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# Strict advertising rules for (foreign) dentists

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### Introduction

The Distance Selling Act (FAGG) provides a statutory duty to provide information on the total price of a product or service on websites, but it does not apply to contracts for healthcare services, with the exception of the distance sale of medicinal products and medical devices. The advertising rules of the Chamber of Austrian Dentists and Dental Specialists (Chamber of Dentists) prohibits the price of private dental services from being mentioned in public unless such a price indication is required by law. The Act on Dentists (ZÄG) provides the possibility to operate a dental group practice in the legal form of a limited liability company, but reserves the possibility to be a shareholder to dentists entitled to practise independently. The interpretation of these provisions was subject to a Supreme Court decision in October 2020.

### Facts

The plaintiff was the Chamber of Dentists. The defendant was a German limited liability company. The majority of its shareholders were not entitled to practise the profession of dentistry independently. The defendant sold custom-made plastic dental splints, together with a treatment plan prepared by dentists. The defendant advertised on its website, among other things, optimal medical care by dentists and orthodontists, online or in person, and that every treatment with its dental splints was carried out by a licensed and specialised dentist or orthodontist.

The defendant also referred to a location in Vienna, stating the name and address of a cooperating dentist. On the website, the costs for the defendant's services were also stated – namely, €1,899 including VAT for Germany and €2,199 including VAT for Austria.

The defendant's contracts with its customers included:

- the creation of an imprint;
- the assessment of the imprint by a dentist;
- the manufacture and delivery of the individual dental splints; and
- monitoring or reviewing the course of treatment.

In case of deviations from the normal course of treatment, an assessment was carried out by a cooperating dentist, who charged the services to the defendant.

The plaintiff sought to prohibit the defendant from:

- advertising its medical products by naming or at least identifying the participating dentists;
- quoting prices for private dental services in public announcements or having such prices quoted; and
- providing dental activities in the territory of Austria, such as taking impressions in the human mouth, or announcing dental activities in Austria, if such services are provided by persons who merely act as vicarious agents for the defendant (even if such persons are competent).

### Decisions

The first-instance court granted the requested interim injunction, which was confirmed by the appellate court.

The Supreme Court upheld the decision.<sup>(1)</sup>

#### **Price indication**

To defend the price indication on the website, the defendant primarily invoked the statutory duty to provide information on the total price pursuant to section 4(1)(4) of the FAGG.

According to article 3(e) of the Advertising Directive of the Chamber of Dentists, indicating the price of private dental services in public is against the profession and thus inadmissible, except where the price indication is required by law. The Advertising Directive is based on the ZÄG and serves to safeguard the reputation of the profession; it is objectively justified according to the case law of the Supreme Court.<sup>(2)</sup>

According to the case law of the Supreme Court, the prohibition of advertising also applies to members of a liberal profession established abroad who work in Austria.<sup>(3)</sup> It is sufficient if the dentist attempts to attract patients for treatment at its foreign place of practice by means of advertising measures.

With the contested advertising announcements on its website, the defendant violated the advertising ban in question.

By referring to the duty to provide information pursuant to section 4(1)(4) of the FAGG, the defendant referred to the exception under article 3(e) of the Advertising Directive – namely, that the indication of the price is required by law. The FAGG implements the EU

Consumer Rights Directive (2011/83/EU). According to article 3(3)(b) of the EU Consumer Rights Directive, it does not apply to contracts for health services according to article 3(a) of the EU Cross-Border Healthcare Directive (2011/24/EU) on the exercise of patients' rights. This is also the case for the EU Services Directive (2006/123/EC), according to article 2(2)(f) thereof.

In the *Fermabel* case (C-57/12), the European Court of Justice (ECJ) stated that the exclusion of healthcare services from the scope of application of the EU Consumer Rights Directive applies to any activity that is directly and closely related to the health status of patients, provided that the activity is carried out by professionals (according to the legislation of the member state concerned). Relevant activities include only those that are directly and closely related to the human health condition and not those that merely enhance general wellbeing. Article 3(f) of the EU Cross-Border Healthcare Directive defines "healthcare professionals" as persons who carry out activities in the healthcare sector that are reserved for a regulated profession. Whether these prerequisites apply in individual cases is left to the assessment of the national courts, which must consider whether the healthcare services in question constitute the predominant component of the services provided.

In the case at hand, healthcare services were provided, because the following actions constituted dental services:

- the use of the individually fitted dental splint;
- the production and assessment of the impression (the analysis of the dentition); and
- the preparation, control and adjustment of the treatment plan.

The defendant therefore could not rely on the EU Consumer Rights Directive.

However, the FAGG's implementation of the EU Consumer Rights Directive (permissibly) goes beyond the scope thereof. According to section 1(2)(3) of the FAGG, this law does not apply to contracts for healthcare services, with the exception of the distance sale of medicinal products and medical devices. This counter-exception was deliberately made by the Austrian legislature for reasons of consumer protection.<sup>(4)</sup>

The counter-exception in question is to be interpreted narrowly. Accordingly, the legislative materials state that, for example, the activities of bandage makers, orthopaedic shoemakers or acousticians do not fall within the scope of the counter-exception, because these professional groups sell medical devices manufactured individually for the patient. It thus follows that the counter-exception in section 1(2)(3) of the FAGG for the distance sale of medicinal products and medical devices applies only to the pure sale of standardised mass-produced articles but does not cover individually manufactured or adapted medical devices. Thus, the activities of the defendant fell under the exception (but not the counter-exception) of section 1(2)(3) of the FAGG. Therefore, the defendant could not invoke the duty to indicate the total price under section 4(1)(4) of the FAGG.

