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COERCIVE MEASURES APPLIED TO INDIVIDUALS

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QUESTIONNAIRE

National procedural laws usually grant courts and tribunals the power to order coercive or enforcement measures directly aimed at individuals to force them to act in a certain way or prevent a certain action.

Within the notion of coercive measures therefore, the notion of the use of force is already implicit although it might be worth mentioning two points:

- These coercive measures might, but not necessarily, refer to “physical” force since one must also regard pecuniary penalties or the loss of rights or procedural powers as the use of force.

- They could refer to the actual use of force and also a threat of the use of force: the effective use of force is as coercive as a warning or threat that this could be used.

However, one may also note how courts are granted powers to impose enforcement or coercive measures on individuals which can be used for two separate aims:

- In some cases courts can use coercive measures on individuals because they are necessary for an adequate compliance with procedures, i.e. to “protect the procedure itself”, that is, to allow it to be adequately handled and to fulfil its function.

- In other cases, however, coercive measures do not protect the proceedings but instead are tools which are part of the enforcement procedure, and therefore serve to protect material rights. The enforcement action does not always affect the debtor’s assets, but some cooperation from the debtor or third parties is sometimes necessary to achieve this; in other cases the aim of the enforcement action consists more directly of forcing the debtor to adopt certain behavioural patterns –and if necessary this must be done “by the use of force”-.

It is obvious that the importance of certain coercive measures can vary according to each legal area. Civil and criminal proceedings are not comparable in this particular aspect: the correct performance of criminal proceedings may require more coercion upon the accused than in civil proceedings.

However, the aim of this questionnaire is to determine the kind of coercive measures established in national legislations to achieve both aims as a basis to prepare a general analysis in this field to outline the scope and actual use of these measures as well as their legitimacy and proportionality according to the intended aims.

I. COERCIVE MEASURES AIMED AT PROTECTING CORRECT PROCEEDINGS

1. *Penalties against proceedings based on bad faith, abuse of law and fraud*

Some legal systems expressly require the litigants and/or their lawyers to respect the rules of good faith in the proceedings and establish penalties for those who do not.

1.1. Does your legal system establish the obligation to act "in good faith" in the proceedings? Does it forbid abuse of law or procedural fraud? Are they equivalent or associated? Does a legal definition exist or is one provided by case law in order to understand the meaning of "good faith", "bad faith", "fraud" or "abuse of law" in the proceedings?

It is seen controversial, whether or not there is the obligation to act "in good faith" in the proceedings, because there is no general rule in the Austrian legal system established. Based on Art 6 European Convention on Human Rights (EMRK) and certain selective special regulations in the Zivilprozessordnung (ZPO) the prevailing opinion imposes the duty to refrain from acting fraudulent or in bad faith on the parties. It will not be necessary to revert to the general principle of "good faith", if one of these special regulations in the ZPO is applicable.[1] Special regulations in the ZPO are e.g. the duty to refrain from unlawful process management, reimbursement of costs in cases of lawsuits, the defendant did not cause for or compensation for frivolous lawsuits. In other views the legislator established these special regulations in the ZPO as forms of

[1] *Konecny* in *Fasching/Konecny,* Kommentar zu den Zivilprozessgesetzen I[3] (2013) Einl Rz 142.

the principle of “good faith” and therefore it is not necessary to refer to the general principle.[2]

There is no legal definition for “good faith”, it is rather provided by case law and literature. The good faith states on the one hand a general duty to act honestly and on the other hand a prohibition of abusive practices in proceedings. A party will act against good faith, if the party intends to defeat or to delay the law enforcement or if the party asserts a claim, although he/she is persuaded of not having a certain right.[3]

1.2. *What kind of personal penalties are established for bad faith, abuse of law or fraud in the proceedings? And specifically, would one or several of the following be applicable:*

a) *An abusive or fraudulent plea would be thrown out by the court (even rejecting a claim or appeal)?*

In general the court has the obligation to order the improvement of a pleading or appeal ex officio.[4] If a party intends to delay the proceeding by consciously violating regulations concerning formalities and content, there will be no need to set a new deadline to improve the plea, claim or appeal. In these cases the court has to reject them without giving the party the possibility of improvement.[5] This is equal to cases where parties were instructed on the need to be represented by a lawyer, however they submit a pleading without a lawyer’s signature. If the parties acted with the intention to disobey regulations of formalities or content, the court would not be allowed to set a new deadline for improvement.[6] Concerning the admissibility of a plea without content there are different views; the jurisdiction tolerates them, whereas some views in literature argues for a rejection.[7]

[2] *Fidler*, Schadenersatz und Prozessführung, Grundlagen und System einer Haftung von Prozessparteien (2014) 86.
[3] *Konecny* in *Fasching/Konecny* I^3 Einl 1 Rz 143.
[4] *Kodek* in *Fasching/Konecny* II/2^2 (2003) §§ 84, 85 ZPO Rz 6.
[5] *Kodek* in *Fasching/Konecny* II/2^2 §§ 84, 85 ZPO Rz 45.
[6] *Kodek* in *Fasching/Konecny* II/2^2 §§ 84, 85 ZPO Rz 48.
[7] *Kodek* in *Fasching/Konecny* II/2^2 §§ 84, 85 ZPO Rz 20 f.

b) *Ineffectiveness of the proceedings made in bad faith, by fraud or abuse of law, with the subsequent estoppel.*

A final judgment would only be eliminated with a procedural remedy, if there were reasonable causes, like serious violation against procedural law or incorrect basis for decision.[8] One of the remedies is the reopening action ('Wiederaufnahmsklage') that intends to abate a final judgment based on incorrect basis for decision and allows the court to make a new decision.[9] A judgement based on fraud or abuse of law, might be removed due to Sec. 530 para. 1 no. 1, 2, 3 ZPO, because this causes include criminal acts based on fraud. These criminal acts include the falsification of documents or giving an untrue testimony with wilful intend. If the party, who acts in bad faith, does not fulfil a criminal offence, the judgment will not be removed. The party, who acts in bad faith, cannot refer to its own fraudulent behaviour to remove the judgement.[10] Further a reopening action ('Wiederaufnahmsklage') will be admissible, if the party does not submit certain evidences or facts in the proceeding without culpability. Thereby the legislature intended to prevent wilful intended lawsuits and proceedings that seem to have no prospect of success. (Sec. 530 para. 2 ZPO, Sec. 530 para. 1 no. 7 ZPO).[11]

A default judgement obtained by fraud ('erschlichenes Versäumungsurteil') cannot be removed, however the jurisdiction permits an action based on Sec. 36 para. 1 no. 3 Exekutionsordnung (EO) to defeat an execution on the basis of this judgement.[12]

c) *Imposing a fine, and if so, how is the amount calculated? Is it subject to any principle of proportionality? Where does this money go?*

The court will be allowed to fine, if the parties act with wilful intend during the process. According to Sec. 220 ZPO a fine because of wilful intend ('Mutwillensstrafe') is restricted to 4.000 euro. First of all the court has to threaten to impose a fine before it is allowed to act. Further the court is allowed to double the fine in cases of unjustified absence of witnesses or experts (Sec. 333 para. 1, Sec. 354 para. 1 ZPO). The court does not have to exhaust the maximum amount. For the measurement of a fine, the court has to consider personal circumstances and economic capacity, although there

[8] *Fasching/Klicka* in *Fasching/Konecny* III^2 (2004) § 411 ZPO Rz 141.
[9] *Jelinek* in *Fasching/Konecny* IV/1^2 (2005) § 530 ZPO Rz 1.
[10] *Jelinek* in *Fasching/Konecny* IV/1^2 § 530 ZPO Rz 48 ff.
[11] *Jelinek* in *Fasching/Konecny* IV/1^2 § 530 ZPO Rz 200, 204.
[12] *Jelinek* in *Fasching/Konecny* IV/1^2 § 530 ZPO Rz 72 ff.

are no daily rates and no investigations.[13] For the reasons that there is no imprisonment for failure to pay a fine and the amount is not as high as in criminal law, the fines are not subsumed under Art 6 EMRK (European Convention on Human Rights). Beneficiary of these financial penalties is the federal government.[14]

The court is allowed to impose a fine because of wilful intend in cases of obtaining legal aid by fraud because of an incorrect or incomplete list of assets (Sec. 66, 69 ZPO), asserting a accessory claim as a part of the principle claim, without separately instancing (Sec. 245 ZPO), wilful intended impeachment of a legal document (Sec. 313 ZPO), wilful intended refusal of a witness to make a statement (Sec. 326 para. 3 ZPO), wilful intended refusal of a expert to draft a report (Sec. 354 para. 3 ZPO) further in cases a party appeals to the Obersten Gerichtshof (OGH) with wilful intend (Sec. 512, Sec. 528 para. 4 ZPO).

Concerning frivolous lawsuits the party has to pay the court costs moved by the successful counterparty, instead of paying a fine (Sec. 408 ZPO see under d).[15]

d) *Imposing upon the litigants the obligation to redress the damage caused by their behaviour during the proceedings, and if so, who can claim compensation: counterparties and third parties? How is the amount calculated? Is it subject to a consideration of a principle of proportionality?*

The parties have the duty to refrain from acting fraudulent or in bad faith. If they do not, they will have to pay damages because of unlawful process management. The parties will be liable for damages, if they act in the knowledge that the process or several procedural actions have no prospect of success. The hopelessness of the process has to be recognized by paying due attention. Therefore the court has to apply a lenient yardstick, because asserting a right should not accompany with liability risk for legal defence.[16] Further the counterparty has the duty to take every reasonable action to prevent the damage (appeal, submission of fact or evidence etc).

According to Sec. 408 ZPO, the successful party has the right to claim damages in the current proceeding for apparently frivolous lawsuits. In addition to the ruling on the matter of dispute, the court is allowed to decide on damages. Sec. 408 ZPO requires a right for damages under tort law (Sec. 1293 ff Allgmeines Bürgerliches Gesetzbuch

[13] *Schragel* in *Fasching/Konecny* II/2^2 § 220 ZPO Rz 2.
[14] *Schragel* in *Fasching/Konecny* II/2^2 § 220 ZPO Rz 1.
[15] *Schragel* in *Fasching/Konecny* II/2^2 § 220 ZPO Rz 1.
[16] *Reischauer* in *Rummel*, Kommentar zum ABGB II/2a^3 (2007) § 1305 Rz 3.

