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The International Comparative Legal Guide to: Class & Group Actions 2012

A practical cross-border insight
into class and group actions work

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Austria



Fiebinger Polak Leon & Partner Rechtsanwälte GmbH DDr. Karina Hellbert

1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

Three mechanisms of enforcing collective interests are available:

- Representative actions filed by an association (*Verbandsklage*).
- Representative test case actions filed by an association (*Verbandsmusterklage*).
- Class actions developed by case law (4Ob116/05w).

Although the Austrian Civil Procedure Code (CPC) contains no provisions governing class actions, the Austrian Supreme Court held that a “class action with a specific Austrian character” (*mit österreichischer Prägung*) is legally permissible (based on § 227 CPC concerning joinder of actions (*objektive Klagenhäufung*)). § 227 of the CPC allows consolidating claims of the same applicant against the same defendant. The claims can be jointly filed under the following conditions: (i) jurisdiction of the court for all claims is given; (ii) application of the same type of procedure; and (iii) the matter in dispute must be of the same nature with respect to the facts and the law (*gleichartiger Anspruchsgrund*).

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services? Please outline any rules relating to specific areas of law.

They apply to all areas or sectors being able to be handled by a civil court, except family or the like. Certain institutions are specifically entrusted to file representative actions, for instance in the consumer field the Consumer Association (VKI). The class actions, where the Supreme Court allowed such an “Austrian” class action for the first time, related to litigation with respect to financial services, namely misinformation of consumers. Furthermore, the Federal Minister for Labour, Social Affairs and Consumer Protection may mandate the VKI to initiate “class” proceedings.

1.3 Does the procedure provide for the management of claims by means of class action (whether determination of one claim leads to the determination of the class) or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group?

There is no specific procedure for managing class actions.

However, a court will give a binding decision with respect to the legal questions to be solved - comparable to solving preliminary questions - and after this ruling, it will be decided on a case-by-case basis, whether the other claim would actually be covered or not. The decision in one case does, therefore, not create a binding precedent for other claims, but it is of course unlikely that the court will alter its decision when the facts and the legal issue to be solved are actually the same.

1.4 Is the procedure ‘opt-in’ or ‘opt-out’?

The procedure is on an “opt-in” basis because it lies in the sole discretion of the party to join such proceedings or not (*Dispositionsgrundsatz*).

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

There is no legal guidance on this. However, professional lawsuit financing companies will finance a lawsuit only if the amount in disputes exceeds EUR 50,000.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

The claims must relate to substantially identical legal or factual questions.

1.7 Who can bring the class/group proceedings e.g. individuals, group(s) and/or representative bodies?

“Class proceedings” can be filed by individual persons or by associations. However, an individual would be liable for costs if the action does not prevail. Thus, such class actions are filed by associations. In case an association files a representative test case or a “class action”, the Supreme Court rules, as a last instance, without restrictions on the amount in dispute.

1.8 Where a class/group action is initiated/approved by the court must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

The CPC does not require associations to inform potential claimants about an action. Before an association files a claim, it normally

mobilises as many consumers as possible through the media, because the amount in dispute is *a.o.* decisive whether a financing company will support the claim or not.

1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?

According to the annual VKI report of 2010, 265 procedures in total have been conducted (representative actions, representative test actions and class actions), including three class actions.

1.10 What remedies are available where such claims are brought e.g. monetary compensation and/or injunctive/declaratory relief?

The kinds of remedies that are available depend on the legal provision upon which the claim is based. Pecuniary compensation is, in any case, available if damages have indeed occurred.

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies e.g. consumer organisations or interest groups?

The representative action can only be filed if such an action is regulated by law. Representative actions are most common in the consumer field and competition area.

- The Consumer Protection Act (CPA) contains various provisions allowing such claims, namely cease and desist claims, with respect to unfair or illegal clauses contained in the general terms and conditions or with respect to issues being of general relevance to consumers (§ 28 CPA and § 28a CPA).
- Also the Act against Unfair Trade Practices allows certain associations to initiate proceedings if they consider that certain provisions of the Unfair Practices Act are violated.

By a representative test case, one single case is tested out. Although the decision is not binding to third parties, it still has a significant impact, because such cases often involve a decision by the Supreme Court providing binding guidance.

2.2 Who is permitted to bring such claims e.g. public authorities, state appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

According to § 29 of the CPA, such actions can be brought by the following representative associations: the Austrian Economic Chamber; the Federal Chamber of Labour; the Council of Austrian Chambers of Agricultural Labour; the Austrian Trade Union Federation; the Presidential Conference of Austrian Chambers of Agriculture; the Federal Competition Authority and the Austrian Association for Consumer Information.

