Federal Supreme Court ruling 4A_235_2020: Has the Federal Supreme Court changed SECO's price disclosure practice with regard to online trading?

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Key takeaways

- **The Federal Supreme Court has dismissed SECO's appeal against the ruling of the Zurich Commercial Court in the Viagogo case. Viagogo did not act unfairly.**
- **In future, and in contrast to SECO's practice to date, a detailed price does not necessarily have to be disclosed from the outset for goods and services subject to the Price Disclosure Ordinance and offered for sale via the internet. It should be sufficient to disclose the detailed price to the buyer at the latest before the purchase is agreed, i.e. before the contract is concluded, meaning that the consumer is not misled as to the actual price to be paid.**

Background of the ruling

Viagogo AG ("Viagogo") offers an online ticket exchange for a secondary ticket market via the websites it operates, enabling customers to buy tickets for events from each other and sell them to each other. Viagogo does not itself act as the seller, but charges a sales price-dependent handling fee for processing the respective purchase transaction between the buyer and the seller.

The global judiciary has had its sights on Viagogo for some time due to the company's allegedly non-transparent business model. Switzerland is no exception. In autumn 2017, the Swiss Confederation, represented by the State Secretariat for Economic Affairs (SECO), filed a lawsuit against Viagogo at the Zurich Commercial Court after well over two hundred domestic and foreign consumers complained about Viagogo's allegedly unfair business practices.

In its action, SECO's primary claim was that Viagogo violated various provisions of the Federal Act against Unfair Competition (Unfair Competition Act, UCA) and the Federal

Ordinance on the Disclosure of Prices (Price Disclosure Ordinance, PDO). Among other things, SECO accused Viagogo of violating the price disclosure regulations by not disclosing the actual price to be paid for tickets as a detailed price from the outset, but only indicating it to the consumer during the ordering process.

During proceedings before the Zurich Commercial Court, Viagogo felt compelled to publish the following notice on its website: "We're the world's largest secondary marketplace for tickets to live events. Prices are set by sellers and may be below or above face value."

Insofar as SECO's legal claims did not already fail on formal grounds, the Zurich Commercial Court dismissed SECO's claim on its merits in a ruling dated 11 March 2020 and declared Viagogo's competitive conduct and in particular its price disclosure practice to be compatible with Swiss unfair competition law.

In the ruling 4A_235_2020 dated 1 December 2020, which is not intended for publication, the Federal Supreme Court supports this ruling and rejects SECO's appeal against it. In its ruling, the Federal Supreme Court takes a liberal stance with regard to price indications, which does not appear to be compatible with SECO's practice to date in this regard. This legal update examines the Federal Supreme Court's ruling from this perspective and explains how it could impact previous practice on price disclosure.

Excerpt from the Federal Supreme Court's rationale for ruling (C. 9.1)

In its ruling, the Federal Supreme Court found that Viagogo had not violated the provisions of the Price Disclosure Ordinance by disclosing the actual price to be paid for an offer (i.e. the detailed price, including all add-ons such as VAT and charges) not from the outset but rather only at the end of the ordering process, but still before the order was triggered.

According to the Federal Supreme Court, the Unfair Competition Act and the Price Disclosure Ordinance do not contain any provisions on when the actual price to be paid must be indicated. An average consumer understands the price originally displayed on a website as the initial price. They do not consider this as the ultimate price to be paid, as they would in the case of a price displayed in a shop. The average consumer is aware that when shopping on the internet, fees and surcharges of various kinds (e.g. VAT, customs duties, shipping and handling charges) can be added to the initial price. This is especially true if a provider expressly points out that such fees and surcharges are not included in the initial price. Against this background, it is only relevant that the buyer of a ticket is aware of the actual price to be paid before agreeing to the contract. There is no commercial practice that required the actual price to be paid for online sales to be indicated at the beginning.

Ultimately, the Federal Supreme Court found that the lack of comparability of the initial prices did not constitute misleading information or deception. Average consumers could be expected to compare the price – even at an advanced stage of the ordering process and despite a certain time pressure. On the internet, it only takes a few clicks to make such comparisons.

