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In brief

News in Brief, December 2022

Editorial

Dearest Santa,

I know that taxes are usually not on the wish lists you receive. Taxes are difficult to grasp and, unlike a book or a new sweater, rarely bring pleasant feelings.

Nevertheless, they are important so that we can function as a state and as a society. So, it is clear to me that we will not find a gift of tax cuts under the Christmas tree: public budgets are stretched by the legacy of the wasteful past, as well as by the present need of urgent investments, extraordinary expenses, and the cost of day-to-day operations inefficient as they may often be.

Here I would like to note that even taxes can be managed smartly – based on principles, not just rules. The thing with rules is that they tend to grow in volume, often faster the Christmas bread dough, but their meaning seems to get lost. The effort to capture all possible situations clashes with the reality of everyday life. That is why the public finds it so hard to navigate any tax legislation. And that is also why there is so much unclarity in it.

More serious yet is the deterioration of the relationship between the state and its taxpayers, which we have seen over recent years. On one hand, there is a noticeable mistrust seeping through tax proceedings and legislation, involving not just tax law but also important social benefits. This results in the need to constantly document everything and anything and prove again and again what has already been proven. The entrepreneurs' distrust in the functioning of the state has also grown, and with it the effort to get back at the state, reflected, e.g., in some entrepreneurs' behaviour following the abolition of the electronic reporting of sales (EET). The project was built on distrust and became its symbol, degrading all the positives it could have brought. On a deeper level, this is reflected in the number of disputes that end up before the Supreme Administrative Court and that inadvertently reveal the height of the wall between the state and the taxpayers.

I wish that any legislative changes that await us in the coming year would contribute to building trust, and that trust would return to the administrative processes and procedures, both routine and complex. Then we could sit down again, relax, and read a book.

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Levy on surplus market revenues of electricity producers

In November, an amendment to the Energy Act passed through the legislative process at record speed, introducing a levy on surplus market revenues for most electricity producers and implementing part of EU Council Regulation 2022/1854 of 6 October 2022, on an emergency intervention to address high energy prices. It also includes a mechanism to introduce caps on energy purchase prices for large businesses. The amendment was published in the Collection of Laws on 30 November 2022 under No. 365/2022 Coll. and entered into effect on 1 December 2022.



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Levy on surplus market revenues

The levy payers are electricity producers and any intermediaries participating in the wholesale electricity markets on behalf of the producers, irrespective of the market timeframe and whether bilateral transactions or transactions on a centralised market are involved. In addition, these also include persons directly or indirectly related to levy payers who supply electricity to the wholesale market.

The subject of this levy is the producer's surplus revenue determined as the difference between the revenue actually earned and the market revenue cap. The levy on surplus revenues amounts to 90% of the surplus revenues expressed in the Czech currency.

Market revenue means the revenue received by the producer in exchange for the sale and supply of electricity produced in the territory of the Czech Republic to the electricity grid. The manner in which the surplus revenue amount is to be established shall be determined by the government through its decree.

Depending on the type of energy, the cap on market revenue from the sale of 1 MWh is:

- EUR 180 (wind, solar and geothermal energy, hydropower without the use of dams, energy from peat and mineral oils)
- EUR 240 (gaseous fuel from biomass) EUR 210 (solid fuel from biomass)
- EUR 100 (recovery of waste except biomass)
- EUR 70 (nuclear energy)
- EUR 170 or EUR 230 (lignite energy depending on the type of power plant).

Hence, a market revenue cap has not been set, e.g., for electricity generated from coal, natural gas, and water using dams. The law also excludes from the levy revenues from the sale of electricity produced in an electricity generation plant with an installed capacity of up to and including 1 MW and electricity produced from biomass.

According to the explanatory report, the levy will be a tax-deductible expense. The Energy Regulatory Office will be the administrator of the levy under the Tax Procedure Code. The levy will be applied in two levy periods: December

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2022 and calendar year 2023. The levy payer must submit the levy statement for the first levy period within two months after the end of the period, i.e., by 28 February 2023, and pay the levy within that period.

The levy for the second levy period will be paid in monthly prepayments. The levy payer is required to report a prepayment of the levy within 25 days after the end of the monthly prepayment period, and to pay it within that period. The procedure for determining the levy prepayment shall be similar to that for determining the levy itself. The final statement of levy prepayments made in the period shall then be submitted within 3 months after the end of this levy period. Levy payers required by law to have their financial statements audited must ensure that the auditor verifies the accuracy and completeness of the selected information provided in the levy statement for the second levy period. The government shall determine the scope of such information and the minimum extent of the verification through a decree.

Mechanism for introducing caps on energy prices for large businesses

During the debate in the parliament, an amending proposal unrelated to the levy on electricity producers was adopted, containing a proposal for a mechanism to cap energy prices for large businesses as customers. This mechanism operates based on the quantification of financial benefits (advantages) that the customer receives by buying electricity or gas at a fixed (capped) price (for example, at the level currently set for retail customers) compared to paying a higher contractual price for electricity or gas.

If this financial benefit exceeds a certain permissible limit, e.g., the public aid intensity under the Temporary Crisis Framework, the business will have to return the undue benefit. Given the ongoing energy consumption, this amount can only be determined after the end of the period for which the prices are capped. It can be expected that the government will propose the specific functioning of this mechanism, depending on the outcome of negotiations between EU member states.

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Fuel card market to change significantly?

The application of VAT on fuel cards is a much debated topic among the professional public, mainly due to the lack of relevant legislation. The EC's VAT Committee has issued a working paper which rather surprisingly does not entirely conform to the usual administrative practice.



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According to existing practice, fuel card issuers in the most usual business models (‘buy/sell’ or ‘commissionaire’ model) carry out two transactions from a VAT viewpoint:

- purchase of goods (fuel) from the fuel station owner and
- delivery of goods (fuel) to the vehicle operator.

