Dealing with hatred on the internet: an overview of the Austrian mandating procedure

Lidando com o ódio na Internet: uma visão geral do "mandating procedure" austríaco

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Abstract: This paper aims to provide an overview of the Austrian Mandating Procedure, which intends to enable individuals affected by particularly massive cases of violations of personality rights in electronic communications networks to enforce their claims for an omission order quickly and cost-effectively. Due to the parallels between the new mandating procedure and the Austrian order for payment procedure, this paper will first describe the order for payment procedure and then take a closer look at the mandating procedure.

Keywords: Civil Procedure Law – Mandating procedure – Order for payment procedure – Hate on the internet – Omission order – Violation of personality rights.

Resumo: Este artigo tem como objetivo fornecer uma visão geral do "mandating procedure" austríaco, que pretende permitir que os indivíduos afetados por violações feitas em massa a direitos da personalidade em redes de comunicações eletrônicas façam valer seus pedidos de ordem de omissão, de forma rápida e econômica. Devido aos paralelos entre o novo "mandating procedure" e o procedimento austríaco de injunção de pagamento, este texto descreverá, primeiro, o procedimento de injunção de pagamento e, em seguida, examinará mais detalhadamente o "mandating procedure".

Palavras-chave: Direito Processual Civil – "Mandating procedure" – Procedimento de ordem de pagamento – Ódio na internet – Ordem de omissão – Violação de direitos da personalidade.

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1. INTRODUCTION

According to recent European studies, almost every second person has experienced hate online. Around 15% have already been targeted themselves[1] and the trend is rising, both in Austria and Germany.[2] Racism, sexism, hatred against inter*, trans* and non-binary people and hatred based on ideology are particularly common sources of such attacks.[3] As part of the research report[4] on a representative survey on how hate on the internet threatens democratic discourse, the German Competence Network against Hate on the Internet (*"Deutsches Kompetenznetzwerk gegen Hass im Netz"*) found that hatred against politicians, scientists, media professionals and medical doctors has increased significantly during the COVID pandemic, that false information and disinformation has been spread many times faster since Russia's attack on Ukraine and that in particular female climate activists are often exposed to violence or violent fantasies online. Antisemitic attacks, anti-Muslim racism and hate speech against refugees have also increased. As a result of the proclamation of the so called *„#stolzmonat"*[5] as part of a far-right social media campaign against Pride Month, hostility against queer and trans

1. Das NETTZ, Gesellschaft für Medienpädagogik und Kommunikationskultur, HateAid und Neue deutsche Medienmacher*innen als Teil des Kompetenznetzwerks gegen Hass im Netz, Lauter Hass – leiser Rückzug, p. 28 et seqq., 37 (available under: [https://kompetenznetzwerk-hass-im-netz.de/wp-content/uploads/2024/02/Studie_Lauter-Hass-leiser-Rueckzug.pdf]).
2. For Austria: 6. #GegenHassimNetz Bericht der ZARA-Beratungsstelle September 2022 – August 2023 (available under: [https://assets.zara.or.at/media/ghinbericht/6_GHiN_Bericht_PDF.pdf]); for Germany: Kompetenznetzwerk (FN 1) p. 11 et seq., whereby in these cases individuals particularly often stated that the hatred directed at them related to their appearance or their physical and mental health.
3. 6. #GegenHassimNetz Bericht (FN 2) p. 6; similar also Kompetenznetzwerk (FN 1) p. 39.
4. Kompetenznetzwerk (FN 1) p. 11 et seq.
5. The term is a literal translation of "Pride Month" and has a derisive connotation.

people is on the rise as well.[6] In many cases, the consequences of hate speech, insults and similar offences also manifest themselves in the non-digital world and reinforce racist and patriarchal power relations:[7] On the one hand, it is to be feared that digital hatred will be followed by physical acts of violence; on the other hand, the psychological, emotional and psychosomatic consequences for those affected can be enormous.[8]

Austrian lawmakers addressed the global social phenomenon of online hatred and the question of how to react as quickly and consistently as possible to racist, sexist or heteronormative attacks in the digital space at a legal level back in 2020 with the Hate on the Internet Prevention Act ("Hass-im-Netz-Bekämpfungs-Gesetz – HiNBG").[9] As part of this legislative package, which also brought about changes in civil law, criminal law and criminal procedural law,[10] the mandating procedure ("*Mandatsverfahren*") was introduced into the Austrian Civil Procedure Code ("Zivilprozessordnung – ZPO"[11]). It is an optional special procedure,[12] intended to enable those affected by *particularly*

6. Analysis of the Amadeu Antonio Stiftung: #Stolzmonat – Rechtsradikale Social Media Kampagne gegen den Pride Month, dated 06.06.2023 (available under: [https://www.amadeu-antonio-stiftung.de/stolzmonat-rechtsradikale-social-media-kampagne-gegen-den-pride-month-100133/]); Report of the Verfassungsschutz Baden-Württemberg, Mit Kampfsport und Deutschlandflagge: „Identitäre Bewegung" propagiert den „Stolzmonat", dated June 30th 2023 (available under [https://www.verfassungsschutz-bw.de/,Lde/Die+_Identitaere+Bewegung_+propagiert+den+_Stolzmonat]).
7. 6. #GegenHassimNetz Bericht (FN 2) p. 7.
8. Legislative materials ("ErläutRV") 481 BlgNR 27. GP p. 1 (available under: [https://www.parlament.gv.at/gegenstand/XXVII/I/481]); for Germany: Kompetenznetzwerk (FN 1) p. 53 et seqq.
9. Bundesgesetz, mit dem Maßnahmen zur Bekämpfung von Hass im Netz getroffen werden (Hass-im-Netz-Bekämpfungs-Gesetz – HiNBG, BGBl I 2020/148, p. 1 (available under: [https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2020_I_148/BGBLA_2020_I_148.pdfsig]); cf. ErläutRV 481 BlgNR 27. GP (FN 8) p. 1; *Mokrejs-Weinhappel*, Zivilprozessuale Maßnahmen zur Bekämpfung von „Hass im Netz", Österreichische Jurist:innenzeitung ("ÖJZ") 2021, p. 53 (53).
10. For an overview of the changes in criminal law and criminal procedure law see for example *Kurdna*, Änderungen im materiellen Strafrecht durch das HiNBG, Österreichisches Anwaltsblatt ("AnwBl") 2021, p. 376; *Salimi*, Hass im Netz, Österreichische Jurist:innenzeitung ("ÖJZ") 2022, p. 16.
11. Gesetz vom 1. August 1895, über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung – ZPO), RGBl 1914/118 in its version of BGBl 2023/77, p. 1 (available under: [https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001699]).
12. *Koller* in *Kodek/Oberhammer*, ZPO-ON (2023) § 549 ZPO margin 1 et seq.; cf. also *Kloiber* in *Fucik/Klauser/Kloiber*, ZPO, 13th edition (2022) § 549 ZPO Anm; *Mokrejs-Weinhappel* (FN 10) p. 53 (53); *Ristic/Frybert*, Das neue Mandatsverfahren nach dem Hass-in-Netz-Bekämpfungs-Gesetz, Juristische Ausbildung und Praxisvorbereitung ("JAP") 2020/2021, p. 239 (239).

massive cases[13] of violations of personality rights in electronic communications networks to enforce their claims for an omission order quickly, cost-effectively and in a low-threshold manner.[14]

The mandating procedure was modelled on procedures that have already been well-established in Austria.[15] In terms of its structure, it is largely influenced by the order for payment procedure ("*Mahnverfahren*") regulated in §§ 244 et seqq. ZPO,[16] which is used to enforce monetary claims and is of enormous practical importance.[17] Due to the parallels between the new mandating procedure and the order for payment procedure, this paper will first describe the Austrian order for payment procedure and then take a closer look at the mandating procedure pursuant to § 549 ZPO. Finally, the procedural analysis is supplemented by a debate of various legal policy aspects and initial practical experiences in connection with the mandating procedure.

