2 November. You can learn more here.

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Windfall tax's final stages: bill to be debated in Parliament

Parliamentary deputies are currently discussing the proposal to introduce a tax on windfall profits (windfall tax) for selected taxpayers in the fossil fuel and energy sectors and for banks. The tax should apply between 2023 and 2025. Excess profits are defined as the general income tax base exceeding the average of tax bases or tax losses for taxable periods beginning and ending between 1 January 2018 and 31 December 2021, plus 20%. The tax base so determined would be subject to an additional tax of 60%.



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Taxpayers and taxable period

The payer of this tax will generally be a payer of corporate income tax generating income qualifying for the windfall tax of at least CZK 50 million in a taxable period falling at least partially within the windfall tax application period (2023-2025). Under these general preconditions, the bill defines three categories of taxpayers.

The first category consists of taxpayers who have income from the activities stated below, provided that the income qualifying for the windfall tax from those activities for the first accounting period ending on or after 1 January 2021 accounted for at least 25% of their annual total net turnover.

- mining of hard coal
- extraction of crude petroleum and natural gas
- production of coke oven products
- manufacture of refined petroleum products.

The second category comprises taxpayers generating income from the following activities:

- production, transmission, and distribution of electricity except for the combined production of electricity and heat in a ratio of electricity produced to heat supplied of less than 4.4
- gas production; distribution of gaseous fuels through networks
- wholesale of liquid fuels and related products
- wholesale of gaseous fuels and related products
- transportation by oil pipeline
- transportation by gas pipeline.

For this category, in addition to meeting the general preconditions above, in the windfall tax application period the taxpayer will have to be part of a corporate group (with the sum of the relevant income of all taxpayers within the group for the first accounting period ending on or after 1 January 2021 of at least CZK 2 billion) or record income qualifying for the windfall tax of at least CZK 2 billion for the first accounting period ending on or after 1 January 2021.

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The third category of taxpayers are banks, namely those whose net interest income (the income qualifying for the windfall tax) for the first accounting period ending on or after 1 January 2021 exceeds CZK 6 billion while meeting the general precondition of having generated net interest income for the relevant taxable period of at least CZK 50 million.

Tax base and rate

The tax base for windfall profits is based on the general corporate income tax base and determined as the difference between the reference and comparative tax bases. The reference tax base is the tax base for the current taxable period or part thereof falling within the 2023 to 2025 period before applying deductible items and after excluding foreign income and related expenses. The comparative tax base is the average of the tax bases and tax losses (again excluding the effect of deductible items and foreign income) for taxable periods beginning on or after 1 January 2018 and ending on or before 31 December 2021, plus an absolute value of 20% of that base or loss.

The tax rate is proposed at 60%. This tax would be applied on top of the statutory corporate income tax (19% on the entire tax base).

Prepayments

Windfall tax prepayments shall be made already in the second half of 2023 based on the fictive tax reported to the tax administrator for the last taxable period ending before 1 January 2023 (i.e., for the 2022 taxable period, for example). In this report, the taxpayer shall include information they would have recorded in their windfall tax return and shall use this information to determine the amount and frequency of prepayments. This report must be submitted by 3 July 2023 at the latest. After filing the first tax return (i.e., for 2023, for example), prepayments shall be determined based on the last known tax liability.

Further development

The proposal to introduce a windfall tax will be discussed by the deputies in the final third reading on 4 November 2022. A vote will also be taken on any amending proposals tabled so far. An amending proposal that would have moved forward the application of the tax to 2022 was not included after all. The amending proposals submitted include, inter alia, a proposal to reduce the limit on qualifying net interest income for banks to CZK 2 or 3 billion; a reduction in the tax rate to 40% for 2024 and 2025; a condition that the group's qualifying income must be at least 50% of the turnover of the first category of taxpayers; and the exclusion of commodity traders from the scope of this tax. After its approval by the chamber of deputies, the bill will be discussed by the senate.

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Temporary protection extended by one year

In response to the war in Ukraine, the EU member states adopted a coordinated approach to refugee protection and enshrined temporary protection status in their national legislations. Under Czech regulations, temporary protection provides its holders with many benefits - the possibility of legal residence and work in the Czech Republic as well as access to health care and education. However, the scope of temporary protection is limited to 31 March 2023. The government has now submitted a bill extending its validity by one year.



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The Czech Republic regulates the situation of Ukrainian refugees through three laws adopted in March of this year. Until now it has been unclear how the residence of temporary protection holders will be dealt with after 1 April 2023, as the current legislation does not allow for a transition to standard residence permits. This issue should be resolved by an amendment known as Lex Ukraine 4.

