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Page: 1/15

**Council for Trade-Related Aspects of
Intellectual Property Rights**

Original: English

CHECKLIST OF ISSUES ON ENFORCEMENT¹

RESPONSES FROM AUSTRIA

Introduction

Update of Austria's list of responses regarding enforcement issues as of 11-2022.

Civil and Administrative Procedures and Remedies

(a) Civil judicial procedures and remedies

1. Specify the courts which have jurisdiction over IPR infringement cases.

a. Industrial property

At the first instance and irrespective of the amount in dispute, the Commercial Court (*Handelsgericht*) of Vienna has compulsory and exclusive nation-wide jurisdiction over cases regarding infringement of industrial property rights, including interim injunctions in connection with such cases (§ 53 JN). In this context, 'industrial property' includes patents, utility models, supplementary protection certificates, designs, union designs, trademarks, union trademarks, topographies of semiconductor products, and plant variety rights. The competent court at the second instance is the Higher Regional Court (*Oberlandesgericht*) of Vienna. Appeals against its decisions can be brought before the Austrian Supreme Civil and Criminal Court (*Oberster Gerichtshof* – § 4 JN).

b. Copyright

At the first instance and irrespective of the amount in dispute, the various Commercial Courts have jurisdiction over copyright infringement cases (§ 51(2) No. 10 JN). As only Vienna has a separate and specialized Commercial Court, the various Regional Courts (*Landesgerichte*) have jurisdiction over the other provinces of Austria in their capacity as Commercial Courts (§ 51(3) JN). The competent court at the second instance is the Higher Regional Court having territorial jurisdiction. Appeals against its decisions can be brought before the Austrian Supreme Civil and Criminal Court (§ 4 JN).

2. Which persons have standing to assert IPRs? How may they be represented? Are there requirements for mandatory personal appearances before the court by the right holder?

a. Standing and representation

The persons and entities having standing to assert their intellectual property rights in court are generally the holders of these rights. Parties appearing before the Commercial Courts or the other courts mentioned above must be represented by an attorney-at-law (§ 27(1) ZPO). In such a case, the party nevertheless has the right to appear before the court with their attorney-at-law and to

¹ Document [IP/C/5](#)

make oral statements to the court (§ 26(2) ZPO). Patent attorneys may not represent their clients in civil or criminal IP infringement cases, but only in administrative proceedings and in appeals proceedings against administrative decisions (§ 16(1) PatAnwG). Foreign attorneys-at-law admitted to practice in EEA countries and having furnished evidence of an Austrian attorney-at-law they are in agreement with, may represent a client before Austrian courts in accordance with EIRAG.

b. Personal appearances before the court

The court may summon a party to appear for court hearings (§ 183(1) No. 1 ZPO). Parties can also be ordered to testify in order to provide evidence on questions of fact that are disputed and also significant for the court's decision on the case. Such an order may be issued *ex officio* or upon request by a party (§ 371 ZPO). If a party summoned to appear for questioning fails to appear and testify before the court and also fails to provide a sufficient excuse, the court may freely interpret this behaviour of the party as evidence (§ 381 ZPO), which will usually be in their disfavour. The court cannot, however, actually force a party to be present during a court hearing or to testify before the court (§ 380(3) ZPO).

3. What authority do the judicial authorities have to order, at the request of an opposing party, a party to a proceeding to produce evidence which lies within its control?

The court may order any party to submit documents or other objects in their possession for judicial inspection if a party has referred to them in the legal proceedings. Such an order may be issued *ex officio* or upon request by a party (§ 183(1) No. 2 ZPO).

If Party A claims that Party B has documents in their possession that are relevant for proving Party A's case, Party A can request the court to order Party B to submit those documents for judicial inspection (§ 303(1) ZPO). Party B may refuse the submission of a document if

it refers to family matters;

the submission would violate a duty of honour;

disclosure of the document would put shame on, or might entail the risk of criminal prosecution of, the party or third persons;

the disclosure would violate an officially recognized duty of secrecy, such as a trade secret (*Kunst- oder Geschäftsgeheimnis*);

there are other equally significant reasons to justify a refusal to submit (§ 305 ZPO).

