Legal update

April 2023

Weinhold Legal

Content

The information contained in this bulletin is presented to the best of our knowledge and belief at the time of going to press. However, specific information related to the topics listed in this bulletin should be consulted before any decisions are made.

Banking, Finance & Insurance:
Daniel Weinhold, Václav Štraser, Ondřej Tejnský

Competition Law / EU Law:
Tomáš Čermák

Dispute Resolution: Milan Polák, Zbyšek Kordač, Anna Bartůňková, Michaela Koblasová, Michal Švec

ESG – Environment, Social, (corporate) Governance
Daniel Weinhold, Tereza Hošková

Family Office:
Milan Polák, Zbyšek Kordač, Michaela Koblasová

Insolvency and Restructuring:
Zbyšek Kordač, Jakub Nedoma

IT, Media & Telecommunication:
Martin Lukáš, Jakub Nedoma, Michal Przeczek

Labour Law: Eva Procházková, Anna Bartůňková, Daša Aradská, Ondřej Tejnský

Mergers and Acquisitions:
Daniel Weinhold, Václav Štraser

Personal Data Protection
Martin Lukáš, Tereza Hošková, Daša Aradská

Public Procurement & Public Sector:
Martin Lukáš, Tereza Hošková, Monika Švaříčková

Real Estate:
Pav Younis, Václav Štraser

Slovak Law:
Tomáš Čermák, Karin Konečná

Start-ups, Venture Capital and Cryptocurrency:
Pav Younis, Martin Lukáš, Jakub Nedoma, Michal Švec, Ondřej Tejnský

New contract type

Contract for the provision of digital content

The amendment to the Consumer Protection Act and the Civil Code No. 374/2022 Coll., which came into force on 6 January 2023 (also known as the Button Amendment), was a subject of interest to the professional and general public, primarily because of the significant changes it introduced in the field of consumer law. However, the amendment in question also brought in a new Section 6 of the Civil Code, entitled 'Provision of digital content', in Part 2, 'Transfer of a property for the use of another', in Title II, 'Obligations arising from making legal acts, of Part 4, 'Relative property rights', which deals with the regulation of the provision of digital content. This modification particularly affects businessmen who develop their own software solutions but also affects their customers.

Regulation subject

In a digital content contract, the provider undertakes to make an item in digital form (digital content) available to the user for his or her own use and the user undertakes to pay a fee for this. The subject of the contract may be the provision of:

- Digital content, which means a set of any data created and provided in digital form. Typically, this will include mobile and computer games and apps, software, but also, for example, e-books.
- Digital Content Services, which means a service that allows a user to create, process, store or access data in digital form, as well as to share data in digital form uploaded or created by that user or another user of the service and/or any other interaction with that data. Such services include, for example, social media, or SaaS (software as a service), or apps in which the user has access to content consisting of videos, podcasts, or online games. The user can then not only 'consume' the content provided, but even create and upload it himself. Digital content service providers are mainly operators of cloud storage services such as Ulož.to, streaming platforms, job and accommodation search portals, as well as operators of online dating sites.

On the other hand, the new contract type is excluded from use (or partially excluded from use) if the subject of the contract is in particular:

- providing health care
- a game, bet or lottery ticket
- financial service
- For the provision of an open source computer program based on a free licence for which the user does not pay a price and where the personal data provided by the user is processed by the provider solely for the purpose of improving the security, compatibility or interoperability of that computer program

It is also possible to pay with personal data

In general, the new rules are applicable when entering into a contract for consideration, where the provider receives payment from the user for the provision of digital content. However, the new rules also apply under Section 2389g of the Civil Code where the content or service is provided to consumers seemingly free of charge if the consumer undertakes to provide his or her personal data (e.g. for advertising purposes) in exchange for payment of a remuneration fee. An exception is data necessary for the performance of a contract or for the fulfilment of legal

Legal update

April 2023

Weinhold Legal

obligations.

Content of the digital content contract

The delivery of digital content should usually take place by making it available without undue delay after the conclusion of the contract. The method of access may be chosen by the provider, but may also be chosen by the customer (in which case the customer's choice takes priority). The obligation to make digital content available is fulfiled when the provider provides the content to the customer and informs the customer how to access it.

The digital content provider now has an obligation to provide updates to the customer to the extent that the provision of updates was agreed in the contract. If the contract specifies an obligation to take care of and improve the functionalities of the software - the software must indeed be improved as part of the updates, otherwise it may be defective digital content, which may give rise to the provider's liability for defects. At the same time, the provider must notify the user of the updates (their availability, the procedure for performing them and the consequences of not doing so).

The user of digital content can be both businessmen and consumers - while when providing digital content to consumers, special provisions contained in subsection 2 of the Civil Code must be used, which regulate, among other things, special regulations for withdrawal from the contract, notification of defects in digital content and their removal, or the possibility to claim a reasonable discount. This provision, inter alia, increases the range of liability of the provider of digital content, who is liable under Section 2389i in particular for the fact that the digital content provided by him:

- corresponds to the agreed description and range, as well as quality, functionality, compatibility, interoperability and other agreed characteristics;
- is suitable for the purpose for which the user requires it and to which the provider has agreed;
- is provided with the agreed accessories and instructions for use, including installation instructions, and user support; and
- corresponds to the trial version or preview made available by the provider before the conclusion of the contract.

