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In brief

News in brief, March 2021

Editorial

It probably is no surprise to hear that I am not writing this editorial from the office. Work from home, and with it the use of modern technology have been booming – with all the positives and negatives they entail (and it seems to me that the negatives are gaining the upper hand). The boundaries between working hours and leisure time have become blurred, and we are in fact online all the time, which may make us prone to psychological problems. Which is why members of the European Parliament have called upon the European Commission to set this right – ideally by means of a directive that would allow employees to disconnect after working hours and be unavailable to their employers, without the fear of sanctions.

CZK 300 thousand or just 150 thousand? The January amendment to the Income Tax Act has brought changes that in practice give rise to numerous questions. Its ambiguity on the deduction of interest on mortgage loans from the tax base was addressed by the Coordination Committee of the Czech Chamber of Tax Advisors and the General Financial Directorate – and we've summarised the committee's conclusions for you, as usual. We also looked into how the tax administration approaches extraordinary tax depreciation, adjusted limits for acquisition costs of tangibles, or abolishment of intangible assets for tax purposes.

The weather outside is nice, so I have decided to disconnect and take my children for a walk before the sun goes down. For now, until the commission rules, I'd better take my phone with me, just in case my colleagues need anything urgently.

May you have plenty of sunshine in your municipalities and districts!



Petr Toman
Partner
KPMG Czech Republic

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Obligatory testing of employees

On 1 March 2021, the Ministry of Health issued an extraordinary measure, ordering the obligatory testing of employees at companies. The measure is effective from 3 March 2021 until further notice.



Romana Szuťányi
kpmg@kpmg.cz

From 12 March 2021 at the latest, employers with 250 and more employees shall allow them to enter the workplace only on the condition that within the last 7 days, they have tested negatively using one of the SARS-CoV-2 tests listed in the measure. The tests shall be provided by the employer. Appropriately, employers have to ask their employees to take the test from 5 March, so that their presence at the workplace under the above conditions is possible on 12 March at the latest. Employers with 50 to 249 employees shall allow entry to the workplace solely to negatively tested employees from 15 March, meaning they have to ask them to test from 8 March. If an employee only works outside the employer's workplace within the 7-day cycle, the employer shall allow them to take a preventative test outside the workplace.

Employees are obliged to undergo the test. The duty to test does not apply to employees working from home and to employees who have recovered from COVID-19 confirmed by a laboratory test, whose isolation period has elapsed, and who first tested positively no longer than 90 days ago.

Following this measure, another extraordinary measure of the health ministry dated 1 March stipulates duties for employees who on their own or administered by a person that is not a medical professional have taken a SARS-CoV-2 test provided by their employer. Until further notice, if the result is positive, employees are ordered to (i) inform their employer immediately, (ii) leave the workplace for their present place of residence, and (iii) report this immediately to the employer's healthcare provider (or, under certain circumstances stipulated in the measure, their registering general practitioner, other healthcare provider or a relevant public health protection authority depending on their place of work) to instruct them on how to proceed further.

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New arrival rules for the Czech Republic

Since 1 March, a new protective measure of the Ministry of Health has been in effect, yet again tightening the rules for arrival from abroad and changing the existing 'traffic light' system (Semafor). For the purposes of this measure, foreign countries have been classified into four categories according to the risk of contracting COVID-19. Changes have also been made to some obligations that both Czech citizens and foreigners must meet upon arrival in the Czech Republic.



Romana Szuťányi
kpmg@kpmg.cz



Petr Štětina
pstetina@kpmg.cz



Michal Mikovčík
mmikovcik@kpmg.cz

Currently, foreigners are allowed to enter the Czech Republic only for defined reasons, such as travel for work, business, to take care of children, relatives or animals, to attend to urgent official matters, to study or to return to one's place of residence. The rules that must be observed upon arrival depend on the risk category of the traveller's country of origin, and apply to both foreigners and Czech citizens.

Countries are now divided into safe countries, i.e. those with a low risk of infection (green), countries with a medium and high risk of infection (orange and red), and countries with a very high risk (dark red), with the strictest rules for entering the Czech Republic.

Travellers arriving from low-risk countries are not subject to any restrictions upon arrival, and are only subject to the general rules of the anti-epidemic system (PES).

Travellers arriving from orange, red and dark red countries are required to fill in an arrival form before traveling, and present it upon request; the arrival form (Public Health Passenger Locator Form) is available in Czech and English. Persons travelling from countries with a medium and high risk of infection must also show an antigen test not older than 24 hours, or an RT-PCR test not older than 72 hours. Persons travelling from countries with a very high risk of infection must show an RT-PCR test not older than 72 hours.

This protective measure now also covers situations where it is not realistically possible to take the test in the country of departure: Czech citizens and their family members travelling from selected countries may substitute the pre-arrival test with a diplomatic note issued by the Czech embassy in that country.

