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In brief

News in brief, December 2021

Editorial

Like the Ghost of Christmas Past, the spectre of inflation has been haunting us, with prices soaring for products as diverse as food, fuel, building materials, and microchips, due to strong post-lockdown demand together with pandemic-induced supply chain disruptions. Since it erodes the value of savings and incomes, inflation is often referred to as a form of taxation, although from the point of view of a tax practitioner at least it does not come with burdensome tax law compliance. The effects of the new Omicron variant are hard to predict, but longer term, further cost increases will likely result from the ongoing tightening of EU carbon emissions targets, as well as the planned introduction of tariffs for certain carbon-intensive imports. We can only hope that the economic impact will be temporary as we gradually transition towards a low-carbon economy.

Wishing you safe and happy holidays!



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Reintroduction of the compensation bonus for entrepreneurs

Considering the renewed spread of the SARS-COV-2 virus and new restrictive measures that may negatively impact business operations, the chamber of deputies approved the Compensation Bonus Act for 2022 in a fast-track legislative procedure. The bill still needs to be approved by the senate and signed by the president.



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The support is aimed at self-employed persons, natural persons who are members in limited liability companies, and persons working for these entrepreneurs under agreements outside employment relationships. The originally proposed limitation of the entitlement to the compensation bonus only for family businesses and small limited liability companies with no more than two members was considered discriminatory and deleted from the bill. The bonus is now intended for companies where all the members are natural persons and their interest in the company is not represented by an equity certificate.

The above categories will be able to receive the bonus if they experience a significant drop in sales as a result of the emergency measures, if they are unable to carry out their activities due to childcare (COVID-19 related quarantine or illness), or if they work under agreements outside employment relationships for reasons on their employer's side.

The bill provides for two bonus periods, the first from 22 November 2021 to the end of 2021 and the second from 1 January to 31 January 2022, also allowing the government to add additional monthly bonus periods until the end of 2022, depending on the course of the pandemic.

The maximum compensation bonus is CZK 1,000 per day for self-employed persons and limited liability company members if they meet the condition of a minimum 30% drop in sales. The fall in sales will be monitored for the calendar months of the bonus period, i.e., December 2021 and January 2022. The comparable period will be any three successive calendar months in the relevant period from June to October 2021.

The act provides specific rules for determining the comparable period in situations where the business activity started or the limited liability company was established later than on the first day of the comparable period. The specific rules also take into consideration seasonal entrepreneurs.

Entitled to the compensation bonus shall be entrepreneurs whose business is their main source of income and who have an active trade licence as of 22 November 2021. The bonus shall also go to those who have interrupted their licence for less than a year, which should particularly concern seasonal entrepreneurs. The act also allows the compensation bonus to coincide with other public support.

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In the case of quarantine or self-isolation of self-employed persons or limited liability company members who contribute to the sickness insurance scheme, the compensation bonus shall amount to CZK 500 per day, without the need to prove that the specified decrease in sales has been met. In the case of workers under agreements outside the employment relationship who were unable to work because their employer's activities were significantly affected, the compensation bonus shall also amount to CZK 500 per day.

The act also defines other conditions that the natural person concerned must meet to be paid the compensation bonus. These are similar to the conditions applicable to the compensation bonuses paid previously.

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Carer's allowance and self-isolation payment relaunched

Within the new wave of the pandemic, the number of adults and children becoming ill is again increasing, and so is the number of employees staying at home. The government has proposed restoring benefits for employees who are unable to attend work.



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Employees who care for children under the age of 10 will be entitled to a carer's allowance for the duration of any school closure or quarantine ordered for the child. Carer's allowances should also be provided to employees caring for disabled persons and children with special educational needs, even over the age of 10. Persons working under agreements outside the employment relationship will also be entitled to the allowance, provided they have been covered by sickness insurance for at least the 3 preceeding months.

According to the proposal, the carer's allowance shall amount to 80% of the daily assessment base, but at least CZK 400 per day, and should be paid out from 1 November 2021 to 28 February 2022.

Employees who themselves have been ordered into quarantine will also be entitled to an allowance added to their wage compensation: the government proposes to reintroduce the self-isolation allowance. Employees will receive CZK 370 per calendar day, but only for the first 14 days of quarantine. If the amount of wage compensation and the self-isolation payment together exceed 90% of the employee's average earnings, the allowance will be reduced. Employers will be able to deduct the amount paid from social security premiums and state employment policy contributions. The allowance will be paid in respect of quarantines ordered after 31 October 2021, but the quarantine must be still in force on the day the law comes into effect. The law is planned to become effective on the date of its promulgation. The allowance is to be paid until 30 June 2022 at the latest.

In view of the urgency, both bills are being discussed on a fast-track basis. The chamber of deputies has already approved them and the senate is expected to discuss them at its session on 15 December 2021.

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Another wave of COVID subsidy programmes to support business

In the context of the current pandemic situation, the government has approved the re-launch of some business support programmes, including COVID - Uncovered Costs and COVID 2021.



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COVID – Uncovered Costs
To be eligible for support under this subsidy programme, applicants must prove that their sales have fallen by at least 30% in the relevant period compared to the same period in 2019 and that they have generated a loss. In this case, the support will amount to 40% of the uncovered costs (losses resulting from the adjusted profit and loss account). If the applicant proves a drop in turnover of 50% or more, the support should be 70% of the loss, according to Mr Havlíček, the minister in resignation. Under the third call to participate in this programme, the relevant period shall mean the months of November and December. The last category of applicants should be micro-enterprises with up to ten employees, which, if they prove a drop in turnover of 80%, should be eligible for 90% of the loss from July 2021. However, the government has so far approved only the first of the above options, with the approval of the other two expected in the next few days.

The maximum subsidy amount shall be limited to CZK 20 million per applicant.

COVID 2021
This type of support will be available to those who can prove a drop in turnover of at least 30% for November and December. The subsidy amount shall be determined as the product of CZK 300 times the number of FTE employees times the number of days in the relevant period (i.e., 61 days - unless the relevant period is extended).

