Class Action Lawsuits against the Tobacco Industry in Austria and Beyond

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1. Introduction

The Supreme Court of Austria (Oberster Gerichtshof) explicitly declared admissible the highly disputed and controversial „class action lawsuit according to Austrian Law"[1], which has been used by the Consumer Protection Committee and the Federal Chamber of Labour as means to legally assert mass damages for years. Notwithstanding this factual background, there seems to be an urgent necessity for on behalf of the lawmaker to introduce a real class action lawsuit. Individuals, suffering from the health damages caused by the highly engineered and manipulated drug delivery device of the tobacco industry – the cigarette[2] –, will then be able to overcome the financial inhibition threshold to sue the multinational tobacco corporations. The procedural enforcement of emerging claims for mass damages must be implemented by the introduction of a feasible class action procedure in line with Article 6 of the European Convention of Human Rights. Only then can access to justice be guaranteed under the necessary constitutional law of every member state of the European Union.[3]

2. The Justice System in Austria and the Pressure from Europe and USA

In a lengthy *obiter dictum*, the Supreme Court of Austria explicitly declared the „class action lawsuit with Austrian imprint", which has been practised by organizations for legally valid and admissible. Yet, the Supreme Court expressed the restriction that the objective joinder of actions requires „a substantially similar entitlement to damages" in the course of assignment of claims receivable for (judicial) collection. In Austria, this would imply a teleological reduction of § 227 of the Code of Civil Procedure.[4]

There is increasing pressure for a legislative reform from the European Commission: in connection with the antitrust laws, the Commission has been pushing for „private enforcement", which conditions and necessitates procedural instruments for coming to terms with mass claims proceedings. Additionally, European lawyers have been bringing class action lawsuits into US courts. The valid arguments within the USA that there exists no efficient procedure for the enforcement of mass claims puts the European lawmakers under considerable pressure. This is why a modern class action procedure is necessary for the defense of the dignity of the Austrian and European justice system.[5]

3. The Legal Problems

Since class action lawsuits against the tobacco industry would entail litigation against foreign and multinational defendants, the assignment of claims to a third party („class action plaintiff") could eventually result in the loss of the consumer's privilege of the *forum actoris* (venue of jurisdiction), even if the claim was originally a consumer's case according to Article 15 ff of the European Jurisdiction and Enforcement Regulation. Moreover, even through the intervention of a litigation-financing society in the case of large amounts in dispute, the risk of liability can become prohibitive for the third party, acting on behalf of the class action plaintiff. Since the actual plaintiff or claimant remains the liable party for the litigation costs, in every individually different case the litigation-financing party will eventually decide whether it will deposit sufficient securities.

4. The Arguments for Class Action Lawsuits

4.1. Avoiding Costly Individual Litigation

The most important efficiency-oriented argument for class action lawsuits is the avoidance of many individual legal proceedings in court. The participation of a litigation-financing party has been possible in many class action lawsuits in Austria, because, on the one hand, the accumulation of the different claims have reached a minimal jurisdictional amount, and, on the other hand, the risk of costs of the „accumulated" and enforceable claims were multiple times lower than the sum of costs of hundred individual trials, even though the assessment base of the court was higher. If necessary, in specific cases, a collective or individual lawsuit can be continued after final judgment in a class action lawsuit. As far as possible, this alternative legal procedure should be the exception to the rule.

4.2. Overcoming the Inhibition Threshold

The disproportionally high costs of individual lawsuits are the simple reasons why damaged plaintiffs have been deterred from enforcing their claims in court. Independent of any difficult

1) Austrian Supreme Court (OGH), 5 July 2005, 4 Ob 116/05 w.
2) Siehe auch mwN: *Davani*, Der Konstruktionsfehler der Zigarette nach dem PHG in Österreich, ecolex 2004, 437; *Burger/Davani*, Schwarzbuch Zigarette (2006).
3) *Klauser*, Von der „Sammelklage nach österreichischem Recht" zur echten Gruppenklage, ecolex 2005, 744.
4) *Klauser*, ecolex 2005, 744 (745).
5) *Kodek*, Möglichkeiten zur gesetzlichen Regelung von Massenverfahren im Zivilprozess, ecolex 2005, 751 (752).

points of law and facts of the case, a modern and effective class action procedure would smooth out this kind of psychological and financial inhibition threshold. This would improve the procedural enforcement of justice and substantive law.

