



Accounting news



Tax news



Legal news



**Grants & Incentives
news**

dReport: September 2019

Leaf through the regular overview of tax, legal and accounting news, get up to speed on subsidy and investment incentives developments.

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Planned Income Tax Changes for 2020

The Chamber of Deputies of the Czech Republic is currently debating two amendments to the Income Taxes Act (Act No. 586/1992 Coll., the Income Taxes Act, as amended), which may come into force in 2020. These amendments, parliamentary press nos. 572 and 509, bring the following proposals for changes.

Change in taxation of interest income arising from bonds issued before 1 January 2013

- The tax base for interest income arising from bonds issued before 1 January 2013 was rounded down to a whole Czech crown (so-called one-crown bonds). Subsequently, this treatment was changed when the tax on total income from one issuer started to be rounded. However, according to the transitional provisions, this adjustment did not affect interest income on bonds issued before 1 January 2013 (so-called one-crown bonds).
- Currently, a special transitional provision is proposed, removing this exemption for bonds issued before 1 January 2013 so that all interest income is rounded down on the level of the tax on total income from one issuer, regardless of the issue date of the bond. In practice, it means that if the amendment is approved, the new rounding procedure will be applied to all bonds.

Change in the method of creation and tax deductibility of technical provisions in insurance

- According to the proposed amendment, insurance and reinsurance companies will newly take into account as tax-deductible expenses the creation of provisions pursuant to the Insurance Act, which is based on the Solvency II Directive and not technical provisions created according to the accounting legal regulations. Thus, technical provisions created according to the accounting legal regulations will no longer be considered as tax-deductible expenses. Another change in approach is that, as technical provisions created pursuant to the Insurance Act are not accounted for, the provisions in insurance will be reflected in the tax base in the form of non-accounting adjustments to profit or loss.
- The transition to the new system is expected to lead to a relatively large impact on the tax liability of insurance and reinsurance companies; therefore, transitional provisions are proposed to split this one-off tax liability into two taxation periods.

Restrictions on the exemption of gambling winnings for natural persons

- Newly, gambling winnings should be exempted from income tax only up to CZK 100,000 (for example Sazka, Sportka, including receipt lottery). Thus, a domestic operator that pays out a prize greater than CZK 100,000 will be obliged to withhold or collect tax on this income. In case of a prize from a similar foreign competition, this income is not reduced by tax-deductible expenses and the natural person has to state it in the tax return.

Modifications following ATAD implementation

- Avoid duplicating the inclusion of so-called capitalised interest in the calculation of the limit for the eligibility of borrowing costs (according to the proposal, it will be possible to apply it for taxation periods from 1 April 2019).
- Addressing the restriction on the deductibility of borrowing costs for partners in partnership companies – e.g. k.s. and v.o.s. (according to the proposal, it will be possible to apply it for the taxation periods from 1 April 2019).
- Setting the taxation treatment for the transfer of assets without change of ownership from another EU Member State to the Czech Republic for securities valued at fair value.
- New rules for taxation of a foreign controlled company in case such a company is held indirectly through a basic investment fund (according to the proposal, it will be possible to apply it for taxation periods from 1 April 2019).

Other changes

- In addition to municipalities and voluntary unions of municipalities, other public corporations such as regions and the state, or better the Czech Republic, are proposed to be considered as parent companies.
- Definition and unification of terminology relating to international treaties (including double taxation law in relation to Taiwan).
- Clarification of the legislation when a taxable entity can claim the tax paid abroad as a tax-deductible expense.

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Investment incentives will have new rules

The Czech president signed the government's amendment to the Act on Investment Incentives, and the enacted legislation was published in the Collection of Laws on 22 August 2019. Among other changes, investment incentives for the manufacturing industry will be limited and the grant of incentives will be subject to governmental approval. The amendment takes effect on 6 September 2019. Incentive applications submitted before the new rules become effective will remain to subject to the former requirements.

Limitation of investment incentives

The amendment to the Act on Investment Incentives is expected to limit investment incentives for other than "supported regions" with higher unemployment. Support will be directed primarily to projects with higher added value (projects with the condition of a higher ratio of employees with higher salaries and university education, by cooperation with universities and research organisations, or investments in research and development projects). In most cases, it is likely that it will be difficult for production projects to meet these conditions, which means that projects located in supported regions will be more likely to receive investment incentives. In these regions, however, it will be necessary to prove the economic benefits and solutions to structural unemployment in the region.

Governmental approval will be needed

An important new aspect of the system of awarding investment incentives is the condition of the government's approval of all the applications with respect to the benefit brought to the region by the investment. A positive change concerns the cancellation of the condition of creating job openings for investments in manufacturing, and the halving the limits of general conditions for small and medium-sized enterprises. Technological centres and centres for strategic services will attract more intensive support in the form of cash support of job openings in all regions or by decreasing the limits for new job openings for strategic investments.

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News round up

Significant deadlines

Please note that applications for VAT refunds from other member states must be filed by no later than 30 September 2019, otherwise the refund claim will cease to exist.

Companies that are interested in creating a VAT group (or increasing/decreasing the number of VAT group members) should file the relevant application with the tax administrator by no later than 31 October 2019 to ensure that the planned steps may be taken as of 1 January 2020. Another opportunity for creating/revisiting VAT groups will come up again in a year's time.

VAT Act Amendment – tax rates

The VAT Act amendment approved last week decreases the VAT rate from 1 April 2020 or 1 May 2020 (depending on its promulgation in the Collection of Laws) to 10% for catering services including serving draught beer, supply of e-books and audiobooks, water and sewer charges, hairdressing and barber services, repairs of bicycles, footwear, adjustments and repairs of clothing and textile products.

VAT Act Amendment – intracommunity trade with goods

A draft amendment to the VAT Act was presented to the Chamber of Deputies for the first reading and should significantly alter the conditions of cross-border trading with goods within the EU. Starting from January 2020, we should encounter, among other things, new conditions for the exemption of intracommunity supplies of goods, new rules for simplifying deliveries via a consignment warehouse and new procedures during the allocation of transportation in chain supplies of goods.

Substantive law conditions for the possibility of applying the exemption on intracommunity supplies of goods will newly include specifically the handover of the tax ID by the customer and the inclusion of intracommunity supplies in the EC sales list. The amendment will bring less scope for decisions about the allocation of transportation in chain supplies of goods and it will set a list of documents proving the actual performance of this transportation, which should be accepted by the tax authorities as a sufficient means of evidence. The functioning of the call-off stock simplification in the Czech Republic will be completely different from what businesses are currently used to, for example, VAT will not be self-assessed as of the time of relocation of goods to the consignment warehouse.

It is necessary to focus on the new rules as soon as possible and identify the impacts on your business, since the changes are relatively extensive. You will need to find adequate solutions for obtaining, verifying, circulating and archiving the newly required information so that your company is able to trade goods within the EU in 2020 without major burdens caused by the application of VAT.

CJEU case law

In case C-71/18 KPC Herring, the Court of Justice of the European Union ('CJEU') provided its comments on the sale of land with a property in a situation where the buyer intends to demolish the property and build another building on the land. In the view of the CJEU, this is not a transfer of construction land, which runs counter to the opinion that has long been presented by the General Financial Directorate.

