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Basic measures to prepare your business on the impact of coronavirus (COVID-19)

How coronavirus (COVID-19) infection will further develop and its impact on the economy are currently very difficult to predict. Therefore, we prepared a brief overview of what you should focus on to keep your employees protected and minimize the impact on your business.

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Slovakia is one of the last countries in Europe, where coronavirus (COVID-19) appeared. Several days have passed since the first case of infection was confirmed and the remote threat has become a real problem for Slovak citizens and entrepreneurs.

As a precautionary measure, Slovakia has introduced a mandatory 14-day quarantine for citizens after returning from four selected countries - Italy, China, South Korea and Iran. Isolation does not only apply to the persons concerned, but also to everybody who is living with them in the same household. Breach of this obligation is considered to be an offense in the public health sector, subject to a fine of up to EUR 1659, or it may have criminal consequences.

Severe measures have been introduced to prevent the transmission of the disease like closing schools, canceling public sport or cultural events.

What should be the primary focus in this situation? Without a doubt, protecting health and preventing the transmission of the disease is a top priority. At this stage, the absence of employees who have to stay home with their children seems to be a bigger problem than the disease itself. However, the effectiveness of preventive measures and the further development of virus transmission are difficult to predict at the moment.

So what should be done to protect the health of employees and their families and, at the same time, to make sure that your business will withstand this stress test unscathed?

I. EMPLOYEE PROTECTION

1. Employer's health protection measures
Caring for the safety and health of employees at work is one of the employer's basic obligations laid down in the Labor Code. In connection with the special legislation contained mainly in the Act on Occupational Safety and Health, the employer is obliged to adopt a system of measures ensuring safety and health at work, maintaining the health and working ability of the employee.

Under these measures, the employer is obliged to continually monitor the situation and keep employees informed about (i) proper hygiene and sanitation practices to lower the risk of infection, (ii) how to proceed when returning from the affected regions (iii) what to do when symptoms of an infection with COVID-19 occur.

The planned measures must be consulted with trade union representatives, employee councils and OSH (occupational safety and health) specialists.

To prevent the transmission of the disease, employers should introduce following measures:

- Provide workplaces with disinfectants and recommended protective equipment,
- Cancel business trips to risk areas, or consider total cancellation of all business trips regardless of the destination,
- Minimize meetings with a higher concentration of participants,
- Consider working from home ('home office'); however, if work from home is not agreed with the employee in advance, the work from home cannot be ordered unilaterally without the employee's consent,
- For workers whose nature of work does not permit work from home, the following may be considered:
    - interruption of work due to other obstacles to work on the employer´s side with entitlement to wage compensation under § 142 par. 3 of the Labor Code.
    - interruption of work due to serious operational reasons on the the employer´s side under § 142 par. 4 of the Labor Code with entitlement to wage compensation of at least 60% of the employee's average earnings. This option is only possible if there is an agreement with the employees' representatives, so it cannot be replaced by the employer's decision and
    - ordered vacation according to § 111 par. 5 of the Labor Code with immediate effect. However, such ordered vacation is only possible with the employee's consent.

2. Measures taken by the employer in relation to an employee displaying infection symptoms

The employer's duty under the Labor Code is to care for the protection and health of employees in the workplace. In order to protect employees, the employer is therefore entitled to:

- monitor the health conditions of employees before entering the workplace; and
- in the event of symptoms of the disease, prevent such employee from accessing the workplace, with due justification of the precautionary measures taken to protect the health of others at the workplace.

3. Measures to enact in case of increased employee absences

The steps taken by the employer in the event of an increased absence of employees, whether caused by the disease itself or by preventive measures, will fundamentally vary depending on the nature of the employer's scope of business.

In the case of non-production activities of the employer, a significant part of the absence of employees can be covered by work from home.

In case of production activity, resp. provision of services, a certain part of the workforce absence can be eliminated by adjusting shifts and vacation schedules (in compliance with minimal advance notice requirements).

