

Delivering expert knowledge  
to global counsel



## Healthcare & Life Sciences - Austria

### Supreme Court rules on nutritional advice by 'bioenergeticicians'

June 03 2015

#### Introduction

#### Facts

#### Supreme Court decision

#### Comment

#### Introduction

The Trade Regulation Act<sup>(1)</sup> distinguishes between unregulated professions (which do not require specific training) and regulated professions (which require specific training). According to Section 119 of the Trade Regulation Act, professionals who provide advice and support – in particular, in relation to personal problems, marital and family problems, educational and professional problems and sexual problems – must obtain a trade licence for life and social coaching. Life and social coaches can provide nutritional advice only if they have successfully completed nutritional science studies at a university or have successfully trained as a dietician. They can also provide scientific sports advice if they have successfully completed sports science or physical education studies.

According to Section 2(1)(11) of the Trade Regulation Act, the act does not apply to medical professionals, psychotherapists or psychologists in the healthcare sector – in particular, physicians, dentists, veterinarians, pharmacists and hospital services. The application of medical science is reserved in particular for physicians.<sup>(2)</sup>

'Bioenergeticicians' are not part of a regulated profession. The scope of their services includes all activities that relate to the "scientifically not yet verified energy field that surrounds everything and includes all forms of life energy, energy direction and energy flow". They may:

- assess the 'energetic status' of clients;
- apply energetic methods, including the application of energetic substances (and complementary substances (eg, blossom essences)); and
- recommend specifically produced energetic substances.<sup>(3)</sup>

The scope of their services excludes medicinal activities, individual consulting, coaching and support in relation to personality problems and any services reserved for healthcare professionals.<sup>(4)</sup>

Under Austrian case law, an alleged infringement of a (general) law or regulation which is not covered by a specific provision of the Unfair Competition Act can, nevertheless, fall under Section 1(1)(1) of the act if this law or regulation cannot be interpreted on reasonable grounds in a way that it does not prohibit the challenged activity.

#### Facts

The defendant was a bioenergeticician who helped his clients to achieve a 'physical and energy balance'. He used the methods of Dr Edward Bach and provided biofeedback and bio-resonance to clients. According to his homepage, his services also included:

- individual assessments of nutritional needs for athletes and workers;
- suggestions to optimise performance during sporting activities in clients' everyday or professional lives;
- testing for adverse food reactions;
- recommendations on nutritional supplements;
- drinking water consultation;
- body mass measurements to assess minimum daily caloric needs; and

- "mind-link-harmonisation of emotional blockades".

The plaintiffs sued the defendant, requesting that a cease and desist order be imposed to prevent him from providing nutritional advice – in particular, determining individuals' nutritional type, testing for adverse food reactions and recommending nutritional supplements.

The court of first instance granted an interim injunction on the basis that the defendant's services infringed the rights of healthcare professionals and life coaches, as only they can provide medical and nutritional advice, respectively. The court found that the advertising on the defendant's website infringed Section 1 of the Unfair Competition Act and was misleading. The appellate court confirmed this decision. The Supreme Court upheld the appellate court's decision.<sup>(5)</sup>

### Supreme Court decision

The Supreme Court confirmed the case law, which states that an alleged infringement of a law or regulation (such as the Trade Regulation Act) which is not covered by a specific provision of the Unfair Competition Act can nevertheless fall under Section 1(1)(1) of the act if this law or regulation cannot be interpreted on reasonable grounds in a way that it does not prohibit the challenged activity. Whether an interpretation of the allegedly infringed law or regulation is reasonable depends on the wording and purpose of the law regulation, the jurisdiction of the courts and the consistent practice of administrative authorities.<sup>(6)</sup>

Further, the court held that to warrant a cease-and-desist order, the challenged activity must influence competition on the market in a perceptible way.

The court held that the 2002 amendment to the Trade Regulation Act placed the provision of nutritional advice under the purview of life and social coaches and thus made it a regulated activity.<sup>(7)</sup> The court stated that the selection, composition and calculation of nutrition for individuals and groups, as well as the provision of nutritional advice to individuals and groups in relation to their particular needs (eg, pregnant women or athletes), constitutes nutritional advice. As such, any individual in an unregulated profession cannot offer these services. The court reiterated that professionals in unregulated professions cannot design dietary plans for clients; they can provide nutritional advice only to the extent that a client could also reach the same conclusions independently (eg, selecting food suppliers, purchasing and selecting food, preparing meals according to a diet plan established by a nutritional expert, varying meals within a dietary plan, counting calories, measuring body mass and establishing a nutritional protocol).