2. ORDER FOR PAYMENT PROCEDURE

2.1. Overview and Application Requirements

The Austrian order for payment procedure is regulated in §§ 244 et seqq. ZPO[18] and became a mandatory (standard) procedure for the enforcement of *monetary claims up to EUR 75,000* (currently approximately 430,000 Reais) through the 1983 amendment to the Civil Procedure Code.[19] This procedure enables the plaintiff to obtain an

13. ErläutRV 481 BlgNR 27. GP (FN 8) p. 9.
14. *Dokalik/Mokrejs-Weinhappel*, Hass im Netz – Das Formblatt zum neuen Mandatsverfahren nach § 549 ZPO, Österreichische Richterzeitung ("RZ") 2021, p. 6 (6); *Kloiber* in *Fucik/Klauser/Kloiber* (FN 12), § 549 ZPO Anm; *Ristic/Frybert* (FN 12), p. 239 (239); cf. *Faber*, Der Zugang zum OGH bei Eingriffen in Persönlichkeitsrechte, in Festschrift Konecny (2022) p. 89 (90).
15. ErläutRV 481 BlgNR 27. GP (FN 8) p. 10; *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (6); *Kloiber* in *Fucik/Klauser/Kloiber* (FN 12), § 549 ZPO Anm; *Galla*, Hass im Netz (2021) p. 68; *Mokrejs-Weinhappel* (FN 10), p. 53 (53); *Pierer*, Das Mandatsverfahren nach § 549 ZPO, Medien und Recht ("MR") 2021, p. 27 (27); *Ristic/Frybert* (FN 12), p. 239 (239).
16. Cf. ErläutRV 481 BlgNR 27. GP (FN 8) p. 10; *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (6); *Kloiber* in *Fucik/Klauser/Kloiber* (FN 12), § 549 ZPO Anm; *Ristic/Frybert* (FN 12), p. 239 (239).
17. *Kodek* in *Fasching/Konecny*, Zivilprozessgesetze III/1, 3rd edition (2017) Vor § 244 ZPO margin 13; cf. *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 5.
18. A special provision for order for payment proceedings before the district courts can be found in § 448 ZPO.
19. Bundesgesetz vom 2. Feber 1983, mit dem Vorschriften über das zivilgerichtliche Verfahren geändert werden (Zivilverfahrens-Novelle 1983), BGBl 1983/135, p. 673 (available under: [https://www.ris.bka.gv.at/Dokumente/BgblPdf/1983_135_0/1983_135_0.pdf]); *Kodek* in *Fasching/Konecny* (FN 17), Vor § 244 ZPO margin 16; *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 4.

enforcement title quickly and easily if the asserted claim is not disputed.[20] This acceleration of proceedings is essentially achieved by the court merely checking the *plausibility* of the claim and issuing a *conditional payment order*.[21] The defendant then has the option of initiating ordinary proceedings by lodging an objection against the payment order;[22] if he/she fails to do so, the payment order becomes legally binding and enforceable. A further prerequisite for the applicability of the order for payment procedure is that the defendant has his/her *domicile, habitual residence or registered office in Austria* (§ 244 ZPO). However, if the defendant has his/her domicile, habitual residence or registered office abroad, the plaintiff has the option of pursuing his/her monetary claim in a European order for payment procedure in accordance with the European Order for Payment Regulation (EC) 1896/2006, which was created based on the Austrian order for payment procedure,[23] but will not be explained further here.

2.2. Initiation of the Order for Payment Procedure

2.2.1. Formal Requirements

The order for payment procedure is largely carried out using automated data processing (§ 250 (1) ZPO).[24] The action for payment must be submitted using an official form (§ 1 AFV[25]) or a specially formatted document (§ 2 AFV).[26] If the action for

20. *Fucik* in *Rechberger/Klicka*, Kommentar zur ZPO, 5th edition (2019) § 244 ZPO margin 1; *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 3; *Ziehensack* in *Höllwerth/Ziehensack*, ZPO Taschenkommentar (2019) § 244 ZPO margin 1.
21. *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 2; *Kodek* in *Fasching/Konecny* (FN 17), Vor § 244 ZPO margin 1; *Ziehensack* in *Höllwerth/Ziehensack* (FN 22), § 244 ZPO margin 1.
22. See f. *Kodek* in *Fasching/Konecny* (FN 17), § 248 ZPO margin 1 et seqq.
23. Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (available under: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006R1896]); cf. *Denk* in *Neumayr/Geroldinger*, Praxiskommentar Internationales Zivilverfahrensrecht II (2021) Vor Art 1 EuMahnVO margin 14; *Kodek* in *Fasching/Konecny*, Zivilprozessgesetze V/3, 3rd edition (2023) Vor Art 1: Einleitung zur EuMahnVO margin 41, 46.
24. *Fucik* in *Rechberger/Klicka* (FN 22), § 244 ZPO margin 2; *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 4.
25. Regulation on formal requirements for automated data processing in legal proceedings: Verordnung des Bundesministers für Justiz über Formerfordernisse in mit Hilfe automationsunterstützter Datenverarbeitung durchgeführten gerichtlichen Verfahren sowie Erstellung von Erledigungen in gekürzter Form (ADV-Form Verordnung 2002 – AFV 2002), BGBl II 2002/510 in its version of BGBl II 2021/578, p. 1 [available under: [https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20002391&FassungVom=2023-12-16]).

payment does not comply with the legally required form, the plaintiff must be given instructions to improve the action in accordance with § 85 ZPO.[27]

2.2.2. Jurisdiction

The *subject-matter jurisdiction* for the order for payment procedure is based on the amount of money sought: For actions up to EUR 15,000 (currently approximately 88,000 Reais), according to the "general rules", jurisdiction falls withing the district courts (§ 49 (1) JN ["Jurisdiktionsnorm – JN"[28]]), while the regional courts (§ 50 JN) have jurisdiction for actions above this amount. *Territorial jurisdiction* is also determined based on the "general rules", so that the place of jurisdiction depends on the legal basis of the monetary claim asserted; in principle, the "general place of jurisdiction" of the defendant can be invoked (§ 65 JN), which is located at the defendant's domicile or the usual place of residence (§ 66 JN; or in the case of legal entities: at their registered office; see § 75 JN).

2.3. Judicial Examination of the Action for Payment

Until the scheduling of a hearing is required, the order for payment procedure falls within the *functional competence* of the "court auxiliaries" ("*Rechtspfleger*"; § 16 (1) no. 1 lit. a RpflG)[29] These are specially trained, non-judicial bodies of the judiciary, which are assigned to assist the judges in dealing with the workload and safeguarding of fundamental procedural rights for simple first-instance activities.[30] Court auxiliaries are bound by the instructions of their superior judge.[31]

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26. *Kellner* in *Kodek/Oberhammer* (FN 12), § 251 ZPO margin 8; the form can be found on the website published by the Federal Ministry of Justice: [https://justizonline.gv.at/jop/web/formulare/gruppe/1/9/36].
27. *Fasching*, Lehrbuch des österreichischen Zivilprozeßrechts, 2nd edition (1990) margin 1643/3; *Kellner* in *Kodek/Oberhammer* (FN 12), § 251 ZPO margin 9; *Ziehensack* in *Höllwerth/Ziehensack* (FN 22), § 244 ZPO margin 4.
28. Court jurisdiction Act: Gesetz vom 1. August 1895, betreffend die Einführung des Gesetzes über die Ausübung der Gerichtsbarkeit und die Zuständigkeit der ordentlichen Gerichte in bürgerlichen Rechtssachen (Jurisdictionsnorm, RGBl 1895/110 in its version of BGBl 210/58, p. 16 (available under: [https://ris.bka.gv.at/eli/bgbl/I/2010/58]).
29. Court Auxiliaries Act: Bundesgesetz vom 12. Dezember 1985 betreffend die Besorgung gerichtlicher Geschäfte durch Rechtspfleger (Rechtspflegergesetz – RpflG), BGBl 1985/560 in its version of BGBl I 2023/179, p. 10 (available under: [https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002703&FassungVom=2022-11-23]); *Fucik* in *Rechberger/Klicka* (FN 22), § 244 ZPO margin 5; *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 6; *Kodek* in *Fasching/Konecny* (FN 17), § 244 ZPO margin 3; *Ziehensack* in *Höllwerth/Ziehensack* (FN 22), § 244 ZPO margin 3.
30. *Fellner/Nogratnig*, Kommentar zum Richter- und Staatsanwaltschaftsdienstgesetz, Gerichtsorganisationsgesetz und Staatsanwaltschaftsgesetz (2024) § 1 RpflG margin 1 et seq.
31. *Fellner/Nogratnig* (FN 32), § 1 RpflG margin 5.