An additional obligation upon arrival is to undergo an RT-PCR test in the Czech Republic. This only applies to travellers from countries with a high risk of infection, who must be tested within 5 days after arrival, and to travellers from countries with a very high risk of infection, who must test no earlier than 5 days and no later than 14 days after arrival. For both these groups, travellers must self-isolate until they receive negative test results. During self-isolation, their free movement is restricted and does not include trips to work. Restrictions of free movement now also apply to persons under the age of five, but only for five days. Persons travelling from a country with a medium risk of infection are obliged to submit a negative test only upon entering a workplace or educational institution. This obligation newly also applies to children who attend kindergarten. All groups are obliged to wear

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respirators in selected places for 14 days from entering the Czech Republic.

The protective measure provides for a number of exceptions to the above rules. For instance, people who have recovered from a SARS-CoV–2 infection in the last 90 days and have a medical report to support this do not need to self-isolate or take the control test. Exempted are also persons travelling to work across the border, if they can show an official certificate issued by their employer.
With the extension of the state of emergency, the exception regarding employer changes has been extended too: during the state of emergency, foreigners holding an employee card may change employers without having to meet the condition of six months of previous employment in the Czech Republic.

Due to the dynamic development of the situation, we recommend monitoring the measures issued by the Ministry of Health closely; you may also contact us for a consultation.

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Transfer pricing - comparability analysis in times of COVID-19

The unprecedented changes in the economic environment following the outbreak of COVID-19 have created unique challenges for setting prices in intra-group transactions. The correct setting or verification of transfer prices for the past year while observing the arm's length principle has become a hot topic. In this respect, identifying the actual effects of the pandemic on a company, and comparing and assessing them will be of key importance.



Petr Bruštík
pbrustik@kpmg.cz



Milan Kůta
kpmg@kpmg.cz

Comparability analyses are one of the key inputs for setting/verifying transfer prices. Yet, historical financial information on comparable transactions or companies (usually used in the preparation of comparability analyses) are less reliable for periods affected by the pandemic; and comparable financials for the year are usually only available in commercial databases in the second half of the following year.

The OECD's guidance on the transfer pricing implications of the COVID-19 pandemic thus lists various sources of information that may be used to support the performance of a comparability analysis:

- analysis of sales structure and volume, compared to pre-COVID-19 years
- analysis of changes in capacity utilisation
- information on incremental costs as a result of the pandemic
- government restrictions or assistance programmes
- macroeconomic, statistical and other industry-specific information
- comparison of planned/budgeted data on sales, costs and profitability compared to actual results, and other.

According to the OECD's guidance, taxpayers should document all currently available market evidence, or other relevant evidence of the pandemic's economic impact, including its effects on the level of demand and on production and supply chains in the particular sector of the economy. Such information may be taken into account when preparing a comparability analysis for periods for which relevant comparables are not yet available.

When preparing comparability analyses for years affected by the COVID-19 pandemic, it has to be considered whether the comparable companies were facing similar conditions or governmental restrictions. Therefore, it is not recommend to simply draw an analogy to the previous 2008/2009 crisis, as market conditions were rather different then.

The last comment of the OECD guidance concerns loss-making comparables. Loss-making companies that in the specific case meet the comparability criteria should not be excluded from the analysis solely because they were loss-making in periods affected by the COVID-19 pandemic.

To mitigate the uncertainty caused by the COVID-19 pandemic, the OECD guidance suggests that tax administrators should allow for retroactive adjustments to transfer prices by issuing corrective tax documents once more exact information on comparable companies/transactions becomes available. Czech tax laws provide for this possibility through the submission of a supplementary tax return. However, in view of the possible materiality

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of the adjustments, companies should also analyse the implications for other taxes (e.g. VAT), customs duties, and, importantly, disclose the facts in their annual reports.

Thus, in these difficult times, taxpayers can only hope that the tax authorities will heed the OECD's recommendations and approach these issues and any possible dispute resolution pragmatically, in particular where taxpayers in good faith make an effort to set prices at arm's length while lacking essential information due to the COVID-19 pandemic.

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2021 amendment to VAT Act introduces deemed supplier concept

The VAT position of electronic interface operators will change dramatically from 1 July 2021. In connection with a planned amendment to the VAT Act relating to e-commerce, individual e-shops ensuring the sale of goods from foreign suppliers will have to assess whether they are operating as deemed suppliers.



Kateřina Klepalová
kklepalova@kpmg.cz



Petra Němcová
pnemcova@kpmg.cz

From 1 July 2021, platforms (electronic interfaces, portals, e-shops) facilitating distance sales of goods will become deemed suppliers for VAT purposes where specific taxable supplies are concerned. This also affects the responsibilities for the payment of VAT on such transactions and keeping relevant records. Decisive criteria include the parameters of the given platform, the status of the original supplier, and the place from which goods are dispatched. Any restrictions to the platform's responsibilities will be subject to strict criteria and will only apply to the potential difference between the VAT amount paid and the VAT amount set by law.

The key question is whether the platform **facilitates** distance sales of imported goods of low value (i.e. goods whose value does not exceed EUR 150) or distance sales of goods to end customers by suppliers not established in the EU.

