

SWISS INVESTMENT REPORT* 16

SEPTEMBER 2015



* The Swiss Investment Report is provided by Wenfei Attorneys-at-Law Ltd. (“Wenfei”), a Swiss law firm which has gained extensive experience in providing services in Greater China.

The Swiss Investment Report is especially designed for Chinese Investors, who are intending to extend their business to Switzerland or Europe or are already doing business in Switzerland.

The Swiss Investment Report provides background information on the Swiss investment-related legal framework as well as information on current developments in the Swiss legislation from a foreign investor’s perspective.

E-Commerce in Switzerland – A brief checklist for Chinese investors

- I Introduction
- II Minimum information on the web shop platform
- III The use of general terms and conditions
- IV Data protection
- V Legal landscape in the European Union
- VI Conclusion

E-Commerce in Switzerland – a brief checklist for Chinese investors

I. Introduction

Chinese investors looking for e-commerce opportunities in Switzerland should be familiar with the Swiss e-commerce legal framework. It is important to understand that Switzerland does not provide for a specific law on e-commerce. Instead, there are various laws and norms relevant for the e-commerce business in Switzerland. As for the conclusion of the purchase contract online, the general provision of the Swiss Code of Obligations in Article 197 et seqq. apply. Furthermore, since 2012 the unfair competition law provides for important provisions regarding the information which must be provided on a web shop and regarding the content of general terms and conditions used in B2C contracts. In addition, the law on data protection must be considered when running a web shop. In case the Swiss company is intending to sell its products not only in Switzerland, but also in the EU, the laws of the EU and the specific European countries shall be observed, too.

This Swiss Investment Report aims at providing an overview on the legal framework relevant on e-commerce in Switzerland. Furthermore, it will provide a brief insight into the respective regulatory framework of the EU.

II. Minimum Information on the web shop platform

Since 2012, Unfair Competition Law determines the minimum information that must be provided by the operator of a web shop.

A person who is offering goods, works or services electronically, (i) shall provide clear and comprehensive information about his identity and contact address including e-mail address, (ii) indicate the individual technical steps that eventually lead to the conclusion of a contract, (iii) provide adequate technical instruments, which may be used to identify and correct type errors before the order is placed, and (iv) immediately confirm the order by electronic means (whereas in most cases this will likely be done by sending a

confirmation e-mail, there are also other means possible from a legal perspective).

Whoever is doing business on an e-commerce platform and fails to comply with these requirements, acts in an unfair manner. It is essential to comply with these requirements, since the violation of these obligations may be sanctioned with a fine or imprisonment of up to three years.

III. The Use of General Terms and Conditions

Particular attention shall be paid to the general terms and conditions for the sale of services and goods used in the e-commerce.

General terms and conditions are provisions that are not individually negotiated but used by one party in respect of numerous contracts to be concluded. As a general principle, general terms and conditions become an integral part of the contract and apply to the contract if the other party agreed to its application. Before an order is placed, the other party must have received a copy of the general terms and conditions or has been given the possibility to read it in a reasonable manner.

In practise, before the consumer in an e-commerce transaction can place the order, the web shop shall provide the general terms and conditions electronically to the consumer or give him the possibility to read them (by clearly indicating a link to the general terms and conditions). Furthermore, the web shop shall provide a box like "I have read and accepted the general terms and conditions" before the order can be placed. In order to make sure that these requirements are given, the web shop shall insure that it is technically not possible to place an order without ticking the box regarding the acceptance of the general terms and conditions.

The general terms and conditions typically provide for stipulations regarding the placement of order, delivery, invoicing, warranty and guarantee, liability, replacement of goods, withdrawal of the contract (note that there is

no statutory right of withdrawal under Swiss law), data protection, applicable law and dispute resolution.

