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CMS TMT Legal update – autumn/winter 2012

Hot topics:

First penalty for 'product placement'

The Radio and Television Broadcasting Council imposed its first penalty for so-called 'product placement' after two years of Act No. 132/2010 Coll being in force.

The Act aims to govern audiovisual media services, which permit 'product placement' (i.e. a product is featured within a programme unit in return for payment/consideration) in certain circumstances; declaring that in cases where the product placement meets statutory requirements, it cannot be deemed hidden advertisement, or more specifically 'hidden audiovisual commercial communication'.

The first ever penalty of CZK 250,000 was imposed for the undue visual and verbal emphasis placed on a food supplement. The Council concluded that the presentation resembled an advertisement and the intensity of the communication exceeded the permitted statutory level. The Act prohibits referring to or displaying a product in a manner which would directly encourage the purchase or rental of such a product.

Auction of frequencies prepared by the CTO

On 11 September 2012, the Czech Telecommunication Office (CTO) officially published a list of bidders in an auction for frequencies. In addition to existing operators, there was only one new bidder not already engaged in the sector. The primary aim of the auction was to attract a new operator to the local market, who would encourage a competitive environment in the oligopolistic Czech telecommunications industry.

The potential bidders believe that the conditions of the auction are such that, in reality, a potential bidder cannot purchase a large enough portion of the frequency band to allow for the development of their own network infrastructure. Thus, the new bidders only have the opportunity to operate in the territory of the Czech Republic as 'virtual mobile operators' within the framework of local roaming. Virtual mobile operators lease a portion of infrastructure from existing operators and therefore cannot operate entirely independently.

Be aware of fees for car radios

The Czech Radio (*Český rozhlas*) has announced that it plans to perform more consistent controls regarding the payments of fees for car radios. The majority of the general public is not fully aware of the existence of Act No. 348/2005 Coll., regarding radio and television broadcasting fees. The obligation to pay

such fees applies to owners of radio and TV sets. Individuals are obliged to pay the fee for one TV set and one radio, disregarding the fact of how many they actually own.

With regard to legal entities and entrepreneurs, the statutory obligation to pay fees applies to each receiver (radio or TV) owned. Fees are to be paid for each device capable of mediating radio or television broadcasting. Therefore, based on this logic such an obligation is also capable of applying to car radios, some of the latest mobile phones or computers with built-in FM or DVB-T cards.

Any fee payer failing to inform the relevant institution, within 15 days, of circumstances which give rise to his/her payment obligation will be obliged to pay an additional charge of CZK 5000 and CZK 10 000 for a radio and a TV set respectively.

CTO inspecting deceptive business practices

Service fees were recently introduced by satellite television service providers operating, among others, in the territory of the Czech Republic. The Czech Telecommunication Office initiated administrative proceedings against such service providers based on suspicions that they were committing administrative offences under the Consumer Protection Act (deceptive business practices) and under the Act on Electronic Communications (business in the field of electronic communications without proper notification). The administrative offence exists when a company introduces fees and fails to inform its customers about the change in general terms and conditions for using the services in accordance with the relevant provisions of the Act on Electronic Communications. Administrative proceedings could result in a penalty of up to CZK 25 million.

According to the court, using a mobile phone can cause brain tumors

The Court of Cassation in Rome has acknowledged a claim made by a fifty-year-old businessman suing the National Institute for Insurance and Occupational Safety and Health for failing to grant him a disability pension claimed in respect of an occupational disease. The businessman believes that he developed cancer as a partial result of his occupation, which required the use of his cell phone for an average of six hours a day over 12 years. The Court of Cassation has confirmed the original judgment, acknowledging a link between frequent use of a mobile phone and tumor development. Although the tumor has been successfully removed, the businessman still suffers great pain and is unable to work. The judgment may trigger a wave of other lawsuits in other states, including the Czech Republic.

New legislation:

Personal data protection on a European level

On 27 July 2012, the European Council presented its opinion regarding an extensive reform of personal data protection, which is to replace the existing Directive 95/46/EC. Unlike the existing Directive, the new legislation will be in the form of an EU regulation. Once adopted the regulation will become directly effective across all EU Member States. The draft regulation (regarding the processing and free movement of personal data (the 'Regulation')) has been known to the public since January 2012; its main aim being to remove the differences which exist between individual jurisdictions as to how the rights afforded through the protection of personal data are enforced in each country.