The EU Council's Regulation implementing the VAT Directive provides a negative definition of platforms (e-shops) that facilitate the sale of goods and may become deemed suppliers. Specifically: only a platform (or e-shop) that at the same time fulfils all the three conditions below shall **not become** a deemed supplier for selected sales.

The platform (e-shop):

- does not set, directly or indirectly, any of the terms and conditions under which the sale is effected
- is not involved, directly or indirectly, in authorising the fee charged for the sale
- is not involved, directly or indirectly, in ordering or delivering the goods.

E-shops that only process payments, advertise goods or redirect those interested in goods to other electronic interfaces shall also not become deemed suppliers.

The above parameters are specified in more detail in the European Commission's Explanatory Notes, the Czech translation of which has already been mentioned to you in our previous issues of the Tax and Legal Update. Despite the availability of a list of illustrative examples in the notes, the decision whether a platform actually facilitates any relevant sales will not be easy.

Information about how platforms should deal with VAT in this respect will be published in the next issue of our Tax and Legal Update.

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Financial administration's response to queries regarding changes to tax depreciation

Extraordinary tax depreciation, adjusted limits for acquisition costs of tangible fixed assets or the cancellation of the intangible asset category are some of the most significant changes introduced by the January amendment to the Income Tax Act. These changes, some of which have a retrospective effect, gave rise to many questions from taxpayers. The most frequent ones have been addressed by the financial administration on its website, e.g., the question of applying extraordinary depreciation via a supplementary income tax return.



Filip Svoboda
fsvoboda@kpmg.cz



Martin Král
mmkral@kpmg.cz

On its website, the financial administration e.g. further explains **the option to use a new CZK 80 thousand limit, increased from the original CZK 40 thousand**, for the acquisition cost of assets acquired in 2020. It has been unclear whether for 2020 taxpayers may apply the increased limit only to assets determined individually or whether they must apply it to all assets costing up to CZK 80 thousand. The financial administration took an approach more helpful to taxpayers and concluded from transitory provisions that the law does not impose a uniform approach, therefore it is also possible to apply the new limits retrospectively just to specific assets. However, it should be understood that for assets not meeting the limit for tangible fixed assets chosen by the taxpayer, the accounting recognition shall be taken as a basis.

The financial administration also deals with **technical improvements to intangible assets** the depreciation of which started pursuant to the previous wording of Section 32a of the ITA. The tax depreciation of intangible assets was abolished by the 2021 amendment, but the financial administration confirms that technical improvements to assets that were previously categorised as intangible assets should continue to be depreciated as before. Consequently, technical improvements to intangible assets already being depreciated will be subject to the existing limit of CZK 40 thousand and straight-line depreciation over a minimum period prescribed by law in effect before the amendment.

For **extraordinary depreciation** that may temporarily be applied for assets falling into the first and second depreciation group in the period from 1 January 2020 to 31 December 2021, the financial administration confirms the general applicability of conclusions reached by Coordination Committee No. 284/16 in Sept 2009, dealing with extraordinary depreciation in 2009. Taxpayers who already had to file their ordinary income tax returns for a part of the above period (typically taxpayers using fiscal years as their accounting periods) shall apply extraordinary depreciation via a supplementary income tax return in which they shall change the method of depreciation of selected assets acquired after 1 January 2020.

The financial administration also states that to meet the condition of a **finance lease contract's minimum duration period,** it is possible to derive from the length of the depreciation period under the conditions pertaining to

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extraordinary depreciation, even without the lessor having to actually apply it. This may be particularly relevant for assets leased from foreign persons.

Finally, the financial administration confirms the possibility to **combine the application of the law before and after the amendment**, directly mentioning the option to use the original limit for the acquisition cost of tangible assets while using extraordinary depreciation in accordance with the new amendment to the ITA.

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Deductibility of interest on mortgage loans after 1 January 2021

On 1 January 2021, an amendment to the Income Tax Act entered into effect, reducing the annual limit of interest paid on mortgage loans or building savings loans to be deducted from the tax base from CZK 300 thousand to CZK 150 thousand. Uncertainty regarding the deductibility of this interest was discussed by the Coordination Committee of the Chamber of Tax Advisors and the General Financial Directorate.



Lenka Nováková
lnovakova@kpmg.cz



Mária Marhefková
mmarhefkova@kpmg.cz

Uncertainty arose primarily in connection with the amendment's transitory provisions, in particular with the term 'procurement of own housing needs'. This term is essential for determining whether the taxpayer may deduct from the tax base interest paid on a mortgage loan under the legal regulations in effect until the end of 2020, i.e. CZK 300 thousand (CZK 25 thousand a month), or whether they must proceed in accordance with the new legal regulations and deduct only CZK 150 thousand (CZK 12.5 thousand a month).

