Legal update

April 2021

Weinhold Legal

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News in legislation

Amendment to the Electronic Communications Act

While a web visitor is reading an interesting article or selecting new clothes, in the background of his activities an enormous amount of data is being collected, also known as cookies.

Cookies can be understood as data files saved in the computer during internet browsing and are intended, besides other things, for monitoring activities, their analysis and subsequent placing of advertising according to preferences of a particular visitor.

At the moment these websites only inform their visitors in a pop-up window about the fact that by browsing the website they approve the use of cookies. Turning cookies off is then possible only in the browser's settings. A slack visitor often does not even read the informative pop-up window, blindly clicks on „understand" and continues browsing his favourite website. Meanwhile, in the background a huge amount of personal data is processed.

This problem should be solved by a seemingly inconspicuous change of one provision in a proposed amendment to the Act No. 127/2005 Coll., on electronic communications and amending certain related law (the Electronic Communications Acts) ("the Electronic Communications Act") as amended ("the Amendment"), which should be discussed in a second reading by the Chamber of Deputies in the next few days. The primary goal of the Amendment is to implement a European codex of electronic communications, which will have a positive effect on consumers in this area.

A current obligation to **verifiably inform** the user about the extent and purpose of processing personal data in Sec. 89 (3) of the Electronic Communications Act will be replaced by this Amendment with the obligation to secure in advance user's **verifiable consent** with the extent and purpose of processing. After adoption of the Amendment, it will no longer be sufficient to simply inform the visitor about using cookies, it will be necessary to get a verifiable consent with these activities. We therefore expect that a change in pop-up windows will occur together with the proposed change as the new pop-up windows will include a button and a tick off box through which users will give a clear consent with using cookies. At the same time, the user will learn the purpose of processing his personal data.

Until the consent is granted, or in the event that it is not granted, it will not be possible to store personal data about users on a computer or other similar device. This will certainly effect the overall websites' design. Not consenting to the use of cookies of course does not mean that the user will not see the website at all, but it can be assumed that the final appearance of the site will be slightly different, for example due to the placement of various advertisements.

Consent will not be required only in the case of so-called technical cookies, which are necessary for the proper operation of the website. Therefore, their overall functionality should not be limited or disrupted by the proposed change.

The amendment is proposed to take effect on 1 January 2022. In the event of its adoption, it can be assumed that the proposed amendment to Section 89 (3) of the Electronic Communications Act next year will significantly affect several areas of internet business, such as marketing agencies, social networks or communication means.

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Newly published case-law

Assessment of late payment interest between entrepreneurs

(Decision of the Supreme Court file no. 23 ICdo 56/2019 of 16 March 2021)

In this decision, the Supreme Court addressed the question of whether and under what conditions it is possible to judicially review the interest agreed in a contract concluded between entrepreneurs.

In previous proceedings, the court of first instance found the agreed interest, which exceeded the normal interest rate more than 15 times, to be contrary to good manners. Subsequently, however, the Court of Appeal concluded that the corrective of good manners cannot be applied to interest levels, taking into account the provisions of § 1797 of the Civil Code, according to which an entrepreneur who concluded a contract in his business cannot claim the invalidity of the contract according to the provision of usury in § 1796 of the Civil Code. No other statutory corrective was applied to assess the amount of agreed interest.

The Supreme Court did not agree with this conclusion. In the opinion of the Supreme Court, the principles of good manners also apply in relations between entrepreneurs, and in the event of their violation, the legal action will be afflicted by absolute invalidity. However, the Supreme Court points out that the conclusion that the absolute invalidity of a legal action for a breach of good manners is a completely exceptional solution and must be justified by the extraordinary circumstances of the case.

At the same time, the application of the corrective of good manners does not preclude the assessment of the given relationship also according to other provisions of the Civil Code. In the opinion of the Supreme Court, it is always necessary to examine whether, for example, one of the contracting parties is in a position of a consumer when concluding a contract, or in a position of a weaker party.