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International taxes in brief

CJEU opines on refund of dividend WHT to non-resident FIIs

On 5 September 2019 the Court of Justice of the European Union (CJEU) delivered its opinion in a case (C-156/17) referred by the Netherlands Supreme Court on whether a non-resident fiscal investment institution (FII) should be entitled to a repayment of withholding tax on dividend distributions from Dutch resident companies. Dutch legislation provides several methods to neutralise the imposition of dividend withholding tax, with the applicable method depending on the status of the dividend recipient. Until 2007, a recipient of dividends that was either not subject to tax or subject to a 0% corporate income tax rate was entitled to a refund of any Dutch dividend withholding tax suffered. In principle, no distinction was made between Dutch resident recipients and non-resident recipients. Non-resident recipients, however, were required to meet all the conditions a domestic company had to meet to qualify as an FII. This gave rise to the question of when a non-resident FII would be comparable to a resident FII and, as such, entitled to the dividend withholding tax refund.

The CJEU is of the opinion that the Dutch law may infringe the free movement of capital provisions of the Treaty on the Functioning of the European Union. It is possible that, under its domestic legislation, the non-resident FII would be deemed to have paid a substantial proportion of its dividends received to its participants within a term that is reasonably comparable to the eight months under the Dutch legislation. As such, the objective of the Dutch distribution requirement (i.e. taxation at the level of the participant within a reasonable time) also would be met, even though the specific requirement for actual distribution of the dividends within eight months of the end of the fiscal year would not. Therefore, depending on the tax treatment of the non-resident FII, the distribution requirement may be an infringement of EU law, since the tax authorities do not accept actual or deemed distributions within a period reasonably comparable to eight months that would have an equivalent effect.

United States: Unanimous ruling in Amazon Case

The unanimous ruling upheld the Tax Court's decision that the definition of intangible assets under US Treasury regulations in effect in 2005 and 2006 does not include residual business assets such as the value of the workforce, goodwill and going concern value. At issue were the assets required to be included in a cost sharing buy-in payment in relation to a cost sharing arrangement (CSA) that was entered into as part of a 2004 restructuring by Amazon.com Inc. (Amazon) and its Luxembourg subsidiary. Amazon valued only the independently transferable intangible assets that it transferred to the European holding company under the CSA, including website technology, trademarks, and customer lists.

The Internal Revenue Service (IRS) valued the entire European business, other than pre-existing tangible assets. The valuation by the IRS included residual business assets such as workforce in place, goodwill, going concern value, and other unique business attributes such as growth options and Amazon's culture of innovation.

The court concluded instead that the definition was limited to independently transferrable assets. To reach this conclusion, the Ninth Circuit examined the regulatory definition of an intangible contained in the transfer pricing regulations, the overall transfer pricing regulatory framework, the rulemaking history of the regulations, and whether the IRS's position was entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997), which states that, under certain circumstances, an agency's interpretation of its own regulations must be given controlling weight as long as it is not plainly erroneous or inconsistent with the regulation. Looking at the text of the regulatory definition of "intangible," the definition's place within the transfer pricing regulations generally, and the rulemaking history, the court concluded that *Auer* deference was not warranted.

Ireland: Transfer pricing legislation

On 2 September 2019, the Irish Department of Finance issued Ireland's Transfer Pricing Rules Feedback Statement, which contains draft legislation to update the domestic transfer pricing regime from 1 January 2020. The existing Irish transfer pricing rules allow an exemption from the transfer pricing rules for certain arrangements entered into before 1 July 2010, to the extent the terms and conditions of such arrangements did not subsequently change. The proposed new legislation would remove this exemption for chargeable periods beginning on or after 1 January 2020. It should be noted that section 835F TCA 1997, which contains documentation provisions, still exempts "grandfathered" transactions from documentation requirements when both parties to the transaction are Irish tax resident companies. Such transactions between Irish tax resident companies will still need to be priced at arm's length, even though there will be no formal documentation requirements in place. Companies classified as "small enterprises" would continue to fall outside the ambit of the domestic transfer pricing documentation requirements from 1 January 2020, but still would be required to adhere to the arm's length principle. However, companies classified as "medium enterprises" would be subject to the domestic transfer pricing law provisions (including documentation requirements) from 1 January 2020. The proposed amendments exclude transfers of assets between Irish tax resident companies from the scope of the transfer pricing documentation requirements. Such transfers also may be subject to group relief under the relevant Irish capital gains tax provisions to provide an exemption from a tax charge.



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Finally, the proposed amendments provide that medium-sized enterprises would be subject to reduced transfer pricing documentation requirements. The draft legislation provides for consolidated revenue-based thresholds to apply before it is necessary to prepare the master file and/or local file as follows: Master file – revenue threshold of EUR 250 million; and Local file – revenue threshold of EUR 50 million.

The due date for completion of the relevant documentation would be contemporaneous with the filing of the annual corporation tax return, approximately nine months after the end of the accounting period. The relevant documentation must be made available upon request in writing by Irish Revenue within 30 days of the request. There is no requirement to file transfer pricing documentation with the corporation tax return.

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Monitoring the Personal Tax Account May Pay Off

Many companies and physical persons watch their finance from the perspective of cash-flow, the amount of interest paid or finance planning. Why is it then that tax entities do not monitor their personal tax accounts recorded by the tax authority? Let us have a look together at cases when it is good to know “what is in the tax purse” of the taxable person, what movements are performed there and when it is the right time to claim overpayments or whether there is a record of an outstanding amount to be paid to the tax authority.

What is a personal tax account?

A personal tax account is a kind of record of all tax obligations and payments of a taxable person kept by the tax authority. The tax authority maintains one personal tax account for every single taxable person and for every single kind of tax. A personal tax account is practically a kind of bank account where, on the one hand, the taxable person can monitor tax assessments arising based on income tax returns, additional income tax returns, additional payment assessments issued after a tax audit, as well as accrued interest, fines and penalties. On the other hand, it can be found on the personal tax account also the payments of the assessments that may be performed either in the form of a payment by the taxable person or a transfer of an overpayment from a different tax account.

Upon a taxable person's request, the tax authority will issue a confirmation about the status of the personal tax account or a debt-free status confirmation. Such confirmations are mostly required when the taxable person participates in tender procedures or when it is required by banks.

Why is it good to watch your personal tax account?

The reasons why taxable persons should be more interested in the movements on their personal tax accounts are summarised below.

Accrued Interest

If a taxable person has a record of an outstanding tax payment, the default interest, which is currently – in the second half of 2019 - stated by law at 16% p.a., increases every day commencing on the fifth business day after the tax payment was due. Such experience shows that it is vitally important to monitor the state of your personal tax account as it can easily happen that a taxable person may not pay its tax correctly or in time and the outstanding amount will be subject to very high default interest.

Overpayment Expiry

Based on the Tax Code, there is one very specific rule regarding tax overpayments. If a taxable person does not claim the overpayment within six years after the end of the year in which the overpayment originated, the overpayment expires and becomes part of the budget from which the activities of the tax authority that kept records of the overpayment, are covered. Such a situation may occur,

for example, if the company management changes and the new management did not check whether there was any overpayment from prior years on the personal tax account.

