

Healthcare & Life Sciences - Austria

Dentist's spring promotion found to bring profession into disrepute

Contributed by [Preslmayr Attorneys at Law](#)

December 05 2012

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Facts

A Hungarian dental company, for which the sole shareholder and director was a Hungarian dentist, offered its services in several Austrian newspapers, under the heading "Spring Promotion", and on a website in the Austrian top-level domain '.at'. The advertisement stated fixed-rate ('instead-of') prices for various dental treatments for a limited period until April 30 2011.

The Austrian Chamber of Dentists issued a cease-and-desist order against the dentist, alleging infringement of Section 35 of the Dentists Act and of the chamber's guidelines on advertising.

According to Section 35, dental practitioners must refrain from any professional misconduct. Such 'professional misconduct' is defined as any activity that might impair the reputation or interests of the profession. Dentists must refrain from any untrue, unreasonable or discriminatory offer or advertising of their dental services. According to the advertising guidelines, any intrusive or blatant description of services, as well as the public indication of prices for dental services, is regarded as professional misconduct.

Decision

In an August 2 2012 decision (4 Ob 79/12i) the Supreme Court confirmed the chamber's right of action on the basis of EU Directive 98/27/EC on injunctions for the protection of consumer interests, although the Hungarian dentist was not a member of the chamber. It also confirmed the dentist's responsibility for the challenged advertisement, since he was the sole shareholder and director of the company.

The Supreme Court held that foreign dental practitioners must comply with the Austrian rules of conduct if they become active in Austria. The court also stressed that neither the Dentists Act nor the advertising rules provide for an absolute prohibition of advertising, they prohibit only information that is untrue, unreasonable or detrimental to the profession's reputation. This limitation on advertising is in the interest not only of dentists, but also of the general public, as it allows patients to make educated decisions.

The Supreme Court held that this limitation of advertising for dentists is also in compliance with EU law (eg, *Doulamis*, ECJ C-446 05).

According to the Supreme Court, advertising fixed dentist's fees impaired the profession's reputation; the dentist could not know in advance the extent and amount of work related to the treatment of each patient and therefore could not reasonably offer services at fixed rates. Such an advertisement was found to bring the service close to an (undesired) mutually interchangeable mass service.

Advertising can be considered 'market puffery' if unreasonable pressure is exerted to make use of a dental service. By limiting the offer in time and indicating fixed, 'instead-of' prices, the advertisement was therefore regarded as illegal.

Comment

The decision demonstrates that the Supreme Court will maintain its strict approach on advertising limits for medical professionals in Austria.

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