

## Healthcare & Life Sciences - Austria

### Teeth bleaching can be carried out only by dentists

Contributed by [Preslmayr Attorneys at Law](#)

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#### Facts

The Austrian Chamber of Dentists recently sued a beauty parlour that offered 'cosmetic teeth bleaching'. The beauty parlour used a tooth gel applied to a dental splint, which clients had to put into their mouth. The bleaching gel was then activated by an LED lamp.

On its website the cosmetic parlour advertised this procedure as a treatment to lighten teeth and remove discolouration through a photochemical reaction of dental enamel and dentinal. The advertisement included a list of situations in which treatment could not be carried out (eg, the presence of gum disease, caries or pregnancy), along with a recommendation to consult a dentist in case of doubt.

The German Chamber of Dentists had stated in September 2012 that bleaching devices with a concentration of hydrogen peroxide of below 0.1% were over-the-counter products and could be applied without the participation of a dentist. The tooth gel used by the beauty parlour did not contain hydrogen peroxide.

#### Legal background

Section 4(3)(4a) of the Dentists Act provides that "the performance of cosmetic and aesthetic dental surgery, provided they require a dental examination and diagnosis", are reserved for dentists.

Under Section 1(1)(1) of the Unfair Competition Act, infringement of a legal provision qualifies as an unfair commercial practice if the provision cannot be interpreted with good reason in such a way that it does not oppose the challenged conduct. When establishing the validity of such interpretations, the obvious wording of the provision, the purpose of the allegedly infringed provision and the decisions of the administrative courts or the continuous practice of the administrative authorities (if any) must be taken into account.<sup>(1)</sup> Furthermore, to qualify as an unfair commercial practice, the challenged conduct must influence competition to the detriment of law-abiding competitors to a more than minor extent.<sup>(2)</sup>

#### Decision

##### *First instance ruling*

The court of first instance denied the grant of an interim injunction. According to the court, the product used by the defendant did not contain hydrogen peroxide and therefore qualified as a simple mouthcare remedy whose application was not reserved for dentists.

##### *Appellate ruling*

The court of appeal overturned the earlier decision and granted the interim injunction. According to the court, bleaching serves to lighten the teeth and remove discolouration through a photochemical reaction. Tooth discolouration may have several causes, whether consumer behaviour (eg, use of tobacco, alcohol or coffee) or morbid changes. Therefore, as such discolouration does not qualify as the result of disease in every case, decisions on the causality of discolouration are reserved for dentists. The removal of discolouration without analysis of the root cause may result in a dental disease that requires treatment remaining unrecognised.

This argument was backed up by the defendant's warnings that bleaching could not be

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performed in case of gum disease or untreated caries. Neither the client nor the defendant's cosmeticians had the ability to diagnose the presence of such conditions. Therefore, the court argued that under these circumstances, the defendant's service should be reserved for dentists, despite the fact that the product did not contain hydrogen peroxide.

### **Supreme Court ruling**

The Supreme Court confirmed this decision.<sup>(3)</sup> The court had no doubt that the advertisement on the defendant's website fell under Section 4(3)(4a) of the Dentists Act. A photochemical reaction (ie, a chemical reaction initiated by light) exceeds the simple application of a mouthcare remedy and therefore qualifies as 'surgery' in the sense of Section 4(3)(4a) of the act. This qualification does not change because of the fact that a remedy without hydrogen peroxide might be sound. Furthermore, as treatment is excluded (according to the defendant's information) in the case of certain common diseases (eg, gum disease, caries), it follows compellingly (and also according to the defendant's own opinion) that whether such disease exists must be verified before treatment. Therefore, treatment requires prior examination and diagnosis (which is an activity reserved for dentists).

### **Comment**

Austrian law provides rather strict reservations on the services that must be rendered exclusively by physicians and dentists. Both the Chamber of Physicians and the Chamber of Dentists vigilantly monitor potential competitors (eg, beauty parlours) to ensure that they do not intrude on the preserves of members. The Supreme Court generally follows this strict approach.

Although the German Chamber of Dentists has qualified bleaching remedies that do not contain hydrogen peroxide (or contain hydrogen peroxide only in a small percentage) as harmless, the application of a remedy without this ingredient will not necessarily qualify as harmless. Arguably, in the case at hand, the courts might have decided otherwise if the defendant had omitted the warnings from its advertisement. However, it would have then been at risk of liability in case of complications caused by the treatment due to dental disease.

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### **Endnotes**

(1) 4 Ob 225/07d = SZ 2008/32 – *Wiener Stadtrundfahrten*.

(2) 4 Ob 225/07d = SZ 2008/32 – *Wiener Stadtrundfahrten*.

(3) 4 Ob 166/13k, October 22 2013.

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