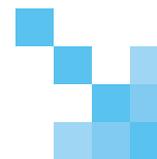


Austria

Constantin Kletzer and Karina Hellbert,
Fiebinger, Polak, Leon & Partner Rechtsanwälte GmbH



www.practicallaw.com/0-383-8176

REGULATORY OVERVIEW

1. Please give a brief overview of the regulatory framework for medicinal products/pharmaceutical products/drugs (as they are called in your jurisdiction), including the key legislation and regulatory authorities.

Medicinal products are heavily regulated in Austria. In particular, the Medicines Act (*Bundesgesetz über die Herstellung und das Inverkehrbringen von Arzneimitteln, BGBl No 185/1983, as amended*) contains rules regarding:

- Manufacture and distribution.
- Marketing authorisations.
- Clinical trials.
- Labelling.
- Pharmacovigilance issues.
- Advertising.
- Gifts to healthcare professionals.
- Monitoring by state authorities.
- Penal provisions.

Imports of medicinal products are also regulated; in general, a licence issued under the Act Governing the Importation of Medicinal Products (*Bundesgesetz über die Einfuhr von Arzneiwaren, BGBl I No 28/2002, as amended*) is required to import medicinal products. However, products imported from a European Economic Area (EEA) member state are exempt from a licence if they are covered in Austria by a national marketing authorisation or are authorised according to Regulation (EC) No. 726/2004 on the Authorisation and Supervision of Medicinal Products and Establishing a European Medicines Agency.

Various regulations require compliance with principles of good manufacturing practice (GMP) and good distribution practice, such as the Regulation Governing the Activities of Companies producing, controlling or placing medicinal products on the market (*Verordnung betreffend Betriebe, die Arzneimittel herstellen, kontrollieren oder in Verkehr bringen*). There are also various labelling regulations concerning labelling of outer packages, summary of product characteristics (SmPCs), and package leaflets as adopted in May 2008, and the Pharmacovigilance Regulation 2006 (*Pharmakovigilanz Verordnung 2006*).

PRICING AND STATE FUNDING

2. Please give a brief overview of the structure and funding of the national healthcare system.

The Austrian healthcare system is not financed through tax revenue but through a mandatory public insurance system funded by contributions from all employers, employees and self-employed people. Certain individuals are exempt from contributing, including:

- Persons earning EUR349.01 (about US\$499) or less per month.
- Persons carrying out a business (including farmers) that generates income below a certain level.
- Certain self-employed persons whose professional organisations opt out of the mandatory insurance system (such as lawyers).

Individuals covered by the mandatory system are allocated to various funds according to their profession. The largest funds governing people employed in the private sector are the nine independent regional health insurance funds (*Gebietskrankenkassen*). Separate health insurance funds exist for, among others, self-employed people and public servants. All funds are members of the Main Association of Austrian Social Insurance Institutions (*Hauptverband der österreichischen Sozialversicherungsträger*) (Association).

Public health insurance funds provide a wide range of benefits. Financial cover is provided, for example, for illness or for self-employed women when giving birth. In general, the insured person does not directly have to pay for medical services. However, certain co-payments are imposed, such as for obtaining a medicinal product, the so-called "prescription fee" of about EUR5 (about US\$7.15). In January 2008 a cap was introduced, so that no person will pay more than 2% of his net income for the prescription fee.

Since 2005, only persons with an e-card are entitled to receive medical services paid for by social institutions. Each insured person must pay EUR10 (about US\$14.30) per year for the e-card.

Individuals who are not governed by the mandatory health insurance system can choose between:

- Insurance provided by the national health system itself.
- Private coverage.

The private system is based on a cost-reimbursement principle (that is, insured persons must pay in advance for their medical treatment and are reimbursed afterwards).

3. In what circumstances are the prices of medicinal products regulated?

The marketing authorisation holder for over the counter (OTC) products can freely determine the price.

Prescription products are reimbursed under the national health insurance system. If the product has been included in the Reimbursement Codex, the price to be reimbursed is fixed. The General Social Insurance Act (*Allgemeines Sozial-Versicherungsgesetz, BGBl No 189/1955, as amended*) sets out basic rules for including a medicinal product in the Reimbursement Codex and calculating the price to be reimbursed (see *Question 4*). However, implementing regulations, as well as guidelines issued by various committees (for example, the Medicinal Evaluation Board), must also be taken into consideration. The guidelines are not binding, but can dramatically influence the price of a medicinal product. The committee responsible for establishing the price is the Price Setting Committee (*Preiskommission*) (Committee) within the Ministry.

In general, the price for a reimbursed product must not exceed the Average European Price (AEP). The AEP is defined as the arithmetic mean of the factory price or deposit price of most EU member states (not taking into account member states which joined after 2 May 2004, so in total 24 member states) where the medicinal product is marketed. To establish the AEP, all identical medicinal products must be taken into consideration. Products with the same active principle, the same strength, the same pharmaceutical form and the same package size are considered "identical". The applicant must provide:

- Information enabling the Committee to calculate the AEP.
- A list of all rebates granted in the various EU member states.

The reimbursement system provides for lowering of the price of the original product if a generic product is included in the Reimbursement Codex (see *Question 4*).

Margins for wholesalers are also regulated (Regulation Concerning the Maximum Margins at Wholesale Level (*Verordnung der Bundesministerin für Gesundheit und Frauen über Höchstaufschläge im Arzneimittelgroßhandel*)).

4. When is the cost of a medicinal product funded or reimbursed by the state? Please briefly outline the procedure and pricing for state funding or reimbursement (for example, is the reimbursement paid to the producer, pharmacist or end-user)?

