C/M/S/

Law.Tax

THE ISSUES 2013

UPCOMING LEGAL TOPICS IN THE CZECH REPUBLIC

CMS Cameron McKenna

2013

Contents

Welcome

Welcome to THE ISSUES 2013

Helen Rodwell
Managing Partner, Prague
T +420 2 96798 818
E helen.rodwell@cms-cmck.com

Iveta Plachá
Senior Partner, Prague
T +420 2 96798 878
E iveta.placha@cms-cmck.com

We are pleased to welcome you to our annual publication *THE ISSUES 2013*. In facing the existing market challenges, we believe that it is important to stay up to date with the latest legal developments affecting your day-to-day business and future investments. To help you prepare for what the year will bring, our team has put together an overview of the most important legal developments and hot topics for 2013.

2013 will be a landmark year for companies getting ready for the new Civil Code - the long-prepared re-codification of the Civil Code will bring a number of fundamental changes that will affect your every day business activities as well as your contractual relationships with customers, suppliers and business partners.

From a real estate point of view, the new Civil Code will introduce a number of new legal institutions, some of which are currently missing for those of you familiar with other Western European and CEE jurisdictions.

There are also other legal and sector developments, which require your attention – including the Act on Corporations, which will introduce substantial changes for companies, intended to bring greater efficiency to doing business in the Czech Republic.

Finally, there is a lot happening across the sectors and our sector specialists have looked at the hot topics offering a practical view on what to be aware of when driving your business forward in 2013.

Pleasant reading!

Helen Rodwell / Iveta Plachá

General Legislative Developments

Act on Corporations – be prepared for revolutionary changes

Ivana Fára
Senior Associate,
Corporate
T +420 2 96798 841
E ivana.fara@cms-cmck.com

The adoption of the new Civil Code and the Act on Corporations, effective as of 1 January 2014, is a step of great importance for the Czech law. There will be many crucial changes, not only as regards the overall regulation of the civil law, but also as regards the part dedicated exclusively to companies, which has been governed by the Commercial Code for more than twenty years now. The proposed Act on Corporations allows for greater contractual freedom and increased liability of parties entering into commercial law relations. These changes are intended to increase efficiency within business circles.

News regarding limited liability companies
The concept of a limited liability company will change. The new regulation will allow for an easier access to business. A limited liability company will no longer be obliged to create a registered capital in the amount of CZK 200,000. The Act on Corporations will now only require that the registered capital of a company amounts to at least CZK 1.

Another important change is the abolition of the ban to chain single-member companies, which had a particularly serious impact in respect of foreign countries.

The Act introduces the so called 'abandon right' of a shareholder, which allows the shareholder to unilaterally abandon the company under certain circumstances.

One shareholder of a limited liability company may, under the new Act, own more than one ownership interest. The company will be authorised to allow the issuance of more types of ownership interests with various rights and obligations attached. The Act introduces the possibility to issue a common certificate (as a type of securities) representing the shareholder's ownership interest. The shareholder will thus be a holder of a security serving not only as evidence of the shareholder's ownership interest but also, for example, allowing for easier transfers thereof.

Governance of a joint stock company according to the new Act
The Act introduces the possibility to govern a joint stock company in two different ways – either according to the standard dualistic model, consisting of a board of directors and a supervisory board, or electing a governing director and an executive board, in which case the company's governance will be concentrated within the powers of the executive board. It will be up to the shareholders to decide on the structure of the company's bodies.

Restrictions regarding internal transactions will no longer be so strict with regard to joint stock companies. Currently, the Commercial Code strictly regulates certain transactions among interrelated parties. The current legal regulation requires the drawing-up of expert opinions in order to determine the value of the transferred property in the case of certain transactions among affiliates, subject to a penalty of the absolute invalidity of the contract. The new

Act on Corporations will continue to impose certain requirements regarding transfers of property among affiliates; such requirements will however be very limited. Opinions regarding the price of the transferred property will be required only if the property is acquired from the founder or shareholder and only in the period of two years following the company's establishment. In addition, these rules must only be observed by joint stock companies, they will not apply to limited liability companies.

Good corporate governance

The Act on Corporations introduces a complex regulation of companies' corporate governance. The Act concentrates on the commencement of a contract on the performance of office, remuneration of members of the companies' bodies, acting of members of bodies and their liability for damage. In addition, the provisions in the Act are based on a test of insolvency which bans the payment of any performances in cases where, as a result of such action, the company would become insolvent and the creditor jeopardised. This protection will be based on the actual condition of the company's property and liability of members of the company's bodies.

The Act amends and specifies in more detail the degree of liability of members of the company's bodies. It stipulates in more detail rules for the determination and approval of remuneration of members of the company's bodies or rules for the removal from the office as a result of a breach of obligation.

The so called 'business judgment rule' is introduced, thus giving the opportunity to the governing body to prove that the body acted lege artis when taking its decisions. If this can be shown, the body will bear no liability for any damage (even if caused by such body) because anyone who proceeds with due care and in the company's interest may not bear all of the risks occurring in the course of business activities.

Members of the governing body (including former members) will newly be directly liable to creditors of an insolvent company for the observance of all of its obligations, provided that the court so decides. This provision in the Act is based on the principle that if a manager has caused or has not prevented (although he could) the company's insolvency, he should bear any possible risks in relation to the creditors.

Is it necessary to undertake any steps?

After the effective date of the Act, such provisions of the companies' memorandums or articles of association that are in contradiction with the mandatory provisions of the new Act will automatically cease to exist. Thus, each company will need to revise the provisions of their founding documents in order to make sure that the provisions are not in contradiction with the Act on Corporations. In addition, the company will be liable for the drawing-up of new wording of articles/memorandum of association that will no longer contain the automatically repealed provisions and shall ensure that such wording is deposited with the collection of documents maintained by the competent registry court no later than six months after the effective date of the Act. If this duty is not complied with within the stipulated period, the company may even be dissolved (in extreme cases).

Within two years after the effective date of the Act on Corporations, you may fully subject your company to the new Act. Alternatively, you may choose not to do so, in which case legal relations regarding your company will be governed by two Codes, i.e. by the provisions of the currently applicable Commercial Code and by the provisions of the Act on Corporations; this would result in ambiguity, administrative costs and uncertainty. Therefore, each company should be actively interested in its future existence after the effective date of the Act on Corporations.

New law to regulate due day of payments

Barbora Dubanská
Senior Associate,
Commercial, Regulatory & Disputes
T +420 2 96798 811
E barbora.dubanska@cms-cmck.com

Radka Lörincová
Junior Associate,
Corporate
T +420 2 96798 893
E radka.lorincova@cms-cmck.com

On average, the Czech businesses pay their invoices in 47 days; this means 17 days later than agreed. The European average is 56 days; however, this figure is getting worse.

A new amendment to the Commercial Code, which shall implement the EU Directive 2011/7/EU on Combating Late Payments in Commercial Transactions, aims to improve payment discipline and to protect small and medium sized businesses against possible abusive behavior of strong buyers. If approved by the Parliament, the amendment shall come into force on 1 March 2013.

Some welcome the draft of the amendment with excitement; others criticize it for its interference with the contractual freedom in private law, which, in their opinion, will suppress business rather than foster it.

The crucial changes to be introduced by the amendment are as follows:

Statutory maturity date of receivables
So far, the maximum maturity date of receivables has not been generally prescribed by law. The amendment is to enact that in business relations receivables shall be paid within 30 days from receipt of an invoice, or alternatively within 30 days from delivery of goods or services if an invoice has been received before goods or services were delivered. This basic deadline for the maturity date of receivables maybe extended to 60 days, if so agreed by the parties.

In relations with public contracting authorities, the receivables shall always become due at latest within 60 days from receipt of an invoice. In other cases, the parties may agree on a maturity date exceeding the limit of 60 days, but only when such an extension is not grossly unfair to the creditor.

To assess whether a particular contractual extension is grossly unfair, it will be necessary to examine all circumstances of the transaction and to consider whether there are objective reasons for departing from the statutory provisions. As a result of this, the suppliers will most likely opt to 'voluntarily' choose a later maturity date rather than to file an action and risk the termination of the business cooperation.

The amendment, however, does not affect the right to agree on a payment in installments. If the debtor is in default with the payment of only one installment, the creditor is entitled to demand the default interest only from the amount of the respective installment.

Furthermore, the amendment will enact a maximum time period for the acceptance of the goods and services to 30 days. The extension of such period will be possible only in exceptional cases.

Due day of payments for agricultural and food products
The idea of a statutory maturity date of receivables is not completely strange to the Czech legal system. The Act on Significant Market Power in the Sale of Agricultural and Food Products from 2010 contains a provision that sets the deadline for payment of an invoice at the 30th day after the date of receipt of goods or services. This law applies to relations between suppliers and their buyers (typically large retailers) where, due to market conditions, the supplier becomes so dependent on its buyer to get its goods to consumers that the buyer may impose unilaterally beneficial conditions for the buyer.

