



Advertising & Marketing

in 19 jurisdictions worldwide

2014

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Advertising & Marketing 2014**Contributing editor:****Rick Kurnit****Frankfurt Kurnit Klein & Selz, PC**

Getting the Deal Through is delighted to publish the first edition of *Advertising & Marketing*, a new volume in our series of annual reports, which provide international analysis in key areas of law and policy.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 19 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are always referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

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Legislation and regulation

1 What are the principal statutes regulating advertising generally?

The main source of advertising law in Austria is the Federal Law Against Unfair Competition (UWG). It includes three main types of prohibited advertising practices:

- unfair commercial practices (section 1 UWG);
- aggressive commercial practices (section 1a UWG); and
- misleading commercial practices (section 2 UWG).

Some further, more specific clauses of prohibited practices exist, such as disparagement of an enterprise, misuse of designations of an enterprise, bribing of employees or agents or disclosure of business or trade secrets.

Several former specialised acts and provisions dealing with, for example, promotional gifts, price discounts or clearance sales were repealed. These areas now fall under the UWG.

Case law also gives consideration to other, more specific laws when interpreting the UWG clauses such as trade regulations, labelling laws and regional planning laws.

2 Which bodies are primarily responsible for issuing advertising regulations and enforcing rules on advertising? How is the issue of concurrent jurisdiction among regulators with responsibility for advertising handled?

According to the Federal Constitutional Law (B-VG), for advertising matters, the Federation has powers of legislation and execution. Thus, the Austrian parliament is responsible for issuing advertising laws and the federal government can enact ordinances whenever such ordinances are provided for by law. There is no concurrent jurisdiction in Austria.

Advertising law is enforced by the courts, the main competent courts are the Commercial Court in Vienna and the regional courts outside Vienna.

3 What powers do the regulators have?

The courts can impose damages and cease-and-desist orders, including a right to elimination of unlawful conditions. In case of disparagement of an enterprise, there is a right to retraction and publication of the retraction. In some cases, the publication of a sentence or the rendering of accounts to the claimant may also be ordered.

In serious cases, the courts can impose monetary penalties as well as prison sentences.

4 What are the current major concerns of regulators?

A current issue is advertising on internet platforms which offer illegal services (eg, music downloads that violate copyrights). Advertising on such platforms is not only unethical, but may also constitute a

breach of the UWG. In this matter, a process of establishing self-regulation has been launched.

5 Give brief details of any issued industry codes of practice. What are the consequences for non-compliance?

In Austria, self-regulation is only of minor importance.

The advertising industry, however, founded an Advertising Council, which established guidelines to be followed by the advertising industry as an instrument of self-control. These guidelines guarantee in particular that a sense of decency is respected in advertising. The Advertising Council has no power to impose sanctions on the advertiser. However, the decisions of the Advertising Council may be published in order to inform the media and the public that a certain practice offends the rules of decency.

6 Must advertisers register or obtain a licence?

Advertisers (companies who want to advertise their products or services) do not have to register or obtain a licence.

Advertising agencies (companies who provide advertising services for others) are considered 'free trades', which do not fall under the regulated trades according to the Austrian Trade, Commerce and Industry Regulation Act. However, before starting business they have to register with the competent district administration authority.

7 May advertisers seek advisory opinions from the regulator? Must certain advertising receive clearance before publication or broadcast?

The regulators have not installed an advisory board. There is, however, the possibility of consulting associations or institutions such as the Advertising Council.

Advertisers do not need clearance before publication or broadcasting.

Private enforcement

8 What avenues are available for competitors to challenge advertising? What are the advantages and disadvantages of the different avenues for challenging a competitor's advertising?

Competitors may bring both principal actions on the merits and an application for preliminary injunctions.

An order to cease and desist is available in both avenues. All other remedies are available only in the principal action on the merits.

