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Certain extraordinary measures have been cancelled by the court. What will be the practical impacts?

The Municipal Court in Prague cancelled four measures of the Ministry of Health with effect from 27 April. At the same time, the Government started to gradually loosen the current restrictions. The court decision will thus probably have the most serious practical impact in the area of the State's liability for damage as the judgement indirectly increased the State's exposure to potential claims of entrepreneurs demanding compensation for damage incurred as a result of the adopted extraordinary measures.

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The application for cancellation concerned four extraordinary measures of the Ministry of Health, two restricting retail sales and two limiting free movement of persons. The applicant argued that the Ministry had exceeded the limits of its competence and powers when it issued the relevant measures. Moreover, the measures had not been published in advance and the parties involved were thus unable to comment on them. This is why the applicant considered the measures unreviewable, incomprehensible (due to numerous ambiguities), disproportionate and chaotic.

The dispute also concerned the actual form of the adopted measures. While the Ministry considered them a legal regulation, the court ultimately agreed with the applicant's opinion that they were "measures of general nature". The court sided with the applicant in many points and ruled on 23 April that the measures had not been adopted in a manner envisaged by the law. The court concluded that only the Government had the competence to impose restrictions of such a nature and that such restrictions could only be imposed under the Crisis Management Act. The fact that the restrictions were adopted by the Ministry of Health was contrary to the rule of law and functioning of a democratic State, including the separation of powers. Nonetheless, in view of the purpose the measures followed, the court decided to postpone the effects of their cancellation, specifically to 27 April. The judgment is final; the Ministry could contest it by a cassation complaint filed with the Supreme Administrative Court. In fact, the Ministry has already stated that it will use this option.

But on 24 April, the Government already abandoned the strict restriction of free movement of persons and cross-border travel (which was not under scrutiny in the judicial review) and adopted new, looser measures instead. The Government further decided to speed up the scheduled gradual opening of businesses. This judgement was among the reasons why the Government asked the Chamber of Deputies to extend the state of emergency and the Chamber complied – the emergency state would apply until 17 May.

In practical terms, the judgement thus primarily streamlines possible claims for damages. If the extraordinary measures were issued by the Ministry of Health under the Protection of Public Health Act, it would be very difficult – even in theory – to claim that the State compensate any damage caused by such measures. The Government, on

the other hand, issues such measures under the Crisis Management Act, which (unlike the Public Health Protection Act) contains special provisions on the State's liability for damage. On top of that, given that the extraordinary measures were cancelled by the court, the State might also be held liable under a special law for damage caused by maladministration or an unlawful decision. The court's decision thus certainly increased the chances of successfully claiming compensation from the State in connection with the emergency measures, although we will probably have to await the decision of the Supreme Administrative Court in this regard. Proposals have even been presented for a special law on general indemnification for emergency measures that would explicitly address this unprecedented situation.

The issue of validity of "forced" settlement with the State

From the beginning of April, employers may apply for a contribution towards wage compensations from the Antivirus programme guaranteed by the Ministry of Labour and Social Affairs. The Ministry of Labour and Social Affairs grants the contribution on the basis of an agreement on the provision of a contribution from the Antivirus programme concluded between the applicant-employer and the State. The terms of the agreement also include provisions on settlement. But is such a general provision on settlement automatically valid?

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The contribution should compensate employers for 60% or 80% (as the case may be) of the compensations for wages paid to employees unable to work due to the COVID 19 pandemic, but no more than CZK 29,000 and CZK 39,000, respectively, per month and employee. Employers wishing to receive the contribution must conclude an agreement with the Czech Republic, whereby they represent that all their claims against the Czech Republic arising from the compensation for damage caused by emergency and extraordinary measures and Governmental resolutions adopted under the Crisis Management Act are settled by payment of the contribution, to the extent to which the damage follows from the employer's obligation to pay compensation for wages or pay in case of impediments to work. Accordingly, even those employers who would otherwise be able to prove that they have incurred damage as a result of the aforementioned measures or resolutions in fact waive their right to claim actual damages when they accept this agreement.