The defendant's reference to section 2(6)(3) of the Act against Unfair Competition (UWG) also failed. This section requires the indication of the gross price in an invitation to purchase. The provision is based on article 7(4) in conjunction with article 2(i) of the EU Unfair Commercial Practices Directive. Article 3(4) of the EU Commercial Practices Directive stipulates that if the provisions thereof are incompatible with other EU legislation regulating specific aspects of unfair commercial practices, those provisions take precedence. In particular, the requirements of the EU Unfair Commercial Practices Directive do not apply if specific sectoral rules exist at EU level on aspects relevant to marketing (advertising or sales), such as information requirements.<sup>(5)</sup>

The EU Cross-Border Healthcare Directive (2011/24/EU) imposes specific information obligations on healthcare providers and also stipulates, among other things, that they must provide clear price information (article 4(2)(b)). In addition, the EU Medical Devices Directive (93/42/EEC) contains specific information requirements.<sup>(6)</sup>

It follows from these considerations that section 2(6)(3) of the UWG did not apply in the case at hand.

Finally, the defendant did not demonstrate any constitutional concerns with its argument that the Chamber of Physicians, unlike the Chamber of Dentists, has in the meantime abolished the ban on advertising price quotations, which is why there is an unobjective differentiation. Physicians and dentists are different professional groups. Although the respective chambers, as the standard-setting bodies, have to decide on the same or similar subjects of regulation, they can use the rights granted to them within the framework of self-government. This situation is comparable to different regulations in comparable areas in the individual federal provinces of Austria. In this regard, the Constitutional Court ruled that the mere fact that there are different regulations for the same subject area in different provinces does not violate the principle of equality.

### **Practice of dentistry**

On the practice of dentistry, the defendant stated that it did not itself provide dental services in Austria.

According to the established facts, the contractual services of the defendant also included:

- the production and assessment of the impression (the dental analysis);
- the control of the course of treatment; and
- if necessary, the adjustment of the treatment plan after an assessment had been made.

These services were carried out by an Austrian dentist with whom the defendant had concluded a cooperation agreement. The cooperation dentist thus acted as a vicarious agent of the defendant.<sup>(7)</sup> The activity performed by them was attributable to the defendant and was indisputably carried out in Austria.

The defendant was therefore not correct in its view that the entire treatment took place in Germany.

In this respect, it was only decisive that the cooperation dentist acted as a vicarious agent.

According to section 26(1)(2) of the ZÄG, a dental group practice may also be operated in the legal form of a limited liability company. According to section 26(3) of the ZÄG, however, only members of the dental profession who are entitled to practise independently may belong to the group practice as shareholders. This provision thus contains a prohibition of limited liability companies of "other" dentists and – in connection with section 4(3) of the ZÄG – a reservation for dentists.<sup>(8)</sup>

The defendant did not meet the requirements of section 26(3) of the ZÄG because persons outside the profession were also shareholders. The defendant's activity in Austria, which it carried out through an Austrian cooperation dentist, thus interfered with the dentists' proviso.

The fact that the defendant's activity was permissible under German law<sup>(9)</sup> did not help the defendant, because section 31 of the ZÄG (concerning the freedom to provide services) applies only to natural persons entitled to exercise the profession.

Finally, the defendant's argument that the dental impression could also be made by the patient themselves was not valid either because, according to the established facts, the Austrian cooperation dentist provided a number of further dental services.

Overall, the defendant's submissions did not succeed in showing an incorrect assessment of the case law by the lower courts. The appeal on points of law was therefore not successful.

#### **Comment**

The Chamber of Dentists is active in protecting the interests of its members and fending off the intrusion of foreign practitioners. Based on the current legislation, there is nothing in the Supreme Court's reasoning to be criticised. However, it seems that the Chamber of Dentist's interest to protect their profession by far outweighs the consumers' interest to be informed on the prices of dental services.

The purpose of limiting the circle of shareholders in a dental group practice operated by a limited liability company maintains the status of a "liberal profession" and prevents profit-oriented institutions from the provision of dental services. The question is whether this limitation is appropriate to achieve this goal.

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#### **Endnotes**

(1) Supreme Court 20 October 2020, 4 Ob 158/20v – Dental Splints – wbl 2021, 114.

(2) See Supreme Court 4 Ob 79/12i and Supreme Court 4 Ob 58/16g.

(3) See Supreme Court 4 Ob 161/16d.

(4) Government Bill 89 NR 25. GP, pages 5 and 23.

(5) ECJ, *Konsumentenombudsmannen* (C-363/19), paragraph 59.

(6) Compare 4 Ob 135/20m (= wbl 2021, 54; editor's note).

(7) Compare 1 Ob 269/99m.

(8) Compare 4 Ob 211/181k (= wbl 2019/113, 360).

(9) *Scholz*, *Medizinrecht*<sup>3</sup> section 23a MBO Rz 2.