On the one hand, preliminary injunctions have the advantage of quick relief through (only) establishing *prima facie* evidence. On the other hand, if the preliminary injunction is ordered but the court finally dismisses the claim in the principal actions, the defendant can claim damages for not having been allowed to advertise while the preliminary injunction was in place.

9 How may members of the public or consumer associations challenge advertising? Who has standing to bring a civil action or start a regulatory proceeding? On what grounds?

Apart from competitors, a suit for a cease-and-desist order may also be filed by associations to promote the economic interests of entrepreneurs. Among these are the Federal Chamber of Labour, the Federal Economic Chamber, the Presidential Conference of the Austrian Chambers of Agriculture, the Austrian Trade Union Federation, the Federal Competition Authority and the Association for Consumer Information.

10 Which party bears the burden of proof?

The plaintiff must prove that the defendant undertook the advertising in question. The defendant must prove that its advertising statements are true. As mentioned before, in the proceedings about the preliminary injunction it is sufficient for the plaintiff to substantiate the claim.

11 What remedies may the courts or other adjudicators grant?

Courts mainly impose damage payments and cease-and-desist orders. In case of disparagement of an enterprise, there is a right to retraction and publication of the retraction. In some cases, the publication of a sentence or the rendering of accounts to the claimant may also be ordered.

In serious cases, courts can also impose penalties (fees and prison sentences).

12 How long do proceedings normally take from start to conclusion?

The duration of a process strongly depends on the complexity of the matter, on the required number of hearings for taking evidence and on whether or not proceedings for preliminary injunctions are necessary (these normally take two or three weeks, when an injunction is not appealed against).

An average cease-and-desist claim takes approximately one to two years from making the claim until judgment by the court of first instance. The decision about an application for a preliminary injunction takes another one to three months.

13 How much do such proceedings typically cost? Are costs and legal fees recoverable?

Under Austrian law, the value in dispute is the basis for the calculation of lawyers' fees and court costs. Lawyers' fees are also affected by the number and type of pleadings prepared, the number and duration of hearings, and whether there are appeals.

Since claims to cease and desist and for publication do not seek payment of money, they must be valued by plaintiffs. If the valuation is disputed by the defendant, the value in dispute is determined by the court. The valuation must be made in accordance with the interest actually claimed.

For proceedings of first instance, costs usually are between €5,000 and €10,000.

The losing party must reimburse the prevailing party for the lawyer's fees and court costs necessary for the pursuit of the prevailing party's rights.

14 What appeals are available from the decision of a court or other adjudicating body?

Judgments by the court of first instance can be challenged at the competent court of appeal, which is one of the four Higher Regional Courts of Appeal. They are located in Vienna (covering Vienna, Lower Austria and Burgenland), Graz (covering Styria and Carinthia), Linz (covering Upper Austria and Salzburg) and Innsbruck (covering Tyrol and Vorarlberg).

Judgments of an arbitration tribunal can only be challenged in case of heavily defective proceedings.

Misleading advertising

15 How is editorial content differentiated from advertising?

According to section 26 of the Media Act, announcements and recommendations as well as other features and reports for whose publication a payment is received must be identified in periodically published media as 'advertisement', 'paid insertion' or 'advertising', unless the design or arrangement excludes any doubts that publication has been made in return for payment.

16 How does your law distinguish between 'puffery' and advertising claims that require support?

Puffery is exaggerated advertising that cannot be taken seriously or literally by the public. It is therefore not regarded as misleading. Also, purely subjective value judgments such as 'Austria's best coffee' are allowed.

If doubts remain as to whether or not a statement is to be taken seriously, it is considered serious.

17 What are the general rules regarding misleading advertising?

Must all material information be disclosed? Are disclaimers and footnotes permissible?

In general, every misleading statement as to the quality and characteristics of goods is prohibited if it causes the customer to buy a product that he or she would not have bought otherwise.

Omissions, incomplete statements, footnotes and disclaimers (eg, which restrict or put into perspective an accentuated advertising claim) are only unlawful if they are likely to mislead the public.