Attorneys-at-law and patent attorneys are under a strict duty of secrecy regarding client information and enjoy attorney-client privilege (§ 9(2) and (3) RAO, and § 17(2) PatAnwG). On the other hand, Party B may not refuse the submission of a document if

1. Party B has referred to it for the purpose of giving evidence;
2. Party B is obliged to hand over or submit the document according to civil law;
3. it is a common document of both parties, e.g. a mutual contract concluded between them or a document written in the interest of all parties (§ 304 ZPO).

The above provisions on the submission of documents also apply to the submission of other physical objects, especially data carriers (§ 369 ZPO).

The court cannot, however, force parties to submit such evidence. Still, the court may freely take failure of a party to comply with a submission order into consideration when evaluating the evidence (§ 272(1) ZPO and § 307(2) ZPO), which will usually be in the non-complying party's disfavour. The same shall apply if the party has intentionally disposed of the document or rendered it unfit for use.

The rights and duties of Party B described above generally also apply to third parties, who can be forced to submit documents – but not physical evidence – within their control as evidence, if they are obliged to hand the document over to Party A or if the requested document is a common one to the Party A and the third party (§ 308 ZPO).

4. What means exist to identify and protect confidential information brought forward as evidence?

There is no general rule in Austrian civil procedure that provides for special marking or protection of confidential information, but only specific rules that apply to certain cases. As already mentioned above, a party may refuse the submission of documents and other objects on certain grounds, which includes duties of secrecy (§ 305 ZPO). Other provisions on the identification and protection of confidential information are:

a. The right to remain silent

Parties and witnesses may, *inter alia*, refuse to testify if

by answering a question, they would put shame on, or risk criminal prosecution of, themselves or on other persons close to them,

they would have to violate a duty of secrecy, which includes attorney-client privilege and trade secrets (*Kunst- oder Geschäftsgeheimnisse*).

Only witnesses may additionally refuse to testify if by answering a question, they would cause a direct adverse effect to their own wealth or the wealth of certain other persons close to them (§ 321 and § 380(1) ZPO).

With this being said, it is important to point out that there is no general rule that prevents a civil court from considering illegally obtained evidence in its decision. This means that if e.g. a witness violates a duty of secrecy by testifying, or a party submits documents containing trade secrets, the court is generally not required to disregard this evidence. On the other hand, the injured party often has a claim for damages against the person who has violated their duty of confidentiality.

b. Exclusion of the public from court hearings

The public is to be excluded from court hearings *ex officio* if a public hearing would endanger public morals or public order, or if there is reasonable concern that a public hearing would be abused to disturb the hearing, or to impede the presentation of facts. If facts concerning family life or trade secrets (*Geschäftsgeheimnisse*) are to be discussed and proven, the public can only be excluded only upon request of a party (§ 172 ZPO).

Apart from these reasons, the public can be excluded from court hearings regarding cases of criminal infringement of patents, utility models, or trademarks. The court can order the exclusion upon request if a company or trade secret (*Betriebs- oder Geschäftsgeheimnis*) of a party or a witness would otherwise be at risk (§ 161 and § 119(2) PatG, § 42(6) GMG, § 60b MSchG). In proceedings involving a claim on the grounds of the Federal Act against Unfair Competition, the public may be excluded upon request if a business or company secret could be endangered by the presence of the public (§ 26 UWG). Persons who publicly disclose confidential information gained from non-public court or administrative hearings risk criminal prosecution and a prison sentence up to six months (§ 301 StGB).

It is also worth noting that even if a hearing is public, it is illegal to make recordings or transmissions of it on photos, videos, or sound records, etc (§ 22 MedienG). Unlawful recordings are considered disruptions of the hearing, which means that the court can expel any person recording from the court room (§ 198(2) ZPO). The press and other spectators must cease recording as soon as the hearing is opened, and may only quietly observe and take notes.

c. Inspection of case records (*Akteneinsicht*)

The parties have the right to inspect a court's records on their case, with some exceptions regarding certain kinds of documents, also in the case of procedural records of other courts or intellectual property rights material submitted by witnesses. Third parties can only be granted inspection of case records provided that this is not contrary to certain legitimate interest of third parties or the public and if, additionally, either both parties consent to the inspection or the third party provides *prima facie* evidence of its legal interest (§ 219 ZPO).

