Legal Update

October 2019

Weinhold Legal

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The information in this newsletter is correct to the best of our knowledge and belief at the time of going to press. Specific advice should be sought, however, before investment and other decisions are made.

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We strongly believe you will find *Legal Update* a useful source of information. We're interested in your feedback on this newsletter, in particular its content, format and frequency.

Please e-mail any comments to frantisek.schirl@weinholdlegal.com or fax them care of František Schirl to +420 225 385 444, or contact your usual partner or manager.

Amendment of the Act on Pharmaceuticals and the Amending of Some Related Acts

Act No. 262/2019 Sb., amending the Act on Pharmaceuticals and some related Acts, was promulgated in the Collection of Laws on 18 October 2019.

The amendment is largely technical in nature, as it primarily introduces changes related to the obligation to prescribe medicines electronically and to the operation of the eRecept [ePrescription] system. It also introduces several other changes that warrant attention.

One change is the extension of the information duty of the marketing authorization holder for a medicinal product. Under the current wording of the Pharmaceuticals Act, marketing authorization holders are obliged to report to the State Institute for Drug Control, for example, information on the volume of deliveries of medicinal products they have placed on the Czech market or whether the medicinal product has been delivered to a distributor. The amendment extends this information duty to include the duty to inform the State Institute for Drug Control of the price of the medicinal product. The information duty is extended in the same way to distributors and pharmacies. The extension of the information duty should enable the State Institute for Drug Control to better supervise compliance with the price regulation of medicines, as binding medicinal product pricing rules are laid down in the Ministry of Health price regulation. In cases of breach of the information duty, marketing authorization holders are subject to penalties of up to CZK 20,000,000, and distributors and pharmacies to penalties of up to CZK 5,000,000.

Another change is the introduction of what's known as the patient drug record, which it will be possible to access in connection with the obligation of doctors to prescribe drugs almost exclusively in electronic form as of January 1, 2018. The patient's drug record will give doctors and pharmacists access to information on all prescribed and dispensed medicines. The purpose of the drug record is to provide doctors and pharmacists with an overview of medicinal products used by a particular patient and, where appropriate, to prevent unwanted combinations of medicinal products. The information contained in the patient's drug record should include, inter alia, the identity of the physician who prescribed the medicinal product or the identity of the pharmacist who dispensed it to the patient. Accessing the system will work on the so-called opt-out principle, i.e. doctors and pharmacists will be able to consult the patient's drug record, unless the patient withholds consent to access. Non-consent can be revoked at any time, or consent can only be given to a specific doctor or pharmacist. Prescription medication data will be available in the eRecept system for a period of one year.

The amendment will come into effect on 1 December 2019.

Recent case law

Contractual default interest cannot be agreed when renting a flat

(Supreme Court Judgment No. 26 Cdo 2059/2018 of 5 June 2019)

In this judgment, the Supreme Court concluded that contractual interest on late payments cannot be validly agreed in a lease (i.e. default interest in an amount set by the parties to a lease agreement and not by Government Regulation No. 351/2013 Coll.).

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In the proceedings, the Supreme Court dealt with the lessor's claim for payment of due rent, which the tenants were obliged to pay as a result of continued use of the apartment, even after lease termination as a result of the agreed lease term, plus contractual default interest of 0.25% per day.

In its judgment, the Supreme Court stated that even in the case of delayed payment of rent for the lease of a flat, the general regulation of the consequences of the delay contained in the Civil Code for contractual obligations shall apply, albeit taking into account the relatively mandatory treatment of the lease of a flat. As a general rule, interest on late payments should induce the debtor to pay the debt on time, while at the same time compensating the creditor for the loss suffered by late payment without having to quantify and prove it. Pursuant to § 2239 of the Civil Code, it is not possible to confirm any obligation of a lessee by negotiating a contractual penalty. Consequently, a contractual penalty cannot be agreed even in the case of delayed rent payment. In the Supreme Court's opinion, contractual interest on late payments and a contractual penalty of an institute are very close, and virtually identical in function, rendering it impossible to negotiate not only a contractual penalty but also contractual default interest in the case of delay in paying rent, as this would circumvent the express prohibition laid down in § 2239 of the Civil Code.

