

## Healthcare & Life Sciences - Austria

### Supreme Court finds mail-order pharmacy guilty of misleading advertising

Contributed by [Preslmayr Attorneys at Law](#)

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#### Facts

The Austrian Chamber of Pharmacists recently sued a Czech mail-order pharmacy for misleading advertising on the grounds that it had wrongly created the impression of being established in Austria.

Calling itself VfG Austria, the Czech pharmacy claimed that it was one of the first online mail-order pharmacies "for the region of Austria". It used the websites [www.vfg-apotheke.at](#) and [www.zurrose.at](#), both of which had an Austrian top-level domain. It claimed to be a "mail order pharmacy for Austria providing top quality for bargain prices" that, because of "bulk purchases of original Austrian branded products", guaranteed customers savings of up to 40%.

The company also stressed that it would deliver only within Austria, since the delivery of medicinal products registered in Austria abroad was illegal, and that deliveries would be made only through Austrian mail. To place orders with the mail-order pharmacy, only Austrian phone and fax numbers and an Austrian postal address were displayed.

The fact that the pharmacy was established in the Czech Republic could be seen only under the general terms and in the websites' legal notices. Furthermore, in printed matter, no mention of the Czech domicile was made; it referred only to the two websites.

#### Legal framework

Section 59(9) of the Act on Medicinal Products prohibits the dispensing of medicinal products via self service or mail order. Furthermore, according to Section 53(1)(13) of the act, advertising addressed to consumers must not contain elements that may induce the purchase of medicinal products by mail order. The Supreme Court has held that the prohibition of mail-order dispensing of medicinal products registered in Austria and not subject to prescription contradicts the European Court of Justice (ECJ) ruling in *DocMorris* (C-322/01). Dispensing of medicinal products by mail order by a foreign pharmacy is therefore considered permissible. However, according to the prevailing doctrine, the prohibition of mail order for medicinal products not subject to prescription is still applicable with regard to pharmacies in Austria.<sup>(1)</sup>

According to Section 2(1)(6) of the Act on Unfair Competition, a trade practice is considered misleading if it contains false information or deceives (or is likely to deceive) a market participant in respect of a product, thereby causing him or her to take a transactional decision that he or she would not otherwise have taken. This applies in particular with regard to the nature, attributes and rights of the trader or his or her agent (eg, his or her identity and assets, qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or IP rights or awards and distinctions). The provision implements Article 6(1)(f) of the EU Unfair Commercial Practices Directive (2005/29/EC).

Article 6(1) of the EU Rome II Regulation (864/2007) provides that obligations arising out of an act of unfair competition will be subject to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected. In addition, Section 20 of the Austrian Act on E-commerce, implementing Article 3(1) of the EU E-commerce Directive (2000/31/EC), provides that within the coordinated field, the legal requirements applicable to a service provider established in a member state are subject to the laws of that member state.

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## Decision

The court of first instance granted the claim. The court of appeal dismissed the claim on the basis that the disclosure of the defendant's domicile in the legal notice and the general terms excluded the likelihood of consumers being misled. The Supreme Court re-established the decision of the court of first instance.<sup>(2)</sup>

### Advertising

With regard to the defendant's advertising in printed matters, the Supreme Court held that Austrian law is applicable to the case on the basis of Article 6(1) of the Rome II Regulation, since the defendant's advertising was addressed to Austrian consumers.

### Online presence

With regard to the defendant's online presence, the court considered Section 20 of the Act on E-commerce. In a previous decision, the Supreme Court had regarded this provision as a rule on a conflict of laws.<sup>(3)</sup> In this regard, the country of origin principle of Section 20 of the act differs from the marketplace principle of Article 6(1) of the Rome II Regulation. In such understanding, the laws of the country of origin were applicable regardless of whether such laws were more severe than the laws of the marketplace. Therefore, the two provisions were diametrically opposed.

However, according to the ECJ's *E-Date advertising* and *Martinez* decisions (C-509/09 and C-161/10), Article 3 of the EU E-commerce Directive does not require an implementation as a rule on a conflict of laws. The provision only requires that a provider must not be subject to more severe requirements under the law of the marketplace than under the law of the country of origin. Therefore, the Supreme Court did not follow its previous decision to always apply the law of the country of origin.

On the basis of these considerations, the Supreme Court applied Austrian law as the law of the marketplace.

### Misleading consumers

With regard to whether consumers had been misled, the Supreme Court assessed:

- how an average informed and circumspect potential buyer of the products would understand the advertising, applying appropriate attention to the purchase of such product;
- whether this understanding corresponded to the facts; and
- whether false information caused or was likely to cause an interested buyer to take a transactional decision that he or she would not otherwise have taken.

The Supreme Court held that both the defendant's online presence and its printed advertisements were addressed to consumers interested in the purchase of medicinal products not subject to prescription. From consideration of the overall impression, such consumers would not doubt that the defendant was an Austrian online pharmacy. According to the court, it cannot be assumed that the average consumer would be aware that such an online pharmacy could not exist under the law applicable in Austria. Consequently, because of the Austrian top-level domain and the several verbal and non-verbal references to Austria, the court argued that consumers would assume that the defendant was an Austrian company.

The court had no doubt that the defendant intentionally wished to blur its domicile. The court held that the information on the domicile in the legal notice and the general terms was insufficient to avoid consumers being misled. Information can prevent the misinterpretation of an otherwise misleading advertisement only if it is perceived by the addressee of the advertisement. An average consumer who almost compellingly infers from the overall impression of a business presentation that he or she is dealing with an Austrian company cannot be expected to verify this impression by a review of the general terms or the website's legal notice. On the contrary, he or she is likely to place an order on the basis of the exclusively Austrian contact information.

The court also had no doubt that the misleading information was likely to cause the consumer to take a transactional decision, as an enterprise is unlikely to issue advertising with no purpose. Furthermore, the court argued that a significant proportion of addressees still believe that an order placed with a foreign company may cause more problems than transactions with a national company. Whether this assumption was true did not affect the assessment of the advertisement under competition laws.

In the absence of any argument from the defendant with regard to Czech law as the law of the country of origin, the court needed to make no deliberations in this respect. The court stressed only that with respect to the fact that the EU Unfair Commercial Practices Directive intends the full harmonisation of consumer-protecting competition laws, there was no reason to doubt that the defendant would have more rights under Czech law than under Austrian law.

## Comment

Although the Austrian Supreme Court followed the ECJ's *DocMorris* decision, the claimant successfully stopped the defendant's marketing activities on the basis of misleading advertising. Although in a common market there should be no mistrust in dealings with companies domiciled in other member states, the Supreme Court's assumption that consumers are still reluctant to purchase from foreign sellers is likely correct. Nonetheless, the court stressed that, with regard to the intention of the EU Unfair Commercial Practices Directive of achieving a full harmonisation of consumer-protecting competition laws, the outcome of the dispute may well have been different if the claimant had sued the defendant in the Czech Republic.

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#### Endnotes

(1) Haas/Plank, *Arzneimittelgesetz*, p 461.

(2) 4 Ob 29/13p, May 23 2013.

(3) Supreme Court 7 Ob 189/11 m.

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