This question mainly concerns taxpayers who at the end of 2020 and the beginning of 2021 commenced activities leading to the procurement of a housing need, e.g. in 2020, they entered into a mortgage loan contract to purchase a flat/family house or filed an application for a building permit but the permit was not granted to them before the end of 2020, etc. According to the conclusions of the Coordination Committee, the GFD is of the opinion that the conclusion of a contract itself cannot be confused with the procurement of a housing need; procurement of a housing need is connected with the transfer or transition of the ownership title to the real property recorded in the Real Estate Register, or the fulfilment of the statutory characteristics/defining features of individual types of housing needs as stipulated in the Income Tax Act.

For **the acquisition of a plot of land for valuable consideration**, the decisive moment at which the housing need is procured shall be the date the ownership title is entered into the Real Estate Register. The amendment has changed the moment from which the four-year period for commencing the building of a housing need starts to run from the date the loan contract is concluded to the date the ownership title to a plot of land is acquired. Consequently, if the ownership title is entered into the Real Estate Register before the end of 2020, the four-year period will start to run from the date the loan contract was concluded (i.e. pursuant to the previous legal regulation) and the taxpayer will be entitled to deduct interest of a maximum of CZK 300 thousand a year.

For **the building of a block of flats/family house or unit**, the decisive moment for claiming a deduction is the date a building permit or a joint permit is issued or the date the construction is notified; after the completion it is necessary to have an extract from the Real Estate Register available. If a building permit was not issued before the end of 2020, the new rules shall apply to the deduction of interest on a mortgage loan, i.e. it will be possible to deduct only CZK 150 thousand a year.

Where **the maintenance of and changes to the construction** of a block of flats, family house, flat in lease or use, unit are concerned, according to the GFD, the decisive moment of the procurement of a housing need shall be the date

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the reconstruction physically started. It is the taxpayer's duty to support this with sufficient documentation, e.g., a contract with a supplier on commencement of construction work, etc.

According to the GFD, **re□nancing** represents a special situation when a new loan is only linked to a previously concluded to which the same conditions under the Income Tax Act apply, i.e. that the housing need must be acquired before the end of 2020. If the housing need was procured before the end of 2020, the original conditions shall stand and the option to deduct interest of CZK 300 thousand a year shall apply despite the fact that the loan refinancing took place only after 1 January 2021.

How to sum up the above conclusions? Unfortunately, the Coordination Committee did not find common ground on this matter and was unable to convince the state administration that the new legal regulation may in practice cause serious application problems with negative effects for taxpayers. The state administration's interpretation mostly links the moment decisive for claiming the deduction from the tax base to another moment, connected with a decision of another administrative body that may easily be delayed. This approach is quite unfortunate from an income tax act perspective and is likely to cause many problems in practice.

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GFD's Information on ATAD

The General Financial Directorate (GFD) issued its Information on Measures Arising from the Implementation of the Anti-Tax Avoidance Directive (ATAD), clarifying certain practical issues associated with the restricted deductibility of excess borrowing costs, exit tax, controlled foreign company taxation and hybrid mismatches.



Diana Marková
dmarkova@kpmg.cz



Iveta Košťálová
ikostalova@kpmg.cz



Žaneta Pokorná
zpokorna@kpmg.cz

Below, we summarise answers to questions relating to two areas of the GFD's information. The remaining areas will be discussed in the next issue of the Tax and Legal Update.

Limited deductibility of excess borrowing costs

According to the published methodology, borrowing costs shall only include foreign exchange differences associated with payables arising as a result of selected borrowing costs as set out by law, i.e. typically FX differences relating to contractual interest. FX differences relating to principal shall not be treated as borrowing costs. If interest becomes part of the principal, the related FX differences will stop being part of the borrowing costs at the moment the interest is included in the principal.

Moreover, the GFD clarifies what derivatives shall be regarded as borrowing costs, when interest contained in a financial charge on a finance lease has the nature of borrowing cost, or how to proceed when assessing whether capitalised interest represents borrowing costs.
The GFD again draws attention to the fact that, under certain conditions, the amounts by which the result of operations for a given taxable period was increased due to the limited deductibility of excess borrowing costs may be deducted from the results of operations for the following periods, but this option does not pass on a legal successor in case of transformations.

Cross-border asset transfers with no change of ownership

The taxation of cross-border asset transfers without a change of ownership (or an exit tax) targets tax avoidance through transfers of assets to jurisdictions with a lower tax burden. Certain cross-border transfers of assets without a change of ownership shall be treated as transfers of such assets by the taxpayers to themselves for consideration that would have been agreed between unrelated parties in normal business relations under the same or similar conditions.

To apply exit tax, it is first necessary to determine whether the assets were transferred with no change of ownership from the Czech Republic to another tax jurisdiction and whether the Czech Republic lost its right to taxation on the subsequent disposals of these assets.

According to the GFD, exit tax applies to all assets of the taxpayer including, inter alia, inventory and assets reported off-balance sheet.

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In company transformations, it will be crucial whether the transformation involves a change of ownership. Where a change of ownership of the assets being transferred is involved, exit tax shall not apply. A change of ownership is always involved in transfers of assets by contribution.

