GLOOR SIEGER

IP News: Revision of the Unfair Competition Act (UCA) and the Price Indication Ordinance (PIO)

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Dear clients and friends

The revised Federal Act against Unfair Competition (**UCA**) as well as the revised Price Indication Ordinance (**PIO**) came into effect on April 1, 2012. The highly controversial revision of the provision on general terms and conditions of business (**GTC**) will however only be effective as of July 1, 2012.

The following changes came into effect on April 1, 2012:

- **Information obligations in electronic commerce** (cf. para. 2 hereunder)
- **Prohibition of certain offers for directory entries and advertisements** (cf. para. 3 hereunder)
- **Prohibition to disregard advertising bans in telephone directories** (cf. para. 4 hereunder)
- **Prohibition of certain promises of financial benefit** (cf. para. 5 hereunder)
- **Prohibition of snowball systems, pyramid schemes and similar promotions** (cf. para. 6 hereunder)
- **Revision of the PIO: Price indication obligations for additional service providers** (cf. para. 7 hereunder)

The revision regarding GTC will come into effect on July 1, 2012 (cf. para. 1 hereunder)

1. USE OF ABUSIVE GTC (Article 8 UCA)

The core of the revision is the new Article 8 UCA regarding the *examination of contents* of GTC (i.e. contractual provisions which are preformulated by a party in view of an undefined number of contracts). Before, GTC were only considered an act of unfair competition if they disadvantaged a contracting party by (a) substantially and misleadingly deviating from the (non-mandatory) statutory provisions or (b) inequitable allocation of rights and obligations. Due to these high thresholds Article 8 UCA was barely applied. In the future, any GTC shall be considered unfair to the extent that they provide for substantially imbalanced contractual rights and obligations to the detriment of consumers and contrary to the principles of good faith.

As opposed to its old version the new Article 8 UCA shall only govern the relationship between businesses and consumers (B2C) and not the relationship between consumers (C2C) nor - according to the prevailing opinion - that between businesses (B2B). Further, the revised Article 8 UCA only includes contracts regarding goods and/or services of ordinary consumption and therefore not, for example, the purchase of luxury goods. The non-applicability of Article 8 UCA in the B2B context has been criticized because also business individuals as well as small and medium-sized enterprises may not dispose of the necessary knowledge and buying power when facing sophisticated and powerful market participants.

The benchmark for the fairness of GTC will be the absence of significant and unjustified imbalances between contractual rights and obligations and not as before the absence of significant divergences from (non-mandatory) statutory law. The judge has to examine the fairness of a GTC-clause taking into account all contractual rights and obligations regardless of whether they are contained in the GTC themselves or in another part of the contract. As until now, the revised UCA does not - unlike the EU law - provide for examples of clauses which might be considered abusive ("Grey List"). Neither is a list of generally abusive clauses ("Black List") available nor one of admissible clauses ("White List").

Article 8 UCA in its new version does not specify the legal consequences for a non-compliant GTC clause (contestability, nullity or claim for remedial action). As no clear information in this regard can be found in the Explanatory Notes of the Swiss Federal Council on the revision of the UCA either, the Swiss Federal Supreme Court will have to answer this question. Under the old version of Article 8 UCA the majority of the doctrine assumed nullity of an unfair GTC clause.

Swiss law applies to any unfair action having effect on the Swiss market regardless of any contractual choice of foreign law otherwise agreed between the parties involved.

Recommendations

We recommend businesses active in the Swiss market to review their GTC in the light of revised Article 8 UCA.

Due to the continuing vagueness of the GTC regulations and the lack of Black, White and Grey Lists it is difficult to determine in advance which clauses will be allowed under Article 8 UCA. The following examples of abusive clauses - brought forward in the deliberations of the Swiss Parliament - may offer some guideline: exclusion of liability in case of gross negligence; obligation to pay interest on the total contractual consideration even though part of it has already been paid; automatic renewal of fixed-term subscription contracts; the right of the drafter of the GTC to unilaterally amend the GTC at any time.

Furthermore, the EU Grey List may be taken into consideration for such analysis (cf. the annex of the Council Directive on unfair terms in consumer contracts, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML).

2. INFORMATION OBLIGATIONS IN ELECTRONIC COMMERCE (Article 3(1)(s) UCA)

According to the new Article 3(1)(s) UCA, one acts unfairly when offering products/services in electronic

commerce via an internet platform without:

i. clearly and completely declaring his/her/its identity and contact address (incl. email address);

ii. indicating all technical steps for the conclusion of the contract;

iii. offering appropriate technical means to identify and correct data entry errors before an order is sent; and

iv. confirming the customer's order immediately by electronic means (particularly by automated email).

Article 3(1)(s) UCA does not - as per Article 3(2) UCA - apply to contracts concluded orally over the telephone or contracts which have been concluded merely by email correspondence or other individual communication.

It is currently unclear and remains to be resolved by the Swiss Federal Supreme Court whether gratuitous offers must also comply with Article 3(1)(s) UCA.

Since the UCA is generally applicable to circumstances affecting the Swiss market, the obligations stated in Article 3(1)(s) UCA must also be fulfilled by foreign providers of products/services in electronic commerce whose offers are aimed at customers resident in Switzerland.

The doctrine takes the view that a breach of Article 3(1)(s) UWG does not lead to the nullity of contracts concluded through an internet platform. Instead, the contract is challengeable in court by invoking a material error regarding e.g. the counterparty's identity or the fact that a binding offer has been made.

