

Interim and precautionary measures - Austria



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1 What are the different types of measures?

Interim and preventive measures are examples of precautionary measures. Austrian law provides for the following precautionary measures:

- measures to preserve evidence;
- measures to achieve the forced sale of collateral;
- interim injunctions.

The common feature of all these precautionary measures is that the parties do not have to prove their claims; they simply have to provide *prima facie* evidence of them (i.e. credibly demonstrate them).

Interim injunctions are the most important of these measures, which is why the notes below are limited to these.

Interim injunctions are court rulings in the form of an order which secures future enforcement, regulates current circumstances for a certain period of time or achieves provisional satisfaction of a claim.

Interim injunctions are sub-divided into injunctions to:

- secure a claim to payment of money;
- secure a claim to performance of an action;
- protect a right or legal relationship.

2 What are the conditions under which such measures may be issued?

2.1 The procedure

Interim injunctions are only granted on application. The parties are the applicant and the respondent. The following courts have jurisdiction to grant injunctions

- during proceedings already pending: the trial court at the same instance;
- during enforcement proceedings: the enforcement court;
- before the main action in contentious proceedings or between the trial and enforcement proceedings: the District Court (*Bezirksgericht*) in the district where the respondent's general place of jurisdiction is located;
- alternatively, the place of jurisdiction of the subject of the injunction or of the permanent or temporary place of residence of the third party debtor, or the District Court which holds the first enforcement hearing.

As the procedure complies with the provisions of enforcement law, legal representation is not compulsory at first instance.

Actual acts of enforcement (such as impounding by the court) are carried out *ex officio* (by the enforcement officer). As a rule, the costs of an interim injunction, which depend on the value of the claim to be secured, are initially borne by the applicant. An applicant may only claim reimbursement of costs if they are successful in the main proceedings for which the application is made done in the main proceedings. However, if a respondent is successful at the stage of the ruling on the interim injunction, they will already be entitled to reimbursement of costs.

2.2 The main conditions

In order to obtain an interim injunction, the injured party must file an application asserting and providing *prima facie* evidence of a monetary claim, a non-monetary claim to some other performance or a disputed right or legal relationship and also that there is a risk.

In order to obtain an injunction to secure a monetary claim, the applicant must provide *prima facie* evidence of a subjective risk; i.e. *prima facie* evidence that, without an injunction, the respondent will take measures to frustrate or complicate collection of the monetary claim.

For all other types of injunction, only *prima facie* evidence of an objective risk is needed, i.e. that, without an injunction, pursuit and collection of the claim through the courts would be impeded or considerably complicated, especially as a result of a change in the current situation.

For injunctions to secure monetary claims and other forms of injunctions, proof that the claim would have to be enforced in countries which do not come under the EU Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the EC Regulation'), and have not ratified the Brussels or Lugano Conventions is sufficient as *prima facie* evidence of risk.

3 Object and nature of such measures?

3.1 What types of assets can be subject to such measures?

All the means available for securing a monetary claim are listed in the Enforcement Code (*Exekutionsordnung*). They are:

- measures to impound and administer movable assets;
- an order prohibiting the disposal or pledging of movable physical assets;
- a third-party prohibition order;
- measures to administer the respondent's property;
- an order prohibiting the disposal or encumbering of property or rights registered in the Land Register.

3.2 What are the effects of such measures?

The effects of these measures vary depending on the security provided. Impounding and administering movable physical assets removes those assets from the direct personal influence of the respondent. In principle, even legal disposal of assets impounded and administered is null and void. The law grants the courts broad latitude to give 'necessary or useful' directions whilst the goods are being retained and administered in order to prevent changes that would reduce their value or the proceeds from them. Such directions may, for example, include the sale of impounded perishable goods.

All disposals which infringe a prohibition on the disposal or pledging of moveable, tangible assets are null and void.

Third-party prohibition orders granted by the court prohibit the respondent from disposing of or collecting any claims against third parties. At the same time, third parties are ordered not to pay any debts owed to the respondent and not to deliver any items due to him or do anything else which might frustrate or considerably complicate enforcement in respect of the claim or the items owed or to be delivered until further notice from the court. In other words, third-party debtors may only be prohibited from fulfilling an obligation or from impairing fulfilment; they cannot be prohibited from making payment to the applicant or from exercising any right. Third parties who fail to comply with the order are liable for damages. Whether disposals in breach of an injunction are null and void is not expressly regulated by law and legal opinion in Austria is divided on the subject.

