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Tax & Legal Weekly Alert

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In this issue:

Draft amendment: State owned institutions will be able to benefit from exemption from excise duty for the fuel delivered in their own tanks

State owned institutions which involve the defence, the public policy, the public health, the national safety and security could be exempted from excise duty for energy products supplied directly to their own tanks in order to be used as aviation fuel. The proposal was mentioned into a draft amendment of the Methodological Norms of the Tax Code, published by the Ministry for Public Finance.

CJEU decision on annual leave. Impact over domestic regulations

Court of Justice of the European Union ("**CJEU**") ruled that, in certain conditions, the right to annual leave may be lost if the employee refuses without justification to exercise this right.

European Commission warns Romania to end its VAT split payment mechanism

On November 8th the European Commission decided to send a letter of formal notice to **Romania** regarding VAT split payment mechanism. The Commission concluded that the Romanian measure is against both EU VAT rules (Council Directive 2006/112/EC) and the freedom to provide services (Article 56 of TFEU).

State owned institutions will be able to benefit from exemption from excise duty for the fuel delivered in their own tanks

Currently, state owned institutions which involve the defence, the public policy, the public health, the national safety and security are potential beneficiaries of exemption from excise duty. Nevertheless, in practice, such institutions cannot benefit from the said exemption, as they do not dispose of the possibility to receive the fuel directly into the aircrafts or into authorised dispensers which actually supply the aircrafts, for circulation inside the airport only.

According to the draft amendment of the Methodological Norms of the Tax Code, state owned institutions will be able to take advantage of the exemption from excise duty for the fuel delivered into their own tanks, held in any form.

We encourage you to consider the implications of these potential modifications on your activity.

For further questions regarding the aspects mentioned in this alert, please contact us.

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CJEU decision on annual leave. Impact over domestic regulations.

On 6 November 2018, the Court of Justice of the European Union ("**CJEU**") rendered decision c-684/16, on the interpretation of art. 7 of Directive 2003/88/EC concerning certain aspects of the organisation of working time and of Article 31 Para. (2) of the Charter of Fundamental Rights of the European Union, regarding the annual leave.

The dispute in the main proceedings and the questions referred for a preliminary ruling

The dispute in the main proceeding was triggered by the fact that a German employer, Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV, refused to grant one of its workers, upon termination of employment, a financial compensation for the untaken leave days. The employer's refusal was based on the German legislation pursuant to which the annual leave must be granted in the course of the calendar year when it is accrued – the possibility of carrying forward the annual leave in the following year being permitted only in the event of compelling operational grounds or for personal reasons pertaining to the employee.

Given the above context, the Federal Labour Court decided to stay the proceedings and refer to the CJEU the following questions for a preliminary ruling:

1. Whether EU law precludes national legislation from providing that the entitlement to an allowance paid in lieu of annual leave upon termination of employment lapses in cases where (i) the worker did not request to benefit from annual leave during a certain reference period and (ii) domestic regulation does not require an employer to specify unilaterally and with binding effect for the employee, when that leave has to be taken by the employee within the reference period.

2. If the first question is answered in the affirmative, is the domestic court required to disapply the national legislation in breach of EU law, even in disputes between private persons.

Grounds and CJEU ruling

a. With respect to the annual leave

CJEU ruled that if:

- The employer is able to prove that it enabled workers to exercise their right to paid annual leave in a concrete and transparent manner and
- The worker refuses to take annual leave voluntarily, being aware of all the consequences arising thereof;

EU law does not preclude national legislation from providing the loss of annual leave or payment of an allowance in lieu of untaken paid annual leave at the end of the employment relationship.

Moreover, CJEU detailed the conditions that need to be met for the right to annual leave/payment of an allowance in lieu of untaken paid annual leave to lapse, namely:

- The employer to enable the worker, in a concrete and transparent manner, to take annual leave;
- To this end, the employer must provide the worker with specific information in good time with regard to his right to benefit from annual leave, to ensure that the purpose of the annual leave is attained (i.e.: enable the worker to rest).

Notwithstanding the above, CJEU reminded that, according to its consistent case law (which remains applicable hereinafter), the right to paid annual leave must be regarded as a particularly important principle of EU social law, the implementation of which by the competent national authorities must be confined within the limits expressly laid down by Directive 2003/88 itself.

Consequently, a practice that would allow the lapse of the right to annual leave without the worker having been provided with the possibility to actually exercise it, would undermine its very substance and, as such, is prohibited.

b. With respect to the domestic court's obligation to disapply the national legislation in breach of EU law

CJEU ruled that in the event that it is impossible to interpret national legislation in a manner consistent with EU law, the national court hearing a dispute between private persons is required to disapply the national legislation.

In this framework, we mention that the above cited CJEU ruling was based on the fact that the right to annual leave is enshrined under the

Charter of Fundamental Rights, primary source of law, which contains a clear, unconditional and sufficiently precise provisions and, thus, can have direct effect.

The impact of the CJEU ruling over national legislation

Art. 146 Para (1) of the Labor Code, as amended and supplemented, enshrines the rule pursuant to which the annual leave must be taken every year.

By way of exception, Para (2) of the same article provides that in the event the employee, for justified reasons, cannot take the annual leave during the year in which it was accrued, the employer is under the obligation to grant the employee the untaken leave days, with his consent, in a reference period of 18 months, calculated from the start of the year following the one in which the right to annual leave was accrued.

In light of the above cited CJEU case law, it is necessary to determine whether art. 146 of the Labor Code may be construed in the sense that the right to annual leave lapses at the end of the calendar year during which it was accrued provided the employer guaranteed the employee the right to perform the annual leave (e.g.: specific and timely information, notification with regard to the number of untaken leave days) and the employee refuses to benefit from annual leave without having any objective justification.

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European Commission warns Romania to end its VAT split payment mechanism

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According to the Commission, this provision also causes a major administrative burden for companies.

Since January 1th, 2018, this mechanism is mandatory for two categories of Romanian taxpayers: those having VAT debts and those that are under insolvency procedures. Their customers registered for VAT purposes must split the payment of the invoice by paying the VAT separately to the VAT account of the supplier. The taxpayer may only use the amount collected on the dedicated VAT account to pay VAT to the Treasury and to its suppliers.

In case Romania does not abolish the mechanism within the next two months, the Commission may send a reasoned opinion to the Romanian authorities. A reasoned opinion is the first step of an infringement procedure.

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