

(EFSA) could be used as a proper reference. In any case, probiotics should not bear any acquired or transmissible antibiotic resistance. In addition, microorganisms shall be: (a) active and vital in the gastrointestinal tract in an amount such as to justify any possible beneficial effects shown under efficacy studies; (b) be able to live and multiply inside the intestine; and (c) be able to confer a physiological benefit, according to the criteria shown in the file attached to these Italian guidelines. Furthermore, the Italian guidelines give criteria for the identification of probiotics species and strains. It is also suggested that at the moment of notification of food and supplements mentioned in these guidelines, analytical method utilised for the probiotic microorganisms numbering should be specified. The specification should also include the genetic characterisation procedure. The guidelines include also considerations relating to the probiotic activity and the probiotic lactic acid bacteria amount necessary to get a probiotic action. From a general point of view, based on recent publications, 109 live cells per day per adult is considered to be a sufficient number to get a temporary colonization. A similar cell number should be present inside the portion/daily dose of the food/supplement. Different daily doses could be accepted, if proved by specific studies. The number of live microbic cells present inside the product at the end of the shelf life should be at least equal to the amount utilised for the efficacy trials. Indications on label should refer to the minimum dose guaranteed at the end of shelf life, under the suggested storing conditions; this amount should not be significantly different from the quantity used for the efficacy tests. Finally, the guidelines contain recommendations regarding the probiotic bacteria safety. As far as prebiotics are concerned, the Italian guidelines contain some general considerations on the properties of prebiotics and on the prebiotic activities. Comparably with the above mentioned probiotic products recommendations, any reference to prebiotic definition should mention the carried dose, inside a “normal” daily consumption, and should be supported by specific studies. The final part of the Italian guidelines is dedicated to the prebiotics safety,

adequate number only for some prebiotics, while this does not hold true for all the ingredients capable of a prebiotic action. Therefore, the effect of

newly introduced prebiotic ingredients should be verified through proper microbiological studies. Research should be aimed to verify the absence of a stimulating action on pathogenic and opportunistic bacteria living inside human intestine.

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Publishers’ Liability for Misleading Advertising of Dieting Products – a Case for Shooting the Messenger

With the rise of the obesity epidemic an increasing number of people are becoming susceptible to the often miraculous claims with which bogus dieting products are advertised. Although some cases may border on fraud or attempted fraud, the Swedish legal system normally deals with misleading product claims according to marketing law rather than criminal law. As a result the authorities lack the investigative powers available in criminal cases. By using fake names and anonymous mailbox addresses the offenders are often able to evade injunctions and penalties, and can continue their abuse advertising as long as they are able to pay for it.

The Swedish Marketing Act 1994 does, however, provide for sanctions to be imposed on any person who has “materially contributed” to an unlawful marketing measure. In a recent ruling¹ the Swedish Market Court ordered an injunction based on this provision against a press undertaking for publishing an ad for a dieting product. There have been very few judgments of this kind against media undertakings and the decision confirms that the Marketing Act’s provision on complicity can be put to effective use in these cases.

The facts of the case were the following.

A company calling itself “Health Mail” had advertised a dieting product named “Algolean” in a number of publications, among them the magazine *Se & Hör*, a weekly tabloid which mainly contains celebrity news. The ad had been designed in edito-

¹ Judgment of the Market Court on 29 August 2006 in Case 7/05, reported as MD 2006:21.

rial style and contained a number of statements indicating that the advertised product had miraculous effects. It was headlined with the following quote from an anonymous woman depicted in the ad: "I lost 19 kilos in a mere 6 weeks, while eating everything I wanted." The main part of the ad consisted of a detailed story, seemingly told by the anonymous woman, describing the weight loss she had experienced thanks to Algolean. The following specific statements were made in the text:

- "Three kinds of algae that let you lose at least 10, 15 or even 20 kilos."
- "As long as you take Algolean you can eat as much as you like and still lose weight, day after day, week after week."
- "I lost as much as 4 kilos from Wednesday night to Sunday."
- "It went as easily as ever, and I didn't have to change my diet."
- "And you will never put the weight back on again."
- "All of a sudden the kilos started falling off."

