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In brief

News in brief, June 2021

Editorial

A year ago, I started my editorial by saying that restrictions were being lifted, beer gardens and restaurants filling up, cinemas and theatres opening. This year, the situation is exactly the same. So we can finally focus on topics other than just COVID-related ones: for instance, the new VAT rules for e-commerce that will enter into effect on 1 July, or changes in access to the labour market for some foreigners.

The pandemic has certainly accelerated digitalisation: from working from home, through the boom of online services, to a (slightly) greater use of technologies in public administration. However, we should keep in mind that digitalisation in itself is not the point, and that people should be at the centre of all social activities. Even more so in the year of the 100th anniversary of the premiere of Čapek's world-famous play R.U.R., which warned against technologies getting out of human control. With this in mind, we have formulated the 121 Manifesto, and I would be happy if you decide to join us in this appeal.



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COVID-19 vaccinations for employees posted abroad

Vaccinations against COVID-19 are in full swing in the Czech Republic. Currently, 30-year-olds may register to get their shots; from June, registration should open for all persons over the age of 16. This means that virtually the entire productive population can, but is not obliged to, get vaccinated. From the labour law perspective, Czech employers cannot make vaccinations mandatory for their employees, in our opinion. But is the situation the same abroad?



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According to information available to us, the approach differs across countries. Legal regulations pertaining to vaccinations are still evolving, and the professional public's opinion is not always united. In the United States of America, e.g., employers may, with some exceptions (such as religious objections or health risk) require employees to get vaccinated, according to some opinions. In the United Kingdom, the same option should be available to employers in high-risk sectors, such as social care and healthcare services. Employers in Italy may also have a similar opportunity. In Canada, the situation varies depending on individual jurisdictions.

For Czech employers, the above means that if they decide to post their employees abroad on a long-term basis, they should consider employee vaccination issues when checking the conditions of employment in the host country. The vaccination obligation should be checked from the perspective of the host country's legislation, and from the perspective of the receiving company. Although so far it seems that most countries approach the issue of employee vaccination in a similar way to the Czech Republic, there has been news that some foreign companies require their employees to be vaccinated. Reuters recently reported that Delta Air Lines will require new employees in the United States to be vaccinated against COVID-19.

Legislation and case law concerning the COVID-19 pandemic are still being established, and it is not yet clear in which direction they will develop. Employers posting their employees abroad can only be advised to consider vaccination issues in addition to immigration, tax or social security issues when checking the conditions of the postings.

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Summary of e-commerce changes (2021 VAT amendment)

From 1 July 2021, significant changes in VAT on the cross-border sale of goods over the internet enter into effect, concerning both sales within the EU and imports from third countries. The place of taxation will be the country of the recipient, which can lead to multiple VAT registrations. An alternative is to use the special one-stop-shop (OSS) regime, where the seller manages their taxes from one portal (one country).



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The amendment to the VAT Act regulating cross-border e-commerce (the e-commerce amendment), is awaiting its third reading in the Chamber of Deputies. In this article, we summarise the basic elements of the changes.

The sale of goods to end consumers at a distance (over the internet) will generally be taxed in the consumer's country. National limits for sending goods shall be abolished; the only exception will be available to small enterprises established in one EU member state and not exceeding the annual threshold of EUR 10,000. This amount includes not only the distance sale of goods, but also the provision of services within the EU. Such businesses may use a simplified treatment and tax the sale of goods in the state of dispatch.

In response to the above change, the OSS application has been significantly extended. Rather than registering for VAT in individual EU countries, the seller can register for the OSS and settle the EU VAT on selected transactions within this special scheme. As the name suggests, the basic idea is the possibility to manage all EU taxes from one place. The OSS scheme is applicable to the distance sales of goods, selected distance sales of imported goods, and to services provided to EU consumers (such as a sale of tickets for events held in other EU states, real estate services or rental of means of transport). In the case of distance selling of imported goods, OSS, or more precisely IOSS, shall be applicable to consignments of actual value of up to EUR 150 that are not subject to excise duty.

The one-stop-shop will operate under several different schemes: the Union scheme, the non-Union scheme and the newly added import scheme (import-one-stop-shop, IOSS). These are separate modules, each with their own registration and returns (including different deadlines for filing the returns). In the future, the OSS is to be further extended to B2B cross-border supplies of goods.

Furthermore, with the abolition of the VAT exemption on imports of small-value consignments (all consignments imported from abroad will now be subject to VAT regardless of their value even if it is minimal), a completely new special regime has been introduced for imports of low-value goods. Thanks to this, holders of the relevant permit could pay VAT on imports of low-value consignments collectively per calendar month, by a supplementary customs declaration.

Finally but importantly, please note the new responsibilities of internet platforms, as they may become deemed suppliers for VAT purposes.

Registrations for the OSS are now open and with the help of an intermediary also available to entities established outside the EU. The above mentioned internet platforms may also register for the OSS.

