Country Report: Austria

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1. Introduction and general overview

As of mid-2024 Austria has not hosted any significant collective private enforcement of data protection law through civil litigation, despite some of the CJEU's recent landmark cases on the GDPR resulting from preliminary references of Austrian courts (UI v ÖP C-300/21), and Austria being home to one of the most active data-protection-focussed NGOs in Europe (None of Your Business, "**NOYB**"). This lack of development, compared to other countries, appears to be largely due to the legal framework's direct or indirect hindrances to collective redress.

On the one hand, Austria's restrictive implementation of Article 80 of the General Data Protection Regulation (Regulation (EU) 2016/679) ("**GDPR**") —which excludes NGOs from litigating liability claims on behalf of data subjects both independently and upon specific mandate—has long been an issue. On the other hand, Austria has historically lacked a proper legislative framework for collective redress. In the field of consumer law, consumer associations have merely been authorized to bring actions for injunctions and declaratory relief in the interests of consumers, while two 'general' instruments of collective redress have developed only in practice. These are based on the assignment of claims to collective entities that litigate them in their own name. As a result, numerous data protection cases are brought before the Austrian Data Protection Authority (*Datenschutzbehörde*, "**DSB**"), while private law cases are often litigated individually or in aggregated forms.

There is a relatively well-developed market for the assignment and possibly bundling of individual claims by specialized players in the field, often leading to settlements, as was famously the case with over 2,000 data subjects affected by ÖP's unauthorized data processing. In this scenario, law firms or legal-tech companies litigate in their own-name claims assigned by individual subjects, and proceed to litigate them either on a separate basis, or aggregating them under § 227 öZPO (*österreichische Zivilprozessordnung*, Austrian Code of Civil Procedure), when they have a fundamentally similar legal basis and involve identical key factual or legal issues, even if the specific facts differ. This scenario increasingly applies in cases of data protection violations, such as data breaches or widespread unauthorized use of data, where a single infringement affects in similar ways a multitude of subjects. This situation may change with the implementation of the EU Representative Action Directive ("**RAD**"), which was enacted in July 2024 after a delay of almost two years.

Section 2 of this report gives a brief description of the legal framework which applies to collective litigation also, or specifically, in the field of data protection law. It addresses four key issues: (i) opt-in regime, (ii) limitation period, (iii) recognition as a qualified entity, and (iv) funding.

Section 3 identifies the main collective actors working in the field of data protection in Austria, either specifically, or as an element of general consumer protection.

In the absence of proper, collective private parties' litigation in the field, Section 4 describes some cases where prospective claimants have flagged their intention to explore future possibilities of claims.

2. Legal Framework

a. National implementation of Art. 80 GDPR

§ 28 of the Federal Act concerning the Protection of Personal Data (*Bundesgesetz über den Schutz personenbezogener Daten,* "**DSG**") implementing Art. 80 GDPR, gives data subjects the right to mandate not-for-profit bodies only 'to lodge the complaint on his or her behalf and to exercise the rights referred to in § 24 to § 27 on his or her behalf'– namely the right to bring complaints with the Data Protection Authority and with the Federal Administrative Court. Hence, Austrian law implicitly excludes the possibility for NGOs to bring claims for liability and compensation under § 29 DSG (implementing Art. 82 GDPR), not only *motu proprio* but also upon a specific mandate from data subjects.

b. National framework on collective redress

- **Action for injunctive relief (*Unterlassungsklage*) under Consumer Protection Act (*Konsumentenschutzgesetz*, "KSchG") and Unfair Competition Act (*Bundesgesetz gegen den unlauteren Wettbewerb*, "UWG")**

Consumer collective actions originally only consisted of the traditional representative action for injunctive relief. With this action, an association qualified under § 29 KSchG could bring a claim to assert its own right for the protection of the public interest, in case of violation of specific legal provisions in the field of consumer law (e.g. unfair contract terms), exclusively seeking injunctive relief. If a claim is successful, the trader is prohibited from perpetuating the infringement under § 28, 28a KSchG and § 14 UWG, and the association can enforce this prohibition. No further *direct* legal advantages derive to individual consumers.

The *Musterverfahren* and the *Sammelklage* were developed by legal practice in the early 2000s to obtain something closer to a proper class action. In both cases, claims are assigned to collective entities which litigate them in their own name.

- ***Musterverfahren österreichischer Prägung***

The *Musterverfahren* seeks to reach a model judgement that will have (solely) *de facto* binding effect on the individual consumers, who are required to take up individual actions to fully benefit from the model decision.

