



**British Institute of
International and
Comparative Law**

COLLECTIVE REDRESS AUSTRIA



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**British Institute of
International and
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I. Traditional multiparty practice

1. General description

In Austria, there are no special rules regarding collective redress. There are, however, several traditional devices of procedural law that can, at least to a certain extent, be used for mass litigations.

a) Individual actions

Obviously, it is possible for claimants to pursue their claims by way of individual actions before the same court or different courts. This, however, usually leads to the undesirable duplication of lawsuits and, possibly, to inconsistent results. This possibility has, nevertheless, been used by some claimants in mass tort claims.

b) Joinder

There are several devices of traditional civil procedure that allow for a joinder of claimants or claims. First, several claimants may join in a single proceeding.¹ Second, one claimant may bring several claims against one or more defendants in one action. By using these procedural means, it is possible for several claimants to join forces against one or more defendants. These procedural devices are of major practical importance. Joinder was used in a number of mass cases with up to several hundred claimants joining in a single complaint.

c) Consolidation of cases

In addition to joinder, the court may consolidate cases if this serves the interest of justice.² In general, this is only permissible in case the actions are pending before the same court. There is one exception to this general rule; in certain tort cases, the court can transfer a case to another court where similar cases are pending for the purposes of consolidation.³ From a practical point of view, consolidation is of limited use in mass litigation. This is due to the fact that consolidation may be impractical if several individual actions are filed at different times. In addition, there are frequently practical problems arising from the large number of lawyers involved and the different trial strategies that would most likely be pursued by them.

d) Test cases

In some cases, potential claimants and defendants conclude an agreement according to which only one case is filed, designed to resolve a number of similar controversies. Alternatively, the parties may agree to await the outcome of an already pending case (both approaches are being referred to as “test case”). In these cases, the potential defendant usually waives the statute of limitations for the time as the test case is pending. Regularly, there is an understanding between the parties that the result of the test case is binding for the other claims.

2. Scope/Type

The mechanisms mentioned above (unless otherwise stated) are horizontal in the sense that they are not restricted to a particular area of the law. In general, both injunctive and compensatory claims are possible. In practice, mass claims are mostly found in tort cases and in cases for damages in connection with false investment advice.

3. Procedural Framework

The above-mentioned mechanisms fit into traditional civil procedure, either by combining several parties or several lawsuits. Technically, there are different forms of joinder, joinder of claims and joinder of parties. Joinder of parties requires that there is some form of connection between the parties joined. Specifically, section 11 subparagraph 2 Austrian Code of Civil Procedure requires that the claims are based on essentially the same facts, and that the court has jurisdiction over all defendants. On the other hand, a single plaintiff can pursue several claims in one complaint (joinder of claims). In this case, the statute does not require that there is a particular connection between the claims brought. This device, provided for in section 227 of the Austrian Code of Civil

¹ § 227 Zivilprozessordnung (Code of Civil Procedure).

² § 187 Zivilprozessordnung (Code of Civil Procedure).

³ § 31a paragraph 2 Zivilprozessordnung (Code of Civil Procedure).

Procedure, is the basis for the ‘Austrian model of class action’ in which several claimants assign their claims to an association which then brings the claims in its own name. Thus, in this case, there is technically only one claimant bringing several claims. Nonetheless, it has been suggested that the requirements for joinder of parties should be applied to this situation as well. The Austrian Supreme Court has taken a middle ground position, requiring that the claims have “essentially a common core” and are based on “essentially the same questions of fact or law”.⁴

The scope of res judicata of the procedures is limited to the parties who actually participated in the proceeding. Other potential members of the respective group who did not take part in the proceeding are, therefore, not bound by the outcome.

With regard to specific procedural rules, please refer to the description in chapter II. 8. below.

a) Competent Court

There are no special rules on jurisdiction for this type of proceedings. Consequently, ordinary rules on jurisdiction apply. Therefore, these types of proceeding can be brought before any Austrian court. Given the nature of most claims, the majority of cases are brought before the commercial courts.

b) Standing

There are no restrictions as to whom the procedures outlined above are available.

c) Availability of Cross Border collective redress

There are no specific rules on Cross Border collective redress. Consequently, there are also no restrictions as to the participation of foreign claimants. General rules regarding the participation of foreign claimants apply (e.g. regarding process capability, jurisdiction, etc).

d) Opt In/Opt Out

As the abovementioned procedures are part of traditional civil procedure, active participation in the form of an action is required. Therefore, the procedures apply only to those who have taken steps to join the proceedings (opt-in model). There are also no specific measures relating to the fact that affected persons may be not identifiable.

e) Main procedural rules

Admissibility and Certification criteria

No special admissibility and certification criteria apply.

Single or Multi-stage process

The procedure is a single-stage process; general rules of civil procedure apply.

Case-management and deadlines

There are special rules on case management or deadlines.

Expediency

Generally, Austrian courts work quite quickly. Thus, in 2012, the average duration (calculated as the median) of civil proceedings was 6 months before the District Courts (Bezirksgerichte) and 12.2 months before the Regional Courts (Landesgerichte).⁵ Roughly 50 percent of cases were resolved after less than six months. Only two percent of all proceedings lasted longer than three years.

