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In brief

News in brief, April 2021

Editorial

The beginning of April means April Fools' Day and the deadline for filing income tax returns. This year, both even on the same date. Just a coincidence? I don't think so! The rules for setting the deadline for filing the tax return are new this year. And as if it was not enough that for years the deadline has fallen on the first days of a month rather than the last ones as one would expect, the new rules go even further with a hit parade of red-tape complexities. In this respect, it may well compete with autumn's "take-away coffee" case, calculating VAT on draught beer, or the slightly older ever-green of defining ERS for catering services. Of course, ERS would still be winning, had it not been temporarily hibernated.

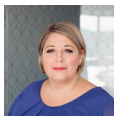
Before we get more specific, let me at least reassure the representatives of companies with a statutory audit duty: thankfully, there are no fundamental changes here. On the other hand, those who have already filed their tax returns although they could have done so at a later date should watch out: under the new rules, the deadline for filing the tax return (which is relevant for various purposes), may be affected by the actual filing date. This only works in the sense of reducing the deadline, i.e. preserving the basic three-month one. This seemingly illogical modification may have certain benefits, such as receiving tax overpayments or reducing tax prepayments (where a tax liability is lower than the last year) at an earlier date. Otherwise, it is more of a headache to puzzle out when the deadline for filing one's tax return actually expires, and everything this implies – for instance, an earlier due date for tax payments. All these are only changes arising from the amended Tax Procedure Code.

And then there is the possibility of applying for a COVID pardon (covered by a separate article). However, this does not concern taxpayers not using calendar tax years or those whose filing deadline is automatically extended until June (sorry, 1 July) because of their statutory audit duty. On the other hand, those who file their tax return electronically may as a special offer get 1+1 extra months. As we can see, a simpler tax administration remains just a promise. Let's hope it's not part of an elaborate April Fool's joke.

Jan Linhart
Partner
KPMG Czech Republic

Waiver of sanctions for late filing of 2020 income tax returns

With respect to the persisting effects of the SARS-COV-2 pandemic, the Ministry of Finance has issued another liberation measure that under certain conditions waives the penalties charged to taxpayers for the late filing of income tax returns for the 2020 taxable period and related default interest and interest on the deferred tax amount. The liberation measure comes in the form of a decision of the Minister of Finance and was published in Financial Bulletin No. 16/2021.



Lenka Nováková
lnovakova@kpmg.cz

Mirka Malá
mmala@kpmg.cz

Mária Marhefková
mmarhefkova@kpmg.cz

The decision waives sanctions for the late submission of corporate and personal income tax returns for the 2020 taxable period if returns are filed no later than 3 May 2021, or 1 June 2021 in the case of electronic filings. Tax underpayments should also be settled to the tax authority's account before this date. If tax underpayments are settled or returns submitted later, penalties will be assessed retrospectively from the statutory deadline for filing tax returns (i.e. 1 April 2021, or 3 May 2021 for electronic filings).

The decision does not apply to taxpayers who file their income tax returns within the extended deadline of 1 July 2021, i.e. those who are required by law to have their financial statements examined by auditors or submit their income returns after 1 April 2021 through a tax advisor. Moreover, the decision does not apply to taxpayers who file their returns for taxable periods other than the 2020 calendar year.

The decision also waives sanctions for the late filing of supplementary income tax returns for 2019 for the payers of personal income tax who in 2020 changed the method of deducting expenses (i.e. instead of actual expenses, they deduct a percentage of income or vice versa). Penalties for the late filing of supplementary income returns for 2019 and default interest relating to the part of tax additionally assessed as a result of the change in the method of expense deduction shall be waived for taxpayers who file their supplementary income tax returns and pay tax no later than 3 May 2021, or 1 June 2021 for electronic filings.

In addition, the decision waives penalties for the late reporting of exempt income under Section 38w of the Income Tax Act if taxpayers who are natural persons report this information no later than 3 May 2021, or 1 June 2021. However, this only concerns taxpayers who file income tax returns for the 2020 taxable period. The waiver does not apply to individuals who do not have to file an income tax return but must report exempt income for the 2020 taxable period.

An amendment to the Act on Public Health Insurance postpones the deadline for filing statements of health insurance payments to health insurance companies by self-employed persons and the deadline for settling premium underpayments determined based on the 2020 statements until 2 August 2021. According to information

from the Czech Social Security Administration's website, statements of social security payments for 2020 can be filed without any sanctions by 30 June 2021. Any social security underpayments for 2020 must also be settled by this date to be able to claim a waiver of penalties for late payment.

Subsidies

New COVID-related business support programmes

The government announced new programmes to support business activities: COVID – Uncovered Costs and COVID – 2021. Applications will again have to be submitted through the Ministry of Industry and Trade's Agenda Information System (AIS MPO) portal as previously for other COVID programmes.

Matěj Kolář
kpmg@kpmg.cz

Karin Stříbrská
kpmg@kpmg.cz

COVID – Uncovered Costs

This programme aims to compensate for fixed costs incurred by entrepreneurs who reported a significant decrease in sales compared with the period before the COVID-19 pandemic. Under the first call, the relevant period is 1 January 2021 to 31 March 2021. The basic condition for awarding support is a decrease in sales in the relevant period by more than 50% compared with the same period in 2019 or 2020. Applicants will have to prove their results of operations based on an adjusted income statement for the relevant period confirmed by an accounting or tax advisor. Where losses net of subsidies exceed CZK 2 million, applicants will have to submit their income statement verified by their statutory auditor.