This was also the view expressed by the European Commission's VAT Expert Group in the spring, and according to the information available to us, this approach has so far also been respected by the domestic ☒nancial administration.

The VAT Committee has now responded to the Expert Group's views, adopting a relatively surprising position: for the standard buy/sell model it can be argued that the fuel card issuer does not at any moment acquire the right to dispose of the fuel as the owner. In line with CJEU Judgment C-235/18 Vega, the Committee concluded that the fuel card issuer merely ☒nances the purchase of fuel on behalf of the vehicle operator, i.e., provides a ☒nancial service exempt from VAT.

On the other hand, for the commissionaire model the VAT Committee agrees with the existing interpretation, i.e., it recommends that the transactions carried out by fuel card issuers in a chain of transactions should continue to be viewed as **the acquisition and subsequent supply of goods** (fuel).

We do not yet know the response of the Czech ☒nancial administration to the Committee's stance. Since a broad interpretation of the Committee's conclusions may have an adverse impact on the fuel card market, we recommend preparing for this situation well in advance.

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Changes in mandatory establishment of databoxes

The mandatory establishment of data boxes for all natural persons will most likely be abolished. The legislative amendment introducing the mandatory establishment of data boxes from 1 January 2023, which is already valid but not yet in effect, will undergo further changes. However, nothing will change for entrepreneurs and legal entities recorded in the Commercial Register, in particular foundations, associations, and associations of unit owners. For these, the mandatory establishment of data boxes shall apply.



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We previously informed you about the amendment to the Act on Electronic Acts and Authorised Document Conversion, based on which databoxes will be established for many entities. Among other things, the act initially required that a databox be established from 1 January 2023 for any natural person using an electronic identification tool issued under a qualified electronic communication system. Thus, it was intended that for any natural person who, for instance, logs into internet banking after the New Year, a data box would automatically be set up. Although the law also took into account cases where these persons did not wish to have a data box and allowed them to deactivate it, this required further activity from these persons.

Unsurprisingly, the amendment was heavily criticised in this form, as people who do not need a databox or would not know how to use it would nonetheless get one. The legislators therefore eventually concluded that their plan for setting up databoxes was too ambitious and prepared another amendment whose most important point is the abolition of the general mandatory establishment of databoxes for natural persons who have used an electronic identi⊠cation tool.

Although it was proposed that the deputies approve the amendment in the first reading so that it could be effective from the New Year, it is going through the standard legislative process. Thus, the amendment is currently going to its third reading in the chamber of deputies and then must pass the senate and be signed by the president. It is therefore uncertain whether it will enter into effect on 1 January as intended.

Notwithstanding the above, it still applies that databoxes **will be set up for all entrepreneurs** (including self-employed persons) and **all legal entities**, meaning that it will be set up not only for companies recorded in the Commercial Register but also, e.g., for foundations, associations, and associations of unit owners.

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Tips and tricks

Defence strategies for tax proceedings with possum-playing tax administrator

A tax administrator should proceed without undue delays, keeping with the principle of promptness of proceedings and procedural efficiency. However, this is not always the case. Therefore, in the following article of our Tips and Tricks section, we focus on how to effectively defend against a tax administrator's inaction.



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If the tax administrator does not proceed without undue delay during tax proceedings, the taxpayer is entitled to file a complaint with the nearest superior tax administrator. This involves situations where the tax administrator's time limit for carrying out an act has expired in vain or the act has not been carried out within the usual time limit. (As for what is the usual time limit, it suffices to consult Instruction D of the General Financial Directorate published in the Financial Bulletin). A complaint can also be lodged if the tax administrator has collected all the necessary documents but has not issued a decision without delay.

The Tax Procedure Code does not fail the taxpayer even if the above conditions have not been met. Accordingly, it is also possible to file a complaint if the tax administrator has not issued a decision and three months have passed since their last action against the taxpayer.

The complaint must meet the general requirements for filings under the Tax Procedure Code, i.e., it must be clear who is making the complaint, what it is about, and what is being proposed.

How is the complaint handled? If the superior tax administrator finds the complaint to be justified, they shall order the relevant tax administrator, no later than within 30 days of receiving the complaint, to remedy the situation. If the tax administrator does not comply with the superior tax administrator's order within 30 days, the superior tax administrator shall take such remedial action themselves and shall notify the person who made the complaint. Should the superior tax administrator fail to remedy the situation, they would also be committing inaction. Another way to deal with the complaint is to shelve it. But even in this case, the taxpayer should be notified of the superior tax administrator's decision within 30 days and should be given the reasons for such a decision.

Filing a complaint is also an important tool against the tax administrator in terms of subsequent procedural steps. If, after filing the complaint, the tax administrator (as well as the superior tax administrator) continues to be inactive in the proceedings, it is possible to file an action for protection against inaction or an action for protection against unlawful interference by the administrative authority, under the Code of Administrative Justice. Such action may only be filed on the condition that the procedural remedies against inaction under the Tax Procedure Code have been exhausted. By means of this action, the taxpayer may then seek to have the court order the tax administrator to issue a decision.

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Overview of current and planned subsidy programmes

New subsidy support opportunities this year were mainly provided by the Operational Programme Technology and Application for Competitiveness (OP TAC). Subsidy support could also be obtained from other programmes such as the Modernisation Fund or the Technology Agency of the CR's programmes. Below we summarise programmes that are currently open and those that we can look forward to in 2023.



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Operational Programme Technology and Application for Competitiveness (OP TAC)

OP TAC currently allows for applying for support in the **Applications and Energy Savings programmes**. The Applications programme is open to mid-cap (capitalisation) entities, i.e., entities with no more than 3,000 employees, assessed on a group-wide basis. Where applicants exceed this limit, they may apply for support if they implement the project in cooperation with a small or medium-sized enterprise (SME). Under the Energy Savings programme, large enterprises may apply for support without limitation.