Implementing the Directive (EU) 2016/943 on the Protection of Trade Secrets, § 26h UWG lays down rules intended to ensure the confidentiality of business secrets in civil court proceedings. Where applicable, the court has to take measures to protect the business secret even if this means to restrict the other party's right to inspect files and the right to be heard. The court shall also produce a confidential version of the written decision, which shall be used by everyone but the owner of the secret and the court.

5. Describe the remedies that may be ordered by the judicial authorities and criteria, legislative or jurisprudential, for their use:

- **injunctions;**
- **damages, including recovery of profits, and expenses, including attorney's fees;**
- **destruction or other disposal of infringing goods and materials/implements for their production;**
- **any other remedies.**

a. Industrial property

The following remedies against an infringer are available to the holder of an industrial property right, with patent law provisions also applying to utility models (§ 41 GMG) and designs (§ 34 MuSchG):

i. Injunction

An injunction forces a proven infringer to cease certain infringing conduct and desist from such conduct in the future (*Unterlassung*). The infringing conduct does not need to be culpable. The applicant needs to prove their legal interest and in particular that there is a risk of imminent infringement (*Erstbegehungsgefahr*) or of repeated infringement (*Wiederholungsgefahr* – § 147 PatG, § 51 MSchG). Such a risk will generally be presumed even if there has only been one incident of infringement.

ii. Monetary compensation

The injured party can choose from the following claims:

generally:

- o adequate compensation, or instead

only in case of culpable infringement:

- o damages, including lost profits, or instead
- o recovery of profits made by the infringer as a result of the infringement, or instead

only in case of reckless or intentional infringement:

- o double the amount of adequate compensation (as a lump sum).

In specific cases of culpable infringement, the injured party can additionally claim compensation for immaterial damage (§ 150 PatG, § 53 MSchG). The infringer is obliged to disclose their accounts concerning the infringement and to hire an expert to audit them (§ 151 PatG, § 55 MSchG).

Recoverability of attorney's fees is discussed under Question 8.

iii. Remedy of infringement

The injured party can demand that the infringer be ordered to remedy the illegal *status quo* at their own cost, in particular by destroying the infringing goods and by making the means of infringement unusable for the infringement (*Beseitigungsanspruch*). The injured party also has the option to instead demand

a method of remedy that destroys less (economic) value, or

that the infringing goods and the means of infringement be transferred to their possession in exchange for an adequate compensation that may not be higher than the cost of production (§ 148 PatG, § 52 MSchG).

iv. Publication of the court's decision

If there is legitimate interest, the prevailing party can demand permission to publish the court's decision. The exact wording of the publication is contained in the court's decision on the infringement case itself (§ 149 PatG, § 55 MSchG).

b. Copyright infringement

In essence, the provisions on

injunctions,

remedy of infringement, and

- publication of the court's decision

under copyright law are almost the same as those in the statutes on industrial property. The only major differences are on the issue of monetary compensation. The copyright infringer owes the injured party

- adequate compensation (irrespective of culpability), and

damages, including lost profits (only in case of culpable infringement),

or instead

double the amount of adequate compensation as a lump sum (only in case of culpable infringement).

In case of culpable infringement, the injured party can additionally claim compensation for non-monetary injury. In specific cases of culpable infringement, the injured party can additionally demand recovery of profits. The infringer is obliged to disclose their accounts concerning the infringement and to audit them, or to hire an expert for this purpose (§§ 86-87a UrhG).

6. In what circumstances, if any, do judicial authorities have the authority to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the goods or services found to be infringing and of their channels of distribution?

The injured party can demand disclosure concerning the origin and the marketing channel of the infringing goods and services, but only if this would not be unreasonable considering the gravity of the infringement and would not contravene statutory duties of confidentiality. Those who are under this disclosure requirement are the infringer and persons who, for commercial purposes, have

possessed infringing goods,
made use of infringing services, or
rendered services that were used for the infringement.