Lex Ukraine 4: two extension options

The bill provides for the extension of temporary protection until 31 March 2024 while working on two options on how the extension will be implemented. In neither case will the extension be automatic; both solutions under consideration involve the cooperation of the temporary protection holders. Under the first option, to extend the temporary protection status, the foreigner would have to register via an electronic form on the Ministry of the Interior's website by the end of March 2023. Simultaneously, the system would assign each foreigner an appointment before the end of September 2023 to appear at the Department of Asylum and Migration Policy of the Ministry of the Interior so that a visa sticker can be reapplied.

The second option also works with an electronic form but does not require a visit to the Department of Asylum and Migration Policy to pick up a new visa sticker. Electronic registration would automatically extend the validity of temporary protection until 31 March 2024 without updating this information in the foreigner's passport. If the foreigner fails to register, the temporary protection will expire on 31 March 2023. The bill allows for the possibility of reapplying if, e.g., the deadline for registering for an extension is missed.

Impossibility of secondary migration remains

An extended temporary protection status would further preserve existing benefits such as free access to the labour market, accommodation, and ☒nancial support. By contrast, the bill does not amend the provision that many temporary protection holders and their potential employers often worry about, which is the impossibility of secondary migration, i.e., granting temporary protection status to those who have already received it or applied for it in another EU country. This relatively strict approach compared to other countries is therefore unlikely to change.

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The bill has only just entered the legislative process. It is therefore likely that it will be further modified. Given that the EU is in the process of a coordinated extension until 31 March 2024, we do not expect any significant deviation from this proposal.

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Amendment to VAT Act to increase limit for compulsory VAT registration

The limit for compulsory VAT registration should increase from CZK 1 million to CZK 2 million from 1 January 2023. This should particularly help small businesses adversely affected by the COVID-19 pandemic. The draft amendment contains other changes, e.g., regarding deadlines and penalties.



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The proposal to increase the registration limit also follows the amendment to the VAT Directive according to which the European Commission allows member states to increase the VAT registration limit to EUR 85,000 from 2025. The change should result in a reduction in the administrative burden on small businesses.

The amendment regulates the cancellation of registration on request and ex officio if the turnover does not reach CZK 2 million for the last consecutive twelve months. Transitional provisions address the situation where a taxable person who is not yet a VAT payer exceeds a turnover limit of CZK 1 million but not the new limit of CZK 2 million at the end of the year. Such a taxable person does not have to join the VAT system unless they voluntarily decide to do so. Another transitional provision addresses existing VAT payers failing to meet the new registration limit. In this situation, the VAT payer may withdraw from the VAT system **within five days of the effective date of this amendment by applying for the cancellation of their registration.**

The draft amendment also increases the turnover threshold from CZK 250,000 to CZK 500,000 where VAT payers have an option to apply for the cancellation of their registration 3 months after the date of becoming VAT payers due to the acquisition of assets on the basis of a decision on privatisation, acquisition of a business establishment or assets on the basis of a transformation of a corporation, or due to the continuation of trade after the VAT payer's death. The draft amendment also proposes to **extend the deadline for responding to the tax administrator's call** in case of doubt about the correctness or completeness of the data provided in a VAT ledger statement if the call is delivered by data message. The deadline shall extend to 17 days from the date the call is delivered to the data box. Therefore, the earlier the VAT payer opens the data box, the longer they will have to respond.

Another novelty is **a reduction of penalties for breaches of obligations related to VAT ledger statements** to half the amount, applying only to natural persons and limited liability companies that have only one natural person as a member.

We can only hope that the amendment to the VAT Act will make it through the entire legislative process by the end of the year.

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Tips and tricks

Appeals proceedings: How long may it take?

The tax authority has assessed you with additional tax. You disagree and therefore decide to file an appeal, hoping to get a remedy soon. How long will it take for the appellate authority to examine the case? Are there any deadlines that the appellate authority must meet? In our Tips and Tricks section, this time we look at the deadlines in the appeals proceedings.



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The most important deadline in tax proceedings is **the time limit for the assessment of tax**. Its course therefore has a major impact on the appeals proceedings, as the entire tax proceedings ends when the decision on the appeal is issued. The appellate authority must be able to issue a decision on the appeal within this time limit. If that time limit expires during the appeals proceedings, the appellate authority is obliged of its own motion to discontinue the proceedings and annul the decision of the first-instance tax authority. If this happens, the proceedings ends without the case itself being examined and the tax being assessed. Where the case spans several periods, the time limit shall be assessed separately for each period.

The ☒nancial administration bodies are well aware of the importance of this deadline and have set up automatic mechanisms to monitor its course. However, the mechanism for monitoring deadlines is not always flawless. Moreover, despite numerous relevant case law, there are still a number of unresolved issues related to the tax assessment time limit. We therefore recommend always checking whether it might be possible to argue that the time limit has already expired and that the tax therefore cannot be assessed. Same as the appellate authority, the court should also examine the expiry of the time limit for the assessment of tax ex officio, but it is also true here that the law aids the vigilant. We recommend that the court or the appellate authority be notified of the expiry of the time limit, including statement of grounds.