4.3. „Pactum de quota litis"

According to § 879 (2) (2) of the Austrian Civil Code, a contract is null and void, if a „legal friend" (e.g.: lawyer, notary, tax accountant) has a financial interest in an entrusted legal case of a plaintiff, in case the plaintiff is awarded money by the court. The objective of this prohibitive and partially outdated rule is to protect the claimant or plaintiff, who is normally not able to assess the prospects of the trial, from unfair speculation: the person, representing the interests of the party, being the advocate of the claimant and influencing the course of the trial, should not have his own interest in the disputed case or a stipulated financial interest in the outcome of the case.[6]

The „pactum de quota litis"-rule in its extensive form and the question whether a litigation-financing party is a so called „legal friend" of the party, has been subject of intense and controversial discussions in Austria.[7] The questions of admissibility and effectiveness of quota litis-agreements, according to the intended purpose of the relevant legal rules, should be restricted to the internal relationship between the claimant and the litigation-financing party. The litigation-financing party will usually receive 30 % of the total awarded sum and carry the total risk for the cost of litigation, in case the „class action plaintiff" loses.[8] Otherwise, the contrary effect would be achieved with a revision of the intended legal rule: the obstacle for an efficient enforcement of mass-claims would be higher instead of lower.[9]

Notwithstanding this financial incentive appreciated by lawyers in typical class action lawsuits, the danger of a certain „conflict of interest" between the class action lawyer and the plaintiffs cannot be denied: the class action lawyer might be tempted to take the bait and make a premature settlement with the defendant, which would definitely assure the lawyer a fee, but it might not represent the interests of the damaged plaintiffs, for example, in form of an appropriate monetary compensation.[10] For this reason, an effective legal and procedural instrument must be developed and implemented in the Austrian justice system and beyond, so that the legal and financial interests of the class action claimants cannot be undermined, subverted or evaded by overhasty and „forejudging" lawyers.

4.4. The Public Interest for Class Action Enforcement of Individual Claims

There is a controversial discussion amongst legal experts, whether the class action lawsuit should be restricted to certain organisations, such as the Consumer Protection Committee. Conservative legal scholars would like to restrict the class action lawsuit to the instruments of fact finding, assessment of damages, and filing for injunctive relief. According to conservative jurists, the claim for damages should not be part of the class action lawsuit. It has been argued that only those organizations, which are exclusively so obligated by law, should pursue the protection and enforcement of collective and public interests. Yet, in the last few years, an international trend towards collective enforcement of claims has been observed, and this development has also reached Austria. Legal scholars in Austria point out that the term „class action lawsuit" is not correct because it might be confused with the US-American class action, which is certainly different in content and system (with, inter alia, the possibility of punitive damages, a jury, and the attorney's contingency fee).[11]

The „class action lawsuit" has developed in the course of this practical development into a „class action lawsuit with Austrian imprint"[12]: an organization or association – entitled to file a class action lawsuit according to § 29 Consumer Protection Law – is assigned a multiple number of claims from consumers, known by name, for their collective enforcement in court. The instrument of the „class action lawsuit with Austrian imprint" has been put into practice with success in relation to diverse legal claims many times, yet still it has been criticized by legal experts because of the missing public interest in the case of collected claims.

The outrageous and potential criminal conduct of the multinational tobacco corporations[13] and the massive health damages caused by clearly justifies the public interest and the filing of a class action lawsuit by collective organizations.[14]

Whatever the factual circumstances of the case, the court will have to examine the conditions in each case: a class action lawsuit can only take place, if the „procedural economy" is promoted and

6) *Scheuba*, „Sammelklage" – Einklang mit der ZPO erbeten, ecolex 2005, 747 (749).
7) *Knöbl*, Prozessfinanzierung: Quo vadis quota litis?, ecolex 2005, 436; see also *Kutis*, Das „pactum de quota litis", Österreichisches Anwaltsblatt 2008/12, 485.
8) *Wagner*, Rechtsprobleme der Fremdfinanzierung von Prozessen, JBl 2001, 416, 427 ff; Kodek, ÖBA 2004, 616.
9) *Klauser*, ecolex 2005, 744 (747).
10) *Micklitz/Stadler*, Gruppenklagen in den Mitgliedstaaten der EU und der USA, in *Gabriel/Pirker-Hörmann*, Massenverfahren – Reformbedarf für die ZPO? (2005) 250.
11) *Wilhelm*, ecolex 2001, 101; *Rechberger*, VR 2003, 20 FN 57; *Kodek*, ÖBA 2004, 616; see also the following relevant statements: *Taruffo*, Some Remarks on Group Litigation in Comparative Perspective, 11 Duke J. Comp. & Int´l L. 2001, 405: „The European rejection of class actions – essentially based on ignorance – has usually been justified by the necessity of preventing such a monster from penetrating the quiet European legal gardens"; *Hodges*, Multi-Party Actions: A European Approach, 11 Duke J. Comp. & Int´l L. 2000, 321: „Europe neither needs nor wants US-style class action litigation". A question of different nature is the acceptance of US-American class action judgements in Europe and whether the rights of the absent class action members were adequately represented.
12) Regarding this conception: *Kolba*, Sammelklagen: Österreich ein Vorbild? Ein Vorbild für Österreich, VRInfo 11/2000, 1; *Klauser*, „Sammelklage" und Prozessfinanzierung gegen Erfolgsbeteiligung auf dem Prüfstand, ecolex 2002, 805; *Kodek*, Die „Sammelklage" nach österreichischem Recht, ÖBA 2004, 615; *Klauser/Maderbacher*, Neues zur Sammelklage, ecolex 2004, 168. This term is widely established by now, even though there have been a number of objections and doubts by prominent Austrian jurists.
13) See, inter alia, *Merten*, Zigaretten – ein fehlerhaftes Produkt. Zivilrechtliche Haftung und strafrechtliche Verantwortung der Zigarettenindustrie, VersR 2005, 465; *Adams* (ed), Das Geschäft mit dem Tod. Der größte Wirtschaftsprozess der USA und der Anfang vom Ende der Tabakindustrie (2007).
14) *Scheuba*, ecolex 2005, 747 (749).

a landmark decision can be reached, in order to solve a legal question of substantial significance – beyond the individual cases.