Cooperating persons and statutory representatives holding contracts on the performance of the office of statutory representatives should also be considered employees for the purposes of this programme.

It will not be possible to combine the above two subsidy programmes, nor will it be possible to combine them with the compensation bonus.

Applications for support may be submitted via the Ministry of Industry and Trade's AIS portal, as has been the case for all previous calls for these programmes. The date for accepting applications to the programmes is yet to be announced.

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Antivirus Regimes A and B extended until end of February

On 29 November 2021, the government decided to extend Antivirus Regime A until the end of February 2022, while at the same time activating Regime B from 1 November 2021 to 28 February 2022, thus responding to the current adverse development of the COVID-19 pandemic in the Czech Republic.



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Regime A is intended for employers whose employees are in isolation or have been ordered into quarantine. Affected employees are entitled to wage compensation equal to 60% of their average earnings. The state's contribution shall amount to 80% of the compensation thus provided, including insurance premiums. The maximum monthly contribution per employee is CZK 39,000.

It will also again be possible to use support from Regime B, designed for employers who have a significant number of employees in quarantine or isolation, have limited supplies of inputs or where demand for goods or services has declined due to the pandemic. Employees will receive wage compensation equal to 100, 80, or 60% of their average earnings, depending on the reason for the work impediment. The state will compensate the employer for 60% of the compensation, including insurance premiums, but only up to a maximum of CZK 29,000 per month per employee.

- The Antivirus programme has now been set to expire on 30 June 2022.
- The government may also activate other schemes, if necessary, without having to re-approve the terms of the programme.
- The government may also temporarily suspend the provision of these contributions if funds to implement the scheme are not available.
- The latest date for the conclusion of an agreement on the provision of contributions from the Antivirus programme between the employer and the Labour Office is 28 February 2022.

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GFD clarifies procedure regarding VAT waiver for electricity and gas

According to the General Financial Directorate (GFD), the waiver of VAT shall apply to electricity intended for any purpose. As for gas, the waiver shall apply both to supplies through the distribution system, and to tankers and cylinders. The GFD has also clarified how to settle VAT on advances.



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The waiver of VAT shall apply to supplies of electricity whatever the intended use, and to supplies of gas intended for the propulsion of engines and the production of heat. It does not matter how the gas is delivered to the customer: VAT shall be waived for gas supplied both through the distribution system, and through tankers or cylinders.

VAT on these supplies shall be waived if the date when the duty to declare the tax arises falls between 1 November and 31 December 2021. The duty to declare the tax arises either upon effecting the taxable supply (the date of taxable supply – most often the date of reading the measuring device or the date of determining the actual consumption) or upon receiving an advance payment. Therefore, if a taxable supply is effected (by reading a measuring device or determining actual consumption) or an advance payment is received in November or December 2021, these supplies are covered by the VAT waiver, and the VAT payer shall issue the tax document without the VAT.

In this respect, the GFD further commented on the settlement of advances. If the settlement takes place following the date of taxable supply in November or December (in particular where the measuring device is read in these months) and it results in an underpayment, the VAT waiver shall apply even though the consumption relates to a prior period. If the settlement results in an overpayment, the tax rate applicable at the time of receiving the advance payment shall apply, in accordance with the rules stipulated by the VAT Act. Therefore, VAT shall not apply to settlement of advances received in November or December 2021. The information also contains several illustrative examples regarding the settlement of advances.

Supplies of electricity and gas that meet the conditions for the waiver of VAT shall be declared in the VAT return on line 26. Where a reverse charge is applied, the recipient shall also declare the supply on line 26, while the provider should do so on line 25.

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New VAT rules for tour operators from 2022

Tour operators will encounter significant changes in the VAT area as of 1 January 2022. From that date, tour operators should start declaring VAT on advances received and should not calculate VAT based on aggregated monthly data. Furthermore, according to the GFD, the exemption for air passenger transport for tours outside the European Union should be restricted. This later decision remains questionable, however, since most European countries have already simplified the exemption for all air transport, leaving us wondering why the Czech Republic should be an exception.



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According to the updated GFD's Information on the Application of VAT on Travel Services, three major changes in this area will become effective from 1 January 2022:

- abolition of the possibility to calculate VAT from the aggregate data for the taxable period for travel services provided
- introduction of the duty to declare VAT on advances received for travel services
- restricting the VAT exemption for air transport within the European Union in the case of foreign tours outside the European Union.

The first two changes reflect the VAT principles for travel services as stipulated by the Court of Justice of the European Union (CJEU) in its recent case law. In short, travel service providers will have to calculate VAT on individual travel services (individual margins), i.e., they will no longer be allowed to use a simplification to calculate an aggregate margin for multiple travel services within a single taxable period.

However, the settlement of direct costs for individual travel services, i.e., matching these costs to individual travel services, is quite complicated in practice. The question is to what extent the allocation of actual direct costs is relevant for the calculation of VAT, especially if the aggregate calculation results in identical VAT amounts. In practice, tour operators generally make the final settlement of actual costs on a destination basis.

In addition, tour operators will now also have to follow the general rules regarding the receipt of consideration before the date of supply, and tax such advances.

However, in our opinion, the latter intention to change the VAT exemption for air passenger transport in the case of foreign tours goes beyond the principles that have been established by the courts. Moreover, this is neither in line with the practices in other EU member states nor with the conclusions and recommendations of the EU VAT Committee, which recommended that to simplify the already complicated calculation of VAT on the margin where the special scheme for travel services is involved, all international passenger transport for foreign tours outside the European Union should be exempt from VAT.

The changes to VAT for tour operators are so significant that they will require significant intervention in the VAT calculation methodology, related adjustments to company software, and certainly an increase in administrative capacity, all of which may have dramatic implications for most tour operators, especially in current times.