In the light of all the circumstances, the State might in fact be abusing the distress of employers when concluding these agreements. The term distress is interpreted to mean not only a threat to physical or economic existence, but also a case where a party is in serious troubles and therefore accepts a disadvantageous contract as a "lesser evil". If the counterparty abuses this situation, the party acting in distress may plead that the relevant provision are invalid.

The recent decision of the Municipal Court in Prague shed a new light on the situation. In the second half of March, the State began adopting extraordinary measures through the Ministry of Health based on the Public Health Act, which – unlike the Crisis Management Act – lacks explicit provisions on compensation for damage, thus making it even more difficult for employers to claim compensation. The measures forced employers to close down or limit their operations or created impediments to work on their part. The State offered them possible compensation under the Antivirus programme. But the Municipal Court in Prague ruled that only the Government had the necessary competence to restrict rights and freedoms of citizens at the time of a pandemic, and that the Government could do so only through emergency measures adopted under the Crisis Management Act, which expressly makes it possible to claim damages. The court cancelled the measures adopted by the Ministry of Health and enabled the Government to issue the same measures using a legitimate procedure by 27 April at the latest. Apart from being unlawful, the steps taken by the State could also be considered chaotic.

In the light of the court decision and the aforesaid circumstances, and also taking into account that most

employers concluded the agreements at a time when they believed they had only a negligible chance to claim damages against the State as the Public Health Act contains no such option, we believe that it is open to debate whether the settlement provision comprised in the agreements is valid without further ado and whether it automatically deprives the employer of the right to claim full compensation for damage incurred as a result of the extraordinary and emergency measures. We believe that the situation has to be approached not indiscriminately, but rather on a case-by-case basis, depending on the specific circumstances. In this respect, the execution of this agreement as such should not prejudice the right to claim damages because where the grounds for invalidity pertain solely to a provision that can be severed, only this provision is invalid, while the remaining provisions of the agreement remain in force.

Certain issues concerning postponement of loan repayment

A new Act specifying certain measures related to repayment of loans during the COVID-19 pandemic came into effect on 17 April 2020. However, the possibility of postponing the repayment of certain loans entails some interpretation ambiguities as well as relatively unknown limitations for the borrowers.

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The new Act lays down only the basic framework of rights and obligations. The lenders may also show leniency with regard to loans not covered by the Act or grant a postponement under more favourable conditions, based on an individual agreement with the borrower.

Disposal of assets during a moratorium

Where the borrower is a legal person, the Act prohibits the borrower from disposing of its assets during the moratorium period should such a disposal lead to any substantial changes in the structure, use or purpose of the assets or other than their negligible reduction. According to the explanatory memorandum, such acts also include distribution of profits and other funds of the company, payment of extraordinary bonuses or repayment of debts to affiliated parties.
During a moratorium, debtor companies must therefore approach their economic management also from this viewpoint, in addition to specific restrictions following from their loan contracts.

Types of loans covered by the Act

The Act applies, in general, to deferred payments, loans of money, credit facilities and similar financial services. Certain expressly listed types of loans are excluded, such as recurrent facilities (revolving loans, overdraft loans, credit cards) and deferred billing where the deferment is free of charge and is provided at arm's length. However, this list of exclusions is ambiguous in several ways.

We believe that the mentioned types of loans are excluded in all cases, i.e. even where the current facility has already been fully utilised. Lease services are another issue. While operating lease is undoubtedly excluded, we believe that the Act does apply to financial lease with a hire-purchase arrangement. On the other hand, the Act should not cover activities such as factoring.

Moratorium period, "premature" and repeated applications for postponement

The moratorium period commences in the month following the borrower's notice. While the Act explicitly covers postponement agreements concluded before the effective date of the Act, it remains silent as regards the possibility to first apply for a shortened moratorium period – until 31 July 2020, and subsequently for its prolongation until 31 October 2020. As we interpret the Act, this option is not available and the borrowers cannot benefit from such a "dual" moratorium.