Evidence/discovery rules

⁴ Austrian Supreme Court 4 Ob 116/05w JBl 2006, 48.

⁵ https://www.justiz.gv.at/web2013/home/justiz/daten_und_fakten/verfahrensdauer~8ab4a8a422985de30122a93207ad63c.c.de.html See

Austrian civil procedure law does not contain any discovery rules as provided by the US-type class action. General rules for taking evidence apply.

In a recent decision (1 Ob 39/15i), the Austrian Supreme Court has ruled that claimants may also present indirect evidence (practically most relevant are files and records from administrative proceedings against the defendant) to the court; this does not constitute a violation of the principle of immediateness of taking evidence (Unmittelbarkeitsgrundsatz). Defendants are, however, entitled to apply that the direct evidence may be examined by the court. This decision is particularly important for capital market claims of investors, due to the fact that most internal processes within the defendant party (e.g. market manipulations) are usually not easy to prove.

Interim measures

In this regard, please refer to the chapter on injunctions (II. 9. e.) below.

Court-directed settlements and out of court settlements

Court-directed settlements may be concluded during the whole proceeding, in special cases (proceedings at district court level) even before an action is brought (so-called Prätorischer Vergleich). In the preparatory hearing (vorbereitende Tagsatzung), the judge is under a duty (§ 258 para 1 number 4 Code of Civil Procedure) to suggest a respective court-directed settlement. Both court-directed and out of court settlements are, in general, subject to some degree of judicial control. However, this is limited to illegality or a violation of good morals. The judge cannot refuse a settlement on the ground that it is not in the best interest of the parties.

4. Available remedies

a) Type of damages

Since all of the measures described above fit into the framework of traditional civil procedure, there are no restrictions as to the available remedies. In most actions, claimants ask for money, although a declaratory judgment would be possible as well.

b) Allocation of damages/distribution methods

Despite the use of the above-mentioned procedural means, the respective actions usually remain legally independent in the sense that compensation is not awarded to the group as a whole, but to the individual claimants according to their respective entitlement. Therefore, no specific method for the allocation or distribution of damages is needed. Generally, the distribution is governed according to the respective legal relationship of the group members.

c) Availability of punitive/extra-compensatory damages

No reward of punitive/extra-compensatory damages is available.

d) Skimming-off/restitution of profits

As far as the profits obtained from a mass harm situation are legally deemed a damage (which will usually be the case), they have to be restituted by means of general tort law. However, there is no procedural device for skimming off profits in a civil proceeding without the initiative of the parties affected by the illegal activity. Since, in case of 'atomized losses', there is typically no incentive for the parties suffering the loss to bring an action,⁶ skimming off of illegal profits occurs only rarely.

In case of criminal actions, illegally obtained profits may also be confiscated by the criminal court (§ 20 et seq Criminal Code). The same applies to profit illegally obtained by cartel members (§ 20 Antitrust Law).

e) Injunctions

In case the respective statutory requirements are met (in general: prima facie evidence of claim and endangerment thereof, additional requirements may be required depending on the nature of the respective claim), claimants may obtain an injunction (§ 378 et seq Execution Order). This injunction may either be applied

⁶ Kodek, Atomised Losses in Tort Law: Conceptual Difficulties and Modern Developments, Journal of European Tort Law 2015, 109.

for in the same action as the (compensation) claim itself, or via two separate actions (first injunction, then ordinary civil procedure).

f) Limitation periods

There are no special rules on limitation periods, i.e. general rules apply. In cases where no specific rule exists, claims become time-barred after 30 years. There are, however, numerous exceptions to this general rule, the most important of which concerns tort claims. There, a so-called subjective test is applied. Claims become time-barred three years after the claimant gained knowledge of the damage and the liable party, at the latest, however, 30 years after the damage occurred. The thirty year-period also applies if the claim arises from crimes committed intentionally and carrying a penalty of one year imprisonment or more.

5. Costs

Austria has a "loser pays" rule. There are, however, some exceptions to this general rule, usually applying when the winning party has culpably caused the occurrence of costs that would have not been necessary (e.g. due to delayed submission of statements or evidence, unnecessary procedural steps).

6. Lawyers' Fees

Lawyers' fees are usually either calculated based on the statutorily provided attorney rates or by individual agreement (usually fixed hourly rates). Contingency fees agreed upon between claimants and their attorneys are invalid (§ 879 para 2 number 2 General Civil Code). In contrast to contingency fees, performance-based fees are largely considered permissible. It is, for example, possible to agree upon a certain fixed sum payable in case of successful litigation, if there is also a fixed sum stipulated in case of unsuccessful litigation and the two sums are not grossly disproportionate (e.g. 7 Ob 8/06 m).

7. Funding and commercial litigation

In recent years, commercial litigation finance became increasingly important. However, as a practical matter, commercial litigation finance is only available to relatively high claims. The respective "threshold" is about 50,000 EUR. It is one of the major advantages of the 'Austrian model' of group litigation (for further details, see chapter III. below).