However, it is clear that long-term interference with the employer's standard operating regime will affect their ability to fulfill contractual obligations.

II. EFFECTS ON CONTRACTUAL RELATIONSHIPS

The negative effects of coronavirus on the economy are evident. In this context, the question arises as to whether coronavirus can be regarded as a vis major, i.e. a liberalization reason for liability for failure to fulfill contractual obligations.

The legal regulation of liability in commercial relations is based on the principle of strict objective liability. Pursuant to Section 373 of the Commercial Code, a person who breaches his obligation under a contractual obligation is obliged to compensate the damage caused to the other party, unless they prove the existence of liberalization reasons. Liberalization reasons, however, do not apply to the obligation to pay a contractual penalty, i. e. the liable party is obliged to pay the contractual penalty even if there is a vis major.

Liberalization of liability arising from a contractual relationship is the existence of force majeure, i. e. unforeseeable circumstances that (i) arose independently of the will of the liable party, (ii) prevent it from fulfilling its obligations and (iii) the liable party could not avert or overcome the obstacle or its consequences.

The vis major obstacle can only be applied if it occurred before the delay of the liable party and does not originate in the economic circumstances of the liable party.

In general, coronavirus can be regarded as an unforeseeable circumstance which has arisen independently of the will of the party concerned. However, whether it constituted an obstacle to the fulfillment of the contractual obligations or whether its consequences could not be averted or overcame, should be assessed individually and, in the event of a dispute, would be subject to review.

However, in order to prevent liability arising from a breach of contractual obligations, it is advisable to:

- review the contractual terms agreed with your contractual partners, including the agreed liberalization reasons, the possibility of premature termination of contractual relationships, as well as sanctions agreed in case of breach of contractual relationship or impossibility to fulfill contractual obligations,
- review insurance contracts (scope of insurance coverage) and credit agreements (consequences of non-fulfillment of the company's economic indicators),
- with your business partners, update each other about the fulfilment of your mutual commitments. As soon as you assume that you will not be able to fulfill any kind of obligation, inform your business partners and try to renegotiate your contractual conditions or the termination of the obligation.
- in case of inability of your contractors to fulfill contractual obligations and after careful consideration of your own capacities, it is necessary to cover the obligation from other suppliers,
- do not rely on that your liabilities will be extinguished or discharged due to vis major circumstances, as its applicablity is usually subject to litigation. Contractual relationships can be altered in various ways or may be bound by other/foreign legal orders which may not allow for the cancelation or discharge liabilities and obligations.

We are constantly monitoring the situation and we will keep you informed of further developments. You can find more information about COVID-19 consequences on the KPMG website.

Case law

Court of Justice of the European Union decides in cases on special taxes levied in Hungary

The Court of Justice of the European Union decided that the EU freedom of establishment does not preclude Member States from levying a progressive tax on turnover, even though the actual burden is mainly borne by companies controlled from another Member State. The Court also ruled that Hungarian advertisement tax penalty regime disproportionately affected companies located in another EU Member State and was therefore contrary to the EU principle of freedom to provide services.

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On March 3, 2020, the Court of Justice of the European Union (CJEU) rendered its decisions in three cases, C-482/18 Google Ireland, C-323/18 Tesco-Global Áruházak and C-75/18 Vodafone Magyarország, each of which concerned aspects of Hungarian law.

first case (C-482/18 Google Ireland) dealt with Hungarian tax on advertisements. Companies within the scope of the tax were required to fulfill the registration obligation while Hungarian registered businesses were in most cases considered to be registered based on existing registration for other taxes. Should the company fail to fulfill the registration obligation there was a penalty regime in place. The initial penalty was levied in the amount of approx. EUR 30,000 and this was increased on a daily basis and reached the maximum amount of approx. EUR 3,000,000.