This methodology has significant practical implications for a large number of companies. Moreover, the majority of taxpayers will be applying the new rules for the first time. We therefore recommend paying attention to this matter and conscientiously keep the necessary records to be able to prepare correct income tax returns, as such detailed records need not necessarily be part of standard bookkeeping.

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TA CR announces fourth THETA programme call

On 10 February 2021, the Technology Agency of the Czech Republic announced the fourth call for proposals under the THETA programme supporting applied research, experimental development and innovation.



Karin Stříbrská
kpmg@kpmg.cz



Lucie Vlachová
lvlachova@kpmg.cz

Project applications are accepted from 11 February to 12 May 2021. Projects are to be initiated between January and February 2022 and their duration should not exceed 48 months. Businesses of all sizes and research institutions may apply for support. Total funds for allocation add up to CZK 645 million, the amount and level of support depend on the project scope and on the relevant sub-programme.

	Sub-programme title	Maximum level of support	Expected allocation	aximum amount of support
Sub-programme 1	Research in public interest	90 %	CZK 75 mil.	CZK 10 mil.
Sub-programme 2	Strategic energy technologies	60 %	CZK 400 mil.	Not set
Sub-programme 3	Long-term technology perspectives	90 %	CZK 170 mil.	Not set

Support may be obtained for personnel expenses and scholarships, tools and equipment, contract research, and other direct and indirect costs.

Sub-programme 1 aims to support research and development in the field of reliability and technological development of nuclear installations, energy regulation and other relevant areas. **Sub-programme 2** focuses on supporting research, development and innovation in the field of energy technologies and system components with a high potential for rapid application in new products, production processes and services. **Subprogramme 3** aims to support research and development of technologies significantly contributing to the transformation of Czech energy sector.
Should you be interested in more information about the THETA programme, please contact us. We will be happy to discuss aspects relevant for your project and assist you in the preparation of the project application.

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Act on Registration of Beneficial Owners: six month to update data

The new Act on the Registration of Beneficial Owners has been published in the Collection of Laws and will enter into effect on 1 June 2021. All business corporations must update the data recorded in the beneficial owners' register within six months of its effective date. Companies that have not yet registered any information about their beneficial owners must do so without undue delay after the law enters into effect. The act introduces strict penalties for failures to comply with the new obligations.



Aneta Boukalová
kpmg@kpmg.cz



Pavlína Rampová
prampova@kpmg.cz

The new law contains a comprehensive regulation of beneficial owners: it revises the definition of the beneficial owner; stipulates strict sanctions for the breach of the obligation to register; lays down more detailed rules for the registration; and makes the register partly accessible to the public.

According to the law, the **beneficial owner** of a business corporation is each individual/natural person who is the ultimate beneficiary or a person with ultimate influence in a business corporation. If such a person cannot be identified for a corporation, then every person in its top management shall be deemed the beneficial owner.

Under the act, it will now be possible to impose a **fine of up to CZK 500,000** on corporations that fail to ensure the timely entry of data in the register of beneficial owners, and on persons who fail to provide the registering person with the necessary cooperation in determining and registering the beneficial owner.

There are also significant private-law restrictions affecting non-registered beneficial owners: **they cannot vote at the corporation's general meeting or adopt decisions as its sole member.** Similarly, a legal entity or trustee of a trust with no registered beneficial owner will not be able to vote or adopt decisions. A resolution of a general meeting or a decision of a sole member adopted in breach of this legislation **shall be invalid**.

The failure to register a beneficial owner will also have a very fundamental e**ffect on the payment of shares in profit, other own resources or a liquidation balance** ('share in benefit'). A corporation without a registered beneficial owner may not pay a share in benefit to that owner, or to a legal entity or trust whose beneficial owner they also are. Furthermore, a corporation may not pay a share in benefit to an entity that itself does not have a registered beneficial owner. If the failure to register is not corrected on time and the share is not paid by the end of the accounting period in which its payment was decided on, the right to the payment shall expire. A statutory body that pays the share in benefit in breach of these rules will be in breach of their fiduciary duty and not acting with due managerial care.

It is therefore recommendable that companies approach the registration of beneficial owners conscientiously and regularly update the registered data with any changes.

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New Foreign Investment Screening Act

On 1 May 2021, the new Foreign Investment Screening Act will enter into effect, introducing tools to review direct investments from third countries for their implications for the Czech Republic's security and internal order. The act may hinder the implementation of foreign investments in the Czech Republic (or the EU) if these are assessed by the relevant authorities as high-risk.



Petr Janíček
pjanicek@kpmg.cz



Gabriela Blahoudková
gblahoudkova@kpmg.cz

A foreign investor under this act is any entity that has made or intends to make an investment in the Czech Republic and does not have their domicile or registered office in the territory of the Czech Republic or the EU, or is directly or indirectly controlled by such an entity. Subject to review may be any investment exceeding the 'effective control' threshold, e.g. the control of at least 10% of voting rights or the foreign investor's membership in the target corporation's bodies. If these prerequisites are met, it is necessary to assess whether a screening by the state authorities is necessary to implement the investment.

