



GENEVA GROUP INTERNATIONAL
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Trade Law in E-Commerce

GGI EasyMeet – Eisenberg AUSTRIA

KAPP Rechtsanwalts GmbH

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RECHTSANWALTS GMBH

- Location: Graz, AUSTRIA (Headquarter) and Ruden, Austria
- GGI member: since 2010
- Employees: 11
- CEO: Mag. Mario KAPP
- Areas of specialization:
 - Corporate Law
 - Real estate law
 - Company restructuring
 - Banking and capital market law
 - Contract law
 - Insolvency law



Introduction

Definitions

Example - Solution

Current case law
(European Court of Justice and OGH)



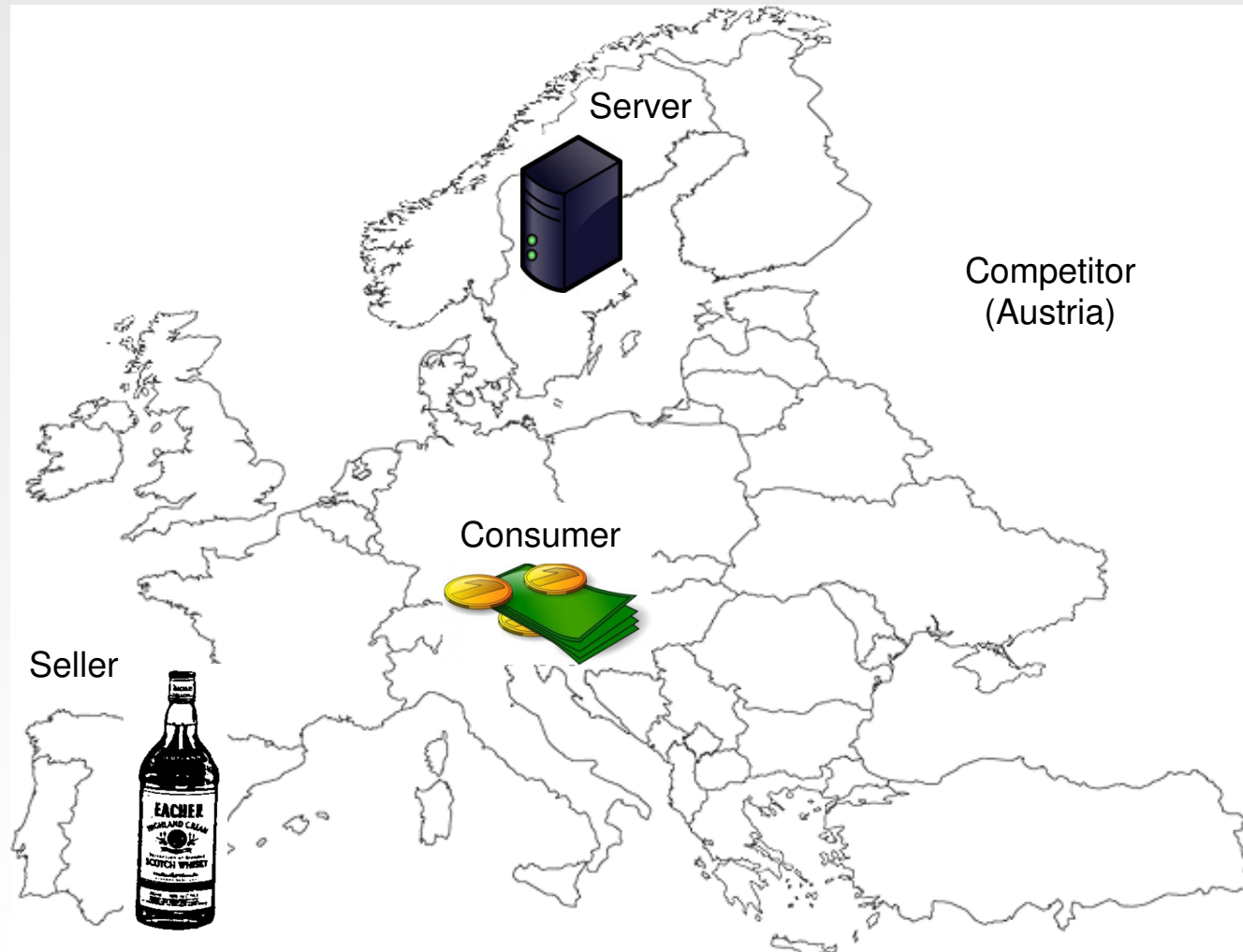
- Services over the internet
- Internet providers and customers are based in different states
- Trade license obligation



Example – Whiskey Online Shop

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Trade License in Austria?