Only products listed in the Reimbursement Codex are reimbursed by the national health insurance system. If an individual is a member of one of the mandatory regional health insurance funds, the pharmacist is reimbursed through a special arrangement with the social fund. If an individual is not a member of a regional health insurance fund, he must advance the costs, and be reimbursed afterwards (cost-reimbursement principle).

The Reimbursement Codex has four different boxes: red, dark yellow, light yellow and green. Reimbursement of a product listed in the red or dark yellow box is generally subject to approval by a physician employed by the Association (see *Question 2*). For certain products, a documentation system applies, which are listed in the light yellow box.

Red box

Each product, for which an application to be listed in the Reimbursement Codex is filed, is automatically included in the red box for a certain length of time (not exceeding three years). The Association must decide whether the medicinal product can remain in the Reimbursement Codex within 90 days of the application being filed.

If the Committee has not established an AEP, the price proposed by the applicant is the relevant reimbursement price. However, if the AEP is lower than the proposed price, the difference between the AEP and the proposed price must be refunded by the applicant.

Yellow box in general

All products with a significant additional therapeutic value are included in the yellow box. All products in the yellow box are reimbursed up to the AEP. The Association must decide whether the product is to be included and at what price, within 90 days of the recommendation by the Medicines Evaluation Commission (*Heilmittel-Evaluierungskommission*) as to whether the product should be reimbursed. The Commission must specifically discuss for which indication(s) and for which group of patients a significant additional therapeutic value is given, and how this can be assessed economically. No time period for issuing this recommendation is specified.

Light yellow box

Products in the light yellow box are products the Association has decided need not be approved by an Association physician, but can be dealt with by a documentation system. Under the documentation system, the medicinal product must satisfy various economic criteria to be reimbursed. Allocation of the products to different systems (approval or documentation) is regulated by Association ordinances (15 have been issued so far).

Green box

For a product to be included in a green box, its prescription by a physician (not directly controlled by the Association) must be medically and economically justified. If products with a similar therapeutic use are already listed, the new medicinal product is only reimbursed if there is sufficient price difference when compared to products that are already included. Products with additional therapeutic value can be reimbursed at a higher price.

Generic products

A generic product is included in the Reimbursement Codex if it is substantially cheaper than the original product. If included, the holder of the marketing authorisation of the original product must offer a price reduction of at least 30%. A second generic product is eligible for inclusion in the Reimbursement Codex if it offers a substantial price difference when compared with the first generic

product. If a third generic product is registered, the applicant of the original product and the Association can negotiate a further price reduction because, according to the Association, the price of the original product should not be higher than that of the third generic product. If a generic product is theoretically available, but not sold in Austria, the Association can undertake a tender procedure for the manufacture of a generic version.

Appeals

Decisions refusing the inclusion in the yellow box or green box, decisions deleting a product from the Reimbursement Codex or decisions re-transferring a product into another box, can be appealed to the Independent Medicines Commission (*Unabhängige Heilmittelkommission; UHK*). The appeal procedure is in practice not relevant. The UHK has only convened once, during the first ten months of this year.

MANUFACTURING

5. Please give an overview of the authorisation process to manufacture medicinal products. In particular:

- To which authority must the application be made?
- What conditions must be met to obtain authorisation?
- Are there specific restrictions on foreign applicants?
- What are the key stages and timing?
- What fee must be paid?
- How long does authorisation last and what is the renewal procedure?

Application

An application for a manufacturing authorisation must be submitted to the Federal Institute for Safety in the Health Field (*Bundesamt für Sicherheit im Gesundheitswesen*) (Federal Institute). The application form and guidelines can be downloaded from the Federal Institute's website (see box, *The regulatory authorities*).

Conditions

A manufacturing authorisation is granted if the applicant complies with all requirements established in the Regulation Governing the Activities of Companies producing, controlling or placing medicinal products on the market, and if the quality of the medicinal product is guaranteed by the use of appropriate equipment. The Federal Institute can impose other, more specific, obligations.

Restrictions on foreign applicants

No restrictions apply to foreign EU/EEA applicants.

Key stages and timing

An authorisation must be granted within 90 days of making the application being made. The time period can be extended, if the Federal Institute requires additional information.

Fee

The application fee is EUR3,000 (about US\$4,300), plus EUR650 (about US\$900) per half-day inspection in Austria (for foreign country inspections EUR750 (about US\$1,100)).

Period of authorisation and renewals

A manufacturing authorisation is valid indefinitely, but can be revoked.

6. What powers does the regulator have to:

- Monitor compliance with manufacturing authorisations?
- Impose penalties for a breach of a manufacturing authorisation?

The Federal Institute has authority to monitor compliance with manufacturing authorisations. The Minister for Health, Families and Adolescents (Minister) can regulate, through an ordinance, which kind of premises should be inspected by the head of the regions (*Landeshauptmänner*). In addition, the Minister must establish general guidelines concerning inspections and taking samples. These guidelines must be respected by the Federal Institute. During an inspection, the Federal Institute has authority to enter the premises, copy documents and take samples, photographs and film footage. In general, such inspections should occur during normal business hours, except in an emergency.

Facilities must be inspected at least every three years (*Medicines Act*) and in practice, these inspections are performed on a regular basis.

Non-compliance with a manufacturing authorisation can result in either (or both):

- Its revocation or suspension.
- The imposition of various obligations.

If the offence is not punishable under criminal law, the Minister can also impose an administrative fine. Fines can be up to EUR25,000 (about US\$35,700), or EUR50,000 (about US\$71,500) for repeat offences. Companies can also face criminal charges.