Footnotes and disclaimers are considered misleading if they cannot easily be seen by the public (eg, if the font size of the footnote or disclaimer is considerably smaller than the rest of the advertisement).

18 Must an advertiser have proof of the claims it makes in advertising before publishing? Are there recognised standards for the type of proof necessary to substantiate claims?

Before publishing the advertisement to its target group, an advertiser does not have to prove the statement it makes in its advertisement. Proof has to be provided in court proceedings only.

The necessary standard of proof is high probability.

19 Are there specific requirements for advertising claims based on the results of surveys?

Advertising claims based on the results of surveys are generally permitted. Survey results must be accurate and not misleading. For example, it would be misleading in a competition among newspapers to compare the number of readers, implying that all newspapers are included in the study, if one significant competitor is not. Further, survey results must be current as of the time of their publication.

20 What are the rules for comparisons with competitors? Is it permissible to identify a competitor by name?

Comparative advertising in which goods or services of one company are compared with those of a competitor is generally permissible (also identifying the competitor by name). Such comparative advertising, though, must not violate the requirement of objectivity. It must not be misleading, disparaging, aggressive, obscene or against public morality.

Attention must be focused on whether the products compared are actually comparable. It is not sufficient to simply indicate that one's own product or service in general is better than that or those

of competitors. All decisive circumstances and reasons must be given allowing the public to make an objective decision. For example, comparison of one's own price for a certain product with the higher price of a competitor for a higher quality product is not permitted.

21 Do claims suggesting tests and studies prove a product's superiority require higher or special degrees or types of proof?

In general, there is no hierarchy regarding different types of proof. Judges are free in their consideration and evaluation of evidence.

Advertisements describing a product as superior on the basis of tests must take into consideration the usual margin of deviation of such tests. Furthermore, superiority must be continuous and considerable.

22 Are there special rules for advertising depicting or demonstrating product performance?

There are no special rules for depicting or demonstrating product performance. The general provisions apply (eg, it must not be misleading or aggressive). It must neither discriminate in terms of gender, sexual preference, ethnicity, race or religion nor encourage or trivialise alcohol or violence.

23 Are there special rules for endorsements or testimonials by third parties, including statements of opinions, belief, or experience?

To use third-party statements in advertising permission by that party is required.

The adherence to a code of practice – if true – may be advertised.

The attainment of a quality mark – if validly conceded – may be advertised as well. However, the claim that an enterprise (including its commercial practices) or a product has been approved, endorsed or authorised by a public or private body when it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation, is prohibited.

24 Are there special rules for advertising guarantees?

There are no special rules for advertising that the seller offers special guarantees for the product.

25 Are there special rules for claims about a product's impact on the environment?

On the one hand, environmental claims are only permitted if such claims can be convincingly proven to be truthful and not misleading. On the other hand, there is no obligation to present data on all possible environmental effects of a certain procedure that has been claimed to be friendly to the environment, as this would make such advertising practically impossible. The expression 'environment-friendly', may, as a rule, be used if the use of the advertised product has a less negative effect on the environment than other comparable products. It is not necessary for the product to have no effect on the environment at all, as consumers do not normally expect this.

26 Are there special rules for describing something as free and for pricing or savings claims?

Pricing claims, above all, must be true and not be misleading. For example, advertising a 'factory price' is misleading if shop overheads form part of the price.

Regarding products that are offered to consumers, according to the Federal Act on Price Marking, prices shall be marked so that any normally attentive observer is able to read and identify them easily. Price lists for services shall be put up at a clearly visible location on the business premises. They may alternatively be laid out on the business premises or made available for inspection by the customer. The

prices shall be marked in Austrian currency (euros) and be inclusive of VAT and all other taxes and charges (gross prices).

For special offers, it must be made clear that the special price concerns one single item only. The special offer must be in stock in sufficient quantities to meet normal, anticipated demand in consideration of the given circumstances. The simple addition 'while stocks last' does not release the seller from this obligation.