When the action for payment is received by the court, the court auxiliary must check not only whether the general procedural requirements are met but also whether the requirements specifically provided for in § 244 ZPO are fulfilled:[32] As already mentioned, the order for payment procedure is limited to actions that *exclusively request a monetary payment*; moreover, the amount of money requested must not exceed EUR 75,000.[33] Also, the order for payment procedure is not applicable if a payment order is to be issued in the bill of exchange mandating procedure ("*Wechselmandatsverfahren*") in accordance with §§ 555 to 559 ZPO.[34] § 244 (2) ZPO formulates the following further restrictions: An order for payment may not be issued if the action is to be rejected because the general procedural requirements are not being met (no. 1);[35] if the claims are obviously not pursuable, if the claims are not yet due or if they are dependent on a consideration according to the information in the action for payment (no. 2); if the defendant is of unknown whereabouts or has his/her domicile, habitual residence or registered office abroad (no. 3)[36] or if the claim is inconclusive (no. 4). A conditional payment order may not be issued if factual allegations are missing or the factual allegations submitted are not sufficient to conclude that the payment order is justified.[37] The plaintiff's statement is initially to be considered true unless the plaintiff's narrative is refuted by existing evidence or obvious facts.[38]

2.4. *Decision of the Court*

If the above-mentioned procedural requirements are not fulfilled, the further course of action depends on whether a general or special procedural requirement is lacking:[39] If a general procedural requirement is not being met, the court has to give instruction to correct the action (if possible). If the attempt to rectify fails, the action for payment must

32. Cf. *Fucik* in *Rechberger/Klicka* (FN 22), § 244 ZPO margin 4; *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 12; *Kodek* in *Fasching/Konecny* (FN 17), § 244 ZPO margin 27 et seq.
33. *Fucik* in *Rechberger/Klicka* (FN 22), § 244 ZPO margin 4; *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 14, 17; *Kodek* in *Fasching/Konecny* (FN 17), § 244 ZPO margin 38, 41.
34. *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 19; *Kodek* in *Fasching/Konecny* (FN 17), § 244 ZPO margin 50; *Ziehensack* in *Höllwerth/Ziehensack* (FN 22), § 244 ZPO margin 5.
35. *Fucik* in *Rechberger/Klicka* (FN 22), § 244 ZPO margin 4; *Kodek* in *Fasching/Konecny* (FN 17), § 244 ZPO margin 36.
36. *Fucik* in *Rechberger/Klicka* (FN 22), § 244 ZPO margin 4; *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 20 et seqq.; *Kodek* in *Fasching/Konecny* (FN 17), § 244 ZPO margin 36 et seqq., 41, 50, 59 et seqq.; *Ziehensack* in *Höllwerth/Ziehensack* (FN 22), § 244 ZPO margin 5.
37. *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 28 et seqq.; *Ziehensack* in *Höllwerth/Ziehensack* (FN 22), § 244 ZPO margin 5.
38. *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 29.
39. *Fucik* in *Rechberger/Klicka* (FN 22), § 244 ZPO margin 6; *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 40.

be rejected by the court.[40] However, if a special procedural requirement is not being met, the action is never rejected: If the defect is amenable to rectification, for example if the claim is inconclusive,[41] the court must first issue an order for rectification.[42] If the plaintiff does not comply or insufficiently complies with the order,[43] the court auxiliary must refer the case to the judge assigned to him/her (*e contrario* § 16 (1) no. 1 lit. a RpflG), who then initiates ordinary proceedings.[44]

If all the necessary formal and substantive requirements are met, the court issues a conditional payment order *without a prior oral hearing and without hearing the defendant* (§ 244 (1) ZPO).[45] It is served on the defendant together with the action for payment (§ 247 (2) ZPO) and must be expressly designated as such. The core element of the conditional payment order is the (alternative) order to either pay the claim sued for, including interest and other costs determined by the court, within 14 days or to lodge an objection (§ 246 (1) and (2) ZPO).[46]

2.5. *Objection of the Defendant*

The defendant now has the option to lodge an objection against the conditional payment order[47] (§ 246 ZPO; § 79 (5) GOG[48]), which is the only legal remedy against the payment order.[49] The time limit for this objection is four weeks and begins with the service of the written copy of the conditional payment order on the defendant (§ 248 (2) ZPO).

40. *Fucik* in *Rechberger/Klicka* (FN 22), § 244 ZPO margin 6; *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 41.
41. *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 30; *Kodek* in *Fasching/Konecny* (FN 17), § 250 ZPO margin 33.
42. *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 42.
43. *Fasching* (FN 30), margin 1643/3; *Fucik* in *Rechberger/Klicka* (FN 22), § 244 ZPO margin 6; *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 42.
44. *Fasching* (FN 30), margin 1643/3; *Fucik* in *Rechberger/Klicka* (FN 22), § 244 ZPO margin 6; *Kodek* in *Fasching/Konecny* (FN 17), § 244 ZPO margin 11 et seq.; *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 6, 42.
45. *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 38.
46. *Kodek* in *Fasching/Konecny* (FN 17), § 246 ZPO margin 19.
47. *Kodek* in *Fasching/Konecny* (FN 17), § 248 ZPO margin 1; *Ziehensack* in *Höllwerth/Ziehensack* (FN 22), § 248 ZPO margin 1.
48. Court Organisation Act: Gesetz vom 27. November 1896, womit Vorschriften über die Besetzung, innere Einrichtung und Geschäftsordnung der Gerichte erlassen werden (Gerichtsorganisationsgesetz – GOG), RGBl 1896/217 in its version of BGBl 2023/77, p. 5 (available under: [https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000009]).
49. *Fucik* in *Rechberger/Klicka* (FN 22), § 248 ZPO margin 1; *Kellner* in *Kodek/Oberhammer* (FN 12), § 249 ZPO margin 1; *Kodek* in *Fasching/Konecny* (FN 17), § 248 ZPO margin 1; *Ziehensack* in *Höllwerth/Ziehensack* (FN 22), § 248 ZPO margin 1.

This period may not be extended or prolonged[50] and corresponds to the length provided for the statement of defence in ordinary civil proceedings (§ 230 (1) ZPO).[51] In proceedings before the regional courts as courts of first instance, the objection must also have the content of a statement of defence (§ 248 (1) ZPO). The objection must therefore contain a specific request and should also state all the facts on which the objections to the action are based.[52] Furthermore, it is advisable[53] for the defendant to offer and specify the evidence necessary to prove his/her factual allegations (§ 239 ZPO).[54] In proceedings before the district courts, the requirements for the objection are less extensive: it is sufficient that the defendant's intention to object to the conditional payment order is clearly expressed.[55] In order for payment procedures before the district courts, it is also assumed that an "empty" objection by the defendant (for example a document with the sentence "I'm not paying!") is sufficient for that purpose.[56]

If the defendant lodges an objection to the conditional payment order in time, the conditional payment order shall *ipso iure* cease to have an effect (§ 249 (1) ZPO); a separate cancellation order is not required.[57] In this case, the judge must initiate ordinary proceedings by scheduling a preparatory hearing.[58-59-60]

2.6. Legal Force and Enforceability

If the defendant does not lodge an objection or does not lodge an objection in time, the conditional payment order becomes final.[59] The conditional payment

50. *Kellner* in *Kodek/Oberhammer* (FN 12), § 249 ZPO margin 5; *Kodek* in *Fasching/Konecny* (FN 17), § 248 ZPO margin 18; *Ziehensack* in *Höllwerth/Ziehensack* (FN 22), § 248 ZPO margin 3.
51. *Kodek* in *Fasching/Konecny* (FN 17), § 248 ZPO margin 17.
52. *Planitzer* in *Kodek/Oberhammer* (FN 12), § 239 ZPO margin 4; *Rechberger/Klicka* in *Rechberger/Klicka* (FN 22), § 239 ZPO margin 4 et seq.
53. The contestation of the allegations on which the action is based is sufficient for the defendant's defence; the statement of facts and the offer of the relevant evidence are therefore merely advisable, but not mandatory content of the objection; in more detail *Planitzer* in *Kodek/Oberhammer* (FN 12), § 239 ZPO margin 11 et seq.
54. *Planitzer* in *Kodek/Oberhammer* (FN 12), § 239 ZPO margin 4, 11; *Rechberger/Klicka* in *Rechberger/Klicka* (FN 22), § 239 ZPO margin 5.
55. *Kodek* in *Fasching/Konecny* (FN 17), § 248 ZPO margin 10.
56. OLG Wien (Higher Regional Court of Vienna) 1 R 292/10h; *Kellner* in *Kodek/Oberhammer* (FN 12), § 249 ZPO margin 3; *Kodek* in *Fasching/Konecny* (FN 17), § 248 ZPO margin 10/1.
57. *Kellner* in *Kodek/Oberhammer* (FN 12), § 249 ZPO margin 10.
58. *Fucik* in *Rechberger/Klicka* (FN 22), § 249 ZPO margin 1; *Kellner* in *Kodek/Oberhammer* (FN 12), § 249 ZPO margin 17; *Ziehensack* in *Höllwerth/Ziehensack* (FN 22), § 249 ZPO margin 2.
59. *Kodek* in *Fasching/Konecny* (FN 17), Vor § 244 ZPO margin 1; *Kodek* in *Fasching/Konecny* (FN 17), § 246 ZPO margin 3.
60. *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 2; cf. *Brenn* in *Höllwerth/Ziehensack* (FN 22), § 411 ZPO margin 5.

order can then no longer be contested[60] and the claim cannot be subject to new proceedings.[61] The legally binding payment order constitutes an enforcement title (§ 1 (1) no. 3 EO[62]).[63]

3. Mandating Procedure

3.1. Introduction and Overview

The mandating procedure was introduced into the Austrian Civil Procedure Code by the Hate on the Internet Prevention Act ("Hass-im-Netz-Bekämpfungs-Gesetz – HiNBG") and came into force on January 1, 2021. Unlike the (mandatory) order for payment procedure, this is an *optional special procedure*[64] that gives the person concerned the opportunity to assert his/her claim for an omission order against a significant violation of his/her personality rights in an electronic communications network that is detrimental to his/her human dignity. The affected person should be granted legal protection quickly and easily upon request[65] by quickly removing content that violates personality rights and preventing its further circulation. One of the main problems with the protection of personality rights has been that ordinary proceedings usually simply took too long[66] and that the remedies offered by the communication platforms themselves in many cases did not lead to satisfactory results.[67] However, the scope of application of the mandating procedure is limited in several respects as will be shown below.