[ABGB]) and does not create a new one. It only permits the injured party to claim damages in the current proceeding so that the party needs not to bring a new action against the injuring party.[17] The party is allowed to claim damages till the end of the proceeding in the first instance, afterwards the party has to bring a new action for compensation.[18] The party has to number the amount of compensation and to submit causes for accruement of damage. Finally the court awards damages at its discretion.[19] If the injured party does not specify the amount or the causes for compensation, the court will have to give the party the possibility of improvement.[20] Damages are no penalty so the court is not graciously allowed to reduce it.[21] Concerning the amount of damages, the injured party should be kept in the same position, as if the damaging action never happened.[22]

Third parties have to claim compensation based on the general tort law.

1.3. *Does your legal system consider that those who act recklessly or in bad faith in proceedings should be forced to pay court costs as a penalty?*

The principles of compensation of costs include the success of the process, any culpability and the necessity of the process. The most crucial factor is the success of the process. The party, who succeeds gets the costs refunded. If the party succeeds completely, he/she will get all the costs refunded, if the party succeeds partially, he/she will get the costs refunded in extend of the success. Regardless of the success, the party has to pay the counterparty's extra costs that arose because of the party's culpability concerning several procedural actions (Sec. 48 ZPO). If the party culpably delays the proceeding because of late submissions of evidence or arguments, the court will be allowed to impose the extra costs (Sec. 44 ZPO) on the party. Unlike Sec. 48 ZPO, Sec 44 ZPO is only applicable to the succeeding party. The party has to reimburse all costs that arose because of the delay. The court is allowed to decide upon the obligation to reimburse the extra costs of the proceeding regardless of a certain motion (Sec. 48 ZPO).[23] Concerning the obligation of reimbursement of cost of witnesses and experts see under 3.1. and 3.3.

[17] *Fucik* in *Fasching/Konecny* III^2 § 408 ZPO Rz 1.
[18] *Fucik* in *Fasching/Konecny* III^2 § 408 ZPO Rz 6.
[19] *Fucik* in *Fasching/Konecny* III^2 § 408 ZPO Rz 11.
[20] *Fidler*, Schadenersatz 112.
[21] *Fucik* in *Fasching/Konecny* III^2 § 408 ZPO Rz 1.
[22] *Reischauer* in *Rummel*, ABGB II/2a^3 § 1305 Rz 2.
[23] *Bydlinski* in *Fasching/Konecny* II/1^2 (2002) Vor §§ 40 ff ZPO Rz 5.

According to Sec. 45 ZPO the litigant would have to pay full costs of the proceeding, if the party brought an action against the defendant, although the defendant did not cause for it and he/she admitted to the litigant's right immediately. In this case the reimbursement of costs neither depends on the success nor on a party's culpability. [24]

The right of reimbursement of costs is not used for claims against third parties. The party has to bring an action against the third party for reimbursement according to general tort law.[25]

2. *Measures aimed at achieving cooperation with the law (excluding proof)*

In many legal systems, even on a constitutional level, the general duty is established for all citizens to cooperate with the law. And when this is not spontaneous or voluntary, coercive measures are established to achieve it by force.

2.1. *Does a general duty to cooperate with the law exist in your legal system? Is it set down as constitutional or legal? Does it have any specific content?*

Although there is no constitutional duty to cooperate with the law, there are duties of cooperation set down legal. According to Sec. 178 ZPO the parties have the obligation of truthfulness and completeness, further the duty to put a submission forward in time. Concerning completeness the parties' submissions have to be justified in detail, further the claim has to be coherent and therefore the parties have to completely adduce all circumstances. The duty of truthfulness includes the obligation to prepare thoroughly and neither to submit an argument with the knowledge of not being truthful, nor to fraudulently conceal facts that are important for the court's decision.[26]

[24] *Bydlinski* in *Fasching/Konecny* II/1[2] § 45 ZPO Rz 1.
[25] *Bydlinski* in *Fasching/Konecny* II/1[2] § 40 ZPO Rz 16.
[26] *Schragel* in *Fasching/Konecny* II/1[2] § 178 ZPO Rz 3.

2.2. *Do penalties exist to force compliance or penalties for non-compliance? Which ones? Are they enforceable by law? Criminal prosecution? Being expelled from the proceedings? Compensation for damages? Fines? Any other kind?*

Violations against the obligation of truthfulness are not directly sanctioned, however some rules in the ZPO imply consequences in case of non-compliance. A violation of the duties is sanctioned by reimbursement of costs (see under 1.3.), further the court will also be allowed to reject the submission, if the party intends to delay the process (Sec. 179 ZPO). Further the parties might pay damages because of unlawful process management (Sec. 1293 ff ABGB). Moreover the court is allowed to impose a fine because of wilful intend for certain behaviour (see under 1.2. c)). Above all fraudulent procedural actions are prosecuted according to Sec. 146 ff Strafgesetzbuch (StGB). Besides violating the obligation of truthfulness might influence the court's consideration of evidence.[27] The parties' behaviour in the whole process has to be accounted for the court's consideration of evidence. The fact that one party makes a wrong submission might lead to fact that the court considers the party to be incredible and considers statements from the counterparty as true.[28]

2.3. *Who may these measures be used against?*

a) *The parties involved?*

These measures may be used against the parties, like reimbursement of costs (see 1.3.), damages (see 1.2. d)) or fines because of wilful intend (see 1.2. c)), further the court is allowed to reject the submission (concerning plea, claim or appeal see 1.2. a)).

[27] *Schragel* in *Fasching/Konecny* II/2[2] § 178 ZPO Rz 4.
[28] *Fidler,* Schadenersatz 139.

b) *Lawyers or other professionals working for the parties?*

The obligation to be truthful is also applicable to lawyers or other professionals. Lawyers are not allowed to deliberately make wrong statements to provide their clients with advantages.[29]

c) *Civil servants working for the Justice Administration? Other functionaries or civil servants? Do disciplinary measures or penalties exist that are linked to correctly conducting the judicial proceedings?*

If the court acts against "good faith", the parties will move motions or apply orally during the proceeding to change the courts decision. If there is already a final judgement, the parties will be able to appeal against it. If there are no remedies left, the parties will be allowed to claim for remuneration arising from public liability.[30] In cases where the breach of the official duties might be prosecuted, the disadvantaged party is allowed to bring a reopening action based on Sec. 530 para. 1 no. 4 ZPO. Relevant criminal offences are e.g. the abuse of official authority (Sec. 302 StGB), any breach of professional secrecy (Sec. 310 StGB) or the incorrect certification of certain documents (Sec. 311 StGB).[31]

d) *Third parties?*

The obligation of truthfulness affects third parties only in proceedings for the taking of evidence. Witnesses have to be truthful and they are not allowed to refuse to give testimony without causes. (see under 3.1.)

[29] *Fidler,* Schadenersatz 142; vgl § 9 RAO.
[30] *Konecny* in *Fasching/Konecny* I[3] Einl I Rz 145.
[31] *Jelinek* in *Fasching/Konecny* IV/1[2] § 530 ZPO Rz 92.

3. *Coercive measures specifically linked to methods of investigation*

Some legal systems use coercive measures to ensure that investigation methods are conducted correctly, whether to obtain declarations or statements from individuals or gain access to documents or other items useful for evidence.

***3.1.** Which measures (including penalties) exist in your legal system to force witnesses to make statements? Are there any specific measures to force them to appear before the courts and, strictly speaking, to force a statement?*

A person, who is able to make a statement and is subject to the domestic jurisdiction, has the general obligation to give testimony in court. This obligation includes the duty to appear in court, the duty to give testimony and the duty to depose.[32] The witness must not be incapable to give testimony. The witness has the obligation to give truthful testimony, whether he/she is under oath or not. For giving a false testimony, the witness will be prosecuted. Moreover the penalty for giving a false testimony under oath will be even higher.[33] In the Austrian procedural law is no general right to refuse to give testimony. According to Sec. 321 ZPO the witness is only allowed to refuse to answer certain questions concerning family or professional duties that accompany personal disadvantages. For instance the witness will not be forced to give testimony, if this leads to prosecution or financial loss for himself/herself or his/her family members. Concerning profession, the obligation of confidentiality is a justification for the witness to refuse to testify. The court has to instruct the witness about existing causes for refusal, however the court is not obliged to take them up ex officio. Assumed that the witness refers to causes, the court firstly has to decide whether or not the refusal is justified. [34] If according to the court there is no justification and the witness is above all not willing to testify, the court will be allowed to force the witness to give testimony. According to Sec. 325 ZPO, the witness will further be forced to make a statement, if the witness refuses to testify without cause (or refuses to testify under oath). The court is allowed to force the witness to make a statement by imposing a fine on him/her, thereby according to Sec. 359 EO every fine must not exceed 100.000 euro. First of all the court hast to threaten the witness with a fine. If in spite of threatening, the witness

[32] *Rechberger/Simotta*, Grundriss des österreichischen Zivilprozessrechts[8] (2010) Rz 804.
[33] *Frauenberger* in *Fasching/Konecny* III[2] § 338 ZPO Rz 1.
[34] *Frauenberger* in *Fasching/Konecny* III[2] § 325 ZPO Rz 1.

is not willing to give testimony, the court will be allowed to impose a fine. If the witness refuses again, the court will be allowed to raise the fine. Instead of a fine the court is also allowed to arrest the witness.[35] According to Sec. 361 Abs 1 EO the court is not allowed to arrest the witness up to 2 months and furthermore the arrest must not exceed the termination of the process in the first instance. The court decides ex officio which measure is appropriate. The parties are not able to move a certain measure.[36]

If the witness refuses to testify with the awareness of not having any justification, the court is allowed to impose a fine because of wilful intent. This fine is additionally to the fine or arrest to enforce a statement (Sec. 326 para. 3 ZPO). A fine because of wilful intent must not exceed 4.000 euro (Sec. 220 ZPO).[37] Assumed that the witness was correctly summoned and his/her absence is not excused, the court is, according to Sec. 333 para. 1 ZPO allowed to sentence a fine and has to summon the witness again. The fine must not exceed 2.000 euro per absence (Sec. 220 ZPO). In spite of the fine the witness does not appear before the court, the court is allowed to double the fine and enforce the summon. [38] The witness will be excused, if the appearance before court causes him/her substantial and disproportional disadvantages. The witness has to plead the causes for justified absence before the hearing. Subsequent excuses would be exceptionally acceptable and would abolish a fine and the order to bear the costs, if the witness had no opportunity to excuse himself/herself before the hearing.[39]

In addition to the fine, the witness has further to bear all the costs that arose by reason of the witness' absence.[40] In case of absence or unjustified refusal to testify, the witness would have to pay compensation for damages, if the witness acted culpable. Concerning the costs, at the end of the process the court makes a cost order, nevertheless it is not allowed to award damages. The parties have to bring a new action for damages against the witness.[41]

[35] *Frauenberger* in *Fasching/Konecny* III^2 § 325 ZPO Rz 3.
[36] *Frauenberger* in *Fasching/Konecny* III^2 § 325 ZPO Rz 3.
[37] *Frauenberger* in *Fasching/Konecny* III^2 § 326 ZPO Rz 4.
[38] *Frauenberger* in *Fasching/Konecny* III^2 § 333 ZPO Rz 7.
[39] *Frauenberger* in *Fasching/Konecny* III^2 § 333 ZPO Rz 9.
[40] *Frauenberger* in *Fasching/Konecny* III^2 § 333 ZPO Rz 1.
[41] *Frauenberger* in *Fasching/Konecny* III^2 § 326 ZPO Rz 2 sowie § 333 ZPO Rz 5, 8.