5. Significant Common Questions in Tobacco-Related Class Action Lawsuits

The Supreme Court of Austria declared the „class action lawsuit with Austrian imprint" for admissible under the following conditions: the collected cases must possess substantially identical claims of damages (significant common question), a condition comparable to Rule 23 (a) of the US Federal Rules of Civil Procedure demanding numerosity, commonality and typicality.

Moreover, substantially identical legal or factual questions need to be resolved, which affect the main legal issue or a decisive preliminary question. With the help of diverse legal methods and theories of resolution by jurists (e.g.: „risk maximization theory") and by passing sanctions on the intentional destruction of evidence[15] and the conduct of the tobacco industry, the court could systematically reverse the burden of proof, the risk of clarification of facts and causation onto the cigarette manufacturers, which would then be binding for all class action plaintiffs.[16]

In the future, the defendants of the tobacco industry will certainly try to weaken the class action plaintiffs with the counter-argument that the „significant common question" does not exist in a given case. This imaginable scenario could be the reason for expensive in-between disputes concerning the admissibility of class action lawsuits in the future.

6. Conclusion

The tobacco industry is indeed well aware of the financial dilemma faced by plaintiff's lawyers. This fact is eloquently quoted in an informal memorandum, celebrating the voluntary dismissal of several US-plaintiffs' tobacco cases: „The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son of a bitch spend all of his".[17] The cigarette manufacturers spend large sums cultivating experts and fabricating evidence to confuse jurors, judges, the public, and the media about the relevant scientific issues. The procedural challenges of the tobacco companies are expensive because plaintiffs already are overburdened financially by tobacco companies' defense tactics of delaying trials with a blizzard of (pre-)trial motions and challenges aimed at exhausting the plaintiffs' often poor funds. The tobacco companies have the financial power to prolong (pre-)trial litigation to make lawsuits as expensive as possible to discourage plaintiffs. The tobacco industry is certainly not alone among product liability and toxic tort defendants in attacking junk science, while simultaneously creating and relying on it for so many decades. Whatever complex questions of legal or procedural nature remain to be resolved and disputed for the enforcement of class action lawsuits against the multinational tobacco corporations in Austria and beyond, these companies should not be insulated from legal accountability for their dangerous products.[18]

Only financially private, public, and public health-related organisations and foundations could fund the above described challenges that are beyond the financial capabilities of most plaintiffs and plaintiffs' lawyers.

The procedural enforcement of mass damage claims – specifically in the form of the „class action lawsuit according to Austrian Law" – has passed its first practical test, but must now be supported with the introduction of a feasible class action procedure, according to the general principles of the European Convention of Human Rights. Now, the lawmakers are required to introduce a true class action procedure, and only then can access to justice be guaranteed under the necessary constitutional law of every member state of the European Union.[19]

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15) See United States District Court for the District of Columbia, *United States of America v Philip Morris USA, Inc., et al.*, Civil Action No 99-02496 (GK), available at http://www.usdoj.gov/civil/cases/tobacco2/index.htm (21.1.2008); see, with further references, *Davani*, Die „Risikoerhöhung" im Fall der Produkthaftung der Zigarettenhersteller, HAVE 3/2005, 220.

16) *Karollus*, Funktion und Dogmatik der Haftung aus Schutzgesetzverletzung (1992); *Davani*, Die Haftung der Tabakindustrie für Gesundheitsschäden von Rauchern (2004); *Davani*, HAVE 3/2005, 220.

17) *Haines v Liggett Group* (D.N.J. 1993), 814 F. Supp. 414 (421) quoting a memorandum from RJ Reynolds counsel J. Michael Jordan, 29 April 1988; see also *Friedman/Daynard/Banthin*, Learning from the Tobacco Industry about Science and Regulation. How Tobacco-Friendly Science Escapes Scrutiny in the Courtroom, Am J Public Health 2005, 16-20.

18) *Friedman/Daynard/Banthin*, Am J Public Health 2005, 16-20; *Adams* (ed), Das Geschäft mit dem Tod (2007); *Merten*, VersR 2005, 465.

19) In its Consumer Policy Strategy for 2007-2013, the European Commission underlined the importance of effective mechanisms for seeking redress and announced that it would consider action on collective redress mechanisms for consumers, http://ec.europa.eu/consumers/strategy/index_en.htm (02.02.2009).