For the purposes of the screening, the act distinguishes between two groups of investments. **The first group includes defined areas that the act considers most sensitive with regard to the Czech Republic's security or internal order;** foreign investments in these areas **cannot be made without prior authorisation by the state**. These include certain activities involving military equipment, the operation of critical infrastructure (e.g. transmission or transport systems) or the management of information systems for critical infrastructure.

The second group includes **investments in other areas of the economy that are capable of endangering the Czech Republic's security or its internal or public order**. This general definition must be interpreted by the investors themselves. For these investments, investors may submit a **request for consultation with the Ministry of Industry and Trade**, thereby gaining legal certainty that the ministry **will not review the investment ex post, up to five years from the date of its completion**, and possibly ban it.

Similar legislation is currently being adopted by all EU member states, in response to Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the EU. National legislations may vary for example in the definition of a foreign investor or, more precisely, in whom not to consider a foreign investor – whether EU entities or entities from the European Economic Area (Austria, for example, has taken this position).

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Right to disconnect? Higher protection of employees in sight

The European Parliament has asked the European Commission to submit a draft directive allowing employees to log off from work after working hours without being sanctioned for such behavior in any way. According to the parliament, the expansion of remote working has been connected with a need to be continuously on-line, negatively affecting the private lives of employees and increasing the risk of mental health problems.



Tomáš Kočař
tkocar@kpmg.cz



Michal Slavík
kpmg@kpmg.cz

Like other events of global significance, the current COVID-19 pandemic brought both positive and negative implications. On the one hand, employees may to a large extent work from their homes and fulfil their work tasks remotely using information and communication technologies, on the other hand, their private lives are being significantly affected. The need to be continuously on-line without being able to disconnect interferes with their private lives, which may result in depression, anxiety, burnout and other mental and physical health problems. Indeed, currently, more than 38% of the EU population is suffering from some sort of mental disorder, while increases in this percentage can be expected considering the growing popularity (or necessity) of home-office arrangements.

According to European statistics, the share of work that people do from home increased by almost 30% during the pandemic, whereas the probability that maximum working hours will be exceeded and the minimum time of rest between shifts as set out by appropriate directives will be shortened is twice as high for work from home. Moreover, almost 30% of employees regularly work in their free time. After considering the requirements for occupational health and safety and work-life balance, the European Parliament asked the European Commission to submit a draft directive setting the minimum conditions under which employees working remotely may log off and be unavailable (e.g. via email or phone) to their employers outside their working hours.

Whereas the right to disconnect has been honoured in France for more than 20 years and enacted or subject to extensive public discussion in many other EU countries, it has not been explicitly established within the EU, despite the fact that the EU founding treaties and the equally positioned EU Charter of Fundamental Rights stipulate that every employee has the right to working conditions that respect their health, safety and dignity and the right to maximum permissible working hours, time of rest and annual paid leave. The European Pillar of Social Rights (2017) also calls for support of innovative forms of work ensuring, inter alia, good-quality working conditions and a work-life balance.

The European Parliament's initiative aims to establish, at the EU level, an employee's right not to be harassed during their time of rest by business emails, phone calls and other work-related communication. Eventually, a working culture in which any impersonal work-related contact between the employer and the employee outside working hours is undesirable should be created at the EU level (and, through the directive's implementation, at the level of EU member states). However, it is hard to estimate to what extent this right will be enforceable in practice, as the effect of information and communication technologies on people's lives is continuously growing and the

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right to log off is rather an elusive concept.

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Case law

SC further tightens conditions for withdrawal from non-compete clause

The recent Supreme Court (SC) judgement marks a further tightening of conditions for employers who decide to withdraw from a non-compete clause negotiated with their employee. According to the judgment, arrangements that give the employer the option to withdraw from a non-compete clause are invalid if they leave to the employer's discretion whether the information gained by the employee during their employment is of such nature as to fulfil the meaning and purpose of the non-compete clause.



Romana Szuťányi
kpmg@kpmg.cz



Michal Slavík
kpmg@kpmg.cz

The Labour Code stipulates that an employer may withdraw from a non-compete clause only during the employee's employment. The SC has previously held that a withdrawal from a non-compete clause is subject to the provision of the Civil Code, under which a withdrawal from a contract is possible if the parties have so arranged or if the law so provides. From this we may deduce that both the employer and the employee may withdraw from a non-compete clause for reasons provided for by law or for any other reason agreed by the parties to the non-compete clause. However, the situation is not so clear.

In the present case, it had been among other things negotiated that the employer may withdraw from the non-compete clause during the employment if "within their discretion they conclude that, given the value of the information and knowledge of the working and technological procedures gained by the employee during their employment with the employer or otherwise, it would not be proportionate and/or reasonable for the employer to insist on or enforce the agreed-upon non-competition from the employer and to pay them the agreed-upon pecuniary compensation".