Possible change in practice with regard to price disclosure obligations?

SECO, which is responsible for the overall supervision of compliance with the Price Disclosure Ordinance, has issued various guidelines, information sheets and brochures to govern in more concrete detail the general abstract regulations on the obligation to disclose prices. In these administrative ordinances, SECO establishes, among other things, the principle of total price disclosure. Accordingly, the actual price to be paid for goods (art. 3 et seq. PDO) or services (art. 10 para. 1 PDO) subject to the Price Disclosure Ordinance must be indicated as a detailed price. Consequently, the price must include, among other things, public charges such as VAT. With regard to when the price has to be disclosed, SECO takes the view that the detailed price must already be indicated at the time the goods and services are offered, i.e. from the outset. According to SECO, these principles apply to both stationary trade and e-commerce.

In view of the above, the Federal Supreme Court has now apparently rejected the validity of this practice in part. Goods and services that are subject to the Price Disclosure Ordinance and are offered for sale via the internet do not have to be marked with a price from the outset that includes all public charges, copyright fees, advance disposal fees and other mandatory surcharges of any kind. The ruling states that it suffices if the price actually to be paid is made known to the buyer at the latest before the sale is agreed (consent given) and thus before the contract is concluded.

In our opinion, it follows from the above that it should no longer be necessary in future to indicate the actual price to be paid already at the time of offering goods or services for sale online. Rather, it should be sufficient to indicate the actual price to be paid for goods or services to the consumer at the latest before the purchase contract is concluded (i.e. before the transaction is concluded). This is particularly the case if the consumer is expressly informed that the initial price displayed is exclusive of any fees and surcharges. This change to previous practice is, in our opinion, reasonable with regard to online trading for the following reasons:

- Firstly, the Unfair Competition Act and Price Disclosure Ordinance do not in fact govern the point in time from which the detailed price for goods and services must be indicated. SECO's restrictive practice of having to indicate the detailed price from the outset is therefore based on neither a law nor an ordinance. Although SECO is entitled to issue administrative ordinances and specify in more detail the price disclosure regulations (art. 23 para. 2 PDO), these specifications are not legally binding. The Federal Supreme Court is thus entitled to limit SECO regulations that go beyond what is required by law and ordinance. Such a limit seems appropriate in the present case, especially since the market transparency in online trading intended by the Price Disclosure Ordinance is neither lost nor restricted. It also increases the practicability of indicating prices in (cross-border) online trade.
- Secondly, the risk of deception and being misled by indication of a certain price is assessed according to the objective understanding of the average consumer. With regard to this objective understanding and the related expectation of consumers as to which price components a stated price must contain, the assessment for the purchase of goods and services online differs to that of purchases in a stationary trade setting. In the case of an ordinary purchase in a shop, there are usually no customs, shipping or handling charges.

> This corresponds to the nature of the transaction. Accordingly, an average consumer may reasonably expect goods and services to be indicated at their final prices in a stationary trade setting. This is not the case with online trade, where the average consumer has long been familiar with the additional costs naturally associated with an underlying remote transaction, and the fact that these costs are added to the initial price of goods or services to be purchased. Average consumers ought to know that the initial price displayed does not correspond to the actual price to be paid. They are therefore not deceived or misled as to the price actually to be paid by the fact that the price indicated at the beginning does not correspond to the detailed price. The average consumer does not need any special protection – as provided by SECO's previous practice – in online trading.

Notwithstanding the foregoing, we recommend providers of goods and services in online trading to critically examine on an individual basis whether a departure from previous SECO practice is justified. For reasons of legal certainty and consumer-friendliness, it is advisable to continue to provide a detailed price from the outset, i.e. including all fees and surcharges provided for by law, for goods and services that are subject to the Price Disclosure Ordinance.

Authors: Michèle Burnier (Partner), Nando Lappert (Associate), Gilles Steiger (Junior Associate)

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Michèle Burnier



Partner
Attorney at law

Pestalozzi Attorneys at Law Ltd
Cours de Rive 13
1204 Geneva
Switzerland
T +41 22 999 96 00
michele.burnier@pestalozzilaw.com