Risk of Seizure Proceedings

Currently, even a small outstanding amount may become the subject of debt collection from the tax authorities, and this may occur even in a very short time. It is necessary to note that the tax authority starts with the easiest manner of collection, namely by ordering the amount from the bank account. In such cases, blocking the bank account may complicate the life of the taxable person significantly. Limiting the right of access to the funds on the account when the taxable person needs to maintain its normal course of business by e.g. paying out wages, settling invoices of suppliers or invoices for operating costs, may be almost liquidating. It is therefore necessary to deal with the situation in time and ideally, try to prevent the risk of seizure. Thus, under such circumstances, it is necessary for the taxable person to bear in mind the risk of outstanding amounts that could result in the situation described above – either accidentally (as a result of a secondary insolvency) or through its own fault (neglecting its legal obligations), and deal with the situation. For example, it is possible to file a deferment request or a request for a payment schedule. Tax payment deferment is possible only based on serious legal reasons when there is e.g. A risk of significant detriment.

Review of Regulations

If a certain sanction is imposed by the tax authorities, it is advisable to review whether the tax authority acted in compliance with the Tax Code. Thus, it is advisable to recalculate the amount of the fines charged on the personal tax account and verify whether their imposition is justified, whether they originated legally, whether the tax authority respected the order of the tax payments, whether the tax authority should not have paid interest for the benefit of the taxable person on the VAT deduction retained. If the taxable person ascertains any incorrectness, it should raise an objection, file an appeal or use any other means of protection.

How to find out the state of the personal tax account?

The easiest manner to find out the state of the personal tax account, i.e. whether person might be owing payments on taxes or whether there is a record of an overpayment that could be utilised elsewhere, is the possibility to view your account personally. It is interesting that this tool is used mostly only for viewing documents in the tax file whereas for viewing personal tax account it is used only very rarely.

Another manner in which taxable person can learn about the records that the tax authority keeps about a taxable person is checking the tax information box. The tax



information box is a tool through which the taxable person can view via the internet selected information recorded on the personal account of the taxable person. Thus, tax entities can monitor tax payments using the tax information box. The tax authority promises that in the future, the functionalities of the tax information box should be more user friendly.

If the taxable person is under time pressure or if it, for some reason, cannot utilise the above mentioned tools, it may try to contact the tax authority informally (e-mail or phone).

It is necessary to act

All that needs to be said is that monitoring your personal tax account may pay off for many reasons, not just the ones outlined above. If a situation occurs which could result in the risks stated above, it is necessary to act, as the Tax Code states many possibilities (eg using a payment schedule, remissions of sanctions or a review of assessments using remedies). One rule applies always - disregarding whether the taxable person is threatened by seizure or expiry of its overpayment – it is always best to act immediately and proactively.

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Amendment to the Tax Code in the Legislative Process

The amendment to the Tax Code, which was approved by the Government of the Czech Republic at the end of August 2019, promises changes in favour of taxable persons and modernisation of the tax administration. The amendment is presented by legislators under the name of MOJE daně, but in addition to the promised online banking in taxes, the amendment to the Tax Code also contains other process changes. Despite the fact that the amendment to the Tax Code proposed by the Ministry of Finance of the Czech Republic has now been approved by the Government of the Czech Republic, it still has the entire legislative process ahead. Taking into account possible complications, it can be assumed that the amendment may be effective in mid-2020.

At the moment, we have to wait to see how the proposal will change during its legislative way and how long it will take to come into effect. The time and practice of taxable persons will show whether this is a step in the right direction and whether the launch of the technical solution is not rushed.

So what makes the planned change so revolutionary?

Tax authority online

The promised digitalisation of financial administration is a step towards modernising the system used by taxable persons. The vision of financial administration is clear: to make it easier for taxable persons to communicate with the tax administrator while reducing administrative burdens and making many other improvements. In practice, it means the introduction of a portal called MOJE daně, which is to extend the already available tax information box service. The current system allows the taxable entity to obtain selected but very limited information collected in the file and on the taxable entity's personal tax account using the internet. The Ministry highlights the importance of the meaning of the designation

MOJE daně which is composed of the words modern (MODerní) and simple (JEdnoduché) and that is what the change should be like.

In addition to information, the new portal should also offer the possibility of active and passive communication with the tax administrator, for example, the possibility to submit tax returns via online forms, which will allow a certain amount of pre-filled data of taxable persons. However, communication should also work in the opposite direction from the tax administrator to the taxable entity in terms of delivery of documents. The Ministry of Finance estimates the launch of the portal in the last quarter of 2020.

Lower sanctions

The amendment to the Tax Code contains a positive significant change for taxable persons, namely the revision of interest related to their new categorisation and its notable decrease. The Ministry of Finance expects the default interest to be reduced by 6% (from the current 14% p.a. plus the Czech National Bank's repo rate to 8% p.a. plus the Czech National Bank's repo rate). This change is also linked to a halving of the interest on the deferred payment.

Prepayments for VAT deduction

The change concerning excessive VAT deductions for value added tax, for which the possibility of prepayments will be newly introduced, should also be helpful. The aim of this amendment is to prevent the phenomenon of retaining the entire excess VAT deduction, even if only a small part of it is examined and disputed by the tax administrator. The amendment includes the obligation to pay the amount of the excess deduction that is not disputed, ex officio. Thus, it will not be necessary to ask the tax administrator for a prepayment for tax deduction. However, following



the introduction of prepayments for tax deductions, the amendment plans to extend the deadline for refunding VAT deduction to 45 days, which may have a significant negative cash flow impact. This is an extension of 15 days compared to the current situation to help the tax administrator assess which part of the deduction is disputed.

Changes in deadlines due to electronic submission and abolition of the 5-day “tolerance” limit for filing tax returns

As part of the incentive to use the new system, the financial administration comes with an extension of the deadline for filing income tax returns by one month, in the case of filing the tax return electronically. However, a negative change for taxable persons is the interference with the established deadlines, which represents the abolition of the tolerance limit for filing the tax return, i.e. The current possibility of filing the tax return or paying the tax liability with a certain delay. Under the current rules, although the tax return is filed later (five working days are allowed for tax returns) or the tax is paid later (four working days are allowed for tax returns), the taxable person does not pay any financial penalty. Taxable persons use this tolerance limit either for subjective or objective reasons, when they were not able to file a tax return or pay their tax liability within the statutory period.

Other changes

In addition to the changes outlined above, the amendment to the Tax Code contains other amendments to the relevant provisions. For example the following new rules were introduced:

- Change in the tax audit to allow the tax administrator to switch at any time from elimination of doubts to the tax audit. In the current legislation, this transition is only possible if longer evidence-taking is anticipated.
- To commence a tax audit, it will now be sufficient to deliver a notification on the commencement of a tax audit; a tax audit is currently commenced at a personal meeting.

- A substantial change for state compensation in the event of unauthorised seizure of tax arrears should be a reduction of 20 percentage points.
- In the case of fines for late filing of a tax report, the limit of the amount to be incurred should be increased. This represents an increase from CZK 200 to CZK 500.
- Introducing the possibility of applying for a personal identifier in the field of tax identification numbers for natural persons is also being proposed, which should replace the currently used birth certificate number.
- It will be possible to combine the statement on the outcome of the audit findings with the completion of the tax audit. Thus, according to the Ministry of Finance, if no additional charges are assessed, the tax audit should be completed more quickly.
- The relation of interest paid by the tax administrator to the compensation of detriment will also be explicitly regulated. The law will only allow for compensation of detriment or reasonable satisfaction for non-material detriment caused to a taxable entity by the tax administrator's behaviour to the extent that no interest paid by the tax administrator arises. The law also explicitly stipulates that the interest paid by the tax administrator is the interest on a refundable excess payment, interest on incorrect taxation and interest on tax deduction.
- The scope of the tax audit will be expanded or narrowed during the course of the audit by the delivery of a notification on the change of scope of the tax audit. The notification received in connection with the tax audit will not contain a statement of reasons and no legal remedy may be lodged against it.