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GFD explains new meal allowance rules

From 1 January 2021, employers may use a new form of meal contribution under the amendment to the Income Tax Act: the monetary meal allowance. The General Financial Directorate (GFD) issued information that answers some of the questions raised by employers and the professional public regarding the tax deductibility of the new meal allowance on the employer's part and its tax exemption on the employee's part.



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In the Information, the GFD answers the six most frequently asked questions.

Unlike conventional meal vouchers, the meal allowance **is not** exempt from income tax on the employee's part without any limit. The information confirms that the new meal allowance is only tax exempt for up to 70% of the maximum subsistence expenses that can be compensated to state salary receiving employees on business trips lasting 5 to 12 hours (CZK 75.6 for 2021). This limit applies for a shift of any length. It is thus not important how many hours the employee actually worked within the shift – the tax exemption applies even if the employee worked only two hours in the shift, for instance.

Further questions concern the possibility of providing the meal allowance to executives/members of statutory bodies and employees working under agreements to perform work/complete a job (rather than employment contracts). The GFD confirms that employers may pay the meal allowance also to these persons, as long as their working hours are scheduled in shifts. For the expense to be tax-deductible on the employer's part, the shifts must be defined in the relevant agreement or contract, and the employee or executive must work at least three hours within the specified shift. At the same time, subject to the conditions of the Income Tax Act (ITA), the exemption on the employee's part can be applied.

Questions about the new meal allowance also concern employees working from home. The ITA does not in any way limit the place of performance of the employee's activities. However, the employer must contractually designate the place of residence as a workplace. Then the meal allowance can be exempted from the tax on income from employment and included in the tax-deductible expenses on the part of the employer. The GFD stresses that working at least three hours in a shift must be confirmed by keeping records of the hours worked.

Finally, the Information deals with the possibility of combining various types of meal allowances. The GFD has clarified this issue, confirming that one employee can only draw one type of allowance at a time. However, nothing prevents employers from providing different types of allowances to different employees.

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Financial administration again answers questions about changes to tax depreciation

Even after months of the Income Tax Act's amendment's validity, the retroactive effect of the changes to tax depreciation has still not been fully clarified. For the third time, the financial administration has again updated the Q&A file on its website concerning one of the most significant changes to tax depreciation in recent years.



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The new information deals, among other things, with the tax implications of the retroactive application of the change in the cost limit (threshold) for tangible assets from TCZK 40 to TCZK 80. In this context, the question arises whether it is possible to claim the acquisition cost of assets costing between TCZK 40 and TCZK 80 on a one-off basis, even though the taxpayer under their accounting policy should capitalise all assets costing over TCZK 40.

In the financial administration's opinion, the recognition of acquired assets in the taxpayer's accounting books is of key importance. From that, it shall be derived whether the accounting depreciation of the asset or its cost upon consumption shall be claimed as the tax-deductible expense. The financial administration points out that a change in the threshold determining tangible assets is solely a tax matter, and is not generally a reason to increase the threshold set in the accounting policies. Furthermore, the accounting treatment cannot be changed retroactively, as this would lead to a change in the accounting method, which would be contrary to the obligation to only apply the accounting methods applicable at the accounting period's beginning.

In light of the above, for many taxpayers who choose to apply the increased threshold, it will be necessary to classify tangible fixed assets costing from TCZK 40 to TCZK 80 into a (new) category of low-value assets, where the accounting depreciation will be the tax-deductible expense. Alternatively, other options introduced by the amendment can be used, such as extraordinary depreciation.

In its answer to another question, the financial administration deals with the implications of the increased threshold for improvements to tangible assets. In its opinion, there is no problem here, as a one-off claiming of the costs of an improvement is not dependent on the accounting recognition. However, the different capitalisation threshold for technical improvements for tax and accounting purposes will have to be reflected in the input price of assets, which will increase related record-keeping demands.

The last two answers deal with intangible assets. The financial administration confirms that the amendment does not regulate the amount of cost of improvements to intangible assets that would have to be capitalised. However, it points out that taxpayers should set in their accounting a threshold for the capitalisation of the cost of intangible assets and their improvements so as to observe the materiality principle.

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Time test for tax exemption upon spouses' community property settlements

The Coordination Committee of the General Financial Directorate (GFD) and the Chamber of Tax Advisers confirmed that the time test for the tax exemption of income from the sale of shares (ownership interests in a business corporation) shall not be interrupted by community property settlements by divorcing couples. The conclusions are crucially important for family businesses and other joint investments by spouses.



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Under private law, the community property of spouses also includes a spouse's share in a business corporation if the partner- or membership arouse during the marriage. At the same time, the acquisition of such share does not establish the other spouse's participation in that corporation. Shareholding thus has two dimensions: the first one is the personal, 'non-property' value, i.e. the rights and obligations arising from being a partner/member in the business corporation; the second one is the property value, which is common to the spouses and is part of their community property. This property value is subsequently also subject to a community property settlement, for instance, in the event of divorce.