61. Cf. *Brenn* in *Höllwerth/Ziehensack* (FN 22), § 411 ZPO margin 9.
62. Enforcement Regulation: Gesetz vom 27. Mai 1896, über das Executions- und Sicherungsverfahren (Exekutionsordnung – EO), RGBl 1896/79 in its version of BGBl I 2023/136 (available under: [https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001700]).
63. *Kellner* in *Kodek/Oberhammer* (FN 12), § 244 ZPO margin 2; *Kodek* in *Fasching/Konecny* (FN 17), Vor § 244 ZPO margin 1, 5; *Ziehensack* in *Höllwerth/Ziehensack* (FN 22), § 246 ZPO margin 2.
64. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 1 et seq.; cf. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (6); *Mokrejs-Weinhappel* (FN 10), p. 53 (53); *Ristic/Frybert* (FN 12), p. 239 (239); *Schoditsch/Brugger*, Zivilrechtlicher Persönlichkeitsschutz im Internet – das neue HiNBG, Zeitschrift für Familien- und Erbrecht ("EF-Z") 2021, p. 100 (103).
65. In more detail: *Pierer* (FN 15), p. 27 (35).
66. *Faber* (FN 14), p. 89 (90); *Karner*, Menschenrecht und Schutz der Persönlichkeit im Zivilrecht, Österreichische Jurist:innenzeitung ("ÖJZ") 2013, p. 907 (911); *Rendl* (FN 67), p. 3 (3); *Schoditsch/Brugger* (FN 65), p. 100 (103).
67. *Rendl* (FN 67), p. 3 (3).

3.2. Substantive Scope

3.2.1. Personality Rights covered

The scope of application of the mandating procedure includes claims for omission due to a *significant violation of personality rights that affects human dignity*. The Austrian legislator has not imposed any restriction as to which personality rights are covered. Therefore, in principle, all personality rights are covered.[68] The interpretation of the term "human dignity" ("*Menschenwürde*") is essentially based on the understanding of the European Convention on Human Rights – ECHR[69] (which is also binding in Austria).[70]

All personality rights that are either expressly laid down in law or can be derived from § 16 of the Austrian Civil Code ("Allgemeines bürgerliches Gesetzbuch – ABGB"[71]) – the central norm for protection of personality rights, according to which the personality of a person is recognised as a fundamental value[72] – are covered by the scope of the mandating procedure.[73] These may include, for example, the right to honour (§ 1330 ABGB), privacy (§ 1328a ABGB), sexual self-determination (§ 1328 ABGB), the right to one's own name (§ 43 ABGB) or to one's own image.[74] § 16 ABGB covers, among other things, the right to the spoken word, protection against secret audio recordings and the unauthorised use of an identifiable voice[75] as well as the right

68. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 4; *Mokrejs-Weinhappel* (FN 10), p. 53 (54); *Ristic/Frybert* (FN 12), p. 239 (239).
69. Convention for the Protection of Human Rights and Fundamental Freedoms (available under: [https://rm.coe.int/1680a2353d]).
70. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 4; cf. also *Pierer* (FN 15), p. 27 (28).
71. Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie, JGS 1846/970 in its version of BGBl 2024/33, p. 1 (available under: [https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622]).
72. OGH (Austrian Supreme Court) 1 Ob 341/99z; 6 Ob 238/00v; *Koch* in *Bydlinski/Perner/Spitzer*, ABGB Kurzkommentar, 7th edition (2023) § 16 ABGB margin 3; *Kutscher/Wildpert*, Das österreichische Personenstandsrecht, 2nd edition (2021) § 16 ABGB Anm 1; *Schauer* in *Kletečka/Schauer*, ABGB-ON, Version 1.02 (2023) § 16 ABGB margin 1.
73. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 4; *Pierer* (FN 15), p. 27 (28); *Ristic/Frybert* (FN 12), p. 239 (239); *Schoditsch/Brugger* (FN 65), p. 100 (100 et seq.).
74. *Ristic/Frybert* (FN 12), p. 239 (239); cf. also *Faber* (FN 14), p. 89 (97); *Koch* in *Bydlinski/Perner/Spitzer* (FN 72), § 16 ABGB margin 6; *Mokrejs-Weinhappel* (FN 10), p. 53 (54 et seq.); *Schauer* in *Kletečka/Schauer* (FN 72), § 16 ABGB margin 11; *Schoditsch/Brugger* (FN 65), p. 100 (100); cf. also OGH 6 Ob 166/22p [28], where it is stated that it is not doubtful that a violation of a person's reputation and honour can mean a violation of their dignity.
75. *Koch* in *Bydlinski/Perner/Spitzer* (FN 72), § 16 ABGB margin 7.

to anonymity of name.[76] According to the legislative materials, violations of the right to physical integrity are not covered because the violation must directly result from displaying words or images in an electronic communications network.[77] However, in our opinion, if the mental impairment reaches the level of an illness,[78] such cases may also be covered by the scope of the mandating procedure, even if no other personality rights are violated.[79]

3.2.2. Required Quality of the Injury

The wording of § 549 ZPO indicates that a "simple" violation of personality rights is not sufficient to assert a claim for an omission order.[80] Rather, a *violation of personality rights* is required that is *significant* and *impairs the human dignity of the person affected.*[81] It should be noted in this context that a violation of human dignity can only be affirmed if the harmful act is not justified by the fundamental right of freedom of expression.[82]

According to the prevailing opinion, the threshold for the quality of injury required should be set rather high in the context of § 549 ZPO.[83] This view is supported by the legislative materials, which state that the special procedure was established for particularly serious cases of violations of personality rights.[84] To meet the necessary significance, the violation must affect the dignity-based core area of personality rights,[85] which includes, for example, attacks on the most personal part of privacy, life, physical and mental health, sexual orientation or family life.[86] However, some academic writers argue that

76. OGH 6 Ob 287/02b; *Koch* in *Bydlinski/Perner/Spitzer* (FN 72), § 16 ABGB margin 7.
77. ErläutRV 481 BlgNR 27. GP (FN 8) p. 9.
78. Cf. *Aicher* in *Rummel/Lukas,* Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch I, 4th edition (2023) § 16 ABGB margin 20.
79. *Critically Pierer* (FN 15), p. 26 (29).
80. *Ristic/Frybert* (FN 12), p. 239 (239).
81. *Ristic/Frybert* ([FN 12], p. 239 [240]) point out that any violation affecting human dignity is likely to have the necessary significance.
82. ErläutRV 481 BlgNR 27. GP (FN 8) p. 10; *Mokrejs-Weinhappel* (FN 10), p. 53 (55); *Pierer* (FN 15), p. 27 (29); *Rendl* (FN 67), p. 3 (5); *Ristic/Frybert* (FN 12), p. 239 (240); *Schoditsch/Brugger* (FN 65), p. 100 (104).
83. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 4; *Schoditsch* (FN 67), p. 913 (914).
84. ErläutRV 481 BlgNR 27. GP (FN 8) p. 9; *Kloiber* in *Fucik/Klauser/Kloiber* (FN 12), § 549 ZPO Anm; *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 4; *Mokrejs-Weinhappel* (FN 10), p. 53 (54); *Pierer* (FN 15), p. 27 (27); *Ristic/Frybert* (FN 12), p. 239 (239).
85. See *Schoditsch* (FN 67), p. 913 (914): "*Würdebasierte*[r] *Kernbereich der Persönlichkeitsrechte*"; *critically Thiele,* Ziviler Rechtsschutz gegen Instagram & Co – oder: Was ist eine Hass-Seite? IT-Recht, Rechtsinformation und Datenschutz ("jusIT") 2021, p. 137 (141 et seq.).
86. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 5; *Schoditsch/Brugger* (FN 65), p. 100 (104); *Schoditsch* (FN 67), p. 913 (914); cf. OGH 6 Ob 166/22p [29].

any violation that impairs human dignity has the necessary significance required,[87] in which case the term "significant" ("*erheblich*") formulated in the law would no longer have any independent meaning.

