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The Revision of the Unfair Competition Act increases the requirements for general terms and conditions for contracts with consumers as of July 2012 and introduces specific disclosure obligations in e-commerce as of April 2012.

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Revision of Unfair Competition Act



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The revision of the Swiss Unfair Competition Act («UCA») will bring important changes for companies that are active in the Swiss market. The revised UCA, inter alia, explicitly states that under certain circumstances using general terms and conditions for consumer contracts will, as of July 2012, automatically be deemed an act of unfair competition. Furthermore, the revised UCA introduces specific information obligations for providers making offers by means of e-commerce (as of April 2012).

Current Rules Regarding General Terms and Conditions

There is no comprehensive legislation in Switzerland with regard to general terms and conditions («GTC»). One of the few provisions that already exist under the current UCA is art. 8 UCA, which deems certain kinds of GTC to be unfair. However, the threshold for qualifying a contractual provision as unfair is high and thus art. 8 UCA does not have much practical relevance.

In order to ensure that parties to GTC are not left without protection, Swiss courts have developed basic rules regarding the adoption and content of GTC. These rules, however, do not allow for an unrestricted review of GTC. A main goal of the UCA revision was to amend art. 8 UCA in a way that would allow courts to review GTC with fewer restrictions. However, the amendment proposed by the Swiss government was highly contentious in parliament and almost led to the failure of the entire revision of the UCA. In the end, a compromise was reached: The threshold of art. 8 UCA will be lowered but only for contracts with consumers.

New Requirements for General Terms and Conditions in Consumer Contracts

The revised art. 8 UCA provides that the use of GTC which, contrary to the requirement of good faith, cause a signif-

icant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer is unfair. This revised provision is largely inspired by art. 3 para. 1 of the EU-Directive on Unfair Terms in Consumer Contracts («EU-Directive»). One significant difference is that the UCA does not include an indicative annex with contractual clauses that may be regarded as unfair. It will therefore be up to the courts to determine which types of contractual provisions qualify as unfair under the revised art. 8 UCA.

The lack of an indicative annex will make it difficult for providers to assess whether their GTC in consumer contracts comply with art. 8 UCA, at least as long as there is no clear case law of the Swiss courts. The prudent provider should adhere to the annex of the EU-Directive as a minimum standard since it would be reasonable to expect that Swiss courts will take the EU-Directive, its annex, and the relevant EU case law into account.

To give an idea of the kind of contractual clauses that could be regarded as unfair under the revised art. 8 UCA if contained in GTC, Swiss Federal Councillor Johann Schneider-Ammann provided in particular the following specific examples: the exclusion of liability even in case of gross negligence, the accrual of interest based on the entire amount even if the amount has been paid in part, and the right of the provider to unilaterally modify the GTC at any time.

Many but not all Swiss scholars take the view that provisions in GTC that do not comply with art. 8 UCA are null and void. Regardless of whether or not this is correct, it is undisputed that a violation of art. 8 UCA does not affect the validity of the entire contract. It is unclear, however, whether a provision of the GTC that is regarded as unfair is null and void in its entirety or whether it is invalid only in part. For example: Will a provision which excludes liability for all kinds of negligence be null and void, and thus lead to an unlimited liability of the provider, or will the courts deem this clause invalid only in so far as it excludes liability in cases of gross negligence? Until there is a final decision rendered by the Swiss Federal Supreme Court on this issue, providers should proceed with caution.

The amended version of art. 8 UCA will enter into force as of July 1, 2012.

Specific Information Obligations Under the Revised UCA

According to the new art. 3 para. 1 lit. s UCA, whoever offers goods, works, or services by means of electronic commerce (e.g. through an online shop) is required to: 1) clearly and completely indicate its identity and contact address (including electronic mail); 2) indicate the different technical steps that must be followed in order to conclude the contract; 3) make available appropriate means for identifying and correcting input errors prior to the placing of an order; and 4) acknowledge receipt of the customer's order immediately by electronic means. As an exception, these requirements do not apply to voice telephone and to contracts that are entered into exclusively through an exchange of electronic post (e-mail) or comparable individual communications (art. 3 para. 2 UCA).

The requirements of art. 3 para. 1 lit. s UCA were drawn from the EU-Directive on Electronic Commerce, which, it should be noted, goes further than the revised UCA in many other aspects. Thus, providers targeting the Swiss market or customers in Switzerland, which already comply with the directive, will most likely be in compliance with the aforementioned requirements. However, we would like to point out that contrary to the directive providers may not exclude the obligations of art. 3 para. 1 lit. s UCA by agreement with a customer that does not qualify as a consumer. Art. 3 para. 1 lit. s UCA will apply to all categories of customers, including customers that do not qualify as consumers.

Art. 3 para. 1 lit. s UCA will enter into force as of April 1, 2012.

Other Changes to the UCA and to Price Disclosure Obligations

Under art. 3 para. 1 of the revised UCA, the following practices are also expressly qualified as acts of unfair competition: «snowball» or «pyramid systems», i.e. announcing the delivery of goods, the payment of premiums, or other benefits on such terms that obtaining an advantage primarily depends on the recruitment of other persons rather than on the sale or consumption of goods or benefits (lit. r); promising a profit in the context of a competition or lottery, the redemption of which is linked to additional costs for the winner (lit. t) and telephone advertising and the disclosure of data for the purpose of direct advertising despite a note in the phone book entry of the customer prohibiting direct advertising or disclosure of data for such purpose (lit. u). Regarding directory registrations and advertisement orders, the revised UCA provides for disclosure obligations for their advertisement and offer (lit. p) and prohibits the billing of directory registrations and advertisement orders without a respective prior order of a customer (lit. q).

In the course of the revision of the UCA, the Ordinance on Price Disclosure («Preisbekanntgabeverordnung», OPD) was also amended. Among other changes, the duty to disclose prices to consumers is extended to additional types of service providers, and the pre-existing disclosure obligations for air travel providers are expanded. Furthermore, not only goods but also services must be described with the relevant criteria, such as trademark, type, kind, quality, and characteristics. If manufacturers, importers, and wholesale merchants disclose recommended prices, they must explicitly indicate that the prices are not binding. Additionally, public fees that are imposed on consumers, as well as copyright royalties and other non-eligible costs must be included in the disclosed price of goods and services to which the OPD is applicable.

The aforesaid changes will enter into force as of April 1, 2012.

Conclusion

The amendments to the UCA and the OPD are both of great practical importance. Swiss providers, as well as providers targeting the Swiss market or customers, are advised to review, and, if necessary, adapt their current GTC, practices, and market appearance before April 1, and July 1, 2012, respectively. Non-compliance could lead not only to the nullity of unfair clauses contained in GTC with consumers but a violation of certain new requirements may also trigger civil and even criminal liability.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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