Funding agreements between claimants and process financiers are currently not subject to judicial control within the financed proceeding, as stipulated by the Commission's Recommendations (para 14 et seq; for further details, see chapter III. 9. below). Separate judicial control (i.e. in a litigation between the claimant and the process financier) is obviously possible.

In academic literature, it is contested whether the prohibition of contingency fees for attorneys (see chapter II. 12. above) also applies to commercial litigation financiers. The Austrian Supreme Court has, as of yet, not settled this dispute. In 6 Ob 224/12b, the Court has (only) ruled that the defendant of the financed action does not have standing to dispute a contingency fee arrangement between a claimant and a litigation finance company. The prevailing view seems to be that the current system of litigation funding is permissible.

8. Enforcement of collective actions and settlements

As regards multi-party claims and settlements, no specific rules regarding their enforcement exist. They are subject to ordinary enforcement via execution proceedings.

9. Number and types of cases brought/pending

As the procedural means described above are part of ordinary civil procedure, there exists no separate official coverage as to the numbers of cases brought forth. The practical relevance of these procedural means is, however, significant. Most of the actions brought forth concern compensatory tort claims (e.g. actions for unsuitable investment advice). Injunctive actions are possible, but practically make up only a minority of cases.

10. Impact of the Recommendation/Problems and Critiques

In this regard, please refer to the joint assessment regarding the current Austrian framework and its compliance with the Commissions recommendations, as provided in chapter III. 15. et seq below.

II. General Collective Redress Mechanism: the 'Austrian model' of group litigation

1. General description

Due to the lack of a formal collective redress mechanism, legal practice in Austria developed a special form of group litigation that may be used in addition to the traditional devices described in chapter II. above.⁷ This form of group litigation is based on a combination of joinder of claims and litigation finance and is referred to as the 'Austrian model of group litigation' (Österreichisches Modell der Sammelklage). Here, potential claimants assign their claims to an association (typically a consumer association). In a second step, the association brings action on its own behalf. Under this scheme, it is possible to assemble large numbers of claimants, thereby allowing the association to use commercial litigation finance. This is advantageous for the claimant because the claim can be pursued without any cost risks.

In practice, the 'Austrian model of group litigation' is of particular relevance and has been successfully used in several mass cases (e.g. against banks for charging excessive interest rates on loans). The largest mass litigation in Austria (concerning a securities case involving more than 3,000 claimants) also used this scheme. In recent years, the 'Austrian model of group litigation' was predominantly used in damages actions for unsuitable investment advice. As of 2012, approximately 20,000 claims were pending before the Vienna Commercial Court and the Vienna District Commercial Court; half of them have been brought by way of the 'Austrian model of group litigation'.

2. Scope/Type

The potential scope of the 'Austrian model of group litigation' is not limited to any specific area of the law. It has to be noted, however, that this device is usually limited to money claims, since, under Austrian case law, claims for declaratory judgments ordinarily cannot be assigned (which would be possible for the application of the 'Austrian model of group litigation').

3. Procedural Framework

The 'Austrian model of group litigation' fits into the traditional practice of Austrian civil procedure. The association to which the claims have been assigned to appears in the proceeding as a single claimant. Therefore, ordinary rules of civil procedure apply.

In such cases, courts regularly decide on one or a few claims by way of a partial judgment. This allows the appellate courts to review the relevant questions of fact and law. After a respective judgment issued by the appellate court, the remaining claims are typically settled out of court by the parties. In case there is no such settlement, a decision of these claims would be relatively easy for the courts, as the relevant questions have already been settled by the appellate decision.

Austrian civil procedure strictly follows the opt-in model (see also chapter III. 7. below). Therefore, the scope of res judicata is limited to the parties who actually participated. The outcome of the proceedings is consequently not binding for other members of the respective group. There are also no specific measures relating to the fact that affected persons may be not identifiable.

4. Competent Court

With regard to the above-mentioned procedural devices, no special rules on jurisdictions exist. Therefore, general rules apply. As a consequence, this type of proceeding could in general be brought before any Austrian court. Given the nature of most claims, most of the respective proceedings are pending before the Vienna

⁷ Klauser 2002 805; Kodek 2004 615.

Commercial District Court (in case the highest single claim brought does not exceed EUR 15,000) or the Vienna Commercial Court for all other claims.

5. Standing

The 'Austrian model of group litigation' is characterized by a 'collectivization' of claims by way of assignment to an association or other institution. Practically, only the Consumer Information Association (Verein für Konsumenteninformation) and the Employees' Chambers (Arbeiterkammern) bring forth such actions. However, also other institutions, such as the Chamber of Commerce, would be entitled to do so as well. In case the aforementioned organisations appear as claimants, special rules have to be observed for the appellate proceedings. In general, all restrictions of remedies based on the amount in controversy (which, in other cases, potentially restrict the grounds that can be raised on appeal to the Court of Appeals and which could bar access to the Austrian Supreme Court altogether), do not apply if these organisations appear as claimants.