The Applications programme is designed to support operating expenses incurred in industrial research and experimental development projects, i.e., expenses incurred to acquire new knowledge needed for the development of new products, materials, technologies, and services. Applications for support can be submitted until 31 January 2023. Mid-cap companies and large businesses may receive aid of up to CZK 125 million. The aid intensity is 50% of the eligible costs for industrial research and 25% of the eligible costs for experimental development for mid-cap companies. For large enterprises working on a project in collaboration with SMEs, the aid intensity is 65% and 40% of eligible costs for industrial research and experimental development, respectively. The next call under the Applications programme is planned for the last quarter of 2023.

The Energy Savings programme provides support for investments aimed at, e.g., the use of renewable energy sources, insulation of buildings, modernisation of electricity, gas, heat and cold distribution systems, or the reduction of the energy consumption of buildings. Large enterprises can receive aid of up to EUR 200 million, with the aid intensity of 45% or 35% of eligible costs.

New calls under the OP TAC's **Potential and Water Savings programmes** are planned to be announced in 2023. The long-awaited and particularly popular Potential programme will support investments in research and development. The call is expected to be announced in the second quarter of 2023. The Water Savings programme will provide support for investments in water saving measures in business management, with the call expected to be announced in the fourth quarter of 2023.

Modernisation Fund

The Modernisation Fund now offers the possibility to apply for support under **RES+** No. 1/2022 - Photovoltaic Power Plants up to 1 MWp, aiming to support the construction of small photovoltaic power plants with an installed

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capacity of up to and including 1 MWp. In addition to support for the installation of photovoltaic power plants, it is possible to obtain funding for battery storage systems and hydrogen production systems using water electrolysis. Applications for support can be submitted until 15 March 2023. The maximum aid intensity may not exceed 50% of total eligible costs, with the maximum aid per unit limited to CZK 11,000/kWp for projects without accumulation or CZK 20,000/kWp for projects with accumulation.

Technology Agency of the Czech Republic (TA CR)

TA CR aims to centralise state aid for applied research and development. Its programmes usually offer support for operating expenses incurred in the implementation of R&D projects and, in contrast to OP TAC, subsidies are usually paid beforehand as advance payments on an annual basis. You may apply for support in the 9th call of TA CR for proposals under the **TREND programme**, sub-programme 2 Newcomers, aimed at providing support for the start-up of own research and development activities of enterprises that have not yet carried out such activities. Applications can be submitted until 11 January 2023. The duration of the project must not exceed 48 months. The project output/result must be, e.g., an industrial design, utility model, prototype, functional sample, etc. The aid intensity for large enterprises is 25-65% of eligible costs, with a maximum subsidy of CZK 15 million. It is necessary to cooperate with at least one research organisation during the project.

In September 2022, the **Transport 2030 programme** was approved as a successor to Transport 2020+. The new programme will support applied research, the results of which will lead to the development of the transport sector and all types of transport and will contribute to greater sustainability and reduce negative environmental impacts. Specific objectives are sustainable, accessible, and safe transport, automation, digitisation, technologically advanced transport, and low-emission and green transport. The first call inviting to the programme will be launched in 2023.

If you are interested in applying for support under one of these programmes, we will be happy to examine whether your project is suitable for the specific requirements of the call.

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New rules on state aid for research, development, and innovation

In October, the European Commission adopted its revised rules on state aid for research, development, and innovation, replacing the existing 2014 framework and aiming to simplify the provision of state aid to boost investment into science, research and innovation (R&D&I) and enable the rapid development and deployment of cutting-edge technologies.



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The new rules should primarily simplify the whole process of granting state aid, including the practical application of the framework and the reduction of the high administrative burden for both state aid providers and recipients. The rules also re☒ect recent EU policy developments relating to environmental and digital transformation.

The new R&D&I rules in particular:

- clarify the applicability of certain de☒nitions in relation to digital technologies and digitisation-related activities (e.g., quantum technologies, blockchain technologies, artificial intelligence, cybersecurity)
- newly allow state aid to be granted for the construction and modernisation of infrastructures for testing and experimenting (e.g., test facilities or living laboratories), to up to 100% of eligible investment costs
- introduce a simplified mechanism for determining indirect costs for R&D projects eligible for state aid
- require ex-post evaluations of the use of state aid only for aid schemes whose total duration exceeds three years.

The above changes should strengthen the position of SMEs and industries where it is not possible to easily transition an innovative solution from the laboratory directly to the market (e.g., due to the need to carry out larger pilot or proof-of-concept projects) and increase investments into R&D&I, thus facilitating the development of cutting-edge and breakthrough technologies and their market launches.

The new rules, valid and effective from the end of October 2022, should not be overlooked by research institutions and other potential applicants for state aid.

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New call under TREND to support research and development

On 23 November 2022, the Technology Agency of the Czech Republic (TA CR) announced the 9th call under the TREND programme, sub-programme 2. Support is available for projects aimed at launching research and development activities by entities that have not yet carried out any of their own activities in this field.



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The call aims to support research and development with results to be applied in an entity's own business activities. Applications can be submitted by businesses that have not received direct or indirect state aid for research and development amounting to more than **CZK 1 million** in the last five years. The applicant must also be working on the project in cooperation with at least one research organisation. Applications will be accepted from 24 November 2022 to 11 January 2023. The lead applicant may submit only one project proposal.

The funds for allocation amount to **CZK 200 million**, with the maximum subsidy per project of CZK **15 million**. The aid intensity for large businesses ranges between **25–65% of eligible costs**, depending on whether the applicant will carry out industrial research or experimental development. Eligible costs may include personnel costs, subcontracting costs, other direct costs, or indirect costs. The project must not take more than 48 months and must be completed by September 2023 at the latest.

The project must include at least one main output/result, which may be an industrial design, a utility model, a prototype, a functional sample, software, a pilot process, or a proven technology.

If you are interested in applying for support, we will be happy to check whether your activities comply with the terms and conditions of the call.