Support shall amount to 60% of uncovered fixed costs, up to CZK 40 million per one call. This support can neither be combined with the COVID 2021 programme nor with the compensation bonus.

Under the COVID – Uncovered Costs programme, uncovered fixed costs shall mean losses net of subsidies as specified by Section 3.1 of the European Commission's Temporary Framework, i.e. Antivirus A, B, A Plus and other subsidies for eligible expenses.
Applications will be accepted from 19 April 2021 to 19 July 2021.

COVID – 2021

This type of support will be provided for maintaining business activities and operations, e.g. expenses for materials, loan repayments or personnel expenses incurred between 1 February 2020 and 31 March 2021. This type of support falls within the EC's Temporary Framework, based on which it is currently possible to provide aid of up to EUR 1 800 thousand until the end of 2021.

If applicants wish to apply for this support, they must prove and document that their sales for the relevant period decreased by at least 50%, whereas the relevant period under the first call is the period between 1 January 2021 and 31 March 2021, and the decrease in sales will be compared with the period from 1 January 2019 to 31 March 2019 or from 1 January 2020 to 31 March 2020.

Support will amount to CZK 500 per employee under employment (expressed as a full-time equivalent – FTE) for every day of the relevant period, i.e. under the first call, 80 days between 11 January 2021 and 31 March 2021. When calculating the coefficient, only employees registered for the payment of premiums with the Czech Social Security Administration on 11 January 2021 shall be taken into account. For applicants with less than three employees,

support shall always amount to CZK 1 500 per day (as long as there is at least one FTE employee).

Support granted under COVID – 2021 cannot be combined with any other types of support to mitigate the effects of the COVID – 19 pandemic, excepting the Antivirus programme (and COVID – Accommodation II after adjustments to the decisive period).
Applications will be accepted from 12 April 2021 to 31 May 2021.

Conclusion

The two above support programmes are intended for both natural and legal persons.

Considering our experience with previous calls, we recommend filing applications sufficiently in advance before the end of the filing deadline. Applicants may thus avoid potential technical problems caused by a possible system overload in the last days before the end of the deadline.

Legal

Municipal Court holds protective measure contrary to law - rules for returning from abroad change

On Wednesday 31 March, the Municipal Court in Prague annulled part of the protective measure regulating the crossing of state borders, on the grounds of it being contrary to law, effective 5 April. The Ministry of Health responded on Saturday by issuing a new measure. The Czech Republic is not the only country struggling with the illegality of coronavirus-related restrictions. On the same date, a similar ruling was issued in Belgium.

Romana Szuťányi
kpmg@kpmg.cz

The Municipal Court has ruled that the parts of the Ministry of Health's Protective Measure of 15 March imposing the obligation to produce a negative test before entering the territory of the Czech Republic on everybody without a difference are contrary to law. Czech citizens' rights to return to their homeland cannot be infringed upon this way. The court also held the requirement to submit a negative test certificate to international carriers illegal. At the same time, the Municipal Court stressed that the conclusions reached shall only apply to citizens of the Czech Republic, not to citizens of other states, as they are not covered by the right of free entry into the Czech Republic as enshrined in the Charter of Fundamental Rights and Freedoms. However, the court pointed out that if another protective measure is adopted, the health ministry must consider its possible discriminatory effects from the perspective of EU law and the rights of citizens of other member states who have, for example, a permanent residence in the Czech Republic.

The court also dealt with the objection of illegality concerning the part of the measure restricting movement in the form of a mandatory post-arrival test and the associated quarantine or self-isolation at home after entering the territory – the petitioner pointed out that the situation abroad is much less risky than in the Czech Republic. However, the municipal court found this part of the measure fully legitimate, as it aimed to minimise the risk of spreading the disease and the possibility of bringing the virus and its mutations to the country, or, more precisely, to limit the spreading of the disease from foreign sources. The court also pointed out that it would be absurd if the state restricted movement between districts or municipalities, but at the same time did not respond in any manner to arrivals from other countries on the grounds that the situation there is better than in the Czech Republic.

Following the municipal court ruling, the ministry issued a new protective measure restricting state border crossings effective from 5 April. In terms of the testing requirements, the conditions of entry into the Czech Republic now differ for Czech citizens or their family members, EU citizens with temporary residence and foreigners with permanent residence ('residents') and other foreigners. For Czech citizens and residents, a negative test is no longer required upon return, only a certificate that a test has been taken. Other foreigners must continue to submit a negative test. For Czech citizens and residents, the measure also distinguishes whether they are travelling to the Czech Republic by public or individual transport. The conditions of return also differ depending on the risk rating of the country from which the person is returning. For citizens of the Czech Republic

and residents, return to the Czech Republic is possible even if they test positive. Following these changes, the conditions for entry to the workplace have been adjusted.

The decision of the municipal court may be challenged by a cassation complaint to be filed with the Supreme Administrative Court. It remains to be seen whether any of the parties to the dispute will use this option, and if so, what the opinion of the SAC will be.

In conclusion, it should be noted that the Czech Republic is not the only country encountering problems concerning the illegality of coronavirus measures. Following an action brought by La Ligue des Droits Humains (League for Human Rights), a Brussels court ruled that the coronavirus measures issued by the Belgian government were against the law. The Belgian government has been given 30 days to rectify this situation. Otherwise, Belgium will have to pay a fine of EUR 5 000 a day.

2021 amendment to VAT Act: platforms and One-Stop-Shops

A draft amendment to the VAT Act, to enter into effect on 1 July 2021, introduces the deemed supplier concept for electronic interface operators (platforms). This concept should be applied when a platform facilitates certain distance sales of goods or distance sales of imported goods. To settle the appropriate VAT, platforms may use various mechanisms, one of which being the EU's One-Stop-Shop (OSS).