While the notion of human dignity is not new to the Austrian legal system, it has been used and interpreted differently in various legal acts.[88] For the mandating procedure, the legislator specifies in the legislative materials that a violation of human dignity certainly is to be affirmed if someone is directly or indirectly denied the right to be a human being *per se*.[89] This is the case if the person is denied the right to life as an equal citizen, is portrayed as an inferior or worthless part of the population as a whole or otherwise suffers inhuman or degrading treatment.[90] Hate postings that wish death or rape on other people are definitely sufficient for a violation within the meaning of § 549 ZPO.[91] The offence of incitement to hatred under § 283 of the Austrian Criminal Code ("Strafgesetzbuch – StGB"[92]) can also be used to assess when a violation affecting human dignity has occurred.[93] According to the prevailing opinion, verbal abuse or mockery that is not legally relevant should not fall under § 549 ZPO.[94] In the case of several "small" defamatory statements, the overall picture of the offence needs to be assessed according to judicature.[95] In addition, secret image recordings within the meaning of § 120a StGB (upskirting)[96] and, according to some scholars, also the unsolicited sending of images of genitalia can be qualified as a violation of human dignity.[97] If the required quality of infringement is not being met, the application for an injunction must be dismissed and ordinary proceedings initiated, as this is a special procedural requirement for the mandating procedure(see chapter 3.6).[98]

87. *Pierer* (FN 15), p. 27 (29); *Mokrejs-Weinhappel* (FN 10), p. 53 (55); *Ristic/Frybert* (FN 12), p. 239 (240).
88. *Schoditsch/Brugger* (FN 65), p. 100 (104); *Schoditsch* (FN 67), p. 913 (914).
89. ErläutRV 481 BlgNR 27. GP (FN 8) p. 10.
90. ErläutRV 481 BlgNR 27. GP (FN 8) p. 10; *Rendl* (FN 67), p. 3 (5).
91. *Mokrejs-Weinhappel* (FN 10), p. 53 (55); also *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 5.
92. Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Strafgesetzbuch – StGB), BGBl 1974/69, p. 641 in its version 2023/135, p. 1 (available under: [https://ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296]).
93. *Mokrejs-Weinhappel* (FN 10), p. 53 (55).
94. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 5.
95. OGH 6 Ob 166/22p [31].
96. The term "upskirting" refers to the unauthorised production of images of the genitals, the pubic area, the buttocks, the female breast or the underwear covering these parts of the body.
97. Cf. *Mokrejs-Weinhappel* (FN 10), p. 53 (55).
98. *Schoditsch/Brugger* (FN 65), p. 100 (103 et seq.); *Schoditsch* (FN 67), p. 913 (914).

3.2.3. Electronic Communications Network

The violation of personality rights must take place within an *electronic communications network*. In this context, the legislator refers to §§ 13 et seq. of the E-Commerce Act ("E-Commerce-Gesetz –ECG"[99]) and Article 2 (1) of EU Directive 2018/1972[100] which contain regulations on electronic communications networks and communications services. Accordingly, the term "communications network" includes widely accessible *social networks, apps, radio, television and cable broadcasting networks*, as well as *messenger services* and *Bluetooth*.[101] The infringing content does not necessarily have to get known to the public; instead, transmission via *text message, email, WhatsApp* or similar services is sufficient.[102]

3.2.4. Limitation to Claims for Omissions

The mandating procedure exclusively applies to the enforcement of claims for omissions.[103] If the person affected by the infringement of personality rights also wishes to assert claims for damages, the special procedure of § 549 ZPO is not applicable.[104] However, according to the prevailing opinion, the omission order includes the *order to remove the infringing content*,[105] provided that the infringement is not merely temporary and can be permanently retrieved.[106]

3.3. Plaintiffs and Defendants

Any individual whose human dignity is impaired due to a violation of personality rights in an electronic communications network is entitled to bring an action pursuant to § 549 (1) ZPO.[107] Additionally, the *employer of the person directly affected* is also

99. Bundesgesetz, mit dem bestimmte rechtliche Aspekte des elektronischen Geschäfts- und Rechtsverkehrs geregelt werden (E-Commerce-Gesetz – ECG), BGBl I 2001/152, 242 in its version of BGBl 2023/182, p. 11.

100. Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, ABl L 2018/321, p. 36.

101. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 6; *Mokrejs-Weinhappel* (FN 10), p. 53 (56); *Pierer* (FN 15), p. 27 (30); *Ristic/Frybert* (FN 12), p. 239 (240).

102. ErläutRV 481 BlgNR 27. GP (FN 8) p. 10; *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 6; *Pierer* (FN 15), p. 27 (30 et seq.).

103. *Mokrejs-Weinhappel* (FN 10), p. 53 (54).

104. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 7; *Ristic/Frybert* (FN 12), p. 239 (240); *Schoditsch/Brugger* (FN 65), p. 100 (103).

105. ErläutRV 481 BlgNR 27. GP (FN 8) p. 10; *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (8); *Mokrejs-Weinhappel* (FN 10), p. 53 (56); *Pierer* (FN 15), p. 27 (28); *Ristic/Frybert* (FN 12), p. 239 (240); *Schoditsch/Brugger* (FN 65), p. 100 (102).

106. Cf. *Ristic/Frybert* (FN 12), p. 239 (240).

107. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (7); *Rendl* (FN 67), p. 3 (3); *Ristic/Frybert* (FN 12), p. 239 (240).

authorised to bring an action (§ 20 ABGB),[108] if the employee's reputation or privacy is violated in a medium in connection with his/her work and the violation is likely to impair the employer's legal or economic sphere.[109] This relates to cases in which there is an objective risk that the employer's ability to deploy the employee for work is significantly impaired[110] by the infringement or the employer's reputation is significantly damaged.[111] This is a direct *claim of the employer*,[112] which – at least at first sight – seems rather alien to the Austrian legal system.[113] Especially the question of how to make sure that the employer does not act against the will of the person affected seems rather problematic in that regard,[114] since the assertion of the employer's claim does not depend on the consent of the employee.[115] In response to an according parliamentary enquiry, the Austrian Federal Minister of Justice asserted that most of the times the employer will only learn of violations when the employee brings them to his/her attention, and that the risk of unwanted litigation by the employer is therefore relatively low.[116] While this may be true in many cases, in our opinion this is not a sufficient counterargument to disperse the fundamental concerns about the employer's right to bring an action.[117] If the employer conducts proceedings regarding a violation of the employee's personality rights against his/her will, there is a risk of renewed emotional stress or traumatisation.[118] If the employee concerned is summoned as a wit-

108. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (7); *Kronthaler* in *Schwimann/Kodek*, ABGB Taschenkommentar, 6th edition (2023) § 20 ABGB margin 3; *Mokrejs-Weinhappel* (FN 10), p. 53 (58); *Rendl* (FN 67), p. 3 (4); *Ristic/Frybert* (FN 12), p. 239 (240); *Schoditsch/Brugger* (FN 65), p. 100 (102).

109. Cf. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (9); *Rendl* (FN 67), p. 3 (4); *Schoditsch/Brugger* (FN 65), p. 100 (102).

110. According to the legislative materials, this is for example the case if the employee falls ill due to psychological pressure and is therefore no longer able to carry out their work (ErläutRV 481 BlgNR 27. GP [FN 8] p. 8); *Rendl* (FN 67), p. 3 (4).

111. ErläutRV 481 BlgNR 27. GP (FN 8) p. 7 et seq.; *Koch* in *Bydlinski/Perner/Spitzer* (FN 72), § 20 ABGB margin 2; *Kronthaler* in *Schwimann/Kodek* (FN 107), § 20 ABGB margin 3; *Rendl* (FN 67), p. 3 (4); *Ristic/Frybert* (FN 12), p. 239 (240 et seq.).

112. ErläutRV 481 BlgNR 27. GP (FN 8) p. 8; *Kronthaler* in *Schwimann/Kodek* (FN 107), § 20 ABGB margin 3; *Rendl* (FN 67), p. 3 (4).

113. Cf. *Pierer* (FN 15), p. 27 (28 et seq.); *Rendl* (FN 67), p. 3 (4).

114. *Rendl* (FN 67), p. 3 (4).

