



TAX news



Grants & Incentives news

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A New Transfer Pricing Guidance and the Czech Translation of the OECD Guidelines

The General Financial Directorate (the “GFD”) issued new Guidance D-34 on the application of international standards to the taxation of related party transactions. This guidance replaces existing Guidance D-332. Together with the new guidance, the Czech translation of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2017 Edition) was published in the [Financial Bulletin of the Ministry of Finance no. 5/2019](#).

The purpose of Guidance D-34 is to ensure that a uniform approach to determining a tax base impacted by related party transactions is applied by both the Tax Administration of the Czech Republic and taxable entities. As opposed to the previous guidance, the update provides more detailed information on, for example, the following topics:

- Actual actions of the parties versus contractual arrangements;
- A functional and risk analysis, including typology of functional profiles, discussion on the key role of industry value drivers, the issue of legal versus economic ownership of intangible assets, or explanation of the difference between a function and an activity;
- Recommendations on how to prepare a benchmarking analysis, including a list of the most frequent quantitative criteria, or recommendations on the approach to updating the analysis; and
- Overview of the methods to identify transfer prices, including comments on their practical application.

What situations may occur or practical considerations

The new guidance also contains some of the GFD’s own considerations which are, in our experience, often applied by tax administrators in conducting tax audits. Such considerations relate to, for example, the possible existence of related party transactions *that are not explicitly referred to in contractual arrangements and accounted for but do exist in reality*. This may involve a so-called “order of the parent

company”, which refers to a control of an independent transaction by a related party, such as when a parent company orders a subsidiary to execute a sale of goods to external customers for a lower than an arm’s length price (and substantiate it by claiming that the transaction will generate a certain benefit for the group as a whole).

If the transaction constitutes a sale of goods to related parties, the tax administrator will try to arrive at a conclusion in the tax audit, by applying Section 23 (7) of the Income Taxes Act, on the difference between the referential price calculated by it and the identified price and subsequently adjust (increase) the entity’s tax base by the identified difference.

However, if the sale of goods involves external entities, the situation will be seemingly more difficult for the tax administrator as it is an independent transaction (it is impossible to directly apply the approach under Section 23 (7) of the Income Taxes Act). Nevertheless, in such a case, the tax administrator can use the institute of the parent’s company order as disclosed above and attribute the difference between the referential price and the identified price to that transaction. The tax administrator will subsequently conclude that the price in that transaction (in the form of a compensation to the subsidiary) shall be determined in an amount corresponding to the identified difference, increasing the entity’s tax base as appropriate.

The above-specified example of the Tax Administrator’s approach as well as the issuance of new Guidance D-34 as such demonstrate that the Czech Tax Administration closely monitors the international developments in the area of transfer pricing and does not hesitate to apply a highly sophisticated approach to its audit activities.

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Investment Incentives Will Have New Rules

On 7 June 2019, the Chamber of Deputies approved the government proposal of an amendment to the Act on Investment Incentives, Bulletin of the Chamber of Deputies no. 298 of 8 October 2018. The amendment can be expected to come into force approximately in September 2019. The approved amendment will represent the basic framework of conditions for awarding investment incentives. Most of the general conditions for granting investment incentives will be flexibly regulated by a governmental decree based on the economic situation and the needs of the labour market.

Following the amendment to the Act on Investment Incentives, support will be directed primarily to projects with higher added value, which should be ensured in particular by 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. These conditions should not apply to projects realised in the “supported regions” with higher unemployment.

Government 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 of 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.

Investment plans submitted before the effective date will be subject to the existing conditions for obtaining an investment incentive.

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News round up

Opinion of the European Commission on Changes Effective from 1 January 2020

With regard to the changes in the conditions of cross-border trading with goods in the EU from January 2020, the European Commission published material with a description of selected aspects of the new rules. The material focuses on the terms for using the call-off stock simplification (losses of goods, creating a fixed establishment for VAT purposes), allocating transport in intra-Community supplies (use of triangulation for multiple entities in a row, the role of a customer's registration for VAT), or the question of determining persons that can produce evidence on such transportation. The European Commission seeks to provide a rather liberal interpretation of the highly-stringent criteria of European legislation; nevertheless, to which extent the unambiguous legislative text may be adapted to specific circumstances still remains unclear. In this context, we would like to note that the Ministry of Finance of the Czech Republic is preparing the respective amendment to the VAT Act with proposed effectiveness from January 2020; the external comment procedure is already terminated at present.