A paper recently issued by the Coordination Committee of the General Financial Directorate (GFD) and the Chamber of Tax Advisers aims to clarify the ambiguity regarding the application of the time test for the exemption of income from the sale of shares in the context of community property settlements. Under the time test, income from the sale of a share shall be exempted from personal income tax as long as the individual held the share for at least five years prior to the sale. While for income from the sale of real property the Income Tax Act clearly stipulates that the time test shall not be interrupted by community property settlements, there is no such explicit regulation for shares and securities.

A practical example might look like this: during the marriage, a husband became a member of a business corporation, therefore his share became part of community property. However, for the entire duration of the marriage, only the husband was registered as a member in the Commercial Register. Subsequently, after 10 years, the marriage was divorced and, under the concluded agreement on the settlement of community property, the share was transferred to the sole ownership of the wife. Two years after the settlement, the wife decided to sell the share in question. Should only the two years of the wife's exclusive ownership of the share be taken into account for the purposes of the time test, meaning that the income would not be tax exempt? Or should also the previous 10 years during which the share was part of the community property but the wife was not in the position of a member (i.e. could not exercise the rights and duties of a member and was not registered in the Commercial Register) be taken into account, meaning that the income would be tax exempt?

The paper proposes a unifying conclusion: community property settlements do not interrupt the running of time tests as they do not constitute new acquisitions. This approach is also proposed for other cases where the Income Tax Act does not explicitly regulate the running of the time test in the context of community property settlements. E.g. for motor vehicles, the time test for tax exemption is one year, and here too, only one of the spouses is

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registered as the owner in the relevant register (technical licence), although the vehicle was acquired during the marriage and constitutes a part of community property. Following discussion in the Coordination Committee, the General Financial Directorate confirmed the proposed conclusions. Community property settlements thus should not cause unexpected tax complications through the interruption of time tests.

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VAT refunds post-Brexit

The General Financial Directorate has issued information on VAT refunds to UK entities after Brexit.



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From 1 January 2021, the rules on tax refunds to taxable persons registered for tax in another member state do not apply to UK entities. Instead, the rules on tax refunds to foreign taxable persons based on the reciprocity principle will apply.

The reciprocity principle is met if the state in which the foreign person has their registered office either does not assess value added tax or a similar general consumption tax, or if such tax is refunded to taxable persons established in the Czech Republic in the amount previously collected.

The Czech Republic does not publish a list of countries that meet the reciprocity principle. However, on 18 May 2021, the General Financial Directorate issued its *Information on the refund of value added tax to taxable persons established in the United Kingdom of Great Britain and Northern Ireland after the end of the transitional period*. According to this information, the reciprocity principle has been met, and taxable persons with their registered office or place of residence in the United Kingdom may claim tax refunds.

Foreign persons may claim the refund by applying to the Tax Authority for the Capital City of Prague in Czech and using the prescribed printed form.

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Digital services tax approval on the horizon

After more than a one-year break, the government's bill on digital services tax has moved on to the next phase of the legislative process. The final third reading in the Chamber of Deputies, which will also vote on all motions to amend the bill made in the second reading, will probably take place in the first half of June. The bill will then be debated by the Senate.



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During the second reading, the deputies proposed several amendments to the bill. From these, the budget committee only recommended the reduction of the rate from 7% to 5% for approval. All the remaining motions, including the proposal to postpone the effective date to 1 January 2022 or 2023, will be voted on within the third reading at the June session. Unless otherwise approved, the act should enter into effect 15 days after its promulgation in the Collection of Laws.

The bill introduces a digital services tax on:

- targeted advertising campaigns
- the use of multifaceted digital interface
- the provision of user data.

Taxable services are those provided through a digital interface. Any software (e.g. website or application) accessible to users shall be considered a digital interface. A user shall be any legal and natural person or entity without legal personality accessing the digital interface using a technical device. For the service to be taxable, it must be provided through a technical device located in the Czech Republic. To determine this, the localisation of the device's IP address will be the primary indication. For each of the above mentioned groups of services, a partial tax base will be calculated, based on the extent to which the taxable service is provided in the Czech Republic.

To determine the taxpayer, all of the following three criteria must be met: The first criterion is that the company belongs to a multinational group with a total annual turnover of at least EUR 750 million.

The second criterion is a significant digital presence in the Czech Republic. This criterion shall be fulfilled if the multinational group's total revenue from taxable services provided in the Czech Republic exceeds CZK 100 million for the relevant period. The bill also sets a minimum threshold for the taxation of digital services: for targeted advertising and providing user data, the total remuneration for the individual type of service provided in the Czech Republic must exceed CZK 5 million; the use of a multilateral digital interface will be subject to taxation if the number of user accounts on that interface exceeds 200 thousand.

The third criterion is the amount of taxable services provided by a multinational group in the EU and EEA, which must exceed 10% of the group's total turnover. Companies that belong to groups that meet the first and second criteria but do not become payers due to not meeting this criterion will only have a reporting duty.

The taxable period shall be a calendar year. Registration with the tax administrator must be made within 15 days from the date of effecting the first taxable service. After that, the entity will become a payer and will be obliged to pay monthly advances. To determine the fulfilment of the conditions for registration and the amount of advances in the first taxable period, a 'relevant' period has been set: the last accounting period for which the entity's

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financial statements have been prepared preceding the first day of the taxable period. Digital services tax payers will be obliged to keep records, in the structure necessary for preparing the tax return, and separately for individual taxable services.