The SC concluded that the employer could not have validly withdrawn from the non-compete clause for the reasons thus agreed. The court admitted that circumstances may arise after the conclusion of a non-compete clause where an employee has not gained information of such a nature for which the non-compete clause had been concluded, therefore the meaning and purpose of the non-compete clause was not fulfilled. The court also acknowledged that if the parties assume that such circumstances will or may arise, these can be agreed-upon as reasons for withdrawal from the non-compete clause. However, the court also noted that an arrangement that leaves to the employer's sole 'discretion' whether the employee has gained such information does not meet the applicable requirements: in the court's opinion, the final effect of such an arrangement would be similar to the employer being given the option to withdraw from the non-compete clause 'without giving a reason' or 'for any reason', which not only is contrary to the law, but also manifestly disrupts public order. Hence, a withdrawal from a non-compete clause on such grounds shall be viewed as invalid, and such invalidity shall be taken into account by the court of its own motion.

In our opinion, the SC judgement brings further uncertainty to negotiating possible reasons for withdrawal from a non-compete clause: an employer is forbidden to decide subjectively, within their discretion, that the meaning and purpose of the non-competition clause has not been fulfilled given the nature of the information gained by the

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employee during their employment; yet the court does not provide any clear criteria to be followed by employers when assessing whether the reasons for withdrawal have been fulfilled.

Therefore, when negotiating non-compete clauses, employers are advised to carefully consider the reasons for which they will subsequently be entitled to withdraw from the non-compete clause. And when considering withdrawing, it is advisable to carefully assess whether the agreed-upon reason has been objectively fulfilled, as the Labour Code does not provide any limits as to negotiating the reasons for withdrawal, while the SC case law is extremely strict in this respect.

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Case law

Remuneration for making funds available using promissory note VAT exempt?

In judgment C 801/19 FRANCK, the Court of Justice of the European Union (CJEU) held that remuneration for the transfer of funds provided by a factoring company to a debtor is, from a VAT perspective, a transaction in securities, therefore exempt from VAT without the right to deduct.



Tomáš Havel
thavel@kpmg.cz



Hana Hašková
hhaskova@kpmg.cz

The case involved three Croatian entities:

- FRANCK (a taxable person), a company engaged in the processing of tea and coffee
- a factoring company
- a debtor of the factoring company, a Croatian retail chain.

The factoring company's debtor was in a situation where, under Croatian banking regulations, they were unable to borrow funds from common financial institutions. Because of their indebtedness, they could also no longer use the services of the factoring company. They therefore decided to issue a promissory note/ bill of exchange which had been transferred by FRANCK to a factoring company, whereby FRANCK became the debtor's guarantor for the payment of the promissory note/bill of exchange to the factoring company on its due date.

Upon the transfer of the promissory note, the factoring company provided funds to FRANCK, who subsequently credited them to the debtor, while withdrawing 1% as remuneration. It was this remuneration that became the subject of the VAT dispute: FRANCK considered it a VAT exempt transaction relating to the granting of credit; however, the Croatian tax administration considered it a taxable transaction relating to debt collection.

The CJEU first reiterated the principles governing VAT exempt financial transactions. The basic rule is that exempt transactions are defined in terms of the nature of the services provided and not in terms of the person supplying or receiving the service. It is therefore irrelevant whether the financial service is provided by a financial institution or a non-financial entity. The CJEU further stated that the promissory notes/bills of exchange issued by the debtor were 'negotiable instruments' as they contained the debtor's obligation to pay a specific amount to the holder of the promissory note/bill of exchange on its due date. In this case, it was irrelevant that the funds were reimbursed not to FRANCK, but to the factoring company.

To conclude the judgment, the CJEU pointed out that the fact that the transaction aimed to circumvent Croatian banking regulations prohibiting banks from lending to companies with such level of indebtedness was irrelevant for the VAT treatment of the situation. The CJEU also rejected the tax administrator's arguments that the transaction constituted a debt collection or brokering, as the main purpose of the transaction was to satisfy the debtor's capital needs. According to the CJEU, the remuneration for transferring funds to the debtor was, for VAT purposes, a transactions in securities, i.e. an exempt transaction without the right to deduct.

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French court outlines new permanent/fixed establishment concept for digital sector

The court's decision brings an entirely new view on a permanent/fixed establishment for companies operating in a digital sector. Will other EU member states also get inspired?



Martin Krapinec
mkrapinec@kpmg.cz



Dominik Kovář
dkovar@kpmg.cz

In the ValueClick International Ltd. case, the Supreme Administrative Court in France discussed the rules for the formation of a fixed establishment from a VAT perspective and of a permanent establishment from an income tax perspective, concluding that a permanent establishment for income tax purposes may also arise in the case of a dependent agent who issues and accepts orders that are subsequently routinely approved by the 'principal company', presumably also where the agent is not authorised to contractually bind the principal. This may give rise to a permanent establishment in the country in which the agent operates.

When evaluating the existence of a fixed establishment for VAT purposes, the court upheld the conditions previously listed by the Court of Justice of the EU: a fixed establishment for VAT purposes arises where sufficient technical and human resources are present in a given country. However, the lack of sufficient technical resources does not automatically exclude the formation of a fixed establishment for VAT purposes for companies operating in a digital sector, as owing to the nature of their services these companies may have their technical tools essentially anywhere.