The disclosure requirement includes, as far as it is reasonable, information regarding

names and addresses of manufacturers, distributors, suppliers, and others who have had possession of the goods or services, as well as commercial buyers and points of sale,

the amounts of goods produced, delivered, received, or ordered; as well as the prices paid for the goods or services (§ 151a PatG, § 41 GMG, § 34 MuSchG, § 55a MSchG, § 87b UrhG).

7. Describe provisions relating to the indemnification of defendants wrongfully enjoined. To what extent are public authorities and/or officials liable in such a situation and what "remedial measures" are applicable to them?

The remedy available for indemnification of defendants wrongfully enjoined is a claim for damages against a public body. It can be brought for loss or damage caused by unlawful and culpable conduct of an officer of the relevant public body in the course of their duties (§ 1 *et seq.* AHG). In the case of wrongful injunction by the civil or criminal courts, the relevant public body will generally be the Republic of Austria. The public officer as a person cannot be directly held liable by a defendant wrongfully enjoined, but may face claims for damages from the public body if it has been made liable for the officer's conduct (§ 3 *et seq.* AHG).

8. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.

a. Duration of civil proceedings

There are various provisions in Austrian civil procedure aimed at discouraging parties from unreasonably prolonging court proceedings:

If a party has given cause to extend a due date or to prolong a court hearing, the court may *ex officio* or upon request impose the costs thus incurred on the party (§ 142 ZPO).

If the court finds that a party could have

- made certain statements of fact or
- presented evidence

earlier than it did (and that it has thus prolonged the proceedings), the court may *ex officio* or upon request impose on the party

- the court fees on that party, even if it prevails (§ 44 ZPO), or
- the costs thus incurred (§ 48 ZPO).

If the court finds that, after careful consideration of all circumstances, there can be no reasonable doubt that

- evidence offered would considerably prolong the proceedings, and
- the intention of the party offering the evidence was to protract (*verschleppen*) the proceedings,

the court may *ex officio* or upon request refuse the taking of the evidence offered (§ 275(2) ZPO). Where the acceptance of a piece of evidence meets with the obstacle of uncertain duration, the court must upon request fix a due date after the expiry of which the proceedings are continued irrespective of any evidence not yet presented.

Parties can only make new statements of fact or present new evidence until the end of the last oral hearing before the court of first instance (§ 179 ZPO).

Compared to many other countries, court proceedings in Austria are rather swift. In 2021, only 2.2 % of all civil proceedings took longer than three years. The average duration of civil dispute proceedings before the Regional Courts, which serve as trial courts for IP infringement cases, was 17.3 months. [These numbers](#), however, are not specific to such cases, which are often more complex and lengthier than the average civil litigation.

b. Costs of civil litigation

In Austria, court fees generally depend on the nature of the dispute and on the amount in dispute. This means the higher the amount of money that the plaintiff claims in their lawsuit, the higher the court fees they have to pay to initiate court proceedings. The court fees are generally calculated as one lump sum per instance, i.e. they do not depend on factors such as the duration of the proceedings or on the number of court hearings. The current rates of court fees in civil proceedings are the following:

Amount in dispute	Amount of court fees
up to € 150	€ 25
more than € 150 and up to € 300	€ 48
more than € 300 and up to € 700	€ 68
more than € 700 and up to € 2,000	€ 114
more than € 2,000 and up to € 3,500	€ 182
more than € 3,500 and up to € 7,000	€ 335
more than € 7,000 and up to € 35,000	€ 792
more than € 35,000 and up to € 70,000	€ 1,556
more than € 70,000 and up to € 140,000	€ 3,112
more than € 140,000 and up to € 210,000	€ 4,670
more than € 210,000 and up to € 280,000	€ 6,227
more than € 280,000 and up to € 350,000	€ 7,783
More than € 350,000	€ 4, 203 plus 1.2 % of the amount in dispute

(§ 32 TP 1 GGG)

Attorneys-at-law, patent attorneys, and their clients are generally free in their agreement on the price of legal representation. *Quota litis* agreements, however, are not permitted, which means that a promise by a client to cede a share of the award to their attorney is unenforceable (§ 879(2) No. 2 ABGB).

For the duration of the legal dispute, each party bears their own costs of litigation, which, for the plaintiff, includes the court fees.