Recommendations

We advise businesses operating in the Swiss market to analyse their online-appearance for compliance with Article 3(1)(s) UCA. This also applies to foreign providers of products/services in electronic commerce whose offers are (also) directed at customers resident in Switzerland.

3. PROHIBITION OF CERTAIN OFFERS FOR DIRECTORY ENTRIES AND ADVERTISEMENTS (Article 3(1)(p) and (q) UCA)

Pursuant to the new Article 3(1)(p) UCA, it is an unfair act to solicit entries in directories or advertisements by way of misleading ordering forms, offers of correction or similar. Further, such solicitations are considered unfair if done without pointing out at a prominent position, in big print and in understandable language:

i. that the offer is against payment and of a private *i.e.* non official character;

ii. the duration of the contract;

iii. the total costs according to the duration; and

iv. the geographical distribution, the form, the minimum print run and the latest time of the publication.

Under Article 3(1)(q) UCA it is also considered unfair to send invoices for entries in directories or advertisements prior to receiving a corresponding order.

The purpose of this provision is to suppress the rampant address book fraud.

4. PROHIBITION TO DISREGARD ADVERTISING BANS IN TELEPHONE DIRECTORIES (Article 3(1)(u) UCA)

Pursuant to the new Article 3(1)(u) UCA the disregard of a notice in a telephone directory stating that a customer (i) does **not** wish to receive advertisements (calls, telefaxes, mail or flyers) from third parties and (ii) his/her data may not be passed on for the purpose of third party advertising (opt-out model) is considered an act of unfair competition. In this context, any promotion for sales must be considered an advertisement. According to a part of the doctrine, even appeals for donations by charity organisations are to be qualified as advertisements under this provision. Remark: In compliance with Article 3(1)(o) UCA stricter regulations (already in force prior to the revision) apply to mass advertisements sent by means of telecommunication (especially via email, automated telephone calls, telefax etc.). This provision requires the prior consent of the customer for such mass advertisements (opt-in model).

It has been criticized that Article 3(1)(u) UCA may have a too large scope of application due to its wording "*who does not respect the notice in the telephone directory*" since, as a result, such advertising bans would have to be observed regardless of the origin of an address. Therefore, it needs to be clarified by the courts whether or not an advertiser must consult the telephone directory to check for such notices even if the advertiser did not obtain the address data from the directory and/or even if there is or was already a contractual relationship with the respective customer.

As stated by the doctrine an existing or past customer may be contacted even if the telephone directory contains an advertising ban. The customer does however have the right to prohibit future contacting. In line with this doctrine the same must hold true if someone agreed to the transfer of his/her data to third parties for the purpose of advertising.

In order to comply with Article 3(1)(u) UCA professional list brokers may not sell addresses marked with advertising bans without the prior consent of the address owner. On the other hand, it is sufficient for the address buyer to receive a guarantee of the list broker that the address list only includes addresses (a) without advertising bans or (b) of persons who have agreed to the transfer of their data.

5. PROHIBITION OF CERTAIN PROMISES OF FINANCIAL BENEFIT (Article 3(1)(t) UCA)

Pursuant to the new Article 3(1)(t) UCA, one who promises a financial benefit in the context of a competition and links the redeeming of the financial benefit to (a) the use of a premium-rate service number, (b) the purchase of goods or services or (c) the participation in a sales event, promotional journey or another drawing acts unfairly.

Since the applicable lottery and gambling law only regulates events which require the provision of a wager in order to receive a chance to win, Article 3(1)(t) UCA shall now additionally govern cases in which one has (allegedly) already won, but must provide a wager "in arrear" in order to actually receive the prize.

The application of Article 3(1)(t) UCA does not require that a competition or lottery has in fact taken place (which is practically never the case). It is sufficient that the promise mentions a competition, drawing or lottery for the alleged financial benefit.

6. PROHIBITION OF SNOWBALL SYSTEMS, PYRAMID SCHEMES AND SIMILAR PROMOTIONS (Article 3(1)(r) UCA)

Pursuant to the new Article 3(1)(r) UCA it is considered unfair to offer (a) the delivery of goods, (b) a

bonus or (c) another benefit if the main advantages of such offer are linked to the recruiting of other persons for such business schemes by the participant.

7. REVISION OF THE PIO: PRICE INDICATION OBLIGATIONS FOR ADDITIONAL SERVICE PROVIDERS

Obligation to indicate prices

The revised PIO adds several new services to its scope of application. Airlines, notaries, veterinarians, undertakers and suppliers of hearing aids are now also obliged to indicate the pricing rate or the total price of their services. The actual pricing rate must also be indicated for services in connection with the sale of drugs and medical products.

Further amendments to the PIO

Pursuant to Article 16(2) PIO the type of price comparison (i.e. self-comparison or comparison with third parties) must be indicated only for introductory prices and competitor comparisons. Consequently, a self-comparison will be assumed in all other cases.

A standardized price reduction amount may now - compliant with Article 17(2) PIO - be indicated with regard to several products, product groups or the entire assortment of goods (for example "CHF 100.00 discount on all TVs"). Hitherto, this was only allowed for a standardized discount rate (for example "10% on all TVs").

Should you have any question or wish to get individual advice, we are at your disposal.

With kind regards

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