The association listed in § 29 KSchG can present 'objectively accumulated' claims assigned to them under § 227 öZPO as a test case before the Austrian Supreme Court. Through this procedure, the consumer organization can ask for a broad set of measures, including injunctive relief, action for performance, declaratory judgements or 'judgements to shape the law'. If the consumer association

settles, it is obliged to transfer any payment to the individual assignors. If no settlement occurs, then the matter is decided by a 'model judgment', which will have a full binding effect *only* on the consumer organization. The individual subjects affected will have to bring separate claims but can rely on the *de facto* binding effect of said 'model judgement', benefiting from an easier and quicker route to redress.

Individual consumers who have *not* assigned the claim are not prevented from bringing individual claims and could still benefit from the existence of the model judgment.

In accordance with § 1497 ABGB (*Allgemeines bürgerliches Gesetzbuch*, Austrian Civil Code), filing a claim by 'assignment for collection' does not stop the limitation period for bringing an individual claim. Considering the particularly short limitation period of many claims (3 years), and that it can sometimes take years for a 'test case' to reach the Supreme Court, there is a risk that claims with the same cause of action will become time-barred, before the release of the 'model judgment'. Therefore, many other parallel proceedings are often initiated out of sheer caution, even if model proceedings have already been initiated.

- ***Sammelklage österreichischer Prägung***

The *Sammelklage* has a broader scope of personal and material application and is developed around the specificity of third-party litigation funding. Individual claimants benefit directly from the judgment without the need for follow-up claims.

In the so-called "class action lawsuit under Austrian law" claims are bundled up and transferred to a singular claimant based on § 227 öZPO, provided that the claims have a similar cause of action and essentially identical issues of law or fact. Each case will be examined individually within the same proceeding, but certain elements might be solved jointly in interim decisions. While anyone can, in principle, be assigned a claim, for the associations under § 29 KSchG and § 502 Abs. 5 Nr. 3 öZPO the appeal restrictions of the öZPO in para. 2 and 3 *leg cit* no longer apply, hence having a preferential standing in these proceedings. Claimants normally seek damages and disgorgement of profit/unjust enrichment.

Third-party litigation funding companies play a significant role here. After careful assessment of the claim's prospect of success (acceptance rate: circa 10-5%), funders sign a contract with the claimant where they assume all legal costs, *vis a vis* significant share of the proceeds of the lawsuit (circa 30-40%), and possibly a minimum secured return. They are kept informed about the development of the proceedings and exert a relevant degree of influence on the litigation strategy (e.g. withdrawal and waiver of a claim require their consent). Prospects of financing are increased because of the higher value of the joint claims and their impact on the (degressive-based) legal costs.

Additionally, since cases are brought through assignment to professional entities, they cannot benefit from the 'domestic' forum for consumers under Art. 17 Brussels I Regulation.

The structure of the Austrian-type class action entails long and costly proceedings, and defendants tend to strongly contest the admissibility conditions (especially the objective similarity of the claim), also to ensure that non-assigned similar claims are time-barred.

The transposition of the Representative Action Directive features a new Representative action for injunctive relief (*Verbandsklage auf Unterlassung*) and a new Representative action for redress

(Verbandsklage auf Abhilfe). These two new actions were established with the long-delayed implementation of the Representative Actions Directive on July 18, 2024, through the *Verbandsklagen-Richtlinie-Umsetzungs-Novelle* ("**VRUN")**. The VRUN introduces amendments to already existing legislative acts and creates a new law – the Qualified Entities Act (*Qualifizierte Einrichtungen Gesetz* – "**QEG**"), establishing the requirements in relation to the recognition, rights, and responsibilities of the qualified entities, as well as the corresponding obligations of the supervisory authorities and courts.

- ***Verbandsklage auf Unterlassung (2024)***

Qualified entities can file an action for an injunction against any legal violation by an entrepreneur that impairs or threatens to impair the collective interests of consumers (§ 619 Abs. 1 öZPO). After the injunction proceedings, consumers still have six months to assert their redress claim by filing an individual action or joining a collective action (see below).
When the case is pending, the limitation period for consumer claims against the defendant that are related to the subject matter of the action is suspended until the proceedings have been concluded with final and binding effect (§ 619 Abs. 4 öZPO).

- ***Verbandsklage auf Abhilfe (2024)***

Qualified entities can assert claims of at least 50 consumers against the same defendant based on essentially similar facts (§ 624 Abs. 1 öZPO). In the first stage, the court examines the general and specific procedural requirements and issues a decision on the conduct of the procedure (§ 626 öZPO) that must be subsequently published (§ 627 öZPO). Other consumers can still join the action up to three months after the court's decision has been published. Qualified entities can refuse this late opt-in without stating any reasons (§ 628 Abs. 1 öZPO). However, when consumers join the proceeding, they cannot withdraw their participation (§ 628 Abs. 5 öZPO).