The breach of this obligation may lead to a fine of up to CZK 10 million, or 10% of their net turnover in the last accounting period.

Other CEE jurisdictions
The Czech Republic is not an exception within the CEE region; other jurisdictions have specific regulations for due payments in the food sector. For instance, in Romania, an invoice for fresh food products such as meat, milk, fruit and vegetables must be paid within 30 days. The Russian regulation is even stricter since the payment term depends on the date of expiry and varies between 10 – 45 days.

Other CEE jurisdictions have similar regulations that apply generally to other sectors as well. For example, the Slovenian regulation is the closest to the newly proposed Czech law – the invoice shall be paid within 30 days, if not agreed otherwise; the overall maturity date shall not exceed 60 days. In Hungary, the 30-day maturity date is subject to a proper delivery of the invoice within 15 days from the date of receipt of the goods.

Increase of the minimum default interest
Another fundamental change to be brought by the amendment is the increase of the minimum interest rate for late payments. The new statutory default interest rate shall correspond to the reference rate of the central bank increased by a minimum of eight percentage points. Due to this increase of the default interests, it will no longer be worthwhile for the buyers to seek credit at the detriment of the suppliers, as it will be significantly more expensive to do so than if the credit were taken out through a bank. Another change is that in the event of the debtor's default, the creditor will be able to charge the default interest without prior notice reminding the debtor of his obligation to pay.

Compensation for recovery costs
In addition, the amendment is to set a special fixed penalty for debtors to cover basic administrative costs of recovering a claim. Under the Directive, the penalty should amount to at least €40 and is payable automatically after the debtor's default. The exact amounts of the penalties in the Czech Republic are yet to be specified in a decree. Creditors shall be also entitled to reasonable compensation for additional costs incurred due to the debtor's default in excess of the said penalty. Those will typically be the costs for legal representation and private enforcement.

What's new in employment law?

Tomáš Matějovský
Partner, Head of Commercial,
Regulatory & Disputes
T +420 2 96798 852
E tomas.matejovsky@cms-cmck.com

Jakub Tomšej
Junior Associate,
Commercial Regulatory & Disputes
T +420 2 96798 808
E jakub.tomsej@cms-cmck.com

The year 2012 has brought about a significant development in the Czech labour law, the results of which remain a hot topic for 2013. Below is a brief summary of the most interesting points.

January 2012 – Amendment to Labour Code
A significant bill to amend the Labour Code entered into force. The amendments have affected, inter alia, the regulation of defined-term agreements, probation period, non-compete agreements, validity and invalidity of employment contracts, termination of employment, rights of employees in the case of transfer etc. The majority of the newly introduced changes aim to support the legal position of employers in the field where the regulation is traditionally rather employee-friendly.

February 2012 – Illegal work investigations
Following an increase of penalties for illegal work, the labour authorities increasingly investigate cases where the employment relationship is 'hidden' behind commercial-law agreements that lead to evasions of social security and health insurance contributions and decreases the protection of the employee. Such illegal work, if discovered, may lead to a fine of up to CZK 10,000,000. While illegal work has been a hot topic of 2012, the government has already announced that the number of controls shall drop in 2013.

April 2012 – Occupational health care reform
A reform of the health system has entered into force, including a reform of occupational health care. The Act on Specific Health Services inter alia requires job applicants to undergo a medical examination before entering into an employment relationship. If such an examination is not performed, the job applicant will be regarded as unfit for work. The job applicant bears the cost of such medical examination unless agreed otherwise or unless he or she enters into employment with the employer. Whilst the Act came into effect on 1 April 2012, a transition period was allowed during which the occupational medical services could be provided based on the preceding law. This transition period will end on 1 April 2013.

May 2012 – Court rules on non-compete clauses
The Czech Supreme Court held that an employer may unilaterally withdraw from a non-compete clause only upon providing legitimate reasons for withdrawal as are contained in the clause. A non-compete agreement is an instrument to protect employer's interests following the termination of employment. An employee is entitled to compensation amounting to at least one half of his/her monthly earnings for each month of compliance with non-compete. It is unclear what reasons may be considered as legitimate and therefore there is always some risk that once a non-compete agreement is concluded, an employer may find it hard to contract out of the duty to pay the compensation. As a result of the Supreme Court ruling, many employers no longer include non-compete clauses in their employees employment contracts.

June 2012 – Whistleblowing regulation
As a consequence of several recent discussions about whistleblowing and its insufficient regulation in the Czech Republic, the Czech Government approved the proposed adoption of a new act to protect whistleblowers. Discussions about its content have been held throughout the rest of 2012. If approved by the Czech Parliament, the new law may become effective in 2013. It should protect whistleblowers against discrimination at their workplace. It is also proposed that whistleblowers may be provided with specific rights in criminal proceedings that follow their report.

August 2012 – Personal use of work equipment
The Czech Supreme Court has ruled that frequent unpermitted private use of an employer's computer equipment by an employee is a valid reason for which an employer may validly terminate a contract of employment. This decision has significantly increased legal certainty when interpreting the relevant Czech Labour Code provisions. The Supreme Court has confirmed that an employer is allowed to gather evidence against an employee who they suspect of violating the statutory ban on using an employer's means of production without consent. The employer can use such evidence in court proceedings against such an employee. Whether the manner of an inspection will be deemed adequate will still need to be assessed on a case by case basis.

September 2012 – Kurzarbeit
The Czech Ministry of Labour and Social Affairs has created the project 'Education for Stability' to support the maintenance of jobs for those employers who are temporarily unable to assign work to employees. In times when no work can be allocated to such employees, they shall be given the opportunity to attend training sessions or other education development sessions, which will be partially funded by the state. In order to qualify for the subsidy, employers must be temporarily failing to assign work to employees for 20-60% of the employee's working hours (i.e. usually 1 – 3 days per week). The total amount that may be drawn by an employer is CZK 31,000 (approx. €1,250) per employee per month and CZK 500,000 (approx. €20,000) per month, on average, in total.

November 2012 – Civil Code harmonization
Following the adoption of a new Civil Code, which shall enter into force in 2014, the Czech government has published a proposal of a bill to amend the Labour Code to comply with the new regulation. The Labour Code shall newly state that employees may not waive their statutory granted rights. Rules regarding possible deviation from statutory rules upon mutual agreement shall be slightly changed. The Labour Code shall continue to forbid some general civil law instruments, such as retention rights or assignment of salary receivables. The final version of the Labour Code amendment will be known in the first months of 2014.

Changes to civil litigation proceedings

Tomáš Matějovský
Partner, Head of Commercial,
Regulatory & Disputes
T +420 2 96798 852
E tomas.matejovsky@cms-cmck.com

Jakub Tomšej
Junior Associate,
Commercial Regulatory & Disputes
T +420 2 96798 808
E jakub.tomsej@cms-cmck.com

2012 was a year when some significant changes to the Act No. 99/1963 Coll., Civil Procedure Code were discussed and approved. Below is an overview of some of these changes.

Enforcement of claims – effective as of 1 January 2013
Under the existing laws, creditors whose claims are not satisfied by debtors and who hold an enforcement title (such as a final and un-appealable court decision or a direct enforceability deed) can choose whether they will seek the satisfaction of their claim in a court proceedings according to the Civil Procedure Code or through a judicial executor (i.e. a person authorised by state to enforce claims as his entrepreneurial activity) pursuant to the Code on Enforcement Procedure. Although the latter process is more expensive, it is faster and more efficient and thus it has become a preferred option.

Whereas the creditors now have a right to choose which option they prefer, and the means of enforcement do not differ to a great extent, the new amendment will particularly change the current practice in the following ways:

— Almost all enforcement proceedings will be carried out by judicial executors. Court commissioners (i.e. court employees responsible for performing certain operations in civil court proceedings on behalf of the court) will conduct only non-business related enforcements.

— The amendment introduces certain new means of enforcement, such as a sale of debtor's receivables or shareholding interest in a limited liability company through public auction. Previously, the creditor only had a right to become the owner of the debtor's receivable and had to wait until the receivable was paid.

— In cases where a debtor has claims that will become due in the future (such as claims from pension schemes), under the amendment such receivables shall now be terminated before their maturity by operation of law and the proceeds will be used to satisfy the creditor's claims.

— As an alternative to current enforcement proceedings by way of a sale of a real estate or an enterprise in a public auction, the amendment introduces a new form of enforcement by way of a court administration of an enterprise or real estate. An administrator appointed by the court will administer the enterprise or property and the proceeds of the administration will be used for the satisfaction of creditor's claims. These methods should be more flexible than the process of a sale of the property or enterprise, which is quite complicated under Czech law, and will apply where the court concludes that administration is the more appropriate course of action.