CLINICAL TRIALS

7. Please give an overview of the regulation of clinical trials. In particular:

- Which legislation and regulatory authorities regulate clinical trials?
- What authorisations are required and how is authorisation obtained?
- What consent is required from trial subjects and how must it be obtained?

- **What other conditions must be met before the trial can start (for example, the requirement for a sponsor and insurance cover)?**
- **What are the procedural requirements for the conduct of the trial (for example, using certain medical practices and reporting requirements)?**

Directive 2001/20/EC on the conduct of clinical trials (Clinical Trials Directive) was implemented by an amendment to the Medicines Act.

Authorisation

The applicant must submit an application to undertake a clinical trial to the Federal Institute. The relevant form is available on the Federal Institute's website (*see box, The regulatory authorities*). However, clinical trials with medicinal products intended for gene therapy or medicinal products consisting of or containing genetically modified organisms must be submitted to the Federal Ministry for Health, Families and Adolescents (*see box, The regulatory authorities*).

Consent

Clinical trial subjects must give their informed consent. Consent must be in writing, signed and dated. For consent to be valid, the clinical trial subject must be informed of certain matters, including:

- That not taking part in the trial or the withdrawal of consent does not adversely affect his medical treatment.
- That personal data is subject to inspection.
- That personal data is kept absolutely confidential.
- That an insurance contract has been taken out.
- The scope, extent and risks associated with the clinical trial.

If a clinical trial subject cannot write, consent must be obtained in the presence of a witness, who must sign the form instead of the clinical trial subject. In the case of a minor, consent must be given by his legal representative. However, if the minor is capable of understanding the scope, extent and risks associated with the clinical trial, his consent must also be obtained. A forum consisting of all Austrian ethics committees has developed specific guidelines for drafting informed consent forms to be used for minors. Similar rules apply to persons incapable of giving informed consent.

Clinical trials on emergency patients not capable of providing informed consent are generally permitted if both:

- The hospital performing the trials informs the public about the conduct of the trials.
- Emergency patients, after being able to consent, consent to further participation in the trial.

It is prohibited to conduct clinical trials on the following:

- Prisoners.

- Persons held in a special institution under the Hospitalisation Act (*Bundesgesetz über die Unterbringung psychisch Kranker in Krankenanstalten, BGBl No 155/1990, as amended*).

- Conscripts.

Other conditions

These are that:

- One of the documents needed for approval is a positive opinion from an ethics committee at the hospital or university where the clinical trial will be performed. The opinion can either be obtained before, or at the same time as, the filing of the relevant application. Special rules apply for multi-centre clinical trials.
- An insurance contract, which must be governed by Austrian law, has to be taken out by the applicant.
- The sponsor has to provide detailed standard operating procedures (SOP).
- The clinical trial study medicinal product must be provided for free. Only under very limited circumstances is the clinical trial study medicinal product reimbursed by health insurance funds.

Procedural requirements

If the applicant is not informed the application has been refused within 35 days of its submission, it can begin the clinical trial.

This time limit does not apply to clinical trials performed with medicinal products that:

- Are used in gene therapy, somatic cell therapy or xenogenic cell therapy.
- Contain or consist of genetically modified organisms.

For these categories of products, either the Federal Institute (for somatic or xenogenic therapy) or the Minister (for gene therapy or products containing GMOs) must issue a decision without undue delay (at the latest, within 90 days of the application's submission). If an advisory board is consulted, the deadline is extended to 180 days.

Even if an ethics committee issues a negative opinion, the Federal Institute/Minister can still approve the clinical trial if the Medicine Advisory Board (*Arzneimittelbeirat*) issues a positive recommendation.

MARKETING

8. Please give an overview of the authorisation process to market medicinal products. In particular:

- **To which authority must the application be made?**
- **What conditions must be met to obtain authorisation?**
- **What are the key stages and timing?**

- **What fee must be paid?**
- **How long does authorisation last and what is the renewal procedure?**

Application

A marketing authorisation is required for *Arzneimittelspezialitäten*. *Arzneimittelspezialitäten* are defined as medicinal products:

- Which are produced in such a way as to guarantee the same composition for each batch;
- Whose packages are sold under an identical name; and
- Which are available in a pre-packaged form to the end user.

The Federal Institute, which is supported by AGES PharmMed, is competent for granting marketing authorisations since 2006. AGES PharmMed is part of the Austrian Agency for Health and Food Safety (*Österreichische Agentur für Gesundheit und Ernährungssicherheit*) and provides the Federal Institute with personnel and scientific support (see box, *The regulatory authorities*).

In addition to the Federal Institute, applications for marketing authorisation can or must be made to the European Medicines Agency (EMA), under the centralised EU system, for certain products.

Conditions

The following requirements, among others, must be satisfied to obtain a marketing authorisation under the national system:

- The applicant must be established in the EEA.
- The product, according to available knowledge and practical experience, must not be harmful in its normal conditions of use.
- The product must only contain substances or preparations whose harmlessness is proven by scientific knowledge or by practical experience.
- The quality of the product must comply with the state of scientific knowledge.
- The description of the medicinal product and the product claims must not be misleading.
- The product's efficacy must be sufficiently proven.
- The labelling must comply with the relevant regulations.

Key stages and timing

Forms for obtaining marketing authorisation are available on the Federal Institute's website.

The Medicines Act requires marketing authorisations to be granted within seven months of receiving the application. The average time to grant a national marketing authorisation is 185 days. If an application for marketing authorisation is refused by the

Federal Institute, the applicant can only file a complaint with the Highest Administrative or Constitutional Court (under the Austrian system, an appeal to the Minister is not available).

The data exclusivity formula provides that all products are granted eight years' data exclusivity and an additional two year marketing restriction, irrespective of the route of approval.