It is possible to submit an interim application for a declaration about rights or legal relationships on whose existence or non-existence the decision in the legal dispute depends in whole or in part and which has effects on all consumers affected by the asserted claim in the same way (§ 624 Abs. 2 öZPO). This allows for bringing the individual aspects of each case outside of the proceedings.

Joining a collective action for redress suspends the expiry of limitation periods retroactively from the time the collective action is brought before the court (§ 635 öZPO). After a collective action for redress has been rejected, joined consumers still have three months from the date the rejection decision becomes final to assert their claim in individual proceedings or by joining a collective action.

Although the qualified entity, not the individual consumers, is a party to the proceedings, the VRUN stipulates as a principle that the defendant company must make payment to the consumers if it loses. However, at the request of the qualified entity until the end of the oral hearing at the first instance, the court must declare that payment can only be made to the qualified entity in the discharge of debt (§ 633 öZPO).

Legal persons established under Austrian law can apply for recognition as a qualified entity for cross-border collective actions if they meet the requirements stipulated in § 1 QEG, with the Federal Cartel Attorney (*Bundeskartellanwalt*) deciding on the recognition. The requirements in question include, *inter alia*, twelve months of public activity to protect consumer interests and legitimate interest in

protecting consumer interests as a statutory purpose, as well as the not-for-profit nature of the activity. Interestingly, a higher threshold applies to the recognition of qualified entities for domestic actions compared to cross-border actions.

The financing of collective actions by third parties is permitted and there is no percentage limit for the contribution of litigation funders (§ 6 QEG). However, third-party financing by competitors of the defendant entrepreneur or persons economically or legally dependent on him is not permitted. Qualified entities may also charge a fee for joining a collective action, provided the latter does not exceed 20% of the amount claimed or the general threshold of 250 euros (§ 9 Abs. 4 QEG). Actions can only be filed with the Commercial Court of Vienna (*Handelsgericht Wien*).

3. Main Actors

In Austria, several actors are involved in different forms of activities that directly impact data protection litigation.

First, Austria hosts one of the most well know association in the field, NOYB, data protection advocacy group and a registered non-profit organization co-founded by Austrian lawyer and privacy activist Max Schrems, whose various activities focus on commercial privacy and data protection violations on a European level.

Secondly, due to the overlap between consumer and data protection law, an important role is played by consumer associations. In Austria, the main entity in charge of consumer protection is the *Verein für Konsumenteninformation* ("**VKI**"), a non-profit organisation founded in 1960, whose mission is to represent and strengthen the consumer interest by informing and educating consumers about their rights and responsibilities, offering help and dispute resolution services to members, and undertaking court cases on behalf of the Federal Ministry of Social Affairs, Health, Care and Consumer Protection and the Chambers of Labor, through all available instruments described in Section 2. In this sense, while not having a public entity status, the VKI acts on behalf of the Government and obtains public funding for its activities, including collective redress. Other important consumer associations include the *Verbraucherschutzverein* ("**vsv**"), an independent cross-border organization, which represents the interests of consumers, and one-person companies or small and medium-sized enterprises, in cases of mass damages.

Last, but not least, the assignment of claims, also in the form of *Sammelklage* is brought forward by legal platforms specialized in claim-assignment and litigation of individual or aggregated claims. Those entities enable affected parties to assign their claims to the organization, which then coordinates legal representation and litigation financing, removing the need for legal expenses insurance and minimizing risk. One such legal platform (Cobin Claims) has also assisted many data subjects in the aftermath of the *Österreichische Post* scandal (see Section 4 below). As a non-profit foundation, the platform is allegedly funded through crowdfunding, donations, and case-related contributions.

Public enforcement is entrusted to the national data protection authority. Also due to the very high activity of NOYB, the DSB is known for receiving a very high number of complaints. At the time of writing, the highest fine reportedly imposed (18 million) concerned the aforementioned *Österreichische Post* scandal.

4. Legal Proceedings

The objective of this last section is to provide an overview of pending and adjudicated data protection CPE proceedings as per 31 August 2024.

In the absence of proper collective private parties' litigation in the field, this Section describes three *Unterlassungsklagen* brought by VKI for violation of consumer law which touch upon data-protection issues, and two cases where prospective claimants have publicly flagged their intention to explore future possibilities of claims. With the implementation of the RAD, the number of cases filed is expected to grow significantly.