The overall costs of litigation can be quite significant as they, *inter alia*, include attorney's fees, court fees, expert's remuneration, and witness' compensation. At the end of civil proceedings, the total costs of litigation incurred by both parties are allocated to them on a *pro rata* basis depending on the degree to which they each have prevailed (§ 40 *et seq.* ZPO). It is therefore theoretically possible

for a fully prevailing party to recover all the costs of litigation from the opposing party. The reimbursement of attorney's costs in court proceedings is calculated according to a tariff system based on the amount in dispute. The RATG regulates the maximum amount of the reimbursement of costs. Any costs incurred by the party vis-à-vis its own attorney (e.g. on the basis of a free agreement) exceeding this amount shall be borne by the party itself, even if it has fully prevailed.

(b) *Administrative procedures and remedies*

9. Reply to the above questions in relation to any administrative procedures on the merits and remedies that may result from these procedures.

In Austria, enforcement of intellectual property rights is a matter of civil and criminal law, which fall under the exclusive jurisdiction of the civil and criminal courts. Non-enforcement related matters such as proceedings regarding application, registration, conveyance and nullity, on the other hand, are generally matters of administrative law and fall under the jurisdiction of the Austrian Patent Office. It is worth noting, however, that appeals against decisions by the Austrian Patent Office need to be filed with and decided by civil courts, i.e. the Higher Regional Court of Vienna (and in turn the Austrian Supreme Civil and Criminal Court), and not by the administrative courts.

Provisional Measures

(a) *Judicial measures*

10. Describe the types of provisional measures that judicial authorities may order, and the legal basis for such authority.

In Austria, a court may order an interim injunction (*einstweilige Verfügung*) as a provisional measure to secure the rights of a party before and during regular court proceedings and also during the execution of the court's decision. An interim injunction generally aims to secure the requesting party's opportunity to pursue a claim in regular court proceedings. Therefore, the requesting party needs to state exactly which claim it wants to have secured. The opportunity to pursue the relevant claim is, *inter alia*, deemed to be at risk if

there is a risk of imminent irretrievable loss or damage,

if there is a likelihood that the opposing party would behave in a way that would render the collection of the award difficult or impossible, or

the award would have to be enforced in a country where enforcement is not secured by treaty or by EU law.

An interim injunction is not available, however, if the requesting party has the opportunity to secure its claims by other means. Measures that may be ordered in an interim injunction include the following:

an order to cease (and desist from) certain conduct,

total prohibition from disposing of certain physical objects,

- or court custody or administration regarding such objects, and

in specific cases, inhibition of third parties (§ 378 *et seq.* EO).

These general rules on interim injunctions also apply in the context of intellectual property infringement, with some specifications:

Interim injunctions are available for securing claims, and for preservation of evidence, with regard to claims for

regular injunction (*Unterlassung*),
remedy of infringement,
adequate compensation,
damages,
profits made as a result of the infringement,

with some limitations with regard to trademarks. If the court finds that it is likely for the fulfilment of the following claims to be at risk in case of commercial infringement, interim injunctions are available for claims for

adequate compensation,
damages, and
profits made as a result of the infringement.

Even if the fulfilment of a claim is not impeded or hindered, or if there is no danger of imminent irretrievable loss or damage, interim injunctions are available for

regular injunctions and
remedy of infringement
(§ 151b PatG, § 41 GMG, § 34 MuSchG, § 56 MSchG, § 87c UrhG).

11. In what circumstances may such measures be ordered *inaudita altera parte*?

In the context of intellectual property infringement, interim injunctions may be issued with regard to

regular injunctions,
remedy of infringement,
adequate compensation,
damages,
profits made as a result of the infringement

without even hearing the opposing party if

- the requesting party would otherwise likely suffer an irretrievable loss or damage, or
 - there is a danger of evidence being destroyed
- (§ 151b(4) PatG, § 41 GMG, § 34 MuSchG, § 56(4) MSchG, § 87c(4) UrhG).

If an interim injunction has been issued *inaudita altera parte*, the responding party can file a statement of opposition (*Widerspruch*) within 14 days of receipt, which has no suspensive effect. If such a statement has been filed, an oral hearing on the interim injunction must take place before the court decides on the opposition. The court can make its decision dependent on the posting of a certain security (§ 397 *et seq.* EO).