The act assumes that in the future, agreement on the principles of taxation of the digital economy will be reached on EU and OECD levels. The application of the act is thus to be limited in time, with 2024 being the last taxable period in which the act should apply.

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Tips and tricks

How to minimise additional tax assessment sanctions?

The conclusion of a tax inspection resulting in an additional tax assessment is associated with sanctions: a penalty plus default interest; the latter, while technically not a sanction, may be many times higher than the penalty. The Tax Procedure Code offers a variety of options to mitigate these negative effects. Below we provide a practical summary of these options, which will also be discussed in more detail in the upcoming issues of Tax and Legal Update.



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If the tax administrator assesses additional tax based on the results of a tax inspection, the duty arises to the taxpayer to pay a penalty equal to 20% of the additionally assessed tax (reduced tax deduction) or 1% of the amount by which a tax loss was decreased.

Additional tax assessments result in tax underpayments subject to default interest, calculated from the date the tax was originally due. In compliance with the amendment to the Tax Procedure Code effective 1 January 2021, the current annual default interest amount equals the CNB repo rate increased by 8 percentage points, i.e. currently 8.25% p.a. However, until the end of 2020, the repo rate was increased by 14 percentage points, sometimes resulting in default interest significantly exceeding the additionally assessed tax in the case of lengthy tax inspections.

The Tax Procedure Code offers a variety of options to minimise penalties and default interest, in particular:

- waiver of tax-related charges (penalties and interest);
- deferment of tax payment;
- early tax payment.

Waiver of interest or penalties: The taxpayer may apply to the tax administrator for a waiver of up to 75% of a penalty. If the maximum waiver is granted, the penalty may decrease to 5% of the additionally assessed tax. The waiver is conditional upon the taxpayer's good tax morale and collaboration during the tax inspection. It is also possible to apply for a waiver of default interest and interest on the deferred tax amount if the tax was paid late for justifiable reasons.

Deferment of tax payment: Subject to statutory conditions, the taxpayer may apply for a deferment of the tax payment or ask to pay the outstanding tax in instalments. The taxpayer is given a chance to pay tax later while significantly decreasing the accrued interest: instead of default interest, interest on the deferred tax amount arises, which is roughly half of the default interest amount. The Tax Procedure Code also allows for retrospective deferments of tax payments under certain conditions.

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Early tax payment: The payment of expected tax even before its assessment or due date, i.e. during the course of a tax inspection or appeal proceedings, stops further accruing of default interest. If the tax inspection is not developing positively for the taxpayer and additional tax is assessed, we recommend, apart from challenging the conclusions of the inspection itself, also considering the above options to mitigate the effects of the related sanctions.

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Final calls for popular programmes under OP EIC

Last calls under the Potential, Application and Innovation – Innovation Project programmes were announced under the Operational Programme Enterprise and Innovation for Competitiveness (OP EIC) that is slowly drawing to an end. These programmes are also intended for large businesses that meet certain conditions.



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Potential – Call VIII

Support will be granted for the establishment or development of centres for industrial research, development and innovation involving the acquisition of machinery/equipment and other facilities to ensure the centres' activities. Eligible costs are capital expenditures relating to tangible and intangible fixed assets and buildings (new buildings and construction work only partly).

Application – Call IX

Support will be provided for industrial research and experimental development. Eligible costs include personnel expenses; expenses for tools, equipment and fittings; expenses for contractual research; expenses for research and development advisory services; and additional overhead and other operating expenses. Capital expenditures are not eligible.

Innovation – Innovation Project – Call IX

Support will be granted for innovation relating to products, processes, organisation and marketing. Eligible costs mainly include capital expenditures associated with innovation.
Large businesses may apply for support under the above programmes but may do so only if they meet the criteria for intervention code 065 (Potential and Innovation programmes) or for intervention code 063 (Potential programme):

- Intervention code 065 – projects having a positive impact on the environment, focusing on the low-carbon economy and climate change resilience with a link to the circular economy (projects focusing on the circular economy).
- Intervention code 063 – projects whose main purpose is to cooperate with a small or medium-sized enterprise on a given development project while the small or medium-sized enterprise will have to use the acquired infrastructure for at least 30% of the machine time over a period of five years. Large businesses may cover all project expenses.