Kateřina Klepalová
kklepalova@kpmg.cz

Petra Němcová
pnemcova@kpmg.cz

Mária Balúchová
mbaluchova@kpmg.cz

A platform that meets the characteristics of a deemed supplier (as discussed in the last issue of the Tax and Legal Update) must resolve how it will settle the appropriate VAT. Where the facilitation of sales of goods of a foreign supplier established in the EU is concerned, two options in principle exist: first, it may register for VAT in all EU countries to which goods are dispatched; second, it may register for the union scheme under the One-Stop-Shop (OSS) regime, which offers a new and more simple alternative for these platforms. Registration for the OSS is voluntary.

An EU platform may register for the OSS (the union scheme) in its home country (state of identification). All VAT collected on selected supplies must then be declared through tax returns filed via a portal of the platform's state of identification. The total tax amount is paid in euros to the account of the financial administration in the state of identification, which then distributes individual tax amounts to appropriate member states.

It should be possible to register for the OSS from 1 April 2021. In the Czech Republic, applications for registration can be submitted by entities that are VAT payers or persons identified for VAT. The authority with local jurisdiction shall be the Tax Authority for the Southern-Moravian Region. Registration is effective from the date of supply stated in the application or from the first date of the month following the month in which the application was filed, but not earlier than 1 July 2021. The union scheme's identifier shall be the Tax Identification Number (DIČ).

Under the union scheme, VAT returns are filed for calendar quarters, always by the end of the following calendar month. The tax shall be expressed in euros using the rate of exchange for the last day of the taxable period, and payable within the deadline for filing a VAT return. The tax base shall be stated only in a standard VAT return; whereas only the tax amount is declared under the union scheme. If the taxpayer does not perform any selected supplies during the respective taxable period, they must file a zero VAT return.

Any corrections must be made within three years via a tax return for the period in which the reason for correction occurred. A special correction module will be used for this purpose. If allowed by domestic legal regulations of the state of consumption, after the three-year period it will be possible to correct the return directly in the state of consumption and not within the OSS.

The OSS regime represents a significant simplification for platforms (and other suppliers of selected supplies) that would otherwise have to deal with substantial administrative expenses for numerous VAT registrations in various states.

Information on ATAD – continued

In the March issue of our Tax and Legal Update, we commented on the General Financial Directorate's Information on Measures Arising from the Implementation of the Anti-Tax Avoidance Directive (ATAD). This time we summarise information on the remaining areas, such as the taxation of controlled foreign companies (CFC rules) and addressing the consequences of different legal classifications (hybrid mismatches).

Diana Marková
dmarkova@kpmg.cz

Iveta Košťálová
ikostalova@kpmg.cz

Žaneta Pokorná
zpokorna@kpmg.cz

Taxation of controlled foreign companies (CFC rules)

Tax obligations are sometimes avoided by the establishment of subsidiaries or permanent establishments in jurisdictions with low or zero taxation. The rules for the taxation of controlled foreign companies (CFC rules) have been designed to tackle this type of business structuring. If a relationship meets the statutory conditions of a controlled and a controlling company, the controlled company's activities are considered as being performed in the CR and therefore taxed in our territory.

The GFD's information, inter alia, describes in more detail relevant procedures and methodology, and clarifies the calculation of half of the tax amount that would be assessed to the controlled foreign company if it were a Czech tax resident. The GFD also clarifies the controlled foreign company's taxable period.

Addressing the consequences of different legal classifications (hybrid mismatches)

Hybrid mismatches, or addressing the consequences of different legal classifications pursuant to the Income Tax Act, are generally situations when an identical legal fact (especially an entity or a financial instrument) is treated differently in two or more jurisdictions as a result of differences in legal regulations, which may result in a double deduction of expenses or in a deduction of expenses in one jurisdiction without a taxation of relevant income in the other jurisdiction. In such cases, the result of operations of associated companies as defined in the Income Tax Act shall be increased.

The GFD's information specifies hybrid mismatches to which the Income Tax Act applies, and clarifies the meaning of terms such as 'different legal classification of a legal fact' and 'expense or another item decreasing the result of operations or the difference between income and expense'. The methodology also provides typical examples of double deductions or deductions without a corresponding inclusion or how an imported mismatch arrangement arises (including a specific illustrative example). The GFD also confirms that the rules against hybrid mismatches shall not apply to situations where a Czech tax resident pays out interest abroad and the foreign recipient's income is exempt from tax, but in both states the payment is considered interest (i.e. irrespective of whether the interest expense is tax deductible in one state and whether the interest income is liable to tax in the other state).

Modernisation Fund – new environmental support

The Modernisation Fund as a new EU programme for 2021–2030 provides support for investments to modernise energy systems, improve energy efficiency and use renewable resources.

Karin Stříbrská
kpmg@kpmg.cz

Vendula Vařáková
kpmg@kpmg.cz

The programme is also open to large businesses. The total amount of funds available for the Czech Republic is approx. CZK 150 billion, accounting for 15.6% of total funds in the Modernisation Fund.

