

## Acute Impact — Decision on Descriptive Additions to Pharmaceutical Brand Names

### ***A recent German administrative court decision may set a precedent for civil litigation surrounding pharmaceutical branding and advertising.***

The Higher Administrative Court of Northrhine-Westphalia (*Oberverwaltungsgericht NRW – OVG-NRW*) has upheld a decision by the Administrative Court of Cologne (*Verwaltungsgericht Köln*) denying a manufacturer of a pharmaceutical a change of its pharmaceuticals registration to include the term “akut” (acute) in the name of its product. While this decision is based in administrative law, it may have considerable implications for trade practices litigation under the German Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb – UWG*) in conjunction with the German Pharmaceuticals Advertising Act (*Heilmittelwerbegesetz – HWG*) and/or the German Pharmaceuticals Act (*Arzneimittelgesetz – AMG*) as well, which pharmaceuticals manufacturers should bear in mind when naming and advertising a product.

### **Summary of the decision**

In its decision dated July 19, 2013<sup>1</sup>, the OVG-NRW upheld a lower court’s decision<sup>2</sup> concerning the term “akut” as an addition to a pharmaceutical brand name. The lower court had found that it constitutes a misleading designation within the meaning of section 8 para. 1 nr. 2 s. 1 AMG to add the term “akut” to the brand name of a pharmaceutical if such pharmaceutical does not work particularly fast or at least faster than comparable products.

The pharmaceutical in question combats the symptoms of heartburn. The pharmaceutical manufacturer did not dispute that the pharmaceutical begins having an effect after an average of one and a half hours after being ingested. Hence, according to the lower court’s findings of fact, the pharmaceutical in question does not begin working faster than other comparable heartburn medications.

Both the lower court and the OVG-NRW found that to the average target group of heartburn medication consumers, the term “akut” would indicate that the product so designated would work particularly fast or at least much faster than comparable products. The courts reasoned that this term is commonly understood to mean “immediate” or “fast”, in particular when used similarly to an adjective in direct conjunction with a pharmaceutical’s brand name.

### **Contradiction of earlier civil court decision**

With this reasoning and the resulting decision, both courts contradict the reasoning of an earlier decision of the Higher Regional Court Munich (*Oberlandesgericht München – OLG München*) dated February 25, 2010<sup>3</sup>. With regard to the *same* pharmaceutical (but with different plaintiffs), the OLG München had

decided that the term “akut” was not misleading and had based its decision on a finding that the average consumer would not expect such pharmaceutical to work particularly fast. On the contrary, the OLG München opined that the average consumer would recognize “akut” as a description of a sudden onset of a condition as opposed to a chronic state of disease.

## **Consequences**

Both the administrative courts and the civil court only elaborate on the misleading or not misleading nature of the term in the reasoning of their respective decisions and only apply *inter partes*, so both decisions remain untouched by one another and either one could still be cited as precedent in future litigation.

Since a violation of section 8 para. 1 nr. 2 s. 1 AMG also amounts to an act of unfair trading under section 4 Nr. 11 UWG<sup>4</sup>, this results in considerably less legal certainty for manufacturers and advertisers of pharmaceuticals.

The OVG-NRW’s decision may well be relied upon as precedent in civil litigations concerning terms similar to “akut” used in conjunction with a brand name of a pharmaceutical in a descriptive fashion.

Likely, in future litigation and, in particular, in preliminary injunction proceedings, civil courts other than the OLG München could tend to agree with the OVG-NRW’s assessment and reasoning, relying on the latter’s expertise in pharmaceuticals law, rather than following the OLG München.

Also likely, consumer protection groups — who have standing to bring motions for preliminary injunctions and litigation under the UWG — will increasingly attack such descriptive additions to brand names citing the OVG-NRW’s decision.

Therefore, for manufacturers and advertisers of pharmaceuticals, should carefully review their product names and portfolio for descriptive additions that could be misunderstood by the average consumer, should evaluate these under the standards of the German laws on pharmaceuticals advertising, and, where necessary, consider changes.

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#### Endnotes

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<sup>1</sup> OVG-NRW docket nr. 13 A 719/13

<sup>2</sup> LG Köln, docket nr. 7 K 6575/10

<sup>3</sup> OLG München, docket nr. 29 U 5347/09

<sup>4</sup> Cf. OLG Köln, NJW-WettbR 1998, 6 (8); Harte-Bavendamm/Henning-Bodewig, UWG, 3<sup>rd</sup> Ed. 2013, § 4 Nr. 11, Nr. 50 with further citations