Revocability of the borrower's notice

It is also unclear in this respect whether the borrower may revoke its request for a moratorium. We believe that once a notice is delivered to this effect, it may only be revoked by agreement, and not unilaterally by the borrower.

Creditworthiness assessment

The Act requires that the effects of a moratorium should be disregarded in assessment of creditworthiness. All information transferred to the register of debtors should contain a flag denoting that the debtor has asked for a moratorium. Nonetheless, the general duty to assess the creditworthiness of applicants for a loan on a case-by-case basis remains applicable, including the necessity to reflect a moratorium.

Relaxing the rules for short-term business trips and employment of EU citizens

With the decreasing numbers of patients infected by the COVID-19 disease, certain measures imposed by the Government and affecting Czech employers and the entry of foreigners – EU citizens and third-country nationals – to the Czech Republic have gradually been loosened since April 27. In many cases, these measures effectively prevented employment in the Czech Republic. The most important changes are summarised below.

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Entering the Czech Republic to perform work in the country

EU citizens are newly allowed to travel to the Czech Republic for work without the requirement for a valid residence permit. Under the relevant regulation, foreigners arriving in the country to work here are divided into two categories – those staying for up to 72 hours and those who will stay longer.

Foreigners in the first category are required to submit a confirmation of a negative COVID-19 test when crossing the border. The test must not be more than four days old and must not be a rapid test. Furthermore, they have to submit a confirmation proving the purpose of their stay in the Czech Republic. The entity issuing such a confirmation to the foreigner must ensure that they comply with the security measures otherwise applicable to employees of the critical infrastructure (i.e. sectors necessary to ensure the operation of society and the economy). Foreigners can thus travel to the Czech Republic for a short time, e.g. for a business trip, to discharge the office of executive director or in relation to professional sports or artistic activities.

Also foreigners coming for a longer period of time must submit a negative test that is not older than four days. In addition, they have to undergo a new test in the Czech Republic between the 10th and 14th day after their arrival. Foreigners must report their expected arrival through the website of the Ministry of Foreign Affairs. In this case, too, the border force officers will check the documents proving the purpose of the foreigner's stay in the country (e.g. employment contract, instruction for a business trip). Employers are obliged to arrange for accommodation, transport and medical care for such foreigners.

In both cases, when crossing the border, the foreigners first have to endure a check for the symptoms of the disease and then, throughout their stay or for a period of two weeks, should they stay longer, they must obey strict restrictions of free movement, allowing only expressly permitted necessary trips (such as trips to work and back, trips to satisfy the basic needs, care for a child, visits to official authorities).

Family members of Czech citizens and EU citizens having temporary or permanent residence in the Czech Republic may also travel to the country from 14 April. They only need to present a negative test together with a birth or marriage certificate; instead of undergoing the test, they can opt for a 14-day quarantine.

Leaving the Czech Republic

Czech travellers were thrilled to hear that the Czech Republic would allow its citizens and holders of residence

permits to travel abroad. Once they return, they have to submit a negative test or stay in quarantine unless their trip is covered by an exemption (e.g. traveling for work for no more than three days, emergency travel for less than 24 hours).

Cross-border workers

Cross-border workers (or "pendlers") represent a specific group deserving special attention. They may newly cross borders as they wish, without the necessity to stay for a two-week quarantine every time they arrive in the other country. However, they have to present a negative test when crossing the border for the first time, and then undergo a new test every two weeks.

The rules for crossing borders are constantly changing. Unless the situation regarding the spread of the infection worsens, it can be expected that the current measures will be further loosened. In the coming weeks, the Government should also focus on relaxing the restrictions applicable to third-country nationals, who have not been considered a priority group so far.

Postponement of advance payments on income tax on dependent activities and of withholding tax

The General Financial Directorate (GFD) has published a guideline allowing payers of personal income tax on dependent activities to apply for postponement of advance payments or for payment of the tax in instalments. Postponement (or payment in instalments, as the case may be) is also possible for certain types of withholding tax – e.g. on income of taxpayers who are not Czech tax residents from the provision of services, commercial, technical and other consultancy activities, etc., in the territory of the Czech Republic.