However, it is not just the time remaining for the assessment of tax that affects the duration of the appeals proceedings. To standardise the length of the appeals proceedings at least partially, the Ministry of Finance has issued Instruction No. MF-5 on the determination of time limits in tax administration, which provides that the **time limit for issuing a decision** on an appeal is six months from the date of receipt of the appeal. However, this is not a final time limit but rather a standard time limit, as its running may be affected by certain factors that may suspend or extend it. In our experience, the appeals proceedings in practice take about a year, often longer if the time limit for tax assessment permits so. The Supreme Administrative Court has held in this respect that the six-month time limit for deciding on an appeal is legally binding on the administrative authorities: they cannot deviate from it; otherwise, such a procedure would be impermissibly arbitrary. However, failure to comply with that time limit does not result in the appeals proceedings being discontinued or the decision of the first-instance tax administrator being annulled, nor does it result in the subsequent decision of the appellate authority being unlawful.

We will look at how to effectively defend against the tax authorities' inaction and overly long proceedings in the next issue of Tax and Legal Update.

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Subsidies

TREND programme to support development of 5G technologies

In October, the Technology Agency of the Czech Republic (TA CR) announced the 8th call to participate in research and experimental development under the TREND programme with a focus on the development of 5G and higher technologies.



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Eligible for support will be industrial research and experimental development projects aimed at putting research results into practice, in particular into industrial production and product offerings on the market, as well as projects developing new services, technologies and materials, and increasing the level of automation and robotics and the use of digital technologies.

The planned funds for allocation are CZK 300 million. Large businesses may also apply for support. The maximum aid intensity may reach up to 50% of eligible costs for large businesses and up to 65% of eligible costs in the case of effective cooperation. The maximum aid amount per project is EUR 15 million. Applicants may submit a maximum of four project proposals under this call.

Applications will be accepted from **6 October to 23 November 2022**. Applicants must start the physical implementation of the project between June and August 2023 and complete it by 31 December 2025 at the latest. The project should take between 12 to 31 months.

Only projects that involve putting the project results/outputs into practice can be supported. The project results/outputs thus represent binding parameters to be achieved by the time of project completion. The project result/output may be an industrial design, utility model, prototype, functional sample, software, semi-production, or proven technology.

Eligible costs include personnel costs, subcontracting costs, other direct costs, and indirect costs of up to 20 % of the actual recognised personnel costs and other direct costs in the relevant calendar year.

If you are interested in this programme, we will be happy to examine whether your activities can qualify for support.

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Subsidies

TREND programme for newcomers

The Technology Agency of the Czech Republic (TA CR) has announced the preliminary parameters of the next call for proposals under the TREND programme to support industrial research and experimental development. The 9th call is intended to kick-start enterprises' own research and development activities. The call is expected to be announced on 23 November 2022.



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The programme will support entities that have so far neither regularly carried out their own research and development activities nor purchased research and development (R&D) services from research organisations. Only those companies that have received R&D support in the last five years up to a maximum of **EUR 1 million** in total are eligible to apply. In addition, there is a prerequisite for cooperation within the project with at least one research organisation.

Amount of aid available:

- maximum amount of ☒nancial support per project: CZK 15 million
- maximum aid intensity per project: up to 80% of eligible costs
- eligible costs may include personnel costs, subcontracting, other direct costs, indirect costs of up to 20% of personnel and other direct costs actually recognised in a given year.

The project 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 shall also be accepted.

According to the disclosed preliminary parameters, the call for proposals will be open until 11 January 2023, and projects must be launched between July and September 2023. Further conditions will be known on the day the call for proposals is announced.

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Registration of beneficial owners: who exercises control?

Effective 1 October of this year, the Act on the Registration of Beneficial Owners has undergone fundamental changes. The legislators complied with the requirements of the European Commission and eliminated the deficiencies concerning the definition of beneficial owner under the 5th AML Directive. The new definition extends the range of persons to be registered as beneficial owners.



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Since 1 October 2022, the beneficial owner is a natural person who:

- a) has a stake in a corporation or a share of voting rights of more than 25%
- b) has the right to a share in profits, other own resources (equity), or a liquidation balance of more than 25%
- c) exercises a decisive influence in a corporation or in corporations that individually or jointly have a stake of more than 25% in that corporation
- d) exercises a decisive influence by other means.

The relatively inconspicuous wording of letters c) and d) extend the range of persons who will newly need to be registered as beneficial owners. Decisive influence (control) in a corporation is exercised by the one who, at their own discretion, can directly or indirectly achieve that the decision-making of a corporation's supreme body corresponds to their will. It is therefore the ability to significantly influence the decision-making of the entity's supreme body (usually the general meeting), and not only in the positive sense, i.e., the ability to ensure that certain decisions are adopted, but also in the negative sense, i.e., having a veto right.