Pursuant to the Directive on Injunctions for the Protection of Consumer's Interests (98/27/EC), actions can be brought by bodies and organisations of other European Member States notified in the Official Journal of the European Communities whenever the violation originates in Austria.

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law e.g. consumer disputes?

A representative action can be brought under consumer protection law, competition law, pharmaceutical law, insurance contract law, antitrust law, labour law and under the Equal Treatment Act.

2.4 What remedies are available where such claims are brought e.g. injunctive/declaratory relief and/or monetary compensation?

Before a trial is initiated, the association tries to obtain a cease and a cease declaration from the company. If this fails, the court claim contains a cease and desist claim as well as a claim requesting the publication of a favourable judgment. Such actions filed by associations do not aim for monetary compensation or for the recovery of profits resulting from such a violation.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

The trial is always handled by a judge.

3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

Generally, these proceedings are not dealt with by specialised courts or judges. If an action is filed against a registered company, the Commercial Court would have exclusive jurisdiction. In addition, also for certain product liability cases, jurisdiction of the Commercial Court is given.

3.3 How is the group or class of claims defined e.g. by certification of a class? Can the court impose a 'cut-off date by which claimants must join the litigation?

Austria does not have a procedure for regulating the certification of a class. Normally, the court simply affirms, by an order, the joinder of actions. The decision by the court to join the actions is generally not appealable; this was recently confirmed also with respect to the permissibility of class actions with an Austrian character. It would only be appealable if the court ordering such joinder has no jurisdiction.

After court proceedings have been initiated, the VKI does not allow consumers to join the class action for organisational reasons. However, it would be possible under the provisions of the CPC by means of "a subsequent joinder of causes of action" (*nachträgliche objektive Klagenhäufung*).

3.4 Do the courts commonly select 'test' or 'model' cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

If a "joinder of action" is admissible, the judge conducts a joint

hearing. It would also be possible that only one joint decision is reached, namely if such a joint decision would indeed, from a procedural point of view, speed up the proceedings.

The claimant and defendant can, together with the judge, decide that issues shall be dealt with prior to the main proceedings, for instance, if within a class proceeding it is unclear whether the association filing for such proceeding would indeed have standing. The relevant legal instrument is called an “*Antrag auf Zwischenfeststellung*” (an application to obtain an interim decision with respect to one specific point). It is also possible that the parties agree to suspend the proceedings, for instance, if the parties enter into settlement negotiations. During the settlement proceedings, the statute of limitation period is also suspended so that the parties can, without a threat of being time-barred, achieve a result which would be satisfying for both parties.

In class proceedings this is a little bit different; such suspension of the limitation period would only be granted to one proceeding and would not have an effect with respect to other proceedings. Thus, it is normally agreed between all the parties that, for the time period for such negotiation, all parties waive the statute of limitation defence. This is, of course, not in the interest of the defendant to give such a waiver, but judges intend to insist on doing so. If various claims are combined in one proceeding, the court can decide one claim after the other, if this is necessary.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

Partial judgments (*Teilurteil*, § 391 CPC) are also available in Austria. A partial judgment would, for instance, be rendered if a defendant acknowledges parts of the claim. The biggest hurdle in practice with respect to such partial judgments is that the parties are sometimes unable to agree upon the questions forming the subject-matter of the partial judgment.

Interim judgments allow decisions about:

- the facts which would result either in the acceptance or rejection of a claim (so-called “*rechtsbegründete Tatsachen*”) (§ 393(1) CPC);
- preliminary questions (§ 393(2) CPC); or
- objections from the defendant concerning limitation (§ 393a CPC).

Documentary evidence, expert opinions or minutes used or relied upon in another court case can be used in the pending procedure if the parties agree (§ 281a CPC).

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

If the judge does not have the required technical expertise, the judge will invite a technical or medical expert to participate in the court hearings and to ask questions to parties and witnesses. Legally, the facts are assessed only by the judge.

A private expert opinion is permissible but is not (in respect of its strength of evidence) to be considered an expert opinion in the formal sense of the CPC. It is treated like all other evidence provided by the parties. Private expert opinions are normally used to undermine the court expert report because, for instance, the expert report did not discuss all the issues at stake or is not in line with the state of the art. In general, private expert opinions are not submitted before the court appointed expert has rendered his/her opinion, except in the case of patent infringement.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

There are no provisions on exchange of documents prior to trial. It is possible to apply for perpetuation of evidence before trial (§ 384 CPC). Furthermore, certain written statements have to be exchanged before the first court hearing (§ 257(3) CPC).