115. *Koch* in *Bydlinski/Perner/Spitzer* (FN 72), § 20 ABGB margin 2; *Kronthaler* in *Schwimann/Kodek* (FN 107), § 20 ABGB margin 5; *Mokrejs-Weinhappel* (FN 10), p. 53 (58).

116. Answer to the parliamentary enquiry (9816/J dated February 18th 2022, 27. GP) to the Federal Minister of Justice (9593/AB, dated April 14th 2022, 27. GP, available under: [https://www.parlament.gv.at/dokument/XXVII/AB/9593/imfname_1438100.pdf]).

117. *Critically* as well: *Anderl/Woltran*, Zivilrechtliche Aspekte des Hass-im-Netz-Pakets, ecolex 2021, p. 193 (193 et seq.); *Rendl* (FN 67), p. 3 (4).

118. On secondary victimisation through civil proceedings in general: *Meisinger* in *Deixler-Hübner/Mayrhofer*, Handbuch Gewaltschutzrecht (2023) p. 206 et seq.

ness in such a trial, he/she must consequently have the right to refuse to testify if he/she fears a considerable (psychological) health risk as a result of the testimony (§ 321 (1) no. 2 ZPO by analogy).[119] Although this does not change the fact that the person concerned must appear in court[120] – which can have an emotional charge in itself –, it could at least help to reduce the risk of secondary victimisation.

The action can be brought against the "*direct violator*" – that is the person who actually causes the infringement of personality rights, links the illegal content or disseminates it by sharing it[121] – as well as against the *intermediary* ("*Vermittler*"; § 20 (3) ABGB).[122] The term "intermediary" includes all host providers who store the information provided by a user by making the information available on their websites or providing storage space on their computers for the operation of a website.[123] Access providers that merely provide access to the communications network, for example by offering telecommunications services, are not subject to such actions.[124] The claim for an omission order against the host provider only arises, however, after a warning has been issued.[125] The host provider thus has to be informed of content that violates personality rights and must be given the opportunity to remove the content in question without delay.[126]

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119. Cf. OGH 4 Ob 196/11v; *Frauenberger* in *Fasching/Konecny* (FN 17), § 321 ZPO margin 15/1; *Körber-Risak* in *Höllwerth/Ziehensack* (FN 22), § 321 ZPO margin 1; *Rechberger/Klicka* in *Rechberger/Klicka* (FN 22), § 321-322 ZPO margin 4; *Spitzer* in *Spitzer/Wilfinger*, Beweisrecht (2020) § 321 ZPO margin 3.

120. *Körber-Risak* in *Höllwerth/Ziehensack* (FN 22), § 323 ZPO margin 2; *Frauenberger* in *Fasching/Konecny* (FN 17), § 321 ZPO margin 15/1.

121. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (7); *Mokrejs-Weinhappel* (FN 10), p. 53 (55); *Pierer* (FN 15), p. 27 (29).

122. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (7); *Koch* in *Bydlinski/Perner/Spitzer* (FN 72), § 20 ABGB margin 3; *Kronthaler* in *Schwimann/Kodek* (FN 107), § 20 ABGB margin 6; *Mokrejs-Weinhappel* (FN 10), p. 53 (57); *Rendl* (FN 67), p. 3 (4); *Ristic/Frybert* (FN 12), p. 239 (241); *Schoditsch/Brugger* (FN 65), p. 100 (103).

123. Cf. on the broad term "host provider": *Ciresa* in *Schwimann/Kodek*, ABGB Praxiskommentar IX, 5th edition (2022) § 16 ECG margin 1 et seqq.; *Zankl*, E-Commerce-Gesetz, 2nd edition (2016) § 16 ECG margin 258 et seqq.

124. ErläutRV 481 BlgNR 27. GP (FN 8) p. 8; *Anderl/Woltran* (FN 116), p. 193 (194); *Koch* in *Bydlinski/Perner/Spitzer* (FN 72), § 20 ABGB margin 3; *Kronthaler* in *Schwimann/Kodek* (FN 107), § 20 ABGB margin 6; *Rendl* (FN 67), p. 3 (4); *Schoditsch/Brugger* (FN 65), p. 100 (103).

125. ErläutRV 481 BlgNR 27. GP 8 (FN 8) p. 8 et seq.; *Anderl/Woltran* (FN 116), p. 193 (194); *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (10); *Kronthaler* in *Schwimann/Kodek* (FN 107), § 20 ABGB margin 7; *Mokrejs-Weinhappel* (FN 10), p. 53 (57); *Schoditsch/Brugger* (FN 65), p. 100 (103).

126. ErläutRV 481 BlgNR 27. GP (FN 8) p. 8; *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (10); *Kronthaler* in *Schwimann/Kodek* (FN 107), § 20 ABGB margin 7; *Rendl* (FN 67), p. 3 (5).

3.4. Initiation of the Mandating Procedure

3.4.1. Form and Content of the Action

For filing an action in accordance with § 549 ZPO, a *form* is available; however, unlike in order for payment procedures, its use is not compulsory.[127] The form can be downloaded directly from a website published by the Federal Ministry of Justice (justiz.online.gv.at).[128] The action must contain an application for an omission order.[129] In the absence of such an application, the action is to be treated as an ordinary action for an omission.[130]

The plaintiff must provide a detailed and specific description of the infringement of personality rights that is being sought to be ceased.[131] They may also extend their action for an omission order to all identical or similar content in order to prevent circumvention of the prohibition.[132] The action pursuant to § 549 ZPO must be accompanied by evidence of the infringement from the electronic communications network.[133] Such evidence may be, for example, a screen shot that depicts the infringing statement; even the attachment of a mere link is considered sufficient, if the infringing content is still available.[134] While this may appear as a low- threshold, difficulties can arise in practice, where the screenshot shows a post in a foreign language.

The substantive claim for an omission also requires the *risk of recurrence*.[135] It is sufficient for the plaintiff to tick the box on the form stating that the illegal content is still available at the time the action is filed.[136] If the unlawful content is still online, the infringement of personality rights is deemed to be ongoing; the risk of recurrence is then to be affirmed in any case – in particular due to the possibility of linking or sharing the

127. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (6); *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 9; *Mokrejs-Weinhappel* (FN 10), p. 53 (54); *Schoditsch/Brugger* (FN 65), p. 100 (105).

128. [https://justizonline.gv.at/jop/web/formulare/gruppe/6/17/79].

129. ErläutRV 481 BlgNR 27. GP (FN 8) p. 10; *Ristic/Frybert* (FN 12), p. 239 (241).

130. *Ristic/Frybert* (FN 12), p. 239 (243).

131. Cf. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (9).

132. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (8); *Ristic/Frybert* (FN 12), p. 239 (242); cf. also EuGH C-18/18, *Glawischnig*, ECLI:EU:C:2019:821; OGH 4 Ob 36/20b.

133. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 12; *Mokrejs-Weinhappel* (FN 10), p. 53 (58).

134. ErläutRV 481 BlgNR 27. GP (FN 8) p. 10; *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (10); *Kloiber* in *Fucik/Klauser/Kloiber* (FN 12), § 549 ZPO Anm; *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 12; *Mokrejs-Weinhappel* (FN 10), p. 53 (58); *Pierer* (FN 15), p. 27 (31); *Schoditsch/Brugger* (FN 65), p. 100 (105).

135. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (10).

136. See form; cf. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 11.

unlawful content.[137] If the content is no longer available, the plaintiff must explain why he/she fears that the content will be disseminated again despite having already been deleted.[138]

3.4.2. Jurisdiction

In contrast to order for payment proceedings, disputes under § 549 ZPO fall within the jurisdiction of the district courts (§ 49 (1) no. 6 JN)[139] regardless of the amount in dispute[140] and are functionally assigned to the judge (and not the court auxiliary). According to the legislator, the district courts should be exclusively responsible for mandating procedures because they already have relevant experience with proceedings focused on protection against violence and access to the district court is easier and cheaper.[141]

A recent amendment to the Civil Procedure Code in 2022[142] also introduced a special territorial jurisdiction rule for mandating procedures: Pursuant to § 92b JN, actions for disputes arising from the infringement of a personality right in an electronic communications network can – in addition to the so-called "general place of jurisdiction" at the defendant's place of residence[143] – also be brought before the court in whose district the harmful event occurred or may occur. The legislator created § 92b JN based on Article 7 (2) of Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[144] Taking into account the interpretation of the parallel European rule, the place where the harmful event occurred is therefore to be understood as both the place where the harm arose (place of success; "*Erfolgsort*") and the place where the event which gave rise to the harm occurred (place of action; "*Handlungsort*").[145] The plaintiff can choose between those two options.[146] For violations of personality rights on the internet, the place of action is the place where the

137. See form; cf. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (10).

138. See form; cf. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 11.

139. *Faber* (FN 14), p. 89 (90); *Kloiber* in *Fucik/Klauser/Kloiber* (FN 12), § 549 ZPO Anm; *Mokrejs-Weinhappel* (FN 10), p. 53 (53); *Pierer* (FN 15), p. 27 (36); *Rendl* (FN 67), p. 3 (5); *Schoditsch/Brugger* (FN 65), p. 100 (105).