The Consumer Ombudsman² was unable to identify the person or persons behind the Algolean campaign. However, the Ombudsman ordered Se & Hör and the other publications concerned, not to publish the ad further. The Ombudsman considered that it must have been "entirely clear" to the press undertakings that the ad was in breach of good marketing practice and that, by publishing it, the companies had materially contributed to that breach. The prohibition was accepted by all the undertakings concerned except Se & Hör.

In the Market Court the Consumer Ombudsman sought an injunction prohibiting the publisher of Se & Hör, Svenska Aller Aktiebolag (hereinafter referred to as Aller), under penalty of a fine to contribute to the marketing of dieting products using any of the statements quoted above or equivalent statements which create the impression that quick and effective weight loss can be achieved through use of the product.

Aller contended that the Marketing Act's provision on complicity was intended primarily for advertising agencies and others who provide professional services in the area of marketing and

advertising. The company stressed that it was not in the business of providing such services and that its personnel had taken no active part in soliciting or designing the ad in question. Aller further stated that Se & Hör had a system for checking the contents of ads prior to publishing, and that there was a clearly defined decision-making chain to be followed in case of uncertainty. This control system often succeeded in stopping questionable ads, Aller claimed. Most ads for health products were referred to Aller via an outside publishing company, Hälsomedia Förlags AB, which specialises in designing, drafting and scrutinising advertisements for the health product industry. Sometimes, however, the urgency that is intrinsic to all press business would not allow a questionable ad to be checked all the way through the decision making chain. The ad in question was provided directly to Aller from "Health Mail", whose real identity remained undisclosed, and the timeframe was very narrow, since Aller was requested to publish the ad very shortly after receiving it. The persons responsible for checking it found no reason to raise doubts. The ad's contents and design gave a credible impression. Aller thus took all measures that could reasonably be required, and it had not been entirely clear to Aller that the ad was in breach of good marketing practice.

At the request of the Consumer Ombudsman, a professor of nutritional science testified to the fact that Algolean could not produce the claimed effects.

The Market Court began by stating that the marketing of dieting products, according to established case law, must conform to a particularly high standard of truthfulness. In the Court's view the advertisement in question gave the impression that Algolean induced massive weight loss without exercise or an altered diet. The quotes from the anonymous person depicted in the ad served to reinforce that impression. The Court found that the evidence heard in the case showed that the claimed effects were impossible to achieve. Consequently, the marketing was misleading with regard to the properties of the product and therefore unfair to consumers according to the Marketing Act.

The Court went on to deal with the issue of complicity. Press undertakings, the Court said, must assume a certain degree of responsibility for advertisements which they agree to publish – even if they have taken no part in designing them – and it

2 One of a many Swedish Ombudsmen, the Consumer Ombudsman ("Konsumentombudsmannen") is a central governmental body charged with the protection of consumer interests. The Ombudsman is empowered under the Marketing Act to issue prohibitions and other orders and to bring litigation against businesses that violate the Act.

is incumbent upon all serious press undertakings to scrutinise advertisements prior to publishing. The Court further stated that it considered this scrutiny is an important factor for the effectiveness of the Marketing Act. However, the Court went on, complicity in unlawful marketing exists only where the evidence shows that it “ought to have been entirely clear” to the press undertaking that the advertisement was in breach of good marketing practice. In the Court’s opinion the advertisement at issue contained claims that were obviously incorrect and absurd and, thus, decidedly misleading. In the light thereof, the Court held that it must have been

entirely clear to Aller that the advertisement was in breach of good marketing practice. The injunction sought by the Consumer Ombudsman was therefore granted.

The judgment is likely to cause the media to observe considerable care to avoid publishing advertisements of the kind in question. This will effectively remove a substantial part of the market for misleading advertising. At the same time it seems that the threshold for liability is set high enough, so that the media will not have to turn down legitimate ads for fear of overstepping the line.

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