— The court will have the right to determine the list of debtor's movable assets which should be subject to enforcement simply by using the information from public registers (such as pledge register, register of motor vehicles, etc.). This should significantly simplify enforcement proceedings, as the court will not have to physically check the scope of movables owned by the debtor.

In addition, judicial executors will no longer have the authority to execute deeds on the direct enforceability of claims. Such deeds will only be executed by public notaries.

Supreme Court appeal - effective as of 1 January 2013
The Czech Supreme Court shall unify Czech case law by way of issuing opinions and especially deciding special appeals (in Czech *dovolání*) against decisions of Czech appellate courts. While a Supreme Court appeal is only permitted in cases explicitly mentioned in the Civil Procedure Act, the list of such cases is rather wide and the Supreme Court has allegedly suffered a heavy workload, which extended the length of some appeal proceedings by up to 2-3 years or even more.

Under the newly adopted rules, a Supreme Court appeal may now only be admissible against a decision of an appellate court if it depends upon resolving a significant question of law,

1. where the appellate court has come to a different conclusion than that which the Supreme Court held in its case law
2. about which the Supreme Court has not yet decided or there are differing approaches to such a question in the Supreme Court case law or
3. about which the Supreme Court has already decided but, in the claimant's view, it should change its approach.

Therefore, the Supreme Court appeal may only deal with legal conclusions of the appellate court; the fact that the appellate court may not have correctly interpreted the statement of facts, the evidence etc. may not be subject to the Supreme Court proceedings.

New Civil Code adjustment – not yet approved
Last but not least, the Czech government has already introduced a bill to amend the Civil Procedure Code to comply with the new Civil Code. Both the new Civil Code and the said bill should become effective as of January 2014.

Under the bill, legal regulation of non-contentious civil court proceedings shall be shifted to a separate piece of legislation. Several changes to the competences of courts at various levels of the court systems should be implemented. As the new Civil Code introduces some new legal instruments (e.g. family undertakings) and enhances the legal protection of some existing instruments (e.g. possession in good faith) the regulation of the proceedings should be also accordingly amended.

CMS will be following the status of the legislation proceedings. For further information, please do subscribe for our on-line Law-Now newsletter at www.law-now.com.

Sector Focus: Consumer Products

Major changes in regulation of the food sector

Ivana Fára
Senior Associate,
Corporate
T +420 2 96798 841
E ivana.fara@cms-cmck.com

Radka Lörincová
Junior Associate,
Corporate
T +420 2 96798 893
E radka.lorincova@cms-cmck.com

The Czech Ministry of Agriculture has recently proposed extensive amendments to the Act on Food and Tobacco Products ('Food Act'), and to the Act on Czech Agricultural and Food Inspection Authority ('CAFIA'). If approved by the Parliament, the amendments shall come into force by 13 December 2014 and, together with the new EU Regulation on provision of food information to consumers ('Regulation'), will bring about the biggest changes in the regulation of the food sector in the past 15 years.

The purpose of the new regulation is threefold: to strengthen the protection of consumers' health; to increase consumers' awareness; and to increase the efficacy of supervision in the food sector. The crucial changes to be introduced by the new regulation and amendments are as follows:

Labelling requirements
The Regulation extends and specifies the existing labelling requirements, especially with regard to nutritional information, allergenic substances and the country of origin.

Nutritional declarations are already mandatory when nutritional statements are written on the packaging of food. However, according to the Regulation, the labels on all processed food and drink products shall provide further information on energy content, fat, saturated fat, carbohydrates, sugars, protein and salt, expressed as amounts per 100g or 100ml. Portion values may also be provided on a voluntary basis. Alcoholic beverages shall remain exempt from the duty to provide mandatory nutritional declarations and a list of ingredients.

The provision of allergen information will be required for all the stages of the food chain i.e. food intended for the final consumer, food supplied by mass caterers, and foods supplied to mass caterers. The current labelling requirement for pre-packed foods, whereby they must declare allergenic ingredients, is maintained, but the allergens must now be emphasized within the ingredients list. Allergen information must also now be provided for non pre-packed foods. For non pre-packed foods, this will be achieved, in accordance with the amendment to the Food Act, by placing such allergen information within close proximity to where non pre-packed foods are displayed.

The Regulation also stipulates that the country of origin for meat from pork, sheep, goats, and poultry will need to be indicated. Such information is currently compulsory only for beef, honey, olive oil, fresh fruits, and vegetables.

There will also be a new labelling requirement concerning so-called 'imitation foods'. The new requirement is that the labels of such foods must clearly state, in a prominent font size and next to the food's brand, that an ingredient that would normally be expected to be found in the food has been replaced.

Furthermore, in order to boost legibility of labels to customers, the provided information will have to have a mandatory minimum font size of 3 mm for lettering, and the label must maintain a clear contrast between print and the background.

The new labelling rules will apply from 13 December 2014, except for the obligation to provide nutrition information, which will apply from 13 December 2016.

Supervision
The amendment to the Food Act will have the effect of redistributing the supervisory duties among authorities. The Ministry of Agriculture proposed that its subordinate organizations shall perform the official inspection of the entire chain of production and consumption of food, including the inspections in food service providers (hospitality services). This would be a change from the current system, where such supervisory activities are conducted by offices subordinate to the Ministry of Health.

Furthermore, according to the amendment to the Act on CAFIA, the inspection authorities will be able to impose a wider range of sanctions. The inspection authorities shall, for example, be able to prohibit the use of premises of an uncooperative food business operator, suspend the placement of mislabelled or poor quality food products on the market, and order quality checks of such products in certified laboratories.

Penalties
The amendment to the Food Act will also considerably increase the penalties that may be imposed on food business operators who are in breach of their duties. For example, the existing penalty of up to CZK 1 million for misconduct of an administrative nature is to be increased to CZK 3 million. The penalties for non-compliance with the quality requirements, storage conditions, labelling or other requirements arising from EU legislation will be able to be imposed up to the amount of CZK 10 million.

Other notable changes
The amendment to the Food Act will further specify the requirements for food business operators regarding food of unknown origin, compliance with the storage conditions, and quality requirements.

The European Commission launches study on choice and innovation in the food sector

Barbora Dubanská
Senior Associate,
Commercial, Regulatory & Disputes
T +420 2 96798 811
E barbora.dubanska@cms-cmck.com

Radka Lörincová
Junior Associate,
Corporate
T +420 2 96798 893
E radka.lorincova@cms-cmck.com

Following the publication of the report on competition law enforcement and market monitoring activities by European competition authorities in the food sector in May 2012, the European Commission is now launching a study to assess the impact of recent developments in the European retail sector on consumers.

In the context of rising food prices, volatile commodity markets, and perceived concerns about the functioning of the overall food supply chain, the food sector clearly remains a priority for the European Commission and national competition authorities of the EU member states.

The final report of the study, which is expected by the end of 2013, will evaluate the impact of different actors in the food supply chain on the choice and innovation in recent years.

The study shall primarily focus on the variety of products available to consumers in their shopping area, and the introduction of retailers' own brand (private label) products. It shall assess whether these factors negatively affected choice and innovation in the European food sector to the detriment of the final consumers. It will also look at the levels of retail concentration in consumer areas.

As the increasing popularity of retailers' own label products undoubtedly strengthens their bargaining power over suppliers, the study should also provide valuable information for the assessment of unfair trading practices in the food sector. The outcomes of the study may have an impact on future legislation in this sector.

Legal consequences of the 'prohibition' on alcohol

Tomáš Matějovský
Partner, Head of Commercial, Regulatory & Disputes
T +420 2 96798 852
E tomas.matejovsky@cms-cmck.com

Radka Lörincová
Junior Associate, Corporate
T +420 2 96798 893
E radka.lorincova@cms-cmck.com

On 14 September 2012, the Czech government was forced to declare a ban on sales of spirits due to a significant number of methanol poisonings. The prohibition lasted two weeks during which the sale of spirits containing at least 20% of ethanol (alcohol) or more was completely prohibited.

As one of the measures adopted in order to lift the prohibition and reopen the liquor market, the Czech government introduced new strip stamps. In this respect, the government also prepared and adopted a new regulation concerning the sale of spirits with an alcohol content of 20% vol. (published under No. 317/2012 Coll.). This regulation came into force on 27 September 2012 and introduced a compulsory declaration of origin for spirits, which now applies to all food business operators involved in placement of spirits in the market.

Spirits with an alcohol content of 20% vol. can be now offered for sale, sold, and offered for consumption in any other form in the Czech Republic and exported and distributed out of the Czech Republic only if accompanied by a certificate (declaration) of origin in every stage of its placement in the market.