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Expansion of electronic sales records approaching

On Friday 13 September, the Chamber of Deputies overrode the proposal of the Senate and approved the amendment to the Act on Electronic Sales Records. After more than one year in the Chamber of Deputies, the amendment is headed for the President's signature. The expansion of electronic sales records to include the remaining taxpayers can be expected no sooner than 1 April 2020.

The amendment contains the following items:

- The obligation to keep records will generally apply to all the remaining taxpayers from the third and fourth waves (sale of own products, provision of services).
- It introduces relief from the obligation to record sales for

taxpayers performing activities in the area of social services, visually impaired entrepreneurs and sellers of fresh-water fish (only in the period from 18 December to 24 December). For technical reasons, the sales of prepaid telephone cards, commercial air transport and sales from gambling have been excluded from the records completely.

- Given the impossibility of review by supervisory bodies, taxpayers will no longer be required to record sales generated outside of the territory of the Czech Republic.
- The amendment brings back the obligation to include the tax ID on receipts. In line with the ruling of the Constitutional Court, this obligation applies only



to situations where the taxpayer's tax ID does not include his or her personal ID number.

- Taxpayers with annual sales of less than CZK 600,000 will be allowed a special regime of sales records. This consists in the possibility of picking up a block of paper receipts at the local Tax Office, giving paper receipts to customers and submitting a quarterly report to the tax authority on the sales recorded under the special regime.

All companies that do not currently record sales and whose activities are not part of the above exceptions should think about how the amendment will affect them. The first step is to carefully analyse all transactions and find out whether they accept cash/bills of exchange/payments using various vouchers (even just exceptionally). If they do, it is necessary to get ready for the obligation to record sales. We will be happy to advise you on this matter and help you find a practical solution for meeting the requirements of the amendment to the Act on Electronic Sales Records in your company.

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DAC 6: New obligation to report certain transactions to taxation authorities in advance

The Chamber of Deputies is currently discussing the governmental draft bill implementing the directive on administrative cooperation in the field of taxation ("DAC 6"). This directive regulates the obligation of businesses to report selected cross-border transactions and other arrangements affecting corporate income tax to taxation authorities in advance. The objective of this EU regulation is to gain better insight into the use of tax regulations and prevent aggressive tax planning.

Cross-border arrangements

According to the Czech draft bill, the reporting obligation will concern only cross-border arrangements, i.e. transactions, corporate measures and other transactions concerning more than one European Union member states or a EU member state and third countries if at least one of the participants of this arrangement:

- Is a tax resident in a different state or jurisdiction than another participant;
- Is a tax resident in at least two states or jurisdictions;
- Does business in another state or jurisdiction via a permanent establishment and this business takes place based on this arrangement; and
- Performs activities in a state or jurisdiction where it is not resident and where it does not have a permanent establishment

Hallmarks

The obligation to report planned transactions to taxation authorities will affect all businesses. Nevertheless, only transactions meeting at least one of the hallmarks will have to be reported. They are legally defined indicators of potential

risk of evasion of tax liabilities. An example of a hallmark is the purposive take-over of losses or a situation where the recipient is a resident in a jurisdiction with zero or near-zero taxation.

Certain hallmarks apply only if the main benefit or one of the main benefits involves obtaining a tax advantage.

Obligated person

The reporting obligation will apply directly to businesses or to their advisors setting up the arrangement. If the advisor is, for example, a lawyer or a tax advisor, they are bound by the obligation of confidentiality. In such a case, they cannot under any circumstances report anything to the taxation authorities on your behalf. However, they should inform you that the reporting obligation applies to you. Failure to comply with the reporting obligation may carry a fine of up to CZK 500,000 imposed by the taxation authority to the obliged person.

The reported information will be subsequently shared with financial administration bodies in other EU member states.

Another round of discussion about this governmental proposal can be expected in the Chamber of Deputies. The final form of the act can therefore keep changing. However, it is necessary to keep track of these changes, because the notification obligation may apply to transactions realised as early as after 25 June 2018.

We will keep you up to date on further developments in this area.

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Proposed Amendments to the AML Act

Legislation regulating anti-money laundering and counter-terrorist financing remains a hot topic. Following a series of amendments in 2017 and 2018 relating primarily to the implementation of the 4th AML Directive (e.g. introducing the duty to register ultimate beneficial owners of legal persons), two other proposed amendments to the AML Act containing several major changes are currently undergoing the legislative process.

List of obliged entities

The first set of principal changes relates to expanding the list of obliged entities, which constitutes the implementation of the 5th AML Directive. An obliged entity refers to an entity for which specific duties are defined in anti-money laundering and counter-terrorist financing legal regulations. It is no longer surprising at present that, for example, banks apply a number of such measures as part of their business operation, such as detailed client identification and check, introducing and using a system of internal policies, special employee training and/or reporting suspicious transactions to state authorities. However, obliged entities should be expanded to newly include:

- a. Real estate agents acting as intermediaries in the lease of real estate (with regard to transactions for which the monthly rental amounts to EUR 10,000 or more);
- b. Persons authorised to trade cultural monuments and objects with cultural value or to mediate such transactions, or to store cultural monuments and objects with cultural value in so-called “free zones”; and
- c. Expanded list of persons providing services relating to virtual currency.

The proposed amendments demonstrate an ongoing trend of expanding the list of obliged entities and their duties to reflect increasing efforts to prevent money laundering and terrorist financing at both the European and local levels. From the perspective of existing obliged entities and especially entities that will be newly incorporated into the list of obliged entities, it is thus critical to monitor current legislation and make timely preparations for compliance with duties in the area of anti-money laundering and counter-terrorist financing because a failure to meet statutory duties may be subject not only to a fine of up to CZK 10,000,000 but also, in the last resort, revocation of a business licence.

Modernisation of the client identification process

At present, client identification is primarily performed “face to face”, i.e. at the physical presence of the person being identified, which considering the current technical possibilities seems to be an increasingly less-attractive choice for both obliged entities and clients when compared with an opportunity to perform remote client identification.

The currently proposed amendments to the AML Act take into account that it will be possible to perform electronic client identification (such as using an identity card containing a chip or the so-called bank identity which is being introduced) or remote client identification that in respect of individuals consists (primarily) of three relatively simple steps:

- a. Sending a copy of the respective parts of the identity card and at least one more supporting document;
- b. Credible demonstration of the existence of a payment account maintained on the client’s name; and
- c. The client making the first payment under a new contract using a previously specified account.

Newly, the AML Act should also expressly allow for the option of using some of the new payment services as part of client identification. The payment services including “account information service” and “payment initiation service” will enable the fulfilment of some rules for remote client identification, which may accelerate, simplify and increase the security of the remote client identification process.

If the amendments to the AML Act defining the above-specified client identification possibility are passed, this will result in not only increased comfort for clients, for which such identification process will be further simplified, but also attractive opportunities for business entities that will be able to integrate new client identification possibilities into their processes and thus obtain a competitive advantage as they will be able to identify their clients in a simpler and faster way.