Verein für Konsumenteninformation vs Laudamotion GmbH	
Date of Initiation of the Claim	2022
Summary	VKI's won a representative action to declare illegitimate and inadmissible Laudamotion's data protection clauses, for being non-transparent within the meaning of Section 6 Paragraph 3 KSchG and for violating Art 6 Paragraph 1 and Art 13 Paragraph 1 GDPR.
Claimant	*Verein für Konsumenteninformation*
Defendant	*Laudamotion GmbH*
Type of Action	*Verbandsklage* (§ 28 KSchG)
Remedies Sought	Injunction
Status/Outcome	Held that a data protection clause in which data subjects "acknowledge" the processing of personal data constitutes consent. If this does not state the purposes in such a way that the data subject can recognize what his or her data is specifically being used for, it is non-transparent.

Verein für Konsumenteninformation vs Whatsapp Ireland Limited	
Date of Initiation of the Claim	2022
Summary	The VKI sued WhatsApp on behalf of the Ministry of Social Affairs. The reason for the lawsuit was a change in WhatsApp's terms of use in 2021. In the course of this, the VKI also examined WhatsApp's terms of use and sued for five more clauses. The Vienna Higher Regional Court judged all clauses sued to be inadmissible.
Claimant	*Verein für Konsumenteninformation*
Defendant	Whatsapp Ireland Limited
Type of Action	*Verbandsklage* (§ 28 KSchG)
Remedies Sought	Injunction

Status/Outcome	Clauses in the Terms of Services were declared illegitimate and inadmissible, considered in violation of the transparency requirement according to Section 6 Paragraph 3 KSchG

Verein für Konsumenteninformation vs Wiener Städtische Versicherung AG	
Date of Initiation of the Claim	2022
Summary	VKI sued *Wiener Städtische Versicherung AG* on behalf of the Ministry of Social Affairs over clauses in its data protection notice. The Supreme Court declared all six clauses in question to be illegal.
Claimant	*Verein für Konsumenteninformation*
Defendant	*Wiener Städtische Versicherung AG*
Type of Action	*Verbandsklage* (§ 28 KSchG)
Remedies Sought	Injunction
Status/Outcome	The Supreme Court examined the clauses in the data protection notice criticized by the plaintiff and concluded they were non-transparent and grossly discriminatory. Thus, they were declared invalid.

NOYB vs CRIF and AZ Direct (pending)	
Date of Initiation of the Claim	2021
Summary	Address trader AZ Direct has been illegally providing personal information such as name, address, date of birth and gender of Austrians to the credit rating agency CRIF, which has illegitimately been using the data to calculate people's (supposed) creditworthiness.
Claimant	NOYB
Defendant	CRIF and AZ Direct
Type of Action	Verbal assignment of claims from 7 individuals, based on para 1392 ABGB.
Relationship with public enforcement	National data protection authority has ruled these practices unlawful (breach of art 5 and 6 GDPR) with two decisions but has not adopted any measures to stop the illegal data processing.
Remedies Sought	NOYB is asking for an injunction and damages (massive annoyance and loss of control for infringement and its modalities), and restitution for unjust enrichment.
Status/Outcome	The case is still pending. NOYB has stated that it is currently exploring the possibility of presenting it as a 'proper' class action proceeding. On 17.06.2024, NOYB filed a statement

	responding to AZ Direct's appeal against the DSB's decision finding a violation of the purpose limitation principal.

NOYB vs GIS – possible future case, not filed yet	
Date of Initiation of the Claim	**---** (possible future action)
Summary	After a hacker stole 9 million Austrian registration data stored in GIS (*Gebühren Info Service GmbH*), Dr. Florian Scheiber and Mag. Robert Haupt decided to issue a call for registration for collective action to claim compensation on behalf of the victims. The DSB confirmed that the actions by GIS constituted a breach of GDPR provisions 'due to a lack of appropriate technical and organizational measures (...) [that] made it possible for personal data of the complaining party (...) to become unlawfully accessible to at least a third person (hacker)". As of November 2023, 2.000 affected by the breach contacted the lawyers.
Claimant	---
Defendant	---
Type of Action	Collective action for damages (type not mentioned specifically in official records)
Relationship with public enforcement	The data protection authority ruled in the first instance that GIS had generally violated the right to confidentiality. GIS appealed against this in all cases and the proceedings are now in the second instance at the Federal Administrative Court in Vienna (*Bundesverwaltungsgericht Wien*).
Remedies Sought	NOYB has publicly stated that it is considering asking for an injunction and damages (massive annoyance and loss of control for infringement and its modalities), and restitution for unjust enrichment.
Status/Outcome	NOYB has stated that it is currently exploring the possibility of presenting it as a 'proper' class action proceeding, despite the lack of implementation of the RAD. Updates are expected now that the RAD has been implemented