Fee

Details of fees are set out on the Federal Institute's website. For example, if Austria is acting as a reference member state in the decentralised procedure (see *Question 10*) for a new active substance, a fee of EUR50,000 (about US\$71,500) applies. For a purely national application of a new active substance, a fee of EUR10,700 (about US\$15,300) is charged.

Period of authorisation and renewals

A marketing authorisation when issued for the first time is generally valid for five years. Three to six months before the marketing authorisation expires, a renewal application must be submitted to the Federal Institute. The application must include an overview of pharmacovigilance data and, if necessary, a report discussing any data that could possibly influence the assessment criteria. After the first renewal has been obtained, the marketing authorisation is normally granted for an indefinite time period. However, under certain circumstances, the validity of a marketing authorisation can be limited to a further five-year period.

9. Please briefly outline the abridged procedure for obtaining marketing authorisations for medicinal products. In particular:

- **Which medicinal products can benefit from the abridged procedure (for example, generics)?**
- **What conditions must be met?**
- **What procedure applies and what information can the applicant rely on?**

A simplified procedure exists for products that can be classified as generic products (*Article 10, Directive 2004/27/EC on the Community code relating to medicinal products for human use (Code for Human Medicines Second Amendment Directive)*).

The applicant does not have to provide documents on pre-clinical and clinical trials, if the applicant can provide documents on well-established medical use of the active substance for at least ten years in the EU. In addition, the applicant does not have to provide pre-clinical and clinical data if either:

- The marketing authorisation holder has consented to the use of the data.
- The product has already been on the market in the EU for eight years.

Forms for obtaining a marketing authorisation are available on the Federal Institute's website, which is the competent authority.

10. Are foreign marketing authorisations recognised in your jurisdiction? If so, please briefly outline the recognition procedure.

Articles 27 *et seq.* of Directive 2001/83/EC (as amended) on the Community code relating to medicinal products for human use (Code for Human Medicines Directive) provide for a European mutual recognition procedure (MRP) and a decentralised procedure (DCP). As the Medicines Act does not contain any specific rules concerning MRP and the DCP, the guidelines provided by Articles 27 *et seq.* of the Code for Human Medicines Directive should be followed.

However, if an applicant intends to designate Austria as its reference member state, a special form (AT-RMS, which is available on the Federal Institute's website) must be completed.

11. What powers does the regulator have to:

- **Monitor compliance with marketing authorisations?**
 - **Impose penalties for a breach of a marketing authorisation?**
-

The Federal Institute monitors compliance with the Medicines Act. For instance, 14 inspections with respect to clinical trials have occurred and 831 medicinal products have been tested concerning their quality.

A marketing authorisation can be suspended, revoked or withdrawn if, for example, the marketing authorisation holder:

- Does not comply with obligations imposed by the marketing authorisation.
- Places unsafe products on the market.
- Does not apply in time for renewal of a marketing authorisation.

In addition, an administrative fine (where these actions are not punishable under criminal law) can be imposed of up to EUR25,000 (about US\$35,700) or, for repeated offences, EUR50,000 (about US\$71,500). Since 2006, companies can also face criminal charges.

12. Are parallel imports of medicinal products into your jurisdiction allowed? If so, please briefly outline what conditions must be met by the parallel importer. Can intellectual property rights be used to oppose parallel imports?

The Medicines Act specifically regulates the procedure for obtaining a parallel import licence. Only applicants established in the EEA can file an application, which must include:

- The name and marketing authorisation number of the product authorised in Austria.
- The qualitative and quantitative composition of the active substance.
- The state where the parallel imported product is authorised and marketed.

- The name and marketing authorisation number of the product to be parallel imported.
- The name and address of the marketing authorisation holder established in the exporting country.
- The name and address of the manufacturer established in the exporting country, where appropriate.
- A description of the packaging.
- The size of the packages to be distributed in Austria.
- A description of the relabelling and repackaging process.
- The name and address of the person responsible for the relabelling and repackaging.
- A declaration that the labels, the packaging, the summary of the product characteristics and so on, do not deviate from the product authorised in Austria.

The Federal Institute must decide, within 45 days of receiving the application, whether to grant the parallel import licence.

Under patent law, once a medicinal product has been marketed with the consent of the right holder in the EEA, parallel imports cannot be opposed unless in exceptional cases, for example for safety reasons. Parallel imports from non-EEA countries imported into the EEA can be opposed by the right holder.

13. Please briefly outline the restrictions on marketing practices such as gifts or "incentive schemes" for healthcare establishments or individual medical practitioners.

It is illegal to offer, grant, or promise gifts or any other incentives, whether in kind or monetary, to health professionals for prescribing a medicinal product. Accepting such incentives is also prohibited. Exceptions exist for:

- Gifts of low value, relevant to the medical or pharmaceutical practice.
- Hospitality offered during a scientific event, though this is strictly limited to its main purpose and must not be extended to persons other than healthcare professionals.

Offering such incentives is an administrative offence and can result in a fine of up to EUR25,000 (about US\$35,700) or, for repeat offences, EUR50,000 (about US\$71,500).

14. Please briefly outline the restrictions on marketing medicinal products on the internet, by e-mail and by mail order.

Only pharmacists can supply medicinal products to end-consumers (the pharmacy monopoly). As a result, medicinal products cannot be sold to end-consumers by mail order or e-mail. A similar restriction is contained in the Austria Trade Code (*Gewerbeordnung, BGBl I No 194/1994, as amended*).

