

General Report Questionnaire for Working Session

“Claims about claims and disclaimers - welcome to the glamorous world of advertising!”

Distribution Commission

Technology, Media and IP Commission

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1. Questions regarding the content of advertisement law on a national level

1.1 Can you describe in 100 words or less the legal framework regulating the advertising practice?

Austrian Competition Law (*Gesetz gegen unlauteren Wettbewerb – UWG*) is the main Austrian legal standard with respect to the issue of aggressive or misleading advertisement in commercial communication (B2B and B2C).

Besides Austrian Trade Mark Protection Law (*Markenschutzgesetz – MarkenSchG*), Austrian Medical Devices Act (*Medizinproduktegesetz – MPG*), Austrian Medicines Act (*Arzneimittelgesetz – AMG*), legal framework for food labelling and labelling of cosmetics.

1.2 What is the general content of the regulations regarding health claims in advertisement?

Health claims are regulated according to the Austrian Medicines Act (*Arzneimittelgesetz – AMG*) or according to the disciplinary law of medical doctors.

1.3 What is the general content of the regulations regarding comparative claims in advertisement?

The general content of regulations is Art 2 a) of the Austrian Competition Law (both indirect and direct comparison).

Accruals and special cases exist with respect to comparative ancillary advertisement, criticizing comparative advertisement or personal comparative advertisement.

1.4 What is the general content of the regulations regarding wrongful claims in advertisement?

The general content of regulations is Art 2 of the Austrian Competition law (with respect to misleading advertisement), and its Annex (to Art 2).

1.5 Is there a general regulation on the content, without a target audience being specified (for example, no "offensive" or "pornographic" or "political" advertisements)?

A general “non-specified” law may be prohibition law (*Verbotsgesetz* – VerbotG) with respect to national socialist activities (the target audience is irrelevant in this case).

The target audience of the Austrian Competition Law varies; in certain aspects the consumer (“reasonably well informed, reasonably observant and circumspect”) is covered. Nonetheless B2B plays a material role in many aspects.

1.6 Is there any regulation regarding types of audiences, regulating content (for example, no fast food advertisements targeted at children)? If yes, what is the general content of this regulation?

With respect to children the standard requirements for the deception of the consumer according to Art 2 of the Austrian Competition Law are much lower. This target audience is of a very sensitive nature. In addition to that encouraging children to buy something is absolutely forbidden (*per-se-Verbot* according to Clause 28 of the Annex to the Austrian Competition Law).

1.7 What are the developments in your jurisdiction regarding *ad blockers*?

Discussed amongst informed, but not yet decided in court.

1.8 What are the sanctions in the field of advertisement law in your jurisdiction? Please cover both public (fines etc) and private (damages claims etc) sanctions related to wrongful advertisement.

Both public fines and private sanctions are covered by law.

With respect to the Austrian Competition Law in detail the legal instruments of restraining orders, actions for an injunction, removal and claims for damages are at one’s disposal and (very restricted) criminal-law protection and administrative penalties have been implemented.

2. Questions regarding Intellectual Property Rights and advertisement

2.1. What is the general content of regulation in your jurisdiction regarding the use of Intellectual Property (such as trademarks) of competitors in advertisement?

The general content of the regulation is Art 10 of the Austrian Trade Mark Protection Law; see for example OGH 17Ob19/11k (“Oral-B”) or OGH 17Ob2/11k (“VELUX”).

Certain aspects are also covered by Art 2 a) of the Austrian Competition Law.

2.2. Under what conditions would, based on the case law in your jurisdiction, the use of trademarks of others as '*Ad Words*' in a Google ad word campaign be allowed?

Case: OGH 17Ob3/10f (“Bergspechte”)

The use of a brand (a brand component) of a third party as a keyword generating advertising does not infringe the rights of a trade mark owner, if the normal and reasonably attentive internet user easily recognizes, that the goods and services advertised neither originate from the proprietor of the mark nor of an economically associated company.

This “key-decision” of the Austrian Supreme Court established a “path-through” for using trademarks of others as “*ad words*” in Google research.

3. Questions regarding a remarkable case regarding advertising claims

Case: OGH 4Ob121/15w (“Forellenfilets”)

3.1. What was the claim or statement under dispute?

Sales of trout filets commercially to consumers under the following circumstances (package layout):

1. Reference is made to a certification, which was not given (“IFS-certified”)
2. Reference is made to the origin, which was not given (“Austrian family business”)

3.2. What was the outcome?

Ad 1. The use of a certification is equal to the use of a quality mark or similar. In case there is no license to the use given from the responsible authority, such a use infringes the Austrian Competition Law (in particular Clause 2 to the Annex of the Austrian Competition Law).

Ad 2. The trout fillets originate from Italy. The reference made to the origin of an “Austrian family business” is misleading for the consumer. The consumer is influenced in his choice thereby.

3.3. What are in your opinion the interesting points in this case?

1. Interestingly the trout fillets have been processed by an “IFS-certified” company in Austria. The seller itself never referred in the advertisement (package layout) to the point, that the seller itself is allowed to use the certificate on its behalf; nonetheless the seller was sentenced by the Supreme Court for having “used” such a certificate. The decision might therefore be seen to be exaggerating in this aspect.

2. Furthermore, and much more interestingly, the case displayed, that the prerequisites for Protected Geographical Indication (PGI) according to EU-Regulation 1151/2012 are weaker than the requirements of Austrian Competition Law with respect to the issue of referred to the “origin” of a product. This is inconsistent. The decision might therefore be seen to be exaggerating in this aspect as well.

4. Points of interest in the field of advertisement law and B2C communication

4.1. What would you like to be discussed during the Working Session?

The impact of “*ad blocking*” and the relevant areas of tension. This is, from my point of view, enormously interesting due to the fact that this issue has not yet been clear-cut decided (not even clearly discussed) by the relevant authorities.

4.2. What specific advertisement law related point of interest would you like to speak about yourself?

4.3. Do you have any suggestions of points of interest omitted in this questionnaire?

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