The individual programme parameters are as follows:

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Parameter	Potential	Application	Inovation
Application acceptance	14 June 2021 – 26 August 2021	8 June 2021 – 31 July 2021	15 June 2021 – 30 August 2021
Total funds for allocation	CZK 1 billion	CZK 1 billion	CZK 1 billion
Subsidy amount	CZK 2–100 million	CZK 2–100 milion	CZK 1–100 milion
Aid intensity	50 % of eligible costs	25–65 % of eligible costs*	25–45 % of eligible costs
Applicant	large businesses, small and medium enterprises	large businesses, small and medium enterprises, research organisations	large businesses, small and medium enterprises
Conditions for large businesses	meeting criteria applicable to intervention codes 065 or 063	even without meeting intervention code criteria but with limited funds for allocation and a lower maximum subsidy amount	only projects meeting criteria applicable to intervention code 065
Type of call	single-round	single-round	single-round

*for large businesses, depending on the supported activity and the implementation of a project in effective cooperation or without such cooperation

Under all programmes, all projects must be carried out in the Czech Republic, but outside of Prague. Supported activities do not include mere restorations of property or manufacturing activities. Applicants must have their beneficial owners recorded in the register pursuant to the Act on Some Measures against Legalisation of Proceeds from Criminal Activity and Financing Terrorism. The registration must be made before a decision on granting a subsidy is issued. Other conditions are part of the individual calls.

Should you be interested, we can provide you with more detailed information or review the suitability of a given programme for your planned activities and any other specific conditions.

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New operational programme under European Green Deal

The European Union has committed itself not to produce any greenhouse gas emissions by 2050, when it plans on becoming a climate neutral continent. In connection with this, a European Green Deal has been entered into and a Just Transition Fund has been established.



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The Green Deal is an action plan to ensure the sustainability of the EU economy, in particular by boosting the efficient use of resources by moving to a clean, circular economy, restore biodiversity and cut pollution. To achieve these goals, a number of measures will have to be adopted, such as investing in environmentally-friendly technologies, supporting industry to innovate, rolling out cleaner, cheaper and healthier forms of private and public transport, decarbonising the energy sector, and ensuring buildings are more energy efficient.

Using the Just Transition Mechanism (JTM), the EU should provide financial support and technical assistance to those who will be most affected by the move towards a green economy. That is why the Just Transition Fund programme has been established, with total funds for allocation in the Czech Republic amounting to EUR 1.64 billion, i.e. approx. CZK 42.7 billion.

The programme has been designed to deal with the negative effects of the move away from coal in most affected regions. In the Czech Republic, these include the Karlovy Vary, Moravian-Silesian and Ústí nad Labem regions. The programme will mainly aim to ensure enough jobs for workers leaving the coal industry and the restoration and redevelopment of the countryside affected by coal mining. **Support is also intended for large enterprises, including businesses trading in emission rights.**

Support will be provided in respect of a wide variety of activities, such as:

- research and innovation digitalisation
- clean energy and energy savings
- circular economy
- redevelopment and new land use, etc.

The programme is planned for the 2021-2027 programme period. The eligibility of expenses starts in 2021 and ends in 2029 when the programme will be ultimately closed. The operational programme is expected to be approved by the European Commission, and first applications should be accepted at the beginning of the following year.

We will keep you informed about any further developments.

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Detailed home office regulation still not in sight (II): employee monitoring

In this article, we deal with the pitfalls that the monitoring of employees working from home may pose for employers. In this case, the employer's right to know whether employees are performing the assigned work during working hours and are not misusing working tools issued to them stands against the employees' right to privacy.



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Whether an employee works at the employer's workplace or at home, the employer has certain options to check the employee's work. However, the employer must ensure that while doing so, they respect the employee's right to privacy guaranteed by Czech law and EU legislation.

Working from home has some aspects that justify derogations from the general rules of monitoring employees at the workplace. Employees at home office do not work under the direct supervision of their superiors, which means that it is more difficult for senior employees to perform their duties under the Labour Code, in particular to manage and control their subordinates' work and observance of working hours, and to evaluate their performance and work results in person. Senior employees thus generally have to rely on electronic means. Some employers therefore request that to facilitate such control, employees remain online during working hours, i.e. show a 'green status' in the office programmes they are electronically connected to as to evoke their active work status. This request is usually justified and employers have the right to demand it. However, the value of information thus obtained may be very limited, as it is impossible to say whether an employee is e.g. studying printed materials or surfing the internet instead. Certain derogations may also apply to employees who schedule their own working hours. Generally, all outcomes of employee monitoring should be assessed on an individual basis, taking into account the employee's job position and work performance.

As regards browsing websites, please also note the provisions of the Labour Code that prohibit employees from using employer's tools and work equipment, including computer technology and telecommunication equipment, for their personal use without the employer's consent. The Labour Code allows employers to check compliance with this ban. However, the monitoring should not be continuous. The principle of proportionality should always be respected, so as not to extensively monitor employees by continuously recording all their activities on the computer. A more suitable solution would be, for instance, to block (blacklist) websites that employees do not need for their work.

Similar principles shall apply to checking the use of a work email box or of a company car equipped with a GPS locator. Another specificity of working from home is the employee's attendance at online sessions or meetings. If the employer provides the employees with the necessary IT equipment and connection, they have the right to demand their attendance. In justified cases, the employee must also allow the online sessions or meetings to be recorded.

Finally, please note that even as regards employees working from home, if an employer decides to monitor their employees' work, they must have a serious reason for doing so and must inform the employees of the possibility of

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monitoring as well as of the manner in which such monitoring is about to take place.