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TA CR introduces new international call: CHIST-ERA

The Technology Agency of the Czech Republic (TA CR) has announced an international call concerning information and telecommunication technologies. One of its topics responds to the upsurge in harmful behaviour on social networks in the form of spreading disinformation and creating fake accounts. The call also aims to develop cross-border cooperation. Therefore, applicants from the Czech Republic must submit their proposals together with at least two other partners from defined countries.



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Applicants may be enterprises and research organisations. If they are related parties, at least one other independent partner must participate in the project. Proposals can be submitted until 17 January 2022; the earliest the project may be worked on is 1 October 2022.

- eligible costs under this call: personnel expenses (including scholarships), other direct costs, subcontracting costs, indirect costs
- maximum aid amount per project: EUR 750 thousand
- maximum aid intensity for large enterprises per project: 25% – 65%
- defined countries: Belgium, Bulgaria, Estonia, Finland, France, Ireland, Israel, Lithuania, Poland, Slovakia, Spain, Switzerland, Taiwan, Turkey, United Kingdom.

Applicants may submit proposals for projects focusing on one of the following topics:

Foundations for Misbehaviour Detection and Mitigation Strategies in Online Social Networks and Media (OSNEM)

The topic responds to the recent growing trend associated with the use of the internet, specifically social networks and media: in particular the spreading of misinformation and fake news, creating of fake user accounts, etc. The aim of the call is to develop innovative technologies at an international level that will identify and prevent this harmful behaviour, in various forms: not just text, but also image, video and audio.

Nano-Opto-Electro-Mechanical Systems (NOEMS) pro ICT
The topic focuses on the creation of systems of elements and on the development of light-based or low-power technologies to be used in ICT applications. The aim is to develop sophisticated technologies and advance the NOEMS' current state.
If you are interested in this call, we will be happy to provide more information and check whether it is suitable for your planned activities.

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Investment incentives to increase in some regions, decrease in others

In November, the government approved two decrees that will affect investment incentives provided in the Czech Republic. In a large part of the Czech Republic, the conditions will be more favourable, and the maximum framework of the support provided will be increased. However, the incentives granted in some regions will unfortunately be restricted as a result of the new EU rules. The area of subsidies will see a similar development in the coming years, as subsidies are partly provided based on the same EU rules.



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An amendment to Government Decree No. 221/2019 Coll. implementing certain provisions of the Investment Incentives Act aims to improve the targeting of investment incentives to progressive industries and investments that are in the strategic interest of the Czech Republic.

Strategic investments

The concept of strategic investments has been part of the investment incentives scheme since 2012. Strategic investments are significant investments for which the state provides a more advantageous combination of investment incentives, primarily in the form of a higher proportion of cash grants. This type of investment is being changed as follows:

If a project meets the definition of a strategic investment, it can receive a subsidy for the acquisition of fixed assets of up to 10% of eligible costs, but not more than CZK 1.5 billion. Under the amendment, the state will favour the Karlovy Vary, Ústí nad Labem and Moravian-Silesian regions, where a subsidy for the acquisition of fixed assets will increase to 20% of eligible costs, with no absolute value limit. The remaining part of the investment incentive will continue to be provided in form of a tax credit.

All investments in:

- the manufacturing of products of a strategic importance for the protection of life and health
- high-tech manufacturing industries
- activities with a higher added value and research and development using key enabling technologies

will be deemed strategic investments without any further restrictions.

According to the government, key technologies are, e.g., nanotechnology, biotechnology, photonics, microelectronics, nanoelectronics, artificial intelligence technologies, advanced materials technologies, and advanced manufacturing technologies.

For other industries, the government is reducing the required minimum number of new jobs that must be created

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from 500 to 250. In contrast, it increases the limit for the minimum investment in fixed assets from the current CZK 500 million to CZK 2 billion, while at least CZK 1 billion must be spent on the acquisition of machinery (previously, CZK 250 million was sufficient).

The amended decree is effective from 1 January 2022 and will apply to applications for investment incentives submitted after that date.

Change in public aid intensity

Deriving from EU rules, the government has also approved a decree on the change in the public aid intensity with effect from 1 January 2022. This involves setting a maximum rate of the incentive or subsidy granted in relation to eligible costs (i.e., for example, based on the investment amount). The existing decree provided for a uniform rate of 25% for large enterprises throughout the country (with the exception of Prague) and 45% and 35% for small and medium-sized enterprises, respectively. Under the new decree, the rate for large enterprises will be as follows:

- 40% in the Karlovy Vary and Ústí and Labem regions
- 30% in the Liberec, Hradec Králové, Pardubice, Zlín, Moravian-Silesian and Olomouc regions
- 25% in the Pilsen-North, Tachov, Rakovník, Kladno and Mělník districts
- 15% in the remaining districts of the Central Bohemian, Pilsen, South Bohemian and Vysočany regions. If the decision on granting an investment incentive is issued before 31 December 2024, the aid intensity may increase to 20%.
- 0% in Prague.

The bonification for small and medium-sized businesses remains the same.

Under the transitory provisions, the aid intensity in effect until 31 December 2021, i.e. 25%, shall apply to investments in the Karlovy Vary, Ústí and Labem, Liberec, Hradec Králové, Pardubice, Zlín, Moravian-Silesian and Olomouc regions, but only to projects whose applications for support were filed before 1 January 2022 and which have not received a decision on granting an investment incentive by that date.

Compliance with the EU rules

The government decrees have not yet implemented all the changes resulting from the new EU rules for public aid (New European rules for public support | KPMG Czech Republic (danovky.cz)), which will also become effective from 1 January 2022. From this date, the Czech legal regulation of incentives will thus not be fully in line with the European one. Where the conditions of the European regulation are stricter than those of the Czech regulation, the EU rules shall be directly applied, as they have been several times in the past (e.g. the impossibility to support a simple expansion of production in certain regions).