The Modernisation Fund is primarily under the competence of the Ministry of Environment; responsibility for its implementation lies with the State Environmental Fund of the CR. The programme is divided into nine areas eligible for support:

1. HEAT – Modernisation of heat supply systems
2. RES+ – New renewable resources in energy sector
3. ENERG ETS – Improving energy efficiency and reducing greenhouse gas emissions in industry in EU ETS
4. ENERG – Improving energy efficiency in business
5. TRANSCom – Modernisation of transport in business sector
6. TRANSGov – Modernisation of public transport
7. ENERGov – Energy efficiency in public buildings and infrastructure
8. KOMUENERG – Community energy
9. LIGHTPUB – Modernisation of street lighting systems

The first three programmes are already open but only for companies with appropriate certification. Relevant for other entrepreneurs will mainly be calls under the ENERG and TRANSCom programmes, expected to be launched in the second half of 2021. The ENERG programme in 2021–2024 will only be available to businesses with registered offices in Prague; from 2025, support will be granted regardless of location. The TRANSCom programme in 2021–2030 will be available to businesses without limits.

Subsidies

OP EIC – new calls for summer 2021

Last calls under the popular Potential, Application and Innovation – Innovation Project programmes are to be announced under the Operational Programme Enterprise and Innovation for Competitiveness (OP EIC) that is slowly drawing to an end.

Karin Stříbrská
kpmg@kpmg.cz

Vendula Vařáková
kpmg@kpmg.cz

According to the recently published time schedule, last calls should be announced at the end of May 2021.

Programme specifics such as aid intensity and the maximum subsidy amount per project will be published by the Ministry of Industry and Trade as soon as calls are announced; however, it can be expected that they will be similar to those of previous calls. The basic deadlines and funds for allocation for individual programmes are as follows:

	Call announcement date	Application acceptance	Funds for allocation
Call VIII Potential	27 May 2021	14 June 2021 – 26 August 2021	CZK 1 billion
Call IX Application	28 May 2021	15 June 2021 – 31 July 2021	CZK 2.5 billion
Call IX Innovation – Innovation Project	28 May 2021	15 June 2021 – 30 September 2021	CZK 1 billion

Another call under TREND

The Technology Agency of the Czech Republic has announced the fourth call to participate in the TREND programme – Sub-Programme 2 – Newcomers.

Karin Stříbrská
kpmg@kpmg.cz

Lucie Vlachová
lvlachova@kpmg.cz

We already informed you about the programme in this article.

The TREND programme mainly aims to enhance the international competitiveness of enterprises by expanding their markets abroad and penetrating new ones and has been designed only for businesses (in cooperation with at least one research organisation) that have not been drawing research and development subsidies exceeding CZK 1 million for the last five years.

Project proposals will be accepted from 11 March 2021 to 28 April 2021. Projects will have to be commenced in the period from 1 January 2022 to 31 March 2022 and may not take longer than 48 months. The maximum subsidy per project is CZK 15 million; total funds for allocation under the programme amount to CZK 180 million. The maximum aid intensity according to individual types of candidates is shown below:

Type of candidates/ Activity category	Industrial research		Experimental development	
	Maximum aid intensity	If effective collaboration is involved	Maximum aid intensity	If effective collaboration is involved
Small business	70 %	80 %	45 %	60 %
Medium-sized business	60 %	75 %	35 %	50 %
Large business	50 %	65 %	25 %	40 %
Research organisation	90 %			

Eligible costs include operating expenses incurred for project implementation such as personnel expenses, sub-delivery-related expenses, etc. but may not include investment (capital) expenditures. Project proposals must result in at least one of the following outputs that will be further applied in practice: industrial design or utility model, prototype or functional sample, software, pilot plant or verified technology, and patent.

Should you be interested in participating in the TREND programme, do not hesitate to contact us. We will be happy to assist you in this matter, e.g. by examining your project's potential score or fulfilment of qualification criteria.

EU introduces stricter controls of goods on import

Importers of goods into the EU should beware. From 15 March 2021, Release 1 of ICS2 – a new electronic system for controlling imports of goods into the EU – is underway. ICS2 will contribute to increasing the effectiveness of customs controls, facilitating legal trading in goods released through customs procedure, and strengthening the protection of the internal market and EU citizens. At the same time, however, it will place higher demands on importers of goods than before. ICS2's full operation should be achieved during 2024.

Tomáš Kočař
tkocar@kpmg.cz

ICS2, to be launched in three phases (releases) according to the nature of the activities carried out by the importers and the mode of transport, will allow for the timely exchange of information on imported goods, the analysis of possible risks even before goods are loaded onto the means of transport (pre-loading) or delivered at the destination point (pre-arrival), and the sharing of the results of customs controls. This should close the gaps in the current ICS1 system and ensure greater protection of the internal market and of EU citizens against defective or otherwise undesirable products (e.g. imports of counterfeit medicines, dangerous toys, illegal drugs or weapons).

On 15 March 2021, Release 1 of ICS2's implementation was launched, covering (i) express carriers, (ii) EU based postal operators and (iii) third-country postal operators shipping to the EU. As of mid-March, prior to importing goods, these carriers are obliged to submit via the ICS2 system an entry summary customs declaration containing minimal information (PLACI) on all goods for whose import to the EU they are responsible. Collecting this data will enable the customs authorities to find out more in advance about the goods being imported and to detect possible safety risks (e.g. if it involves transport of substances or equipment that could explode aboard an aircraft). These obliged entities should therefore prepare for the implementation of ICS2 as soon as possible, if they have not already done so. Otherwise, they face the risk that the goods being carried might not be released into the EU.

The next phase of the implementation of ICS2, to be launched from 1 March 2023, will also apply to air carriers, and freight forwarding and logistics providers. During this phase, reporting obligations, including the scope of the information reported, will be further extended: they will cover all goods transported by air in postal, express and freight consignments.