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

In Austria no discovery procedure is available. Consequently, the parties are not required to disclose any documents before the trial has actually started. However, if a party relies, in the proceedings, on a specific document as evidence, the document must also be provided to the other party. In addition, if the document is considered to be a joint document, e.g. a contract signed by both parties and it is in the possession of only one party, such party must furnish the other party with this joint document. Only under very restricted circumstances can a party legally enforce the provision of other types of documents not being joint documents. How the judge interprets whether the provision of documents is rejected by a party lies normally at his sole discretion.

3.9 How long does it normally take to get to trial?

The claimant initiates proceedings by filing a claim. The court then orders the defendant to respond within four weeks. It takes, in practice, two to four months before the first court hearing is conducted.

3.10 What appeal options are available?

If the amount in dispute does not exceed EUR 2,700, the grounds for an appeal against a first instance judgment are limited to nullity or mistakes in the legal assessment. A second instance court decision can be appealed to the Supreme Court under certain limitations: the amount in dispute has to exceed EUR 5,000 and the matter must be of substantial or procedure law, which is of utmost importance for the consistency or legal certainty of the law, or contributes to a further important development of the legal system.

Actions from associations are privileged because the amount in dispute does not have to exceed EUR 5,000.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Basically, the limitation period for bringing legal proceedings to a court depends on applicable substantive law.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have a discretion to disapply time limits?

The relative limitation period (three years) commences at the time a right could have been exercised for the first time. For instance, in case of tort litigation, the limitation period runs from the point in

time the aggrieved party obtains knowledge about damage and the actual tortfeasor.

The absolute limitation (thirty years) runs from the actual occurrence of the incident. Limitation periods can be suspended (if a claim is filed in court, provided that the claim is continued with proper respect and the claimant prevails or if settlement negotiations are being conducted).

The court will only deal with this issue if the defendant actually invokes the limitation defence. The judge has no discretion to disregard such a defence. In certain circumstances the law itself provides that the statute of limitation must be disregarded, for instance if, for a minor or disabled person, a custodian has to be appointed.

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Concealment and fraud do not affect limitation periods. As mentioned above, the limitation period commences with the actual knowledge of damage and the person inflicting the damage. Concealment simply results in the fact that the claim is filed at a later time.

5 Remedies

5.1 What types of damage are recoverable e.g. bodily injury, mental damage, damage to property, economic loss?

Pecuniary loss as well as non-pecuniary loss is recoverable. Compensation for personal injuries includes costs for medical treatment, loss of income and damages for pain and suffering.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Under Austrian substantial civil law, a claim for compensation implies actual damage having occurred. Therefore, costs of preventative medical monitoring cannot be claimed.

However, it is possible to file a declaratory action for future damages (*Feststellungsklage auf zukünftigen Schaden*). Such declaratory action results in the defendant being held liable for any damages occurring in the future that have stemmed from the incidents that triggered the court proceedings.

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Punitive damages are not recoverable in Austria. Judgments awarding punitive damages are not enforceable because that would be a violation of the *ordre public* principle.

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

Generally, there is no maximum limit on damages under common civil law. However, the Train and Automobile Strict Liability Act (EKHG) provides for a maximum limit on damages. Such limits could also, under certain instances, have an impact on settlement negotiation. For instance, in the Kaprun case in 2000, the limits provided for in the EKHG were taken as guidance.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

It lies in the sole discretion of claimant to quantify the damages. The awarded amount is distributed proportionally, depending on the amount in dispute of the single claim.

5.6 Do special rules apply to the settlement of claims/proceedings, e.g. is court approval required?

It lies in the complete discretion of the parties whether they settle the case during the proceedings or not. However, if the highest instance has ruled, and thus the judgment becomes legally binding, a settlement rendered before the court is no longer possible. It is of course left to the parties to afterwards agree that the rendered judgment shall not be enforced. However, this would trigger special fees in Austria (so-called "*Vergleichsgebühren*").

The settlement can be concluded before the court, but also out of court. If one party to an out-of-court settlement refuses to act in accordance with the agreement, the other party has to file a claim in court in order to obtain a verdict and be able to enforce the out-of-court settlement. A settlement recorded by a notary is, under certain conditions, directly enforceable.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party? Does the 'loser pays' rule apply?

According to the CPC, the prevailing party can recover court fees and legal costs (including fees for experts, for interpreters, for witnesses and the cost for the publication of a favourable judgment). The prevailing party can recover attorney's fees only to the amount provided for by the Austrian Attorney's Fees Act.

A class claim is normally financed by a professional lawsuit financing company which bears the costs in case the defendant is successful. If the party supported by the financing company prevails, the financing company will receive up to 40% of the awarded amount. If the party does not have the financial means to conduct such a trial, legal aid is available.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

In case a professional lawsuit financing company bears the costs, costs that are not reimbursed by the opponent (e.g. costs of private expert opinions) are deducted from the awarded amount. In case no professional lawsuit financing company bears the costs and assignors have acquired legal protection insurance, the common costs are proportionally divided (depending on the amount in dispute accounted for by the individual claim).