The respective certificate of origin shall include a test report from an accredited laboratory established in any Member State of the European Union. Each purchaser that is a food business operator shall be given a copy of this statement in paper form bearing the stamp and signature of the responsible person, or electronically with an advanced electronic signature.

The Court of Justice of the EU on health and nutrition claims: Wine may not be promoted as being 'easily digestible'

Frances Gerrard
Senior Associate,
Head of Consumer Products
T +420 2 96798 834
E frances.gerrard@cms-cmck.com

Radka Lörincová
Junior Associate,
Corporate
T +420 2 96798 893
E radka.lorincova@cms-cmck.com

The labelling and advertising of food products claiming health and medical benefits in the European Union must comply with the Regulation No. 1924/2006, on Nutrition and Health Claims Made on Foods ('Regulation'). Even after the European Commission finally published the list of permitted health claims for use on foods, some uncertainty remained about the extent to which nutrition and health claims can be properly made.

The Court of Justice of the EU ('Court') has, in a recent case, sought to clarify the principles for determining whether a statement can be properly considered a health claim. The case concerned the use of the claim 'easily digestible' for a wine. German producer Deutsches Weintor claimed that, because of the lower acidity, its wine causes less adverse effects compared to other wines. The national supervisory authority objected to the use of the phrase 'easily digestible' on the basis that it is a health claim under the Regulation and such claims are not permitted in relation to alcoholic beverages.

The Court considered that, within the definition of health claim, the Regulation provides no information as to whether the relationship between health and food must be direct or indirect, or as to its intensity or duration. The Court consequently found that, when interpreting whether a statement is a health claim, the relationship between food and health must be understood in a broad sense.

According to the Court, the concept of a health claim:

— covers not only claims promising improvements in health as a result of consumption of a food, but also any claim implying the absence or reduction of negative or harmful effects on health, which would otherwise accompany or follow such consumption (i.e. claims of mere preservation of a good state of health) and

— refers not only to the effects of the direct consumption of a precise quantity of a food which is likely to have only temporary or fleeting effects, but also those of the repeated, regular, even frequent consumption of such a food.

In light of the above conclusions, the Court ruled that the phrase 'easily digestible' in the context of reduced acidity of wine is indeed a health claim. In this landmark decision, the Court clearly prioritized the protection of public health by adopting such a broad interpretation of the concept of health claims.

Sector Focus: Energy & Utilities

Energy performance certificates

Lukáš Janíček
Senior Associate,
Head of Energy & Utilities
T +420 2 96798 833
E lukas.janicek@cms-cmck.com

Lucie Hallóová
Associate,
Energy & Utilities
T +420 2 96798 809
E lucie.halloova@cms-cmck.com

There has been passed an amendment to the Energy Management Act (406/2000 Coll.), which aims to bring Czech law in line with the European directive on the energy performance of buildings. The majority of the provisions of the amendment introducing new obligations relating to the so called 'energy performance certificates of buildings' came into force on 1 January 2013. According to its critics (including the Czech President), the new rules will cause unnecessary expenditure for both the private and public sectors and will distort the free-market environment.

Concept of the certificates

The concept of energy performance certificates is not new to Czech law. The Energy Management Act already regulates general matters regarding this issue; this will not be affected by the Amendment. An energy performance certificate provides information about the energy performance of a building and it has to be executed by an energy expert (newly to be called 'specialist') listed by the Ministry of Industry and Trade. The performance is calculated using a standardised method. The certificate is executed for a building as a whole and it applies to each of its parts (units). The certificate remains valid for 10 years unless it expires in connection with major structural modifications of the building.

The certificate is a mandatory part of the building's technical documentation. It also forms a part of an application for a building permit or a notification of a construction.

Construction and major structural modifications of buildings

The number of situations when one needs to arrange for the certificate has been extended by the Amendment. As of 1 January 2013, developers, owners and condominiums of owners are required to ensure that an energy performance certificate is executed in connection with the construction of a new building or major structural modifications of existing ones no matter how large their floor area is (until 31 December 2012, this applied only to buildings with a floor area larger than 1,000 square metres).

Selling and renting of buildings

Another situation when the owners and condominiums of owners are newly required to ensure execution of a certificate is when selling or leasing a building or an integral part of the building. This obligation also has to be fulfilled with regard to existing buildings with no certificate executed during their construction or major structural modification. The certificate or its certified copy must be presented to a potential buyer or tenant before entering into an agreement. Upon the conclusion of the agreement, the certificate or its certified copy must be handed over to the buyer or the tenant. Finally, a seller or a landlord also has to ensure that the data stated in the certificate is presented in materials promoting the sale or rent of the building. The reason for this is that the certificate provides important information to a potential buyer or tenant, as it provides comparable details about the building's operating costs.

Special rules for existing administrative and residential apartment buildings until 2015

Special rules shall apply for existing administrative and residential apartment buildings that are being used (this does not include residential houses for which the general rules as described above apply). From 2015 onwards, developers, owners or condominiums of owners will have an obligation to ensure execution of the certificate for these buildings no matter if they are being leased, sold or modified.

Sanctions for non-compliance with the regulation

A breach of the obligations introduced by the Amendment shall constitute an administrative offence, for which individuals can be fined up to CZK 100,000 (approx. €4,000) and other legal entities up to CZK 200,000 (approx. €8,000).

Emission Allowances Auctions

Radim Kotlaba
Senior Associate,
Energy & Utilities
T +420 2 96798 830
E radim.kotlaba@cms-cmck.com

Karel Petrželа
Junior Associate,
Energy & Utilities
T +420 2 96798 856
E karel.petrzela@cms-cmck.com

The new Act no. 383/2012, on Conditions for Emission Allowances Trading (the 'Act') has been published in the Collection of Laws. The Act shall replace a significant part of current act no. 695/2004 Coll. and implement the revised European Union Emissions Trading Scheme into Czech law. Most of the provisions of the new legislation will be effective as of 1 January 2013.

Under the current legislation, the emission allowances were granted for free o the emission producers who only paid a related gift tax. The new Act introduces an auction system for emission allowances allocated to the Czech Republic. In 2020 all emission allowances shall be sold in auction instead of being granted for free. During the transition period until 2020, 645 million allowances shall be allocated to the Czech Republic. 342 million allowances shall be sold in the auction and 303 million shall be granted to emission producers for free to secure their competitiveness on the market. The expected income from the allowances auction is €1.5 billion to 5 billion.

Every emission allowance represents emission of one tonne of CO2 equivalent. If the emissions produced by an emission producer exceed their allowance, the producer shall pay €100 for every emission allowance missing. The Act further designates in accordance with the European legislation that at least 50 per cent of the earnings from the allowances auction shall be used for projects linked to lowering emission of greenhouse gas and mitigation of negative consequences of climate change. Earnings may be used, amongst others, for improvement of energy efficiency in industry.

Technical infrastructure construction simplified

Radim Kotlaba
Senior Associate,
Energy & Utilities
T +420 2 96798 830
E radim.kotlaba@cms-cmck.com

Karel Petrželа
Junior Associate,
Energy & Utilities
T +420 2 96798 856
E karel.petrzela@cms-cmck.com

The recent amendment to the Act no. 183/2006 Coll., Building Act effective from 1 January 2013, intends to simplify the planning and construction permitting procedures particularly in relation to the construction and permitting of technical infrastructure.

The technical infrastructure includes, amongst others, aboveground and underground electronic communication lines, aboveground and underground electricity transmission or distribution system lines, gas transmission or distribution system lines or heat energy distribution system lines.

Pursuant to the amendment, the replacement of technical infrastructure lines will not require a planning permit in case the following requirements are met: (i) the route of the lines and the technical specifications are not changed and (ii) the boundaries of the current protection or safety zone are not exceeded.

Furthermore, the construction of technical infrastructure will not require a construction permit or notice, meaning that this type of construction will be carried out solely on the basis of a planning permit. Nevertheless, the construction will still be subject to the occupancy / use permit.

Law: Act no. 350/2012 Coll. amending Act no. 183/2006 Coll., Building Act

Obligatory financial security for the prevention and remedy of environmental damage

Lukáš Janíček
Senior Associate,
Head of Energy & Utilities
T +420 2 96798 833
E lukas.janicek@cms-cmck.com

Karel Petrželа
Junior Associate,
Energy & Utilities
T +420 2 96798 856
E karel.petrzela@cms-cmck.com

From January 2013 the law imposes new obligations onto operators regarding certain environmentally sensitive activities, these are set out in Annex no. 1 to the Act no. 167/2008 Coll., on the prevention and remedy of environmental damage (the 'Act'). The list of relevant activities set out in Annex 1 of the Act (the 'Activities') which create new obligations which operators will have to comply with include: the operation of any facility which is subject to an integrated permit (IPPC), facilities for recovery, disposal, collection or purchase of waste, abstraction of and discharges into surface water and groundwater, managing and transporting hazardous chemical substances and chemical preparations or stationary sources of air pollution.