The third phase, effective from 1 March 2024, will cover maritime, inland waterway, rail and road carriers, including consignments carried by these modes of transport. In some cases, it will also apply to the final consignees of the goods.

Finally, we would like to point out that until individual carriers are obliged to report via ICS2, they may continue to use ICS1, functioning parallelly. However, this will only be possible until 2024, when ICS2 will be fully operational.

Census obligatory for Czechs and foreigners

On Saturday, 27 March, the 2021 Population and Housing Census began, for the first time in history offering the possibility of online participation. Whom does it concern, what obligations does it involve and what should be watched out for?

Romana Szuťányi
kpmg@kpmg.cz

Vojtěch Kotora
vkotora@kpmg.cz

The census involves the regular process of obtaining detailed information about population and households. The census is held at regular 10-year intervals, the reference year being the first year of each decade. Since the last census took place in 2011, the process takes place again this year.

The online census runs from Saturday, 27 March to Tuesday, 11 May. Respondents have several options how to meet their obligations. The first one is to fill out the form directly on the website of the Czech Statistical Office. It is also possible to use a mobile application available for both Android and iOS systems. Respondents who cannot or do not want to participate online may use the traditional paper form of the census, available from 17 April.

Printed forms will be distributed starting April 17. Respondents may also pick them up at any contact point. These have been established at selected branches of the Czech Post and regional administrations of the Czech Statistical Office. The census will run until 11 May. If someone does not participate in the census in either of these forms, they will to a limited extent be included on the basis of data available in the state databases. Fines of up to CZK 10,000 may be imposed for failure to provide data or for providing data contrary to the 2021 Census Act.

Another novelty is that the census form covers half as much data as the last one. Information is gathered for instance on the house or apartment where the respondent and other persons live together, their completed education, employment, and place of work or school. As it turned out, the coronavirus pandemic also affected the census: for example, there was confusion about what response to give about commuting, as respondents are currently mostly working from home. According to published information, they should respond according to whether they will continue working from home even after the end of anti-pandemic measures.

The census concerns Czech citizens with permanent residence in the Czech Republic, including those temporarily residing abroad, as well as those who do not have permanent residence here but live in the Czech Republic (e.g. who have returned from abroad, but have not yet been able to register in the Czech Republic). The census also concerns foreigners who have permanent residence in the Czech Republic or temporary residence for more than 90 days, or have been granted asylum, subsidiary protection or temporary protection. The census obligation applies to these foreigners regardless of whether they are currently in the Czech Republic. Only foreigners with stays of less than 90 days (e.g. tourists) and diplomats are excluded from the census. Census forms will also be available in foreign languages, including English, German, Polish, Russian, Romani, Ukrainian and Vietnamese. The mobile applications and the online census on the CSO's website also work in these languages.

The results of the census will be processed by the end of this year and published in 2022.

Concluding contracts between single-member companies and their members

In small, single-member companies, the member is usually closely involved in the company's activities and its management, therefore often holding the office of the statutory body. Sometimes, the sole member who represents the company as its statutory body also deals with the company. For instance: as the sole member they provide funds to the company, and as a statutory body they transfer receivables, acknowledge debts or enter into purchase contracts. For a contract concluded between a single-member company represented by the sole member on one part, and that member on the other part to be valid, it is necessary to ensure that it meets all statutory requirements.

Pavlína Rampová
prampova@kpmg.cz

Gabriela Blahoudková
gblahoudkova@kpmg.cz

The Corporations Act explicitly allows for the existence of single-member business companies. To maintain as much contractual freedom as possible, it also allows for the sole member to enter into contractual relations with the company. However, it lays down special rules for these cases, to protect the company and third parties (in particular creditors) from acts whereby the sole member might abuse their position contrary to the company's interest.

Contracts concluded between a sole member and the company represented by that member are subject to a rule contained in Section 13 of the Corporations Act. This provision requires **that the contract be concluded in writing, with verified signatures**. The same requirement also applies to unilateral legal acts by a company represented by its sole member towards such member, or vice versa, by a single member towards their company (e.g. acknowledgement of a debt or unilateral offsetting of claims).

This provision aims to prevent wrongful acts by the member and the statutory body in one person, who, in the absence of a written form with a verified signature might change the content of the contract or backdate it, arbitrarily and at any time. A failure to comply with the stipulated obligation may, in extreme cases, result in the nullity of the contract or unilateral act. Ultimately, this means that the court may declare it null, of its own motion and without a time limit. In this context, the Supreme Court also touched on the issue of the use of electronic signatures, stating that although they do not have the same effect as verified signatures, under certain circumstances, their use may not render a legal act null.

However, the above mentioned section does not apply to contracts concluded between the sole member and the company where the company (when concluding the contract) is represented by another person (usually a second statutory representative who is not the sole member), or contracts concluded in the ordinary course of business. In its recent case law (29 ICdo 43/2018), the Supreme Court also held that the rule did not apply to contracts concluded between two single-member companies represented by the same sole member.

We recommend that sole members and statutory representatives of companies carefully assess all contracts being concluded from the perspective of Section 13 of the Corporations Act. Should they find that the contract concluded

between a single member alias a statutory body does not meet the legal requirements, an additional remedy is possible, with effects for the future.

Representation of limited liability company by statutory representatives and its limits

When founding and operating a limited liability company, its members usually deal with the issue of setting up its corporate governance and defining the powers of the statutory representatives (executives). In this article, we will present the basic possibilities of limiting the statutory body's power to act on behalf of the company, and the consequences of the breach of such limits.