Please note that unlike the Czech regulation under which the date of filing an application is relevant for deciding whether to follow the existing or the new rules, the European regulation takes as a basis the date on which a decision to grant the investment incentive was issued. Therefore, the new EU rules will apply to all projects for which an investment incentive was applied for in 2021 but no decision on the investment incentive was issued by 1 January 2022.

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National Recovery Plan's first calls: photovoltaics, electric cars and water saving

The Ministry of Industry and Trade has issued more information on the use of funds from the National Recovery Plan: Beneficiaries can also be large businesses, and projects can be implemented throughout the Czech Republic, including Prague. The terms and conditions of the individual calls should to some extent replicate those of the well-known Operational Programme Enterprise and Innovations for Competitiveness. Applications shall be submitted via the MS2014 application.



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Transition to cleaner energy sources

Photovoltaics

The call aims to support photovoltaic power plants and electricity storage on business buildings and shelters (e.g. garages or warehouses).

- Applications are planned to be accepted from 1 December 2021 to 31 May 2022.
- Only costs incurred for the installation of photovoltaic power plants including energy storage will be eligible.

The proposed aid intensity is as follows:

- o 35% for photovoltaic systems
- o 45% for electricity storage systems in the territory of Prague
- o 50% for electricity storage systems outside the territory of Prague
- Support will be paid out retrospectively (ex-post) in form of a subsidy based on the submitted application including appendices.
- Applicants do not have to prepare energy assessments or launch any tender proceedings but shall calculate the price based on unit costs.
- Along with the application, entrepreneurs will have to submit a conformity assessment of the PV plant parameters and a contract to connect the power generation plant to the electricity grid (or a future contract) and other documents.

Modernisation of heat supply systems

The call is currently in the preparation phase. Support will primarily focus on the reconstruction of existing heat supply systems, including the construction of new connecting branches to existing systems.

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- Applications are planned to be accepted from 15 February 2022 to 15 December 2022.
- The planned aid intensity is 40–50%, setting the aid intensity uniformly at 50% regardless of the size of business.

Clean mobility development

Electromobility

This call is also in the preparation phase. The ministry is currently considering whether to support investments in clean mobility in the form of direct subsidies or other financial aid. The call is expected to be finalised in December of this year.

- Applications will start to be accepted at the beginning of 2022.
- The following areas will be of particular interest to businesses:
    - support for the purchase of electric vehicles, hydrogen (H2) vehicles and e-cargobikes
    - building of non-public charging station infrastructure for private companies
- The ministry plans to support pure electric and hydrogen cars.
- Support for the purchase of hybrid or plug-in hybrid vehicles is not under consideration.
- The aid intensity should be around 50%.

Water conservation in industry and circular solutions in enterprises

Calls to participate in programmes for water conservation and the circular economy are expected to be announced early next year, but no further information has become available yet.

At KPMG, we will be happy to assist you with the selection of the appropriate support and the subsequent preparation of your application.

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Tips and tricks

Information obligation: what question may tax officers ask?

The tax authorities often call upon taxpayers – both formally and informally – to provide them with information or documents. While the information obligation towards the tax administrator is rather extensive, it does have its limits. Sometimes, such call may be a harbinger of a tax inspection focusing on a particular supplier. In this article, we clarify what questions the tax officers may ask regarding your business partners and in what manner, what to watch out for, and how to defend yourselves.



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The Tax Procedure Code stipulates the information obligation: upon request, selected persons are obliged to provide the tax administrator with the requested data. That obligation applies to persons effecting supplies that are subject to any tax; the obligation thus falls upon virtually all business entities. To those who are bound by confidentiality – typically banks, insurance companies or lawyers and tax advisors - special rules apply that to some extent lift their confidentiality duty.

Taxpayers are obliged to provide the tax administrator only with information leading to the fulfilment of the purpose of tax administration: i.e., to correctly determine and assess tax, and ensure its payment. Tax administrators also may not ask for information that they can ascertain from their own records or from another public authority. Most often, tax officers ask for detailed information about trading with another taxpayer, and request invoices or contractual documentation. The tax administrator's call (request) must be formal, usually delivered to the data box, and must be justified – the tax administrator must explain why the requested information is needed. If the tax administrator contacts the taxpayer by phone or email, there are no sanctions if the taxpayer does not respond. If the call meets the statutory conditions, the taxpayer must provide the requested information to the tax administrator, free of charge and within the set deadline, but only if the information is at their disposal. The taxpayer is under no obligation to obtain additional information for the tax administrator or to process or assess the information in any way. If the taxpayer does not comply with the call and does not respond at all, they face a penalty of up to CZK 500,000. The deadline set in the call is usually 15 days, and it is possible to apply for its extension. The call/request for information itself cannot be appealed, but it is possible to lodge a complaint as a form of defence; an appeal is only possible against the decision that imposes a fine.

In practice, a call to provide information may be a harbinger of a further review or an upcoming tax inspection. This is quite common, especially when the tax administrator asks about cooperation with entities that turn out to be uncontactable for the tax administrator. Recently, it has been mainly the case of suppliers of advertising services, cleaning work, or various unqualified assembly work. The tax administrator may also use the data obtained by means of the call in a subsequent tax inspection.

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EP: multinationals to publish profits and taxes paid in individual countries

On 11 November 2021, the European Parliament approved a proposal for the directive introducing public country-by-country reporting. The CbC report, informing, among other things, about profits generated and taxes paid, broken down by individual countries, has been prepared by multinational groups since 2017, but so far has only been submitted to the tax administration; now they will have to be uploaded to company websites or published in public registers.



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EU member states must implement the directive by 22 June 2023. Local legislation must then be in force at the latest for periods starting on or after 22 June 2024. In practice this means that for calendar year taxpayers, the first reporting year will be 2025, and the report will be due by the end of 2026. As individual member states may adopt the rules earlier, we recommend monitoring the developments around the directive. Differences between states may also arise due to the implementation of a safeguard clause, which grants an exemption from publication for up to five years. Sanctions for failure to meet the new obligation are also within the competence of individual states.