In certain situations laid down by the law, for example in the case of a controlling person under the Business Corporations Act or in the case of persons who may appoint or dismiss the majority of members of the statutory body of a corporation, decisive influence (control) is presumed. However, it can also arise for other reasons, even just contractual ones: for instance, the company's creditor who has contractually reserved the right to veto certain decisions of the company's supreme body may become its beneficial owner.

What about 'acting in concert'?

Decisive influence can also be exercised through acting in concert. This means actions by two or more persons using their voting rights to jointly influence, control, or manage a business corporation.

Concerted action is also presumed in some cases, such as close persons or persons who have concluded an agreement on the exercise of voting rights, but it can arise in virtually any way. If acting in concert is considered, even very small stakes may become relevant from the perspective of the registration of beneficial owner if their holders act in concert with a majority shareholder, member, or partner.

Imagine a company with four members/partners: a father with a 1% stake, and three sons, each with a 33% stake.

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Although the father's share is minimal and in itself has a negligible influence on the company's decisions, it must be considered that the sons respect his views when making decisions about the company and will do nothing against his will. All members/partners thus act in concert. This then leads to the situation where all four members/partners are regarded as beneficial owners. Acting in concert shall also be recorded in the register of beneficial owners.

A rebuttable presumption applies to acting in concert, i.e., if persons who are presumed to act in concert, such as members/partners who are also family members, do in fact not act in concert, this must be proved. It is obvious that the new concept of beneficial owners may in some cases **significantly broaden the range of persons who need to be registered as beneficial owners**. The Act on the Registration of Beneficial Owners stipulates that the registering persons are obliged to ensure that the data in the register of beneficial owners comply with the new requirements, within six months of the effective date of the amendment to the act. Within this period, they are exempt from any related court fees.

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Self-employed can associate and bargain collectively

The European Commission has issued guidelines on the application of EU competition law to collective agreements regarding the working conditions of self-employed persons who are in the same position as employees. Under these guidelines, it will be possible for self-employed persons, to associate like employees for collective bargaining purposes without infringing on EU competition law.



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Article 101 of the TFEU prohibits agreements between undertakings that restrict competition. As self-employed persons fall under the definition of an undertaking under EU law, they run the risk of breaching competition rules when collectively bargaining about their remuneration or other business conditions. Consequently, they may be subject to penalties of up to 10% of their worldwide annual turnover, which puts some self-employed persons at a significant disadvantage compared to employees. The newly adopted guidelines aim to address this issue.

The guidelines define the following categories of self-employed persons, who according to the Commission are **in the same position as employees** and should therefore have the right to bargain collectively without infringing on competition law. Specifically:

- self-employed persons without employees ('solo self-employed persons') who provide their services exclusively or mainly to one counterparty
- self-employed persons without employees working side-by-side with employees
- self-employed persons without employees working through digital labour platforms
- self-employed persons who may have difficulties in influencing their working conditions due to a weak negotiating position vis-à-vis their counterparty.

This exception to general EU legislation prohibiting the conclusion of **cartel agreements** is to apply to all agreements concluded collectively between the above categories of self-employed persons on the one hand and the customers of their services on the other hand (collective agreements), if they concern the working conditions of these self-employed persons (e.g., remuneration, working hours, holidays, insurance, conditions for termination of services). The guidelines also allow self-employed persons to be covered by a collective agreement that has already been concluded and has so far applied only to employees. This means that self-employed persons in the position of de facto employees can now associate and bargain collectively without the risk of sanctions.

The guidelines follow the long-term development of the case law of the Court of Justice of the EU, which has repeatedly ruled that, under certain conditions, self-employed persons must be regarded as employees and be granted rights typically belonging to employees, including the right to bargain collectively. The guidelines were also adopted in the context of current changes in the labour market, in particular production process digitalisation, and the growing number of self-employed persons providing their services through online platforms (e.g., Uber or Bolt).

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From our point of view, this is a step in the right direction, especially considering the number of people working through digital platforms, which was over 28 million in the EU at the beginning of this year, while further growth of this sector is expected. We therefore assume that collective bargaining for self-employed persons, whether in the form of negotiating collective agreements or founding trades, will be gaining importance in the Czech Republic as well.

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When does Labour Code not apply to truck drivers?

In the summer, an amendment to the Road Transport Act entered into effect, as a result of which certain provisions of the Labour Code shall not apply to drivers in international road transport from 1 August 2022. The amendment thus restricts certain labour-law standards for drivers who have been posted by their employers from another EU member state to the Czech Republic.