Aneta Boukalová
kpmg@kpmg.cz

Pavlína Rampová
prampova@kpmg.cz

By operation of law, if a limited liability company has more than one statutory representative (executive), **each of them alone is a statutory body** with full power to act within and without the company (vis-à-vis third parties). Members may specify in the memorandum of association that **all statutory representatives as a collective body** (referred to for instance as the board of statutory representatives or the executive board) shall be the statutory body. The board shall then adopt decisions collectively, similarly as a board of directors in a joint stock company, by at least a simple majority of its members present at the meeting, unless the memorandum of association stipulates otherwise.

The memorandum of association may also specify **the manner of the statutory representatives' acting** on behalf of the company. The information on the manner of representing the company is recorded in the Commercial Register and is publicly available. The most common manners of representing a company with multiple statutory representatives are:

- each statutory representative acts independently in all matters
- two and/or more statutory representatives act jointly in all matters
- statutory representatives act jointly only to enter into contracts exceeding a certain value, dispose of real property owned by the company, etc.

In principle, one of the statutory representatives may be completely prevented from acting independently on behalf of the company by making their acting conditional upon the co-signing by another statutory representative. If the statutory representative then acts contrary to the manner recorded in the Commercial Register, such legal acts shall not be binding upon the company, not even vis-à-vis third parties. This means that if one of the statutory representatives on their own enter into a contract on behalf of the company where the joint signature of two statutory representatives is required, the contract shall be invalid.

Statutory representatives' acting in any matter may also be made **conditional upon the consent of another body of the company** – most often the general meeting or the supervisory board, by stipulating this in the memorandum of association. However, such restriction shall not be effective vis-à-vis third parties, not even if it has been published in the Commercial Register; legal acts made by statutory representatives in breach of such restrictions remain valid and the company shall be bound by them, even if the third party knew of the restriction. A statutory representative who has acted without the required consent of another body shall be liable to the company for such acting beyond their powers.

The only case where the company shall not be bound by a contract entered into without the consent of the required body are legal acts where the general meeting's consent is also required by law (e.g. entering into a contract for the transfer or pledge of a business establishment). A contract concluded without the supreme body's consent shall be invalid; its invalidity may be invoked within six months of the date on which the invoking person became (our could have become) aware of the fact that the general meeting's consent had not been given. However, the validity can only be challenged within 10 years of the contract's conclusion.

European financial transaction tax back on the table

Portugal is trying to reopen in the Council the debate on the proposal for a financial transaction tax at the EU level. The debate should focus on setting the conditions of taxation and avoid political issues.

Jana Fuksová
jfuksova@kpmg.cz

Duc Van Nguyen
kpmg@kpmg.cz

A common system for the taxation of financial transactions has been under discussion at the EU level since 2011. The proposal put forth at that time envisaged a tax of 0.1% on the transfer of shares and bonds, and 0.01% on financial transactions in derivative instruments. So far, political consensus has not been reached among all member states. In 2013, eleven of them moved ahead with so-called enhanced cooperation on a legislative proposal that would apply only to this group of states. During the negotiations, Estonia withdrew from the group. The Czech Republic did not participate, as it persistently has been against the introduction of such a tax.

The most recent significant development came in the form of a proposal from the German finance minister in December 2019, for a revised financial transaction tax directive to be adopted by the 10 remaining states under enhanced cooperation. The revised proposal included an optional exemption for pension schemes and a new system for the mutualisation of financial transaction tax revenues, as well as an increase in the rate. At the same time, the financial transaction tax was mentioned as a possible new EU resource as part of the EU's long-term budget. In the meantime, several EU member states (France, Italy, and Spain) have introduced unilateral equivalents of a financial transaction tax.

In an attempt to move the legislative proposal further, the Portuguese presidency of the Council has proposed a discussion on the design of the new tax at the EU level. The approach suggested by the presidency should allow for the gradual implementation of the tax, based on the models developed and already tested by France and Italy. In Portugal's view, a step-by-step approach would allow:

- EU member states and the EC to methodically evaluate the economic impact of the financial transaction tax
- tax administrations to progressively develop efficient and effective collection procedures
- market structures and financial institutions to gradually build up the knowledge and infrastructure required to facilitate tax compliance.

All EU member states have been invited to provide views on the proposed design of the financial transaction tax, and on whether the French and Italian experience would represent a solid basis for a gradual European approach on the tax (either in the context of the enhanced cooperation or EU-wide). A proposal to include the transactions in equity derivatives in the scope of the financial transaction tax (in line with the Italian model) is also a part of the discussion. It is not yet clear how the member states will react to the renewed discussions and whether the financial transaction tax has a chance of being adopted. The position of the Czech Republic has also not been made available yet.

Preferential tax treatment is illegal public aid, even FC Barcelona will feel it

The Court of Justice of the EU (CJEU) has finally closed a long-standing dispute over the preferential tax treatment of the largest football clubs in Spain. The conclusion is unforgiving: FC Barcelona, FC Real Madrid and other clubs will have to pay back millions of euros to the Spanish financial administration, because the tax treatment adopted in the 1990s was found to constitute illegal public aid.

Tomáš Kočař
tkocar@kpmg.cz

In 1990, Spain passed a law obliging all Spanish professional sports clubs to change their legal form to sports joint stock companies. However, this obligation did not apply to clubs that had reported profit in previous years. These were: FC Barcelona, FC Real Madrid, Athletic Club (Bilbao) and Club Atlético Osasuna (Pamplona). These apparently well-managed clubs were thus able to continue operating as non-profit organisations, therefore applying a special income tax rate, which until 2016 was five percent lower than that for sports joint stock companies. As a result, these clubs saved several million of euros in income taxes.