12. Describe the main procedures for the initiation, ordering and maintenance in force of provisional measures, in particular relevant time-limits and safeguards to protect the legitimate interests of the defendant.

An interim injunction can be initiated by filing a request with the competent court. The requesting party needs to state

- the type of injunction desired,
- the duration for which it wishes the interim injunction to be in force,

- the exact claim it wishes to have secured, and
- the facts on which the request is based (§ 389(1) EO).

The court may order the requesting party to post a security if the adverse effects of the interim injunction on the responding party can be remedied by payment of money (§ 390 EO). In the context of infringement of industrial property, the courts have held that a security needs to be posted in cases where it appears possible that the allegedly infringed right is void (cf. Stadler/Koller § 159b PatG, Rz 95).

The court may reject the request or issue an injunction, which becomes effective as soon as the responding party has received it. The court's decision on the interim injunction can be appealed within 14 days of its receipt. The appellee then has 14 days from the receipt of the appeal to file an answer (§ 402(3) EO). Upon request, the appeal can be granted suspensive effect (§ 524(2) ZPO). The appellate court can approve the injunction, or restrict or lift it, in particular if e.g.

its scope is wider than necessary,

circumstances have changed so much since it was issued that it has been rendered unnecessary,

the responding party has posted sufficient security to the court, or

the requesting party's alleged claim on which the interim injunction was based has been corrected or denied in a final decision (§ 399 EO).

The requesting party is obliged to compensate the responding party for any and all adverse effects to its wealth (*Vermögensnachteile*) resulting from the interim injunction if

the requesting party's alleged claim for which the interim injunction was granted is denied in a final decision,

the request otherwise presents itself as unjustified, or

the requesting party fails to bring a lawsuit or commence enforcement within the relevant time-limit.

If the interim injunction was obviously wilfully (*mutwillig*) obtained, the responding party can petition the court to impose a reasonable penalty on the requesting party (§ 394 EO).

13. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.

a. Duration of civil proceedings

There are various provisions in Austrian civil procedure aimed at discouraging parties from unreasonably prolonging court proceedings:

If a party has given cause to extend a due date or to prolong a court hearing, the court may *ex officio* or upon request impose the costs thus incurred on the party (§ 142 ZPO).

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Parties can only make new statements of fact or present new evidence until the end of the last oral hearing before the court of first instance (§ 179 ZPO).

If an act by a court is overdue, a party can file a request (*Fristsetzungsantrag*) with this court. This request asks the superior court to set a time limit to the inferior court for the performance of the overdue act. The inferior court then has four weeks from receipt of this request to finally perform the overdue act. If the inferior court complies with the request, it has to notify the requesting party of its compliance, and of the fact that the request will be considered withdrawn if the requesting party does not state within 14 days that it wishes to further pursue the request. If the inferior court fails to comply with the request within four weeks, however, it must forward the request to the superior court, which is required to swiftly decide on it. Its decision on the request cannot be appealed (§ 91 GOG).

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For the duration of the legal dispute, each party bears their own costs of litigation, which, for the plaintiff, includes the court fees.

The overall costs of litigation can be quite significant as they, *inter alia*, include attorney's fees, court fees, expert's remuneration, and witness' compensation. At the end of civil proceedings, the total costs of litigation incurred by both parties are allocated to them on a *pro rata* basis depending on the degree to which they each have prevailed (§ 40 *et seq.* ZPO). It is therefore theoretically possible for a fully prevailing party to recovery all the costs of litigation from the opposing party. The reimbursement of attorney's costs in court proceedings are calculated according to a tariff system based on the amount in dispute. The RATG regulates the maximum amount of the reimbursement of costs. Any costs incurred by the party vis-à-vis its own attorney (e.g. on the basis of a free agreement) exceeding this amount shall be borne by the party itself, even if it has fully prevailed.

(b) *Administrative measures*

14. Reply to the above questions in relation to any administrative provisional measures.

Enforcement of intellectual property rights is a matter of the civil and criminal courts and not one of the administrative bodies. This also applies to provisional measures.