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- Internet services = Information society services
- Activities provided against payment by means of electronic equipment
- Provided completely On-line
- Examples:
 - Software
 - Images
 - Texts
 - All kinds of data
 - On-line advertisement
 - Consulting, etc



On-line and Off-line services

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- Separation in two parts
- Offer and conclusion of contract → On-line
- Service → Off-line



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- Different laws
- Member States of the EU and third countries
- EU is undertaking efforts → several directives relevant to trade law issues
- Directive on electronic commerce (Directive 2000/31/EC)
- Austria → E-Commerce Act (ECG)
- Austrian Trade Act (GewO)



E-Commerce Directive and ECG

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- Implementation in national law
- E-Commerce within the European Economic Area
- EU, Iceland, Liechtenstein and Norway
- Country-of-origin principle
- Law of the state of establishment



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„Service providers subject to the E-Commerce Directive or to the ECG must apply the trade regulations of the Member State in which they are established.“

- Few exceptions:
 - Consumer protection regulations
 - Free choice of law

- Motivation behind country-of-origin principle:
 - Reduce risks linked to the application of law
 - To promote E-Commerce



➤ Commercial activities:

„These are activities that a person pursues independently, regularly, and with the intention to generate profits.“

➤ Geographical scope → Austria

➤ Connecting factor:

- Place from where the respective trade is carried out
- Economic/organisational center of an enterprise
- Permanent establishments or branch offices



➤ Permanent establishment =

„Where the enterprise conducts business with the customers and can be accessed by the customers, as well as the place where the majority of internal business transactions take place.”

→ Therefore, especially in the case of E-Commerce, the server location or the location of the service provider must not be regarded as the location of the enterprise.



The Austrian Trade Act

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- Section 50 Trade Act
- Exception of E-Commerce → to deliver goods on order anywhere
- Pharmaceuticals, weapons, pyrotechnics
- Delivery of the goods → ancillary right
- Main activity of the enterprise
- Separate trade license



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- Cross-border services
- Trade license in Austria
- Place of performance
- Establishment of the enterprise
- Significant part of the trade activity