Information of the General Financial Directorate

The General Financial Directorate (the "GFD") is already finishing its work on the methodological note concerning the VAT treatment of the issuance and distribution of vouchers. Some opinions included in this note are likely to be considered controversial (refunding cash when handling a complaint about goods paid with a voucher, obligation to return VAT deduction with regard to unused vouchers) while some other ones will be welcome in practice (reverse charge regime, non-taxation of the amounts paid with vouchers above the respective price etc.). Other comments of the stakeholders are still being incorporated.

As part of the debates at the level of the Coordination Committee, the General Financial Directorate took a negative stance regarding the operation of associations in which individual income and expenses (costs and revenues) are not distributed evenly among participants. Pursuant to the GFD, a mere distribution of income is insufficient for the elements of a contract on association to be met. This opinion could have far-reaching implications on the functioning of associations in the Czech Republic.

CJEU Case Law

In **C-185/18 Oro Efectivo**, the CJEU admitted that other sales taxes may also apply if they do not meet fundamental VAT elements (system of deductions, generality). The digital sales tax, the introduction of which is being considered by the Ministry of Finance, does not seem to contravene VAT legislation in any respect.

The opinion of the Advocate General as to case **C-42/18 Cardpoint** confirms that the VAT exemption for transactions concerning payments and transfers cannot be extended to include ATM operation services, even though they are of vital significance to cash withdrawals. It is, however, possible that in practice, some entities may exempt such service from VAT as they believe that they constitute the key element in money transfers. The ultimate decision in the matter will be taken by the CJEU. Nevertheless, considering the analysis performed by the Advocate General, a different conclusion is hardly to be expected.

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International taxes in brief

Austria: Introduction of digital taxation

On 4 April 2019, the Austrian Federal Ministry of Finance (MOF) released a draft bill on the taxation of the digital economy. The digital service tax (DST) is expected to apply as from 1 January 2020. Companies providing covered services would be subject to the DST only if their worldwide revenues exceed EUR 750 million and their revenues from Austrian-source covered services exceed EUR 25 million. For multinational groups, these thresholds would apply to consolidated revenues. As a covered service will be classified online advertising services (e.g. The placement of advertisements on search engines and online banner advertisements). A covered service would be deemed to be provided in Austria if the advertisement is displayed on the device of a user with an Austrian IP address.

CJEU: No national assessment of compatibility with TFEU

On 2 May 2019 the CJEU issued a decision concluding that national courts do not have jurisdiction to determine whether certain requirements associated with a state aid regime are compatible with the fundamental freedoms in the Treaty on the Functioning of the European Union (TFEU). The CJEU acknowledged that the assessment of the compatibility of domestic rules in the EU member states with state aid measures falls within the exclusive competence of the European Commission. The CJEU's decision is clear in its effect: where the refund of dividend withholding tax to (domestic) public entities is considered state aid, national tax courts cannot grant a refund to foreign public entities based on application of the fundamental EU freedoms.

EU: update of list of non-cooperative jurisdictions

On 17 May 2019, the European Council announced updates to the EU list of non-cooperative jurisdictions for tax purposes. Aruba, Barbados and Bermuda each have made the required changes to their laws and/or political commitments to get them removed from the main list. Barbados has made commitments at a high political level to remedy EU concerns regarding the replacement of its harmful preferential regimes by a measure of similar effect, whilst Aruba and Bermuda now have implemented their commitments. As a result, only 12 jurisdictions remain on the list: American Samoa, Belize, Dominica, Fiji, Guam, Marshall Islands, Oman, Samoa, Trinidad & Tobago, United Arab Emirates, the US Virgin Islands, and Vanuatu. The Council has indicated that it will continue to regularly review and update the list in 2019, but has requested that updates are limited to a maximum of two per year as from 2020.

Germany: Court rejection of the MOF's position on anti-treaty shopping rules

The Lower Tax Court of Cologne, in a 23 January 2019 decision (which recently has been made public, but has not yet been officially published by the court), rejected the German tax authorities' (MOF's) interpretation of a Court of Justice of the European Union (CJEU) decision on the domestic anti-treaty shopping rules. The MOF set forth its interpretation of the CJEU decision in a decree dated 4 April 2018, in which the MOF limited the application of the ruling to claims for a reduced dividend withholding tax rate that are based on the EU parent-subsidiary directive (PSD). However, the MOF's decree is limited in its scope and, due to its unclear wording, created a high level of uncertainty for affected taxpayers relating to the MOF's interpretation of the CJEU decisions. The decision of the Lower Tax Court of Cologne is noteworthy for several reasons. It sets out the court's position on several different issues that are relevant for inbound investors and for withholding tax payments in general. It rejects views of the tax authorities that have been heavily criticised by tax commentators as not being in line with EU law and the CJEU decisions, and hopefully will pave the way for a federal tax court decision on these matters. Even though the tax authorities have not yet officially filed an appeal of the lower tax court's decision, it is expected that they will do so and that the case will be decided by the federal tax court.

