Legal update

February 2022

Weinhold Legal

Contents

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

Mergers and acquisitions:
Daniel Weinhold, Václav Štraser, Jakub Nedoma

Insolvency and Restructuring:
Zbyšek Kordač, Jakub Nedoma, Michal Švec

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

Real estate:
Pav Younis, Václav Štraser, Michal Švec

Personal Data Protection:
Martin Lukáš, Anna Bartůňková, Tereza Hošková

Labour law:
Anna Bartůňková, Eva Procházková, Daša Aradská

Slovak law:
Tomáš Čermák, Karin Konečná

Family office:
Milan Polák, Zbyšek Kordač, Michaela Koblasová

Dispute resolution: Milan Polák, Zbyšek Kordač, Anna Bartůňková, Michaela Koblasová

Competition law / EU law:
Tomáš Čermák, Jana Duchoňová

Start-ups and Venture Capital:
Pav Younis, Martin Lukáš, Jakub Nedoma

Public procurement & Public sector:
Martin Lukáš, Monika Švaříčková, Tereza Hošková

News in Legislation

Amendment to the Electronic Communications Act in the field of telemarketing

On January 1, 2022, Act No. 374/2021 Coll., Amending Electronic Communications Act No. 127/2005 Coll., and Amending Certain Related Acts (hereinafter "**ECA**"), which adapts ECA to the General Regulation on the protection of personal data (hereinafter referred to as "**GDPR**"), became effective. In addition to the often mentioned change of the opt-out mode to the opt-in mode in the area of cookies, however, this amendment also brought **significant changes in the area of telemarketing**. The Czech Telecommunication Office also contributed to the simpler interpretation of this amendment. In cooperation with the Office for Personal Data Protection and the Ministry of Industry and Trade, it prepared a joint interpretative opinion with answers to the most frequently asked questions concerning the new rules.

While so far the participant has had to actively express his disagreement in the so-called participant list, the new principle is quite the opposite. It is automatically assumed that marketing calls cannot be made because the participant does not want them. If the contact is made for marketing purposes from a source other than the public (subscriber) list, then the contact person must prove how he / she obtained the contact and that he / she is authorized to handle it in accordance with the GDPR. **If the consumer wants to be contacted with marketing offers, he will have his consent indicated in the subscriber list**, thanks to which he will be able to be contacted.

What is a public (subscriber) list, what is its purpose and who creates it?

The subscriber list can be created and managed by anyone who obtains subscriber data in accordance with § 66 ECA. The purpose of such a list is to search for a detailed contact information about a person on the basis of his or her name or, where appropriate, the minimum number of other identifying elements required. As it is a public list, it must be published as such and available to all potential applicants under the same conditions.

However, the change of regime does not affect the current possibility of contacting existing customers, the legislation in question applies only to those calls in which there is no existing relationship between the caller (contacting) and the called party (contacted) and if the new contact is called for commercial communication. The customer can therefore be contacted if the entrepreneur has any other individual consent to contact, even though this customer has stated in the public list that he does not wish to be contacted for marketing purposes.

Random generation of telephone numbers has so far not been considered as a processing of personal data from the GDPR point of view. However, the amendment to the ECA has an impact on this issue, § 95 para. 5 newly stipulates the legal fiction that the **random generation of telephone numbers is also considered to be the creation of a subscriber list**.

As part of the changes made in § 95 and § 96 ECA, the ban on direct marketing through calls without human participation (automatic calling devices), facsimile devices or e-mail is further extended to persons whose data were obtained from the subscriber lists.

Legal update

February 2022

Weinhold Legal

The changes described above will take effect in the list of participants issued before the date of entry into force of this amendment **six months after the date of entry into force of the amendment** (1 July 2022), when there is a rebuttable legal presumption that the participant does not wish to be contacted for marketing purposes. Negotiations contrary to the above and sanctions for such conduct will not undergo any fundamental changes with the amendment. It will continue to be a misdemeanor under ECA, for which a legal or entrepreneurial natural person can be fined up to CZK 50,000,000 or up to 10 % of net turnover. Individuals face a fine of up to CZK 100,000.

Support for small and medium-sized businesses in the field of intellectual property rights in 2022

Also this year, small and medium-sized businesses can benefit from support from the European Commission, which is mediated by the European Union Intellectual Property Office (EUIPO) and national industrial property offices. The above-mentioned support for small and medium-sized enterprises is a part of the European Union's Intellectual Property Action Plan, which was adopted by the Committee on European Affairs of the Chamber of Deputies and the Parliament of the Czech Republic. The proposed projects to support small and medium-sized businesses were approved in November last year.