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This measure aims to support employers and taxpayers who have insufficient funds for the payment of wages and levies on wages or possibly to meet other liabilities related to income subject to withholding tax, all that due to the extraordinary measures. The original guideline issued in 2015 did not allow to postpone advance payments on personal income tax on dependent activities or withholding tax.

Taxpayers can thus newly apply for postponement of advance payments on personal income tax with regard to dependent activities for the period from February to July 2020, and for withholding tax which falls due between 31 March and 31 August 2020. However, the postponement is only possible until 30 September 2020.

A postponement or payment in instalments may only be permitted on the basis of an individual application filed by the taxpayer. The application must contain information on the relevant advance payment or withholding tax, its amount, the grounds for the application, and the date until which the postponement is requested or the suggested payment schedule, as the case may be. The applicant must also prove grounds for postponement relating to the extraordinary measures, e.g. document the impact of an ordered quarantine or disease on business; demonstrate a production outage caused by obstacles related to the extraordinary measures on the part of the suppliers; prohibition of retail sale and provision of services due to the extraordinary measures, etc. The impact of extraordinary measures can be documented, for example, by comparing current sales with sales in the previous period. Default interest will accrue on the outstanding amount of the advance on tax (withholding tax) during the period of postponement; nonetheless, the tax administrator may waive the default interest based on an individual application pursuant to the GFD Guidelines D–44 (“COVID grounds”)

The guideline also states that an application need not be rejected if the taxpayer has some funds in his account but he needs them to pay fixed costs. Each application has to be assessed individually. Applications submitted by 31 July 2020 will not be subject to an administrative fee.

Please note that applications for postponing advance payments on dependent activities or withholding tax must be filed anew every month.

Waiver of VAT on the grounds of an extraordinary event

Value added tax on free delivery of goods and provision of services to selected entities is waived until the end of the state of emergency declared to fight the spread of the SARS-CoV-2 coronavirus provided that the goods and services serve to stop the spread of the virus.

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The waiver applies, in particular, to donations provided to the bodies of the Integrated Rescue System, the army, healthcare providers and social services facilities. Exempted supplies include, for example, free medical goods or provision of refreshments to these entities, their employees, clients and volunteers working for them.

The administrative fee charged for certificates of non-existence of debts and statements of personal tax accounts issued by the bodies of the financial and customs administration has also been waived. The waiver applies to certificates requested by tax entities from the date of issue of the relevant decision, i.e. from 15 April, to 31 July 2020. The tax administrator should not require any proof that an application for waiver is linked to impacts of the coronavirus pandemic.

The state of emergency will continue in the Czech Republic until 17 May 2020, with possible prolongation.

Impact of governmental measures on the application of double taxation treaties

In response to the extraordinary governmental measures adopted in the context of the COVID-19 pandemic (e.g. restriction of travel, quarantine), the OECD has released a recommendation to address certain tax implications of a temporary change of the place of work or residence. Indeed, the measures might affect the State's taxation rights under international tax treaties.

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Tax domicile

The OECD recommends that for the purposes of double taxation treaties, cross-border employees should not be considered tax residents of the country where they have temporarily dislocated only for reasons related to the COVID-19 measures.

In determining the tax domicile of legal entities, the temporary governmental measures related to the COVID-19 pandemic should not, according to OECD, affect the determination of the place of actual management of the company if, for these reasons, the company is temporarily managed from another country.

Permanent establishment

The OECD contends that temporary work from home in a country other than the employer's domicile should not create new permanent establishment. Activities performed by a dependent representative who temporarily concludes contracts on behalf of a taxpayer from another country should not give rise to a permanent establishment in the country where the contracts are temporarily concluded either. This, however, does not apply if the dependent representative already regularly concluded contracts on behalf of the taxpayer in his home country before the adoption of the COVID-19 measures. On the other hand, temporary interruption of work on construction and assembly projects should not interrupt the running of the period decisive for assessing whether a permanent establishment has been created, i.e. whether the construction site is a permanent establishment, and should thus be included in this period.