Other than that, there are no special provisions (restrictions) on standing. Therefore, any other association is entitled to pursue claims that have been assigned to it. In scholarly literature, it has been suggested that a special limited liability company could be set up to serve as a vehicle for the 'Austrian model of group litigation'. It seems, however, that this approach has not been used in practice so far. Recently, an association ('COBIN - COntumers-Business-Investors')⁸ was founded, aimed at supporting collective redress litigations, particularly by raising respective funds and organizing and carrying out mass litigations under the 'Austrian model of group litigation'. COBIN plans to organize and finance first mass litigations as of fall 2017.

In the latter cases, the special rules for appellate proceedings mentioned above do not apply. Thus, a mass case brought by a 'normal' association or other body is simply governed by ordinary rules of civil procedure.

There are no restrictions as to the persons entitled to assign their claims to an institution. As a practical matter, however, participation in such a proceeding requires that an association is willing to take up one's claim, though it seems that so far this has not created any particular difficulties.

6. Availability of Cross-Border collective redress

The procedure is not restricted to Austrian claimants. Foreign claimants are free to participate. There are no procedural peculiarities if this mechanism is used in cross-border cases. Since the procedure requires that all claimants actively take part and assign their claims to an association, jurisdiction over the members of the group (which may be problematic in an opt-out type procedure) is not an issue.

However, it should be noted that the CJEU has held that the rules on jurisdiction for consumer cases under the Brussels I Regulation do not apply any more if a consumer assigns his claim to an association.⁹ In 1993, the Court held that a plaintiff (now claimant) acting in pursuance of his trade or professional activity, and who is not, therefore, himself a consumer party to one of the contracts listed in Article 15 Brussels I Regulation, may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention (now Regulation) concerning consumer contracts.¹⁰ The rationale for this decision is that a consumer association is less worthy of special protection than an individual consumer.

In 2016, the Austrian Supreme Court requested a preliminary ruling from the Court of Justice of the European Union concerning the question whether a claimant to whom other consumers assigned their claims can invoke the jurisdiction under Article 15 Brussels I Regulation 2001 (which is available only to consumers), if he – in connection with the enforcement of his alleged claims against Facebook – publishes books, gives paid lectures, operates webpages, raises donations and organizes an action under the 'Austrian model of class action'. For further details, please refer to the case summary in chapter VI. below.

⁸ <https://www.cobinclaims.at/>

⁹ ECJ, Judgment 1 October 2002. - Verein für Konsumenteninformation v Karl Heinz Henkel, - Case C-167/00; Austrian Supreme Court 4 march 2005, 9 Nc 4/05w.

¹⁰ ECJ, Judgment of 19 January 1993, Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH.

7. Opt In/Opt Out

Austrian civil procedure strictly follows the opt-in approach. The same applies to the 'Austrian model of group litigation'. The claimant has to assign his claim to an association or other institution. Therefore, the procedure only applies if an active step was taken in order to join the proceedings. Also with regard to the Austrian model of group litigation, there are no specific measures relating to the fact that affected persons are not identifiable.

8. Main procedural rules

a) Admissibility and certification criteria

The 'Austrian model of group litigation' is not subject to any certification process in the technical sense of the term. The first actions that were filed under this scheme were vigorously challenged by the defendants. For example, in some investor claims cases, it took three years until the Austrian Supreme Court decided that the procedure was admissible and that the defendant did not have standing to challenge a claimant's use of commercial litigation finance.

The Austrian Supreme Court, however, imposed a requirement that raising several claims in one action is only permissible if the claims are based on substantially the same cause of action and concerned substantially similar questions of law and fact.¹¹ In practice, this requirement does not constitute any significant restrictions, due to the fact that no reasonable claimant would bring totally unrelated claims in one proceeding.

A common defence strategy of defendants in unsuitable investment advice cases is to argue that the claims should not be joined in a group action since the advice given to the various members of the group has to be assessed on an individual basis, therefore not being suitable to disposition in a group proceeding. In the most prominent case, claimants successfully overcame this objection by arguing that the defendant had employed a systematic, general scheme of unsuitable advice in order to promote a specific product.

b) Single or Multi-stage process

The procedure is a single-stage process. Since the Austrian model of group litigation is characterized by all claims being assigned to a single association which then appears in the proceeding as a single claimant, ordinary rules of civil procedure apply. The real challenge is finding and categorizing possible claimants and dividing them into manageable 'portions' for a group proceeding. This type of work is carried out by the association which appears on behalf of the claimants and not by the court.

c) Case-management and deadlines

There are special rules on case management or deadlines.

d) Expediency

Since the Austrian model of group litigation utilizes the same procedural framework as individual lawsuits, the time frame is roughly the same as in individual litigation (see, in this regard, chapter II. 8. d. above). Obviously, since group actions typically involve complex questions of law and fact (such as investor suits for damages), the duration of these cases will typically be on the higher end of the spectrum.