Special Requirements Related to Border Measures

15. Indicate for which goods it is possible to apply for the suspension by the customs authorities of the release into free circulation, in particular whether these procedures are available also in respect of goods which involve infringements of intellectual property rights other than counterfeit trademark or pirated copyright goods as defined in the TRIPS Agreement (footnote to Article 51). Specify, together with relevant criteria, any imports excluded from the application of such procedures (such as goods from another member of a customs union, goods in transit or *de minimis* imports). Do the procedures apply to imports of goods put on the market in another country by or with the consent of the right holder and to goods destined for exportation?

16. Provide a description of the main elements of the procedures relating to the suspension of the release of goods by customs authorities, in particular the competent authorities (Article 51), the requirements for an application (Article 52) and various requirements related to the duration of suspension (Article 55). How have Articles 53 (security or equivalent assurance), 56 (indemnification of the importer and of the owner of the goods) and 57 (right of inspection and information) been implemented?

17. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost. How long is the validity of decisions by the competent authorities for the suspension of the release of goods into free circulation?

18. Are competent authorities required to act upon their own initiative and, if so, in what circumstances? Are there any special provisions applicable to *ex officio* action?

19. Describe the remedies that the competent authorities have the authority to order and any criteria regulating their use.

Criminal Procedures

20. Specify the courts which have jurisdiction over criminal acts of infringement of IPRs.

At the first instance, the Regional Criminal Court (*Landesgericht für Strafsachen*) of Vienna has exclusive nation-wide jurisdiction over cases of criminal infringement of industrial property (§ 162(2) PatG, § 44(2) GMG, § 38(2) MuSchG, § 60a(2) MSchG). For criminal copyright infringement, jurisdiction at the first instance falls to the Regional Court having territorial jurisdiction (§ 91(5) UrhG).

The competent court at the second instance is the Higher Regional Court having territorial jurisdiction (§ 33(1) No. 1 StPO).

21. In respect of which infringements of which intellectual property rights are criminal procedures and penalties available?

With regard to all forms of criminal infringement of intellectual property, criminal charges can be brought against the infringer, but only in cases of intentional infringement. The owner or manager of a business can likewise be held criminally liable if they fail to hinder an employee's or contractor's infringement.

In case of criminal infringement of industrial property, employees and contractors cannot be held criminally liable if they have committed the infringement at the orders of their employer or their contractual partner and if it could not have been reasonably expected of them to refuse committing the infringement due to their status of economic dependence (§ 159 PatG, § 42 GMG, § 35 MuSchG). With regard to copyright law, infringers who make unauthorized copies, talks or performances for their own use (or not for profit for somebody else's own use) cannot be held criminally liable (§ 91 Abs 1 UrhG).

a. Criminal infringement of patents, utility models, and designs

A patent prohibits any third party from

offering or supplying means relating to an essential element of the invention for the use of the invention to persons other than those entitled to use the invention, without the consent of the patent holder,

- if the third party knows or it is obvious from the circumstances that these means are suitable and intended to be used for the use of the invention (§ 22(3) PatG).

Anybody who intentionally infringes a patent in this manner commits a criminal offence (§ 159(1) PatG). Equivalent provisions apply to infringement of utility models (§ 4a(1) and § 42(1) GMG).

A registered design grants its holder the exclusive right to make use of it and to prohibit third parties from using it without his consent. The said use includes, in particular, manufacturing, offering, marketing, importing, exporting or use of a product in which the design is incorporated or to which it is applied, or the possession of the product for the said purposes (§ 4(1) MuSchG). Anybody who intentionally infringes a registered design in this manner commits a criminal offence (§ 35(1) MuSchG).

b. Criminal trademark infringement

The holder of a registered trademark has the right to prohibit third parties from

using, in the course of trade and without his consent, any sign which is identical with, or similar to, the trademark in relation to goods or services,

- irrespective of whether or not such goods or services are identical with, similar to, or dissimilar to those for which the trademark is registered,
- if the trademark has a reputation in the national territory and if the use of the sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of the trademark (§ 10(2) MSchG).