Operators who carry out such Activities will now have to conduct environmental damage risk assessments. Terms and details of the risk assessments and relevant reports are contained in Governmental Regulation No. 295/2011 Coll. (the 'Regulation').

Operators who carry out such Activities are also generally obliged to arrange 'financial security' for the reimbursement of costs incurred by any environmental damage; that is unless one of the following exceptions applies:

— the operator can prove, based on the risk assessment performed in accordance with the Regulation, that the potential environmental damage of the Activities will not exceed CZK 20,000,000

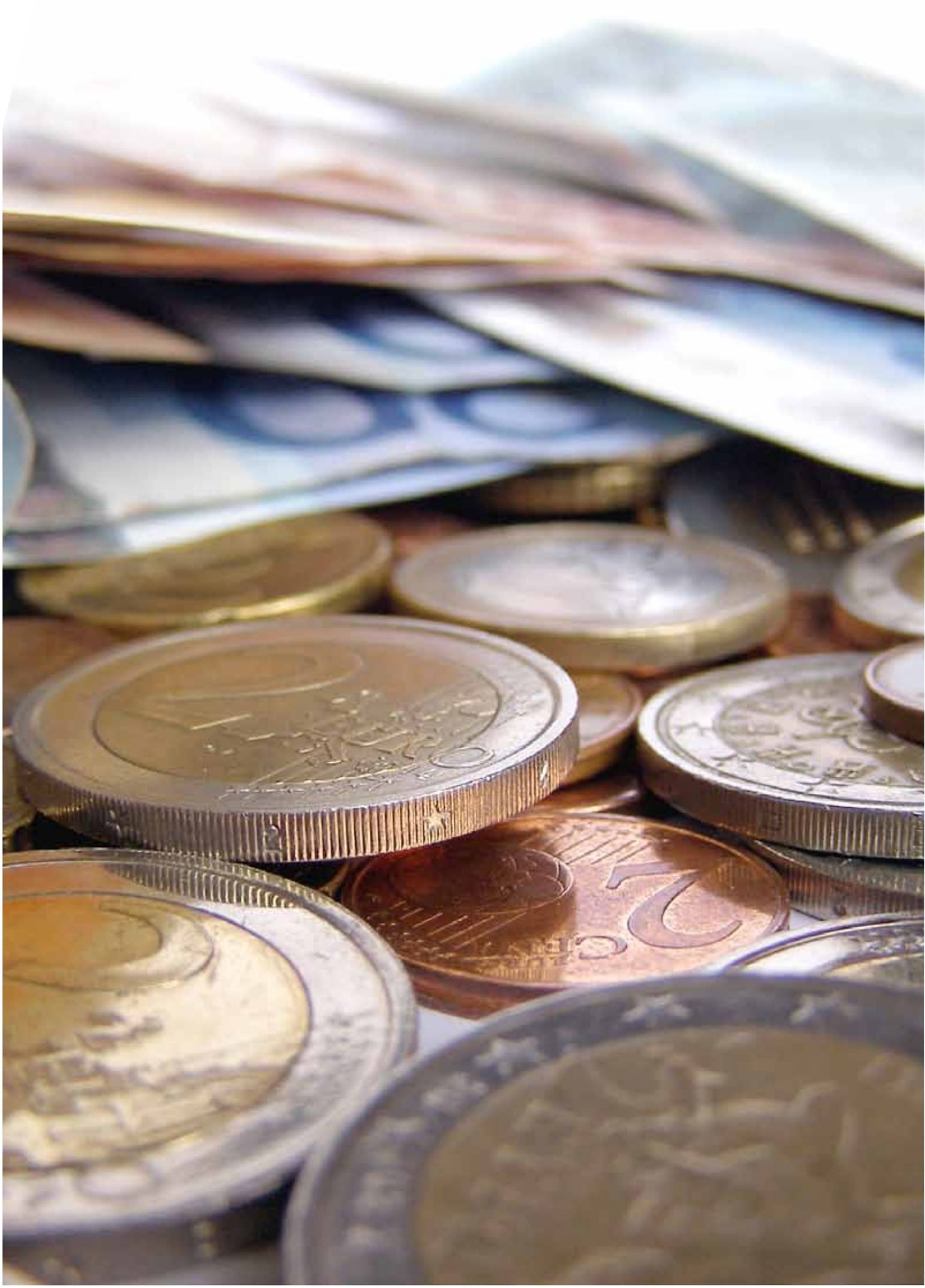
— the operator is registered in the EMAS Programme (or has initiated activities required for registration) or

— the operator has a certified environmental management system which complies with CSN EN ISO 14000 standards (or has initiated activities for obtaining such certification).

It may be that your business falls within one of these exemptions and thus under the Act you will not be obliged to create the above mentioned 'financial security'. Despite this, if your business operations include any one of the Activities, you should perform the required risk assessments pursuant to the Regulation. You should also conduct the new risk assessment if any substantial change is introduced to the performance of any Activity.

If a business does not create 'financial security' for Activities, as required by the Act, it may not carry out such Activities. Breach of the obligation to have 'financial security' may also result in the business being fined for an amount up to CZK 1,000,000.

The law is not entirely clear as to how the amount of adequate 'financial security' should be calculated; neither does it define what will be considered a suitable form of 'financial security'. The Regulation anticipates that 'insurance products' or 'banking products' will be used as 'financial security'. In our view other forms of 'financial security', such as an adequate reserve fund, would also be satisfactory.



Sector Focus: Financial Services

Tighter rules for consumer loans

Tomáš Matějovský
Partner, Head of Commercial,
Regulatory & Disputes
T +420 2 96798 852
E tomas.matejovsky@cms-cmck.com

Jakub Tomšej
Junior Associate,
Commercial Regulatory & Disputes
T +420 2 96798 808
E jakub.tomsej@cms-cmck.com

The complex draft legislation regarding amendments to the Act on Consumer Loans (ACL) has so far been successfully proceeding through the law making process. Unless something unexpected happens the draft shall become effective at the beginning of 2013.

The motivation behind the draft came from the European level as the Czech Republic is obliged to implement an European directive harmonizing the determination of the annual percentage rate of charge concerning credit agreements for consumers. Yet this change in itself is relatively minor in comparison with the full content of the draft amendments; there are many more significant modifications that are included with the draft.

These modifications are aimed at enhancing consumer protection rather than implementing any mandatory EU rules. The area of consumer protection has been considered a problem of the ACL in the Czech Republic. A number of the significant changes are as follows:

1. **Creditworthiness of the debtor**. The draft modifies the provision relating to the loan providers' duty to properly determine the creditworthiness of the consumer before the loan agreement is concluded. It shall be newly stated that an agreement concluded despite the fact that the debtor's ability to repay was not assessed thoroughly (i.e. with regards to the extension of the loan, period of time for which it is provided, debtor's income and the purpose of the loan) will be deemed invalid.
2. **Ban of bills of exchange and cheques**. The usage of the bills of exchange or cheques for the purposes of securing the loan shall be completely banned. However, as the ACL does not state that a bill of exchange and/or cheque securing the consumer loan shall be invalid, the loan provider may still be able to enforce it. The law only states that the loan provider shall be in such case liable for damages sustained by the consumer as a result of the breach of the ban. This may be problematic in practice.
3. **Security of receivables**. The draft states that value of the security must not be evidently disproportional to the value of the receivable. From a practical point of view, it means that it will not be possible to put, for example, real estate in pledge in cases of loans of lesser value.
4. **Customer service phone lines**. Another new provision prohibits the use of phone numbers with higher rates when offering, negotiating or brokering the loan. Nevertheless, due to the insufficiently defined legal drafting of the amendments, the providers will still be able to use expensive lines for services such as obtaining information relating to the current extent of the debt (i.e. those services that cannot be considered *offering, negotiating or brokering of the loan*).
5. **Transparency in relation to the contract with the broker**. The draft brings a new set of rules applicable to the consumer – broker relationship. Primarily, the consumer will be entitled to withdraw from the contract with the broker if the loan agreement is not arranged and entered into in 14 days following the conclusion of the broker contract. Furthermore, the information on any reward for a broker shall be included in the contract provided the reward is paid by the consumer.

As there is a strong possibility that the draft will soon become effective, it is advisable to pay attention to the prospective changes outlined above. Note that the draft also proposes to tighten the possible sanctions arising from the breach of the providers' duties. The maximum financial penalty threshold shall be increased from 5,000,000 CZK to CZK 20,000,000 (approx. €800,000).

