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alemão

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How to enforce a court decision

Áustria

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----inglês

1 What does enforcement mean in civil and commercial matters?

Enforcement (also termed 'execution' or 'compulsory enforcement' in Austria) means the use of the power of the state to assert enforceable claims and demands.

The Enforcement Code provides for various types of enforcement:

enforcement to recover monetary claims

enforcement to ensure that actions are taken or refrained from

Enforcement to recover monetary claims

In the case of enforcement to recover monetary claims, the creditor's enforcement request must select the assets to be seized (selection of the means of enforcement); here they can choose, inter alia, between enforcement on movable goods, enforcement on receivables, in particular enforcement on salary, and forced sale of real estate by auction. Means of enforcement can also be combined.

If the creditor applies for enforcement to recover a monetary claim without specifying a means of enforcement, the application shall include enforcement on movable goods and salary and the recording of a list of assets (simple enforcement package). The creditor may also apply for the extended enforcement package, which covers all the means of enforcement available for enforcement on movable property to recover a monetary claim (enforcement on movable property, claims and property rights).

Enforcement to ensure that actions are taken or refrained from

In the case of enforcement to ensure that actions are taken or refrained from, the creditor must request the means of enforcement provided for in the Enforcement Code for enforcement of the claim.

Enforcement for the purposes of injunctive relief is subject to the imposition of a fine at the request of the enforcement court when enforcement is granted. In the event of any further infringement, the enforcement court should, on request, impose a further fine or a custodial sentence for a total period of up to 1 year. To enforce an action which can be carried out by a third party, the petitioning creditor is authorised, at the request of the court, to have the action carried out at the expense of the obligated party.

The claim for an action, which cannot be carried out by a third party and whose execution is at the same time exclusively dependent on the will of the obligated party, is enforced through the imposition – at the request of the court – of a fine or a custodial sentence for a total period of up to 6 months on the obligated party to execute action.

2 Which authority or authorities are competent for enforcement?

The authorisation of enforcement lies in principle with the appropriate district court (*Bezirksgericht*).

Court with territorial jurisdiction

The court with general jurisdiction according to the debtor's place of residence is, in principle, competent for enforcement to recover a monetary claim on movable property.

For the enforcement on real estate (registered in the land registry), the land registry court (*Grundbuchsgerecht*) has jurisdiction.

Upon authorisation of enforcement, the proceedings should be *ex officio*. The enforcement process is conducted either by the judge (forced sale of real estate) or by the court official (enforcement on movable goods or enforcement on receivables). The court official is a specially trained member of the judicial staff.

The completion steps are set by the bailiffs, who are judicial staff in Austria working neither as self-employed individuals nor as representatives or vicarious agents of the petitioning creditor. They largely act alone until the success or failure of the enforcement proceedings is definite.

In the case of enforcement of claims or property rights not specified in the application for enforcement, or where the extended enforcement package has been requested, the enforcement procedure must be carried out by the enforcement administrator.

The creditor is then invited to submit applications only if without them the court or bailiff is not able to continue the procedure or if the official procedure entails costs. The creditor may, however, provide additional information in the application: they may refrain, for example, from requiring the employer to provide an explanation, in the case of enforcement on salary, of whether the remuneration exists and how much it amounts to; or, in the case of enforcement on movable goods, from requiring forced entry into a dwelling, entailing locksmith's fees, if the debtor cannot be located.

3 What are the conditions under which an enforceable title or decision may be issued?

3.1 The procedure

Enforcement to recover monetary claims

The enforcement process is divided into an authorisation and an enforcement process.

The authorisation of enforcement requires an application by the creditor, in which they select the means of execution desired for enforcement. If the creditor wishes to recover the claim from an entrepreneur, they usually choose enforcement on movable goods and submission of a list of assets. Under this procedure, the bailiff tries to recover the payment of the claim; if this does not succeed, they pledge the objects found. If these do not cover the claim to be recovered, the bailiff will require the debtor to submit a list of assets detailing their assets in full.

If the creditor wants to recover the claim from a consumer, they usually choose enforcement on movable goods, enforcement on salary and submission of a list of assets. The creditor can choose enforcement on salary regardless of whether they know where the debtor is employed or from whom they receive a salary. If they do not know this, they need to know the date of birth of the obligated party; the court can then identify the payment office through the Main Association of Austrian Social Insurance Institutions. The first step is the seizure and transfer of the salary of the debtor. If this is successful, the enforcement on movable goods will be carried out only at the request of the creditor or if it is clear that the claim to be recovered cannot be repaid within 1 year. Under this procedure, the bailiff tries to obtain payment of the claim; if this is not successful, they seize objects found. If these do not cover the claim to be recovered, the bailiff will require the debtor to submit a list of assets detailing their assets in full.

For the enforcement request, the creditor must use a form (E-Form 1) or make a formatted request. No representation by a lawyer is required in order to make an application for enforcement.