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Tax liabilities – October 2019

October

Thursday, 10	Excise tax	Tax maturity for August 2019 (excluding excise tax on alcohol)
Monday, 14	Intrastat	Submission of statements for intrastat for September 2019, paper form
Tuesday, 15	Road tax	Advance payment of tax for 3rd quarter 2019
Wednesday, 16	Intrastat	Submission of statements for intrastat for September 2019, electronic form
Sunday, 20	Value added tax	Tax return and maturity of the MOSS VAT
Monday, 21	Income tax	Monthly payment of deducted advance payments on personal income tax from employment
Friday, 25	Gambling tax	Submission of statement for advanced payment on deduction from lotteries and other similar games and payment of advanced for 3rd quarter 2019
	Value added tax	Tax return and tax due date for 3rd quarter and September 2019
		EC Sales List for 3rd quarter and September 2019
		VAT control statement for 3rd quarter and September 2019
	Energy taxes	Tax return and tax maturity on gas, solid fuels and electricity for September 2019
Excise tax	Tax maturity for August 2019 (only the excise tax on alcohol)	
	Tax return for September 2019	
	Tax return for claiming of refund of excise tax, for example on fuel oil, other petrol (benzine) for September 2019 (if applicable)	
Wednesday, 30	Energy taxes	Submitting a notification about meeting the obligation to ensure minimum amount of biofuels and maturity of the related security
Thursday, 31	Value added tax	Last day of term for submission of application, changes or cancellation of VAT group according to § 95a based on VAT Act with effectiveness of change of group on 1 January 2020
	Income tax	Payment of special-rate withholding tax for September 2019



Tax liabilities – November 2019

November

Monday, 11	Excise tax	Tax maturity for September 2019 (excluding excise tax on alcohol)
Thursday, 14	Intrastat	Submission of statements for intrastat for October 2019, paper form
Monday, 18	Intrastat	Submission of statements for intrastat for October 2019, electronic form
Wednesday, 20	Income tax	Monthly payment of deducted advance payments on personal income tax from employment
Monday, 25	Value added tax	Tax return and tax for October 2019 EC Sales List for October 2019 VAT control statement for October 2019
	Energy taxes	Tax return and tax maturity on gas, solid fuels and electricity for October 2019
	Excise tax	Tax maturity for September 2019 (only the excise tax on alcohol) Tax return for October 2019 Tax return for claiming of refund of excise tax, for example on fuel oil, other petrol (benzine) for October 2019 (if applicable)

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Announcement of a Call for Waste Processing in the Environment Operational Programme

The Ministry of Environment has announced a call, through the Czech State Environmental Fund, for the support of projects for filing applications and provision of support under the Environment Operational Programme 2014 – 2020. It is call no. 126, priority axis 3, focusing on waste processing.

The objective of the call is to support projects for the construction and modernisation of facilities for collection, sorting and treatment of waste, facilities for energy use of waste and relating infrastructure and facilities for handling dangerous waste, including medical waste.

The applications for subsidy by individual supported activities may be filed both by public and business entities. The aid intensity per project is no more than 85% of total eligible costs. The eligible costs of the project are then limited from CZK 500 thousand (net of VAT) to EUR 50 million (including VAT).

The eligible costs which the subsidy covers are as follows:

- Costs of construction work, supplies and relating services;
- Acquisition of tangible (equipment) and intangible assets;
- Tests and documents relating to putting the assets into permanent operation;
- In large projects, preparation of a comprehensive cost-benefit analysis; and
- Preparation of an analysis of waste production potential.

Applications will be accepted: from 2 September 2019 to 3 February 2020

The call is organised in rounds (competition) with one round model of application evaluation. Support will be provided to projects implemented throughout the Czech Republic.

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Announcement of New Calls in the Operational Programme Enterprise and Innovations for Competitiveness

During September, the Ministry of Trade and Industry plans to announce a series of calls focusing on research and development activities under the Operational Programme Enterprise and Innovations for Competitiveness.

These are calls in the following programmes:

- Application – the programme aims to support projects focusing on industrial research and experimental development;
- Innovation – the programme allows for the support of projects aiming to purchase manufacturing technology for introduction of new or innovated products into production and launching on the market; and
- Potential – the programme focuses on the support of projects aiming to found or develop centres of industrial research, development and innovations.

It will be possible to present the projects starting from October, depending on deadlines determined for individual programmes. The projects must be implemented in the Czech Republic, outside of the capital city of Prague, the decisive criterion is the actual place where the project is implemented.

We will bring you detailed information on individual programmes, such as the amount of the subsidy, types of eligible costs, in the next issue of dReport.

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Ground-breaking ruling: usability of financial statements in deciding on profit distribution

In its ruling of March 2019, the Supreme Court allowed the use of ordinary or extraordinary financial statements as a basis for the payment of profit shares until the end of the following reporting period. This broke the previously required six-month limit for the usability of financial statements as a basis for the payment of profit shares.

The earlier legal regulation contained in the Commercial Code set a six-month period starting with the end of the fiscal year when the general meeting had to approve the company's financial statements. The Commercial Code did not specifically determine a period within which the general meeting had to decide on the distribution of profit. The case law of the Supreme Court, contained e.g. in ruling no. 29 Cdo 4284/2007 of 30 September 2009, inferred that particularly in order to protect creditors, "the ordinary financial statements prepared for the previous reporting period could not be used as a basis for profit distribution after the end of the period set for calling the general meeting for the purposes of discussing the ordinary financial statements." The arguments were based on the fact that an older set of financial statements no longer had sufficient informative value to provide a realistic view of the company's financial situation based on which shareholders could make a qualified decision about profit distribution.

This ruling was criticised by many experts; however, it continued to be respected in practice even after 1 January 2014, when the Business Corporations Act came into force. Companies therefore often chose to make profit share prepayments after the end of the six-month period.

A turn in this interpretation came only with ruling no. 27 Cdo 3885/2017 of 27 March 2019. In this ruling, the Supreme Court explained the changes in the legal regulation of the distribution of profit of a joint stock company brought by the Business Corporations Act compared to the regulation contained in the Commercial Code.

The Supreme Court addressed in particular the following three matters:

1. Decisions of the general meeting on the distribution of profit and relation to the usability of the financial statements;
2. Interpretation of the required elements of the invitation to a general meeting; and
3. Compliance of the general meeting's decision with good morals.

The next part of this article will deal only with the first item.

Usability of the financial statements for the previous reporting period

First of all, the Supreme Court stated that the legal regulation of profit distribution of a joint stock company had undergone several changes with effect from 1 January 2014, and it was therefore impossible to automatically apply the judiciary conclusions adopted in the interpretation of the Commercial Code.

Although the Business Corporations Act ("BCA") stipulates that a profit share shall be determined based on ordinary or extraordinary financial statements approved by the highest body of the business corporation (Section 34 (1) of the BCA) and simultaneously regulates the period for discussing the ordinary financial statements of a joint stock company (Section 403 (1) of the BCA), the previous case law related to the Commercial Code can no longer be applied. This is the case because the Business Corporations Act – unlike the Commercial Code – explicitly regulates the "insolvency test" (Section 40 (1) of the BCA), which should be sufficient for achieving the goal of preventing the payment of profit shares "to the detriment" of the Company's creditors.