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

If a claim is pending before the court, the claim can only be withdrawn with prejudice. This means if one of the members of the

group withdraws his/her claim, he has to pay the full costs occurred up until that point relating to his claim.

6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

The court does not manage any costs. For certain fees, e.g. if a court appointed an expert that has to render his opinion, the fees to be charged are regulated by a specific law. With respect to these costs, there is indeed a cap. At the end of the proceedings, the parties will file their costs and the court will only assess the costs, whether they are appropriate or not, if one of the parties has submitted a reasoned opinion why it considers the costs are too high.

7 Funding

7.1 Is public funding e.g. legal aid, available?

In case the Federal Ministry for Labour, Social Affairs and Consumer Protection instructs the VKI to initiate a class or a representative test action, the Federal Ministry will reimburse the VKI.

Legal aid is available only for individual persons. The constitutional court is currently dealing with the issue of whether it would be in violation of the European Convention on Human Rights because legal aid is no longer available to legal entities.

7.2 If so, are there any restrictions on the availability of public funding?

A defendant can request legal aid if he does not have the financial means to conduct the proceedings. Support either relates to the court fees alone or could also relate to court fees, interpreters, the provision of a lawyer if needed, etc. Even if legal aid is granted, this would not relieve the person obtaining legal aid from paying the costs of the opponent if the claimant loses the trial.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

According to the *quota litis* prohibition, a success rate for the awarded amount is not allowed to be agreed upon, since lawyers should not be able to exploit clients who cannot evaluate litigation risks. However, third party funding is legally admissible in Austria.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Professional litigation financing companies may provide funding if the amount in dispute exceeds EUR 50,000. In case of success, a professional lawsuit company charges between 20% and 50% of the awarded amount. The "fees" of such a company depend on certain criteria e.g. prospect of success, amount in dispute and financial standing of the opponent.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

In case an association files a claim, it is standard that the claims of the consumers are assigned to the association. This takes away the cost risk being faced by a consumer when submitting the case on their own.

8.2 Can consumers' claims be brought by a professional commercial claimant which purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

Such a procedure is not foreseen under Austrian provisions. Such claims can only be assigned, not "purchased".

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

Victims of a crime can pursue pecuniary damages which arise from the criminal act in criminal proceedings. The advantage of such an approach is that, in criminal proceedings, the prosecutor will conduct the necessary investigations, thus victims can easily obtain evidence, which can be used if they pursue their claims afterwards in civil proceedings. If the damages cannot be easily established within the criminal proceedings, the criminal court will state in its judgment that the damage must be pursued by relying on the ordinary civil courts. If the tortfeasor is indeed convicted, the tortfeasor cannot argue afterwards in civil proceedings that he did not commit the crime. The criminal court decision is thus binding for the civil court.

8.4 Are alternative methods of dispute resolution available e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Disputes can be settled by the Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC). Under the rules of arbitration and conciliation of the Arbitral Centre, multi-claimant litigation is admissible if the same arbitrators are appointed in the different proceedings and all parties and arbitrators give their consent (Section 13 (7) Vienna Rules).

Mediation is available on the condition that all parties give their consent. Limitation periods are suspended during mediation proceedings. Mediation costs depend on expenditure of time and not on the amount in dispute. However, an out-of-court settlement cannot be enforced in court.

Conciliation board procedures are provided for disputes relating to accommodation and telecommunication matters.

8.5 Are statutory compensation schemes available e.g. for small claims?

In Austria, there are no statutory compensation schemes available specifically for small claims. However, in certain areas, compensation schemes are provided for, e.g. the Act Concerning Compensation for Vaccination Damages. Damages that are recoverable are those inflicted by vaccinations, that are, among others:

- recommended by the “Mother-Child-passport”;
- recommended by a regulation issued by the competent Minister; or
- ordered by an administrative authority based on section 17 of the Pandemic Law.

8.6 What remedies are available where such alternative mechanisms are pursued e.g. injunctive/declaratory relief and/or monetary compensation?

Generally, all kinds of remedies are available, but when mediation occurs, it is often agreed that, for instance, the ruling will not be published.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict ‘forum shopping’?

Yes, claims can be brought by residents from other jurisdictions. Within the CPC, instruments can be relied upon to prevent “forum shopping” but in essence they are aimed to prevent claims by other nationals not having a residence in Austria. However, such instruments can no longer be invoked against nationals, entities etc., having their seat or residence in the European Union.

9.2 Are there any changes in the law proposed to promote class/group actions in Austria?

A first draft for amending the CPC to allow group actions was distributed in 2007. There were some discussions going on, but it seems that the introduction of a group action is currently not a priority of the government.

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