Public CbC reporting shall be mandatory for multinational groups with a controlling company established in the EU whose consolidated turnover exceeds €750 million and which operates in more than one member state. If the controlling company is based outside the EU but operates in the EU through a subsidiary or branch (subject to conditions regarding the size of the EU presence), the obligation to publish the data shall pass on to that subsidiary or branch. The number of companies affected by the new obligation may thus be higher than it first seems.

The report shall contain information on all companies in the group. For companies based in an EU member state or in countries deemed 'non-cooperative' jurisdictions (EU black and grey lists), information shall be provided in aggregate for each state. For companies in all other jurisdictions, information shall be reported in aggregate, as a single amount. The following information shall be disclosed, among others:

- description of business activities
- number of employees
- profit or loss before tax
- corporate income tax current and deferred, including explanation of any differences

The European Commission believes that the accessibility of information about multinationals' revenues and tax paid in individual states will bring greater transparency as well as enhanced public scrutiny. The question is whether this level public scrutiny is not to the detriment of the competitiveness of European enterprises who will bear a greater administrative burden as well as the risk that the published information may be misinterpreted, misunderstood, or expose commercially sensitive information.

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We expect that mandatory public disclosure will also motivate some multinational groups to control their transaction flows to avoid negative publicity or reputational damage.

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Personal Data Protection Office imposing penalties mainly for unsolicited advertising in first half of 2021

The Office for Personal Data Protection has published an overview of its inspections for the first half of 2021. The office most often and most severely sanctioned sending of unsolicited commercial communications. Penalties were also imposed for incorrectly set consent with cookies or failures to delete the accounts of former employees. The office inspected both private entities and non-profit organisations as well as public administration.



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Most of the inspections held were initiated subsequent to complaints from the public, usually a data subject whose personal data were processed by the person subject to the inspection. Cases of former employees or dissatisfied customers are not unusual in this respect.

In the area of personal data protection, during its inspections the office most often focused on:

- review of the legal titles for processing personal data
- fulfilment of information obligations of personal data controllers
- excercising the rights of data subjects
- ensuring sufficient security of personal data.

In relation to the security of personal data, the office, e.g., found fault with an insurance company that had not revoked access to the insurance company's data box to its former employee (the complainant) on the date of termination of employment. Thus, the complainant had access to personal data in the data box of the inspected insurance company even after the termination of employment.

As for the review of legal titles for personal data processing and the fulfilment of information obligations, the office turned its attention to e.g., customer loyalty programmes. For retailers, it primarily checked whether the use of loyalty programmes and cards, including customer family cards, involves the processing of personal data to an adequate, relevant, and necessary extent. In this context, it also assessed whether personal data are processed fairly, transparently and based on lawful grounds. Finally, the office focused on the fulfilment of information obligations towards data subjects, the use of processors and the level of security of customer databases.

In relation to the processing of personal data, the office also dealt with the unauthorised (unjustified) making and storing of copies of ID cards or legal titles in connection with the use of cookies. With regard to cookies, one inspection revealed, among other things, that users could not provide their informed consent to the processing of personal data on the website of an online shop, as by clicking on the link to find out more information, users in fact automatically gave (uninformed) consent.

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The most and highest sanctions were imposed for sending unsolicited commercial communications. Fines ranged from tens of thousands to the lower hundreds of thousands of Czech crowns. During inspections concerning unsolicited commercial communications, the office primarily paid attention to the reasons for sending commercial communications and to the senders' information obligations.

Considering the inspections' results, it is recommendable that companies should pay proper attention not only to the fulfilment of their information obligation towards the recipients of the communications, but also to their databases of electronic contacts used for sending commercial communications. They should make sure that these databases contain only contacts that are their customers who have not refused to receive commercial communications or contacts who have given their consent to receive commercial communications. Sufficient control mechanisms should be put in place for this purpose. Companies should not underestimate how their internal processes have been set up and how they comply with personal data protection rules. So, if you find yourself on the Personal Data Protection Office's radar or just want to be at ease and have everything in order, please do not hesitate to contact us.

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How to set wage ranges in job vacancy reports

When employing foreigners, reporting job vacancies to the Labour Office is an important step. Practice shows that when preparing a job vacancy report, it is important to correctly define not just the required qualification and place of work, but also the wage conditions.



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An application for an employee card may be submitted by a foreigner whose purpose of stay is to be employed in one of the job positions published in the central register of vacant positions that may be staffed by employee card holders. All data and documents attached to the application must correspond to the specifics of the job position, i.e., the required qualifications, place of work, and wages, so that before a job vacancy is published and made available to foreign candidates, it undergoes a labour market stress test as the Labour Office examines whether there is a candidate for the position from the Czech Republic or another EU member state. Only after this test, which takes ten to thirty days, it is possible to fill the job position with a foreigner.

Practice shows that it is very important for the employer to state in the vacancy report the amount or range of the wage that corresponds to the wage conditions that will subsequently be contracted with the foreigner; otherwise, the employer risks that they will be unable to staff the job by the foreigner. We would like to draw your attention to a court decision in which a court confirmed the rejection of an application to extend a foreigner's employee card in a case where the wage stated in the employment documents attached to the application was more than 30% higher than the maximum wage that the foreigner could achieve according to the job vacancy report. In the court's opinion, the change in the wage in effect meant employing the foreigner in another job position which had not properly passed the labour market stress test. Therefore, it could not be filled with a foreigner.

In its decision, the court provided some guidance on how to set the wage amount, or wage range, in job vacancy reports. First of all, wages should always be set in gross amounts, i.e., before tax and other levies. Tax and other levies depend on a number employees' personal factors (e.g., number of children, entitlement to tax credit, etc.) which means that the employer cannot in fact report the net amount of wages: net wages of employees in the same job position and with the same gross wages may vary depending on their personal circumstances. The wage specification must also include personal bonuses, extra pay for overtime work, night work, etc. In general, wage conditions comprise the summary of all circumstances that may affect the determination of the amount of wages. And the knowledge of all these conditions is crucial for the candidate to be interested in and, consequently, hired for the advertised job. The opposite approach could affect candidates' decisions as to whether to apply for such a position, which would again mean that the labour market test could not be considered relevant.