According to the European Commission, the aim of the Regulation is to strengthen the individual's right to privacy whilst using the Internet; an arena where an ever increasing amount of personal data is being exchanged. Whilst the Regulation will include new obligations, for example a new duty to notify, it will also make administrative procedures easier by implementing simplified procedures allowing personal data to be transferred outside of the EU). The Regulation also aims to regulate the consequences imposed when obligations owed in respect of personal data protection are breached.

The Regulation has its supporters and opponents. A draft of the Regulation is currently being discussed by the European Parliament and individual Member States. If adopted, it should come into force two years after its approval.

Bill on audiovision

On 26 October 2012, the Senate passed the government bill on audiovision. On 31 October 2012, it was delivered to the President of the Czech Republic for signing, however, the President returned the Act back to the Chamber of Deputies. This Act should unify legislation concerning audiovisual works and adapt it to the current dynamic development of modern technologies and the nature of the distribution processes.

The bill establishes a new State Fund of Cinematography (the 'New State Fund'), replacing the existing Czech State Fund for the Support and Development of Cinematography (the 'Old State Fund'). The State Fund of Cinematography will continue to be subject to its superior administrative authority, the Ministry of Culture of the Czech Republic. Compared to the existing Old State Fund, the New State Fund will pursue a number of new activities, in particular the management of fees, record keeping in the field of audiovision and, last but not least, it will provide financial support to the film industry. Save for minor exception, the planned effective date of the Act is 1 January 2013.

Regulation on advertising in the health care sector

On 25 October 2012, the Chamber of Deputies discussed, in a first reading, a draft amendment to Act No. 40/1995 Coll., on the regulation of advertising, and referred it to the Health Care Parliamentary Committee for discussion. The amendment is aimed to create mechanisms which reduce the scope of corruption and unethical conduct in medicinal product advertising and the healthcare sector and ensures the continued prevention of corruption in this area.

The proposed legislation classifies categories of possible prohibited activities falling within so-called 'sponsoring'. Within the framework of professional meetings any sponsor will be only be entitled to provide transport or the reimbursement of travel costs, accommodation, boarding and payment of registration fees. At the same time, new rules have been created

for agents who will become prohibited from pursuing their business during consultation hours. Logically, the amendment also takes into account the increased regulatory powers of the State Institute for Drug Control. Last but not least, a significant increase in the value of imposed penalties (up to three times) is to be introduced.

The amendment should come into force on 1 January 2013.

Amendment to the Act on Electronic Communications

The Amendment to the Act on Electronic Communications (the 'Act') came into force on 1 October 2012. The Act responds to the recent repeal of Sections 2 and 3 by the Constitutional Court. Such Sections governed the retention of data concerning the communications of mobile telephone operators. However, the court was of the opinion that the provisions were vaguely worded and lacked sufficiently safe rules regarding the security of stored data. Thus, such provisions were unable to ensure sufficient protection of personal data by way of data storage and by transfer of such data to authorised entities, or more precisely, the provisions did not clearly specify which entities were deemed to be authorised entities.

The repealed provisions of the Act were criticised for failing to identify a list of authorities authorised to request operational and localisation data, as well as for failing to specify the purpose for which such data may be required.

In response to the opinion of the Constitutional Court, the amendment contains a list of authorised entities; namely the Police of the Czech Republic, Prosecuting Attorney's Office, Security Information Service (*BIS*), Military Intelligence Service and the Czech National Bank. These entities are authorised to request information from mobile telephone operators and such operators are obliged to provide such information to the requesting entity free of charge.

An obligation has also been imposed on mobile telephone operators requiring them to store the data concerning the communications of their clients for a 'retention period' of six months. Operators will not be authorised to store or provide the content of their clients' communications. They will only be able to supply data regarding call duration, call location, the recipient of the call or the IP address.

Details concerning the scope of stored operational and localisation data, form and manner of transferring such data from an operator to authorised entities and the methods for supplying operational and localisation data are set out by an implementing decree.

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Upcoming seminars:

Act on Corporations Business Breakfasts/January 2013

Series of two breakfast seminars covering how your business will be affected by the new Act on Corporations. A general-focused seminar will be followed by a seminar concentrating on two most favourite types of companies in the Czech Republic.

CMS Civil Code Academy/ February-March 2013

This is a breakfast seminar series covering how your business will be affected by the new Czech Civil Code. Among others, the series will include the specific seminars for the new Civil Code for Banks; the new Civil Code and Real Estate Investors and Developers; Contracts under the new Civil Code; Insurance under the new Civil Code; Liability Issues under the new Civil Code; and Consumer Protection under the new Civil Code.

If you would like to stay informed about upcoming seminars, please email prague.events@cms-cmck.com