3.2. *Which measures (including penalties) exist in your legal system to force the counterparty to make a statement, particularly when the questioning focuses on facts that may be against their interests? Are there any measures to force them to appear before the courts and for them to make a statement?*

The examination of the parties is primary evidence like the examination of witnesses. Like witnesses, the parties have the duties to appear before court, to make a statement and to depose, however the parties can be neither forced to appear before court nor forced to make a statement (Sec. 380 para. 3 ZPO).[42] (Only in proceedings concerning marriage, the court is able to force parties to appear before court. Further if the claiming spouse does not appear before court, the claim might be deemed to be withdrawn.)[43] If a party makes a statement, it will have to be truthful. In contrast to witnesses parties can be prosecuted for a wrong statement only when they depose. If they do not state under oath, they may only be prosecuted for intending to deceive the court.[44]

The court is not allowed to force parties to appear before court, neither to make a statement nor to depose, however this conduct has influence on the court's consideration of evidence. According to Sec. 381 ZPO the parties' behaviour in the whole process has to be accounted for the court's consideration of evidence. The fact that one party does not appear or does not make a statement might be probative accepting statements of the counterparty as true.[45] Generally both parties have to be heard by the court, however the court is allowed to hear only the attendant party respectively the party who wants to make statement.[46] The valuation of the party's absence would be admissible, if the party was correctly summoned to the examination or the date of the party's examination was fixed in a prior hearing, which the party registered and abstained from getting summoned. The party has to be always instructed on the procedural consequences of absence.[47] Further the party has to be absent without causes. Whether a party is incapable or just does not want to appear before court, has to be measured by the court. Insufficient justifications for a party's

[42] *Rechberger/Simotta*, Grundriss[8] Rz 821.
[43] *Spenling* in *Fasching/Konecny* III[2] § 380 ZPO Rz 11.
[44] *Spenling* in *Fasching/Konecny* III[2] § 371 ZPO Rz 5.
[45] *Spenling* in *Fasching/Konecny* III[2] § 381 ZPO Rz 1.
[46] *Spenling* in *Fasching/Konecny* III[2] § 380 ZPO Rz 9.
[47] *Spenling* in *Fasching/Konecny* III[2] § 381 ZPO Rz 3 ff.

absence are profession (in general), illness, or holiday.[48] On demand of the court, the party has to evidence the cause.[49]

According to Sec. 380 para. 1 ZPO the parties have, like witnesses, the right to refuse to make a statement concerning certain questions, however the refusal is not justified because of fearing to lose the process or financial loss. If the refusal is justified, the court is not allowed to value the fact, that the party does not answer the question in favour of the counterparty.[50]

3.3. *Which measures (including penalties) exist in your legal system to force experts appointed in a specific case to draft their reports and present them in the proceedings within the period established by the court?*

Experts have the duties to appear before court, to swear an oath and to deliver a report. The obligation to act as an expert only exists for a person, who is public appointed and is recorded in a list of experts. This public expert will have to swear an oath, if he/she is recorded in the list of experts. The expert is allowed to refuse the appointment for the same causes witnesses are allowed to refuse to testify (Sec. 321, 322, 353 para 2 ZPO). [51] The duties of the expert are not directly enforceable, because the expert is in contrast to the witness exchangeable. Therefore the court is not able to impose a fine, arrest the expert or enforce the summons. If the correctly summoned expert is absent without cause or does not deliver the report on time, the expert will have to bear the costs that arose by reason of the expert's absence or late delivery.[52] Further the court is allowed to impose a fine or a fine for wilful intend. Unlike imposing a fine on witnesses, the fine for wilful intend cannot be imposed on experts in addition to the fine for late delivery or causeless absence. According to Sec. 354 para. 1 excuses after the hearing are exceptionally acceptable and would abolish a fine and the order to bear the costs, if the expert had no opportunity to excuse himself/herself before the hearing.[53] Further according to Sec. 354 para. 3 ZPO, the expert will have to pay damages for delay or frustration of the proceeding, if he acts culpable. The court is not allowed to award damages, therefore the parties have to bring a new action for

[48] *Spenling* in *Fasching/Konecny* III^2 § 381 ZPO Rz 8.
[49] *Spenling* in *Fasching/Konecny* III^2 § 381 ZPO Rz 10.
[50] *Spenling* in *Fasching/Konecny* III^2 § 380 ZPO Rz 3, 7.
[51] *Rechberger/Simotta*, Grundriss^8 Rz 810.
[52] *Rechberger* in *Fasching/Konecny* III^2 § 354 ZPO Rz 1.
[53] *Rechberger* in *Fasching/Konecny* III^2 § 354 ZPO Rz 1.

damages against the expert. If the expert culpable fails to fulfil the obligations, the expert will have no right to claim the fees.[54]

3.4. *Which measures (including penalties) exist in your legal system which may enable access to documents and other items with evidential weight which are held by the counterparty?*

First of all, the party adducing evidence has to move the adduction of documents or other items with evidential weight that are held by the counterparty. Therefore the party is able to move a motion or to orally apply for it in the hearing.[55] Moreover the party has to show credibly that the counterparty holds the documents.[56] Equal to the fact that the counterparty holds the evidence itself is the fact that the counterparty commits the evidence to a third party. The counterparty would not have the duty to supply the other party with evidence, if the counterparty did not commit it to the third party. In this case the party adducing evidence has to bring an action against the third party.[57]

According to Sec. 304 para. 1 ZPO the counterparty will have the duty to adduce documents or other items with evidential weight, if the counterparty itself refers to the evidence, because the court or the other party should have the possibility to prove the statement.[58] Further the counterparty has the obligation to adduce the document, based on civil law or on a contract.[59] For instance, there will be a legal obligation to adduction, if the document is a certificate of indebtedness or a receipt (Sec. 1426, 1428 ABGB).[60] Moreover the counterparty has the contractual obligation to adduce the evidence, if the document has a collective content, which means a document that both parties intended to construct or that records a certain transaction (Sec. 304 para. 2 ZPO).[61]

Concerning other documents the counterparty has the duty to adduce them, however the counterparty is allowed to refuse the adduction because of certain causes by law. According to Sec. 305 ZPO the counterparty won't have to adduce the evidence, if this leads to prosecution, or the content concerns the family or it is against the obligation to

[54] *Rechberger* in *Fasching/Konecny* III^2 § 354 ZPO Rz 3.
[55] *Kodek* in *Fasching/Konecny* III^2 § 303 ZPO Rz 17.
[56] *Kodek* in *Fasching/Konecny* III^2 § 303 ZPO Rz 25.
[57] *Kodek* in *Fasching/Konecny* III^2 § 303 ZPO Rz 21.
[58] *Kodek* in *Fasching/Konecny* III^2 § 304 ZPO Rz 3.
[59] *Kodek* in *Fasching/Konecny* III^2 § 304 ZPO Rz 8.
[60] *Kodek* in *Fasching/Konecny* III^2 § 304 ZPO Rz 10.
[61] *Rechberger/Simotta*, Grundriss^8 Rz 800.

confidentiality.[62] The causes that justify a refusal are finally listed, however there is a sweeping clause saying that the counterparty will be allowed to refuse the adduction, if there are causes that are "equal important". In this case the court has to take all interests into consideration to make a decision.[63] The court decides, after hearing the counterparty, whether or not the evidence has to be adduced.[64]

The court's decision is not enforceable, however the counterparty's refusal has influence on the court's consideration of evidence. An unjustified refusal to submit a document might be derogatory to the refusing party.[65] According to the prevailing opinion, the court is not allowed to consider the justified refusal unfavourably for the refusing party.[66] If the party has a right of adduction based on the law, the party will be able to bring another action against the counterparty to enforce the access to the document.[67]

The statements above are equal for items with evidential weight (Sec. 369 ZPO).[68]

3.5. *Which measures (including penalties) exist in your legal system which may enable access to documents and other items with evidential weight held by a third party? Do any differences exist according to whether a third party is a private individual or a public authority?*

The party adducing evidence has to move a motion or has to orally apply for the adduction of a document held by a third party. If the third party denies the possession of a certain document, the party will have to credibly show the opposite.[69] The court decides, after hearing the third party and the counterparty, whether or not the evidence has to be adduced.[70] According to Sec. 308 ZPO the third party will have the duty to adduct the document, if the obligation is based on the law or the document has collective content concerning the party adducing evidence and the third party. Under Sec. 309 ZPO there will be no obligation to adduction, if it is contentious business. In this case the party has to bring an action in detinue against the third party.[71] The court's decision is appealable and enforceable. The court is allowed to capture the

[62] *Kodek* in *Fasching/Konecny* III[2] § 305 ZPO Rz 4 ff.
[63] *Kodek* in *Fasching/Konecny* III[2] § 305 ZPO Rz 13.
[64] *Kodek* in *Fasching/Konecny* III[2] § 303 ZPO Rz 16 f.
[65] *Kodek* in *Fasching/Konecny* III[2] § 305 ZPO Rz 15.
[66] *Kodek* in *Fasching/Konecny* III[2] § 305 ZPO Rz 16.
[67] *Kodek* in *Fasching/Konecny* III[2] § 307 ZPO Rz 25.
[68] *Gitschthaler* in *Fasching/Konecny* III[2] § 369 ZPO Rz 3.
[69] *Rechberger/Simotta*, Grundriss[8] Rz 801.
[70] *Kodek* in *Fasching/Konecny* III[2] § 308 ZPO Rz 11.
[71] *Kodek* in *Fasching/Konecny* III[2] § 308 ZPO Rz 13.

document directly (Sec. 346 EO) or it is able to impose a fine or arrest the third party (Sec. 354 EO).[72]

