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Swiss IP News We provide you with updates on new decisions, the relevant legislative process and other trends in the fields of intellectual property and unfair competition law from a Swiss perspective.

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Viagogo's Online Sale Practices Held to Be Unfair

On 27 October 2021, the Swiss Federal Supreme Court ("**Court**") handed down its ruling [4A_314/2021](#), in which it held parts of Viagogo AG's ("**Viagogo**") online sale practices to be unfair pursuant to the Federal Act against Unfair Competition ("**UCA**"). At the request of Circus Knie ("**Knie**"), the Court held it unfair to advertise tickets being sold out despite them still being available on other platforms, and to offer tickets by referring to non-existent categories and seating arrangements. It further found the ticket acquiring process in general to be contrary to the requirements of clarity required by law.

Background

Viagogo operates a global ticket exchange and resale webshop where users can acquire, amongst others, tickets to Knie's circus shows. The subject matter of the dispute was the ordering process in Viagogo's webshop.

In the outset of Viagogo's online ordering process, an overview of Knie's upcoming shows appeared where individual shows were already claimed to be "sold out". When selecting a not yet sold out performance, users were informed about the small number of remaining tickets. Thereafter, a seating plan and corresponding ticket categories were displayed, which, however, did not reflect Knie's actual offers. After again being reminded of the tickets' scarcity, users would select the tickets and then be put in a queue and made to wait for Viagogo to check the tickets' availability. Subsequently, users were given a short time span of a couple of minutes to decide whether or not to buy the tickets. It was advertised that allowing the time to expire would likely result in an increase in the ticket price. Users were also reminded repeatedly of the high demand for those tickets. Finally, while the handling fee and the booking fee were announced during the ordering process – by quantifying only the latter –, the overall price was only indicated and

specified in the second to last step. Yet, when finally confirming the order, the overall price disappeared.

Knie applied to the Commercial Court of St. Gall to have Viagogo cease and desist from applying the above practices it determined unfair. In its decision of 24 February 2021 (HG.2018.181-HGK), the Commercial Court of St. Gall prohibited Viagogo from (i) advertising events as being sold out, (ii) selling tickets according to non-existent categories and seating plans and (iii) increasing the price steadily throughout the ordering process while repeatedly pressuring users to hastily acquire the tickets with aggressive advertisement as to the scarcity and high demand of the tickets as well as setting deadlines for completing the orders. Viagogo appealed against this decision before the Federal Supreme Court.

Decision

The Court first discussed whether it was contrary to the UCA to advertise tickets as being sold out when, in fact, other ticket retailers and Knie itself still offered tickets to such shows. Pursuant to Article 3 para. 1 let. b UCA, anyone is acting unfairly who makes false or misleading statements about its goods, services,

prices or quantities in stock. Viagogo claimed that the statement "sold out" would not mislead users as it would just apply to the tickets available on Viagogo's webshop as a mere secondary ticket exchange platform (i.e. an intermediary between seller and buyer). However, the Court disagreed: users cannot be expected to inform themselves of the platform provider's role, not least because this fact was not readily mentioned on Viagogo's website. Rather, the Court held it to be notorious that users rarely consulted the terms and conditions; a fact aggravated in the present case by the applied time pressure, the aggressive advertisement, and the difficulty of finding the terms and conditions on Viagogo's website. Hence, the Court held that advertising the tickets as being sold out on Viagogo's website misled users into thinking the tickets were sold out in general and, consequently, held this practice to be unfair in accordance with Article 3 para. 1 let. b UCA.

The Court further discussed whether showing non-existent seating plans and false ticket categories were compliant with Article 3 para. 1 let. b (see above) and article 3 para. 1 let. i UCA according to which anyone acts unfairly who conceals the quality, quantity, intended use, usefulness or dangerousness of goods, works or services and thereby deceives the customer. Viagogo did not contest the incorrectness of the seating plan and ticket categories. However, it maintained that the chosen descriptions would not mislead users since no statement of quality was made (e.g. "Circle Seating" or "Balcony Middle Left"); thus, users could not be misled. The Court, on the other hand, held that Viagogo was not primarily accused of disappointing "quality expectations". Rather the unfairness would stem from the lack of comparability: by offering tickets for non-existent seat categories, potential buyers were deprived of any possibility to compare the offer with other offers and to look for possibly cheaper options. As a

consequence of the market opaqueness caused by such measures, users likely acquired overly expensive tickets.

Finally, the Court considered the ordering process as a whole, and examined whether it collided with the requirements of clarity under the UCA as enshrined in Articles 2, 3 para. 1 let. b and 18 UCA. In this regard, the Court held that informing users of the number of tickets being available was indeed misleading. It argued that it was unclear for buyers that the number to which Viagogo was referring was only that of the tickets left on Viagogo's webshop. The Court further ascertained that, in light of the continuous price increase during the ordering process, the overall price being composed intricately (i.e. partially being composed of foreign currency, the fees dispersed over the ordering process, etc.) and the applied time pressure, the ordering process seemed to be designed to obfuscate the overall price and its composition. Hence, the Court held that the ordering process bore a potential to mislead users and thus conflicted with the requirements of clarity as required by the UCA.

Nevertheless, as regards the information on the overall price, the Court partially confirmed its previous decision [4A_235/2020](#) of 1 December 2020, in which it decided on a request brought by the State Secretariat for Economic Affairs (SECO) against Viagogo. In particular, the Court upheld in the present decision that it sufficed for Viagogo to show the overall price at the moment of confirmation (for at least three minutes) instead of showing it already from the outset.

Comment

The Court's verdict is certainly coherent in its result. In particular, the total of coercive measures – from the exertion of time pressure to the targeted pressurisation with false information as regards quantity and categories of seats – does

not comply with the requirements of clarity under the UCA.

Nevertheless, it is important to award users with an adequate degree of responsibility when active in the online domain. Companies should be allowed to demand from users to at least superficially inform themselves of a website's background when acquiring goods and services thereon. Hence, while Switzerland's courts typically already apply a rather high standard to consumer responsibility, courts should remain cautious in denying users any sort of responsibility, resistance to pressure or information abilities. After all, courts will never be able to comprehensively prevent misconduct on the Internet, and maintaining consumer awareness helps to prevent users from being misled.

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