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Agency employment facing significant changes

The Ministry of Labour and Social Affairs has published a draft amendment to the Employment Act and the Labour Code, introducing new conditions for employment agencies and their employees. The amendment aims to increase the protection of agency employees, especially in the event of their employer's insolvency. The amendment also introduces several stricter requirements.



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One of the main changes is the abolition of compulsory insurance for employment agencies against bankruptcy. According to the MLSA, the insurance did not serve its purpose as it did not distribute any insurance benefits. After the coronavirus crisis, some insurance companies also refused to enter into such insurance contracts. The amendment proposes that if an employment agency goes bankrupt, the wages of its employees should be paid in the same way as is the case for standard employers: i.e., under the Act on the Protection of Employees in the Event of Insolvency of Employers.

Another fundamental change is the modification of the conditions concerning the period for which the employee is assigned to the user, i.e., the company for which the agency employees actually perform work. Employment agencies and users will have to ensure that the temporary assignment of an employee to work for the same employer does not exceed three years. Any shorter periods for which the employee has been assigned to the user on a temporary basis will count towards this period unless more than three years have elapsed since the last temporary assignment.

The amendment also prohibits the relatively common practice of agencies hiring their employees for a fixed period of time, namely for the period of the temporary assignment to the user. Nowadays, the employment of agency workers may end overnight with the termination of the agency's cooperation with the user, which is what the amendment intends to avoid. Violations of these obligations may result in fines of up to CZK 1 million.

The amendment also tightens the conditions for granting employment agency permits

From now on, the employment agency's expert guarantor can only be someone who gained their experience in the last ten years immediately preceding the date of submission of the application for permit. To be granted a permit, the applicant must be debt-free and in the last three years have not committed an offence for which the permit could be revoked. The mandatory security deposit shall also increase from CZK 500,000 to CZK 750,000.

On the other hand, the new regulation will be more favourable to employment agencies as regards the grounds for a withdrawal of the permit. Under the current wording of the law, the authorities are de facto obliged to revoke a permit for any violation of the Employment Act; under the new law, this will only be an option. The authorities will thus be able to assess whether revocation is appropriate considering the severity of the agency's transgression.

The MLSA proposes that the law come into effect at the beginning of January 2024. By preparing for the changes well in advance, agencies can avoid any possible sanctions or the unexpected rejection of an application for an

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agency employment permit.

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News in consumer protection legislation

The Amendment to the Consumer Protection Act and the Civil Code will bring several important changes aiming to increase the protection of consumer rights and make it more efficient. Below we provide a summary of some of the changes.



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More transparent discounts

The amendment introduces a seller's obligation to publish the lowest price for which they were selling a product in the last 30 days before the discount or possibly from the time when they started offering and selling a product to the time of granting the discount if the product has been on sale for less than 30 days. If the seller increases the discount gradually, they should disclose the lowest price at which they were offering the product in the last 30 days before the discount was first granted. The aim is to avoid the artificial inflation of prices before discounts.

Verified consumer reviews

The rules for publishing consumer reviews are being tightened. Before publishing them, the seller must verify that the reviews come from customers who have actually purchased or used the product and inform consumers about how they ensure that the reviews are verified, or, alternatively, inform them that the reviews have not been verified.

Contracts concluded by telephone

When concluding a contract orally over the phone, the seller must also send an offer in text form. The consumer is bound by the offer only after they express their consent electronically or by signing a document confirming the offer.

More rights for consumers harmed by unfair business practices

A consumer affected by an unfair business practice may withdraw from a contract within 90 days from the date of its conclusion or demand a reasonable discount corresponding to the nature and gravity of the unfair business practice.

News in the sellers' information obligation

The new legislation extends the information that the seller must communicate to the consumer, especially for distance contracts. It also introduces new requirements for the electronic conclusion of contracts. The seller must also ensure that consumers placing an order explicitly acknowledge that they commit to paying for the order. If an order is made using a button, such a button must be marked with an easily legible text "order with commitment to pay" or other unambiguous wording. The sanction for the failure to comply with this obligation is the invalidity of the contract unless the consumer invokes it.

The amendment to the Consumer Protection Act and the Civil Code now awaits its promulgation in the Collection of Laws. Once promulgated, it will enter into effect in 30 days.

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Legal

Amendment brings greater protection for farmers and food producers

An important amendment to the Act on Significant Market Power has successfully passed the legislative process and will enter into effect on 1 January 2023. In addition to introducing a broad list of prohibited business practices, it will now apply to many more entities than before. Are you one of them?



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The Act on Significant Market Power protects suppliers against food supply chains abusing their position in connection with the purchase of food or the provision of related services. So far, the law has applied mainly to large customers, i.e., those whose turnover from the sale of food and related services in the territory of the Czech Republic in the last accounting period exceeded CZK 5 billion.

Under the amendment, transposing into Czech law the EU Directive on Unfair Trading Practices in Business-to-Business Relationships in the Agricultural and Food Supply Chain, the law will now apply to the entire supply chain. Instead of the current rebuttable presumption of the existence of a significant market power, the law now sets strict turnover limits for suppliers and customers above which the customer is automatically regarded to have a significant market power. The amendment thus significantly expands the range of entities to which the law applies (it may now also apply, e.g., to customers with turnover just above CZK 50 million, i.e., EUR 2 million).

The amendment also contains a broad list of unfair business practices that are prohibited between a customer with significant market power and its supplier, further specifying some of the existing ones and defining new ones; e.g., the false indication of the country or place of origin of an agricultural product or food product may now be penalised. Furthermore, customers will not be allowed to cancel orders for perishable agricultural or food products less than 30 days before their delivery. It will also be prohibited to make supplies conditional upon using third-party services whose conditions and price are set by the customer.

The form and essentials of the contract between the customer and the supplier are also regulated in more detail. The contract must be concluded in writing before the commencement of supplies or services. It must contain information about the price, subject of purchase, service or specification of a special price/promotion, if so agreed. The customer will also be obliged to hand over to the supplier at least one copy of the contract immediately after the conclusion of the contract.