Netherlands: rejection of TP adjustment to hybrid loan

A Dutch appellate court has held that deductions on a hybrid debt instrument were not prohibited by transfer pricing or financial instrument characterisation rules, but that the deductions could be denied as an abusive avoidance arrangement. The court concluded that the instruments should be respected as debt for Dutch tax purposes and that the 13 percent interest rate was not excessive under the transfer pricing rules. Despite persuading the court that no specific provisions on transfer pricing or debt-equity classification disallow the deductions, the court agreed with the government that the arrangement was an abusive tax avoidance transaction subject to the Dutch doctrine of "fraus legis". The use of the convertible instruments had no purpose other than to create significant tax deductions that eroded the Dutch tax base, the decision says.

Poland: New definition of beneficial owner

The new definition of a beneficial owner (BO) in Poland's corporate income tax and personal income tax acts, which became effective on 1 January 2019, has made the requirements to qualify as a BO more stringent, thus limiting



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the scope of beneficial ownership. The new definition may be applied even in cases where an applicable tax treaty does not contain a beneficial ownership clause. As a result, the scope of tax treaty withholding tax exemptions may be limited and qualification for treaty benefits for intercompany payments may be in question. According to the new definition in Polish tax law, a BO is an entity that meets the following criteria: it receives a payment for its own benefit, it can decide how to use the payment and it bears the economic risk of loss for all or part of the payment; it is neither an intermediary, or a representative, trustee or other entity that is obligated

to transfer the amount to another person, in whole or in part; and it carries out actual economic activities in its state of residence if the amounts it receives are related to these economic activities.

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Tax liabilities – July 2019

July

Monday, 1	CRS (GATCA) report	Submission of announcement according to Section 13k of Act No. 164/2013 Coll., as amended
	FATCA report	Submission of announcement according to Section 13k of Act No. 164/2013 Coll., as amended
	Income tax	Submission of tax return and payment of tax for 2018, if the taxpayer has obligatory audit or the tax return is elaborated and submitted by the tax advisor Payment of special-rate withholding tax for May 2019
Wednesday, 10	Excise tax	Tax maturity for May 2019 (excluding excise tax on alcohol)
Monday, 15	Road tax	Advance payment of tax for 2nd quarter 2019
	Intrastat	Submission of statements for intrastat for June 2019, paper form
Wednesday, 17	Intrastat	Submission of statements for intrastat for June 2019, electronic form
Saturday, 20	Value added tax	Tax return and maturity of the MOSS VAT
Monday, 22	Income tax	Monthly payment of deducted advance payments on personal income tax from employment
Thursday, 25	Gambling tax	Submission of statement for advanced payment on deduction from lotteries and other similar games and payment of advanced for 2nd quarter 2019
	Value added tax	Tax return and tax for 2nd quarter and for June 2019
		EC Sales List for 2nd quarter and June 2019
		VAT control statement for 2nd quarter and for June 2019
	Energy taxes	Tax return and tax maturity on gas, solid fuels and electricity for June 2019
Excise tax	Tax maturity for May 2019 (only the excise tax on alcohol)	
	Tax return for June 2019	
	Tax return for claiming of refund of excise tax, for example on fuel oil, other petrol (benzine) for June 2019 (if applicable)	
Tuesday, 30	Energy taxes	Submitting a notification about meeting the obligation to ensure minimum amount of biofuels and maturity of the related security
Wednesday, 31	Income tax	Payment of special-rate withholding tax for June 2019



Tax liabilities – August 2019

August

Friday, 9	Excise tax	Tax maturity for June 2019 (excluding excise tax on alcohol)
Wednesday, 14	Intrastat	Submission of statements for intrastat for July 2019, paper form
Friday, 16	Intrastat	Submission of statements for intrastat for July 2019, electronic form
Tuesday, 20	Income tax	Monthly payment of deducted advance payments on personal income tax from employment
Monday, 26	Value added tax	Tax return and tax for July 2019 EC Sales List for July 2019 Tax control statement for July 2019
	Energy taxes	Tax return and tax maturity on gas, solid fuels and electricity for July 2019
	Excise tax	Tax maturity for June 2019 (only the excise tax on alcohol) Tax return for July 2019 Tax return for claiming of refund of excise tax, for example on fuel oil, other petrol (benzine) for July 2019 (if applicable)

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The Latest Schedule of the OP PIK Calls

The table below presents the latest schedule of the calls under the Business and Innovations for Competitiveness Operational Programme (“OP PIK”) that has already been announced, or will be announced in the near future, including the deadlines for submitting subsidy applications in individual programmes.