While, in the early years of group action proceedings, the composition of the group, the jurisdiction of the court and the propriety of the funding (in light of the contingency fee involved) were vigorously challenged, often resulting in protracted litigation, it seems that these issues now seldom lead to significant delays any more.

e) Evidence/discovery rules

There are no special rules on evidence or discovery for this type of proceeding. Occasionally criminal proceedings are used in mass damages cases as a vehicle to bring civil claims. Austrian criminal law allows the victim of a crime to pursue his or her claims in the criminal proceeding. The court can award damages or grant other remedies if the defendant is convicted. In case of an acquittal, damages can only be obtained by way of a separate civil proceeding. This procedure of 'annex proceedings' (Adhäsionsverfahren) is available regardless of the number of claimants and is cheaper than initiating a separate civil litigation. While criminal courts in the past

¹¹ Austrian Supreme Court, 12 July 2005, 4 Ob 116/05w.

may have been reluctant to decide on civil claims (referring the victims to civil proceedings instead), this seems to have changed in recent years. Obviously, this avenue is available only if the damages claimed are the result of the criminal conduct of the defendant.

In 2015, the Austrian Supreme Court (1 Ob 39/15i) has ruled that claimants may also present indirect evidence (practically most relevant are files and records from administrative proceedings against the defendant) to the court. For further information, please refer to chapter II. 8. e. above.

A 2017 reform, implementing the cartel damages directive, introduced a limited form of discovery for cartel damages cases.

f) Interim measures

As far as it is necessary to secure the assigned claim, injunctions according to general rules may be issued. Given the nature of most claims (usually compensation for monetary damages), injunctions are rather the exception than the norm.

g) Court-directed settlements and out of court settlements

With regard to the 'Austrian model of group litigation', the same rules on settlements generally apply as already discussed above (chapter II. 8. g.). Further, as also already mentioned (chapter III. 3. above), it is common practice of Austrian courts to decide on one or a few claims by way of a partial judgment in order to permit the appellate courts to review the relevant questions of fact and law. Once these questions are answered, the remaining claims typically are settled by the parties.

9. Available remedies

a) Types of damages

The procedure is almost exclusively available for monetary damages. The reason for this is that the procedure is based on claims assigned to an association or other institution. Under Austrian case law, claims for a declaratory judgment normally cannot be assigned.

b) Allocation of damages/distribution methods

There are no statutory rules regarding the allocation of damages and/or specific distribution methods. The association to which the claims have been assigned usually first pays the litigation financier, covers its own expenses (if any) and then passes on the remains of the recovered amount proportionally to the damaged parties. Details of the distribution are usually governed in further detail by respective agreements between the association, the process financing company and the damaged parties.

c) Availability of punitive/extra-compensatory damages

Also with regard to the 'Austrian model of group litigation', there is no reward of punitive or extra-compensatory damages.

d) Skimming-off/restitution of profits

Please refer to the comments above (chapter II. 9. d.). No special rules apply to the 'Austrian model of group litigation'.

e) Injunctions

Please refer to the comments above (chapter II. 9. e.). No special rules apply to the 'Austrian model of group litigation'. Injunctions are, however, relatively seldom in respective cases.

f) Limitation periods

There are no special rules regarding limitation periods under the 'Austrian model of group litigation'. General rules apply, please also refer to chapter II. 9. f.

10. Costs

Please refer to the comments above (chapter II. 10.). No special rules apply to the 'Austrian model of group litigation'.

11. Lawyers' Fees

Please refer to the comments above (chapter II. 11.). No special rules apply to the 'Austrian model of group litigation'.

12. Funding

The 'Austrian model of group litigation' has the advantage of yielding a sufficiently high amount in dispute which enables the claimants to use commercial litigation finance. This enables the claimant to pursue his or her claim without any risk. On the other hand, the fee for the litigation finance will generally be between 25 and 40 percent of the overall amount recovered. The Austrian Supreme Court has held that a defendant has no standing to challenge such a fee arrangement.¹² Commercial litigation finance is used quite often in this type of proceeding. Initially, the possibility of using litigation finance was one of the major driving factors in inventing this procedure. Since litigation-funding agreements are not normally divulged, no exact figures as to the frequency of the use of litigation finance are available. It is a safe assumption that all the 'big proceedings' described above with more than 50 claims brought in one proceeding use litigation finance. Coordination of contributions to the costs of such a large number of claimants would be difficult in practice. Some proceedings for unsuitable investment advice are brought without litigation finance, but this seems to be the exception rather than the norm.

As already mentioned, currently there are plans for a private association that is intended to raise the required capital for consumer mass litigation, in particular by means of crowd funding (COBIN, see III. 3. a. above).

13. Enforcement of collective actions and settlements

No specific rules regarding enforcement of collective actions and settlements exist. They are subject to ordinary enforcement via execution proceedings

14. Number and types of cases brought/pending

The procedure is extremely important in practice. Whilst initially it was used mainly in proceedings with a few dozen claims, it is now the vehicle to bring large numbers of claims in one proceeding. Today, the area where this type of proceeding is used most prominently is investor suits for damages for unsuitable investment advice. In 2013,¹³ there were about 22,000 investor claims pending before the Vienna Commercial Court and the Vienna Commercial District Court. Of these, about 12,700 claims were brought by way of 22 group proceedings which combined more than 50 claims per proceeding. The average number in this category was 580 claims per proceeding. In addition, there were 72 smaller group proceedings with less than 50 claims per proceeding. 1,400 claims were brought in this way, resulting in an average of 20 claims per proceeding. In recent years, the number of group proceedings has declined. Thus, it seems that in 2013 no such proceeding was brought, in 2014 and 2016 only one each and in 2015 two.¹⁴ This is probably due to the fact that most cases arose in the aftermath of the financial crisis of 2007/2008. Since under Austrian law claims for damages are time-barred after three years, such claims will not be brought any more.

