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Obsah

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Anti Vendor lock-in - Unfavourable provisions in contracts for the supply of ICT products

When concluding contracts for the supply of ICT products, the issue of setting up mutual rights and obligations, especially intellectual property rights and related aspects in these contracts proves to be problematic. As a result of inappropriate rights and obligations, it is not uncommon for the user of an ICT product to be completely dependent on the supplier who originally supplied the ICT product for maintenance, updates or modifications, thereby effectively creating a monopoly in these aspects, both legally and technically. The user is thus unable to carry out the necessary activities on his own and cannot turn to other entities, even though this would often save considerable financial resources. There are also cases where users try to counter these situations with not entirely appropriate mechanisms, such as the overuse of the concept of employee works.

Since the setting of mutual rights and obligations, especially intellectual property rights and related rights, in ICT supply contracts has its own specifics, we have decided to present some typical disadvantageous provisions in these contracts, which result in forced binding of the user to the supplier, referred to as vendor lock-in, or otherwise worsen the user's position.

For the sake of completeness, we consider it appropriate to mention briefly the nature of the licence. A licence is an authorisation to deal in a certain way with an object subject to copyright or other intellectual property (e.g. a computer program), in particular to use it, but also to modify it, incorporate it into other systems, etc. The term licence is also used to refer to a licence agreement, i.e. a contract under which the provider, who has intellectual property rights, grants the user the right to use those rights, in other words, the provider grants a licence by means of a licence agreement. The extent to which this exploitation is possible is determined by the licence agreement or by the relevant laws. It should be emphasised that in the case of copyright licences, the right to use the subject matter subject to copyright is granted, but the copyright itself is not transferable. In this respect, the licence can be likened, for example, to a situation where we can use an apartment because we have rented it, but not because we have bought it.

Please note that this document is intended as a guide; the presence or absence of any of the following examples of arrangements should not be inferred from the presence or absence of the contract. The use of this document is not a substitute for a legal, technical, economic or other analysis of the relevant contract (draft contract) carried out by a qualified person.

Typical disadvantageous contractual clauses:

- The licence for an ICT product is strictly for the user to whom it was originally granted - it is not possible to sub-license and it is not possible to assign the licence, even to entities that are subordinate (owned by the user), superior (owned by the user) or have a common superior (owner).
- The ICT product license is strictly for the user also in the sense that if any transformation of the user occurs, e.g. a spin-off, a merger with another entity or a change of legal form, the license will expire.
- The licence for the ICT product is strictly for the user also in the sense that if there is any change in its ownership or similar structure, e.g. if the user acquires a new owner (partner, shareholder) or a superior entity, the licence shall terminate.
- The licence for an ICT product is linked to specific characteristics of the user, e.g. student status, non-profit status or population; if the user loses these characteristics, the licence expires.
- The user is prohibited (not allowed) to change, modify or extend the ICT product without the cooperation or consent of the supplier, the user is not authorized to do these activities himself and is not authorized to do these activities through another entity.
- Technical support of the ICT product, its maintenance and other regular activities shall be carried out exclusively by the supplier, the user is not authorised to carry out these activities himself and is not authorised to carry out these activities through another entity.
- The user shall not have access to the technical documentation of the ICT product.
- The user shall not have access to the source code of the ICT product, if the user has access, the user shall not be entitled to any intervention in this code.

- The license is limited by the number and parameters of user stations, if these aspects change (e.g. if new computers are purchased), the license is non-transferable and therefore unusable.
- The contract contains a clause on total or partial exclusion of liability for malfunctions of the delivered ICT product.
- The supplier has contractually ensured (or it is not contractually excluded) the possibility to remotely decommission the ICT product.
- * Although the ICT product has been customised, the supplier grants a non-exclusive licence to it and therefore retains the right to grant this licence to other entities that can use the same product, as well as the right to use the product itself.
- The licence for an ICT product is limited in time, territory or purpose in a way that is not appropriate to the expected time, territory or purpose of use of the ICT product.
- The licence obliges the user to use the ICT product unconditionally.
- The licence granted for the ICT product does not cover updates, corrections or modifications to the ICT product, even if they are made by the supplier.
- The contract stipulates the user's non-disclosure agreement (NDA) so extensively that the user is prevented from using the intellectual property rights (licence), or stipulates the obligation of confidentiality so extensively that the user is obliged to keep the information confidential even if it is not necessary.
- Definitions of terms are missing (usually because one or both parties to the contract assume that these are familiar terms) or interpretative provisions.
- The performance is delivered in stages (analysis, implementation, operation, maintenance), but the value of the performance is not determined for each stage separately. This causes complications, in particular if any of the envisaged stages are no longer performed and it is therefore necessary to settle rights and obligations only to the extent of the stages that have already taken place.
- The supplier is entitled to not complete and/or deliver the ICT product or service for too many reasons, or even for no reason at all.
- The contract does not stipulate the termination of the user's obligation to pay the performance to the extent of the amount corresponding to VAT in the event that the performance to this extent has already been paid directly to the tax authorities due to the supplier's status as an unreliable VAT payer (provisions of § 106a and § 109a of Act No. 235/2004 Coll., on VAT).
- The supplier has not assumed the so-called risk of change of circumstances, or even the user has assumed this risk (§ 2620(2) of the Civil Code).
- The supplier's guarantee for the ICT product is missing.
- There is no provision that the ICT product or service delivered will be performed in such a way that its performance will comply with the user's legal obligations (e.g. in the area of cyber security or personal data protection).
- There is no provision for the supplier's obligation to carry out maintenance and development, in particular the obligation to carry out these activities due to changes in legislation governing the user's activities.
- There is no provision for an exit strategy, i.e. a procedure for termination of the user's cooperation with the supplier, in particular an arrangement ensuring the user unconditional and complete migration of all necessary data so that the successor ICT product can be used without problems, regardless of who supplied the successor ICT product and how it differs from the previous ICT product.
- It is not excluded, or even explicitly contractually allowed, for the supplier to exercise a so-called right of retention (§ 1395(1) of the Civil Code), especially with regard to user data.
- There are no penalties for non-compliance.
- The user does not make sufficient use of the possibilities provided by Act No. 134/2016 Coll., on public procurement, e.g. the possibility to reserve changes to the commitment pursuant to Section 100 of this Act, although this possibility is recommended by a government resolution (Government Resolution No. 450 of 14 June 2017).

We recommend that the above-mentioned provisions in licensing agreements be limited as much as possible and preferably replaced by arrangements that give the user the broadest possible control over the ICT product. We believe that a properly designed licence agreement will help users to meet the expectations they have of an ICT product without being forced to endure licence restrictions or being forced to develop a product that is already available on the market in-house to secure the necessary rights.

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