The statements above are equal for items with evidential weight (Sec. 369 ZPO).[73]

The court will have to impose the obligation to adduct documents or items with evidential weight, held by a public authority, only if the party is not able to get access to the documents or the public authority refuses the delivery.[74] The court requests to convey the document, based on the public authority's obligation to administrative assistance according to Art 22 Bundesverfassungsgesetz (B-VG). If the public authority refuses to convey the document, the court is not able to force them to act, however it is able to appeal to the superior authority. Even the party is able to appeal against the unjustified refusal of the public authority.[75]

3.6. *In the cases above, are the possible penalties subject to rules of amounts or duration? If they are financial penalties, who will be the beneficiary?*

Sec. 220 ZPO defines the amount of fines. First of all the court has to threaten to impose a fine before it is allowed to act.[76] The fine has not to exceed 2.000 euro, further a fine because of wilful intend is restricted to 4.000 euro. The court is allowed to double the fine in case of unjustified absence of witnesses or experts (Sec. 333 para 1, Sec. 354 para 1 ZPO). The court does not have to exhaust maximum amount. For the measurement of a fine, the court has to consider personal circumstances and economic capacity, although there are no daily rates and no investigations. Beneficiary of these financial penalties is the federal government.[77] According to Sec. 359 EO, fines have not to exceed 100.000 euro. Such fines are used to force a witness to make a statement or to force a third party to adduct a document or other items of evidential weight. This fine is a coercive measure therefore the court has to impose a fine high enough to bend one's will but with the possibility to increase it next time if necessary. For the measurement of a fine, the court has to consider personal circumstances and economic capacity and the frequency of infringement.[78] There is no possibility to imprison a person because he fails to pay the fine. According to Sec. 354, 361 EO

[72] *Kodek* in *Fasching/Konecny* III^2 § 308 ZPO Rz 15.
[73] *Gitschthaler* in *Fasching/Konecny* III^2 § 369 ZPO Rz 5.
[74] *Fasching* in *Fasching/Konecny* III^2 § 229 ZPO Rz 5.
[75] *Kodek* in *Fasching/Konecny* III^2 § 301 ZPO Rz 4 f.
[76] *Schragel* in *Fasching/Konecny* III^2 § 220 ZPO Rz 1.
[77] *Schragel* in *Fasching/Konecny* II/2^2 § 220 ZPO Rz 2.
[78] *Klicka* in *Angst*, Kommentar zur EO^2 (2008) § 354 Rz 20.

imprisonments are admissible as coercive measure after the court already imposed a fine. Further each imprisonment does not have to last longer than 2 months; 6 months total duration. Moreover imprisonment will only be a legal measure, if the infringement is proven.[79] Beneficiary of these financial penalties is the federal government.[80]

4. Coercive measures specifically linked to fulfilling criminal proceedings

In the context of criminal proceedings one may also note a strengthening of the requirement to cooperate with the law and to fulfil the proceedings correctly.

***4.1.** Is there any **obligation to report participation in a crime**? How is the non-compliance of this penalised? Is this possible obligation greater when police officers, doctors or civil servants are involved? In what way?*

In general there is no obligation for Austrian citizens to incriminate someone who has participated in a crime. Though, everybody has the right to do so.

This right goes even further: If a person is about to commit or is already committing a crime or the police is on search, it is allowed to stop this person. The next police station available has to be informed immediately. (§ 80 StPO)

Just in case of certain crimes, which are punishable by a more than 1 year prison sentence, also citizens are obliged to inform the police or the threatened person (§ 286 StGB). If they do not follow this obligation to report and the crime has at least been tried, they risk a 2 year imprisonment (but the punishment for the omission of the prevention can never be more severe than the possible punishment for the particular criminal offence).

The offender does not get sentenced, if he

- can't prevent or report the crime without significant disadvantages for himself or a relative,
- hears about the criminal offence in pursuance of his vocation as a cleric or

[79] *Klicka* in *Angst*, EO^2 § 354 Rz 21.
[80] *Klicka* in *Angst*, EO^2 § 359 Rz 4.

- would violate another legally recognized obligation to confidentiality and the consequences of this violation would outweigh the negative consequences of the omission of the prevention or the report.

A legally recognized obligation to confidentiality can be found for doctors (§ 54 ÄrzteG), lawyers (§ 9/2 RAO) and notaries (§ 37/1 NO). In each case there is the need of weighing the interests. For example confidentiality of a notary is seen as less important than the discovery of money laundering or financing of terrorism. A doctor who reveals a repeated mistreatment in order to protect the threatened person can be regarded a typical example for this weighing of interests.

According to § 54 ÄrzteG the obligation to confidentiality does not exist, if the revelation of the secret is absolutely necessary to protect higher interests as for example public health care.

§ 78 StPO lays down that public authorities/agencies are obliged to inform the police or prosecution in case of the suspicion of a crime.

The consequences of violation range from disciplinary to judicial sanctions. In extreme cases the omission of the report can be qualified as misuse of authority after § 302 StGB, which is punishable by a prison sentence up to 5 years.

4.2. *How is the* ***obligation to cooperate*** *regulated when it involves* ***doctors*** *and* ***civil servants*** *with the police or another authority in criminal* ***investigations****?*

Given an obligation of disclosure after § 78 StPO, authorities are obliged to provide inspection of records for the police, the prosecutor's office and the court. In this case it is not permitted to refer to the obligation of confidentiality (§ 79 StPO).

Except for this case (§ 78 StPO) it is prohibited to examine public officers as witnesses, who are liable to official secrecy, as far as they are not released from their obligation to confidentiality (§ 155 StPO).

Concerning the confidentiality of **doctors,** § 54 ÄrzteG provides that superior interests, in particular the administration of justice, can be an admissible breach of this principle. It's a balancing of legally protected interests: The individual interest of secrecy of the patient on the one hand and the public interest of clarification on the other hand.

The revelation of the secret to protect superior interests is only admissible, if it is indispensable for the particular purpose.

Also according to the data privacy act (§ 9 DSG) sensible data can be disclosed in order to protect important public interests.

So basically the administration of justice and criminal investigations would not fail because of a doctor's obligation to confidentiality. On the contrary doctors are even obliged to report immediately, if there is a reasonable suspicion that a criminal offence has caused the death or grievous bodily harm. The same applies to the suspicion of abuse of infants or adults, who are unable to control their behavior (§ 54 ÄrzteG).

As an exception there is the right to remain silent (§ 157 Abs 1 Z 3 StPO), for instance for psychologists. They can refuse to give evidence about details they were told in practice of their profession. In these cases the seizure of documents and data is explicitly prohibited.

4.3. *How is the* ***discovery of secret data and information during criminal investigation*** *penalised? Are the personal penalties the same for civil servants, lawyers, witnesses or the indicted or accused? How is this balanced with the right to information?*

§ 121 StGB Violation of professional secrecy:

According to § 121 StGB, the revelation of secret data and information concerning the medical condition of a person coming out in exercise of profession, is punishable by a 6 months prison sentence or a penalty up to 360 daily rates, if the discovery is not justified by a public or suitable private interest.

Also a person, who gets access to secret data as part of education, for instance as an assistant or expert, is subject to § 121 StGB.

The offender has to be prosecuted only on demand of the person with the interest of discretion (Abs 6).

The same applies to the violation of business and professional secrets coming out in exercise of public control, examination or inquiry (§ 122 StGB).

Is it the indicated or **accused** person, who reveals secret data and information in order to defend himself, the discovery is often justified or at least excused in regard to the right of self-defence.

If for example a **lawyer** gets accused by a client, he gets implicitly released of his obligation to confidentiality. Therefore he will be able to speak out in a criminal or disciplinary proceeding.

However if the lawyer gets accused by third parties, his first duty is to seek permission from his client in order to reveal secret data and information.

If there is no approval, the breach of professional confidentiality is admissible when the client's refusal to approve the discovery is an abuse of law and it is absolutely necessary to confute the accusation.

If lawyers or doctors reveal secret information in violation of their obligation to confidentiality, disciplinary punishment and action for damages can be the consequence. The violation of the medical confidentiality is qualified as violation of a doctor's obligation according to § 136 Abs 1 Z 2 ÄrzteG.

As disciplinary punishment a written expulsion, an up to 36.340 € fine or a temporary occupational ban can come into consideration.

4.4. *Are there any measures to avoid the interference of parties and third parties during investigations or in criminal proceedings? (Unlawful pressure exerted on witnesses, experts or juries or destruction of sources of evidence).*

To avoid distortions during investigations there are several measures given by Austrian law:

First of all there is the possibility of **seizure**, which is the preliminary establishment of authority to dispose, and the preliminary prohibition of the surrender of property to third parties (§ 110 StPO).

Seizure is admissible, if it gets enabled by the prosecutor, conducted by the police and it seems necessary in respect of

1. evidence issues
2. the protection of private claims (§ 367 StPO)
3. guaranteeing the disgorgement of enrichment (§ 20 StGB), lapse (§ 20 b StGB), sequestration (§ 26 StGB) or another lawfully proprietary direction.

Each person is obliged to surrender property when the police is demanding it. If the affected person contradicts the confiscation invoking a legally recognized obligation to

confidentiality, the objects are put under seal until the court can decide about the sequestration.

Sequestration according to § 115 StPO is the judicial decision about the establishment or proceeding of seizure.

Definitely the most severe measure is pretrial **custody** (§ 173 StPO):

It is only (on request of the prosecutor) admissible, if the suspected person is deeply suspicious of a certain criminal offence and has already been heard by the court and one of the reasons for arrest in para 2 is given.

One of these reasons for arrest is – based on certain facts – the danger that the accused could influence witnesses, experts or co-accused, or he could try to eliminate evidence of the offence, or could aggravate the investigation for the truth.

The court must not approve pretrial custody, if it is disproportionate or the purpose can be reached with milder measures.

Milder measures are in particular:

- the pledge in cases of violence at home to avoid every contact with the victim and the instruction to avoid a certain apartment and its immediate surrounding or an interdiction of entering after § 38a SPG or an interim injunction after § 382b EO (along with taking the keys).
- the instruction to report every change of stay.

A wrong evidentiary statement in front of the court, the prosecutor or the police or the attempt to incite somebody to do so is punishable by an up to 3 years prison sentence (§ 288 StGB).

If someone designedly helps another person, who committed a crime, to flee from justice or to escape punishment, this person may be punished by an up to 2 years prison sentence (§ 299 StGB).

Furthermore the suppression of evidence is punishable by an up to 1 year prison sentence (§ 295 StGB).