Compliance with the law will be supervised by the Office for the Protection of Competition. It may impose a penalty for its violation, even repeatedly. However, the aggregate amount of the penalties may not exceed CZK 10 million or 10% of net turnover.

We recommend that all entrepreneurs in the agriculture and food industry who may now be subject to the law

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make sure that their supplier-customer relationships are set up correctly and, if necessary, renegotiate them as soon as possible.

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How to set minimum share of low-emission vehicles in public procurement?

The new Act on the Support to Low-Emission Vehicles, which belatedly transposes into Czech law Directive (EU) 2019/1161 of the European Parliament and of the Council on the Promotion of Clean and Energy-Efficient Road Transport, stipulates a requirement to achieve a minimum share of 'clean' and zero-emission vehicles in public procurement and in the acquisition of public passenger transport services.



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The strict limits will have to be achieved in two periods, first by 31 December 2025 and then by 31 December 2030, in awarding above-threshold public contracts for the acquisition (purchase, lease) of specified types of vehicles and public passenger transport services, and public contracts for the provision of specified transport-related services. By the end of 2025, the minimum share of environmentally friendly vehicles should be as follows:

- 29,7% for passenger cars, light trucks, and minibuses
- 41% for buses
- 9% for trucks.

Also, a half of the limit for buses will have to be achieved by zero-emission vehicles. In the next period until the end of 2030, the minimum share of environmentally friendly buses will be significantly increased to 60%.

For a breach of these obligations, the Office for the Protection of Competition may impose fines of up to CZK 20 million. However, the law does not apply, e.g., to agricultural vehicles, vehicles used on construction sites or airports, or ambulances. The law is primarily intended to strengthen the protection of urban air quality and prevent sanctions from the European Commission. Reducing the number of emission vehicles will also contribute to the EU's green transition objectives. The question remains how it will impact the state budget, as the prices of low-emission vehicles (especially buses) may be significantly higher.

The law entered into effect on 1 December 2022. We therefore recommend that entities awarding public contracts prepare for these changes as soon as possible.

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DMA: feared by online platforms, bringing hope for users

Soon, the online world will undergo a radical transformation. As of 1 November 2022, the Digital Markets Regulation entered into force, which will mainly affect large companies doing business in the digital world – such as Apple, Google, or Microsoft.



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The main objective of the Digital Markets Act ("DMA") is to set restrictions for large companies referred to as gatekeepers who provide services in the online world with the aim to reach end users (e.g., search engines, social networks, virtual assistants, cloud computing services or advertising services), thereby ensuring the protection of competition and of the users themselves.

Companies will be considered gatekeepers if they meet any of the following criteria:

- The company has sufficient market significance, i.e., an annual turnover of at least EUR 7.5 billion or a market value of at least EUR 75 billion.
- The company connects a large number of businesses to a large number of consumers through its platform: the platform has at least 45 million users in the EU and at least 10,000 business users (e.g., Meta, Apple, or Microsoft).

Furthermore, gatekeepers will also be companies designated as such by the European Commission, even if they do not meet the above criteria.

The DMA introduces many new obligations and restrictions for gatekeepers, often ensuing from judicial decision-making practice in the field of competition law. Examples include:

- prohibition to use the personal data of its users obtained within one service for another service of the same gatekeeper without the users' consent
- prohibition to use the personal data of its users obtained through third parties for the purpose of providing advertising without the users' consent
- prohibition to require users to register for a service to use the main service provided by the gatekeeper
- prohibition to require users to use certain services (e.g., a payment service)
- prohibition to prevent its users from notifying the competent public authority of non-compliance
- obligation to allow businesses to promote their offers on the gatekeeper's platform
- obligation to inform the Commission of any contemplated merger with another digital service provider or a provider enabling data collection.

Each gatekeeper is obliged to notify the Commission of its gatekeeper status without delay; to ensure transparency, the Commission shall regularly publish their list and the services for which they must comply with the above obligations.

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For breaches of these obligations, the Commission may impose a penalty of up to 10% of the gatekeeper's worldwide turnover in the previous accounting period, even for negligent breaches. A penalty of up to 20% of the global turnover can be imposed if the gatekeeper already committed a breach in the last eight years. The key provisions of the DMA will be entering into effect gradually in the course of 2023. In view of the need to thoroughly assess whether a company may have gatekeeper status and the large number of new restrictions associated with it, we recommend preparing for the DMA as soon as possible.

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Case law

Monetary contribution to employee vacation: taxable income

In its recent decision, the Supreme Administrative Court upheld the state authorities' interpretation as to what can be considered a non-monetary benefit to an employee from an employer. The ruling has implications for the exemption of the benefit from income tax and social security contributions.



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In the case in question, an employer provided an employee with a monetary contribution to cover expenses demonstrably incurred on their vacation.

The District Social Security Administration (DSSZ) considered the contribution paid by the employer to be the employee's taxable income that had to be included in the assessment base for the social security premium, as the employer did not observe the requirement that the payment be non-monetary, which is one of the conditions for tax exemption on the part of the employee.

The Regional Court sided with the employer, concluding that a non-monetary benefit to an employee which is exempt from income tax can take two forms: the provision by the employer of services or goods acquired as de☒ned by the law, or the provision of a contribution for such purposes, i.e., the employee purchases the bene☒t themselves and the employer merely provides them with ☒nancial resources for this specific purpose, either in advance or against expenses already demonstrably incurred. The District Social Security Administration lodged a cassation complaint against the Regional Court's decision with the Supreme Administrative Court.

The SAC did not fully agree with the Regional Court's conclusions. According to the SAC, **the essence of a non-monetary benefit, apart from its limited purpose, is also the form in which it is provided**. A non-monetary benefit is by nature a benefit that is not provided in money or is not exchangeable for money or other similar means or benefits.