Place of taxation of financial compensation or other contributions *in lieu* of wages

Where the employer provides a financial compensation or some other contribution in lieu of wages under a State aid program in the framework of governmental measures to mitigate the impact of COVID-19, such income should be considered income from employment and taxed in the country where the employee usually performed his/her work before the crisis.

The analysis is based on the wording of the OECD Model Tax Convention; nonetheless, the interpretation of the term "temporarily" will be important in specific cases and it will also be necessary to take account of the wording of the relevant bilateral treaty and applicable national legislation.

Some Member States (e.g. Slovakia) have already confirmed that they will proceed in accordance with the above-mentioned OECD recommendations. As far as we are aware, the Czech tax administration intends to proceed exclusively based on double taxation treaties for the time being and does not plan to change this approach, not even temporarily.

COVID Plus guarantees and postponement of the deadline for applications for subsidies

The anticipated Government regulation specifying detailed conditions for the provision of guarantees under the COVID Plus programme has been published in the Collection of Laws. Guarantees for loans granted within this programme will be provided by the Export Guarantee and Insurance Corporation (EGAP).

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Guarantees should be provided only to enterprises:

- having more than 250 employees (even if seated in Prague);
- whose share of exports in the total annual revenues from the sale of products, provision of services and sale of goods reached at least 20% in the last accounting period; a manufacturing or trading company may prove its share of export indirectly through the exporter's share of export;
- not benefiting from any other State aid in the form of loan guarantees in connection with the COVID-19 pandemic;
- which have submitted an affirmation declaring, in particular, that the enterprise has experienced a sudden lack of liquidity, was not insolvent before 12 March and
- has no overdue liabilities towards the State.

Excluded from the aid are companies predominantly engaged in land and pipeline transport, water transport, air transport, accommodation, activities of travel services intermediaries, travel agencies and in other booking and related activities, activities of gambling houses, casinos and betting agencies.

The applicants will be bound by a number of conditions and limitations stipulated in the individual loan agreements. These will include the following obligations and limitations, in particular:

- To pay liabilities towards suppliers properly and in due time;
- To pay wages to employees properly and in due time;
- **Limitation of payment of dividends or other shares of profits, prohibition of sale of equity interests and sale of any tangible and intangible fixed assets or their encumbrance by third-party rights without the consent of the financing bank during the term of the guarantee.**

The maximum amount of the loan for which the guarantee will be provided may not exceed 25% of the borrower's total annual sales in 2019. The minimum amount of the loan is set at CZK five million. At the same time, the maximum aggregate of all outstanding principal amounts of loans secured by EGAP's guarantee may not exceed the amount of two billion Czech crowns per beneficiary or group of economically related companies.

Guarantees will be provided for three years for operating loans and for five years for investment loans. They will

cover up to 80% of the principal amount of the loan if the borrower is assigned a rating better than B- by the Export Insurance Corporation, and 70% if the borrower achieves exactly the rating of B-.

Four billion crowns have been allocated from the State budget for the first phase of this programme; this amount may be further increased by the Government.

The COVID Plus guarantee programme is expected to be launched in the first week of May as it has to be first notified to the European Commission.

News on subsidies

The Ministry of Industry and Trade has updated the calls timetable for subsidies for the Operational Programme "Enterprise and Innovation for Competitiveness" in that it postponed the deadlines for the following calls:

- Real Estate – Call IV Travel Industry – extended until 31 May 2020
- Real Estate ITI Hradec Králové – extended until 31 May 2020
- Energy Savings – Call V – extended until 30 June 2020
- Smart Grids 1 – Call V – extended until 30 June 2020
- OZE – Call V – extended until 30 June 2020
- Low-carbon Technologies – Call V – extended until 28 June 2020

Simultaneously, all fixed deadlines set out in the individual calls have been postponed by thirty days (the latest date for completion of the project, fixed deadlines for the submission of relevant compulsory annexes, etc.). The reason is that the relevant compulsory annexes are hard to obtain from third parties due to the COVID-19 pandemic. Further changes and measures in the area of subsidies should follow.

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