



Competition Law Newsletter Switzerland

Revision of the Unfair Competition Act (UCA): Tougher Controls of GTC and New Regulations for E-Commerce

On 1 April 2012, the revised Unfair Competition Act (UCA) came into force. For companies and individuals doing business in the Swiss market, the revision brings about new duties of information for e-commerce as well as tougher controls of general terms and conditions (GTC) used in consumer contracts. In order to give the affected companies enough time to review and potentially amend their GTC, the new rules on the control of GTC will come into force only on 1 July 2012.

Control of General Terms and Conditions

The centrepiece of the revision of the UCA is the new rule of Article 8 UCA on abusive GTC. As from 1 July 2012, the relevant criteria for determination of unfairness will be 'good faith' instead of 'deception'. The wording of the revised Article 8 UCA is inspired by Article 3(1) of the Council Directive 93/13/EEC on unfair terms in consumer contracts. Pursuant to the new provision of Article 8 UCA, the use of GTC is to be considered as unfair if, contrary to the requirement of good faith, a significant and unjustified imbalance between contractual rights and obligations is created to the detriment of the consumer. This can be the case if, for example, all risks are shifted to the consumer without justification, or if the GTC provide for an automatic extension of a contract of fixed duration, especially when the deadline for the consumer to express his desire not to extend the contract is set at a date long before the end of the initial contract term.

Because deception is no longer a requirement, GTC clauses can be considered unfair and unlawful even if they are unambiguously worded and the consumer has been explicitly pointed to them. It is no longer required that the consumer is misled over the content of certain provisions of the GTC.

In case a provision of the GTC violates the principles under Article 8 UCA, it is considered to be null and void. In a fairly recent decision of 18 December 2008, the Federal Supreme Court refused to partially uphold the unfair provision to the extent it could be considered in compliance with the law.

The scope of application of the revised Article 8 UCA is limited to consumer contracts (B2C). The revised provision does not apply to contracts between businesses (B2B). This is an exemption to the basic principle of the unfair competition act being applicable to all tiers of competition.

The UCA does not contain a definition of the term 'consumer contract'. However, the prevailing doctrine considers that all contracts entered into by consumers relating to goods and services not intended for business or professional use of the consumer will be governed by the provision. This encompasses contracts for products and services that go beyond a consumer's everyday needs. To the extent a purchaser is not a professional reseller, the contract is to be qualified as a consumer contract even if the purchaser ultimately resells the product or service. The interpretation of the term 'consumer contracts' under Article 8 UCA is still subject to discussion and will eventually have to be determined by the courts.

It remains to be seen how strict the courts will apply the new rules on control of GTC. Fact is, however, that a clear wording or a special emphasising of a significantly imbalanced provision does no longer prevent such provision from being invalid.

Until case law has established clearer criteria on the application of the revised Article 8 UCA, the exemplary clauses contained in the annex to the Council Directive 93/13/EEC may provide some guidance to the



practitioner: As the new Swiss rule is inspired by the Directive, the Swiss courts are likely to take into account the Council Directive and the case law of the European courts concerning the Directive when applying Article 8 UCA. Because the Swiss consumer protection organizations are also entitled to sue and claim a violation of Article 8 UCA, it has to be assumed that very soon there will be case law on the application of the revised provision concerning the control of GTC.

New Rules for E-Commerce

Apart from the new rules on the control of GTC, the revision of the UCA also entails a provision aiming at improving the transparency in electronic commerce: According to Article 3(1)(s) UCA, it is now mandatory that each online service provider publishes information about its identity and its contact details, including its e-mail address (imprint). Furthermore, the e-commerce provider must make the user aware of the individual technical steps leading to the conclusion of a contract and provide the customer with an overview of its order and with the option to amend incorrect details before the contract is entered into. Finally, once a contract has been entered into, the provider must without delay send to the customer a confirmation of its order submitted. This new provision does not only apply to consumer contracts but generally to all offers made by means of e-commerce (including offers in B2B marketing).

New Provisions against Unfair Business Practises

The revision of the UCA further introduces some new offences into the catalogue of Article 3 UCA. These additional offences concern unfair business practises that have been of some practical relevance in the past. Before the introduction of the new provisions in the catalogue of Article 3 UCA, these business practises were partially covered by the sweeping clause against unfair competition under Article 2 UCA. In order to clarify the legal situation and to provide clear and forceful legal means, the practises have now been exemplified and included in the catalogue of Article 3 UCA.

Articles 3(1)(p) and (q) UCA respond to the recurring misuse observed in the past years of unclear offers that were sent to businesses suggesting allegedly free registration in business registers or advertising

an inscription in a useless register. The new provisions now stipulate clear rules on what kind of information such offers must contain and how these information must be presented (big font, intelligible language). In addition, invoicing such registration services without a respective order having been placed is considered to be an unfair act.

The new Article 3(1)(r) UCA deals with so called snowball and pyramid systems. Such systems work on the premise that financing is provided by a continuously increasing number of participants. The past has proven that such systems have the power to cause serious damage to the economy. Therefore such systems and schemes are considered to be unfair and unlawful provided that the benefit for participants results mainly from the recruitment of new participants who pay an entrance fee to the system, and not from the sale of goods or services.

According to Article 3(1)(t) UCA, it is prohibited to link winning promises made in the context of a lottery or sweepstake to additional preconditions. For instance, someone who promises winnings may not make the cashing of the winnings conditional upon the use of a premium rate service number, the payment of any additional compensations or the purchase of certain goods or services.

Finally, it is an unfair act to ignore the note in the telephone book according to which marketing calls are not desired, or according to which consumer data cannot be passed on for direct marketing purposes (Article 3(1)(u) UCA).

Strengthening of Legal Enforcement and Cooperation with Foreign Authorities

Two new rules on legal enforcement aim at enhancing the efficiency of the UCA. On the one hand, the revision expands the government's right to sue. On the other hand, the revision creates a legal basis for a closer cooperation with foreign competition authorities.

Article 10(3)(b) UCA provides the government with the right to sue against unfair commercial practices if collective interests, such as those of domestic members of an industry sector, are threatened or violated. This provision provides the basis for the government's support and protection of 'victims' domiciled in Swit-



Switzerland who were threatened or violated in an unfair manner by either domestic or foreign businesses. The government thereby has the means to also protect domestic collective interests. Prior to the revision only foreigners could benefit from the government's right to sue against unfair practices, namely in cases in which Switzerland's reputation was deemed to be tainted by unfair practices that were exercised by Swiss businesses in foreign markets.

In addition, provided collective interests are affected, the Swiss government has the right to inform the public of enterprises which act unfairly. This right to inform the public is intended to be a means of prevention in the government's hand.

Finally, Article 21 and 22 UCA provide a new legal basis for a better cross-boarder cooperation of domestic and foreign competition authorities. In particular, the Swiss unfair competition authorities are now authorised to exchange data with their foreign counterparts. This new form of cooperation between domestic and foreign unfair competition authorities exclusively concerns cases in which the government would have a right to sue, namely cases in which public interests are at stake.

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