To conclude, we recommend that employers carefully consider and set the wage conditions in their job vacancy reports. Incorrectly set wage conditions can make it much more difficult to recruit foreigners for vacant job positions.

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Case law

Constitutional Court: employees deserve wages for on-call breaks

The Constitutional Court stood up for a firefighter from Ostrava airport. During his break from work, the firefighter had to remain ready to intervene even at the farthest point of the airport within three minutes. According to his employer, he was not entitled to wages for such breaks, and the breaks were not counted as working time. The Constitutional Court stated that the time during which an employee remains ready to intervene is working time, regardless of whether the intervention takes place. The case now goes back to the district court.



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The Constitutional Court held that "during a break from work for which an employee is not remunerated, the employee can freely manage their time within their discretion, rest, and not be available to the employer". In contrast, the court pointed out that the firefighter had to be constantly on call during his break and ready to intervene should the situation require. According to the court, this was therefore work that could not be interrupted, and for such work, according to the Labour Code, employees are entitled to remuneration even during a break period, which shall also be counted as working time. The court added that "the period of time during which an employee is ready to intervene is working time regardless of whether the intervention takes place."

This is a landmark decision with impact on both employers and employees. Employees in similar situations may claim compensation for up to the past 3 years. We expect such lawsuits to increase in number.

Another firefighter's case recently appeared before the Court of Justice of the European Union (CJEU). The employee was in principle on call 7 days per week and 24 hours per day. Yet, he was only required to participate in 75% of the interventions and did not have to be present at a specific place but had to arrive at the fire station to participate in interventions in a relatively short time. During the on-call time, the firefighter worked as taxi driver. The CJEU concluded that "whether that [on-call] time constitutes working time must follow from an overall assessment of all the facts of the case, in particular whether the constraints imposed on the worker during that time are of such a nature as to constrain objectively and very significantly that worker's ability to freely manage their time and pursue their own interests". In the case in question, the CJEU concluded that the constrains were not of such a nature as to very significantly affect the employee's ability to freely manage their time.

It is clear that on-call workers are entitled to a breather. How big such a break will be depends on the nature of the job and on the set conditions of the on-call status.

For instance, employees can enjoy a cup of coffee at work, if time allows. However, an afternoon espresso has recently became rather bitter for employees in Italy: after more than a decade of litigation, an employee learned that her broken wrist during an afternoon coffee-break did not qualify as an on-the-job accident and that she was not eligible for compensation from the insurance company. What was the story? The employee went for a cup of coffee with her colleagues during a break and slipped and injured herself as she was returning to the office. The dispute eventually appeared before the Court of Cassation in Rome, which ruled that "coffee was not a need

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connected with work", as it could be postponed or cancelled.

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Application of time test to proceeds from sale of former cooperative apartment

If you intend to sell an apartment that had been in cooperative ownership (owned by a housing cooperative in which you were a member) before you became its owner, beware of calculating the time test: the period of time of the membership in the housing cooperative cannot be included in the time test for tax exemption of the proceeds from the sale.



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The Supreme Administrative Court (SAC) dealt with the taxation of proceeds from the sale of an originally cooperative apartment, which took place in 2014 (2 Afs 211/2020-29). The key legal question was whether the five-year time test for the tax exemption of the proceeds from the sale of an apartment should also include the time for which the seller had held a share in the respective housing cooperative.

The complainant had held a member's share in a housing cooperative since 2004, and the right to use the apartment since 2005. In 2013, she acquired, free of charge, the ownership right to the apartment, which she subsequently sold in 2014. She considered the proceeds from the sale of the apartment to be exempt from tax on the grounds of meeting the "time test" of five years between the acquisition of the apartment and its sale. She based her entitlement to the exemption on the linguistic interpretation of the term "acquisition", and on the SAC's case law (2 Afs 20/2011-77 of 15 April 2011): in the previous judgment, the SAC held that the term "acquisition" in Section 4(1)(b) of the Income Tax Act can be interpreted to include the acquisition of member's rights to an apartment in cooperative ownership.

The SAC concluded that the complainant did not meet the conditions for the tax exemption, as the sale of the apartment took place in 2014 when the new wording of the mentioned provision was already in force: effective from 1 January 2014, the vague term 'acquisition' was replaced by 'acquisition of an ownership right'. According to the SAC, this eliminated the legislative inaccuracy, overriding the previous case-law to which the complainant had referred and from which she derived her entitlement to the tax exemption of the proceeds from the sale of the apartment.

Therefore, when an apartment that had been previously in a cooperative ownership is being sold, the period of time for which the person owned a member's share in the housing cooperative can no longer be included in the time test. This may have a significant effect on whether the proceeds from a sale of a formerly cooperative apartment will be exempt from tax, which is currently particularly relevant, as the time test has been extended from 5 years to 10 years if the seller has not had their residence in the apartment prior to the sale.

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Case law

CJEU: conditions for denying right to deduct VAT if invoice includes fictitious supplier

The Court of Justice of the European Union (CJEU) dealt with the question of whether a recipient of a taxable supply in the reverse charge regime may be denied the right to deduct VAT if the invoice indicated a fictitious supplier.



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Ferimet purchased recyclable material (scrap) from Reciclatges. In their VAT return, Ferimet declared the received supply in the reverse charge regime. During a tax inspection, the Spanish tax authority found that the supplier indicated in the invoice did not have the resources to make the supply and concluded that the supplier was fictitious. Subsequently, the tax authority did not accept Ferimet's right to deduct VAT and issued a tax assessment notice in this respect.