In accordance with the applicable legislation, a consumer is every natural person, including an entrepreneur, who concludes a contract outside the scope of his business activities with an entrepreneur. A person in this position is always considered a weaker party and the law therefore offers him increased protection in legal relations. Therefore, if an entrepreneur who is also a natural person has concluded a contract with another entrepreneur outside the scope of his business activities, it is necessary to assess whether the concluded contract does not have the nature of a consumer contract. In such a case, it will be necessary to apply Act No. 145/2010 Coll., on consumer credit, for the relevant contracts concluded by the end of 2016.

An entrepreneur who is not in a position of a consumer in the relationship might be in a position of a weaker party, for example due to his position on the market. If the weaker party does not have a real opportunity to influence the basic contractual conditions, because they are determined by another contracting party, the application of the legislation on adhesion contracts can be considered. At the same time, however, the Supreme Court points out that the mere inadequacy of interest or remuneration cannot be subject to review under the provisions on adhesion contracts.

In summary, the Court of Appeal erred in focusing only on the corrective of good manners, or rather on its exclusion, and did not deal with other possible legal means of protection. The Supreme Court annulled the decision of the Court of Appeal and ordered it to deal better with the factual findings of the court of first instance on the circumstances of the conclusion of the contract, which show that the plaintiff knew in advance that the defendant entrepreneur would not pay the debt.

The Court of Justice dismissed the appeal of Deutsche Telekom and Slovak Telekom and clarified the scope of the Bronner judgement

(Judgement of the Court of Justice in case C-152/19 P and C-165/19 P of 25 March 2021)

In these proceedings, the Court of Justice dealt with an appeal against the decisions of the General Court in Cases T-827/14 (Deutsche Telecom) and T-851/14 (Slovak Telekom).

Pursuant to the decision of the European Commission of 15 October 2014 (CASE AT.39523), Slovak Telekom and Deutsche Telekom committed infringements of Article 102 of the Treaty on the Functioning of the European Union (TFEU) in the field of telecommunications between 12 August 2005 and 31 December 2010, which consisted of the following actions:

a) failure to provide information to alternative operators necessary to make user lines available;
b) limiting the scope of its responsibilities related to the user lines made available;
c) setting unfair conditions in the Reference offer of making user lines available regarding collocation, qualification, forecasts, repairs and bank guarantees;
d) the use of unfair tariffs that do not allow an equally efficient competitor to use wholesale access to available Slovak Telekom user lines in order to replicate the retail broadband services offered by Slovak Telekom without incurring a loss (margin squeeze).

Slovak Telecom and Deutsche Telekom sought the annulment of the above Commission decision before the General Court, but the General Court dismissed most of the action, annulling only the part of the decision relating to a 5-month period in 2005 and upholding the fines in the tens of millions of euros.

By appeal, Slovak Telecom and Deutsche Telekom subsequently sought annulment of those judgements of the General Court, decisions of the Commission and annulment or reduction of the fines imposed.

In its ruling, the Court referred to its previous decisions, in particular the judgement in Bronner (C-7/97), which ruled that a newspaper publisher which abused its dominant position by denying its competitors access to its newspaper distribution infrastructure. In this judgement, the Court held that not even a dominant competitor could be required to make his own infrastructure available to its competitor, with reference to the principles of contractual freedom and the essence of that

competitor's right of ownership. The obligation to provide access to a given infrastructure can thus only be imposed if it is necessary for competitors to enter the market. The Bronner judgement is still central to the assessment of the abuse of a dominant position, as it sets out the basic conditions for deciding on these issues.

However, this time the Court distinguished *the refusal of access* to the infrastructure in question from *access under unfair conditions*, concluding that the conditions of the Bronner judgement do not apply in this case. This among other things eliminated the Commission's obligation to demonstrate that access was *necessary* for competing undertakings to enter the market, as required by the Bronner judgment. The Commission's investigation should therefore have focused only on whether or not the conduct of the dominant undertaking is abusive.

As Slovak Telekom granted access of its user lines on unfair terms, thereby abusing its dominant position, the Court of Justice dismissed the appeal in its entirety against the judgements of the General Court in that case.

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