Introduction

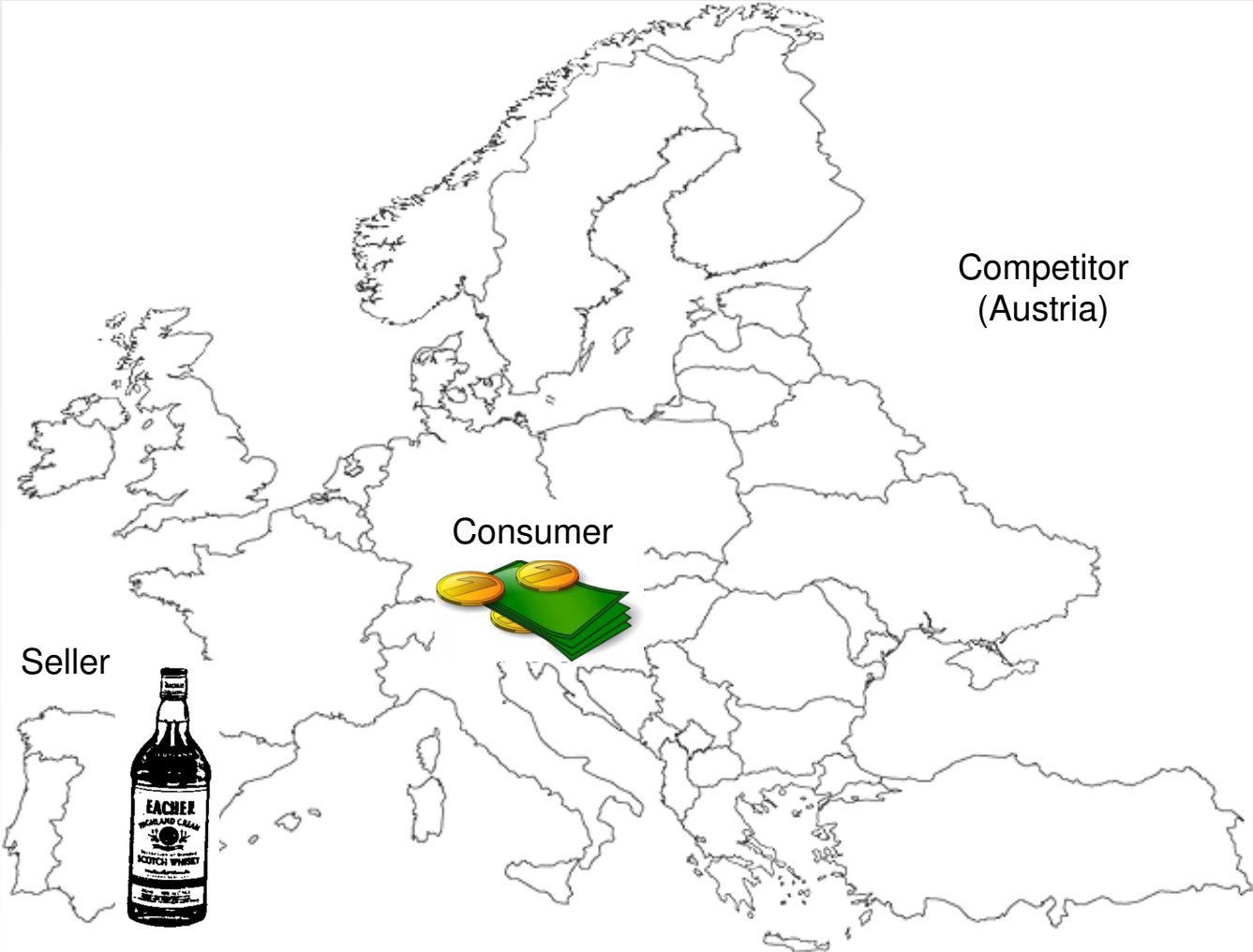
Definitions

Examples - Solution

Current case law
(European Court of Justice and OGH)



Example – Whiskey Online Shop



- Separate case in two areas
- On-line → E-Commerce Directive and country-of-origin principle
- Off-line → Not in the scope of the Austrian Trade Law