140. Pursuant to § 59a JN, a fixed amount in dispute of € 5,000 applies to mandating proceedings.

141. ErläutRV 481 BlgNR 27. GP (FN 8) p. 9; also *Mokrejs-Weinhappel* (FN 10), p. 53 (53).

142. Zivilverfahrens-Novelle 2021 – ZVN 2021, 1291 BlgNR 27. GP p. 1 (available under: [https://www.parlament.gv.at/dokument/XXVII/I/1291/fname_1038262.pdf]).

143. *Mokrejs-Weinhappel* (FN 10), p. 53 (53).

144. ErläutRV 1291 BlgNR 27. GP (FN 41) p. 5; OGH 6 Ob 30/24s [11].

145. OGH 6 Ob 30/24s [13]; cf. *Simotta* in *Fasching/Konecny*, Zivilprozessgesetze V/1, 3rd edition (2022) Art 7 EuGVVO margin 277.

146. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (9); *Simotta* in *Fasching/Konecny* (FN 144), Art 7 EuGVVO margin 277.

author of the infringing content is based.[147] The place of success, on the other hand, is the place where the injured party has the centre of his/her interests.[148]

3.5. Judicial Examination of the Action pursuant to § 549 ZPO

As soon as the action is received by the court, the judge examines its compliance with the general procedural requirements as well as the special requirements set out in § 549 (1) ZPO.[149] At this stage of the proceedings, the court must assess whether the alleged violation constitutes a violation within the meaning of § 549 (1) ZPO, based on the applicant's submission and the attached evidence.[150] In this regard, the court also examines whether there are concerns about the authenticity of the submitted evidence from the electronic communications network.[151]

3.6. Decision of the Court

If not all general procedural requirements are being met, the court must reject the action as inadmissible (if necessary, after an unsuccessful attempt to rectify procedural errors).

If there is no significant violation of personality rights in an electronic communications network that is detrimental to human dignity or if proof of the violation has not been provided despite the possibility of rectification, the court must dismiss the action by order[152] and has to initiate ordinary proceedings.[153] The plaintiff may lodge an appeal against the order denying him/her access to special proceedings under § 549 ZPO.[154] The court will also initiate ordinary proceedings if the asserted claim is not an omission claim or if the person concerned asserts additional other claims – for example claims for damages – in the same action.[155]

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147. EuGH C-509/09, *eDate Advertising/X* and C-161/10, *Martinez/MGN*, ECLI:EU:C:2011:685 (joined cases); C-251/20, *Gtflix Tv*, ECLI:EU:C:2021:1036; OGH 6 Ob 30/24s [16].
148. Cf. EuGH C-509/09, *eDate Advertising/X* and C-161/10, *Martinez/MGN*, ECLI:EU:C:2011:685 (joined cases); OGH 6 Ob 30/24s [16]; *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (9); *Ristic/Frybert* (FN 12), p. 239 (241); *Simotta* in *Fasching/Konecny* (FN 144), Art 7 EuGVVO margin 379 et seqq.
149. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 13 et seq.; *Mokrejs-Weinhappel* (FN 10), p. 53 (58).
150. Cf. *Anderl/Woltran* (FN 116), p. 193 (194); *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 14 et seq.; *Ristic/Frybert* (FN 12), p. 239 (242).
151. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 14; *Ristic/Frybert* (FN 12), p. 239 (242 et seq.).
152. OGH 6 Ob 166/22p [17]; *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 15; *Mokrejs-Weinhappel* (FN 10), p. 53 (54, 58 et seq.); *Ristic/Frybert* (FN 12), p. 239 (243).
153. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 15; *Mokrejs-Weinhappel* (FN 10), p. 53 (54); *Ristic/Frybert* (FN 12), p. 239 (243).
154. *Ristic/Frybert* (FN 12), p. 239 (243).
155. *Ristic/Frybert* (FN 12), p. 239 (243); *Schoditsch/Brugger* (FN 65), p. 100 (103).

If the court comes to the conclusion that the alleged infringement can be conclusively derived from the information provided by the plaintiff, it must issue an injunction *without a prior hearing and without hearing the defendant.*[156] The omission order shall be served on the defendant together with the action brought by the injured party (§ 549 (3) ZPO).

3.7. Objection of the Defendant pursuant to § 549 (2) and (3) ZPO

After being served with the omission order, pursuant to § 549 (2) and (3) ZPO, the defendant can lodge an objection within a non-extendable period of 14 days.[157] The court must inform the defendant of the consequences of such an objection.[158] This is the *only legal remedy available* against the omission order.[159] The defendant's objection must *merely indicate that he/she intends to take action* against the order;[160] the substantive content of the objections does not necessarily have to be stated. The formal requirements for the objection are therefore similar to those of the objection to the payment order before the district court.[161]

Once the defendant lodges an objection in time, the mandating procedure turns into ordinary proceedings.[162] The action is then to be treated as an "ordinary" action for omission.[163] In contrast to the order for payment procedure, raising an objection in a mandating procedure *does not cause the omission order to lose its effects*. Instead, it remains in force during ordinary proceedings and the court decides in its final judgement whether the order is revoked or not (§ 549 (3) in conjunction with § 558 ZPO).[164] However, as will be shown below, this circumstance is only relevant in the event of a (possible) provisional enforceability of the omission order.

156. *Faber* (FN 14), p. 89 (90); *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 16; *Mokrejs-Weinhappel* (FN 10), p. 53 (59); *Pierer* (FN 15), p. 27 (33); *Rendl* (FN 67), p. 3 (5).
157. *Galla* (FN 15), p. 69; *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 21; *Mokrejs-Weinhappel* (FN 10), p. 53 (61).
158. *Ristic/Frybert* (FN 12), p. 239 (244).
159. *Galla* (FN 15), 69; *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 21; *Mokrejs-Weinhappel* (FN 10), p. 53 (61); *Ristic/Frybert* (FN 12), p. 239 (244).
160. *Galla* (FN 15), p. 69; *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 21; *Mokrejs-Weinhappel* (FN 10), p. 53 (61).
161. Cf. Chapter 2.5; *Mokrejs-Weinhappel* (FN 10), p. 53 (61 et seq.).
162. *Anderl/Woltran* (FN 116), p. 193 (194); *Mokrejs-Weinhappel* (FN 10), p. 53 (62); *Rendl* (FN 67), p. 3 (5).
163. OGH 6 Ob 166/22p [17].
164. OGH 6 Ob 166/22p [18]; *Faber* (FN 14), p. 89 (90); *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 21; *Koller* in *Kodek/Oberhammer* (FN 12), § 558 ZPO margin 4 et seq.; *Mokrejs-Weinhappel* (FN 10), p. 53 (62); *Pierer* (FN 15), p. 27 (35).

3.8. Provisional Enforceability

§ 549 (4) ZPO provides for the possibility of granting the omission order provisional enforceability at the request of the plaintiff.[165] According to the Austrian legislator, this shall ensure that, *in the case of serious allegations*, the efficient and rapid protection of personality rights should be given *priority over any associated interference with the defendant's freedom of expression.*[166] In this case, the court must weigh up the interests at stake:[167] provisional enforceability may only be granted if the continued effect of the infringement is either intolerable for the plaintiff, associated with considerable disadvantages, or incompatible with fundamental values of the Austrian legal system (§549 (4) ZPO).[168] This can be the case, if the infringement concerns the dissemination of sound or image recordings of intimate personal areas, if accusations relate to the professional qualifications or character traits of the person concerned or if a supra-individual component is added to the violation of personality rights, such as gender-related, ethnic, religious or political vilification or incitement to hatred.[169]

If the court grants provisional enforceability, the plaintiff can enforce the omission order even before it enters into legal force and thereby achieve the deletion of the infringing statement or depiction.[170] Provisional enforceability takes effect as soon as the court order granting provisional enforceability has been served on the plaintiff and remains until the end of the proceedings.[171] In addition, the defendant (who was not given the right to be heard before the issuing of the omission order) has *no right to appeal*

165. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (10); *Kloiber* in *Fucik/Klauser/Kloiber* (FN 12), § 549 ZPO Anm; *Galla* (FN 15), p. 70; *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 18; *Mokrejs-Weinhappel* (FN 10), p. 53 (60); *Pierer* (FN 15), p. 27 (31 et seq.); *Rendl* (FN 67), p. 3 (5); *Ristic/Frybert* (FN 12), p. 239 (244); *Schoditsch/Brugger* (FN 65), p. 100 (105).