15. Impact of the collective mechanism on stakeholders

The emergence of the Austrian model of group litigation has certainly led to an increased supply of commercial litigation funding. Austria is, however, far away from "US conditions" or a "claims industry", as sometimes envisioned by opponents of mass litigation procedures. Often, associations have to resort to German litigation financiers. Further, (consumer) associations regularly scan potential mass litigation cases and offer support to potential claimants.

¹² Austrian Supreme Court, 27 February 2013, 6 Ob 224/12b.

¹³ The figures given here are as of 31 December 2012. They are taken from an unpublished lecture by Judge Parzmayr, judge of the Commercial Court, on 25 April 2013.

¹⁴ It should be noted that there is no official statistics for group proceedings. Therefore, the numbers provided above are based on information provided by individual judges of the Vienna Commercial Court.

16. Problems, critiques and calls for reform

The current system generally works quite well in practice. There are, however, certain critiques of the current system that have been identified in the literature.¹⁵ Traditional procedural institutes like joinder or consolidation of cases are suitable for some cases, but certainly not for all. In particular in cases with a large number of parties, the coordination of the proceedings poses severe problems to the court. Test cases are a cost-saving possibility to settle controversial factual and legal matters, but they require the consent of the defendant party, which is unsatisfactory from the perspective of access of law.

The 'Austrian model of group litigation' is suited to solve some of the problems arising from traditional multi-party practice, but not all of them. First, from the perspective of access to justice, it is questionable that the assignment of one's claim to an association is, in many cases, the only practical way of pursuing one's claim. Further, due to the required amounts in order to get litigation funding, it is currently the case that disputes with rather low amounts in dispute (e.g. mass and dispersed damages) are less likely to cause respective actions. In addition, the financial and personnel resources available to associations organizing mass litigations may further limit the number of claims that can be brought in this way.

In light of an increase in mass litigation and the abovementioned problems, a draft for a group procedure has been promulgated by the Austrian Ministry of Justice in 2007, which was not to replace, but to supplement the procedure currently used. Under this draft, a new group proceeding will be introduced for cases involving three or more claimants, and a large number of (probably more than 50) claims and similar questions of law and fact. However, a claimant is always free to pursue his claims as an individual action instead of participating in the group proceeding. The court decides on all common questions of fact and law by judgment. Any questions not resolved in the group proceeding have to be determined in individual lawsuits. The draft was met with severe resistance by the Chamber of Commerce and, consequently, the Conservative Party. Given the present political situation (end of coalition government and early elections to be held in October 2017)), implementation of the reform is unlikely in the near future.

In 2015, collective redress and its potential reform was discussed at the 19th Austrian Juristentag,¹⁶ but did eventually not lead to respective legislative action. Recently, the president of the Viennese bar association publicly and firmly called for legislative action.¹⁷

17. Incompatibilities with the Recommendation's principles

Despite the absence of a statutory collective redress procedure, the current Austrian framework, including traditional means of multi-party proceedings and the 'Austrian model of group litigation', is in large measure in line with the Recommendation's principles. Austrian law does not, for instance, provide for any punitive damages (Recommendations para 31), jury awards or pre-trial discovery procedures (Recommendations recital 15). Further, the current Austrian framework is consistently based on the opt-in model (Recommendations paras 21 et seq). Austrian courts are also able to dismiss manifestly unfounded cases (Recommendations para 13) and may even impose financial sanctions on the claimant in such cases (§ 408 Austrian Code of Civil Procedure). There are several ADR-mechanisms (Recommendations para 26) in place that, within certain limits, are also able to handle collective claims. In addition, as to the costs, Austria has a 'loser pays' rule (Recommendations para 13); *pacta de quota litis* (Recommendations para 30: contingency fees) are not permissible under Austrian civil law (§ 879 para 2 number 2 Austrian Civil Code).

Some of the recommendations are quite difficult to assess due to their general character, e.g. whether the collective redress procedures are "fair, equitable, timely and not prohibitively expensive" (Recommendations para 2). In general, this is certainly the case with regard to the Austrian framework. However, due to a lack of specification of the relevant evaluation criteria, precise assessments are difficult.

There are also certain parts of the Austrian framework that are not in line with the Recommendation's principles, the most important being the standing to bring a representative action (Recommendation paras 4 et seq) and

¹⁵ Kodek 2015 137 et seq.

¹⁶ Oberhammer 2015 73 et seq.

¹⁷ Newspaper "Die Presse", 25.4.2017.

the control of litigation funding by the court where the financed proceeding is pending (Recommendation paras 14 et seq).

Currently, there are no special restrictions on standing. Therefore, any association is generally entitled to pursue claims that have been assigned to it (and claimants are free to assign their claims to whatever association they deem appropriate). The Recommendation's restrictions (non-profit making character, direct relationship between the main objectives of the entity and the rights granted under Union law, sufficient capacities) are, therefore, currently not met. Further, as any association is entitled to pursue claims, there is also no procedure to ensure that entities lose their status (Recommendation para 5) once the requirements are not any longer met. This, however, hardly leads to any negative consequences in practice, as most of the associations that organize representative actions nevertheless fulfil the requirements of the Recommendation, even if they are not statutorily required to do so.