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The provisions of the Labour Code will not apply to drivers posted by their employer (a carrier established in another member state) to perform work within the framework of the transnational provision of services in the territory of the Czech Republic. Similar regulation should also be adopted by the other EU member states to avoid a disproportionate administrative burden for road transport operators.

As a result of the amendment, **Section 319 of the Labour Code**, i.e., provisions concerning minimum vacation, maximum working hours, and minimum wages under the Labour Code **shall not apply to drivers**. Carriers whose drivers perform one of the defined types of transport may not apply this section. Specifically, the exemption from the Labour Code shall apply if the driver performs exclusively bilateral road freight transport for hire or reward purposes, or regular, occasional passenger, or international shuttle transport. Bilateral road transport means that the point of departure and the point of destination/arrival are situated in two states, in one of which the carrier is established. Other states through which the driver passes are only transit states. Thus, the provision shall not apply, e.g., when a carrier providing occasional passenger transport makes local excursions in the territory of a state other than that in which it is established.

Bilateral transportation also covers transportation with **additional activities**, i.e., where the Czech Republic is not the point of departure or arrival, and yet loading or unloading of freight or picking up or setting down passengers takes place here. It is considered additional activity if the carrier performs one such activity during the freight transport to the final destination. Or, if no such activity was carried out on the way to the final destination, two activities are carried out when returning to the point of departure (i.e., the carrier may, e.g., carry out two unloading operations on the return journey). However, this exemption has a time limit until 20 August 2023. From that date, only drivers whose vehicles are equipped with smart tachographs will be able to carry out additional activities.

The Czech Labour Code will continue to apply to drivers who carry out **cabotage**, i.e., where the drivers transport animals, goods, or persons within the state to which they were posted or between two states in none of which they are not established. In such a situation, the conditions concerning, e.g., the minimum time of rest shall apply in the same way as to employees of Czech employers.

The observance of the rules will be checked by the Police of the Czech Republic, who may require the drivers to submit a document proving they perform transport under the international road transport scheme, and a record of

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time driven, safety breaks, and rest periods.

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EU unifies chargers for phones, tablets, and laptops

From 2024, all phones and tablets sold in the EU will have to be equipped with a USB Type-C charging port. Two years later, the obligation will extend to laptops.



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At the beginning of October, the European Parliament passed a new directive introducing the obligation for manufacturers to equip mobile devices with a USB Type-C port from the end of 2024. The directive affects almost all mobile devices rechargeable via a cable with a power delivery of up to 100 Watts. In addition to phones and tablets, these include, e.g., headphones, speakers, navigation systems, digital cameras, and e-readers. The rules will also apply to products by Apple, long opposed to the directive. Laptop computers will only be subject to the directive from 2026.

A single charger will make life easier for consumers and promote environmental protection. It will also have a positive impact on the retailers and distributors of chargers, whose turnover is expected to grow by up to EUR 457 million per year, as consumers will be able to purchase a new device without a charger and buy one separately – even if retailers offer a charger as part of the mobile device package. On the other hand, retailers whose devices do not yet have a USB Type-C charging port will have to prepare for this change.

The draft directive must now be approved by the Council of the EU and then transposed into Czech law. However, considering the broad political consensus on the matter, it is expected that it will be passed soon. Sellers of phones and other portable devices who are to be affected by this obligation should start preparing their operations, products, and related documentation for the upcoming change.

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Compensation for connecting flight delays mandatory

The Court of Justice of the EU strengthened air passenger rights while highlighting the role of travel agents in ticket sales (C-436/21). Passengers will thus be entitled to compensation even for the delay of a connecting flight operated by a different air carrier not bound by the specific legal relationship. It is sufficient that a travel agent combined the flights into a single ticket and charged the passenger for the total price



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In the present case, a passenger purchased a ticket from a travel agent from Stuttgart (Germany) to Kansas City (USA), the journey consisting of three flights with different airlines which had no legal relationship between each other. The travel agent from whom the passenger purchased the ticket merely issued a single ticket and charged the passenger the total price for all those flights. While the first Swiss International Air Lines AG flight and the second American Airlines flight went as planned, the third American Airlines flight between Philadelphia and Kansas City was delayed by more than four hours.

The passenger sought a one-off compensation of EUR 600 payable to passengers in the event of a flight delay of more than three hours, pursuant to Regulation (EC) No. 261/2004 of the European Parliament and of the Council and the established case-law of the Court of Justice of the EU (in particular the judgment in Sturgeon, C-402/7 and C-432/07). They sought compensation even though the delayed flight itself did not fall within the scope of the regulation (it was not a flight from an airport in the EU territory) and Swiss International Air Lines AG had no legal relationship with American Airlines.