Consequently, the Supreme Court found the contractual interest for late payment to be invalid in this case and changed the judgment of the Court of Appeal by granting the applicant default interest only at the rate specified by the relevant government regulation.

Consequences of transfer of leased real property on the obligation to pay rent

(Supreme Court Judgment No. 28 Cdo 270/2019 of 2 April 2019)

In the Supreme Court's opinion, a tenant who has not been notified of a change in ownership of the subject of the lease by the original owner, or provided with proof thereof by the acquirer, cannot (until this happens) be relieved of his obligations to the former owner, and is obliged to continue to pay the rent (even in relation to the legislation in effect after the adoption of the new Civil Code).

In the given proceedings, the applicant sought a claim against the respondent (the original owner of the leased object) for an amount corresponding to the rent received by the respondent from the tenants after he had transferred the title to the leased object to the applicant. However, neither the applicant nor the respondent notified the tenants of the transfer of the lease. In the applicant's view, the respondent unjustly enriched himself in this way.

The Court of First Instance upheld the application. However, the Court of Appeal changed the judgment of the Court of First Instance to dismiss the action. According to the Court of Appeal, by accepting performance from the tenants (even though he was no longer the owner of the rented property), the respondent was unjustly enriched at the expense of the tenants, not the applicant, and therefore the applicant should have sued the tenants themselves.

The applicant appealed the judgment of the Court of Appeal, which the Supreme Court found justified; it set aside the Court of Appeal's judgment and referred the case back to the Court of Appeal for further proceedings.

Although the legislation effective from 1 January 2014 (i.e. after the adoption of the new Civil Code), unlike the previous legislation, no longer expressly states that the lessee is entitled to be freed of his obligations to the former owner as soon as the lessee is informed of the change or has the change proven by the acquirer, in its interpretation the Supreme Court concluded that a lessee who was not notified of a change in ownership by the original owner or had such change proven by the acquirer may not (until this happens) be freed of his obligations to the former owner and is obliged to pay the previous owner rent; in the Supreme Court's opinion, it is in the legal interest of the lessee (who could in no way influence the transfer of the rights and obligations under the lease agreement to the new lessor and may even not have known about it) to insist on the above-mentioned legal conclusions as well as the conditions of the new Civil Code.

The right to payment of a contractual penalty

(Supreme Court Judgment No. 23 Cdo 2615/20172 of 9 May 2019)

In this judgment, the Supreme Court confirmed the view advocated by legal theory that if, for practical reasons, a certain time has been determined or is customary for a pronouncement or performance, then such pronouncement or performance must be effected in a timely manner at this certain time of the last day (i.e. not at any time until midnight of the last day). This rule was also adopted by the Civil Code, which in § 602 stipulates the need to exercise a right or fulfil an obligation such that it would happen at a usual time of day, unless something different results from custom, the established practice of the parties or special circumstances of the case.

The Supreme Court dealt with the issue of the right to a contractual penalty in a situation where the applicant sought a determination in proceedings that the respondent's entitlement to a contractual penalty, which the respondent offset against a contractual advance payment did not ensue from the termination of the binding preliminary purchase contract in which the contractual penalty was agreed. It was agreed in the contract that in the event of a breach of an obligation under the contract, the other party would become entitled to a contractual penalty. Since the contractual penalty is of an ancillary nature, its establishment is subject to the existence of a principal obligation. Nevertheless, if a right to a contractual penalty arises while the main obligation still exists, this will result in a separate and main obligation of an independent "new" obligation that will continue even if this binding preliminary purchase contract (the main obligation) later terminates.

As one of the obligations under the binding preliminary purchase contract was the obligation to enter into a contract to open an escrow account, which obligation was not met even during the bank's opening hours on the last day of the contract execution period, a breach of contractual obligation occurred (giving rise to the right to a contractual penalty) at this moment (i.e. the end of the bank's operating hours). The binding preliminary contract then terminated as a result of fulfilment of the termination clause according to which the contract should terminate if the actual purchase contract is not concluded by the end of this same day. However, the right to a contractual penalty arose as early as the day before (at the end of the bank's opening hours), as a result of which the applicant was unsuccessful in his action.