In 2016, following an extensive investigation into aid granted to Spanish football clubs, the European Commission decided that the tax treatment applied for almost 30 years conferred an advantage on the above clubs and constituted illegal public aid. However, the EU General Court subsequently annulled the Commission's decision. The case was finally closed this month by the CJEU, which sided with the European Commission.

In Judgment C-362/19 P, the CJEU stated that, in the case of aid schemes, a distinction must be made between the aid scheme itself and the individual aid granted under that scheme. In the present case, all professional sports clubs that fulfilled the conditions could benefit from the preferential tax treatment. Such a tax measure therefore constituted illegal aid, even though only a few football clubs actually benefited from the lower tax rate and it was not possible to determine in advance the exact amount of aid granted. Therefore, the assessment of whether an unlawful advantage is being conferred on the clubs for the purposes of Article 107(1) of the Treaty on the Functioning of the EU (TFEU) should have been made at the time of adopting the aid scheme – the relevant law (ex ante), rather than ex post, depending on the claiming, if any, of tax deductions, reliefs or other variable facts that may subsequently neutralise the advantage previously granted.

According to the CJEU, the tax treatment adopted by Spain in the 1990s conferred an unjustified advantage on FC Barcelona, FC Real Madrid, Athletic Club (Bilbao) and Club Atlético Osasuna (Pamplona) over other competitors. Those football clubs will therefore have to repay the illegally granted public aid, which in practice means paying tax arrears over the last 10 years, including interest.

Although the amounts to be recovered reach millions of euros, which is a negligible figure in terms of the clubs' value (for information: Lionel Messi's current market value is EUR 80 million, and that of FC Barcelona's A-team is even 10 times higher), the CJEU's decision may be critical, given the current coronavirus pandemic. All the more so for the financially decimated FC Barcelona...

Case law

Is additional tax assessment due to VAT fraud reason enough not to waive penalties?

If the tax administrator concludes that a VAT payer has even indirectly been involved in VAT fraud (typically, by having accepted a delivery affected by fraud), the entitlement to VAT deduction will be withheld from the payer. The payment of additional VAT and related default interest and penalties represents an unexpected expense for the payer, with a significant financial effect on their business. According to the latest case law of the Supreme Administrative Court (SAC), proven involvement in VAT fraud may even endanger any waivers of penalties relating to additionally assessed tax.

Jana Fuksová
jfuksova@kpmg.cz

Pavlína Rampová
prampova@kpmg.cz

The Tax Procedure Code allows for the waiver of up to 75% of a set penalty, depending on the extent of taxpayer's cooperation during a tax inspection or another procedure carried out to assess additional tax. If the maximum waiver is applied, a 5% instead of 20% penalty is imposed. When assessing the situation, the tax administrator also takes into account whether the taxpayer violated tax or accounting regulations before, and the frequency of such breaches of obligations in tax administration. In a recent SAC judgment (1 Afs 236/2019), a taxpayer was involved in a serious VAT fraud and the tax administrator proved in the tax proceedings that the taxpayer should or could have known of its involvement in such fraud. Even though the taxpayer fulfilled the basic formal pre-conditions for a waiver of penalties as well as the requirement to have no record of violations of tax and accounting regulations, the tax authority denied the waiver to the taxpayer after assessing the nature, intensity and other circumstances of the violation of tax regulations.

Referring to its previous case law, the SAC concluded that when deciding on a waiver of penalties, it is necessary to consider also the violations of tax regulations leading to the assessment of additional tax to which the penalties being waived relate. The SAC confirmed that this particular case involved a particularly serious violation of tax regulations, not only in terms of the involvement in carousel fraud, but also in terms of the extent of tax being avoided (as the additionally assessed tax amount exceeded CZK 15 million). The court concluded that involvement in fraud that the taxpayer should and could have been aware of is a relevant reason to deny a waiver of penalties. It may even be the only reason to deny the waiver if the tax administrator substantiates it in a proper and logical manner.

In practice, when assessing taxpayers' applications for waivers of penalties, the tax authority should evaluate each case on an individual basis, always considering specific factual backgrounds. However, with respect to the SAC's conclusions in the above case, there is the risk that the tax authority will not waive, even partly, penalties to those who have even unconsciously been involved in VAT fraud.

Case law

CJEU: Supplies between head office as part of VAT group and foreign branch subject to VAT

The Court of Justice of the European Union (CJEU) issued its long-awaited decision in the Danske Bank case (C812/19) and clarified the relationship between a foreign branch and its head office that is part of a VAT group. Six and a half years after the Skandia judgment, it is now clear that supplies between the head office, which is a member of a VAT group in one member state, and its branch in another member state are subject to VAT. The CJEU's decision will mainly affect the financial sector in which the combination of branches and VAT groups is not uncommon.

Jana Fuksová
jfuksova@kpmg.cz

Filip Morcinek
fmorcinek@kpmg.cz

Danske Bank whose principal establishment is located in Denmark operated an information platform shared with its foreign branches. Expenses associated with its use were charged to, among others, its Swedish branch. The subject-matter of the dispute between the Swedish branch and the Swedish tax administration was whether services provided to the branch by the Danish head office that is a member of a VAT group can be treated as taxable supplies for VAT purposes.