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Ministry of Labour and Social Affairs provides easier labour market access for foreigners whose temporary residence ended

The employment of foreigners has long raised a number of practical questions that employers and foreigners themselves often find difficult to answer. The Act on the Residence of Foreign Nationals in the Czech Republic (Foreigners' Residence Act) or the Employment Act often prove unhelpful as well, as the interpretation of many of their provisions is unclear. The provision of the Foreigners' Residence Act regulating the termination of the temporary residence of a family member of an EU citizen and their subsequent residence in the Czech Republic is one of them.



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Foreigners who are family members of EU citizens usually have free access to the Czech labour market. If the Ministry of the Interior terminates their temporary stay in the Czech Republic for a legally defined reason (e.g. at their own request), it also sets a deadline for their departure. Within this deadline, the foreigner may apply for a long-term residence permit to allow them to continue to reside and work in the Czech Republic. Until their application is decided on, they can stay in the Czech Republic on the basis of the 'fiction of legal stay', meaning that during this period, their stay is still considered legal on the basis of the temporary residence permit.

Until recently, the Ministry of Labour and Social Affairs made the foreigner's free access to the labour market conditional upon their status as a family member of an EU citizen. In addition, this status had to be proven by the relevant residence permit for a family member of an EU citizen. If the foreigner no longer had the residence permit, according to the Ministry of Labour and Social Affairs, they no longer had free access to the labour market, even if still residing legally in the Czech Republic on the basis of the above-mentioned presumed fiction. In practice, this meant that the foreigner could not legally work in the Czech Republic in the period between the loss of the residence permit of a family member of an EU citizen and the issuance of their long-term residence permit. Such situations could last several months during which the foreigner remained without funds, with their employer being forced to find at least a temporary replacement.

Recently, the Ministry of Labour and Social Affairs changed its interpretation. Under its new approach, if a foreigner has applied for a long-term residence permit on time, they may both legally reside in the Czech Republic and have free access to the labour market until their application is decided on. According to information available to us, the Ministry of Labour and Social Affairs has reconsidered its interpretation, taking into account the fact that the legislators have granted to such foreigners the right to legally reside in the Czech Republic until their application is processed. The Ministry of Labour and Social Affairs also took into account their need to secure

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means for their own subsistence during this temporary period.

The change in the interpretation by the Ministry of Labour and Social Affairs is, in our opinion, a step in the right direction. The relevant provision in the Foreigners' Residence Act was ambiguous, and the new interpretation by the Ministry of Labour and Social Affairs will help to resolve such problematic situations for both foreigners and employers.

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Last year's development of competition law – Czech Anti-Trust Office case law (II)

In this article, we summarise the decision-making practice of the Office for the Protection of Competition ("Anti-Trust Office") in individual areas, including related statistics. We also focus on how successful competitors have been in remonstrance proceedings before the president of the Office (second-degree decisions) and in the review proceedings of the Office's decisions before the administrative courts.



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First-degree decision-making

In 2020, the Office issued 65 first-degree decisions, imposing over CZK 266 million in fines. Importantly, 11 decisions concerned prohibited agreements, and serious horizontal cartels were identified in seven cases. For instance, fines in the aggregate amount of over CZK 118 million were imposed for the conclusion of a cartel agreement concerning an IT contract for the city of Přerov; in this case, the competitors not only effectively shared the public contract through mutual contacts and exchange of information, but even participated in drafting the winning bid specifications. As the competitors met all conditions for the settlement procedure, the Office eventually reduced their fines by 20% and did not impose a ban on performing public contracts.

The Office also imposed a first-degree penalty of CZK 20 million for the abuse of a dominant position by Intergram. This collective rights administrator was found guilty of enforcing disproportionate terms and conditions for the use of copyright-protected work of performing artists and producers of audio and audio-visual recordings through TV sets and radios located in an accommodation facility. The abuse of a dominant position consisted in the fact that Intergram had demanded fees even for unoccupied rooms. This decision has not yet become final and conclusive, as Intergram has filed a remonstrance against the decision.

A penalty of CZK 984,000 for the anti-competitive conduct of a public administration authority was imposed on the Capital City of Prague. Following a remonstrance procedure, this penalty was reduced to CZK 740,000. The punishable conduct involved the setting of parking conditions for hybrid vehicles that were found to be biased, discriminatory and disproportionate in view of the intended purpose of the regulation, i.e. to limit the negativeimpact of transport emissions on air quality.

Traditionally, the largest number of decisions concerned the mergers of competitors. In none of the 47 cases, the merger was prohibited; in the 34 cases where the merger met the stipulated conditions the decision was issued in a fast-track procedure within a shorter deadline.

Second-degree decision-making

A total of 20 remonstrance proceedings were initiated in 2020, 13 of which concerned prohibited agreements. In total, seven second-degree decisions were issued, six of them on the merits of the case. In five cases, the president of the Office denied the remonstrance and in one case altered the decision. In a case concerning the abuse of the dominant position by OSA (Copyright Protection Association for the Rights to Musical Works), the Office's

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president confirmed the fine of CZK 10,676,000; here, the abuse of a dominant position consisted in a behaviour similar to that of Intergram - i.e. that OSA's fees did not take into account whether rooms were occupied.