The SAC concluded that non-monetary benefits in this sense can only be those where the employer pays sums of money to a person other than the employee and their family member (unless the employer themselves is the provider of the recreational facility) and that person then provides a benefit or service to the employee. This is the only way to ensure that the benefit is treated as exempt from income tax and therefore not included in the assessment base for the social security premium.

The SAC did not consider it appropriate to apply the provision of the Income Tax Act regulating sums received by an employee from an employer as advances to be paid by the employee on behalf of the employer. Its application is prevented by the provisions being mutually exclusive: one stipulates the exemption of the employee bene☒t from income tax, while the other excludes the supply from being subject to income tax. The SAC decision confirms the state authorities' interpretation of what is to be considered a non-monetary bene☒t to an employee from an employer under the Income Tax Act for the purposes of the exemption of certain bene☒ts from income tax, where the non-monetary form of provision is required.

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Case law

CJEU on disclosure of beneficial owner information

In EU member states, the legal regulation of beneficial owners and their registration is based on the AML Directive. Under the directive, information on beneficial owners within the territory of member states should be accessible to any member of the public. However, the CJEU, by its judgment from the end of November, has declared the provisions of the AML imposing this obligation invalid.



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The case before the CJEU concerned Luxembourg law. In accordance with the AML Directive, Luxembourg created a Register of Beneficial Owners containing information on the beneficial owners of registered entities. The information is publicly available on the internet. In the present case, a Luxembourg company and its beneficial owner sought before the Luxembourg courts that the access to this information be restricted, on the grounds that the publication of the information exposes him and his family members to the risk of kidnapping, deprivation of personal freedom, violence or even death. In the proceedings, Luxembourg courts of higher instances referred a series of prejudicial questions to the CJEU on the interpretation of certain provisions of the AML Directive, its validity, and on the possible conflict between the disclosure of beneficial ownership information to the public and the interference with fundamental human rights.

Provision interferes with the right to private life and personal data protection

In judgments C-37/20, C-601/20, the CJEU held that the provision of the AML Directive under which member states must ensure that information on beneficial owners registered in the registers in their territory is accessible in all cases to any member of the general public is invalid. According to the CJEU, such publicly available information allows an unlimited number of persons to be informed about the factual and financial situation of the beneficial owner, which constitutes serious interference with an individual's right to private life and personal data protection.

The purpose of the provision is to prevent illegal activities by increasing transparency; according to the CJEU, this pursues a general interest objective which can justify even serious interference with human rights. However, the CJEU found that the interference that this measure entails is neither limited to what is strictly necessary nor proportionate to the objective pursued, which are the conditions for allowing such interference.

Finally, it should be mentioned that the Luxembourg legislation in principle allowed the public to access all personal data of beneficial owners, including their full date and place of birth. Czech legislation differs from the Luxembourg one in this respect: under Czech law, the register available online contains only the name, surname, month and year of birth, nationality, and country of residence. It is therefore not yet clear how the future amendment to the AML Directive will be treated by Czech legislators and the European Union in general, as other changes concerning beneficial owners and the AML Directive are currently being debated. We have no doubt that the registration of beneficial owners will continue to evolve.

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Case law

Disguised legal act in payment of dividend to beneficial owner

In its recent judgment, the Supreme Administrative Court (SAC) dealt with a profit distribution payment to a Cypriot company. After assessing the entire context of previous transactions, the SAC held that the actual status had been disguised and agreed with the conclusions of the tax administrator who had additionally assessed a withholding tax.



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In the present case (2 Afs 94/2021), an individual (a natural person) sold their share (ownership interest) in a Czech limited liability company to a Cypriot company. The conditions of the sale were quite specific: first, 25% were transferred at a significantly higher price than the remaining 75% whose gradual transfer was also part of the share transfer agreement. The terms of payment of the purchase price were agreed only in general terms: the purchase price was to be paid within a time horizon of ten years without any further specification of the amount or timing of individual instalments. As such, the sale of the share formally fulfilled the conditions for tax exemption and therefore, the income was not taxed.

In the following taxable period, the limited liability company paid out all dividends to the Cypriot company. As, under tax legislation, this was a payment of a dividend to a parent company, no tax was withheld from the payment. Within days of receiving the payment, the Cypriot company transferred all funds thus obtained to the account of the individual (the original shareholder/member of the limited liability company), arguing that it was an instalment of the purchase price for the share transferred. In a tax inspection, the tax administrator concluded that in the present case, the beneficial owner of the funds paid was not the Cypriot company, but the individual – the original owner of the share, and that **the transactions carried out concealed the true legal status, which is the payment of a dividend to the individual**. Unlike the payment of dividends to the parent company, payment to an individual is subject to withholding tax.

In agreement with the tax administrator, the SAC described the acts of the entities as purposefully leading to the avoidance of a tax liability, which, in the eyes of the court, was the main purpose of the transactions. The SAC further emphasised that in practice, it is always necessary to assess transactions depending on the economic purpose of the legal relationship and the conduct of its participants.

That judgment confirmed yet again that, in tax inspections, individual transactions are assessed considering all related facts, not just the individual steps and their formal-legal status.

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Case law

CJEU on awarding free-of-charge vouchers to employees

The provision of vouchers to employees free-of-charge does not always mean an obligation to pay output VAT on the transactions. The CJEU (C-607/20) drew attention to the possibility of employers providing them as part of their economic activity, ultimately leading to retaining the right to deduct without paying output VAT.



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GE Aircraft Engine Services Ltd is engaged in the production of aircraft jet engines. To reward its best performing employees, the company introduced an employee programme under which nominated employees received a voucher for the purchase of selected goods from unrelated retailers.

The company purchased the vouchers from another company within the corporate group and claimed the right to deduct VAT on the purchases but did not pay output VAT. The tax administrators maintained that this was a gratuitous provision of services by a taxable person for the use of its employees (i.e., for purposes unrelated to its business), and, on these grounds, demanded the payment of output VAT.