The court requesting a ruling from the CJEU offered two points of view: first, Danske Bank as the principal establishment and its Swedish branch can be treated as a single taxable person if the Swedish branch is not independent from its principal establishment and, simultaneously, is not part of any grouping for VAT purposes in Sweden. This is based on Judgment C-210/04 (the FCE Bank case) in which the court held that if a branch is not independent from its principal establishment, the branch and the principal establishment must be considered a single and identical taxable person and as such, supplies in form of services between the principal establishment and its branch shall not be subject to VAT. The second point of view derives from the principles of Judgment C7/13 (Skandia) in which the court held that the provision of services for consideration by the principal establishment (seated in a third country) to a branch that is established in an EU member state and is part of a local VAT group is regarded a taxable supply. Services provided by a third person to a member of a VAT group must be treated as services provided to the VAT group itself. The Danske Bank case involves a mirror situation to the Skandia case, as here it was the branch that was part of a VAT group; however, the Swedish branch cannot be considered part of the VAT group, owing to territorial restrictions.

The CJEU clearly held that the conclusions of the Skandia judgment shall also apply in the reverse situation. A branch in another member state and the principal establishment of a principal who is a member of a VAT group in a home country shall be treated as separate taxable persons for VAT purposes. If the principal establishment provides services to the branch in question, these must be regarded as services provided by the VAT group and shall be subject to a VAT reverse-charge mechanism according to the nature of provided services.

After a gap of almost seven years from the Skandia judgement, the CJEU again made clear that its conclusions shall also be applied to mirror situations. To assess a VAT treatment of supplies effected between the principal establishment and its branch, it is not decisive which of the entities is part of a VAT group but whether any of them is part of it. In practice, this will mainly affect the financial sector for which the background of the Danske Bank case is typical. As the financial institutions' entitlement to deduct VAT is usually very low, the application of VAT will be an additional expense for them.

Case law

CJEU on reduction of taxable amount on provision of indirect bonuses

In C-802/19, the Firma Z case, the Court of Justice of the EU (CJEU) opined on the treatment of indirect bonuses provided to end customers where goods had originally been delivered to another member state as supplies exempt from VAT with entitlement to VAT deduction.

Tomáš Havel
thavel@kpmg.cz

Marcela Jelínková
kpmg@kpmg.cz

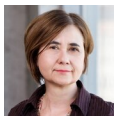
A Dutch pharmacy (Firma Z) delivered pharmaceuticals from the Netherlands to an insurance company in Germany, which then provided them to its customers (insured persons), individuals living in Germany, within their health insurance schemes. If, upon the purchase of the pharmaceutical in question, the insured person completed a questionnaire regarding their illness, Firma Z paid out a certain amount to them as a discount from the pharmaceutical's price, while reducing the VAT taxable amount of pharmaceuticals delivered to the insurance company by this amount.

According to the CJEU, the sale of pharmaceuticals in this case involves two taxable supplies: the first one is the delivery of goods from the Netherlands to the public health insurance company in Germany, which is exempt from VAT. The second one is the delivery of goods by the public health insurance company to the insured persons. When acquiring goods from the Netherlands, the insurance company must declare VAT in Germany. The subsequent delivery of pharmaceuticals to the insured persons is not subject to VAT pursuant to the EU VAT Directive.

The CJEU held that if Firma Z provides a discount from the price of pharmaceuticals to the insured persons, the taxable amount (the amount of tax-exempt supplies to another member state) of the original delivery of pharmaceuticals cannot be reduced. In our opinion, this viewpoint is in line with the CJEU's existing case law; however, we may encounter different approaches in practice.

News in brief, April 2021

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



Lenka Fialková
lfialkova@kpmg.cz

Václav Baňka
vbanka@kpmg.cz

DOMESTIC NEWS IN BRIEF

- The GFD has issued its Information on Applying VAT on the provision of COVID-19 testing services.
- The GFD has issued its Information on the Effects of the COVID-19 Pandemic on Transfer Pricing and a translation of the relevant OECD guidance of 18 December 2020.
- The GFD has issued Instruction D-47 on the Waiver of Default Interest and Other Tax-Related Charges, regulating the procedure of the Czech financial administration for making decisions on waivers of tax-related charges pursuant to the Tax Procedure Code. The instruction follows an amendment to the Tax Procedure Code in effect from 1 January 2021 and replaces the previous Instruction D-47.
- The Czech Social Security Administration has published explanations and procedures regarding the issue of e-sicknotes due to quarantine or isolation that are followed by the payment of a wage compensation for time spent in quarantine ('self-isolation payment').
- This year, CzechInvest will launch a Technological Incubation project, currently under preparation, inspired by the ESA BIC cosmic incubator now celebrating its fifth birthday. Within this project, CzechInvest will provide support to more than 300 start-ups from seven key technological areas, each receiving aid of up to CZK 5 million.
- The Ministry of Labour and Social Affairs' Notice No. 143/2021 on the average annual gross wage amount in the Czech Republic for 2020 for the purposes of issuing blue cards pursuant to Act No. 326/1999 Coll., on the residence of foreign nationals in the Czech Republic, has been published in the Collection of Laws.

FOREIGN NEWS IN BRIEF

- The Court of Justice of the European Union has confirmed that the Polish tax on the monthly turnover of retailers exceeding EUR 4 million and the Hungarian tax on advertisement (5.3% of the base exceeding approx. EUR 312 thousand) do not infringe upon EU legislation on state aid.
- Directive No. 2021/514, amending Directive No. 2011/16/EU on administrative cooperation in the field of taxation (DAC 7), has been published in the Official Journal of the EU, introducing the duty of digital platform operators to report transactions performed via such platforms. The duty will also apply to operators outside the EU regardless of their size. Member states are obligated to implement the directive in national legislations by the end of 2021, with effect from 1 January 2023.

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