Latest insurance law developments

Patrik Przyhoda
Senior Associate,
Head of Corporate
T +420 2 96798 858
E patrik przyhoda.cms-cmck.com

Magda Němcová
Junior Associate,
Corporate
T +420 2 96798 837
E magda.nemcova@cms-cmck.com

Insurance Act in the new Civil Code
The new Civil Code for the Czech Republic comes into force as of 1 January 2014 (the 'New Civil Code'). The New Civil Code will incorporate the currently separate rules contained in the Insurance Act. The incorporation of such rules into the New Civil Code will inevitably have an impact upon the insurance sector: The New Civil Code including the following important changes:

— it creates a new right allowing the insurer to terminate an insurance contract with a policyholder in the event that the insurer did not receive all relevant and necessary information from the policyholder prior to entry into the insurance contract

— the lack of the insurance interest on the policyholder's side may cause the insurance contract to be deemed invalid

— it allows an option for insurance premiums to be paid by the insurer to the policyholder in non-monetary form

— it creates a new duty on the insurer to inform the policyholder about any discrepancies between the offered insurance and the policyholder's requirements

— it creates a new right for the policyholders allowing them to terminate the insurance contract if the insurer breaches the equity basis setting out the calculation / the determination of the amount of the insurance premium to be paid and

— the insurer shall newly define in the insurance terms and conditions terms such as insurance event, entitled person, and insurance risk etc.

Amendment to the Act on insurance intermediaries
The Ministry of Finance has prepared an amendment to the Act on Insurance Intermediaries (the 'Amendment'). This Amendment shall be discussed in the near future by Parliament.

The Amendment is due to change two main areas: (a) the current structure of insurance intermediaries and (b) it will strengthen the position of policyholders in the insurance sector.

— The five existing categories of insurance intermediaries will be reduced to two categories. The purpose of the reduction is to help decrease the regulatory differences that currently exist across the five categories and to help policyholders to avoid the confusion currently caused by the existence of five different categories of insurance intermediaries. Additionally, the Amendment will make it compulsory for candidates who wish to become an insurance intermediary to pass a professional exam.

— The transparency of the key information provided to the policyholders will be strengthened. Although the policyholder is currently provided with key information, the form and the manner of how this information is presented is not currently regulated. Insurance intermediaries and/or insurance companies will, following the Amendment, now be obliged to provide key information (e.g. consequences of the early termination of the insurance contract, how to resolve disputes and/or submit complains etc.) to the policyholders on a (new) special form. Details regarding the special form will be specified in an implementing provision.

Additionally, the Amendment extents the liability of insurance intermediaries and insurance companies by setting out new types of administrative offences that may be committed; for example carrying out insurance activities without a licence, breach of the duty of confidentiality or breach of the duty to inform the Czech National Bank about changes in data registered in the state register. Moreover, the fine which may be imposed has been increased from CZK 10.000.000 (approx. €396.000) to CZK 20.000.000 (approx. €792.000).

The extension of the competency of the financial arbitrator
Parliament will discuss in the near future a new amendment to the Act on the Financial Arbitrator regarding the scope of their powers. The new amendment will allow the financial arbitrator to deal with disputes between insurance companies or insurance intermediaries and the policyholder or potential policyholders arising during the process of offering, providing, or mediating the insurance policy.

Revision of the Insurance Mediation Directive
The revised Insurance Mediation Directive ('IMD') aims to efficiently improve regulation in the retail insurance market. It seeks equal position and conditions for all participants involved in the selling of insurance products as well as strengthening policyholders' protection. The overarching objectives are undistorted competition, consumer protection, and market integration.

Particularly, the revised IMD intends to achieve the following:

— extend the scope and application of the current Insurance Mediation Directive to all distribution channels (direct writers, car rentals)

— each insurance intermediary who is about to carry out his/her insurance activities in a different member state based on the freedom of services, shall inform the supervising body in the different state about his/her intention to operate in his/her market

— the insurance intermediary who is about to carry out his/her insurance activities in a different member state based on the freedom of establishment, shall now have to submit to the supervising body of that member state more details about the insurance activity e.g. business plan, list of persons authorised to run the insurance subsidiary etc.

— a new duty placed on the insurance company to inform the policyholder (prior the closing on an insurance contract) about e.g. the class of insurance, the methods of the voluntary settlements

— ensure sellers' professional qualifications correspond with the complexity of products sold and

— a new duty placed on the insurance company to ensure that the description of the insurance product which falls within the IMD is published on its websites.

Foreign account tax compliance Act – influence the Czech insurance
Almost two years ago the United States adopted the Foreign Account Tax Compliance Act ('FATCA'). FATCA shall have a wide impact on companies based in the U.S. as well as foreign companies with American assets or clients. Under FATCA, a foreign financial institution ('FFI') including insurance companies, may enter into an agreement, by 30 June 2013, with the Internal Revenue Office requiring information regarding the American accounts of FFIs to be provided. If the FFI does not conclude on such an agreement, all payments originally coming from the U.S. will be subject to a 30% withholding tax. The aim of this law is to reduce tax avoidance. The implementation of FATCA will be phased in, starting from June 2013.

Amendment to the Insurance Act – obligatory payment to the fire departments
The Parliament of the Czech Republic shall discuss an amendment to the Insurance Act (the 'Amendment'). This Amendment places a new duty on insurance companies to pay an obligatory amount from their received contributions to support financing fire departments. Once this amendment is adopted, insurance companies shall have to transfer a certain amount of money received from their policyholders (the policy on the responsibility for damage caused by a vehicle) to the Ministry of the Interior on the special account (the 'Ministry'). After transferring the money to the Ministry, this money shall be allocated to the respective municipalities and afterwards to the fire departments.

Sector Focus: Hotels & Leisure

Strengthening air passengers' rights in the EU

Lukáš Hejduk
Senior Associate,
Head of Hotels & Leisure
T +420 2 96798 892
E lukas.hejduk@cms-cmck.com

In October 2012, the European Court of Justice (the'ECJ') surprised many observers with its keenly-awaited judicial decision on air passengers rights. As a result of the judgement, air passengers within the reach of EU law can enjoy the first benefits of bolstered consumer protection. However, downsides may follow.

In its decision in the joined cases of *Nelson v Lufthansa* (C-581/10) and *TUI* and *Others v CCA* (C-629/10) the ECJ made another step to strengthen the protection of consumers of air travel. According to the decision, passengers whose flights are delayed for three hours or more must now be offered compensation. The amount of compensation to be offered is subject to regulation No 261/2004, and is outlined in more detail in both the table and Box 1 below. The ECJ also clarified the differences that had existed between denied boarding, cancellation and delay of flight; the ECJ held that there is no difference between passengers suffering a cancellation of a flight and passengers with a delayed flight who suffer a lost of time. Nevertheless, this opinion has not made its way directly into the adopted regulations establishing common rules on compensation and assistance to passengers in the event of denied boarding or cancellation or long delay of flights.

From now on the passengers whose flights are delayed should, in some circumstances, be entitled to the following monetary compensation:

Compensation for delay		
Distance	Delay	Amount
1,500 km and less	3 hours or more	€250
More than 1,500 km in the EU Other flights between 1,500 km – 3,500 km	3 hours or more	€400
More than 3,500 km	More than 4 hours	€600

The ruling is not the first occasion the ECJ has shocked airlines with such a controversial decision; a similar ruling was made in *Sturgeon v Condor* (joined cases C-402/07 and C-432/07) in 2009. The controversy of this decision led national courts to seek the opportunity to ask the ECJ once again if it still holds the same views on this issue. In *Nelson v Lufthansa* (C-581/10) and TUI *and Others v CCA* (C-629/10), the ECJ confirmed its previous ruling. The recent decision also clarifies that if the air carrier operator can prove the delay was caused by circumstances beyond its actual control (such as political instability or severe weather that makes flying dangerous), then no compensation will be payable.

Despite appearing to be welcome news for the consumer, it is still possible that the air carrier operators will pass on the increased financial burden (in part due to potentially higher insurance premiums) to its customers in the form of higher prices. In that case, passengers could end up being worse-off than they were before the decision.

For the time being, one thing is certain – consumer protection is a key objective of the EU and it is likely that the ECJ will continue its pattern of passing decisions that enhance consumer rights.

Information to note:

Since 2005, Regulation (EC) No 261/2004 has guaranteed passengers rights to different forms of compensation if:

1. they are denied boarding against their will
2. their flight is cancelled
3. their flight is delayed.

The Regulation seeks to minimize the number of passengers denied boarding against their will by asking volunteers to surrender their bookings in exchange for benefits and to fully compensate those who are finally denied boarding. Passengers who are denied boarding have the option to cancel their flights (subject to reimbursement) and they have to be given the option of continuing the flight under satisfactory conditions, including entitlement to reasonable services and monetary compensation. Similar rules apply to those passengers whose flights were cancelled.