3.2 The main conditions

In order to be able to carry out enforcement, the petitioning creditor must have an enforceable decision on an enforcement order. Furthermore, a declaration of enforceability is required, which is issued by the enforcement order authority in the court proceedings. The creditor must also know the address of the debtor; the former need give the date of birth only if they want to apply for salary enforcement but do not know the payment office.

4 Object and nature of enforcement measures

4.1 What types of assets can be subject to enforcement?

The debtor is liable for obligations through all their assets, insofar as these are not exempt from seizure. But an enforcement procedure covers only those assets which the creditor wishes to seize and which they specify in the enforcement application. However, it is also possible for the creditor only to indicate the means of enforcement in the application for enforcement, and not to mention any objects of enforcement (e.g. enforcement on all claims or on all property rights of the obligated party). In this case, the enforcement administrator identifies the assets that can be seized for enforcement purposes.

The creditor may also use the following enforcement instruments, for example: receivables other than salary claims, a share in a limited company of the debtor; or, if the debtor owns real estate, the petitioning creditor can claim forced creation of a lien, forced administration and forced sale by auction.

The assets of the debtor that are exempt from enforcement are listed in the subsection 'Restrictions on enforcement'.

4.2 What are the effects of enforcement measures?

The effects of enforcement measures depend on the enforcement instrument:

Enforcement on movable goods

A lien is created in respect of the attachable property; this is mostly auctioned off.

Enforcement on receivables, in particular enforcement on salary

A right of lien is established on the claim. The debtor is forbidden to dispose of their claim or, in particular, to collect it. The claim, insofar as it is seizable, is surrendered to the creditor. If an administrator is appointed in enforcement cases, they are responsible for the seizure and enforcement of the claim.

Forced sale of real estate by auction

A right of lien is established on the property. From the moment that the commencement of the auction proceedings is recorded in the land register, legal actions by the debtor concerning the property and its accessories, which do not belong to the ordinary administration, are ineffective against the creditors and the bidder. If the debtor sells the property, the authorised auction continues against the purchaser of the property.

Penal consequences will ensue if an obligated party conceals, disposes of, sells or damages a part of their assets, or creates a pretext of or recognises a non-existent liability, or otherwise reduces or seems to reduce their assets and, as a result, impedes or diminishes the creditor's satisfaction through enforcement or a pending enforcement procedure. Likewise, an obligated party is punishable if they destroy, damage, deface, render unusable or withdraw, in whole or in part, from involvement with an object which was officially seized or taken possession of.

4.3 What is the validity of such measures?

Enforcement continues until such time as it has been successfully concluded or terminated, for instance because the debtor has paid their debt to the creditor during the enforcement proceedings.

The Enforcement Code also allows for the enforcement process to be deferred. This can happen, in particular, if an action is brought against the invalidity or ineffectiveness of the enforcement title, if the termination of enforcement is requested, if an opposition suit is brought before the court (see under 4), if a court decision authorising enforcement is contested, if a complaint is lodged against the act of enforcement, or if a waiver or amendment of the legally enforceable declaration of enforcement is sought.

5 Is there a possibility of appeal against the decision granting such a measure?

The right of appeal is granted against the enforcement authorisation (referred to in Austria as the execution authorisation). The appeal should be addressed to the appeal court (higher regional court) but is lodged with the court of first instance (district court). The appeal should be lodged within 14 days.

Representation by a lawyer is generally required. The appeal process is a purely written procedure in which the interdiction of novation applies.

The fact that the debtor has, in the meantime, paid the claim to be recovered can be invoked with an opposition motion or an action to oppose enforcement (and not with an appeal against the authorisation of enforcement). The complaint must be lodged with the court which granted enforcement. An application for deferment of enforcement may be combined with the complaint. If the claim is legally enforced, enforcement should be terminated *ex officio*.

If enforcement was granted under the simplified authorisation procedure, this took place solely on the basis of the data provided by the petitioning party. In this case, the debtor can show – through an appeal – that an enforcement title covering the enforcement, including confirmation of enforceability, is missing, or that the enforcement title does not correspond to the information contained in the application for enforcement. The appeal should be lodged with the court that approved enforcement in the first instance. When the appeal is lodged, the court examines whether an enforcement title covering the claim to be recovered is available. The time limit for objections is 14 days.

6 Are there any limitations on enforcement, in particular related to debtor protection or time limits?

Restrictions on enforcement

In general, the applicable restriction is that enforcement cannot be carried out to a greater extent than is necessary for the realisation of the claim stated in the enforcement authorisation.

The law provides for certain enforcement restrictions in favour of specific persons or associations of persons:

the property of an establishment in the service of public transport which is under state control may be subject to enforcement measures liable to disrupt public transport services only with the consent of its supervisory authority;

prior to the execution of enforcement against a person serving in the Federal Army or the Federal Police, a notification of the enforcement authorisation must be given to the senior officer in command of that person;

in military buildings, the execution of enforcement requires prior notice to be given to the commander of the building and consultation of their military attaché; enforcement proceedings against persons enjoying immunity in Austria on the basis of international law, as well as on enforcement objects and premises of these persons, may be carried out only by the Federal Ministry of Justice in agreement with the Federal Ministry of European and International Affairs;

enforcement against a municipality or a public or charitable institution may be authorised for the purpose of recovering financial claims only in respect of those assets which can be used to satisfy the creditor without affecting the public interests which the municipality or institution is to protect. If enforcement serves the execution of a contractual lien, this restriction does not apply.