Further, there is currently also no judicial control of litigation funding, as provided by the Recommendation (paras 14 et seq). Quite to the contrary, the Austrian Supreme court has ruled in 6 Ob 224/12b that the defendant does not have standing to dispute a contingency fee arrangement between a claimant and a litigation finance company. Claimants are, therefore, neither required to declare to the court the origins of their funds (para 14), nor is there a specific rule that would allow the court to stay the proceedings (para 15) in case the criteria stated in the Recommendations are not met.

Given the fact that there is currently no formalized collective redress procedure, there is also neither an official channel for the distribution of information on collective redress actions nor a national registry of respective actions (Recommendation paras 10 et seq, 35 et seq). In practice, associations assisting claimants under the 'Austrian model of class action', however, regularly publish information on currently pending mass litigations (e.g. on their homepage, via newspapers, etc), which usually ensures that potential claimants are informed about pending actions. There are currently also no special rules on the question whether representative entities from other Member States are permitted to seize Austrian courts (Recommendation para 18). This question is governed by general principles of Austrian civil procedure which determine whether an association has standing before Austrian courts.

With regard to the recommendation that an individual member of the claimant party should be free to leave the claimant party any time before the final judgement is given or the case is otherwise validly settled, being subject to the same conditions that apply to withdrawal in individual actions (para 22), it has to be noted that the 'Austrian model of group litigation' involves a generally binding assignment of claims to an association. According to general rules, this assignment of claims cannot be unilaterally revoked by the assigning party, unless otherwise stipulated in the respective agreement.

18. Problems relating to access of justice/fairness of proceedings

In general, the Austrian framework ensures satisfactory outcomes regarding access to justice and the fairness of proceedings. Problems arise in particular with regard to disputes with rather low amounts in dispute (e.g. mass and dispersed damages). Here, there are usually not sufficient incentives to bring respective suits before the courts. Individual claimants refrain from actions due to the (comparably) high costs and the risk of a potential loss. The 'Austrian model of group litigation' is usually also not available in these cases, as no litigation funding will be available. Further, it is not guaranteed that individual claimants find an association that is willing to organize and perform respective mass litigation. Here, respective legislative measures would be necessary in order to ensure consistent access to justice.

The current Austrian framework generally prevents abusive litigation. Due to the presence of a 'loser pay' rule, claimants refrain from bringing suits without any legal cause. With regard to the 'Austrian model of group litigation', the prospects of success of a respective litigation are being examined by both the association organizing the suit as well as the litigation financier (and their respective attorneys). Therefore, it is rather unrealistic that abusive litigation will be brought before the courts. In case of a manifestly unfounded action, Austrian courts are able to dismiss respective cases and impose financial sanctions on the claimant.

III. Sectoral Collective Redress Mechanisms

1. Labour Law

Austrian civil procedure provides for a specific collective procedure in certain labour law cases. Here, certain associations may bring actions for a declaratory judgment if the case concerns a question of labour law and is relevant for three or more employees.¹⁸

2. Partial debentures

The only area of the law where there is a truly collective redress mechanism concerns claims arising from certain bonds (Teilschuldverschreibungen – partial debentures). For respective claims, a statute of 1874 (the Kuratorenengesetz) provides for the appointment of a curator who shall then represent the bond holders in court and, possibly, in insolvency proceedings. While this statute is of considerable interest from a scholarly point of view, and, in part, also served as a model for the reform bill proposed in 2007 (as discussed previously), it seems that it is only used extremely rarely in practice. This is not due to the fact that the procedure provided for by the statute was inadequate, but rather that all claims brought for unsuitable investment advice and related claims in the past involved other types of bonds or securities to which the statute does not apply. Therefore, this statute does not need to be discussed in further detail.

3. Appointment of a curator

In addition, several other statutes authorize the courts to appoint a curator in mass proceedings. In most cases, this is for purposes of service only (but see the exception regarding claims arising from certain bonds – Teilschuldverschreibungen – mentioned above).¹⁹

4. Special provisions for landlord-tenant cases

Special provisions exist for landlord-tenant cases involving more than six parties.²⁰ Here, service can be fulfilled by posting of the documents in the respective house or by sending the documents to a curator appointed by the court. These rules are only designed to simplify the service of documents; they do not restrict the parties' right to appear per se or by an attorney.

5. Injunctive relief sought by associations

According to § 29 Konsumentenschutzgesetz (Consumer Protection Act), certain associations are entitled to seek injunctive relief. This provision implements the Injunctions Directive 98/27/EC.

6. Administrative proceedings

There are also special provisions for mass proceedings in administrative law. Again, these provisions authorize service by publication. In certain proceedings regarding permits for businesses, the administrative authority is authorized to appoint a curator if twenty or more parties have raised objections which are substantially similar.²¹

¹⁸ § 54 Labour and Social Courts Act (Arbeits- und Sozialgerichtsgesetz).