In the past year, the Office mostly succeeded in defending its decisions in judicial review proceedings before the administrative courts. Of the nine cases before the Regional Court in Brno, seven were decided in the Office's favour. The Supreme Administrative Court dealt with four cassation complaints against the regional court's judgments, and in all cases ruled in favour of the Office.

Supervision over public procurement

In 2020, the Office imposed 65 fines totalling CZK 11,904,000 in the area of public procurement, inspecting mostly public contracts in construction, IT and healthcare. Most common errors by the contracting entities were, e.g.: indeterminate and/or ambiguous specification of the tender conditions, discriminatory qualification requirements, or incomplete settlement of suppliers' objections.

Second-degree decision-making in the field of public procurement

As regards public procurement, remonstrances against first-degree decisions were filed in 215 cases. The Office's president issued a total of 223 decisions, and upheld the first-degree decisions and denied the remonstrance in 66 percent of them. In 2020, the average time needed to issue a second-degree decision was 53 days, which is a slight decrease for the third year in a row.

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Current developments in green finance

Although the Czech Republic is hardly a European leader in green investment and sustainable finance, financial institutions, headed by big banks, are getting ready for the new regulation. Apart from increasing transparency, the following years will focus mainly on resetting internal processes and portfolio structures.



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A survey carried out by KPMG in the first quarter of 2021 among large and smaller banks operating in the Czech market showed that the big players in particular are placing increasing emphasis on diversity and investments in green projects. This shows that investment trends and the regulatory environment are fulfilling their purpose. On the regulatory part, the SFDR Regulation promoting greater transparency, and the Taxonomy Regulation determining what investments shall be considered environment-friendly, contribute significantly to this.

At present, relevant financial institutions are obliged to disclose information regarding transparency in the context of sustainability and related risks: in particular their general policy, remuneration principles, and integration of sustainability risks. The Czech National Bank's approach to information disclosure, especially as regards the integration of sustainability risks, has been rather extensive so far; therefore, in accordance with best practices, we recommend disclosing this information not only in the statutes, but also in key information documents.

In the next phase, financial institutions must prepare for disclosing information at the level of individual financial products, which will be provided for in detail by regulatory technical standards (RTS). The revised RTSs are still expected to enter into effect on 1 January 2022.

The next step towards climate change mitigation and adaptation can also be seen in the Taxonomy Regulation: by adopting this implementing act on EU taxonomy, the European Commission specifies what economic and other activities substantially contribute to achieving the set environmental objectives. This implementing regulation is also due to enter into effect on 1 January 2022.

In the context of green investments, the question arises when and to what extent these investments shall be treated preferentially before the law and by the banks when scoring companies before providing bank finance. On the other hand, there are also voices asking whether such preferential treatment is economically appropriate. Detailed discussions on these topics are to be expected in the coming months. We will see in which direction and at what pace green finances will develop.

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Future direction of EU business taxation

The European Commission has issued its Communication on Business Taxation for the 21st Century, summarising current actions and future plans in response to the OECD debate on changes to international tax rules and the introduction of minimum taxation. In five points, the Commission also presented its own tax agenda, primarily aimed at stepping up the fight against profit shifting and helping to rebuild the economy. The Commission also wants to pave the road to change the tax mix in EU member states where the taxation of labour accounts for half, and to gain resources for the EU budget.



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Existing initiatives

The European Commission continues to prepare the amendment to the Energy Taxation Directive, to reform the existing EU emissions trading system, and also to draft a new carbon tax (the last two should bring EU its own resources). Legislative proposals should be published this July.

The proposal for a new digital levy should be independent of the outcome of the negotiations at the OECD level and compatible with the obligations arising from international trade agreements. The aim is for the digital levy to generate a new source of EU revenues. The Commission will withdraw the previous Digital Services Tax and Digital Presence proposals.

Minimum tax

The legislative proposal for the minimum taxation of multinationals contained in OECD Pillar 2 will be presented in 2022 in the form of a new directive. Conclusions of the OECD negotiations will also affect the existing rules contained in the ATAD Directive, in particular concerning the taxation of controlled foreign companies (CFC). The Interest and Royalty Directive will also be amended, to the effect that the exemption from withholding taxes will not be granted if there is no taxation in the country of the recipient.

At the same time, the Communication indicates that Pillar 2 of the international taxation reform allowing profits to be taxed regardless of physical presence in a given country will apply to all multinationals above a certain size, regardless of the business sector. The agreement reached at the OECD level should then also be transposed into EU law, in the form of a directive.

Shell companies

A legislative proposal aiming to prevent the use of companies with no real economic activity (shell companies) and artificial arrangements is to be presented in the second quarter of 2022. The Commission has launched a public consultation on this.