Updating contracts after the amendment

While in B2B relations between businessmen the new rules will only apply to contracts concluded from 6 January 2023, in B2C relations the new rules will apply to newly concluded contracts as well as to contracts concluded earlier if the contract with the consumer has not ended yet. In these cases, it is necessary to check whether existing contracts and terms and conditions need to be modified.

Case law

Limitation of the claim for damages

(Judgment of the Supreme Court of the Czech Republic of 15 February 2023, Case No. 23 Cdo 1594/2021)

The plaintiff, a tax, legal and business consultancy company, entered into a contract of mandate with the defendant under which the defendant was supposed to provide tax, economic and organisational consultancy services to the plaintiff and third parties appointed by the plaintiff. In 2013, the plaintiff entrusted the defendant to provide those services to the plaintiff's long-term client, Miele technika s.r.o. In this connection, the defendant's conduct in 2013 caused damage to the plaintiff's client by failing to submit a tax refund claim in the appropriate manner, as a result of which the tax was not refunded to the plaintiff's client. Although the plaintiff was itself a provider of tax advice and, moreover, was alerted to this misconduct by the Specialized Tax Office in 2014, it failed to respond to the situation. The plaintiff did not inform Miele technika s.r.o. of the damage until 2019. Following this notification, Miele technika s.r.o. claimed damages from the plaintiff. Following this, the plaintiff made an insurance claim, which recognised the claim as valid and paid the insurance claim with a deductible. The plaintiff had to pay a deductible of CZK 75,000 on the insurance claim, and as a result of the defendant's conduct, it suffered damage in the same amount. The plaitiff therefore claimed that the defendant should pay that amount in damages.

Since the client was not officially notified of the defendant's misconduct until 2019, even though, given its expertise in tax consulting, the plaintiff must have been aware of the damage as early as 2014, the defendant argued that the claim was time-barred. As regards the limitation objection, the Court of First Instance held that both the plaintiff and the client had acquired knowledge of the damage already suffered in April 2016 at the latest. It concluded that it was from that point at the latest, when both the plaintiff and the client were in possession of all the necessary factual circumstances from which it was possible to infer the occurrence of the damage, its (approximate) scale and the liable party, that the three-year subjective limitation period for bringing a claim for damages should begin to run and that the plaintiff's claim against the defendant was time-barred as of April 2019. It therefore found the claim unfounded and dismissed it in its entirety.

On the plaintiff's appeal, the Municipal Court in Prague amended the judgment of the court of first instance by ordering the defendant to pay the plaintiff compensation in the full amount, as it disagreed with the assessment of the limitation objection by the court of first instance. According to the Court of Appeal, the damage only became apparent when the insurance company recognised the claim (in 2019), although the plaintiff knew from the outset that such a deductible was fixed at CZK 75,000, as it was not sufficiently clear whether the payment would be made.

On the defendant's appeal, the Supreme Court found the Court of Appeal's assessment of the case to be incomplete and therefore incorrect and remanded the case back to the Court of Appeal for further proceedings. It held that the second sentence of Section 2952 of the Civil Code contains an express rule according to which, if the actual damage

Legal update

April 2023

Weinhold Legal

depends on the incurrence of a debt, the injured party has the right to have the debt discharged or compensated by the wrongdoer. Thus, the conclusions of the Court of Appeal's earlier decision-making practice that, until the debtor has paid the amount owed to his creditor, he cannot successfully claim compensation under third-party liability, since he has not yet incurred the damage, are no longer applicable. **The law now explicitly states that the damage may also consist of a debt, thus that this condition for the creation of the obligation to compensate for damage may already arise from the fact that the victim's assets are burdened with a debt, regardless of how or whether the debt is discharged.** In the event of actual damage which depends on the creation of a debt, the injured party is entitled to have the debt discharged or compensated by the wrongdoer. According to the case law of the Supreme Court, the injured party becomes aware of the damage when it discovers the facts from which the occurrence of the damage and, indicatively, its scope can be inferred (so that the amount of the damage in monetary terms can be determined approximately), and it is not necessary for it to know the exact scope of the damage. The victim's knowledge of the identity of the wrongdoer is linked to the moment when he receives information on the basis of which he can make a judgment as to which particular person is responsible for the damage.

Thus, if the plaintiff already knew in December 2014, or could and should have known with regard to the exercise of her professional competence, that a debt within the meaning of Section 2952 of the Civil Code had been incurred towards the client and that the defendant should have caused this damage, she is liable for damage within the meaning of Section 620 of the Civil Code. The Supreme Court therefore finds the Court of Appeal's assessment of the case incomplete and therefore incorrect.