Although the Medicines Act has been constantly amended since the ECJ's *DocMorris* decision (case C-322/01), it is still prohibited to sell products over the internet or to advertise on internet distribution channels. However, at least according to the Pharmacists' Association, this prohibition only applies to national pharmacists and not to other pharmacists established in the EU. This was confirmed by the Supreme Court decision allowing mail order under very limited circumstances, such as only for OTC products and only for private use.

ADVERTISING

15. Please briefly outline the restrictions on advertising medicinal products. In particular:

- Which legislation applies and which regulatory authority enforces it?
- What types of medicinal product cannot be advertised?
- What restrictions apply to advertising that is allowed?

The Medicines Act defines "advertising for medicinal products" according to Article 86 of the amended Code for Human Medicines Directive.

Advertising of medicinal products is only allowed for the following medicinal products:

- Those for which marketing authorisation or an approval for distribution in parallel import has been granted.
- Those produced according to the Medicines Act in pharmacies.

Advertising for pharmaceutical products must:

- Objectively describe the properties of the medicinal product without exaggeration.
- Not contain information or illustrations, which attach to the medicinal product an effect exceeding its actual effect.
- Not give the impression that success can be expected in general.
- Be in line with the SmPC.

The Medicines Act distinguishes between advertising directed to healthcare professionals (persons qualified to prescribe or supply medicinal products) and those directed at the general public, as follows:

- Advertising to healthcare professionals is allowed, if the information is provided according to the SmPC.
- It is illegal to advertise to the general public:
 - prescription-only products;
 - OTC products with the same invented name or the same scientific name as a prescription-only product; and
 - registered homeopathic medicinal products.

Advertising for medicinal products for which marketing authorisation has not yet been obtained and for non-approved indications is generally prohibited, other than at scientific events where participants are mainly from outside Austria.

The new Code of the Austrian Pharmaceutical Manufacturer Association 2007 (*Pharmig*) provides some guidance in this field (see www.pharmig.at, heading: "Publikationen").

Certain advertising restrictions also apply to OTC products. These are substantially in line with rules set out in the amended Code for Human Medicines Directive.

PACKAGING AND LABELLING

16. Please briefly outline the regulation of packaging and labelling of medicinal products. In particular:

- Which legislation applies and which regulatory authority enforces it?
- What information must the packaging and/or labelling contain?
- What other conditions must be met (for example, information being stated in the language of your jurisdiction)?

Packaging and labelling requirements are in line with the amended Code for Human Medicines Directive (see section 17, *Medicines Act*). In addition, the Minister has recently published new regulations concerning SmPCs, package leaflets and labelling of the primary package as well as of blisters. The requirements are monitored by the Federal Institute.

Information

As well as name, dosage and so on, the following characteristics must be displayed:

- Whether the product is available:
 - on prescription only, and only in pharmacies (*rezept- und apothekenpflichtig; verschreibungs- und apothekenpflichtig*);
 - only in pharmacies (*apothekenpflichtig*); or
 - other than in pharmacies, in which case this must be appropriately declared by symbols or pictograms.
- The following wording: "Attention! This medicinal product can influence your reactions and your ability to drive" (*Achtung! Dieses Arzneimittel kann die Reaktionsfähigkeit und Verkehrstüchtigkeit beeinträchtigen*).

The following markings are also accepted, but not mandatory:

- The telephone, fax number or e-mail address of the marketing authorisation holder.

- Green dot (*Der Grüne Punkt*). This indicates the manufacturer is licensed by PRO-Europe (an umbrella organisation of national compliance schemes responsible for the recovery and recycling of packaging waste).
- European Article Numbering (EAN) code. This is a commercial distribution code system (barcode) that is widely used (a standardised way of representing barcodes).

Conditions

In general, all particulars on the outer and inner packaging must be in German. Certain information must also now be given in braille. Austria does not require price or reimbursement conditions to be displayed on the label.

TRADITIONAL HERBAL MEDICINES

17. Please briefly outline the regulation of the manufacture and marketing of traditional herbal medicinal products in your jurisdiction.

Directive 2004/24/EC on traditional herbal medicinal products has been implemented accordingly in Austria.

PATENTS

18. What types of medicinal products and related substances and processes can be protected by patents and what types cannot be patent protected? What are the legal criteria to obtain a patent? Which legislation applies?

According to the Austrian Patent Law (*Patentgesetz, or PatG, BGBl 259/1970, as amended*) inventions can obtain patent protection if they are all of the following:

- Novel.
- Not obvious from the state of the art to a person skilled in the art.
- Of industrial application.
- Not excluded from patent protection (for example, discoveries).

Inventions that fulfil these requirements are patentable even if they concern a product that consists of or contains biological material, or a process that produces, processes or uses biological material. Biological material is any material containing genetic information and capable of reproducing itself or being reproduced in a biological system. Any such patentable inventions consist of:

- Biological material that is isolated from its natural environment and produced by a technical process, even if it previously occurred in nature.
- An element isolated from the human body or otherwise produced by a technical process, including the sequence or partial sequence of a gene, even if the structure of that element is identical to that of the natural element.

The following (related to the life science sector) are not considered inventions:

- The human body, at the various stages of its formation and development.
- The simple discovery of one of its elements, including the sequence or partial sequence of a gene.

Patents are not granted for the following (relating to the life science sector):

- Methods for treatment of the human or animal body by surgery or therapy, and diagnostic methods practised on the human or animal body.
- Processes for cloning human beings.
- Processes for modifying the germ line genetic identity of human beings.
- Uses of human embryos for industrial and commercial purposes.
- Processes for modifying the genetic identity of animals, which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.

Patent protection is available for chemical compounds used as pharmaceuticals (substance protection). In addition, the Austrian Patent Office (*see Question 19*) accepts claims to protect new indications of known substances (Swiss claims). Any substance or composition, which is state of the art, is patentable for use in a method to treat the human or animal body for surgery or therapy (or any such diagnostic methods), provided that its use for such methods is not state of the art.