In addition, it is also necessary to take into consideration the fact that based on the Business Corporations Act, the rule of the "limited usability" of the ordinary financial statements for the distribution profit based on the case law can be easily circumvented if the company issues shares with fixed profit shares. The right to a fixed profit share for the preceding reporting period arises as of the first date of the following reporting period as long as profit was generated in the preceding period. Shareholders holding shares with fixed profit shares will therefore receive a fixed profit share regardless of whether and when the general meeting makes a decision about profit distribution.

According to the Supreme Court, "with effect from 1 January 2014 the ordinary financial statements prepared for the previous reporting period can therefore serve as a basis for profit distribution until the end of the next reporting period."

In this respect it is a breakthrough ruling which will make it possible for the **general meeting to make a decision about profit distribution at any time during the entire subsequent reporting period, provided that the company meets the insolvency test and would not bankrupt itself by paying out profit.**



Payment of director's fees without profit distribution to shareholders

The Supreme Court additionally addressed the matter of impossibility to pay out director's fees unless profit is paid out to shareholders. At the time of validity of the Commercial Code, a rule applied that the general meeting could not determine the profit share of members of the Board of Directors and Supervisory Board (director's fees) without approving profit for distribution and the shares of shareholders in the profit determined in this way (dividends). According to the Supreme Court, "with effect from 1 January 2014 the general meeting may also decide on the distribution of profit by distributing its part in the form of director's fees to the members of elected bodies (provided that this is allowed by the company's articles of association), or allocating it to a fund established by the articles of association and created from profit, and keeping the rest in retained earnings; however, the non-distribution of the remaining portion of profit has to be duly justified." a valid reason for not distributing (a portion of) profit among shareholders can be (for example) a provision contained in the articles of association, regulating the handling of the company's profits.

Amendment to the Business Corporations Act

The anticipated draft amendment to the Business Corporations Act that should come into force on 1 2020 explicitly states, in reaction to the new case law of the Supreme Court of the Czech Republic, that profit determined based on ordinary or extraordinary financial statements can be paid out until the end of the reporting period following the reporting period for which the financial statements are prepared.

It also limits the level of profit share prepayments to the half of the average profits achieved in the last three reporting periods.

The full text of the Supreme Court's ruling is available [here](#).

Source: www.nsoud.cz

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Invitation to a Seminar

News in Czech Accounting

Prague, Brno, Ostrava, Pilsen and Hradec Kralove

We would like to invite you to Deloitte's traditional autumn seminar focusing on financial statements and accounting in the Czech Republic. The seminar will comprise practical examples and tips in the areas where, as advisors and auditors, we come across the most findings. Furthermore, we will introduce to you the concept of new accounting legislation for the period 2020 -2030, which is in the process of preparation. We will also discuss the planned changes to the Czech accounting legislation related to the forthcoming amendment of the Act on Business Corporations. The programme will also include new tax developments and their impact on companies' financial statements.

The seminar is predominantly intended for accountants, economists and financial managers preparing or involved in the preparation of financial statements under Czech accounting legislation and the related tax and legal regulations, and for all of you who want to learn more about Czech accounting and the most recent tax and legal developments.

Seminars will be held in Czech and will be delivered by our professionals.

The seminar is not intended for consultants or employees of companies engaged in providing advisory services.

Dates

Prague:	12 November 2019 and 10 December 2019
Ostrava:	21 November 2019
Pilsen:	5 December 2019
Hradec Kralove:	11 December 2019
Brno:	12 December 2019

More information and registration on: akce.deloitte.cz



The Biggest Pitfalls of Adopting IFRS 16, which Addresses the Reporting of Leased Assets

Since 1 January 2019, IFRS 16 has been in effect. This standard substantially revised the accounting treatment applied by lessees to leased assets. For companies, this means more demanding work with data; the need to define which of their contracts fall under the scope of IFRS 16; and also, for instance, employee training. What are the pitfalls lessees face in connection with the new standard? And is there a way the whole accounting process can be simplified?

While earlier, payments under operating leases were directly expensed, and any extraordinary payments and rental-free periods were reported on an accrual basis, now lessees are required to report on the face of the balance sheet both the right-of-use asset and the liability arising from future lease payments, which is similar to the treatment formerly applied to finance leases. The way leases are reflected in expenses is through the amortisation of the right-of-use asset and interest on the lease liability.

What does the term “lease” under IFRS 16 incorporate? Some readers may think this only includes leases of cars or other movable assets. However, in fact, leases also include leases of buildings, office premises, land and IT infrastructure.

Three key challenges companies have to address in accounting for leases:

- 1. The data in place are not homogenous.** To determine correctly the values of the right-of-use asset and the lease liability, companies have to, first of all, identify contracts that fall under the scope of the standard. Subsequently, the relevant data need to be extracted from the contracts. However, these primary data are unstructured. This is because frequently the contracts do not have a unified form. For instance, the lease payments are not always specified as a unique amount - conversely, primarily in respect of leases of buildings, lease amounts comprise multiple components. In such cases, a decision needs to be made on whether a particular component shall be reflected in the calculation or not. Moreover, some of the components increase on a regular basis, depending on inflation.
- 2. Judgements regarding the lease term.** Frequently, lease contracts incorporate options for lease term extension or reduction. Here, companies have to assess whether they are reasonably certain about exercising the relevant option. Moreover, contracts for an indefinite period of time are a special issue, especially in relation to property leases. This is because IFRS 16 does not explicitly specify how the lease term should be determined in respect of such contracts, based on which subsequently the value of the right-of-use asset and the value of the lease liability are calculated. Therefore, company management is required to apply judgement, which may have a material impact on the statement of financial position. Also, most probably, the judgement will be subject to due scrutiny by auditors.

- 3. Frequently, Excel is not enough.** After creating the register of contracts including all necessary data, the values of the right-of-use asset and the lease liability are calculated. For the primary calculation, work experience with Excel and knowledge of essential functions of financial mathematics will suffice. Many firms have decided to go this way, that is, to calculate the relevant amounts on their own using Excel spreadsheets. However, life brings about changes, and thus, new contracts are concluded, while others expire, are prolonged, extended or shortened. IFRS 16 does reflect events like this and provides guidance on their accounting treatment. However, this is the stumbling block of using the simple models in Excel – if they are to at least partially address such issues in an automated way, they may not be merely a simple Excel spreadsheet. For instance, as soon as the number of contracts increases, contracts paid in EUR are added, the Excel spreadsheet will soon reach its limits in terms of reliability and transparency of the data contained in it.

Forget about Excel – let us introduce dLease, a smart assistant in accounting for leased assets

At Deloitte, we decided to hit another way by creating an SQL database tool. We offer this instrument to our clients under the title **dLease**. Among other things, tens to thousands of contracts can be managed in the tool, without any impact on the system's stability. Embedded formulas also address the changes specified above, including foreign currency translation and automated lease payment indexation (ie based on the development of inflation). With one click, dLease generates a report including all details that are necessary for the reporting of leases in line with IFRS 16 and all data required by the standard for disclosure in the notes to financial statements. This is because like every new standard, IFRS 16 not only places increased requirements on the accounting treatment, but also on the disclosure of complementary information. **Would you like to know more about dLease? Go to [our webpage](#).**

The application of IFRS 16 is mandatory for reporting periods starting 1 January 2019. Even though companies were required to disclose the assessed impact of this standard already in the financial statements for 2018, many of them have postponed ongoing accounting for these items until the preparation of financial statements for 2019. If you do not have in place a tool for reporting lease contracts yet, we recommend paying attention to the selection of an appropriate instrument now so as to avoid unpleasant last-minute surprises.