166. ErläutRV 481 BlgNR 27. GP (FN 8) p. 11; *Pierer* (FN 15), p. 27 (31).

167. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 18; cf. *Ristic/Frybert* (FN 12), p. 239 (244).

168. *Anderl/Woltran* (FN 116), p. 193 (194); *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (10); *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 18; *Mokrejs-Weinhappel* (FN 10), p. 53 (60 et seq.); *Pierer* (FN 15), p. 27 (31 et seq.); *Ristic/Frybert* (FN 12), p. 239 (244); *Schoditsch/Brugger* (FN 65), p. 100 (105).

169. ErläutRV 481 BlgNR 27. GP (FN 8) p. 11; *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 19; *Mokrejs-Weinhappel* (FN 10), p. 53 (61); *Ristic/Frybert* (FN 12), p. 239 (244).

170. See also § 44 AußStrG, which served as the prototype for this rule (ErläutRV 481 BlgNR 27. GP [FN 8] p. 10); cf. *Pierer* (FN 15), p. 27 (33); *Deixler-Hübner* in *Gitschthaler/Höllwerth*, Kommentar zum Außerstreitgesetz I, 2nd edition (2019) § 44 AußStrG margin 4.

171. *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 20; *Mokrejs-Weinhappel* (FN 10), p. 53 (61); *Pierer* (FN 15), p. 27 (33); *Ristic/Frybert* (FN 12), p. 239 (244).

against the granting of provisional enforceability.[172] In our opinion, this is in considerable conflict with the *right to a fair trial* laid down in Art 6 ECHR.

4. CONCLUDING CONSIDERATIONS

Order for payment procedure and mandating procedure have *many similarities in terms of their procedural structure*: Essentially, both are intended to quickly, easily and inexpensively obtain an enforcement title. In terms of the matter in dispute, the order for payment procedure concerns the assertion of monetary claims up to and including EUR 75,000 (currently approximately 430,000 Reais), while the mandating procedure concerns the assertion of claims for an omission order due to a significant violation of personality rights in an electronic communications network that impairs the human dignity of an individual. In both procedures, the court's examination of the action is limited to checking the conclusiveness of the plaintiff's submission and in neither of them there is an oral hearing. The defendant can lodge an objection against the decision in order to preserve his/her right to be heard, which in both cases leads to a transfer to ordinary proceedings.

However, a look at the amount of court cases shows a *significant divergence in the actual practical relevance* of these two special proceedings. In 2023, regarding the district courts, 83% of a total of 382,978 civil actions were brought as order for payment actions. The judicial statistics demonstrate the enormous simplifying benefit this procedural instrument has to offer: 92 % of the payment orders issued by district courts were not contested;[173] only in the remaining 8% of cases ordinary proceedings were initiated. The order for payment procedure therefore plays a central role within the Austrian litigation landscape. However, the same cannot (at least not yet) be said for the mandating procedure. The number of proceedings according to § 549 ZPO recorded in 2021 amounted to 25, in 2022 and 2023 to only 12 each.[174] The low number of mandating procedures is surprising, as there is no shortage of legally relevant reports of digital hatred. In an initial assessment, the counselling centre ZARA classified around 45% of the 1.824 hate reports made in 2023 as legally relevant.[175] Based on ZARA's annual reports, the legislator estimated an annual volume of around 750 new mandating procedures.[176] The significantly lower number of actual

172. *Anderl/Woltran* (FN 116), p. 193 (194); *Koller* in *Kodek/Oberhammer* (FN 12), § 549 ZPO margin 20; *Pierer* (FN 15), p. 27 (33); *Ristic/Frybert* (FN 12), p. 239 (244).

173. Procedural statistics of 2023 derived from the Operational Information System ("Betriebliches Informations System – BIS").

174. Answer to the parliamentary enquiry (18182/J dated March 21st 2024, 27. GP) to the Federal Minister of Justice (17618/AB, dated May 21st 2024 27. GP), supplement to question 4 (available under: [https://www.parlament.gv.at/dokument/XXVII/AB/17618/imfname_1629822.pdf]).

175. 6. #GegenHassimNetz Bericht (FN 2) p. 5.

176. 48/ME 27. GP Vorblatt und Wirkungsorientierte Folgenabschätzung p. 1 (available under: [https://www.parlament.gv.at/dokument/XXVII/ME/48/fname_819529.pdf]).

mandating procedures could possibly be attributed to the fact that in practice, other effective methods of tackling hatred on the internet have been established. Specialist counselling centres such as ZARA should be mentioned first and foremost in this context, but protection against violence centres, women's emergency centres and victim support centres also deal with cases of online hatred.[177] As part of the BanHate campaign, the Styrian Anti-Discrimination Centre has developed its own app to simplify the reporting of infringing content online.[178] All incoming reports are thoroughly reviewed and (criminally) prosecuted if necessary. The affected individuals are also informed about the possibility of initiating legal proceedings pursuant to § 549 ZPO if a significant violation of personality rights is suspected. However, initial reports on experiences in the field show that the court fee of 107 euros (currently approximately 618 Reais)[179] – to be paid when bringing an action under § 549 ZPO – is likely to be a considerable hurdle, not to mention the costs of possible subsequent ordinary proceedings. Despite the legislator's commendable intentions, this procedural tool plays only a minor role in the fight against hate on the internet so far.

ANNEX

§ 549. ZPO

(1) In legal disputes concerning actions in which only claims for an omission order are asserted due to a significant violation of personality rights in an electronic communications network that impairs the human dignity of an individual, the court shall issue an omission order at the request of the plaintiff without a prior oral hearing and without hearing the defendant if the alleged claim can be conclusively derived from the information in the action. The action must be accompanied by evidence from the electronic communications network which shows or makes apparent the infringing content.

(2) The omission order contains an order to omit the asserted infringement and the words "omission order" ["*Unterlassungsauftrag*"] as well as the pronouncement that the defendant, if he/she disputes the asserted claim, must raise objections ["*Einwendungen*"] to the order within fourteen days. It has to contain an instruction that the omission order can only be contested by raising objections ["*Einwendungen*"] and that, if objections ["*Einwendungen*"] are lodged, ordinary proceedings will take place regarding the action filed.

177. For a more detailed breakdown of the organisations that dealt with cases of hate speech online in 2023: 17618/AB XXVII. GP supplement 6 (available under: [https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.parlament.gv.at%2Fdokument%2FXXVII%2FAB%2F17618%2Ffnameorig_1629824.xlsx&wdOrigin=BROWSELINK]).

178. For more information on the BanHate campaign see [https://www.banhate.com/app/].

179. *Dokalik/Mokrejs-Weinhappel* (FN 14), p. 6 (8); *Mokrejs-Weinhappel* (FN 10), p. 53 (54).

(3) The omission order shall be served on the defendant together with the action. Objections ["*Einwendungen*"] may be raised against the omission order within a mandatory time limit of fourteen days upon service. It is sufficient if the intention to raise objections ["*Einwendungen*"] is evident from the document. The decision on costs contained in the omission order may be contested by appeal ["*Rekurs*"]. §§ 556 (5), 557 (2) to (6) and 558 ZPO shall apply mutatis mutandis.

(4) The court may, at the request of the plaintiff, grant the omission order provisional enforceability if the continued effect of the allegedly infringing act is intolerable for the plaintiff, associated with considerable disadvantages or is incompatible with fundamental values of the Austrian legal system. Provisional enforceability takes effect as soon as the order granting it has been served and remains in effect until the proceedings have been terminated. The defendant has no right to appeal the order granting provisional enforceability.

(5) The Federal Minister of Justice is authorised to publish a form for the action and the request for issuing the omission order and to keep it available on the Internet on the website of the judiciary.

§ 244. ZPO

(1) In legal disputes concerning actions which exclusively request a monetary payment not exceeding EUR 75,000, the court shall issue an order for payment conditional on the defendant not lodging an objection ["*Einspruch*"], without a prior oral hearing and without hearing the defendant, unless an order for payment is to be issued (§§ 555 to 559).

(2) An order for payment may not be issued if

1. the action is to be rejected;
2. the claim is not pursuable according to the information in the action or is obviously (§ 269) not yet due, is dependent on a consideration or the defendant's whereabouts are unknown;
3. the defendant has his/her domicile, habitual residence or registered office abroad;
4. the claim is inconclusive.