19. How is a patent obtained? In particular:

- **To which authority must the application be made?**
- **What fee must be paid?**
- **What are the key stages and timing?**

The authority

An application is made to the Austrian Patent Office (*Österreichisches Patentamt*) (www.patentamt.at).

Fee

The following fees apply:

- The application fee is EUR180 (about US\$257) and the fee for publishing specifications in the *Patent Bulletin* is EUR200 (about US\$286) for the first 15 pages (each additional 15 pages costs EUR130 (about US\$186)).
- The initial annual renewal fee is EUR70 (about US\$100), increasing annually up to a maximum of EUR1,400 (about US\$2,001).

- The initial annual fee for the supplementary protection certificate is EUR2,200 (about US\$3,145), increasing annually up to EUR3,400 (about US\$4,860).

Process and timing

A separate application must be filed for each invention, and must include:

- Contact details of the applicant, including bank account.
- Contact details of the legal representative (if applicable).
- The title of the invention.
- Enclosures, such as:
 - descriptions;
 - patent claims;
 - drawings;
 - a summary;
 - the names of all inventors;
 - information regarding claimed priority.

The application is examined by a member of the technical department of the Patent Office (*Technische Abteilung*). The patent application is published, at the latest, 18 months after the application is filed. On the day of publication, rights conferred by the patent provisionally enter into force. Any third party can file an objection against the (impending) grant of the patent, although any such person does not become party to the proceedings and is not entitled to reimbursement of costs.

If there is no reason to refuse the patent, the patent is granted. Any third party can file an opposition to the grant within four months of publication of the patent specification. If there are oppositions, an oral hearing will be scheduled, if appropriate.

20. How long does patent protection last? How is a patent renewed or patent protection extended?

The maximum term of protection of a patent is 20 years from the application date.

No renewal process is available for patents. For pharmaceutical products, the period of exclusivity can be extended by a supplementary protection certificate.

21. In what circumstances can a patent be revoked?

The nullity department of the Austrian Patent Office (*Nichtigkeitsabteilung*) has exclusive power to revoke a patent for any of the following reasons:

- The subject matter of the patent was not patentable.

- The patent does not disclose the invention sufficiently clearly and completely as to enable a person skilled in the art to carry out the invention.
- The micro-organism deposited is not constantly available.

22. When is a patent infringed? How is a claim for patent infringement made and what remedies are available?

A patent confers on its owner the exclusive right to manufacture, distribute, offer for sale, use or import or possess for these purposes the patented subject matter. These rights do not cover studies or trials and any practical claims deriving from them, as far as these are required for marketing authorisation of a medicinal product.

If a patent granted is directed to a process, the effect of this patent also covers any product directly obtained by this process.

Contribution

The concept of contributory infringement was introduced in the Patent Act as amended in 2005 (*PatG*). A patent owner is entitled to prevent any third party from offering or supplying to a direct infringer with means relating to an essential element of the invention, if the third party knows, or it is obvious in the circumstances, that this information is suitable and intended for putting the invention into effect (*section 22(3), PatG*). In addition, any person assisting or supporting a direct infringer with intent will also be liable.

Equivalence

According to court practice, confirmed by the Supreme Court and the Supreme Patent and Trademark Senate, equivalent use of a patented invention occurs if a person skilled in the art at the priority date and equipped with a general technical knowledge, considering the state of the art, takes (an) exchanged feature(s) without inventive effort, as a method of functioning in the same way as the patent.

Infringement via equivalence does not occur, if the new invention uses features having equal effect while altering the protected idea in essence or contradicting the fundamental idea of the invention.

Civil proceedings

Patent infringement can be pursued by civil proceedings, where the Commercial Court of Vienna (*Handelsgericht Wien*) is exclusively competent. Its decisions can be appealed to the Higher Court of Vienna, whose decisions can be appealed further, under limited circumstances, to the Supreme Court.

A person whose patent right has been infringed (or is at risk of being infringed) can apply for a preliminary injunction before, simultaneously with or after bringing the main civil action.

The following remedies are available in civil proceedings:

- Injunctive relief (including preliminary injunctions).
- Removal of the interference.

- Monetary remedies, including:
 - adequate remuneration; or
 - in the case of fault on behalf of the defendant, either damages (including lost profits) or payments of the profits achieved by the infringing party.
- In the case of gross negligence or intent, twice the amount of the appropriate remuneration is payable instead.
- Adequate compensation for any damage other than financial losses, provided this is justified by the particular circumstances of the case.
- Rendering of accounts.
- If appropriate, a request for information concerning distribution channels.
- Publication of a judgment in favour of the patent owner.

Criminal action

The patent owner can bring a criminal action against the infringer, and as part of this the applicant can apply for a house search and seizure. The Criminal Court of Vienna (*Landesgericht für Strafsachen Wien*) has exclusive competence.

TRADE MARKS

23. Can a medicinal product brand be registered as a trade mark? What are the legal criteria to obtain a trade mark? Which legislation applies?

Under the Austrian Trade Mark Protection Act (*Markenschutzgesetz, BGBl 1970/260, as amended*) (*MSchG*), product brands can be protected by a registered trade mark if they both:

- Can be graphically displayed.
- Possess a distinctive character in relation to the goods or services of an undertaking for which they are to be registered.