In its judgment C-436/21 of 6 October 2022, the Court of Justice of the EU stated that the concept of **connecting flights** covers transportation consisting of several flights operated by different operating air carriers not bound by a specific legal relationship where those flights were combined by a travel agent who charged a total price and issued a single ticket. A passenger departing from an airport in the territory of the EU whose flight to the destination of the last flight (in this case, Kansas City) was delayed on arrival by at least three hours is therefore entitled to compensation under Article 7 of that regulation. It does not matter that there was no legal relationship between the air carriers and that the interconnectedness of the individual flights had been created only by the travel agent. The condition of a legal relationship between airlines would significantly restrict passengers' rights to seek compensation for long delays.

The Court of Justice of the EU has thus once again **upheld air passengers' rights while emphasising the role of travel agencies** (including OTAs – online travel agencies) in the sale of air tickets. On the other hand, travel agents may face a higher risk of legal actions for damage compensation by air carriers having to compensate passengers for flight delays.

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EU to increase state support for businesses hit by energy crisis

The European Commission has extended the Temporary Crisis Framework allowing direct subsidies or other forms of state aid for businesses affected by the energy crisis to mitigate the negative economic impact.



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The Temporary Crisis Framework allows EU member states to ☒nancially support businesses affected by the energy crisis. Through direct subsidies and other forms of aid (e.g., loans, guarantees, tax relief), member states can help businesses ensure sufficient liquidity for their operations and compensate for the additional costs incurred because of exceptionally high gas and electricity prices.

As the Temporary Crisis Framework was to end on 31 December 2022, the European Commission has decided to extend it to allow member states to continue to make use of exemptions from the ban on granting state aid in connection with the ongoing war in Ukraine and the energy crisis. The adopted amendments complement the EU's emergency measures on intervention in energy markets and:

- extend the validity of the measures under the Temporary Crisis Framework until 31 December 2023
- **increase the maximum aid limit for a single business up to EUR 2 million**; however, aid may be higher if other conditions are met
- **provide for more ☒exible criteria for granting aid** (e.g., in exceptional cases, allowing public guarantees exceeding 90% coverage to be granted to energy businesses)
- require recipients of aid of more than EUR 50 million to meet commitments to reduce their carbon footprint and protect the environment.

The new wording of the Temporary Crisis Framework thus allows higher state aid to be granted to businesses. However, larger businesses will have to commit to meeting additional EU green policy obligations.

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Case law

Definition of concern group for actions to set aside under insolvency act

The Business Corporations Act defines a group (a 'concern') as follows: one or more persons subject to single management by another person or persons form a concern group with that dominant person. However, the concept of a concern group is also used in other legal regulations which do not contain its definition; hence, inconstancies may arise over its interpretation in the context of individual laws. One of the regulations that use the term is the Act on Bankruptcy and its Resolution (the Insolvency Act).



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On one hand, meeting the definition of a concern group provides several advantages to the parties involved: e.g., they can apply a more favourable regime regarding compensation for damage caused and can give instructions on business management to the managed person's statutory body. On the other hand, there are also **negative consequences** associated with the existence of the concern group: for instance, under the Insolvency Act, vis-à-vis a person forming a concern group with the debtor, creditors may seek to set aside (declare ineffective) a legal act made without adequate consideration for the benefit of such person in the last three years before the insolvency proceedings were initiated.

In decision No. 29 Cdo 14/2020, the Supreme Court recently dealt with **assessing the existence of a concern group in the context of a bankruptcy receiver's action to set aside** (the Paulian action). For these purposes, the court held that the concept of a concern group under Czech law cannot be confused with mere control, as the mere fact that two companies are in their mutual relations controlled and managed by one person shall not in itself lead to the conclusion that they together form a concern group. On the contrary, the court held that a necessary prerequisite for the existence of a concern group is single management pursuant to Section 79 of the Corporations Act, which is conditional upon the existence of the dominant person's control, its influence on the dependant person's activities, the long-term promotion of the group's interests, the group's single policy, and coordination and conceptual management of at least one of the important components of the group's business. The law does not define the specific form that establishes the existence of a concern group (e.g., its de facto origination, origination by a contractual arrangement or by a decision of a body of the managed person); however, the defining features of a concern group must always be met, and the facts of the case have to be assessed.

In addition, for a concern group to come to existence, the law also stipulates the obligation to **publish a concern group declaration**; without fulfilling this obligation, the benefits stipulated by the Corporations Act cannot be applied.

The Supreme Court thus confirmed **a unified interpretation of the concern group concept in the law**, meaning that to prove the existence of a concern group in the context of an action to set aside under the Insolvency Act, it is necessary to prove the fulfilment of the conditions under the Corporations Act, and these requirements cannot be disregarded or mitigated when interpreting the concept of a concern group in the context of other legal regulations.

