



Distribution Newsletter Switzerland

"Lex Booking" – the new Article 8a UCA as the first GTC content control in B2B-settings

On 1 December 2022, a new Article 8a of the Swiss Federal Act on Unfair Competition (UCA) entered into force. This so-called "Lex Booking" provision aims to improve the market position of accommodation providers *vis-à-vis* online booking platforms by prohibiting parity clauses regarding price, availability or conditions in contracts between booking platforms and accommodation providers.

This amendment of the UCA is significant in two respects. *On the one hand*, it is the first time that a (limited) review of the content of General Terms and Conditions ("GTC") in the commercial sector has been enshrined in Swiss law. *On the other hand*, Switzerland has adapted the legal situation to that of neighboring countries. In France, Italy and Austria parity clauses have already been prohibited for some time. In Germany, a ban has not yet been enshrined in law, but there have already been rulings that qualified such clauses as contrary to antitrust law.

1. Parity clauses in the GTC of online booking platforms

The contracts between accommodation providers and online booking platforms such as Booking.com and Expedia are generally supplemented by GTC. These GTC usually contain so-called parity clauses, which restrict the accommodation providers in making offers as they deem fit. Parity clauses can relate in particular to price, availability and conditions.

There are different forms of **price parity clauses**. With so-called **broad** price parity clauses, the accommodation providers are obliged to offer the best prices exclusively on the booking platform. With such clauses, the accommodation providers are prohibited from offering rooms or accommodation at a lower price through other distribution channels. Not even by telephone or to spontaneous "walk-in" customers, prices that are lower than on the booking platform may be offered.

So-called **narrow** price parity clauses go less far – they only prohibit accommodation providers from offering lower prices on their own website than on the booking platform.

Availability parity clauses refer to the extent to which the type and number of rooms offered on other channels may differ from the offer on the booking platform.

Condition parity clauses refer to the equality of the offer with regard to other conditions, such as cancellation terms or included additional services such as breakfast, Wi-Fi or discounts for local transport.

In order to indirectly enforce compliance with parity clauses, accommodation providers that did not comply with the parity clauses were sometimes sanctioned by the booking platforms. This happened, for example, by temporarily not offering their rooms or by lowering the accommodation in question in the platform's ranking.

2. The history of the new Article 8a UCA

In April 2011, a hotelier complained to the Secretariat of the Competition Commission of Switzerland ("WEKO") about the business practices of online booking platforms, in particular about the price parity clauses in the GTC. Two months later, the Swiss industry association for hotels, HotellerieSuisse, also turned to WEKO regarding the same clauses.

WEKO then initiated an investigation against the three booking platforms Booking.com, Expedia and HRS in December 2012. In its decision of 19 October 2015, the WEKO ruled that the use of broad price parity clauses was contrary to competition law, whereas it left the assessment of narrow parity clauses open.

On 30 September 2016, Pirmin Bischof, a member of the Swiss parliament, submitted the motion "Ban on adhesion contracts of online booking platforms against the hotel industry", also called "Lex Booking". With this motion, he requested that the law be amended to



prohibit price parity clauses between booking platforms and accommodation providers.

After the Swiss parliament obliged the Swiss Federal Council to accept the motion and extend it to include availability and condition parity clauses, the latter made a draft for an amendment of the UCA, which was adopted by parliament on 17 June 2022. The amended law entered into force on 1 December 2022 in the form of a new Article 8a UCA.

3. The new Article 8a UCA

The new Article 8a UCA has the following wording:

"Art. 8a UCA

Use of parity clauses in dealings with accommodation businesses

A person acts unfairly in particular if, as the operator of an online platform for booking accommodation services, they apply general terms and conditions of business that restrict, directly or indirectly, the ability of accommodation businesses to fix prices and make offers by means of parity clauses, in particular in relation to prices, availability or conditions.

In geographical terms, the provision always applies if the Swiss market is affected. This is the case in particular if the accommodation provider is located in Switzerland.

The provision is limited to parity clauses in GTC. Article 8a UCA does not apply to parity clauses in individually negotiated agreements.

All "accommodation businesses" are protected. This includes not only classic hotels, but also, by way of example, providers of holiday flats, apartments and youth hostels.

As can be seen from the wording of the provision, it does not only cover price parity clauses, but explicitly also availability or condition parity clauses – both indirectly and directly.

Accommodation providers enjoy protection against parity clauses because such clauses are seen to be unfair. There is a disproportion of contractual rights and obligations between the platform operators and the accommodation providers and the accommodation providers are unduly restricted in making their offers.

4. The legal consequences of a violation of Article 8a UCA

Article 8a UCA is a civil law provision. Accordingly, a violation of Article 8a UCA only has civil law consequences, whereas the criminal law provisions of the UCA do not apply.

The civil law consequence of a violation of Article 8a UCA is that the GTC clause in question is null and void (i.e. ineffective) pursuant to Article 20 Swiss Code of Obligations. GTC clauses that violate Article 8a UCA are thus not directly enforceable in Switzerland.

If the GTC contain a choice of law in favor of foreign (i.e. non-Swiss) law, such foreign law is generally applicable. However, an exception applies insofar as the chosen foreign law leads to the effectiveness and enforceability of parity clauses. To this extent, the foreign law is to be disregarded and the parity clause is to be denied application (Articles 17 and 18 IPRG).

5. The remedies available for violations of Article 8a UCA

If a booking platform operator tries to enforce a parity clause **directly** (which seems never to have happened so far), the accommodation provider can invoke the nullity of the GTC clause in question.

If, on the other hand, a platform operator enforces a parity clause **indirectly** by means of sanctions, the accommodation provider concerned must actively defend itself. For this purpose, the legal remedies pursuant to Article 9 UCA are available, according to which the accommodation provider can demand the following:

- Prohibition of an imminent infringement (injunctive relief);
- Elimination of an existing violation (action for removal);
- Declaration that a violation is unlawful, if the violation continues to have a negative effect (declaratory relief);
- Payment of damages (action for damages).

If there is a risk of harm that cannot easily be undone, a preliminary injunction may be applied for to prohibit any indirect enforcement (sanctions) until a final decision is rendered by the competent court.

In addition to the accommodation providers themselves, competitors, suppliers or customers whose economic interests are threatened or adversely impacted by unfair parity clauses are entitled to sue, alongside professional and trade associations such as HotellerieSuisse.



6. Content control in B2B-settings as a novelty under Swiss law

With Article 8 UCA, Swiss law has been providing the means for a review of the content of general terms and conditions for consumers for some time. However, until now no content control for general terms and conditions in B2B-settings was provided for by the law.

This has changed with Article 8a UCA. For the first time, there is now a statutory control of the content of GTC between merchants. However, this content control is limited to one industry and to specific situations.

In the consultation phase ("*Vernehmlassung*"), it was demanded that the ban on parity clauses should apply to all sectors, not only to accommodation providers. However, this was rejected, with the reasoning *inter alia* being that it is unclear whether problematic parity clauses also exist in other sectors.

Thus, the first B2B content control of GTC in Switzerland remains limited to a single industry. Nevertheless, the introduction of Article 8a UCA is a first step towards content control of GTC in a B2B context. With this first step, Switzerland is moving towards its neighboring countries, which in some cases (e.g. Germany and Austria) even have a general control of the content of GTC. However, as long as the content control is not extended to other sectors, Swiss contract law is still more liberal than the contract law of neighboring countries.

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