27 Are there special rules for claiming a product is new or improved?

Claiming a product is new or improved must again be true and not misleading. Expressions that indicate a product's newness or up-to-dateness cannot be sustained for too long because otherwise consumers erroneously assume that the innovation is still recent.

For products that are subject to quick technical and fashionable changes, the above-mentioned period is shorter than for other, less 'dynamic' products.

Prohibited and controlled advertising

28 What products and services may not be advertised?

Products whose sale and possession is prohibited under criminal law must not be advertised.

Spirits must not be advertised in radio and TV spots.

Furthermore, for alcohol advertising, the following restrictions apply. An advert must not:

- be directed to minors;
- depict minors consuming alcohol;
- promote excessive consumption of alcohol;
- make a connection between alcohol and improved physical or physical performance; or
- present a high alcohol level as something positive.

Pharmaceuticals and medical devices advertising must:

- not be directed to minors;
- not be for prescription medicine;
- clearly indicate (non-prescription) medicine as such;
- not make an untrue claim that something is a medical (healing) product;
- not claim superiority or comparability with other medical products;
- not claim a doctor's medical treatment is redundant;
- not hide potential side effects; or
- not be featured in teleshopping.

Tobacco advertising is generally prohibited. An exception is advertising by tobacconists in and around their tobacco shop. This exception is in addition to several restrictions.

29 Are certain advertising methods prohibited?

In general, aggressive advertising is prohibited.

Advertisements may not exert psychological pressure on consumers to buy. Advertisements are prohibited if they place customers under pressure to agree to purchase merely to escape these pressures.

Addressing persons in front of shops, even if not done in a nasty or presumptuous way, is not allowed. The mere distribution of advertising material in public is generally allowed.

Advertising via unsolicited phone calls to private persons is generally prohibited.

Advertising by post is generally allowed unless the addressee declared otherwise.

The use of a snowball sales system is prohibited. A snowball sales system is an arrangement whereby the customer is promised delivery of a good or performance of a service against a remuneration to be performed unconditionally if the customer, by means of the orders or vouchers handed over to him, finds for the enterprise

of the promising party another purchaser who enters into the same contractual relationship with such enterprise.

Lay advertising, which involves the referral of relatives, friends and acquaintances in order to receive premiums or other benefits, is considered against good morals and therefore prohibited. Moreover, advertisers must not use subliminal messages.

30 What are the rules for advertising as regards minors and their protection?

The inclusion of a direct exhortation to children in an advertisement to buy advertised products or to persuade their parents or other adults to buy advertised products for them is prohibited. However, an indirect invitation to a purchase by showing the benefits and pleasures connected with a product is allowed, even if aimed at children.

31 Are there special rules for advertising credit or financial products?

For advertising credit or financial products, the general rules apply. In addition, advertisers must provide customers with all relevant and necessary information to enable the customer to make a well-founded decision.

If advertising for loans contains figures, these have to be clearly, accurately and noticeably illustrated by an example containing all relevant loan information such as the effective interest rate, total loan sum and loan period.

Relevant legislation includes the Capital Market Act and the Consumer Credit Act.

32 Are there special rules for claims made about therapeutic goods and services?

Pharmaceuticals and medical devices advertising must:

- not be directed to minors;
- not include prescription medicine;
- not include other (non-prescription) medicine clearly identifiable as such;
- not make an untrue claim that something is a medical (healing) product;
- not claim superiority or comparability with other medical products;
- not claim that a doctor's medical treatment is redundant;
- not hide potential side effects; and
- not feature on teleshopping.

33 Are there special rules for claims about foodstuffs regarding health and nutrition, and weight control?

In Austria, Regulation No. 1924/2006 on nutrition and health claims made on foods is applicable. Health claims must be approved by the European Commission, which set up a list of already approved claims in Regulation No. 432/2012.

In general, 'well-being' claims are only allowed when supported by an approved statement.

Applications for approval of a claim can be sent to the Federal Ministry of Health.