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Finally, the Supreme Court refused to apply the concept of **a single economic unit** used in competition law. A single economic unit doctrine is an exceptional situation where the parent company may be held liable for the unlawful conduct of its subsidiary. In this context, according to the Supreme Court, it is necessary to distinguish between the private-law regulation of a concern group on one hand, and the public-law regulation of competition on the other hand. Therefore, an exception cannot be applied to relationships that do not involve any infringement of public-law rules protecting competition, therefore also not to contractual relationships entered into voluntarily.

To conclude: **distinction must be made between various forms of business groupings**, as the law attaches different consequences to different degrees of their integration, such as the liability for damage caused, the duty to disclose entities in the report on relations, or the possibility to effectively subject the entity to single management within the concern group.

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Case law

Penalty for filing VAT ledger statement for incorrect taxable period

In case 5 Afs 281/2021-34, the Supreme Administrative Court (SAC) dealt with the question of whether a CZK 50,000 penalty had been legitimately imposed on an entity who had incorrectly filed a VAT ledger statement for a previous period. The SAC concluded that the purpose of such penalty is to deter taxpayers from not complying with their obligation to file a VAT ledger statement, and that in the case in question, the company's conduct did not meet this criterion.



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In the present case, a company filed a regular VAT ledger statement for August 2019 with a one-day delay caused by technical problems. The company mistakenly attached a VAT ledger statement relating to the taxable period of January 2019. The tax administrator called upon the company to file an additional statement, but the notice was delivered to a company representative without the power of attorney necessary for such matters. The tax administrator then imposed a penalty of CZK 50,000 on the company, corresponding to a sanction for not filing the VAT ledger statement even within a substitute deadline.

The company objected, arguing that they did file the VAT ledger statement, albeit in the form of an incorrect file. Throughout the proceedings, the tax administrator stated their ground claiming that the filing of a VAT ledger statement for another taxable period was completely irrelevant for tax administration, as it did not fulfil its primary function of informing the tax administrator about transactions carried out in the given taxable period and thus not allowing them to respond promptly to a high risk of a reduction in the tax liability.

The Municipal Court agreed with the tax administrator's conclusions, but the company disagreed with its arguments and the case proceeded before the SAC. The SAC strongly opposed the imposed penalty and ruled that it was up to the tax administrator to find out the true meaning of the VAT ledger statement submitted in the form of an incorrect file and call upon the company to remedy the situation by giving them a notice. With regard to the inadequate power of attorney of the representative, the tax administrator should have informed the company directly about the receipt of a VAT ledger statement for a different period, which had been already filed. The penalty imposed by the tax administrator corresponded to a penalty with which the tax administration aims to deter taxpayers from not fulfilling their obligation to file a VAT ledger statement, which was not the case here.

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Case law

VAT treatment of sub-participation agreements

The Court of Justice of the European Union (CJEU) has dealt with the question whether sub-participation agreements, whereby a creditor under a credit agreement (a lender) transfers the credit risk to a third party, are covered by the exemption from VAT on granting, negotiating and managing credits.



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In a sub-participation agreement, **the lender transfers their risks arising from the credit agreement to a third party**, while the respective loan receivable remains on their balance sheet. The sub-participant either provides the lender with funds, or just shares the risk and only provides the funds to the lender when the borrower defaults. The borrower is not a party to the sub-participation agreement and if they fail to meet their obligations, the sub-participant is not entitled to a refund of the funds provided to the lender.

In case C-250/21, the CJEU dealt with the VAT treatment of a sub-participation whereby a bank covered their risk from a credit agreement. When granting a credit to the borrower, the bank at the same time concluded a sub-participation agreement with an investment fund. Under this agreement, the fund provided the bank with funds corresponding to a part of the credit granted, and the bank undertook to transfer to the fund the collected instalments that were paid to it by the borrower over the term of the credit agreement. The point of dispute was the VAT treatment of the consideration received by the investment fund (the difference between the amount paid to the bank upon entering into the sub-participation agreement and the received instalments). The question was whether that service fell within the scope of 'granting and negotiating credit' and could thus be exempt from VAT. The Advocate General believed the service did not constitute a granting of credit, but she did not exclude its exemption from VAT: instead, she suggested that the transaction might be exempt under Article 135(f) of the VAT Directive.

The CJEU confirmed that it was a case of granting credit: in its opinion, granting of credit consists, inter alia, in the provision of capital against remuneration, which a sub-participation agreement meets. Also, the sub-participant bears the credit risk, and it is irrelevant to the classification of a sub-participation agreement whether the credit risk stems from the default of the borrower or from the insolvency of the lender. The fact that the sub-participant has no legal remedy against the lender in the event of default by the borrower is also irrelevant. The CJEU thus confirmed that **sub-participation is exempt from VAT**.