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IFRS EU Endorsement Process

The European Financial Reporting Advisory Group (EFRAG) updated its report showing the status of endorsement of each IFRS, including standards, interpretations, and amendments, most recently on 13 September 2019.

As of 23 September 2019, the following IASB pronouncements are awaiting European Commission endorsement for use in the EU:

Standards

- IFRS 14 *Regulatory Deferral Accounts* (issued in January 2014) - the European Commission has decided not to launch the endorsement process of this interim standard and to wait for the final standard
- IFRS 17 *Insurance contracts* (issued in May 2017)

Amendments

- Amendments to IFRS 3 *Definition of a Business* (in October 2018)
- Amendments to IFRS 10 and IAS 28 *Sale or Contribution of Assets between an Investor and its Associate or Joint Venture* (issued in September 2014)
- Amendments to IAS 1 and IAS 8 *Definition of Material* (issued in October 2018).
- *Amendments to References to the Conceptual Framework in IFRS Standards* (issued in March 2018)

Click here for the [Endorsement Status Report](#).

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Invitation to Autumn Seminars

IFRS News 2019

We would like to invite you to Deloitte's traditional autumn webinar on International Financial Reporting Standards (IFRS).

From the comfort of your office, you will gain a full and lightning-quick overview of new and amended standards. We will give you a short summary of the nature of the changes to enable you to identify whether the changes affect your company. You will also learn how much time is left for their potential implementation.

In the webcast, you will have an opportunity to ask questions.

This on-line seminar will not cover in detail the new IFRS 16 *Leases*. This standard will be the topic of specialised seminars organised in the autumn.

The webcast is predominantly intended for accountants, economists and financial managers working on projects relating to IFRS, and for all who want to know more about IFRS. The webcast will be held in Czech.

Date:

- 16 October 2019, 10 a.m. – 11 a.m.

For more information and to register, please go to: akce.deloitte.cz

The Pitfalls of Financial Statements under IFRS for 2019

We are pleased to invite you to Deloitte's autumn seminar on International Financial Reporting Standards (IFRS).

You will be provided with an overview of standards and interpretations, which have been mandatorily effective since 1 January 2019 or later. We will draw your attention to the major changes and their impact on financial statements prepared for the year 2019.

We will have a closer look at the new IFRS 16 *Leases*, which has been in effect since 1 January 2019. The standard brings along changes that are primarily critical from the lessee's perspective, as according to the amended rules, operating leases are now reported on the face of the balance sheet. We will primarily focus on how the adoption of this new standard should be reflected in the 2019 financial statements and what practical expedients may be used in the transition. We would like to note that we will focus on IFRS 16 in greater detail during a special seminar entitled "[IFRS 16 Leases in Practice](#)".

We will also draw your attention to the most common errors our auditors came across during audits of financial statements prepared in accordance with IFRS for 2018. Given



that most frequently, the errors were related to the implementation of the new standards IFRS 9 *Financial Instruments* and IFRS 15 *Revenue from Contracts with Customers*, we will address these standards with appropriate care during the seminar.

We will also pay attention to missing disclosures in the notes to the financial statements.

And finally, we will also have a look at an overview of IFRS changes that are expected to come into effect in the near and later future.

The seminar is primarily intended for accountants, economists and financial managers of projects relating to IFRS and for all who want to know more about IFRS.

The whole day's seminar will be held in Czech in Prague, Brno and Ostrava and will be hosted by Deloitte experts.

Date:

Prague	6 November 2019, 9 a.m. – 3 p.m.
Ostrava	12 November 2019, 9 a.m. – 3 p.m.
Brno	19 November 2019, 9 a.m. – 3 p.m.

For more information and to register, please go to:
akce.deloitte.cz

IFRS 16 – *Leases in Practice*

We are pleased to invite you to the autumn seminar on International Financial Reporting Standards (IFRS), which will be held in our new office premises in Prague Vinohrady. We will scrutinise the new IFRS 16 *Leases*, which has replaced IAS 17 *Leases* and which has been effective for reporting periods starting on 1 January 2019. Also, we will address in detail the relating interpretations. The new standard brings along significant changes, primarily those from the lessee's perspective. This is because operating leases are newly reported on the face of the balance sheet.

At the seminar, we will focus on challenging areas that require applying greater judgement in implementing the new standard. We will provide practical examples on how individual requirements placed by the standard shall be implemented. We will also pay detailed attention to various practical expedients that may be used in the transition to the new standard. You will also find out about new disclosures to be provided in the notes.

Certainly there will be time to answer your questions during the seminar.

The seminar is primarily intended for accountants, economists and financial managers of projects relating to IFRS and for all who want to know more about IFRS.

The whole day's seminar will be held in Czech in Prague and it will be hosted by our professionals.

Date:

- Prague: 26 November 2019, 9 a.m. – 4 p.m.

For more information and to register, please go to:
akce.deloitte.cz

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Uncertainties regarding the processing of biometric data persist; experts' opinions on their processing differ

In recent months, the Office for Personal Data Protection (the "Office") has attracted the attention of both the professional and non-professional public with its decisions or statements on the processing of biometric data, specifically in relation to dynamic biometric signature and attendance systems. As there are a number of open issues with regard to the new data protection legislation, the opinions and approaches of experts regarding the conditions under which data may be processed differ as well. What does the professional debate currently deal with?

The Office commented on the issue of biometric data processing in **Opinion No. 2/2014** (dealing with dynamic biometric signature from the perspective of the original Data Protection Act) and **Opinion No. 1/2017** (dealing with biometric identification and authentication of employees, which is an update of earlier **Opinion No. 3/2009** on this topic). In relation to this opinion, in spring 2018, the Office issued a statement that with the effectiveness of the General Data Protection Regulation (the "GDPR") the legal view of personal data processing technologies will have to be changed.

A quarter million penalty for breach of the data minimisation principle in concluding credit agreements

Nearly a year after the above-mentioned opinion had been updated, the Office issued a relatively controversial decision imposing a fine of CZK 250,000 on a branch of a foreign bank for breaching the data minimisation principle in concluding credit agreements with its clients using a dynamic biometric signature which was assessed by the Office as a collection of sensitive data. In this case, the Office concluded that the scanning of biometric signatures, despite the consent given by the client, is superfluous and for the purposes declared by the bank it is sufficient to record the image of the client's signature.

The processing of sensitive data, referred to in the GDPR terminology as "special category data", is generally prohibited, unless specific exceptions to this rule may be applied, which can be understood as specific legal titles whose application is generally more difficult than in the case of one of the legal titles pursuant to Art. 6 of the GDPR, on the basis of which the processing of "conventional" personal data may take place.

Debate topic no. 2: the Office's comment on the proposed amendment to the Labour Code issued in June

Further debate was then triggered by the Office's comment on the proposed amendment to the Labour Code from the end of June of this year. While the purpose of the amendment

(which should also apply to the Employment Act) was to transpose the EU Directive on the assignment of workers in the framework of the provision of services, as one of the points of comment, the Office proposed to amend the Labour Code with a completely new and with the stated amendment unrelated provision in the Czech law to anchor the employer's authorisation pursuant to Art. 9 (2) (b) of the GDPR, on the basis of which biometric data of employees could be processed (for the purpose of unique identifiers - see below) for the purpose of attendance systems. The question is whether the amendment proposed by the Office in the framework of the legislative process as a legislative rider has a chance to succeed. However, it is important that with the proposed amendment to the forthcoming amendment to the Labour Code, the Office indicated that from its legal point of view, the processing of employees' biometric data (for the purpose of their unique identifiers) has currently no legal basis within attendance systems.