Regarding the **content of general terms and conditions**, the following principles and stipulations shall be taken into consideration:

- a) Ambiguous stipulations shall be interpreted to the disadvantages of the editor ("**Ambiguity Rule**")
- b) General terms and conditions shall not apply if they are unusual. This is the case when the contractual partner based on the specific circumstances does not have to expect to have such a rule in the general terms and conditions ("**Unusualness Rule**")
- c) The judicial practise is very strict regarding the stipulation of a **jurisdiction clause** in the general terms and conditions. Simply void are deviations from the ordinary jurisdiction in accordance with the civil procedure law in consumer contracts¹, which is (i) for actions of the consumer the seat or domicile of either the consumer or supplier, and (ii) for actions of the supplier the domicile of the consumer.

Furthermore, the **Unfair Competition Law** provides for specific rules regarding the content of general terms and conditions used in consumer contracts ("B2C"). According to Article 8 Unfair Competition Law, the use of improper general terms and conditions used in consumer contracts are qualified as an unfair action. The general terms and conditions are qualified as improper (i) if they provide for a significant and unfair disparity between the contractual rights and obligations to the disadvantage of the consumer, and (ii) if the significant and unfair disparity is in violation of the principle of good faith.

The criminal consequences for using improper general terms and conditions are the same as for the usage of inadequate information on the e-commerce platform.

¹ Contracts about services of the usual consumption, which are intended for the personal or family use, are deemed as consumer contracts under Swiss law.

Disputed in the legal practice is the question whether improper general terms and conditions pursuant to Article 8 Unfair Competition Law shall be void as such, or whether only voidable. Furthermore, it is disputed whether, in case a specific clause of general terms and conditions is qualified as void by a court, this would mean that the whole contract is void or whether the court would only declare the specific clause as void, but would uphold the contract it-self.

IV. Data Protection

A. Principles of the Swiss Data Protection Law

E-commerce typically depends on the collection and processing of the customer's data, such as name, address and payment information. Depending on the specific case, the vendor may request the customer to provide further personal information. The collection and processing of personal data is governed by the Federal Law on Data Protection ("Data Protection Law").

The following principles of the Swiss Data Protection Law are particularly relevant for e-commerce transactions:

- Personal data processing must be in accordance with the **principles of good faith and reasonableness**. For instance, the requests for personal information about the marital status of a web shop provider that is selling clothes would violate the principle of reasonableness, since the information about the civil status of a customer is not relevant for the purpose of selling clothes.
- The collection of the personal data and the purpose of its processing must be **recognizable** for the concerned person. For instance, if a customer provides his name, home address, e-mail address, and payment information to a web shop provider when ordering a product online, it is recognizable for the customer that the web shop provider will use this information for the performance of the transaction. Furthermore, it is also recognizable for a customer that the web shop provider would send own advertisement to the customer after the order is placed. However, it is principally not recognizable for the customer that the web shop provider would

forward this personal information to a third party for advertisement or marketing purposes.

- Personal data must be **protected by reasonable technical and organizational measures** against unauthorized processing.

B. Recommendations by the Federal Data Protection and Information Commissioner

The Federal Data Protection and Information Commissioner (FDPIC) has issued recommendations to e-commerce providers regarding the implementation of the data protection². The recommendations provide for useful input for e-commerce traders. They include particularly the following suggestions:

- **Transparency:** In order to strengthen the trust in e-commerce transactions, the e-commerce trader shall process personal data transparently. The e-commerce trader shall inform the user, which personal data they are processing for which purpose. The users shall particularly have the option to choose whether they want their personal data be used for marketing and advertisement purposes or not.
- **Data security:** Technologies like cryptographic processes, authentication processes and tools for anonymization are suitable for the securing the data, and shall be used for e-commerce business.
- **Privacy statement:** It is encouraged by the FDPIC to develop and put online a privacy statement (sometimes also called privacy policies). Such privacy statement shall provide to the user and customers of the specific website and web shop clear indication with regard to how the provider is processing customers' data. The privacy statement shall be formulated in a clear and transparent language. Hence, the customer may freely decide whether and how he wants to have its personal data processed. The FDPIC is convinced that this would

² <http://www.edoeb.admin.ch/datenschutz/00683/00703/index.html?lang=de>

create further trust in the e-commerce business. Of course, the provider that puts such a privacy statement online is also advised to adhere to its own privacy statement.