Programme name	Programme focus	Type of call	Types of recipients*	Planned date for accepting grant applications
Real Estate Call II– Integrated Territorial Investment Hradec-Pardubice	Subsidy for modernising manufacturing premises and reconstructing the existing obsolete business infrastructure and brownfield structures	Ongoing	SME	From 2 May 2019 To 2 May 2020
Energy Savings in Heat Supply Systems Call IV	Subsidy for reconstructing and developing heat supply systems, and increasing the efficiency of cogeneration	Ongoing	SME, LE	From 1 Oct 2019 To 1 June 2020
Technology – Integrated Territorial Investment Ostrava Call II	Subsidy for start-up businesses for the acquisition of new machinery, technology devices and equipment	Ongoing	SME	From 30 Aug 2019 To 30 June 2020
Technology – Integrated Territorial Investment Olomouc Call II	Subsidy for start-up businesses for the acquisition of new machinery, technology devices and equipment	Ongoing	SME	From 1 Oct 2019 To 1 Oct 2020
Technology – Industry 4.0 Call XI	Subsidy for non-production technologies and their connection to the production process	Ongoing	SME	From 1 Aug 2019 To 1 Nov 2019
ICT in Enterprises Call VI	Subsidy for acquiring new technologies and services in the area of IS/ICT solutions	Ongoing	SME, LE	From 1 Nov 2019 To 1 April 2020
Real Estate Call IV – Tourism	Subsidy for modernising outdated buildings for the development of business activities in the area of tourism	Ongoing	SME	From 3 Oct 2019 To 3 March 2020
Real Estate Call IV – Coal Regions	Subsidy for modernising outdated buildings for the development of business activities in the area of coal regions	Ongoing	SME	From 3 Oct 2019 To 3 March 2020
Energy Savings Call V	Subsidy for activities related to final energy consumption savings	Ongoing	SME, LE	From 16 Sept 2019 Do 30 April 2020
ICT in Enterprises Call VI	Subsidy for acquiring new technologies and services in IS/ICT solutions	Ongoing	SME, LE	From 1 Nov 2019 To 1 April 2020
Real Estate Call II – Integrated Territorial Investment Hradec-Pardubice	Subsidy for modernising manufacturing premises and reconstructing the existing obsolete business infrastructure and brownfield structures	Ongoing	SME	From 2 May 2019 To 2 May 2020

* SME – small and medium-sized enterprise, LE – large enterprise

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Energy Savings and Renewable Energy

In early July, the Ministry of Industry and Trade of the Czech Republic is going to publish several calls focusing on the treatment of energy resources. Specifically, this will involve the Energy Savings and Renewable Energy programmes.

Energy Savings

Call V in the Energy Savings programme will support projects focusing on decreasing the energy intensity of enterprises. The subsidy applies, *inter alia*, to the reconstruction and modernisation of facilities producing energy for own needs and the electricity, gas and heat distribution systems with the aim of increasing the efficiency of or modernising the lighting systems of buildings and industrial parks.

Eligible applicants include small and medium-sized enterprises. The subsidy relates to tangible fixed assets, intangible fixed assets necessary for the operation of tangible fixed assets, energy assessment report and project documentation.

The maximum subsidy provided to a single project amounts to 50%, 40% and 30% of eligible expenses for small, medium-sized and large enterprises, respectively. The amount of subsidy for the energy assessment report and project documentation is 60-80% of eligible expenses, based on the size of enterprise.

According to the current schedule, applications will be accepted from 16 September 2019 to 30 April 2020. This is an ongoing call. Projects must be realised in the Czech Republic outside the Capital of Prague, whereby the deciding factor is the actual place of the project implementation.

Renewable Energy

Call V in the Renewable Energy programme will support projects using renewable energy resources for energy production and distribution. The subsidy applies, for example, to the construction, reconstruction and modernisation of small hydroelectric power stations, distribution of heat from the existing biogas stations, construction and reconstruction of combined heat and power generation from biomass, construction and reconstruction of wind power plants or solar collectors etc.

Eligible applicants include small and medium-sized enterprises. The subsidy related to tangible fixed assets, intangible fixed assets necessary for the operation of tangible fixed assets, energy assessment report and project documentation.

The maximum subsidy provided to a single project amounts to 40-80% of eligible expenses, based on the size of enterprise and type of supported activity.

According to the current schedule, applications will be accepted from 2 September 2019 to 31 March 2020. This is an ongoing call. Projects must be realised in the Czech Republic outside the Capital of Prague, whereby the deciding factor is the actual place of the project implementation.

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