This year, compared to last year, support for small and medium-sized businesses is extended to trademarks and industrial designs registered outside the EU, and it is further extended by subsidies for patent applications. The administration associated with the application is significantly simplified and the time windows for grant applications have disappeared, it is possible to apply for them at any time during the year.

This year, the subsidy can be drawn through 2 types of vouchers, each of which is intended to pay for a different, selected activity.

The first type of voucher allows you to draw a subsidy of up to 1,500 EUR and can be used for a subsidy of:

- 90 % of the cost of IP scan services (preliminary diagnosis in the field of intellectual property)
- 75 % of the cost of applications for trademarks and industrial designs registered in the European Union
- 50 % of the cost of filing an application for a trade mark or design outside the territory of the European Union

The second type of voucher is applicable for subsidies of up to 50% of the cost of the patent application fees at national level.

The aid granted can also be used to reimburse costs for pre-patent fees, patent fees and publication fees. The maximum subsidy for this voucher is 750 EUR.

An application for a subsidy from the SME Fund for 2022 can be submitted from 10 January 2022 to 16 December 2022. In this context, however, it should be noted that the fund contains only a limited amount of funds, with subsidies being awarded according to the order of applications and funds. according to the available information will no longer be increased. If SMEs are thus interested in taking advantage of this grant scheme, it is recommended that they apply as soon as possible..

News in Case Law

Overtime work for an employee with shorter working hours

(Judgement of the Supreme Court File No. 21 Cdo 2141/2021 of 27th October 2021)

The applicant sought payment of a wage, or 'eventually' wage, taking into account overtime pay, from a defendant with whom she had been employed under several fixed-term employment contracts since 1999, most recently as a researcher. In addition to the employment contract, the defendant limited the employee's working hours (from the original full-time employment) to only six hours a day from Monday to Thursday. Even after the conclusion of that addendum, the applicant, working to the full knowledge of the employer, worked to the original extent of eight hours a day, five working days a week. The defendant even "normally" authorized her to leave on Friday, which he treated as if it were a normal working day.

The District Court of Prague-West awarded the plaintiff wage for overtime work in the amount of CZK 178,813.97 and dismissed the remainder of the lawsuit. To determine the extent of overtime, he applied the provisions of Section 136 of Act No. 99/1963 Coll., The Civil Procedure Code, and supplemented overtime hours with all Fridays in which the plaintiff worked during normal working hours of eight hours, and the days when she was on a business trip, plus a surcharge of 25% for overtime and a surcharge of 10% for weekend work.

The Regional Court in Prague, as the court of appeal, dismissed the action to this extent in a statement ordering the defendant to pay the plaintiff CZK 178,813.97 with accessories. In his view, the profession of researcher is a

> *'work activity which is not precisely determinable and measurable in time'*.

For any creative job, which undoubtedly includes scientific activity,

> *"it is difficult to distinguish what is one's own work and what are the activities that necessarily precede or follow*".

Working hours in such occupations

> "*are difficult to determine or assess in the usual way, for example in manual occupations*".

The Supreme Court, on appeal, ruled that for an employee with shorter working hours, it is necessary to distinguish between work performed beyond the agreed shorter working hours, but within the specified weekly working hours (for the performance of such work, employees are entitled to a salary without the surcharge specified in the provisions of Section 114 (1) of the Labor Code), and, secondly, work performed in excess of the specified weekly working hours, which the law in the provision of § 78 par. i) of the Labor Code refers to overtime work for which the employee is entitled to a wage and a supplement of at least

Legal update

February 2022

Weinhold Legal

25% of average earnings, unless the employer and the employee have agreed to provide compensatory leave in the scope of overtime work instead of a supplement.

Therefore, if an employee demands an action against her employer to pay her for the work she has done in addition to the agreed working hours, the conclusion as to what performance is due to the employee is a matter of legal assessment and such a claim cannot be resolved by any petition used by the plaintiff in its suit.

In both cases, the employer's consent to the performance of such work is a condition that the activity of an employee who works "part-time" with the employer can be considered as overtime if the work is performed beyond the specified weekly working hours. It does not have to be only written, but can also be made orally or silently.

Given the nature of the work, it is up to each employee how he or she organizes the work, **the employer's consent to the employee's work beyond the agreed working hours cannot be inferred only from the employer's knowledge that the employee works even after working hours or outside working hours**, but did not give the order to stop work and took note of the performance of work.