Ferimet appealed the tax assessment notice arguing that they had demonstrably received the supply and that there had been no loss of tax revenue. The Spanish court, on the other hand, accepted the argument that in the case in question a fictitious supplier may not be a mere formal error and referred the question to the CJEU.

The CJEU confirmed that the right to deduct VAT is subject to compliance with material as well as formal conditions. Among the material ones, the CJEU classified the condition that, when providing the supply, the supplier must act as a taxable person. The CJEU also reiterated its previous conclusions that the right to deduct VAT must be allowed if the material conditions are satisfied, even if the taxable person has failed to comply with some of the formal conditions. However, this is not the case if, because of non-compliance with formal requirements, it is impossible to verify that substantive requirements have been satisfied.

According to the CJEU, indicating a fictitious supplier in an invoice may constitute a breach of material conditions. If the tax authority cannot otherwise verify whether when providing the supply the supplier had the status of a taxable person, the right to deduct VAT may not be granted. The tax authority may also deny the right to deduct VAT if it is established that the supply recipient has committed VAT fraud or knew or ought to have known that the transaction was part of a chain affected by such fraud.

With regard to the CJEU's conclusions above, we recommend that companies always check whether the data in invoices correspond to business reality. According to current administrative practice, any discrepancy may have negative tax consequences for the parties involved. In particular, the right to deduct VAT will very likely be denied if the facts or evidence do not support that the supplier was a taxable person.

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Case law

Taxpayer (yet again) fails to bear burden of proof regarding advertising services

The Supreme Administrative Court (SAC) ruled against the taxpayer and dismissed a cassation complaint in a dispute concerning the refusal of the right to deduct VAT on received advertising services. In the SAC's opinion, if the extent of the supply as declared in the tax documents is not supported, the right to deduct VAT cannot be exercised.



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A taxpayer claimed VAT on purchased advertising services. The services were to include both illuminated advertising on banners and static advertising on rented advertising space. To prove that the services were indeed provided by the advertising supplier, the taxpayer submitted photographs of a light board displaying the name of the entity, their business and contact details. In addition, witness statements were taken indicating that several persons had actually seen the advertisement in question.

According to the tax administrator, neither the submitted photographs nor the witness statements proved that the services took place at the time, place, and extent as ordered under the contract. For example, it was not clear from the photographs when exactly they were taken or where the banners were specifically located (missing time and date of taking the photograph or a picture of the surroundings of the billboard that would allow to identify its location). Moreover, the tax administrator was unable to determine from the witness testimonies who had actually provided the agreed advertising services. For these reasons, the tax administrator did not recognise the right to deduct VAT on the received invoices.

The SAC confirmed the conclusions of the tax administrator and of the regional court. The SAC pointed out that the subject of the dispute was not whether the taxpayer received "any" advertising services. It must be proven that the advertising services were provided in the extent in which the service was accounted for. This was not the case here, and so the substantive conditions for the right to deduct VAT, i.e. the performance of advertising services as declared in a formally perfect tax documents submitted, were not met.

The judgment follows the SAC's decision rejecting the tax deductibility of costs of advertising supplies for income tax purposes. It is therefore to be expected in the future that in cases where the provision of advertising services has been challenged for the purposes of income tax, tax administrators will also challenge the right to deduct VAT.

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Case law

Interest on interest in tax proceedings

In its recent judgment, the Supreme Administrative Court confirmed that taxpayers are entitled to compensation for late declared and paid interest on the tax administrator's unlawful conduct – again, in the form of interest on the tax administrator's unlawful conduct. Until the end of 2020, its annual amount was 14% + the CNB's repo rate.



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Tax disputes entail not just the litigation and related costs, but also a significant disruption to taxpayers' cash flow: the additionally assessed tax usually must be paid within 15 days from the decision on the appeal, which means that throughout the subsequent court case, the tax authority has considerable financial resources at their disposal. If the court then annuls the decision assessing the additional tax, the taxpayer is also entitled, in addition to the refund of the tax paid, to interest on the tax administrator's unlawful conduct (after the amendment effective January 2021, 'interest on the incorrectly determined tax'). The interest should be granted automatically, but in practice, this is not always the case. The taxpayers may be up for another dispute – this time over the interest.

In a recent judgment, the court dealt with the question of whether, following a successful litigation over the interest, the taxpayer should also be entitled to additional compensation in the form of interest on the late declared and paid interest. The case in question involved a refund of gift tax after filing an additional tax return. Following a judicial review, approximately CZK 100 million was returned to the company. However, the tax administrator was reluctant to award interest (on their unlawful conduct) on this amount, which for more than two years amounted to more than CZK 35 million. The company won this dispute too, and was awarded the interest, by a court decision, in 2019. However, they were not satisfied with this and demanded from the tax administrator a second payment of interest for the period during which they did not have the first awarded interest at their disposal.

The Supreme Administrative Court thus asked themselves a question: "Is it possible to charge interest on interest on the tax administrator's unlawful conduct?" The answer was an unequivocal yes – if the tax administrator had acted unlawfully twice regarding two different amounts (on one hand, the original principal, and on the other hand, the first awarded interest), they cannot compensate these two incorrect procedures by awarding a single (the first) interest payment. Awarding interest is not prevented by the prohibition of anatocism (charging interest on interest), as the financial administration argued.

However, not all disputes over interest on interest are won by taxpayers. In contrast to the above, in a case concerning interest on late declared and paid interest on a withheld VAT deduction (as in the 'Kordárna' judgment), the court denied the second interest payment. As for the future, the issue has been most likely resolved by this year's amendment to the Tax Procedure Code, under which no further interest shall be charged on interest not awarded by tax administrators. However, old disputes continue to be governed by the old rules, and it is often still possible to demand interest in these old disputes.

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Case law

Regional court: tax administrator erred in applying transfer pricing rules to transactions between unrelated parties

The Regional Court in Hradec Králové sided with the taxpayer against a tax administrator who, without any basis in law, treated a part of a company's transactions with independent entities as controlled transactions. The tax administrator then wrongfully assessed additional tax and a penalty by applying to these uncontrolled transactions rules used to assess prices between related parties.