II. PERSONAL COERCIVE MEASURES TO ACHIEVE COMPLIANCE WITH JUDICIAL DECISIONS

1. Personal measures to ensure payment is made

Apart from measures which directly affect assets, some regulations establish personal coercive measures to achieve the fulfilment of payment or to guarantee the most appropriate effectiveness.

1.1 Does your legal system establish the obligation of the debtor to cooperate in fulfilling payment? And in particular, is he or she obliged to provide information regarding the extent and location of his or her personal equity? How is the compliance with this duty enforced? How is non-compliance penalised?

The Austrian legal system does not establish a general obligation of the debtor to cooperate in fulfilling payment. If there is a judgement that obliges the defendant to perform (payment), this party is under the obligation to pay the full amount (generally) within 14 days (= time for performance)[81] on penalty of judicial enforcement. The debtor is basically not obliged to provide information regarding the extent and location of his or her personal equity. However, such obligation may arise in enforcement proceedings.[82]

In this regard it should be clarified that in Austria not every single contentious proceeding is followed by an enforcement proceeding, esp if the adjudicated party pays voluntarily in respect of the decision. (A general remark: Declaratory judgements and judgements modifying or changing a legal right or status don´t require enforcement at all.) Reversely, not every single enforcement procedure needs a contentious proceeding: Cf. for example enforceable notarial acts or administrative enforcement orders.[83]

In enforcement proceedings because of money claims (**execution of monetary claims**), which are the most common enforcement proceedings, the creditor enforcing the levy of execution (= betreibender Gläubiger) has to locate the objects for

[81] Cf. § 409 para. 1 ZPO.
[82] See below for more information.
[83] *Kodek/Mayr*, Zivilprozessrecht[2] (2013) Rz 5.

enforcement (= Exekutionsobjekte) and to name the place where they are located (in the application for enforcement, cf. § 54 para. 1 no. 3 EO). In many cases, however, the creditor enforcing the levy of execution does not have the knowledge needed to make that specification. Furthermore, there are debtors who disguise their assets to withdraw those from enforcement proceedings. If the execution has been attempted unsuccessfully, the Austrian enforcement law sets an **obligation for the obligor to provide the creditor with further assistance** (**obligation to declare the financial circumstances**). This will be done by a list of assets (= Vermögensverzeichnis; § 47 EO), which is formally recorded by the court or the bailiff.[84]

The obligor must fill in this list correctly and completely: According to § 292a StGB, a person who does not fill in this list correctly and completely and thereby jeopardizes the satisfaction for creditors is punishable to a term of imprisonment of between six months or a fine of up to 360 daily rates. If the obligor refuses to submit the list of assets, the court has to impose compulsory attendance by the bailiff ex officio (§ 48 para. 1 EO). If the obligor refuses the submission before a court, the court has to impose **coercive detention** on him; the coercive detention ends with the submission of the list of assets, but at the latest six months thereafter (§ 48 para. 2 EO).[85]

The initiation of the procedure to submit the list of assets has to take place ex officio.[86]

1.2 Does your legal system establish the obligation of third parties to cooperate with fulfilling payment?

In order to obtain **a monetary claim**, the creditor may enforce the levy of execution against the debtor on a claim for money (= attachment of debts [= Forderungsexekution]). The most important form of an enforcement on a claim is the **garnishment of salary claims** (= Gehaltsexekution).

The object of the enforcement is a claim for money, which the debtor (obligated party) has against a third party ("**third party debtor**", garnishee). As mentioned above, the

[84] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] (2011) 123 f.
[85] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 124, 126.
[86] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 124.

claim for income from employment (e.g. wage, salary) plays a dominating role in this aspect. If the requirements are fulfilled, the court will issue a garnishment order. This order must contain a description of the claim and an order forbidding the third party debtor (in general the employer) to pay anything to the debtor (in general the employee). Therefore, the **third party debtor** has to be described in detail in the application for enforcement (with name and address). If the creditor does not know the name of the third party debtor, he only needs to give the date of birth of the debtor, which he can poll at the registration office according to § 294a para. 3 EO (garnishment of salary claims, if the **third party debtor** is **unknown**, cf. § 294a EO).[87]

The **third party debtor** has to fulfill a number of obligations (cf. § 301 EO para. 1 no. 1 – 5 EO): He has to make a statement and answer questions concerning the existence, the extent and the collectibility of the claim (so-called **third party debtor declaration** [= Drittschuldnererklärung]). According to § 301 para. 2 EO, the **third party debtor declaration** has to be sent to the court and to the creditor.

The third party debtor is responsible for any damage incurred by the refusal of the declaration or by a wilful or grossly negligent or incomplete declaration.[88]

a) Are financial institutions obliged to provide information concerning the debtor's assets? How are they forced to comply with this duty? How are they penalised for non-compliance?

The **attachment of bank accounts** in enforcement proceedings is of considerable practical importance. In that kind of proceedings, **financial institutions** are obliged to provide information concerning the debtor´s assets according to § 301 EO: The third party debtor, or rather, the financial institution is obliged to submit the third party debtor declaration, unless the creditor expressly foregoes this. The obligation to provide information cannot be imposed in enforcement proceedings, but the third party debtor will become liable for damages.[89]

[87] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 241 ff.
[88] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 244 f.
[89] *Kodek*, Die Pfändung von Bankkonten, ÖBA 2010, 19 (29).

In this context, the **relationship between the banking secrecy and the obligation to submit the declaration** has to be assed. According to **§ 38 BWG**, financial institutions are committed to maintaining confidentiality.[90] In earlier times, it was argued that the banking secrecy has priority over the obligation to submit the third party debtor declaration because the KWG (the predecessor law of the BWG) was regarded as the latter and more specific act. But nevertheless financial institutions can submit a third party debtor declaration because the customer does not have a legitimate interest that the financial institution does not submit the declaration. Under the current predominant opinion, however, the obligation to provide information in this enforcement proceedings has priority over the banking secrecy.[91]

b) Are certain public administrations (especially the tax administration) obliged to provide information concerning the debtor's assets? How are they forced to comply with this duty? How is non-compliance penalised?

Public administrations are not obliged to provide information concerning the debtor's assets. But within the garnishment of salary claims, the registration office and the Federation of Austrian Social Insurance Institutions have certain duties to cooperate. If the name of the third party debtor is unknown, the creditor – as mentioned above - only needs to give the date of birth of the debtor in the application for enforcement: According to § 294a para. 3 EO, the **registration office** is obliged to provide that very information. The enforcement court contacts the **Federation of Austrian Social Insurance Institutions** and asks if there are any employers or other **third party debtors** listed (so-called **Drittschuldneranfrage**).[92]

2. Personal measures to ensure non-monetary fulfilment

Non-monetary fulfilment is aimed at obtaining from the debtor items (not money) and instructing the debtor to behave in one way or another.

[90] For further information see *Laurer,* BWG[3] § 38 BWG Rz 1 ff.
[91] *Kodek*, ÖBA 2010, 29 f; see also *Apathy*, Abtretung von Bankforderungen und Bankgeheimnis, ÖBA 2006, 33 (35); *Jabornegg*, Aktuelle Fragen des Bankgeheimnisses, ÖBA 1997, 663 (673).
[92] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 241 f; *Oberhammer* in *Angst*[2] § 294a EO Rz 5 ff.

2.1. In particular, does your legal system accept the concept of penalty payments multa coercitiva – astreinte – Zwangsgeld?

a) In which cases and with what aims are these accepted?

b) How is the amount calculated?

c) Who is the beneficiary?

As a general rule, the Austrian legal system does not include the concept of an "astreinte" to which the creditor is entitled to.

However, there are other forms of **coercive penalties**: In this aspect, the so-called **direct natural execution** (= direkte Naturalexekution) and the **indirect natural execution** (= indirekte Naturalexekution, cf. §§ 354 ff EO) must be distinguished. Direct natural execution means that the act owed by the debtor is imposed by **direct enforcement**:[93] For example, the bailiff takes the object away from the debtor and hands it over to the creditor (cf. § 346 para. 1 EO). By contrast, in the so-called **indirect natural execution,** the act owed by the debtor is imposed **by coercive penalties**.[94] The execution for the purpose of obtaining non-fungible acts and the execution for the purpose of obtaining acquiescence and forbearance are **indirect** natural executions.[95]

<u>The execution for the purpose of obtaining non-fungible acts (§ 354 EO)</u>

This kind of execution will be forced through **fines or imprisonment** of a maximum duration of six months (§ 354 para. 1 EO). But there are some restrictions: Every single fine is limited to € 100.000 (§ 359 para. 1 EO); the duration of every single imprisonment is limited to two months (§ 361 EO), the total duration of the imprisonment is limited to six months (cf. § 354 para. 1 last sentence EO).[96] The enforcement starts **under the threat of a penalty**; the **first penalty**, which is threatened, is a **fine** (§ 354 para. 2 sentence 1 EO). The penalty will be made more severe step-by-step.[97]

[93] *Rechberger/Oberhammer*, Exekutionsrecht[5] (2009) Rz 145.
[94] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 257.
[95] *Rechberger/Oberhammer*, Exekutionsrecht[5] Rz 146.
[96] *Rechberger/Oberhammer*, Exekutionsrecht[5] Rz 441.
[97] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 270.