According to the court, assessing an individual's nutritional type, testing for adverse food reactions and suggesting nutritional supplements are services reserved for professionals that have completed specific education. Further, as these activities are the core services provided by nutritionists (a regulated profession), they cannot fall within the scope of an unregulated profession. Suggesting specific nutritional supplements is essentially the same thing as selecting, creating and calculating a diet – activities which can be performed only by nutritionists. Further, providing customised nutritional advice based on specific needs and testing for adverse food reactions is similar to establishing a dietary plan.

According to the court, there was no need to determine whether the defendant's advertising infringed the rights of professional nutritionists, sports coaches or physicians, or whether the defendant's pseudo-medical methods were (at best) non-scientific, as the defendant's ads were in any case misleading.<sup>(8)</sup> As in all other professions, the defendant was prohibited from providing misleading information about his services.

In addition, the concealment of facts is relevant if the public expected this information to be provided, despite there being no general duty to provide complete information in ads. Incomplete information infringes Section 2 of the Unfair Competition Act if the concealment creates an inaccurate impression and may mislead the public. Whether an omission or concealment is considered misleading depends on whether:

- the concealed information is necessary for the average customer to make an informed decision;
- the concealment influences consumers' economic behaviour; and
- limitations on the ability to provide the concealed information exist.

The court held that a duty to inform exists if a method is applied which is not scientifically rational, but creates an impression as such, or if the ineffectiveness of a method is proven by empiric research.<sup>(9)</sup> To assess whether a duty to inform exists, the understanding of the average and reasonable consumers must be considered.

In the case at hand, the defendant's advertising created the impression of a scientifically established method. The defendant not only advertised that he could help individuals to achieve a healthy weight, but

also that he could treat eating disorders and prevent diseases. This created the impression that the assessments and treatments which he provided helped to alleviate or relieve diseases, which automatically brought his claims in line with those services which can be performed only by healthcare professions. The defendant's claims would make the average consumer assume that he was qualified to provide the services of qualified personnel. The court thus ruled that as the defendant had none of the necessary qualifications, his advertising was misleading.

### Comment

As in most developed countries, nutrition, obesity and weight problems are increasingly receiving attention from the Austrian population. In light of this, all types of charlatan are appearing, claiming that they can provide solutions, which often put the health of those affected at risk. Under Austrian law, only qualified healthcare professionals can provide health-related advice and services. The Supreme Court's decision has enforced and supported this approach.

*For further information on this topic please contact Rainer Herzig at Preslmayr Attorneys at Law by telephone (+43 1 533 16 95) or email ([herzig@preslmayr.at](mailto:herzig@preslmayr.at)). The Preslmayr Attorneys at Law website can be accessed at [www.preslmayr.at](http://www.preslmayr.at).*

### Endnotes

- (1) *Federal Law Gazette* 1994/194, as amended.
- (2) Section 3 of the Physicians Act and the *Federal Law Gazette* I 1998/169, as amended.
- (3) For details on the occupation and applied methods of energeticians, see [www.humanenergetiker.co.at](http://www.humanenergetiker.co.at) – a website hosted by the professional group of personal service providers in the Chamber of Commerce.
- (4) Section 2(1)(3) of the Professional Standards, available at [www.humanenergetiker.co.at/wp-content/uploads/standesregeln-mit-logo-23062014.pdf](http://www.humanenergetiker.co.at/wp-content/uploads/standesregeln-mit-logo-23062014.pdf).
- (5) Supreme Court ruling dated September 17 2014, 4 Ob 61/14w.
- (6) Supreme Court ruling dated April 23 2014, 4 Ob 58/14d.
- (7) Supreme Court ruling dated September 15 2004, 9 Ob 64/04h.
- (8) Supreme Court ruling dated November 21 2006, 4 Ob 151/06v.
- (9) Supreme Court ruling dated November 21 2006, 4 Ob 151/06v.

---

*ILO provides online commentaries as specialist Legal Newsletters. Written in collaboration with over 500 of the world's leading experts and covering more than 100 jurisdictions, it delivers individually requested information via email to an influential global audience of law firm partners and international corporate counsel. Please [click here](#) to register for the service.*

The materials contained on this website are for general information purposes only and are subject to the disclaimer.

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at [www.iloinfo.com](http://www.iloinfo.com).

### Author

#### Rainer Herzig



Register  
now for  
continued  
access



- [Contact](#)
- [Disclaimer](#)
- [Privacy Policy](#)
- [Terms](#)
- [Cookie Policy](#)



© 1997-2015 Globe Business Publishing Ltd

Online Media Partners