¹⁹ Law of April 24, 1874, Reichsgesetzblatt 1874/49. There are similar provisions in §§ 225 et seq of the Stock Corporation Act (Aktiengesetz) for mergers and other forms of corporate reorganization.

²⁰ § 37 paragraph 3 Tenancy Law Act (Mietrechtsgesetz).

²¹ § 365c Gewerbeordnung (Business Act).

IV. Information on Collective Redress

Due to the lack of a formalized collective redress mechanism in Austria, there is currently neither an official channel for the distribution of information on collective redress actions nor a national registry of respective actions. However, associations assisting claimants under the 'Austrian model of class action' regularly publish information on currently pending mass litigations (e.g. on their homepage, via newspapers, etc),

V. Case Summaries

<u>Case name</u> n.a.	<u>Keywords</u> Jurisdiction, consumer, data protection
<u>Reference</u> OGH 20.7.2016, 6 Ob 23/16z	<u>Summary of claims</u> The decision was rendered in a case in which the claimant purportedly has assembled some 5,000 other 'victims' (both from Austrian, other EU member states and non-member states) claiming that their rights under data protection law have been violated.
<u>Subject areas</u> Procedural law, Data protection law	<u>Findings</u> The Austrian Supreme Court initiated a preliminary ruling procedure before the European Court of Justice, concerning the question whether a claimant to whom other consumers assigned their claims can invoke the jurisdiction under Article 15 Brussels I Regulation 2001 (which is available only to consumers) if he – in connection with the enforcement of his alleged claims against Facebook – publishes books, gives paid lectures, operates webpages, raises donations and organizes an action under the 'Austrian model of class action'. Further, the Austrian Supreme Court wanted to know whether a consumer can, simultaneously with his own claims, claim jurisdiction under Article 16 Brussels I Regulation (2001) for claims of other consumers from (1) the same Member State, (2) other Member States or (3) a non-Member State, that have previously been assigned to him. Outcomes: see above Settlement: no
<u>Dispute resolution method</u> Austrian model of group action	
<u>Court or tribunal</u> Austrian Supreme Court	
<u>Cross-border character/implications, if any</u> Consumers from EU member states and non-member states involved	
<u>Opt-in</u>	<u>Remedy:</u> injunctive and damages
<u>Type of funding</u> third party funding	<u>Amount of damages awarded:</u> n.a. (see above) <u>Distribution of damages:</u> n.a. (see above)
<u>Costs</u> loser pays principle	
<u>Abusive litigation</u> no	

<u>Case name</u> n.a.	<u>Keywords</u> Litigation finance, pactum de quota litis, contingency fee
<u>Reference</u> OGH 27.2.2013, 6 Ob 224/12b	<u>Summary of claims</u> The decision was rendered in an Austrian model of group action concerning damages for poor investment advice. The decision, however, only concerned the question whether a defendant has standing to dispute a contingency fee arrangement between a claimant and a litigation finance company.
<u>Subject areas</u> Procedural law Civil law	<u>Findings</u> The Austrian Supreme Court held that a defendant did not have standing to dispute a contingency fee arrangement between a claimant and a litigation finance company. Rather, the prohibition of the pactum de quota litis in § 879 Abs 2 Z 2 Austrian Civil Code was only intended to protect the client, not his adversary.
<u>Dispute resolution method</u> Austrian model of group action	
<u>Court or tribunal</u>	

Austrian Supreme Court	<u>Outcomes</u> See above
<u>Cross-border character/ implications, if any</u>	<u>Remedy:</u> damages <u>Amount of damages awarded:</u> n.a. (see above) <u>Distribution of damages:</u> (see above)
Involvement of German litigation financier	
<u>Opt-in</u>	
<u>Type of funding</u>	
third party funding	
<u>Costs</u>	
loser pays principle	
<u>Abusive litigation</u>	
no	

<u>Case name</u> n.a.	<u>Keywords</u> Joinder, certification, Austrian group action
<u>Reference</u> OGH 12.7.2005, 4 Ob 116/05w	<u>Summary of claims</u> The case concerned a group action on behalf of 684 consumers claiming that the bank had charged excessively high interest rates.
<u>Subject area</u> Procedural law	<u>Findings</u> Despite objections made by the defendant, the trial and appellate courts allowed all claims in one action. The Supreme Court affirmed, holding that no appeal lies against decisions of this kind. Furthermore, raising several claims in one action was permissible provided the claims were based on substantially the same cause of action and concerned substantially similar questions of law and fact.
<u>Dispute resolution method</u> Austrian model of group action	<u>Outcomes</u> The ruling of the Austrian Supreme Court held that the claim was procedurally permissible. No decision was rendered on the merits of the case. Therefore, no damages were awarded in this proceeding.
<u>Court or tribunal</u> Austrian Supreme Court	<u>Remedy:</u> damages <u>Amount of damages awarded:</u> n.a. (see above) <u>Distribution of damages:</u> n.a. (see above)
<u>Cross-border character/ implications, if any</u> no	
<u>Opt-in</u>	
<u>Type of funding</u> n.a.	
<u>Costs</u> loser pays principle	
<u>Abusive litigation</u>	

no	
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