According to the court, decisive for the formation of a fixed/permanent establishment is whether a given company has sufficient human resources, e.g. employees, who are authorised to make decisions, e.g. enter into contracts on behalf of the company in a given country, even if only through a dependent agent.

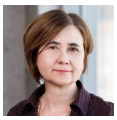
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News in brief, March 2021

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



Václav Baňka
vbanka@kpmg.cz



Lenka Fialková
lfialkova@kpmg.cz

DOMESTIC NEWS IN BRIEF

- In connection with the extraordinary events caused by the coronavirus pandemic, the government approved another general pardon by the Minister of Finance, waiving VAT-related penalties and other charges for the late filing of VAT returns and VAT ledger statements for the February 2021 taxable period where VAT returns and VAT ledger statements are filed and the related tax paid before 12 April 2021.
- An act on compensation bonuses for 2021 was published in the Collection of Laws under no. 95/2021. The bonus will increase to CZK 1 thousand a day and will not be linked to a state of emergency. It will be provided on a retrospective basis from 1 February 2021.
- The government passed a bill to increase compensation of income paid to employees under a quarantine order. The government proposes to temporarily increase compensation for wages, salaries or remuneration paid based on agreements to perform work/complete a job to 100% of the average reduced earnings over the period of first fourteen days of the ordered quarantine (including isolation) for the period from 1 March 2021 to 30 April 2021. The bill is yet to be discussed by the parliament.
- As a result of the closure of schools and pre-school facilities, parents of children who had so far been allowed to attend these facilities will be entitled to carer's allowances from 1 March 2021.
- On 22 February 2021, the Ministry of Labour and Social Affairs disclosed information about the extension of the Antivirus programme until the end of April 2021. The programme should undergo minor changes such as an increase in the limit for drawing all state subsidies including the Antivirus programme by one employer from EUR 800,000 to EUR 1.8 million. Contributions from the Antivirus should continue to be provided only for employees whose employment has been for at least three months on the date the monthly statement of paid wage compensations is submitted.
- The Ministry of Labour and Social Affairs has published recommendations for employers on how to proceed when providing time off work to employees who are being tested or vaccinated or accompanying a family member to their vaccination in connection with the COVID-19 pandemic.
- A draft amendment to the Labour Code, increasing the basic amount of vacation from four to five weeks in a calendar year passed the repeated second reading in the chamber of deputies.
- Notice No. 8/2021 of the Ministry of Foreign Affairs, on concluding a treaty between the Czech Republic and Bangladesh to prevent double taxation, tax evasion and tax avoidance, has been promulgated in the Collection of International Treaties.
- The following was published in the Ministry of Finance's Financial Bulletin in February:
    - Notice on the Treaty between the CR and Pakistan implementing MLI in the bilateral double taxation treaty.
    - Notice on the application of the Treaty between the CR and Kyrgyzstan preventing double taxation, tax evasion and tax avoidance.
    - Correction of the Tax authorities' bank accounts for most frequently paid taxes table (in IBAN format) for the payment of taxes from abroad (Appendix no. 5 to the article "How to currently pay tax to the tax authority in 2021").
    - Decision on the waiver of administrative fees due to an extraordinary event.

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- The financial administration informed on having launched the pilot operation of an on-line tax authority - MOJE daně on 28 February 2021. The on-line tax authority aims to offer modern, simple and on-line solutions for dealing with tax liabilities.
- In cooperation with courts, notaries and a supplier, aiming to modernise and enhance the effectiveness of work of courts and notaries relating to the agenda of beneficial owners and trust funds, the Ministry of Justice changed the layout of these information systems on 1 March 2021. On the same date, the ministry also launched a universal central component for user authentication and authorisation.
- The government has submitted to the chamber of deputies a bill on the protection of whistle-blowers and another related amending act, transposing the directive on the protection of persons who report breaches of law.

FOREIGN NEWS IN BRIEF

- On 22 February 2021, the EU Council revised the EU list of non-cooperative jurisdictions for tax purposes. The Council agreed to add Dominica to the list and move Barbados to the "grey list". Following this latest revision, the EU blacklist includes the following twelve jurisdictions: American Samoa, Anguilla, Dominica, Fiji, Guam, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, US Virgin Islands, Vanuatu. The Council is also seeking opinions from the member states on two on-going files: the EU Financial Transaction Tax and the public Country-by-Country Reporting (CbCR) proposals.
- The Belgium Constitutional Court asked the Court of Justice of the EU for a preliminary ruling on the application of mandatory disclosure requirements under the Directive on Administrative Cooperation (DAC6). The dispute concerns the duty of lawyers to notify other advisors (intermediaries) that they are bound by professional secrecy in relation to a particular arrangement that may be in conflict with the obligation of secrecy itself.

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www.kpmg.cz
Tel.: +420 222 123 111

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