In case of delay, the operators have to treat the waiting passengers in the manner prescribed by the Regulation. For instance, if the scheduled time of departure is delayed for at least two hours (in the case of flights of maximum of 1500 kilometres) the air carrier operator must offer passengers meals and refreshments free of charge and, in addition, two telephone calls or e-mails free of charge. If the expected time of departures delayed into the next day, the passengers are entitled to hotel accommodation and they are also entitled to be provided with transport between the airport and the place of accommodation.

How to make a claim?

In case passengers suffer delay, they should contact the airline office from where the ticket was bought or follow the airline's website and the steps it prescribes for making a claim. In case of delay, passengers should always find out the reason and the length of the delay as the information will be useful in future communication with the airlines.

Sector Focus: Lifesciences

Latest developments in the Lifesciences sector

Tomáš Matějovský
Partner, Head of Commercial, Regulatory & Disputes / Head of Lifesciences
T +420 2 96798 852
E tomas.matejovsky@cms-cmck.com

Karel Petrželа
Junior Associate, Lifesciences
T +420 2 96798 856
E karel.petrzela@cms-cmck.com

Amendment to the Act on Pharmaceuticals

The Czech Chamber of Deputies is currently processing a draft of an amendment to the Act on Pharmaceuticals that implements Directive 2011/62/EU, regarding the prevention of the entry of falsified medicinal products into the legal supply chain, and Directive 2010/84/EU regarding the pharmacovigilance. It addresses mainly the following issues:

— **Patient Information.** The draft amendment introduces an obligation for pharmacists to inform patients whether the particular medicinal product is subsidised by the public health insurance and if so, in what amount.

— **Prevention of abuse of medicinal products.** The draft amendment imposes quantitative restrictions on sales of medicinal products and establishes a register monitoring their distribution. Based on the information about the amounts previously issued to a particular patient, the pharmacists shall be able to determine what amount of the particular product may still be sold to the patient. If the amount was to exceed the specified limit, it could be no longer issued.

— **Protective elements on outer packaging.** All medicinal products for human use shall have protective elements on their outer packaging. These elements shall enable the distributors and persons authorized to supply them to verify their authenticity, identify the individual packaging and make sure the outer packaging has not been tampered with. However, the elements shall not appear on medicinal products that are not subject to prescription or that are listed on the special list adopted by the European Commission.

— **Safety of medicinal products.** Each company authorized to sell medicinal products will newly be responsible for the continuous monitoring of the safety of its products after their launch. The aim is to help to detect the previously unrecognized risks associated with the administration of the medicine.

Health claims and nutrition claims on food supplements

To address the issue of customers confusing food supplements with pharmaceuticals, it is required under Czech law that food supplements only contain health claims that comply with specific food legal regulation as food supplements are legally considered as food.

Labels of food supplements must contain a statement indicating the importance of a varied and balanced diet and a healthy lifestyle, the quantity of the food and pattern of consumption required to obtain the claimed beneficial effect, a statement addressed to persons who should avoid using the food (where appropriate), and an appropriate warning for products that are likely to present a health risk if consumed excessively.

Health claims can be divided into two groups. Health claims referring to the reduction of disease risk have to be individually reviewed by the European Commission. The list of 'approved' health claims shall be published by the European Commission. Health claims other than those referring to the reduction of disease risk also have to be authorised by the European Commission but the review procedure is primarily done by national authorities.

Authorised claims are listed in the Union Register of nutrition and health claims made on foods, an interactive database available on the Commission's website (ec.europa.eu/nuhclaims/).

From the beginning of December 2012 all claims that are not authorised and are not on hold or under consideration shall be prohibited.

Revision of EU regulatory framework for medical devices

On 26 September 2012, the European Commission published the proposals for the Regulation on medical devices and the Regulation on in vitro diagnostic medical devices which shall replace the existing medical devices directives.

The regulations introduce, amongst others, the following changes:

— **Extension of the scope.** The Regulation on medical devices shall also cover products manufactured utilizing non-viable human tissues or cells that have undergone substantial manipulation (except for products covered by Regulation (EC) No 1394/2007) and implantable, or other invasive products, without a medical purpose with characteristics and a risk profile similar to those of medical devices.

— **Qualified representative**. Manufacturers shall dedicate a 'qualified person' with expert knowledge in the field of medical devices who would be responsible for regulatory compliance.

— **Traceability of medical devices throughout the supply chain**. Economic operators shall be able to identify an economic operator who supplied them with a medical devices and economic operators, health institutions or healthcare professionals to whom they have supplied medical devices. Manufacturers shall assign their devices a Unique Device Identification (UDI) to allow identification and traceability of their devices.

— **Extended database of medical devices**. The database shall provide comprehensive information on medical devices and make this information available to the public. Registration requirement. Information describing and identifying the devices as well as their manufacturers, authorised representatives, and importers shall be registered in an electronic system.

— **Stricter requirements for clinical evaluation**. The Regulation introduces a new system of principles governing the clinical evaluation procedure and an elaborate procedure for clinical investigations including rules for post-market clinical follow-up investigation.

Amendment to Act on Pharmaceuticals to allow use and growing of cannabis

On 7 December 2012, the Chamber of Deputies of the Parliament of the Czech Republic passed an amendment to the Act on Pharmaceuticals which allows persons and entities holding the relevant license to grow cannabis for medical use. The license shall be granted for a limited period of time on the basis of a selection procedure. The State Institute for Drug Control shall buyout all the produced cannabis and the licensed producers shall not be allowed to sell the produced cannabis directly.

Amendment to Advertisement Regulation Act to prevent distortion of the market

The Chamber of Deputies of the Parliament of the Czech Republic is discussing an amendment to the Advertisement Regulation Act. This amendment deals with the fact that healthcare specialists receiving uncommon benefits from pharmaceutical companies may feel obliged to prescribe specific pharmaceuticals.

One of the issues addressed is the so-called 'doctors' congress tourism' - as the academic congresses are sometimes held in exotic destinations, giving the doctors 'above standard' conditions. The proposed amendment specifies that the destination and duration of academic congresses must be adequate to the purpose of such meetings. In addition, not only academic congresses but also other similar expert meetings will be regarded as an advertisement on pharmaceuticals and thus will be regulated accordingly.

Furthermore, non-interventional post-marketing studies will be expressly deemed to be advertisements on pharmaceuticals and should be subject to stricter regulation. The amendment also imposes a ban on advertising pharmaceuticals in the form of a contest or lottery based on the number of prescribed, consumed, or dispensed pharmaceuticals, and a ban on offering bonuses for dispensing prescription pharmaceuticals covered by public health insurance.

Sector Focus: Real Estate & Construction

Lease of Business Premises under the New Civil Code

Lukáš Hejduk
Senior Associate,
Real Estate & Construction
T +420 2 96798 892
E lukas.hejduk@cms-cmck.com

Lucie Kislerová
Associate,
Real Estate & Construction
T +420 2 96798 782
E lucie.kislerova@cms-cmck.com

The New Civil Code is slowly approaching its projected entry into force planned on 1 January 2014. Amongst all the innovations it is bringing, there are certain major changes with regard to the regulation of leases. As these changes shall apply also to lease agreements concluded and existing before the respective date of the New Civil Code's effectiveness, they are particularly important for all those currently in tenancy relationships.

1. Change of the owner of the leased property

The first major change that all landlords and tenants should be aware of is the new rule relating to the change of the owner of the leased property. In case the landlord transfers the ownership right to the property, the new owner is not bound by contractual obligations of the original lease agreement, unless he specifically knew about them. He is only bound by statutory regulation. This new provision clearly protects the purchaser against any disadvantageously agreed conditions of the original contract that he is not aware of, but it does not protect the tenant in these situations. This rule applies not only to the leases of business premises, but to all leases in general.

The change of the ownership of the leased property itself is not a sufficient reason for notice to be given. Only if the new owner reasonably believes that the purchased property is not leased does he have the right to terminate the lease. He has the right to terminate the lease within three months after he learned or should have learned that the property is leased and who is the tenant. The tenant's rights against the original landlord are not affected.

2. Termination of the lease of business premises

The New Civil Code sets out the circumstances under which a lease of business premises for a definite period of time can be terminated before the agreed date. The lease can be immediately terminated in the event of a gross violation of duties of a party when significant damage is caused to the other party. The tenant may also terminate a lease for a definite period of time when the circumstances under which the lease agreement was concluded have changed to the extent that the tenant can not reasonably be required to continue the lease.

The lease can also be further prematurely terminated subject to the termination notice when the activities for which the business premises are designated cannot be carried out. That can be either because the tenant lost the capability to perform such activities, or because the premises are no longer appropriate for accommodating the activities (i.e. after their reconstruction or removal by the landlord).