CJEU was asked if obligation imposed on suppliers of advertising services to submit a declaration for the purposes of that tax represents a restriction on the freedom to provide services. The Court ruled that a reporting obligation, which is an administrative formality, should not constitute an obstacle to the freedom to provide services itself. The Court further noted that the exemption from the obligation to submit a tax declaration does not prevent the cross-border supply of advertising services, but rather prevents suppliers already registered with the tax authority from being required to complete an additional administrative formality.

In relation to the special penalties imposed for failing to register for the Hungarian tax on advertisements, the Court noted that sanction regimes in tax matters typically fall within the competence of individual EU Member States. While the sanctions in this case were, in the first instance, applicable to both domestic Hungarian and non-domestic companies, the Court determined that it was likely that domestic Hungarian companies would be penalized under the general provisions of Hungarian tax law and would result in significantly lower penalties.

The CJEU concluded that legislation based on which the penalty for non-compliance with the registration obligation is levied to the suppliers of services established in another Member State in a series of fines issued within several days, the amount

of which is exponentially increased without giving those suppliers the time necessary to comply with their obligations or the opportunity to submit their observations, or having itself examined the seriousness of the violation **is in the contrary to the freedom to provide services.**

The second and the third case (C-323/18 Tesco-Global Áruházak and C-75/18 Vodafone Magyarország) dealt with the special turnover taxes applicable in Hungary using progressive rate structure and their compliance with the EU law.

Both a special tax on certain sectors and a special tax on telecommunications are calculated out of the turnover amount using the progressive rate structure. It was also argued that application of the special tax as well as tax on telecommunications in practice leads to a scenario in which foreign-owned subsidiaries are more likely to be subject to the higher rate of tax than domestic Hungarian businesses.

The CJEU in its judgments noted that the freedom of establishment prohibits direct or indirect discrimination based on the location of the seat of a company.

The Court therefore examined whether the use of a progressive tax rate to impose different levels of taxation on companies represents either direct or indirect discrimination. The Court noted that the disputed tax makes no distinction between taxpayers based on where they have their registered office and therefore does not establish direct discrimination. The Court further noted that the application of a system of progressive taxation is within the power of each Member State and that progressive taxation can be based on turnover on the basis that turnover represents a criterion of differentiation that is neutral and a relevant indicator of a taxable person's ability to pay. The Court therefore found also no evidence of indirect discrimination and concluded that **the EU freedom of establishment does not preclude Member States from levying a progressive tax on turnover, even though the actual burden is mainly borne by companies controlled from another Member State.**

its judgment CJEU also confirmed that introduction of a tax which is based on the overall turnover of the taxable person, which is levied periodically, and not at each stage of the production and distribution process, and where there is no right to deduct tax paid at an earlier stage of that process in not prohibited by the EU VAT Directive.

The above judgments significantly reduce chances that the member state would challenge the specific turnover taxes as being in the contrary to EU law.

Cayman Islands, Palau, Panama and Seychelles added to the EU list of non-cooperative jurisdictions

ECOFIN has adopted again a revised EU blacklist of non-cooperative jurisdictions for tax purposes. The EU Finance Ministers agreed to add four new jurisdictions to the list: Cayman Islands, Palau, Panama and Seychelles.

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This happened after assessment of the implementation commitments made by each jurisdiction at the end of 2018. The deadline for implementing the commitments was the end of 2019 and finished with the following results:

- The Cayman Islands does not have appropriate measures in place relating to economic substance requirements for collective investment vehicles.
- Palau failed to implement any automatic exchange of financial information measures.
- Panama failed to obtain at least a “Largely Compliant” rating from the Global Forum on Transparency and Exchange of Information for Tax Purposes for Exchange of Information on Request.
- Seychelles was moved to the blacklist, for failure to address issues in relation to existing harmful preferential tax regimes.

Since the first EU blacklist was published in December 2017, it has been revised twelve times. Following this latest revision, the EU blacklist comprises of twelve jurisdictions: American Samoa, the Cayman Islands, Fiji, Guam, Oman, Palau, Panama, Samoa, Seychelles, Trinidad and Tobago, the US Virgin Islands and Vanuatu.

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