Furthermore, for the protection of the debtor, certain assets are compulsorily exempted, for example:

Enforcement on movable goods

items corresponding to a modest lifestyle for personal or household use;

items necessary to train for a profession and for professional practice, as well as learning aids intended for school;

sufficient food and heating materials to cover the needs of the debtor and the family members living with them in the common household for 4 weeks; pets;

family pictures, letters and other papers as well as the wedding ring of the debtor;

aids to compensate for a disability and care support for the debtor or the family members living with the debtor in the common household, as well as therapeutic substances and assistive devices which are required in the context of medical therapy;

religious objects;

cash up to the amount exempted from seizure until the next payment term of the salary following seizure, if the income of the debtor legally cannot be seized or is seizable only to a limited extent.

The bailiff and the enforcement administrator may also refrain from the seizure of items of low value if it is obvious that the proceeds from the continuation or execution of enforcement will not exceed the costs of enforcement.

Enforcement on monetary claims (enforcement on salary):

Reimbursement of expenses insofar as they cover the extra costs incurred in the exercise of professional activity;

statutory aid which is granted to cover the extra costs associated with a disability or long-term care, e.g. care allowance;

statutory aid for the payment of rent or to cover other housing expenses;

family allowances;

certain statutory benefits granted on the occasion of the birth of a child, in particular the lump-sum childcare allowance;

certain types of aid that are granted by the Public Employment Service;

reimbursement of costs from statutory social security.

The following in particular are exempt from seizure:

benefits in kind provided under social security laws;

a claim to the distribution of matrimonial property and matrimonial savings, insofar as it has not been recognised or judged by an agreement or settlement.

Earned income, pension benefits and statutory remuneration which serve to compensate for temporary unemployment or a reduction in earning capacity can be seized on a limited basis. The unseizable part ('minimum subsistence level') depends on the amount of income and the number of the debtor's maintenance obligations. The unseizable amounts, which are increased annually, are shown in the tables on the website of the Federal Ministry of Justice (third-party debtor statement – Federal Ministry of Justice). The law takes into account the special needs of the debtor or their creditor in individual cases, by allowing – on request – the unseizable allowance to be increased or reduced under certain circumstances. In the case of enforcement on account of a statutory maintenance claim, the amount of the unseizable allowance is reduced generally by 25%.

In addition, the Tenancy Act (*Mietrechtsgesetz*, MRG), in the case of an enforcement title on eviction from an apartment subject to the MRG, provides for the protection of the debtor in that eviction must be postponed if the tenant faces homelessness as a result.

Deadlines for enforcement

Deadlines by which applications for enforcement must be made are not provided, save in exceptional cases (eviction order pursuant to Section 575 of the Austrian Code of Civil Procedure (*Zivilprozessordnung*, ZPO). However, the debtor can counter the enforcement with the objection of a statute of limitations which has already entered into force. The statutory period of limitation for claims for which there is a legally binding title of enforcement ('claims awarded by enforceable judgment', *Judikatsschulden*), is generally 30 years from the date of entry into force of the enforcement title. If the enforcement title is based on the rights of legal entities governed by public or private law, this limitation period is extended to 40 years. However, an exception exists with respect to services payable only in the future, provided that the general limitation provisions stipulate a shorter period of limitation for such services.

The statute of limitations is interrupted by any legally binding enforcement authorisation and begins anew with the last enforcement step or the termination of enforcement.

In certain cases, temporary barriers are provided for a further enforcement application or the continuation of the enforcement procedure:

in the event of no seizable objects being found in an enforcement on movable goods, an application by another petitioning creditor for the authorisation of an enforcement on movable goods or of the new execution is to be granted, but only 6 months after the last unsuccessful execution attempt, unless a previous attempt at execution is likely to yield results;

the petitioning creditor may lodge a claim for enforcement on salary against an unknown third-party debtor after the approval of an enforcement on movable goods only if 1 year has elapsed since the authorisation; this blocking period does not apply if the petitioning creditor proves that only after their application for the authorisation of an enforcement on movable goods did they learn that the debtor is entitled to seizable salary claims. The debtor is obliged to submit a more recent list of assets only if the creditor proves that the debtor has acquired assets or if more than 1 year has passed since submission of the list of assets.

The Enforcement Code also lays down deadlines intended to ensure rapid settlement. The bailiff thus has to schedule the first enforcement action within 4 to 6 weeks and report back to the creditor on the implementation or the obstacles within 4 months at the latest. The lien for forced collection, which is granted to the creditor on the basis of an enforcement on movable goods of the debtor, expires after 2 years if the sales procedure has not been duly continued.

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