The question remains whether this provision will also automatically apply (after the date of the New Civil Code's effectiveness) to those current lease agreements, where the statutory provisions on terminating the contract set out in the current legislation have been excluded.

3. Objections to the notice of termination

The new law brings a significant change into the process of giving notice of termination (in Czech: *výpověď*") for leases of business premises. In these events, the party receiving the notice of termination is entitled to raise objections in writing against the notice within a period of one month from the date of its receipt. Without raising the objections on time, the party cannot seek judicial review of the legitimacy of the notice of termination.

4. Compensation for takeover of the customer base

The New Civil Code recognizes the value of the customer base (in Czech: '*Zákaznická základna*'). There are situations when, after the termination of a lease of business premises, the new tenant may benefit from the takeover of the customer base created by the former tenant. If the terminating party in this case is the landlord, the former tenant is then entitled to compensation for the benefit acquired by the Landlord or a new tenant upon the assumption of the customer base created by the outgoing tenant (based on the New Civil Code it is not clear who shall pay the compensation and how the compensation shall be determinate). Nevertheless, this rule does not apply when the tenant receives the notice of termination for gross violation of its obligations.

5. Transfer of the lease of business premises

Another new provision is the specific provision on transfers of a lease of business premises. Subject to prior approval of the landlord, the tenant may newly transfer the lease in connection with the transfer of his business activity for which the leased premises are used. Both the landlord's consent and the agreement on the transfer of the lease shall be in writing.

Recommendation

Since most of the New Civil Code's provisions are of a dispositive nature, it is recommended to conclude amendments to the current lease agreements avoiding application of those aforementioned new rules that are not convenient for the parties or which are ambiguous. It is also recommended to take into account the provisions of the New Civil Code in the negotiations of the new lease agreements. In this manner, the risks that may arise after 1 January 2014 can be eliminated.

Construction products in European legislation

Barbora Dubanská
Senior Associate,
Head of German Desk
T +420 2 96798 811
E barbora.dubanska@cms-cmck.com

On 1 July 2013, the Regulation 305/2011/EU laying down harmonised conditions for the marketing of construction products becomes fully effective and replaces the former Directive 89/106/EEC. The aim of the Regulation is to simplify and clarify the existing framework, and improve the transparency and the effectiveness of the existing measures of putting construction products on the market.

It might appear that both the Regulation and the Directive are rather similar to each other. The Direction's main purpose was to unify the elementary construction requirements, from which the technical requirements for construction products can be derived, and to provide conditions for putting construction products onto the European single market including their CE marking. The new Regulation provides conditions for putting the construction products onto the market through harmonised rules for defining the quality of construction products in relation to their performances, and for using CE marking for there products. Nevertheless, there are significant conceptual differences, for example in the meaning of CE marking of the products.

The Directive introduced harmonised technical specifications to describe the products. These were adopted by the Regulation. However, the concept of demonstrating that the product complies with the harmonised technical specification has not remained. The new concept is based on declaration on the product's performance. The user of the product (e.g. a designer) can decide, whether the particular product is suitable to be used for a particular construction. CE marking used to be a manufacturer's declaration that the product complies with the harmonized technical specifications. According to the Regulation, CE mark carried by the product will now declare that the information about the product's performance has been obtained in compliance with the requirements provided by the Regulation, therefore, this information must be accurate and reliable. To summarise, the Directive provided requirements the products had to meet, whereas the Regulation introduces methods on how to describe the products' performance. According to the Regulation, the products that have been described using these methods can be CE marked.

Although the regulation applies to construction products, not the construction works themselves (these are regulated by national legislations), the Regulation provides elementary requirements the construction works should meet. In addition to the Directive's six requirements (mechanical resistance and stability; safety in case of fire; hygiene, health and the environment; safety in use; protection against noise; energy economy and heat retention), the Regulation introduces one additional requirement – sustainable use of natural resources. The construction product must not jeopardize construction works meeting these requirements.

The Regulation aims to remove barriers to trade in the field of construction product. The CE marked products should be the only marking of conformity of the construction product with the declared performance and compliance with applicable requirements relating to Union harmonisation legislation – this principle is expressed even more clearly in the Regulation than it used to be in the Directive. There can be problems arising from national systems of products marking. This has also been the case in Germany, where the Commission started investigations based on numerous complaints made by manufacturers from EU who had experienced difficulties selling construction products on the German market. In Germany, there is the national system of Bauregellisten in use, which requires Ü marks for some of construction products, even for those which have already been CE marked. This additional testing, the Commission argues, may create barriers to trade on the European Single market. However, at the time it is unclear what the result of the Commission's action will be.

The member states remain entitled to provide their own regulations – these cannot, however, create barriers to trade on the Single market, with the exception of cases where the member states deem necessary to ensure the protection of health, the environment and workers when using construction products.

Sector Focus: TMT

Auction of frequencies and first virtual operators on the Czech market

Ivana Fára
Senior Associate,
Head of TMT
T +420 2 96798 841
E ivana.fara@cms-cmck.com

Last year, the Czech Telecommunication Office (CTO) announced a tender for the rights to use radio frequencies for providing a public communications network, and officially published a list of bidders on 11 September 2012. Besides the existing mobile network operators, only one new bidder, so far not engaged in the sector, has expressed its interest in taking part. The auction was expected to fetch around CZK 7.4 billion.

Despite the fact that the selection procedure was originally scheduled to close at the end of November 2012, the period of auctioning has been extended and its closing will depend on future interest of bidders in the offered frequencies. In December 2012, the CTO stated that candidates had expressed their continued interest and that the auction would continue in 2013.

The primary aim of the auction was to attract a new operator to the local market, who would encourage a competitive environment within the oligopolistic Czech telecommunications market, as well as to provide high-speed mobile Internet services in the new so-called 'fourth generation networks' both to individuals and business entities.

According to potential candidates, the auction conditions have been set so that candidates virtually loses the chance to efficiently auction a portion of the frequency band, which would have allowed them to develop their own network infrastructure. As a result, the new bidders only have an opportunity to operate in the territory of the Czech Republic as the so-called 'mobile virtual network operators' within the framework of local roaming.

Mobile virtual network operators lease a portion of infrastructure from existing operators and therefore cannot operate entirely independently. Mobile virtual network operators have no own networking infrastructure and provide their customers with services in a network leased from standard mobile operators. Mobile virtual network operators currently operate in most European countries. Like other mobile operators, they provide their customers with services, billing, operational and technical information for users and terminal settings. They have own SIM cards, own mobile network codes and own roaming agreements.

So far, potential mobile virtual operators on the Czech market have met with resistance from existing mobile operators unwilling to allow them access to their networks. The CTO's analysis shows a lack of sufficient competition on the mobile services market in the Czech Republic due to the fact that operators act in concert and do not allow the entry of other firms. As a result, the Office aims to facilitate the entry of new virtual operators on the market with a goal of price reduction and extended offers. Nevertheless, according to the CTO's statement, the impact of the newly introduced regulatory measures will not be apparent until 2014 at the earliest.

Reports about negotiations between the first virtual operating entities and existing mobile operators have been emerging on the market. The first signs appear to promise only the reselling of services of existing mobile operators, but the aim is likely to be achieved – services of the first virtual operator are being offered at lower prices compared to the existing Czech 'standard'.

The presence of virtual operators will not only extend the telecommunications services market, but also start a price war which will benefit customers and allow them to better select the cheapest and best operator according to their preferences. Another option is also to extend the market by establishing separate branches of three local operators.

Future developments of the telecommunications services market and behaviour of mobile operators towards their virtual colleagues will become apparent during this and subsequent years. We can, at least, expect lower prices and wider choice of service providers on the telecommunications market.


CMS offices
Rio de Janeiro
Beijing
Shanghai
Aberdeen
Edinburgh
Moscow
Hamburg
Amsterdam
Utrecht
London
Bristol
Antwerp
Duesseldorf
Cologne
Leipzig
Dresden
Berlin
Warsaw
Brussels
Luxembourg
Frankfurt
Prague
Kyiv
Paris
Strasbourg
Stuttgart
Munich
Vienna
Bratislava
Budapest
Zurich
Lyon
Ljubljana
Zagreb
Milan
Belgrade
Bucharest
Sarajevo
Sofia
Rome
Tirana
Barcelona
Madrid
Lisbon
Seville
Algiers
Casablanca

Law-Now™

CMS Cameron McKenna's free online information service

Receive expert commentary and analysis on key legal issues affecting your business. Register for free email alerts and access the full Law-Now archive at **www.law-now.com**

CMS Cameron McKenna LLP
Mitre House
160 Aldersgate Street
London EC1A 4DD

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000

1301-000080-3