The judge chooses the **type of penalty** (fine or imprisonment), but the **first penalty** has to be a **fine**.[98] Furthermore, the judge decides the **extent of the penalty** (discretionary decision). The level of the penalty is dependent upon the economic efficiency of the obligor, upon the frequency of infringements and upon the economic benefits, which the creditor derives from the infringements.[99]

The coercive penalty according to § 354 EO is of **preventive character** (in contrast to the coercive penalty according to § 355 EO)[100], which becomes especially clear with the imprisonment: The imprisonment has to be stopped immediately if the obligor achieves the fulfillment of the obligation.[101]

The beneficiary of the fine is the **Federal Republic of Austria** (Art III para. 16 BGBl I 2000/59).[102]

Execution for the purpose of obtaining acquiescence and forbearance (§§ 355 ff EO)

This kind of execution will be forced through **fines or imprisonment.** Every single fine is limited to € 100.000 (§ 359 para. 1 EO); the duration of every single imprisonment is limited to two months (§ 361 EO), the total duration of the imprisonment is limited to one year according to § 355 para. 1 EO (in contrast to the total duration according to § 354 para. 1 EO).[103]

The first penalty has to be a fine, which is threatened **without prior announcement** (cf. § 355 para. 1 EO). This is in contrast to § 354 EO, where the enforcement has to start under the threat of a penalty.[104]

Hereafter, the judge chooses the **type** (fine or imprisonment) and the **extent of the penalty** (discretionary decision).[105] The level of the penalty depends on the nature and gravity of the infringements, on the economic efficiency of the obligor and the extent of

[98] See above; *Klicka* in *Angst*[2] § 354 EO Rz 20.
[99] *Klicka* in *Angst*[2] § 354 EO Rz 20.
[100] See below for more information.
[101] *Rechberger/Oberhammer*, Exekutionsrecht[5] Rz 441.
[102] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 270.
[103] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 272.
[104] See above.
[105] *Klicka* in *Angst*[2] § 355 EO Rz 17.

the participation in the infringement (cf. § 355 para. 1 penultimate sentence EO). The court has to give reasons for the level/amount of the penalty (§ 355 para. 1 last sentence EO).[106]

The coercive penalty according to § 355 EO is not of preventive character (like the coercive penalty according to § 354 EO)[107], but of **repressive character**.[108]

In this case as well, the beneficiary is the **Federal Republic of Austria** (Art III para. 16 BGBl I 2000/59).[109]

2.2. Which particular personal coercive measures are established in your legal system to achieve the handing over of movable assets? Can this also affect third parties?

The personal coercive measure, which is established in our legal system to achieve the handing over of movable assets, is the **execution for the purpose of the handing over or the delivery of movable assets** (cf. §§ 346 – 348 EO, Exekution zum Zweck der Herausgabe oder Leistung von beweglichen Sachen). It is a so-called **direct natural execution** (= Naturalexekution), which means that the act owed by the debtor is imposed by **direct enforcement**. By contrast, in the so-called **indirect** natural execution (= indirekte Naturalexekution, cf. §§ 354 ff EO) the act owed by the debtor is imposed by coercive penalties.[110]

In the execution for the purpose of the handing over or the delivery of movable assets, the bailiff will take the movable assets away from the obligor (if they are in the custody of the obligor, cf. § 346 para. 1 EO). Then the bailiff will hand them over to the creditor enforcing the levy of execution (with acknowledgement of receipt). If the movable asset is not in the custody of the obligor but in the custody of a third party, the further procedure depends on whether the third party is willing to hand the asset over or not: If the third party is willing to do so, he has to hand the respective asset over to the bailiff,

[106] *Klicka* in *Angst*[2] § 355 EO Rz 18 f; *Rechberger/Oberhammer*, Exekutionsrecht[5] Rz 442.
[107] See below for more information.
[108] *Rechberger/Oberhammer*, Exekutionsrecht[5] Rz 444; OGH 3 Ob 48/11x SZ 2011/62; RIS-Justiz RS0010057.
[109] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 273.
[110] See above; *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 257.

who passes it on to the creditor (cf. § 347 para. 1 EO). If the third party refuses to hand the movable asset over, the obligor´s claim for return against the third party will be transferred to the creditor (§ 347 para. 2 EO). If necessary, the creditor may bring the third party debtor action (against the third party).[111]

If the movable asset should not be discovered, the obligor has to declare where the asset is located (**Declaration of Assets** according to § 346a para. 1 EO). Should this declaration not deliver any new insights, an **action for compensation** according to **§ 368 EO** is possible.[112]

2.3. What particular personal coercive measures does your legal system establish to achieve the handing over of immovable assets? Can this also affect third parties?

The personal coercive measure that is established in our legal system to achieve the handing over of immovable assets, is the **execution for eviction** (= **Räumungsexekution**, § 349 EO). It is also a so-called **direct natural execution** (= Naturalexekution), which means that the act owed by the debtor is imposed by **direct enforcement**.[113] In the application for enforcement, the object being vacated has to be described in detail. If the requirements are fulfilled, the bailiff will set a date by which persons and movable assets will be removed (**eviction**). The eviction will be enforced by the bailiff, if the **creditor** provides the necessary resources: According to § 349 para. 1 EO, the creditor has to provide the **necessary workers** and the **necessary means of transport**. The creditor's not ensuring these means will lead to a suspension of the enforcement proceedings[114] until the creditor submits a fresh application.[115] The execution for eviction is **terminated** with the handing over of the vacated immovable asset.[116]

The obligation for vacation of premises only affects those who have the obligation to provide according to the title. But **third parties** can also be affected: The execution for

[111] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 258 f.
[112] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 259; for further information to this action see *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 163.
[113] See above under II.2.2.
[114] For further information see *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 140.
[115] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 260.
[116] Cf. RIS-Justiz RS0002120.

eviction affects those persons who derive their right to use from the lessee, for example members of the family of the main tenant, subtenants or employees (cf. § 568 ZPO).[117] If the third party claims that he has a right against the creditor, which is an impediment to the execution, he has to bring a third party proceedings **according to § 37 EO**.[118] However, this is only possible as long as the eviction has not already been carried out.

2.4. What particular personal coercive measures does your legal system establish to achieve compliance consisting of certain behaviour? Can this also affect third parties?

The personal coercive measures that are established in our legal system to achieve compliance consisting of certain behaviour are:

- Execution for the purpose of obtaining fungible acts (§ 353 EO)
- Execution for the purpose of obtaining non-fungible acts (§ 354 EO)
- Execution for the purpose of obtaining acquiescence and forbearance (§§ 355 ff EO)
- Execution for the purpose of the issuance of a declaration of intention (§ 367 EO).

The execution for the purpose of obtaining **fungible acts** is a **direct natural execution,** which means that the act owed by the debtor is imposed by **direct enforcement**.

By contrast, the execution for the purpose of obtaining **non-fungible acts** and the execution for the purpose of obtaining of **acquiescence and forbearance** are an **indirect natural execution**, which means that the act owed by the debtor is imposed by coercive penalties.[119]

[117] For further information see *Iby* in *Fasching/*Konecny[2] § 568 ZPO Rz 1 ff.
[118] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 261. For the third party proceedings (§ 37 EO) see *Jakusch* in *Angst*[2] § 37 EO Rz 1 ff, Rz 27 ff.
[119] See above. Cf. *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 257.

The execution for the purpose of **the issuance of a declaration of intention** is a special case:[120] If the defendant is adjudged to make an expression of will (for example an agreement to a contract), this expression is deemed to have been given as soon as the judgement becomes final. Enforcement measures are neither necessary nor legally admissible.[121] Other examples for this type of execution are: the revocation of an insulting remark, the declaration on the registration in the land register, the declaration on the registration or or the cancellation in the commercial register.[122]

Execution for the purpose of obtaining fungible acts (§ 353 EO)

If the title relates to the taking of an action by the obligor, it must be determined whether this action is fungible or non-fungible. A fungible act does not require personal performance by the obligor. It will be enforced by the court authorizing the creditor to have the act performed by somebody else, at the cost of the obligor.[123]

Some examples:

The title is: "*The defendant is sentenced to remove the fence on the property 400 in entry numbers (EZ) 2000 land register Stainz"*

or *"The defendant is sentenced to remove the vehicle, brand: BMW 116i, colour: blue, which is parked on the car park of the plaintiff."*

All of these acts can be performed by the obligor himself, but also by a third party; therefore these acts are **fungible**. The act is fungible (within the meaning of § 353 EO) if it can be performed by the obligor or by a third party, and if it does not make any legal or economic difference for the creditor by whom it is performed.[124]

Execution for the purpose of obtaining non-fungible acts (§ 354 EO)

A non-fungible act (within the meaning of § 354 EO) is a positive act, which cannot be performed by a third party, but only **by the obligor personally**; the implementation must also be entirely dependent **on the will of the** obligor.[125]

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[120] *Rechberger/Oberhammer*, Exekutionsrecht[5] Rz 147.
[121] Cf. OGH 1 Ob 652/52 SZ 25/232; OGH 6 Ob 64/06i; RIS-Justiz RS0001527; *Klicka* in *Angst*[2] § 367 EO Rz 1.
[122] *Seiser*, Exekutionsrecht[9] (2014) 73.
[123] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 266.
[124] *Seiser*, Exekutionsrecht[9] 70; OGH 3 Ob 60/95 SZ 69/160; OGH 3 Ob 44/02w SZ 2002/71; RIS-Justiz RS0004706.
[125] Cf. RIS-Justiz RS0004489.

Some examples:[126]

- the order to leave the matrimonial home according to preliminary injunction[127]
- the issue of testimonials, references etc…[128]
- the obligations to provide information[129] by – for example – the manager of artistic achievements

If, however, the implementation depends on the will of a third party (e.g. approval requirements) as well,[130] and if there is no consent about this (and no executory title against the third party), the execution according to § 354 EO is not possible. In this case, the creditor is entitled to claim for compensatory damages.[131]

In some specific cases, the execution according to § 354 EO is not allowed, for example: enforcement of the undertaking, which concerns the married life or the private life (e.g. the resumption of the marital cohabitation).[132]

Execution for the purpose of obtaining acquiescence and forbearance (§§ 355 ff EO)[133]

Based on the execution title, the obligation owed by the debtor consists of **refraining from an act** or **acquiescing** certain acts. If the obligor does not behave as provided in the execution title, enforcement measures according to § 355 EO are possible.[134] The subject of the execution according to § 355 EO is a claim for acquiescence or forbearance.

Some examples:[135]

- The obligation to refrain from contacting a specific person[136]

[126] See *Seiser*, Exekutionsrecht[9] 71; *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 269.
[127] OGH 2 Ob 485/51 SZ 24/198; RIS-Justiz RS0004414.
[128] OGH 8 ObA 217/00w JBl 2001, 735; RIS-Justiz RS0114814.
[129] OGH 3 Ob 88/95 SZ 69/226; RIS-Justiz RS0004403.
[130] *Klicka* in *Angst*[2] § 354 EO Rz 1.
[131] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 269.
[132] Cf. OGH 6 Ob 132/71 SZ 44/181; RIS-Justiz RS0047809; for other cases see *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 269.
[133] For further information, especially to the concrete procedure view: *Klicka* in *Angst*[2] § 355 EO Rz 9 ff.
[134] *Seiser*, Exekutionsrecht[9] 72.
[135] See *Seiser*, Exekutionsrecht[9] 72; *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 271 f.

- The obligation to acquiesce the access to the property
- Duties to refrain from certain acts according to the law against unfair competition

2.5. Which particular personal coercive measures does your legal system establish to make debtors behave in a certain way (prohibitions) or ceasing certain activities they were doing (injunctions)? Can these also affect third parties?