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A large Czech timber company defended itself in court against the tax administrator's approach, and the Regional Court in Hradec Králové stood up for them. The Income Tax Act stipulates that, if prices agreed between related parties differ from prices that would have been agreed between unrelated parties in common business relations under the same or similar conditions, the tax administrator shall adjust the taxpayer's tax base by the ascertained difference. This provision should therefore apply only to related parties, strictly defined by law. However, the tax administrator applied it also to the company's transactions with unrelated parties (independent entities) and assessed additional income tax and penalties.

According to the Regional Court in Hradec Králové, however, the tax administrator erred in extending the exact definition of related parties in the Income Tax Act to cases that do not fall within that definition. The tax administrator assessed the function and risk profile of the company as a limited function and risk manufacturer, while the company considered itself a full-fledged manufacturer. In the dispute, the company argued that the tax administrator did not examine the actual state of the individual decision-making processes within the group to which the company belonged. At the same time, according to the company, the tax administrator erred in carrying out a comparability (market) analysis. The Regional Court upheld the company’s objection that the tax administrator could only analyse transactions between related parties, and that the tax administrator should first prove that there was indeed a relationship between related parties.

The Appellate Financial Directorate has lodged a cassation complaint against the court’s decision, and we will have to wait for the final assessment. Even so, the court’s ruling is quite crucial for many taxpayers, as it gives them new arguments for possible disputes with the tax administrator. At the same time, it has been once again confirmed that an incorrectly assessed function and risk profile within the group business model can cause considerable complications for companies.

Well-prepared transfer pricing documentation, including a comparative market analysis covering related-party transactions, can be very effective in preventing similar situations. We will be happy to assist you with the preparation of your company’s transfer pricing documentation.

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Case law

SAC once again restrains tax administrators from collecting tax, cost what it may

The Supreme Administrative Court has published a long-awaited judgment in the case of the pharmaceutical company ELI LILLY ČR, s.r.o., which concerned the invoicing of marketing and distribution costs. The company sought to achieve minimum profitability in line with transfer pricing in a price-regulated environment.



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In the Eli Lilly case, the tax administrator concluded that marketing and distribution services that the company provided to one of the foreign companies within the group should be included in the tax base from the sale of pharmaceuticals in the Czech Republic. The reason was that, purportedly, the services were in fact provided to customers in the Czech Republic, not to companies abroad.

According to the SAC, however, the tax administrator and the municipal court both confused the term service recipient, i.e., the one who ordered the service and benefited from it, and the term recipient of marketing information, i.e., the one whom the content of the marketing service is meant to affect. The tax administrator also failed to reflect the complexity of doing business in a strictly regulated market in pharmaceuticals, in which other participating entities may also be influenced by the marketing information.

In this respect, it cannot be argued that the recipient of the marketing service is the last link in the chain (i.e., the end customer). The end customer is often unable to assess the marketing information due to its highly technical nature. Additionally, pharmaceuticals are covered by public health insurance, and there is de facto no payment for consideration. Finally, due to the price regulation of pharmaceuticals, Eli Lilly has very limited options to transfer the marketing costs onto the end customers. It is therefore obvious that payments for marketing services cannot be included in the tax base, as the tax base would thus exceed the amount of consideration received from the customer.

The SAC further opined on the question of the indivisibility of a taxable supply. The court referred to the established case law of the Court of Justice of the European Union, under which each transaction shall be regarded as independent and should not be artificially split. What is crucial is how the supply is perceived by a typical consumer: if a typical consumer perceives the supply as several separate supplies, it must be viewed as such also from the VAT perspective.

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News in brief, December 2021

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



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DOMESTIC NEWS IN BRIEF

- The application for a VAT refund in Great Britain for the first half of 2021 must be filed by 31 December 2021. The UK VAT refund period is not the calendar year but the ☒scal year from 1 July to 30 June, and the application must be submitted no later than six calendar months after the end of the ☒scal year.
- A decree amending certain decrees on submissions via prescribed forms in tax administration was published in the Collection of Laws (No. 437/2021 Coll.).
- An amendment to the Valuation Decree was issued under No. 424/2021 Coll.
- An amendment to the government decree on the minimum wage, on the lowest levels of the guaranteed wage, on the definition of a difficult work environment, and on the amount of extra pay for work in a difficult work environment was published under No. 405/2021. The minimum wage shall increase to CZK 16,200 from 1 January 2022.
- An overview of the changes from 1 January 2022 within the competence of the Ministry of Finance can be found here.
- The financial administration issued its Information on the Application of Section 38zh of the ITA relating to the Application of Tax Losses as Items Deductible from Taxable Income.
- The financial administration issued its updated Information for Taxable Persons not Established in the CR (VAT registration and other selected tax obligations).
- A government decree on the permissible level of public aid in the cohesion regions of the Czech Republic was published in the Collection of Laws under No. 428/2021.

FOREIGN NEWS IN BRIEF

- The European Parliament subcommittee on tax matters (FISC) released a draft report on the establishment of a European withholding tax framework, to be prepared in legislative form by the end of 2022. The framework should find a balance between tackling fraudulent practices leading to non-taxation and inappropriate tax refunds and the need to ensure the reduction of double taxation for enterprises and investments. The framework should also introduce a system to ensure that all dividend, interest, and royalty payments out of the EU are taxed at a minimum effective rate and a harmonised EU procedure for all member states in respect of withholding tax refunds.
- The tax bill implementing the Polish Deal tax package was signed by the Polish president and should become effective on 1 January 2022. The bill includes significant corporate income tax changes such as a new Polish holding company regime, a minimum corporate income tax, provisions limiting the shifting of the profits to related entities in low-tax jurisdictions, innovation tax reliefs, and a reform of Polish transfer pricing rules.

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