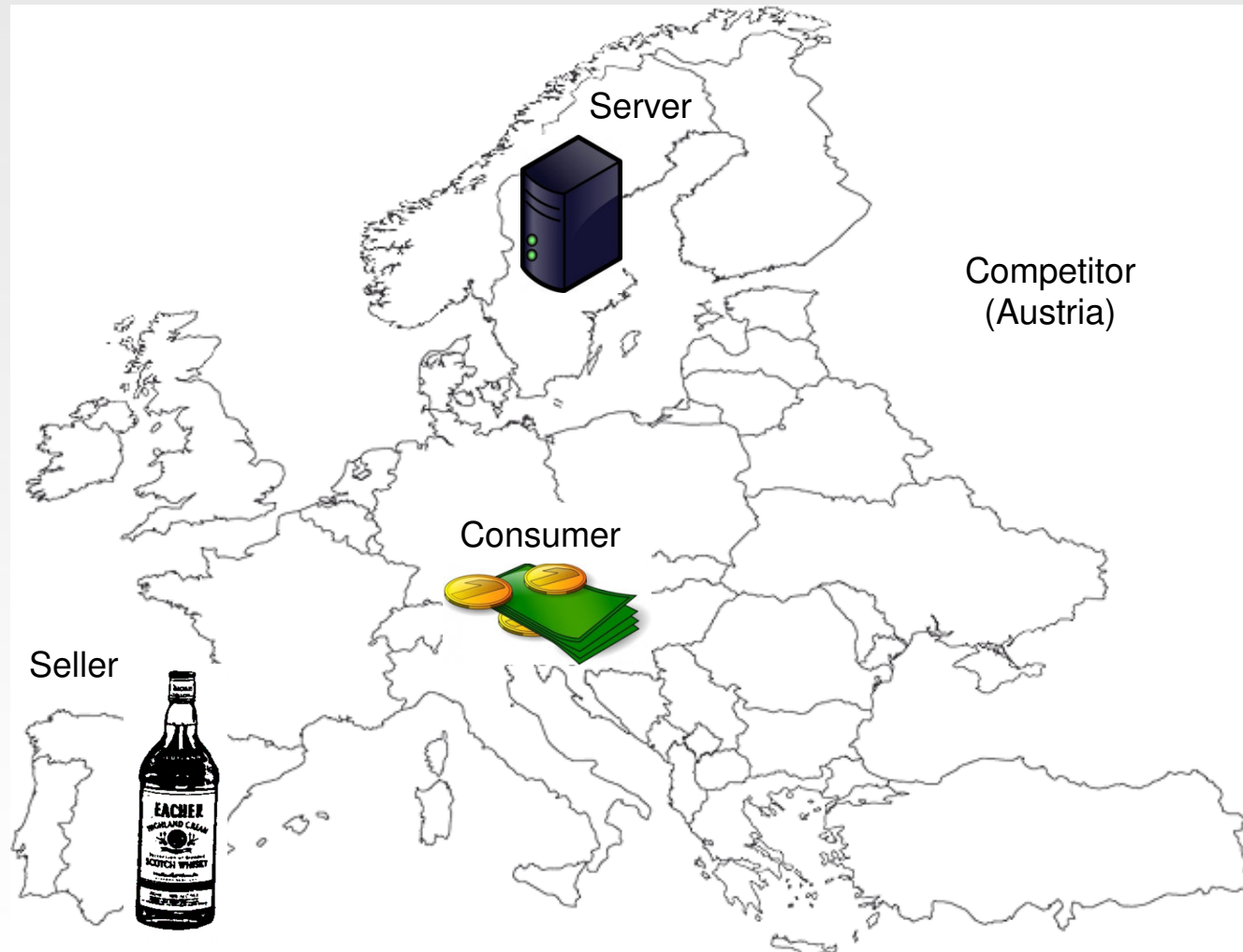
No Trade License required



Example – Whiskey Online Shop

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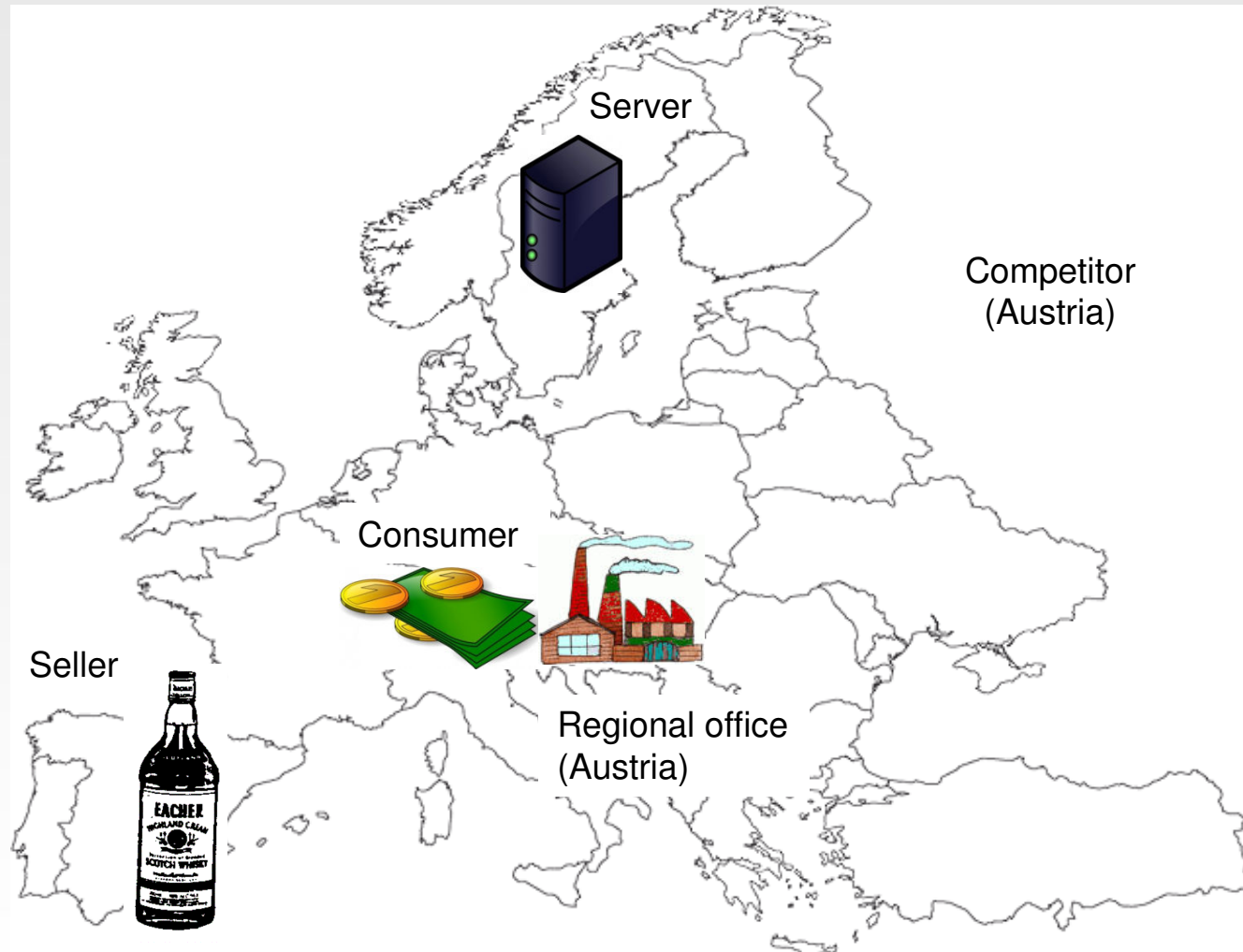
Server does not matter
No Trade License required



Example – Whiskey Online Shop

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country-of-origin principle → Austrian Trade Law

Trade License required



Introduction

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Examples - Solution

**Current case law
(European Court of Justice and OGH)**

- European Court of Justice:
 - ECJ Case C-108/09 of 2 December 2010

- Austrian Supreme Court:
 - Case 4 Ob 30/09 d of 14 July 2009



ECJ Case C-108/09 of 2 December 2010

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➤ Facts:

- Contact lenses over the internet
- Prohibited by the Hungarian authorities
- Medical devices
- E-Commerce Directive
- No information society services
- Medical advice and physical examination



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ECJ Case C-108/09 of 2 December 2010

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➤ Legal evaluation:

- ECJ separates facts in two areas
- Act of selling, offer and conclusion of the contract
- Delivery
- On-line → E-Commerce Directive
- Contracts by electronic means
- Medical devices are not excluded
- Medical examination only recommended
- Shipment → primary legislation and principles of free movement of goods

- National legislation → inadmissible



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Austrian Supreme Court Case 4 Ob 30/09 d of 14 July 2009

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➤ Facts:

- Defendant → Belgian company
- Digital photos through website to customers worldwide
- No office in Austria
- „Photo laboratory“ does not require a permit in Belgium
- Plaintiff → Austrian company
- Same line of business
- No trade license and registration in Austria



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Austrian Supreme Court Case 4 Ob 30/09 d of 14 July 2009

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➤ Legal evaluation:

- Trade legislation was closely linked to the physical establishment
 - Scope of Austrian Trade Act → not cover mere on-line activity
 - Distinction between on-line and off-line services
 - Shipment of photos → off-line service
 - No activity within the scope of the Austrian Trade Act
 - Result = No violation of the Trade Act
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- On-line services → ECG and E-Commerce Directive
 - Country-of-origin principle
 - Trade license according to Belgian law
 - Discrimination of natives is accepted



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