According to the CJEU, employee motivation is related to the business purpose.

To the CJEU, the British court therefore referred the preliminary question whether awarding vouchers to employees of a company for purchases from retailers constitutes the provision of a service for the use of its employees for purposes other than those of its business.

According to the CJEU, it is necessary to assess all circumstances under which a programme takes place, in particular its nature and objective. In the present case, the CJEU believed the aim of the rewarding was to motivate employees, increase their performance, and thus contribute to **the entire company's higher profitability**. The CJEU thus concluded that in this case, this was the gratuitous provision of a service for the purpose of increasing the company's performance, therefore a provision of a service for the purpose of the company's business activity. It is therefore not necessary to pay output VAT on the given supply (provision of vouchers free-of-charge).

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Case law

SAC on claiming tax loss from transfer pricing adjustments abroad

Transfer prices are at the heart of many disputes with tax administrators not just in the Czech Republic but also abroad, often dragging on over many years. If tax is additionally assessed for one of group companies abroad, is it at all possible to claim the higher costs of the other company involved in the transaction in the Czech Republic, and how? This is especially problematic where a tax loss is additionally assessed after the expiry of the deadline for claiming it.



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In its decisions of 11 and 16 November 2022, the Supreme Administrative Court commented on the issue; the dispute involves the same case subject to two cassation complaints.

In 2013, a Czech taxpayer filed an additional tax return for 2006, 2010, and 2011, following the German tax authority's tax inspection and the decision that the Czech entity had overstated its transfer prices. For these reasons, the Czech taxpayer was additionally assessed a tax loss for 2006 and decided to claim it against the tax liability of 2010 and 2011 by applying for the reopening of proceedings (note: tax loss cannot be claimed after five years from its assessment; at the time of the case, a specific rule applied allowing to claim a tax loss only against a higher tax base). The tax administrator discontinued the proceedings and did not allow the claiming of the tax loss.

The taxpayer defended themselves in two ways: firstly, they sought to invoke retaliatory measures by the finance ministry to ensure reciprocity or to remove the harshness of law under Article 25 of the Czech-German Double Taxation Treaty. The tax administrator denied the request, arguing that they had accepted the transfer pricing adjustment for 2006. Subsequently, the tax administrator decided that the dispute lacked an international element, as the claiming of the 2006 tax loss in 2010 and 2011 was a matter of domestic law. The SAC confirmed this view.

As a second defence, the taxpayer applied for the reopening of the proceedings for 2010 and 2011. The tax administrator denied the request. The tax administrator found the claiming of the tax loss to be unjustified (this was also confirmed by the SAC), as the tax loss for 2006 was only assessed in 2013. As such, it did not exist in 2010 and 2011, therefore the conditions for reopening of the proceedings had not been met.

To conclude: an adjustment to the tax base due to a change in the assessment of transfer prices in a cross-border situation may lead to double taxation if it results in an increase in a tax loss that cannot be claimed under the general rules of the Income Tax Act for claiming losses in a domestic situation.

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Case law

Caution above all: pending litigation clauses in share transfer agreements

Agreements on the transfer of a share in a business corporation quite often contain clauses on pending court disputes and possible future debts of the company being purchased. In such cases, the arrangement may be that the debt shall be paid by the transferor, not by the company or its new owner.



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The Supreme Court expressed its opinion on the possibility of concluding such arrangements in judgment No. 27 Cdo 3366/2021. In the case at issue, the transferor in a share transfer agreement represented that there were no pending judicial or other proceedings involving the company being sold, with the exception of three proceedings. For those three proceedings, the transferor undertook that should the courts rule to the effect that the company would incur a liability, the transferor would pay that liability instead of the company. The transferee thus wanted to protect their investment in the company because should the company lose in one of the legal proceedings, its assets would be reduced.

After signing the transfer agreement, the company lost one of the litigations and was ordered to pay money to the other party. In response, the company called upon the transferor to fulfil their obligation under the share transfer agreement. However, the transferor did not grant the company's requests. A lawsuit followed. The first-degree court sided with the company and ordered the transferor to pay the amount, as the arrangement in the contract corresponded to the concept of a contract in favour of a third party under the Civil Code: as it had been agreed that the performance would not be provided to the other contracting party (i.e., the transferee), but to the company being purchased. The first-degree court also held that this contractual provision was not invalid and that the will of the parties was not contrary to the contractual arrangement. However, the court of appeal dismissed the lawsuit, stating that the company was not entitled to the payment of the amount and that the provision was not in favour of the company.

The case proceeded to the Supreme Court, which mainly dealt with the question whether the appellate court had departed from the will of the parties when interpreting the contractual provision. The Supreme Court stated that **the will of the acting party, which must have been known to the other party, is important for the interpretation of the contract. The court made it clear that the value of the share in the company depended on the value of its assets**. Therefore, if damage were caused to the company, this would also be reflected in the decrease in the value of the shares. The Supreme Court therefore vacated the decision of the appellate court and referred the case back to it for further proceedings. We can thus conclude that in view of case law, similar clauses in share transfer agreements should stand, but the contracting parties must take extra care when formulating them.

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Case law

Is it possible to maintain right to deduct even in chain fraud?

The Supreme Administrative Court in a recent judgment dealt with the right to deduct tax on a supply provided within a fraudulent chain of transactions. The tax administrator did not fully prove that the taxpayer knew, or could have known, that the supplier would not pay output VAT because of tax fraud.



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Case No. 5 Afs 55/2020 involved a company trading mainly in Apple brand electronics in B2B mode outside the manufacturer's authorised regime. In a tax inspection for the period from August to November 2014, the tax administrator assessed additional tax on the company, on the grounds of denying them the right to deduct.