The privacy statement should provide information about the following questions:

- What legal provisions are applicable for the data processing of the supplier?
- Which personal data are collected and for what purpose?
- Which data are provided to third parties and for what purposes?
- Which options regarding the data processing are open to the user?
- Which rights (particularly information and correction rights) does the user have?
- Who provides answers to questions regarding the data processing?
- Which security measures are applied for the protection of the personal data?

V. Legal landscape in the European Union

Since 2000, the European Union (EU) has enacted various directives relevant to e-commerce, which the EU member states had to implement in their national legislation.

The important e-commerce directive 2000/31 and consumer right directive 2011/83 provide particularly for the following provisions:

- a) **General Information obligations:** The e-commerce service provider is obliged to provide some minimum information in easily, directly and permanently accessible way to the customers, including: name of the service provider; geographic address at which the service provider is established; the details of the service provider, including his e-mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner; where the service provider is

registered in an trade or similar public register, the trade register in which the service provider is entered and his registration number;

- b) **Information obligations regarding the conclusion of a contract:** At least the following information shall be given by the service provider clearly, comprehensively, unambiguously and prior to the order being placed by the customer: the different technical steps to follow to conclude the contract; whether or not the concluded contract will be filed by the service provider and whether it will be accessible; the technical means for identifying and correcting input errors prior to the placing of the order; the language offered for the conclusion of the contract.
- c) **The main characteristics of the goods or services,** to the extent appropriate to the medium and to the goods or services.
- d) **The total price of the goods or services,** inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable.
- e) **Right of withdrawal:** The consumer shall have a period of 14 days to withdraw from the contract, without giving any reason (There are some exceptions to this right of withdrawal). The withdrawal period shall start when the consumer (or a third party indicated by the consumer) acquires physical possession of the goods. In case of a service contract, the withdrawal period starts on the day of the conclusion of the contract. If the trader has not provided the consumer with the information on the right of withdrawal before the conclusion of the contract, the right of withdrawal shall principally last for 12 months.

- f) **The delivery** shall take place without undue delay, but not later than 30 days from the conclusion of contract, unless the parties have agreed otherwise on the time of delivery.

- g) **Information immediately before the order is placed:** If an e-commerce contract to be concluded places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner and directly before the consumer places his order, of the main characteristics of the goods or services (see letter c above) and the total price of the goods or services (see letter d above). Furthermore, in case of long-term contract the conditions for terminating the contract and the minimum duration of the consumer's obligations.

- h) **The button "order with obligation to pay":** Furthermore, the trader shall insure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall be labelled in an easily legible manner only with the words "order with obligation to pay" or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. Words like "order" or "continue" are not sufficient in order to bindingly place an order. If the trader has not complied with this requirement, the consumer shall not be bound by the contact or order.

Effective as of August 1, 2012, Germany implemented the consumer right directive 2011/83 into national law. The law became known in the public as the "Button-Law".

VI. Conclusion

E-commerce has gained enormous popularity in recent years in the EU and Switzerland. Many e-commerce undertakings have improved their web shops. The techniques have been standardized, and become more sophisticated and

secure, so that it has become much easier to run a professional e-commerce platform at reasonable costs. Many e-commerce traders also made their platforms more consumer-friendly, since they offer their services and goods in a clear and transparent way. Consequently, the consumers' trust in the e-commerce has improved.

In order to obtain and keep the consumer's trust in the specific e-commerce platform, the provider is advised to not only meet the legal requirements of the specific country in which he offers his services and goods, but also implement recommendations from the relevant state agencies or self-regulatory organizations.

This document is for general information only and is not intended to provide legal advice.

© Wenfei Attorneys-at-Law Ltd., September 2015

Check the Swiss Investment Report archives on:
<http://www.wenfei.com/index.php?id=22&L=0>