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Case law

CJEU on right to deduct VAT upon entering liquidation

The Court of Justice of the European Union ruled on whether there is an obligation to correct the previously claimed VAT deduction on capital goods if a company enters into liquidation and applies for VAT deregistration.



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UAB "Vittamed technologijos" is a company engaged in scientific and technical research. As part of a planned project, they worked on the development of a diagnostic and monitoring medical device. For development purposes, they acquired goods and services on which they deducted input VAT.

Following the completion of the development, the company launched the product on the market, but the project turned out to be loss-making over the following years. For this reason, the sole owner and shareholder of the company decided to discontinue its operations. The company then entered liquidation and applied with the tax administrator for the cancellation of their VAT registration. The tax administrator initiated a tax inspection and based on the established facts subsequently challenged the previously claimed VAT deduction on acquired inputs related to the project.

The CJEU first confirmed the previous case law, under which the right to deduct VAT shall be retained if:

- the intended economic activity does not give rise to specific outputs with the right to deduct VAT, or
- if, for reasons beyond its control, the taxable person does not use the acquired inputs to carry out outputs with the right to deduct VAT.

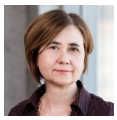
At the same time, however, the CJEU pointed out that for capital goods, a taxable person may be obliged to correct a previously claimed VAT deduction if they discontinue their activities before the related outputs with the right to deduct VAT have been carried out, and therefore no longer have – and will never have – any intention of using the capital goods to carry out taxable transactions. The court thus concluded that in the case at hand, the company shall not retain the right to deduct.

According to the CJEU, the situation could be different if, for instance, after entering liquidation, the company were to sell the assets owned to settle its previously incurred debts.

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News in Brief, November 2022

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



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DOMESTIC NEWS

- A decree containing new prescribed forms for submissions for 2023 has been published in the Collection of Laws (under No. 312/2022 Coll.).
- The financial administration informs that the Viewing Selected Data service, which allows access to selected information from personal tax accounts and the taxable entity's file maintained by the tax authority, will be terminated on 30 November 2022.
- A new reporting obligation for sharing economy platform operators starts in January 2023. This is the reporting obligation under the DAC7.
- The government has approved a proposal to negotiate a treaty between the Czech Republic and the United Arab Emirates on the avoidance of double taxation in the field of income taxes and on the prevention of tax evasion and avoidance.
- A communication on the treaty between the Czech Republic and the Republic of South Africa for the avoidance of double taxation and prevention of tax evasion in the field of income taxes in relation to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting has been published in Financial Bulletin 13/2022.
- Based on the government decree on the general assessment base for 2021, the conversion coef☒cient for adjusting the general assessment base for 2021, the reduction thresholds for determining the calculation base for 2023, the basic pension assessment level set for 2023 and the pension increase in 2023 (see the Collection of Laws and International Treaties), the average wage for the following year is CZK 40,324. The maximum monthly and annual limit for participation in sickness insurance are CZK 161,296 and CZK 1,935,552, respectively.

FOREIGN NEWS

- The EU Council has agreed to move Anguilla, the Bahamas, and Turks and Caicos Islands from the grey list to the black list of non-cooperative jurisdictions. Following the latest revision, the following 12 countries are considered non-cooperative jurisdictions: American Samoa, Anguilla, Bahamas, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands, and Vanuatu.
- The EU Council Regulation on Emergency Intervention to Address High Energy Prices was published in the Official Journal of the EU on 7 October and entered into force the following day.
- The European Commission has asked the public for feedback on policy proposals for a new corporate tax system called "Business in Europe: Framework for Income Taxation (BEFIT)". This initiative would provide common rules for determining the corporate income tax base for EU-based entities that are part of a corporate group with global consolidated income above a certain threshold. BEFIT would also include provisions for the redistribution of profits to member states based on a prede☒ned formula. After redistribution, profits would be subject to the corporate income tax rate of the relevant member state. The deadline for providing comments is 5 January 2023. The draft rules are expected to be adopted by the Commission in the third quarter of 2023.

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- The OECD has issued updated guidance on BEPS 13 (Country-by-Country Reporting), aiming to ensure consistent implementation and provide certainty for tax administrations and taxpayers. The key updates relate to the reporting of information on permanent establishments and the treatment of short and long accounting periods.
- The OECD has issued a report calling for the revision of the rules for providing tax incentives in the light of the OECD's Pillar II (minimum effective tax of 15%). The report identifies several aspects that countries should consider when preparing for Pillar II. The report in particular looks at the current use of tax incentives, analyses key provisions of the Global Anti-Base Erosion (GloBE) rules, and shows how different types of tax incentives may affect the effective tax rate. For more information, please see here.
- The OECD has issued another document for public consultation, which concerns tax administration and legal certainty regarding Amount A intended to be taxed in the market country under the OECD's Pillar I.

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