Anybody who intentionally infringes a trademark in the course of trade in this manner commits a criminal offence (§ 60(1) MSchG).

c. Criminal copyright infringement

Anybody who, intentionally and without being authorized to do so, makes use of a

literary or artistic work in a manner of exploitation reserved to the author,
performance in a manner of exploitation reserved to the performer or the organizer,
photograph or a sound record in a manner of exploitation reserved to the producer,
radio broadcast in a manner of exploitation reserved to the broadcaster,
database in a manner of exploitation reserved to the producer, or
press publication in a manner of exploitation reserved to the producer

thus commits a criminal offence (§ 86(1) UrhG). Further criminal copyright infringements include infringements of computer programs (§ 90b UrhG), technical measures (§ 90c(1) UrhG), and identifying indications (§ 90d(1) UrhG; § 91(1) UrhG).

22. Which public authorities are responsible for initiating criminal proceedings? Are they required to do this on their own initiative and/or in response to complaints?

Criminal infringements of intellectual property are private prosecution offences (*Privatanklagedelikte*), which means that only the injured party and not the public prosecutor can bring charges against the infringer or the other persons mentioned above (§ 159(5) PatG, § 42(5) GMG, § 35(5) MuSchG, § 60a(1) MSchG, § 91(3) UrhG).

23. Do private persons have standing to initiate criminal proceedings and, if so, who?

Only the injured party has standing to initiate criminal proceedings.

24. Specify, by category of IPR and type of infringement where necessary, the penalties and other remedies that may be imposed:

- **imprisonment;**
- **monetary fines;**
- **seizure, forfeiture and destruction of infringing goods and materials and implements for their production;**
- **other.**

a. Imprisonment and monetary fines

The criminal sentences available to the court for infringement of the various intellectual property rights are quite uniform. Defendants can be sentenced to

generally, a monetary fine of up to 360 times their daily income (or, in case of copyright infringement, imprisonment of up to 6 months), or

- in case of commercial infringement, imprisonment of up to two years (§ 159(1) PatG, § 42(1) GMG, § 35(1) MuSchG, § 60(1) MSchG, § 91(1) and (2a) UrhG).

b. Seizure, forfeiture and destruction

With regard to industrial property, equivalent provisions to those on remedy of infringement in civil proceedings apply to criminal proceedings (§ 161 PatG, § 42(6) GMG, § 35(6) MuSchG, § 60b MSchG).

In criminal copyright infringement proceedings, the private prosecutor can request the court to order the infringing goods to be destroyed and the means infringement (i.e. the means exclusively or primarily used for it) to be made unusable (§ 92(1) UrhG). In order to secure these measures, the private prosecutor can petition the court to seize the infringing goods and the means of infringement (§ 93(1) UrhG).

c. Publication of the court's decision

Equivalent provisions to those on the publication of the court's decision in civil proceedings apply to criminal proceedings (§ 161 PatG, § 42(6) GMG, § 35(6) MuSchG, § 60b MSchG, § 91(4) UrhG).

d. Pursuit of civil claims in a criminal trial (*Privatbeteiligung*)

It is worth noting that Austrian criminal procedure allows victims, i.e. persons adversely affected by criminal conduct, to bring civil claims against the defendant in criminal court (§ 65(1) and § 67 StPO).

25. Describe provisions governing the length and any cost of proceedings. Provide any available data on the actual duration of proceedings and their cost, if any.

As in civil proceedings, if an act by a court is overdue, a party can file a request (*Fristsetzungsantrag*) with the court. This request asks the superior court to set a time limit to the inferior court for the performance of the overdue act. The inferior court then has four weeks from receipt of this request to finally perform the overdue act. If the inferior court complies with the request, it has to notify the requesting party of its compliance, and of the fact that the request will be considered withdrawn if the requesting party does not state within 14 days that it wishes to further pursue the request. If the inferior court fails to comply with the request within four weeks, however, it must forward the request to the superior court, which is required to swiftly decide on it. Its decision on the request cannot be appealed (§ 91 GOG).

Criminal proceedings in Austria are very swift by comparison. On average, criminal proceedings before the Regional Courts only took 4.2 months in 2021. [These numbers](#), however, are not specific to IP infringement cases, which are often more complex and lengthier than the average criminal proceedings.