Tax loss carry back

On the date of issuing the Communication, the Commission also released a legally non-binding recommendation to member states to allow for the claiming of tax losses incurred in 2020 and 2021 retroactively against 2019, 2018 or 2017 tax bases, provided that no tax loss was recognised in these periods. For such tax loss carry backs, the

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recommendation sets a limit of EUR 3 million per taxable period.

Tax advantages for equity-financed companies

In the first quarter of 2022, the Commission will present a proposal for a directive introducing a special allowance for equity financing. By this, the Commission aims to address the debt-equity bias in corporate taxation.

Common set of rules for income taxation

The Commission will propose a new framework for the income taxation of multinational enterprises in Europe, based on key elements: a common tax base, which will subsequently be allocated to individual member states using a formula. This would mean that current transfer pricing rules will no longer be necessary in the future. The legislative proposal intended to replace all pending proposals for a common corporate tax base is to be published in the course of 2023.

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Case law

CJEU on roaming services' place of supply

In the case of SK Telecom Co. Ltd, No. C-593/19, the Court of Justice of the EU (CJEU) dealt with the determination of the place of supply for roaming services, following the rule of effective use and enjoyment.



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SK Telecom, a South Korean company, provided roaming services to their customers established in South Korea during their stays abroad, including Austria. For this purpose, the Austrian network operator provided SK Telecom with its network, at prices charged including Austrian VAT. SK Telecom subsequently requested a refund of the VAT paid, under the relevant EU directive.

The Austrian tax authority denied this request, arguing that the roaming fees charged by SK Telecom to their customers in South Korea were taxable in Austria. The tax authority mainly invoked the provision of the Austrian VAT Act under which the places of supply shall be relocated to Austria, as the SK Telecom's customers effectively used and enjoyed the services in Austria; SK Telecom therefore did not fulfil the conditions for VAT refund under Austrian law.

The CJEU dealt with the question whether the said provision in Austrian law was consistent with Article 59a of the VAT Directive. Article 59a allows member states to consider a place of supply of services situated outside the EU as being situated within their territory if the services are effectively used and enjoyed in their territory. According to the CJEU, it was therefore first necessary to assess whether the services were effectively used and enjoyed in the territory of an EU member state.

SK Telecom offered and provided the roaming services on a separate basis to persons temporarily residing in the territory of a member state — the services were separate and independent of other communications services used by those persons, and were paid for separately. The CJEU therefore held that the services were in fact effectively used and enjoyed in the territory of an EU member state during SK Telecom customers' temporary stays.

In the case in question, therefore, the roaming services were effectively used and enjoyed in Austria. Regardless of the taxation in South Korea, Austria can be regarded as the place of supply of the services. Please note that the Czech VAT Act implements Article 59a of the Directive (the effective use and enjoyment rule) to a narrower extent than the Austrian one, so that it applies in principle only to B2B services.

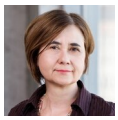
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News in brief, June 2021

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



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DOMESTIC NEWS IN BRIEF

- Until the end of June 2021, the government has extended the part of the Antivirus programme concerning employers whose employees are ordered into quarantine or isolation.
- The Chamber of Deputies has confirmed the original wording of an amendment to the Act on the Czech National Bank, aiming to allow the central bank to respond on time and when necessary to macroeconomic risks arising on the real estate and mortgage markets and possibly violating financial stability.
- The financial administration has disclosed information about the results of its inspections of transfer pricing in 2020. A total of 249 inspections were performed, resulting in additionally assessed income tax of CZK 1.4 billion and an increase in the tax base of CZK 7.9 billion. Between 2014-2020, the financial administration carried out 2,431 inspections, resulting in additionally assessed tax of CZK 4.5 billion and an increase in the tax base of CZK 46.9 billion.
- The Ministry of Labour and Social Affairs has submitted a pension reform proposal to the government. The ministry claims that the reform enjoys support across political parties, at the OECD level, from domestic experts and pro-senior organisations. The proposal follows three basic priorities: fairness, clarity and sustainability.
- An amendment to the Act on Employment, regulating the Kurzarbeit mechanism, has been approved by the deputies and is now heading to the Senate. It should help in time of crisis when employees cannot be allocated work for objective reasons. In such a case, the state will partly compensate employers for wage compensations paid by them to their employees. The amendment aims to help overcome such crises while maintaining jobs.

FOREIGN NEWS IN BRIEF

- The Conference of the Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) approved an opinion that sets out a series of guiding principles for addressing questions about the interpretation and implementation of the MLI. Those principles were drawn from public international law, the design of the MLI itself, and its drafting history.
- The OECD has published Tax Policy Reforms 2021: Special Edition on Tax Policy during the COVID-19 Pandemic, which provides an overview of the tax measures introduced during the COVID-19 crisis across almost 70 jurisdictions.
- The fourth edition of the Tax policies in the EU 2020 survey examines how member states' tax systems perform in terms of the EU's priorities such as promoting sustainable investment or supporting job creation and employment. New elements of this year's edition include discussions on tax competition, the design and distribution of the overall tax mix, the sustainability of tax systems in a changing world, and measuring effective tax rates on corporate income.

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