34 What are the rules for advertising alcoholic beverages?

Spirits must not be advertised in radio and TV spots.

Furthermore, for alcohol advertising, the following restrictions apply. Adverts must not:

- be directed to minors;
- depict minors consuming alcohol;
- claim therapeutic, tranquilising or conflict-resolution effects;
- promote excessive consumption of alcohol;

- make a connection between alcohol and improved physical or mental performance, or more social and sexual success; or
- display a high alcohol level as something positive.

35 What are the rules for advertising tobacco products?

Tobacco advertising is generally prohibited. An exception is advertising by tobacconists in and around their tobacco shop. This exception is limited by several restrictions:

- at least 10 per cent of advertising space must be reserved for health warnings;
- there must be no advertising for cigarettes without a filter;
- there must be no belittlement of the negative effects of smoking;
- it must not be directed to those of under 30 years' of age;
- cartoons must not be used; and
- there must be no discount sales or distribution of free packages.

36 Are there special rules for advertising gambling?

According to the Gambling Act, advertisers for gambling must adhere to a certain level of responsibility. This adherence, however, is not subject to claims by competitors under the UWG but only to public supervision.

37 What are the rules for advertising lotteries?

Lotteries also fall under the Gambling Act (see section 36).

38 What are the requirements for advertising and offering promotional contests?

Promotional contests, which consumers can participate in without additional (hidden) costs, are generally allowed, even if participation requires the purchase of a product. However, as soon as additional costs occur (exceeding the usual price of the product), the contest is considered a 'promotional game', which may fall under the Gambling Act and therefore be subject to restrictions.

39 Are there any restrictions on indirect marketing, such as commercial sponsorship of programmes and product placement?

Sponsorship of programmes must not interfere with the editorial content or directly call for the purchase of a service or product of the sponsoring party. Sponsored programmes have to be made recognisable as such. News and other programmes with political content may not be sponsored.

In general, product placement in broadcast media is prohibited. However, there are numerous exceptions to that prohibition. It is allowed if the provided products are free of charge, and it is generally allowed in films, TV series, sport programmes and in 'light-weight entertainment' programmes.

Where product placement is allowed, it must indicate the product placement before and after the programme and must not:

- interfere with the editorial content;
- directly call for the purchase of a service or product; or
- display the placed product too dominantly.

40 Briefly give details of any other notable special advertising regimes.

Special provisions apply to certain freelance professions such as lawyers, doctors, veterinarians, midwives and morticians. In general, these professions are limited to reserved forms of advertising (eg, no puffery).

Social media

41 Are there any rules particular to your jurisdiction pertaining to using social media for advertising?

According to the E-Commerce Act, an internet advertiser must ensure that the advertisement is identifiably as such and that the enterprise 'behind' the advertised product or service is identifiable as well.

According to the Telecommunications Act, the sending of e-mails or text messages for the purpose of direct advertising is prohibited without the recipient's explicit consent. This prohibition applies to social media users as recipients of advertising messages as well.

42 Have there been notable instances of advertisers being criticised for their use of social media?

Facebook in particular has been heavily criticised a lot for its terms of use, which are often accepted by the users without reading and which grant Facebook the right to 'use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. [...] You understand that we may not always identify paid services and communications as such.'

This does not comply with Austrian advertising (eg, ads have to be marked as such) and data protection regulations (eg, no valid consent by customer for data use).

43 Are there regulations governing privacy concerns when using social media?

The use of a social media users' personal data must comply with the provisions of the Data Protection Act. Any use of data for advertising or marketing purposes requires the data subject's explicit consent. The principle of informational self-determination determines that the data subject has to be aware of the exact facts that she or he is giving consent to. Furthermore the data subject's consent shall be given freely without any form of constraint. A valid consent requires the data subject's exact knowledge in advance about what data is collected for what purpose if the processing of data is not an absolute necessity for the fulfilment of the contract. A generic circumscription of the recipients of the data is not sufficient.



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