An administrator, who will be supervised by the court, is appointed to administer the respondent's real property.

An entry is made in the Land Register to the effect that the debtor is prohibited from disposing of or encumbering his properties or rights registered in the Land Register. Once that entry has been made, voluntary disposal of property or rights by the respondent and corresponding entries in the Land Register are possible, but only of limited effect in respect of the applicant. Only if the applicant's claim is dismissed by the court in a final judgment or the injunction is otherwise cancelled does the third party come into full possession of his/her rights, including with regard to the applicant, and can have the prohibition removed.

3.3 What is the validity of such measures?

An interim injunction is only valid for a specified period of time, although it may be extended at the applicant's request. If an injunction is ordered separately from the substantive proceedings, the court must set a reasonable time limit for substantiating the secured claim and filing a claim or application for enforcement. The respondent can stay enforcement of the injunction and cancel injunctions already enforced by lodging a redemption sum.

Injunctions must be cancelled on request or *ex officio* if:

- the deadline for substantiating the claim has expired and no substantiation has been provided;
- the interim injunction was enforced more widely than was necessary in order to protect the applicant;
- the conditions for an injunction are no longer fulfilled;
- the respondent has paid a redemption sum or provided security;
- the grounds for the injunction no longer apply.

4 Is there a possibility of appeal against the measure?

There are two types of appeal under the injunction procedure, neither of which delays the proceedings:

- an objection to the interim injunction itself: if a respondent has not previously been heard, they may lodge an objection within 14 days. New evidence may be provided in order to ensure a fair hearing. The Court of First Instance rules on such objections by order and the hearing of the appeal is not open to the public;
- an appeal known as a '*Rekurs*' is also available against an order granted in interim injunction proceedings. The time limit for this appeal is 14 days. This appeal procedure is a written procedure in which no new evidence may be provided. An appeal on a point of law may also be lodged against a confirmed order granting an interim injunction, but not if the application for an injunction was dismissed.

Special rules:

The law makes provision for the following:

- temporary accommodation for a (divorced) spouse;
- temporary regulation, use or safeguarding of matrimonial assets and matrimonial savings;
- temporary accommodation for a child;
- injunctions to prevent domestic violence;
- injunctions to prevent violence in general;
- temporary rent;
- injunctions to prevent invasion of privacy;
- measures to satisfy one spouse's urgent need for accommodation.

Of these special rules, interim injunctions preventing violence are especially important. Austria has a very efficient but simple system of protection against violence which allows a violent resident to be expelled from the home and forbidden to return. A person whose violent behaviour makes it unreasonable to expect the other person to meet them may also be forbidden from frequenting certain places or making contact. Most importantly, this system provides for close cooperation for the prevention of domestic violence between the police, the courts, the local domestic violence centre and, where minors are involved, youth welfare agencies.

The forces of law and order have the power under policing laws to issue a two- week expulsion or restraining order on persons who have endangered another person's life, health or liberty. If an application for an injunction is filed with the court, the order is extended to a maximum of four weeks. The police must also inform the local domestic violence centre, so that they can provide the victims with support.

The court must also, at the victim's request, order a person who has made cohabitation with another person impossible as a result of physical attack, threat of physical attack or mental cruelty:

- to leave the home and the immediate vicinity, and
- not to return to the home or the immediate vicinity while the home is being used to meet the applicant's urgent need for accommodation.

The court may also prohibit the person expelled from frequenting specified locations (such as the street outside the home or the child's school) and order them to refrain from meeting or contacting the applicant, provided that this does not conflict with the respondent's own serious interests.

Interim injunctions granted in connection with main proceedings, such as divorce proceedings, annulment proceedings, division of property proceedings or proceedings to clarify rights of use of the home, apply pending final judgment in the main proceedings. Injunctions may be granted irrespective of whether or not the parties are still living together and independently of the main proceedings. However, if no main proceedings are pending, an injunction may not be granted for longer than six months.

If the conditions for doing so are met, an interim injunction must be enforced immediately either *ex officio* or on request. The enforcing authority (enforcement officer) must order the respondent from the home and remove all keys to the home from him and lodge them with the court. When a domestic violence injunction is enforced, the court may instruct the forces of law and order to call on the law and order enforcement officers at their disposal. This is a frequent occurrence in practice, meaning that violence injunctions are generally enforced by the police rather than by an enforcement officer (bailiff).

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Last update: 16/10/2019