For the personal coercive measures, which are established in our legal system **to make debtors behave in a certain way**, **see under chapter 2.4.**

In additions to these measures within enforcement procedures (which require a title generally obtained in a prior civil procedure), the Austrian legal system also offers a system of injunctions to make debtor behave in a certain way or cease certain activities they were doing:

- **Injunction to secure pecuniary claims according to § 379 EO**
- **Injunction to secure other individual claims according to § 381 no. 1 EO**
- **Special injunction to secure any other legal sphere according to § 381 no. 2 EO**

Injunction to secure other individual claims according to § 381 no. 1 EO

These other individual claims are claims which are not related to a payment, but **to any other performance, acquiescence or forbearance**. The enforcement of the injunction will not be carried out according to §§ 87 – 345 EO, but according to §§ 346 – 369 EO. (For this type of claims the **preliminary seizure for security (= Exekution zur Sicherstellung)** does not exist[137]; therefore an injunction may be issued if there is a title that is not enforceable yet.[138])

[136] In case of a preliminary injunction according to §§ 382e, 382g EO.
[137] Cf. *Hausmaninger*, The Austrian Legal System (2003) 228.
[138] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 294.

Injunctions to secure other individual claims according to § 381 no. 1 EO are quite common, especially to secure claims for injunctive relief, for example according to the UWG and intellectual property rights.[139]

The provision according to § 381 no. 1 EO is subject to two conditions:[140]

a) the assertion and certification of an **individual claim,**

b) the assertion and certification of an **interest in this injunction.**

§ 381 no. 1 EO requires **a concrete, objective endangering**, which does not depend upon the behaviour of the obligor. Without the injunction, the legal pursuit or the realization of the claim would be thwarted or made essentially more difficult, especially by some alteration of the physical condition.

The injunction according to § 381 no. 1 EO **is strictly linked to the claim**. The injunction must not anticipate the final decision.[141]

§ 382 para. 1 EO provides the following means of providing security (**non-exhaustive enumeration**, no. 1 – 7, not no. 8!):[142]

- (for Claims for restitution) **the deposit in court** or **the impounding of movable property** (no. 1)
- **forced administration of movable or immovable property** (no. 2)
- the **granting of a right of retention** (no. 3)
- the **requirements** for the opponent **to take all action** deemed suitable to preserve the goods or to maintain the current condition (no. 4)
- the **prohibition** for the opponent **to take actions that have negative influence** on the claim object (no. 5)
- the **prohibition of the divestment or mortgaging of real estate** or registered rights (no. 6)

[139] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 294.
[140] *Seiser*, Exekutionsrecht[9] 79.
[141] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 295; *Rechberger/Oberhammer*, Exekutionsrecht[5] Rz 484.
[142] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 295 f; *Rechberger/Oberhammer*, Exekutionsrecht[5] Rz 486 ff.

- the so-called "**Drittverbot"**: If the opponent has a claim for restitution or for performance against a third party, a double prohibition may be adopted (no. 7)
- **personal arrest**: **Imprisonment** according to § 386 EO is only a subsidiary means of providing security, which means that it can be used only if another injunction is not adequate to fully implement the security purpose.

Special injunction to secure any other legal sphere according to § 381 no. 2 EO

The function of these injunctions goes far beyond the hedging purpose (= Sicherungszweck) of the injunctions according to § 379 EO and § 381 no. 1 EO. According to § 381 no. 2 EO, injunctions may be adopted if they prevent the risk of violence or irretrievable damage and they seem to be necessary. These injunctions have mainly settlement function, partly performance/paying function.[143] In contrast to the injunctions according to § 379 EO and § 381 no. 1 EO, the injunctions according to § 381 no. 2 EO are **not strictly bounded by the main claim**.[144] Means of providing security can be adopted, which do not exactly relate to the specific main claim. The injunction may even anticipate the final decision.[145] However, no decision should be made that cannot be reversed in the final decisions.[146]

The provision according to § 381 no. 2 EO is subject to two conditions, which have to be asserted and certificated:[147]

a) the existence of an **unsolved legal right** and

b) the **so-called "Regelungsinteresse"** (= necessity of the injunction to prevent the risk of violence or irretrievable damage).[148]

The risk of violence is supposed to include mainly physical assaults. Examples for the risk of irretrievable damages are: the use of meadows by heavy goods vehicles, imminent infringement of personal rights[149] etc.

The **means of providing security** are listed (non-exhaustive list) in § 382 para. 1 no. 1 – 8 EO, § 382a EO and § 386 EO (imprisonment). Finally, only the means of providing

[143] *Rechberger/Oberhammer*, Exekutionsrecht[5] Rz 477.
[144] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 288 f, 296.
[145] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 288 f, 296 f; RIS-Justiz RS0004942 and RS0009418.
[146] RIS-Justiz RS0009418 (T15, T17).
[147] *Seiser*, Exekutionsrecht[9] 80.
[148] See § 381 Z 2 EO.
[149] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 298; see also OGH 4 Ob 140/07b.

security that are listed in § 382 para. 1 **no. 4** and **no. 5** EO are usable: **requirements and prohibitions for the opponent**.[150]

Additional means of providing security concern in particular **matters of family law**:[151]

- **Provisional maintenance** for spouses, for registered partners in accordance with the EPG and for children (§ 382 para. 1 no. 8 lit a EO).
- Regulating the use and the securing of **marital property and marital savings** according to § 382 para. 1 no. 8 lit c EO.
- **Preliminary maintenance for minors** according to § 382a EO.
- **The protection from domestic violence** in dwellings according to § 382b para. 1 EO.
- **The general protection from violence** according to § 382e EO.

Other means of providing security are:[152]

- The order of **payment of a temporary rent** according to § 382f EO
- Various orders according to the **anti-stalking law** (see § 382g EO)[153]
- The securing of an **urgent requirement of accommodation of a spouse** according to § 382h EO

Finally, there a some injunctions in special laws (e.g.: UWG, UrhG, KartG).[154] The most important case in practice is § 24 UWG (a claim to a cease and desist order under competition law).[155]

<u>Can these also affect third parties?</u>

[150] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 298; *Rechberger/Oberhammer*, Exekutionsrecht[5] Rz 500.
[151] *Rechberger/Oberhammer*, Exekutionsrecht[5] Rz 501 ff.
[152] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 300 f.
[153] For more details see *Kodek* in *Angst*[2] § 382g EO Rz 1 ff.
[154] See *Rechberger/Oberhammer*, Exekutionsrecht[5] Rz 509 ff.
[155] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 302.

The orders/injunctions mentioned above may also affect third parties. However, this depends on the injunction. E.g., according to **§ 382g EO**, the court may prohibit the obsessive person from contacting the stalking victim. The prohibition to enter in contact with certain persons may also affect third parties, if the act is authorized by the stalker.[156]

If rights of third parties have been infringed through use of the enforcement of the injunction, there are some legal remedies against this injunction: The recourse against the decision (e.g.: third party debtor against the so-called Drittverbot[157], the application for postponement according to § 42 EO, a third party proceedings according to § 37 EO or a complaint against the enforcement according to § 68 EO).[158]

2.6. Do specific rules exist concerning intellectual and industrial property?

There are specific rules concerning intellectual and industrial property.

Concerning intellectual property:

Proprietary rights of exploitation (= urheberrechtliche Verwertungsrechte, **§ 25 para. 1 UrhG**, differently fee claims and proprietary rights of use) shall be immune from enforcement proceedings because of money claims.[159] Object of the execution are only rights of exploitation, which can be applied for the purpose of their use or practising. The author´s moral rights and the copyright cannot be assigned, because they are not property rights according to §§ 330 ff EO. Suitable objects for enforcement can only be executive exploitable property rights, which are part of the assets of the obligor.[160] However, proprietary rights of exploitation protect individual interests of the author and are therefore exempt from the execution of monetary claims (§ 25 para. 1 UrhG).[161]

But there are a number of exceptions to this principle. For instance a film producer´s (freely alienable) exploitation rights to commercially produced cinematographic works can be object of enforcement without any restrictions (§ 40 para. 1 sentence 1 UrhG). The execution for the purpose of obtaining acquiescence and forbearance remains

[156] OGH 8 Ob 155/06m Zak 2007/170.
[157] See above.
[158] *Rechberger/Oberhammer*, Exekutionsrecht[5] Rz 534.
[159] *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 255.
[160] *Büchele* in *Kucsko,* urheber.recht § 25 UrhG 1.1.
[161] *Büchele* in *Kucsko,* urheber.recht § 25 UrhG 1.1.

permissible as well, e.g. the enforcement of the claim for delivery of the painting sold by the originator.[162]

Concerning industrial property:

Patents and licenses

Patents may be attached by entry in the patent register (§ 34, § 43 para. 1 PatG). The realization is carried out by forced administration, forced leasing or (subsidiary) forced sale.[163] Licenses may be attached by double prohibition, which is addressed to the licensor and licensee. A license right can be attached independently (such as a patent right) if the patentee consents; otherwise the mortage can only be sold by forced administration or forced leasing of the company (cf. § 37 PatG).[164]

Trademark and design rights

Trademark and design rights are independently marketable and may be levied in execution such as patent rights.[165] According to § 28 para. 2 MSchG, legal disputes about trademarks have to be noted in the trade mark register. The seizure of trademarks is achieved by a prohibition of transfers (= Verfügungsverbot). According to § 22 para. 1 MuSchG, property rights on design rights will be acquired by entry in the design register; a prohibition of transfers has only a declarative meaning. The same applies to utility models according to § 32 GMG.[166]

2.7. Do specific rules exist concerning family law (i.e. visiting rights)?

There are specific rules which concern non-contentious procedures. Generally, decisions that are taken under non-contentious procedures **are to be enforced in accordance with the EO** (cf. § 80 AußStrG):[167] They constitute an **execution title** according to § 1 no. 6 EO. Decisions or settlements on maintenance obligations have to be enforced in accordance with the EO. If they are from a member state of the EU, the provisions of the Regulation (EC) No. 4/2009 on maintenance obligations must be

[162] *Büchele* in *Kucsko,* urheber.recht § 25 UrhG 1.2.
[163] *Oberhammer* in *Angst*[2] § 331 EO Rz 61.
[164] *Oberhammer* in *Angst*[2] § 331 EO Rz 62.
[165] *Frauenberger* in *Burgstaller/Deixler-Hübner*, Komm EO § 331 EO Rz 51.
[166] *Frauenberger* in *Burgstaller/Deixler-Hübner*, Komm EO § 331 EO Rz 51 f. See also *Neumayr/Nunner-Krautgasser*, Exekutionsrecht[3] 254.
[167] For further information see *Pimmer* in *Gitschthaler/Höllwerth,* Komm AußStrG § 80 AußStrG Rz 1 f.

implemented.[168] However, not every single decision in non-contentious procedures can be enforced within the means of the EO. In certain sensitive areas, a special **"non-contentious enforcement"** is needed instead.[169]

Regarding the enforcement of rules of the "custody" or the right to personal contacts, **§ 110 AußStrG** is a special regulation. According to this regulation, enforcement in accordance with the EO is not allowed (cf. § 110 para. 2 first sentence AußStrG).[170] The decision may be enforced in accordance with § 79 AußStrG (cf. § 110 para. 2 second sentence AußStrG): The court shall apply **adequate coercive measures** ex officio or on application.[171] According to § 79 para. 2 AußStrG, such coercive measures are primarily fines and coercive detention (§ 79 para. 2 no. 1 and 2 leg cit). Other coercive measures are listed (non-exhaustive list)[172] in § 79 para. 2 no. 3 – 5 AußStrG. The court may as well impose other measures, which are not listed in § 79 para. 2 AußStrG (e.g. disciplinary measures such as a reprimand, the threat of a coercive detention).[173]

The conditions for an enforcement of rules of the "custody" or the right to personal contacts are listed in § 110 AußStrG: Either there is a judicial decision (no. 1), or an agreement that made under the supervision and with the approval of a court (no. 2), or the custody has been decided before a civil registrar (no. 3).

