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## Intellectual Property - Austria

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### Patent protection: pharmaceutical product versus dietary supplement

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**Decision**  
**Comment**

In its decision of February 9 2010 (17 Ob 35/09k) the Supreme Court evaluated the scope of patent protection of so-called 'Swiss-type claims' and infringements constituted by dietary supplements, thereby interpreting the European Patent Convention on a national level.

#### Facts

The claimant owns a European patent (a Swiss-type claim - ie, intended to cover subsequent medical use (or indication of efficacy) of a known substance or composition) which confers protection to pharmaceutical products containing a certain essence of clover in order to medicate post-menstrual stress (PMS), menopausal symptoms or prostate cancer. The defendant markets a dietary supplement called Vita Lady Vitalkapseln. This product also contains clover extracts and is advertised to ease PMS or menopausal symptoms. Among others things, the claimant filed for injunctive relief to restrain the defendant from keeping from sale, selling, marketing, using, launching or possessing such dietary supplement, claiming that the defendant had infringed its patent right by selling a product containing clover which is deemed a 'pharmaceutical product' within the meaning of the granted patent. The defendant alleged that its product did not qualify as a 'pharmaceutical product', but rather constituted a mere dietary supplement with no therapeutic or medical benefits.

#### Decision

The Supreme Court reasoned that the patent in question conferred purpose-related protection with respect to a specific therapeutic use. It referred to Article 53(c) of the European Patent Convention (previously Article 52(4) of the European Patent Convention 1973) in connection with Article 54(5) of the European Patent Convention (previously Article 54(4) of the 1973 convention), stating that medical products are also patentable for any second or further use in methods for treatment - even though they might have already been part of the state of art - if such use is novel and inventive.

In this context, the court evaluated that 'therapeutic treatment' is to be interpreted broadly: the term is not limited to the restoration of one's health (eg, by curing diseases or easing pain), but also includes any treatments to maintain one's health proactively. Consequently, dietary supplements might fulfil these prerequisites; only treatments which do not meet the (minimum) standard of medical prophylaxis (because they might help only to approve general wellbeing - eg, health food and vitamins) do not fall within the meaning of 'therapeutic treatment'.

With respect to the claimant's patent, patent protection will be granted with respect to the particular product and its qualification for the so-designated purposes. Thus, the question of whether the defendant had infringed the claimant's patent right depended on whether the defendant had used - to a significant degree - the same substance for the same purposes (taking into account dosage and packaging). However, the court found that the findings in the case were not sufficient to determine whether the defendant had committed a patent infringement and thus remanded the case to the court of first instance. If it were to be found that the defendant had advertised its product in a way that consumers, pharmacies and physicians would have believed that the dietary supplement served the same purpose as the claimant's pharmaceutical product, there would be *prima facie* evidence for an infringement of the claimant's patent rights. Only if the defendant could prove that its product was likely to be without effect, would the claimant be burdened to provide evidence for the existence of a patent infringement.

#### Comment

The Supreme Court ruled that if the prerequisites are met (ie, providing therapeutic treatment), dietary supplements might be regarded - for patent law purposes - as a pharmaceutical product. Shortly after the Supreme Court rendered its decision, the Enlarged Board of Appeal of the European Patent Office ruled on the permissibility of such Swiss-type claims (see decision of February 19 2010, G 2/08). Among others things, the board stated that "where the subject matter of a claim is rendered novel only by a new therapeutic use of a medicament, such claim may no longer have the format of a so-called Swiss-type claim". The Supreme Court's decision will have no retroactive effect, but future patent applications will have to comply with the new law contained in the decision.

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