Trade marks that cannot be registered include marks that:

- Are devoid of any distinctive character.
- Consist exclusively of signs or indications, which are used for designating the kind, quality, quantity, intended purpose, value, origin or time of production of the goods or of the provision of the services, or other characteristics of the goods or services.
- Consist exclusively of signs and indications that have become customary in current language, or in the bona fide and established practices of the trade.
- Consist exclusively of the shape that results from the nature of the goods themselves.
- Are contrary to public policy or principles of morality.

- Deceive customers with respect to the nature, the quality, or the geographical origin of the goods or services.

24. How is a trade mark registered? In particular:

- To which authority must the application be made?
- What fee is payable?
- What are the key stages and timing?

The authority

An application is made to the Austrian Patent Office (www.patentamt.at).

Fee

The following fees apply:

- The registration fee is EUR80 (about US\$114), plus a fee for three classes of EUR20 (about US\$29).
- The fee for each additional class is EUR25 (about US\$36).
- The protection fee of EUR200 (about US\$286).
- The publication fee of EUR25 (about US\$36).

Process and timing

The following information must be provided:

- Contact details of the applicant, including bank account.
- Contact details of the legal representative (if applicable).
- The nature of the trade mark (word mark, 3-D mark, and so on).
- Enclosures, such as:
 - a description of the trade mark (if applicable);
 - in the case of a collective trade mark, the statutes of the association;
 - for sound trade marks, the melody saved on a disk;
 - information relating to priority claimed (if applicable);
 - five drawings of the trade mark (maximum size eight by eight centimetres, if applicable);
 - a description of goods and/or services for which the trade mark is designated.

The application is examined by a member of the legal department of the Austrian Patent Office (*Rechtsabteilung*). Trade mark applications cannot be rejected on the grounds that prior trade mark applications or registrations exist. The Trade Mark Protection Act does not provide for an opposition procedure for holders of prior rights. However, the Patent Office forwards to the applicant a

record of all prior registrations and pending applications for identical or similar trade marks. The applicant can choose to withdraw the application or uphold it by paying the protection fee.

A holder of prior rights can file an application to revoke a trade mark, if it is identical or confusingly similar to a prior right, subject to the conditions stipulated in the Trade mark Protection Act.

25. How long does trade mark protection last? How is a trade mark renewed?

Protection initially lasts for ten years. Trade mark registration can be renewed for an indefinite number of ten-year terms by a simple payment of the renewal fee.

26. In what circumstances can a trade mark be revoked?

A trade mark can be revoked by the nullity department of the Austrian Patent Office on various grounds, including:

- On the application of the trade mark owner.
- If the trade mark was not renewed in time.
- If the nullity department issued a decision ordering the revocation of the trade mark.
- On the application of a prior right holder if the trade mark:
 - is identical to an earlier registered trade mark;
 - is similar to an earlier registered trade mark and there is a risk of confusion;
 - is identical or similar to an earlier prior right (such as a firm name); or
 - has been registered by an agent without the consent of the right holder abroad.
- On the application of any third party if:
 - the trade mark is not registerable;
 - the trade mark was not genuinely used within the last five years;
 - the trade mark, following registration, has become customary in current language as a way of designating a good or service for which the trade mark is registered, as a result of the holder's conduct or failure to act in the course of business;
 - the trade mark has become deceptive because of the holder's use or because of use with the holder's consent; or
 - the applicant acted in bad faith when obtaining trade mark protection.
- If the relevant fee was not paid in time.

27. When is a registered trade mark infringed? How is a claim for trade mark infringement made and what remedies are available?

The following uses of a sign are considered infringement of a trade mark:

- Fixing the sign to goods or their packaging, or to objects relating to a service rendered.
- Offering goods or putting goods on the market (or stocking them for these purposes) under the sign, or offering or supplying services under the sign.
- Importing or exporting the goods under the sign.
- Using the sign on business papers, in announcements or in advertising.

The holder of a trade mark has the exclusive right to prevent any third party from using (without his consent, in the above way) in the course of trade:

- Any sign identical with the trade mark in relation to goods or services that are identical to the goods or services for which the trade mark is registered.
- Any sign identical with, or similar to, the trade mark used for identical or similar goods or services, if there is likelihood of confusion on the part of the public. This includes likelihood of association between the sign and the trade mark.
- Any sign identical with, or similar to, the trade mark in relation to any goods or services, where the trade mark has a reputation in Austria and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of the trade mark.

Infringement proceedings are handled by the ordinary civil courts acting as commercial courts. However, for an infringement of a Community trade mark, the Commercial Court of Vienna has exclusive jurisdiction. The remedies available are the same as for infringement of patents (*see Question 22*).

28. Is your jurisdiction party to international conventions on patent and trade mark protection?

Austria is party to a number of conventions, including the:

- WIPO Paris Convention for the Protection of Industrial Property 1883 (Paris Convention) (as amended in 1979).
- WIPO Madrid Agreement Concerning the International Registration of Marks 1891 (Madrid Agreement) (as amended in 1979).
- WIPO Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks 1957 (as amended in 1979).
- WIPO Strasbourg Convention on the Unification of Certain Points of Substantive Law on Patents for Inventions 1963.

- Patent Cooperation Treaty 1970 (as amended in 2001).
- Strasbourg Agreement Concerning the International Patent Classification 1971 (as amended 1979).
- WIPO Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks 1973 (as amended 1985).
- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Protection 1977 (as amended in 1980).
- WIPO Protocol Relation to the Madrid Agreement 1989 (as amended in 2006, amendments of 2007 will enter into force in September 2008).
- WTO Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS) (amendments of 2005 ratified, but no legal effect yet).
- WIPO Patent Law Treaty 2000 (still not ratified).
- European Patent Convention 2000.
- Agreement on the application of Article 65 of the European Patent Convention 2000 (London Agreement) (not ratified yet).