It should be emphasized that in all measures concerning the custody or the exercise of personal contact, **the best interest of the child must be a primary consideration.** The court has to refrain from the enforcement if the best interests of the child so requires.[174] In this context, § 108 AußStrG needs to be mentioned: If the minor has reached the age of 14 and refuses the personal contact with the parent that is not living in the same household, any applications for regulating such contacts or the enforcement of terms of visitation (= Kontaktregelung) must be dismissed.[175] If, however, a parent refuses the personal contact with his child, the regulation of the

[168] *Mayr/Fucik*, Verfahren außer Streitsachen (2013) Rz 340.
[169] *Mayr/Fucik*, Verfahren Rz 341.
[170] *Beck* in *Gitschthaler/Höllwerth,* Komm AußStrG § 110 AußStrG Rz 1.
[171] OGH 10 Ob 26/05d.
[172] OGH 7 Ob 546/79 EF 35.107; LG Salzburg EF 118.914.
[173] *Maurer/Schrott/Schütz*, Komm AußStrG § 79 AußStrG Rz 3.
[174] For further information see RIS-Justiz RS0008614.
[175] For details see *Beck* in *Gitschthaler/Höllwerth,* Komm AußStrG § 108 AußStrG Rz 5.

personal contact and the enforcement of this regulation are permitted, even against the will of the parent.[176]

3. *Specific measures to pass criminal rulings*

3.1. *Which of the following personal measures exist in your criminal laws? Which of these are general ones and which are applied only for certain crimes? (e.g., domestic or family violence)*

In case of the conviction on probation the Court is able to issue instructions (orders and restraints), provided that it's necessary and appropriate to restrain the offender from committing further crimes.

- suspending employment

§ 27 StGB - Loss of official position:

The conviction of an official due to a criminal offence with intent causes the loss of an official position, if

1. the imposed prison sentence surpasses 1 year,
2. the prison sentence without probation surpasses 6 months or
3. the conviction took place because of the misuse of an authority position (§ 212 StGB).

The conviction of a doctor due to a criminal offence with intent (for a more than 6 months prison sentence) is seen as a breach of discipline according to § 136 ÄrzteG and can also cause a temporary prohibition of the exercise of profession. (§ 139 ÄrzteG)

- prohibiting residence in certain areas

[176] *Beck* in *Gitschthaler/Höllwerth,* Komm AußStrG § 108 AußStrG Rz 27.

In order to avoid custody a judge can issue the instruction not to enter a certain place, a certain apartment (including the seizure of keys) or its direct surrounding. (§ 173 Abs 5 Z 3 + 4 StPO)

Also the report of each change of stay can be instructed (Z 5).

- prohibiting to approach the victim (restraining order)

  In case of violence in apartments (§ 38a SPG) the pledge to forbear every contact with the victim can be a milder mean as well. (§ 173 Abs 5 Z 3 StPO)

- prohibiting any communication

  The possibility of the prohibition of any communication is not listed in § 173 Abs 5 StPO. But as it is a demonstrative numeration, the prohibition of communication can also be a milder mean in order to avoid custody.

  According to § 59 StPO the suspected person, who has been arrested, has the right to contact a lawyer. Basically the communication between the accused person and the lawyer must not be observed.

  As an exception, observation can only be approved, if the suspected person has been arrested because of the danger of suppression of evidence and serious circumstances suggest that the contact with the lawyer could interfere with the gathering of evidence.

  The suspected person has to be informed about the observation. The observation has to end after a 2 months period of time since the arrest began and at least when bringing in the bill of indictment.

- prohibiting them from driving

  The court is able to take off somebody's driving license temporarily in order to avoid custody. (§ 173 Abs 5 Z 6 StPO)

  The commitment of certain more severe crimes (eg murder or serious bodily harm) automatically leads to the driver's licence revocation, because the law assumes a lack of reliability, which is a requirement for holding a driver's licence (§ 7 Abs 3 FSG).

- withdrawing the right to carry weapons

The court is also able to seize other documents of permission temporarily (eg a firearms licence). (§ 173 Abs 5 Z 6 StPO)

Public authorities are obliged to prohibit the possession of weapons and munitions, if there are certain circumstances which certify the assumption that the subject could endanger life, health or freedom of people or someone else's property through the misuse of weapons (§12 WaffG, § 50 SPG). It is not the court's competence to withdraw the right to carry weapons as a penalty.

- withdrawing the right of residence

According to § 67 FPG a residence ban can be issued by the competent authority (Aliens Registration Office) against EEA-citizens, if public safety and order is endangered due to the personal behaviour of the person concerned. This ban can be issued for an unlimited period, if eg the concerning person was sentenced to a more than 5 years prison sentence without probation.

- community work or services

In the case of less severe crimes the possibility of diversion exists. Instead of a formal criminal proceeding the suspected person may – upon proposal by the public prosecutor or the court – do community work under certain circumstances. After a successful diversion the criminal proceeding gets discontinued. Diversion is only admissible, if the suspect agrees (§ 201 StPO).

- a duty to permanently inform of whereabouts

The instruction to report each change of stay or to give constant updates about ones location after a certain period of time is a milder mean in order to avoid pretrial custody (§ 173 Abs 5 Z 5 StPO).

- disqualifying from doing certain activities

§ 220b StGB occupational ban:

In case of an offence against the sexual integrity and self-determination of a minor, the court has to enjoin the offender from following his occupation for a 1 to 5 year long

period, if it involves the education, supervision or other intense contact with minors and the risk that the offender will repeat an offence of this kind some time is given.

If there is the risk that the offender will repeat an offence of this kind and severe consequences are expected, the occupational ban is for an indefinite period of time (the court has to prove the requirements at least every 5 years).

People, who were banned from their occupation, are punishable by an up to 6 months prison sentence or 360 daily rates, if they do not obey.

- obligation to take part in certain educational programmes

--- (not to be imposed by criminal courts, but for instance by family courts)

- being subject to custody

Pretrial custody (§ 173 StPO) is admissible under strict requirements as explained above in **4.4**.

- prohibiting from publishing or diffusing information

- withholding certain services provided or withdrawal of data

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- suspending activities or subjecting them to judicial administration

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3.2. *Do others exist in your regulations? If so, for which cases?*

Assuming that strict requirements are fulfilled (especially the commission of an offence and the danger of committing an offence with severe consequences in the future), involuntary commitment is admissible for mentally disturbed or drug abusing offenders or dangerous reoffenders – given its proportionality (§§ 21 ff. StGB).

3.3. *Do special personal penalties exist for crimes committed by legal entities? Which ones?*

Next to the punishability of natural persons the VbVG states the liability of legal entities for crimes, if

1. the crime was committed for their own benefit or
2. obligations are violated, which are directed by the legal entity itself.

The legal entity is responsible for crimes by a decision maker, if the decision maker acted culpably and against the law.

The legal entity is also responsible for crimes by employees, if the employees acted culpably and against the law and the committal of the offence was enabled or essentially facilitated by a decision maker, who neglected the due diligence – especially if essential technical, organisational or personnel measures for the prevention of such crimes were omitted.

Breaches are penalized by a fine additional to the personal penalties of the natural persons. Daily rates can reach from 50 € to 10.000 €. The maximum number of daily rates is 180, if the offence is punishable by a 20 years- or life-long prison sentence.

If the fine gets reduced on probation, the court is able to issue instructions (§ 8 VbVG).

4. *Can one go to prison in your country for owing money? In which cases? How is this applied?*

Basically one doesn't have to go to prison just for owing somebody else's money, but not being able to repay the debt.

As an exception, intentional fraudulent bankruptcy is sanctioned with six months to ten years imprisonment (§ 156 StGB).

Intentional fraudulent bankruptcy arises if someone intentionally (i) conceals, evades, sells or damages part of the assets of the debtor, or (ii) fosters the pretence of or acknowledges a (non-existent) debt, or (iii) in some other way reduces or pretends to reduce one's assets and as a consequence at least one creditor suffers a disadvantage.

According to § 158 StGB, intentional preference of a creditor is sanctioned with a maximum of two years imprisonment. There is an intentional preference of a creditor if

the debtor gives preferential treatment to one of its creditors after bankruptcy has occurred and if the debtor knows of this fact and at least one creditor suffers a disadvantage.

According to § 159 StGB, gross negligence leading to insolvency and gross negligent disregard of creditors' interests are sanctioned by imprisonment of up to one year. Such actions include (i) destroying, damaging, making unusable, squandering or giving away an important part of the assets, (ii) spending excessive amounts of money in speculative ventures or in high risk business ventures which are not related to the regular scope of business, (iii) incurring excessive costs despite financial circumstances or business capacity, (iv) failing to keep the books or business documents in a way that gaining an overview of the actual financial and profit situation is very difficult, or failing to take other agreed and necessary controlling mechanisms which make it possible to obtain such overview, (v) failing to prepare mandatory annual reports or preparing such reports late or in a way that an overview of the actual financial and profit situation is very difficult.

In case of a financial loss of more than 800.000 €, the offence is punishable by a prison sentence up to 2 years (§ 159 Abs 4 StGB).