Unacceptable: Consent to data processing for the purpose of an attendance system

The Office concluded that the practice of employers collecting employees' consents to the processing of personal data for the purpose of attendance systems is unacceptable. These are considered by both the European Data Protection Board and the Office a priori as unfree as a result of the employee's dependent relationship with the employer; therefore, the legal title of explicit consent pursuant to Art. 9 (2) (a) of the GDPR is not applied.

The professional public expressed an opinion that the legal title of processing also includes the determination, exercise or defence of legal claims or the exercise of jurisdiction by the court (refer to Art. 9 (2) (f) of the GDPR). However, this legal title implies the commencement of a legal dispute (in this case, for example, a dispute over the presence of an employee at the workplace), i.e. it is inherently a secondary legal title which may only apply in certain situations. The processing must be based on a different legal title before the actual dispute arises. Moreover, if the Office acknowledged the latter legal title, the aforementioned amendment would have not been needed and it would have been sufficient to state that the practice of collecting consents is incorrect. In view of the above, the Office proposed just an amendment to the Labour Code, which, in its view, is intended to solve the "legislative gap" in the Czech law so that the processing of employees' biometric data (for the purpose of attendance systems) can be based on the aforementioned Art. 9 (2) (b) of the GDPR (in simplified terms, it is a legal title of the performance of duties and an exercise of special rights of an administrator in the field of labour law).



Academics vs. professional public: Can biometric data be treated as any conventional data?

In addition to discussing the appropriate legal title, there is another open question (which, strangely, remains largely unnoticed abroad), i.e. The purpose of the texting of Art. 9 (1) of the GDPR as it only includes, in the special category data, those biometric data that are processed for the purpose of a unique identifier of an individual. Some academics and the professional public assign great importance to this formulation and interpret it from a purely linguistic point of view. Therefore, it appears that if biometric data are processed for “mere” authentication, Art. 9 does not need to be taken into consideration at all and biometric data can be treated as any conventional data and the processing can be based on one of the legal titles of Art. 6 of the GDPR since Art. 9 (1) refers only to identification and not authentication.

Such an approach, however, rather neglects the intended purpose of protecting biometric data as such and is particularly favourable from a business perspective, but not in terms of the protection of such data themselves. Indeed, if

such data are leaked, the consequences will be equally negative, whether authentication (i.e. verification of the identity of an individual by comparing data 1:1) or identification (i.e. direct recognition of an individual by comparing data 1:n) takes place.

Consequently, there are a number of open questions on the issue of biometric data processing and the above text is only a brief outline of the current professional debate. It is expected that with the technological progress the issue of biometrics and the processing of these data will be increasingly addressed. We have no other choice but to hope that the current confusing situation and inconsistent interpretation will soon be clarified by the Office (or other authority) and the Office will thus fulfil its promise to issue a completely new opinion in which it will unambiguously comment on the current debate.

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Posting employees within the EU – half-time in the implementation of the new directive

Free movement of services as the basic principle of the internal market of the European Union has brought the necessity to coordinate conditions under which companies in one member state can assign their employees to another member state to provide services.

These regulatory efforts first led to the adoption of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (“**Directive**”). However, after more than twenty years of effectiveness of the Directive, it has proved necessary to assess whether the existing rules for posting workers within the EU are sufficient in the light of the current reality and whether the protection of the rights of the posted workers is set up adequately and free movement of services is sufficiently guaranteed.

The result of these considerations was the adoption of Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (“**New Directive**”). The New Directive, which came into force on 30 July 2018, modifies and deepens the existing rules arising from the Directive.

Two possible ways of posting workers

The first essential change compared to the current treatment is the distinction of two categories of posting of workers, namely long-term and short-term. Posting of a worker for less

than 12 months is a short-term posting according to the New Directive and in justified cases this short-term posting may be extended by up to six months (in this case, the total length of the posting would be 18 months); a posting for a longer period of time represents a long-term posting. For long-term postings, all working conditions apply that are generally applicable in the member state where work is performed, with certain exceptions (e.g. the conditions for concluding an employment relation). This approach is based on the idea that the posting of an employee should be by definition temporary and it should not be a means of abusing the rules ensuring free movement of services. A rule has been set for this reason that stipulates adding up posting periods of workers if one worker is replacing another (assuming that the new worker is to perform the same work at the same location as the previous worker). Aside for monitoring the posting period of each individual employee, which is now standard, employers will have to keep record of the sum of postings of various employees if they perform the same activity at the same location.

All minimum compensation components to be guaranteed

In addition, the New Directive **expands and deepens the scope of comparable conditions** applicable to posted employees (if these conditions are more advantageous for them) to include new salary or wage components related to the posting of an employee. Unlike the Directive, the New Directive assumes that instead of minimum wage (guaranteed



wage in the Czech context) and extra pay for overtime work, the worker will be guaranteed **all minimum components of compensation**. A specification of this rule was necessary due to the divided approach of the individual member states regarding the legislative determination of which components are included under minimum wage in the relevant state. In the case of posting to the Czech Republic, it will be necessary to take into account (in addition to extra pay for overtime work, which is already applicable now) extra pay for work at night or extra pay for work on Saturdays and Sundays. This measure will place significantly higher demands on the employer sending an employee abroad to ensure comparable conditions in the country of posting.

Pay attention to various rules in other countries

In fact, the situation may be much more complicated than it seems at first glance, because certain countries use various rules not just based on current legislation, but they also apply e.g. commitments arising from collective agreements or commitments differing by canton or constituent states on certain activities or fields. In practice, a situation may occur where the minimum components of compensation are easy to find on the official portals of state administration, but in addition to this information the employer will have to look up additional remuneration rules based on the locality or field of activity. It may be assumed that even in the case of a Czech entity receiving employees posted from abroad, the administrative demands will increase and lead to the need for closer cooperation between the posting and receiving entities, or close cooperation with professional companies specialising in the relevant matters in the individual countries.

In addition, the New Directive states that it will be necessary to take into account reimbursement for travel expenses which the employee is entitled to for travel for the purpose of or in relation to the performance of work.

It is also necessary to realise that the matter of comparable remuneration and reimbursement of travel expenses will have to be assessed not just from the perspective of the Directive but also with respect to the taxation of the individual expenses or income, both for the employee and the employer.

Implementation of the New Directive

Member states are obliged to implement the new rules for posting employees based on the New Directive within two years of the effective date. In relation to the implementation the Czech Ministry of Labour and Social Affairs has already prepared a draft bill amending two legal regulations concerning the posting of workers, namely Act No. 262/2006 Coll., Labour Code, as amended, and Act No. 435/2004 Coll., on Employment, as amended. The consultation procedure regarding this bill has recently been concluded. The draft bill projects all the new elements in the Czech legal system and based on the proposed wording, it should come into effect on the last date by which the New Directive has to be implemented, i.e. as of 30 July 2020.

Since adherence to the rules concerning posted workers is always the responsibility of the posting entity, employers should adjust or set up their company processes in advance and take into account the new rules for posting workers. In addition, some states have already implemented certain processes and non-compliance or circumvention may entail very significant sanctions that could lead even to the prohibition of the entity's activity in the relevant territory.

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