In the appeal proceedings, the tax administrator revealed chains of transactions in which the company was involved: the company purchased electronics from other EU member states and stored them in the Czech Republic. Then they sold the same electronics to other 'ready-made' domestic or foreign companies. Through further links of the chain, the electronics got back to the Czech Republic. However, these companies did not declare or pay output VAT and when approached by the tax administrator became uncontactable. In the ensuing litigation, the Municipal Court in Prague examined the fraudulent chain and whether there were objective circumstances that would have made the company aware of the illegal activity. The court also assessed whether the company had taken reasonable steps to detect or prevent the tax fraud. The court held that the company had deviated from common practice, had not complied with its own business terms and conditions, and could and should have known of their involvement in a fraud. The court's arguments were the insufficient control of IMEI numbers of the phones which helps to detect the unreliable origin of the device including any link to illegal activity; the absence of contracts between the B2B contracting parties; and the issuance of tax documents before accepting the order. The company appealed against this to the SAC.

The SAC agreed with the tax administrator that in combination, the evidence may create the impression of the existence of tax fraud, but it also held that separately, the individual parts of the case can be explained. **According to the SAC, merely revealing the structure and pointing out the business practices and the fact that tax was not paid in a part of the supply chain does not a priori constitute the company's involvement in tax fraud**.

The SAC concluded that company's manner of trading outside the official distribution network was legal and legitimate. The court acknowledged the company's arguments for not reviewing their business partners and not concluding written contracts (historical knowledge of partners and previous experience with them). At the same time, the court denied the tax administrator's claim that the transaction had no economic purpose, proving that the average margin on the fast-moving trades was around 2%.

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The SAC found the company's cassation complaint justified and vacated the judgment of the Municipal Court in Prague. The case has been referred for further consideration. This is yet another long-running dispute between the state administration and a private entity.

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Case law

CJEU on determining place of supply for services provided within VAT chain fraud

According to the basic rule, the place of supply for granting emission allowances is the place of the service recipient. Involvement in tax fraud has no effect on this determination, ruled the CJEU in case C-641/21 Climate Corporation Emissions Trading GmbH.



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Climate Corporation Emissions Trading, an Austrian company, supplied greenhouse gas emission allowances to a German company. In their tax return, they declared the supply of allowances as an exempt supply of goods to another member state. In a tax inspection, the Austrian tax administrator discovered that the German customer was involved in VAT fraud as a 'missing trader' in a fraudulent chain of transactions.

Austrian Climate Corporation Emissions Trading should or could have known about the involvement in this fraudulent chain. The tax authorities therefore requested that VAT on the supply of emission allowances should be paid in Austria.

The CJEU first confirmed that the transfer of greenhouse gas emission allowances is regarded as a supply of services, not a supply of goods. This means that according to the basic rule, the place of supply shall be determined as the place where the service recipient is established or has an establishment. This aims to ensure that the service is taxed in the state of consumption and to define the competence of EU member states. The directive does not set any special rules governing the place of supply, neither for transfers of emission allowances, nor for supplies of services in the context of tax fraud.

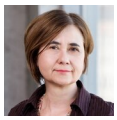
In the case at hand and according to the basic rule, the place of supply of the provision of emission allowances is Germany (as the place of the service recipient). Involvement in tax fraud has no effect on determining the place of supply. The refusal to grant VAT exemptions for supplies of goods within a fraudulent chain cannot be applied by analogy to the supply of services as these are different VAT regimes.

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In brief

News in Brief, December 2022

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



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DOMESTIC NEWS

- An amendment to the Value Added Tax Act and other tax legislation (Tax Package 2023) which, among other things, introduces a windfall tax with effect from January 2023, has been published in the Collection of Laws under No. 366/2022 Coll.
- In connection with the tax package, the financial administration has issued its Information on the Increase of the Turnover Limit for VAT registration to CZK 2 million.
- A communication on the treaty between the Czech Republic and Bulgaria for the avoidance of double taxation and prevention of tax evasion in the field of income and property 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 14/2022.
- The chamber of deputies has approved the government proposal to abolish the electronic reporting of sales (EET) from January 2023. The senate will now discuss the proposal.
- On 23 November 2022, the treaty between the Czech Republic and the Principality of Andorra for the avoidance of double taxation in the field of income and property taxes was signed. Both countries will now follow the standard legislative process to bring the treaty into effect.
- The financial administration has issued a warning that the Viewing Selected Data service, which has so far allowed access to selected information from personal tax accounts and taxpayers' files maintained by the tax authority, will not be available from 1 December 2022. It will no longer be possible to log in to this service after that date.
- The Ministry of Labour and Social Affairs has announced a call for projects under the Operational Programme Employment Plus, aimed at introducing age management into ☒rms, which involves the management of employees taking into account their age and stage of life.

FOREIGN NEWS

- The OECD has published statistics on international tax disputes resolved with a view to finding mutual agreement between contracting states. In 2021, countries initiated 2,423 new cases, of which 1,050 relate to transfer pricing, including the allocation of profits to permanent establishments, and the remainder to other double taxation issues. The Czech Republic initiated 22 new cases in 2021, of which 12 relate to transfer pricing. For more information, please see here.
- The ECOFIN Council has agreed to revise the Code of Conduct for Business Taxation, an instrument that promotes fair tax competition within and outside the EU. The revised code of conduct will apply from 1 January 2023. The original version from 1997 specifies criteria for identifying harmful tax measures having the nature of preferential tax regimes. The revised code extends the definition of harmful tax measures to any other elements of tax systems that create opportunities for double non-taxation or may lead to multiple tax advantages.
- The EU Council has approved the European Parliament's position on the Regulation on Foreign Subsidies Distorting the Internal Market. The regulation gives the European Commission powers to investigate

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nancial contributions received in non-EU countries by groups operating in the EU internal market if these lead to distortions. Among the contributions that may be investigated are tax exemptions. The regulation thus complements the rules on state aid and will enter into force on the twentieth day following its publication in the Official Journal of the EU.

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