PRODUCT LIABILITY

29. Please give an overview of medicinal product liability law, in particular:

- Under what laws can liability arise (for example, contract, tort or statute)?
- What is the substantive test for liability?
- Who is potentially liable for a defective product?

Legal provisions

Liability can arise under:

- The Product Liability Act (*Bundesgesetz über die Haftung für ein fehlerhaftes Produkt, BGBl 99/1988*) (PHG).
- The Civil Code.
- Criminal law.

However, none of these rules contain specific provisions regulating liability for medicinal products.

Substantive test

In compliance with Directive 85/374/EEC on liability for defective products (old Product Liability Directive), the Product Liability Act establishes strict (non-fault) liability for defective tangible products. The producer is liable for all damages (other than consequential damage) caused by the defective product itself. A

THE REGULATORY AUTHORITIES

Federal Ministry for Health, Families and Adolescents (*Bundesministerium für Gesundheit, Familie und Jugend*)

T +43 1 71100
F +43 1 71100 4300
E buergerservice@bmgfj.gv.at
W www.bmgfj.gv.at

Main areas of responsibility. Clinical trials (GMO) and general supervision.

Federal Institute for Safety in the Health Field (*Bundesamt für Sicherheit im Gesundheitswesen*)

T +43 5 0555 6111
F +43 5 0555 6009
E communications@ages.at
W www.ages.at

Main areas of responsibility. These are granting various authorisations, such as for importation, manufacturing, clinical trials and marketing of medicinal products.

Agency for Health and Food Safety, Department PharmMed (AGES PharmMED)

T +43 5 0555 0
F +43 5 0555 22019
E communications@ages.at
W www.ages.at

Main areas of responsibility. The AGES PharmMed is the actual organisation performing scientific evaluations in the context of granting marketing authorisation, manufacturing licences, and so on. Marketing authorisation itself is granted by the Federal Institute for Safety in the Health Field.

AGES PharmMED is also involved in:

- Monitoring compliance with advertising, pharmacovigilance and various authorisations.
- Conducting inspections.

product is considered to be “defective” if it does not provide the safety that can be expected, taking into account all the circumstances, including the:

- Presentation.
- Use that is reasonably expected.
- Time when the product was placed on the market.

However, the PHG does not impose a product-monitoring obligation. This is specifically imposed by the Law on Food and Consumer Safety (*Lebensmittelsicherheit und Verbraucherschutzgesetz, BGBl I 13/2006*).

The claimant must provide the court with proof of damage, a defect, and the causal relationship between them. However, the PHG provides for a shift in the burden of proof to the defendant for certain defences, including where the importer argues it did not place the product on the market or the product was not defective when it was placed on the market.

Liability

Any of the following can be held liable as a “producer”:

- The manufacturer.
- The person displaying his name or trade mark on the product.
- An importer of a product from a non-EEA country.
- The distributor, if the manufacturer or the importer cannot be identified, and if the distributor did not provide the consumer or client with the contact details in due time.

30. What are the limitation periods for bringing product liability claims?

The same statutes of limitation apply as under the old Product Liability Directive, which are:

- Three years for proceedings brought for recovery of damages, or 30 years if any such damage occurred from an act being subject to a criminal offence, if a term of imprisonment exceeds one year (*section 1489, Civil Code*).
- Ten years for rights conferred by the Product Liability Act.

31. What defences are available to product liability claims?

Liability can be avoided if:

- The defect arose because mandatory provisions issued by a competent authority were adhered to.
- The state of scientific and technical knowledge when the product was placed on the market was not such as to enable the discovery of the defect.
- In the case of a manufacturer of a component, the defect is attributable to the design of the product in which the component has been fitted or to instructions given by the manufacturer of a product.

32. What remedies are available to the claimant?

Under the Product Liability Act, a consumer can only be compensated for damages if they exceed EUR500 (about US\$715). The complaint must be filed with the commercial court where the defendant has his seat of business or where the harmful event occurred.

33. Are class actions allowed for product liability claims? If so, are they common?

Class actions are not allowed in Austria. In certain circumstances the Civil Procedure Code allows claimants to join their cases (for example, where the claims are based on similar facts and the same court has jurisdiction to deal with all the claims). However, the individual claimants remain independent parties to the trial and a separate judgment is delivered for each claimant. In addition, the court has authority to refer the case to another court if referral will result in the trial taking less time or has a cost-saving effect.

A draft bill allowing class actions is still under discussion. It remains to be seen, if implemented at all, whether this law has any impact on product liability cases.

REFORM

34. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.

Due to lack of sufficient funding, major reforms are expected in the social security field, especially to reimbursement of medicinal products and the range of treatment provided by hospitals (centralisation of certain treatments, cut down of services provided for free, and so on).

CONTRIBUTOR DETAILS

Constantin Kletzer and Karina Hellbert
Fiebinger, Polak, Leon & Partner Rechtsanwälte GmbH

T +43 1 582 580
F +43 1 582 582
E c.kletzer@fplp.at
k.hellbert@fplp.at
W www.fplp.at

Essential know-how online
www.practicallaw.com

PRACTICAL LAW COMPANY

GENERAL WARNING:



The IP & Life Science Team* of Fiebinger Polak Leon Attorneys at Law protects your rights and strengthens your position in the event of unauthorized use of your intellectual property.

WWW.FPLP.AT

* in urgent cases or for any questions regarding this topic please refer to Constantin Kletzer c.kletzer@fplp.at
Peter M. Polak p.polak@fplp.at
A-1060 Vienna | Am Getreidemarkt 1 | T +43 (0)1/ 582 580 Karina Hellbert k.hellbert@fplp.at