Chapter 11
Disgorgement of Profits Under Austrian Law

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Abstract Although Austrian criminal law contributes to the idea of disgorging unlawfully gained advantages, Austrian law places the main focus of attention on remedies arising under private law. Given that the Austrian Civil Code does not expressly provide a general legal basis for disgorgement damages, claims under the law of unjust enrichment play an important role regarding profit disgorgement. However, at least in special areas of private law an instrument is available that appears to be at least closely related to disgorgement damages.

Keywords Disgorgement • Profit • Austria • Confiscation • Forfeiture • Unjust enrichment • Damages • Disgorgement damages • Intellectual property law • Competition law

Introduction

The idea that unlawful conduct should not pay is very common in Austrian law. It underlies various statutory provisions and also appears in legal literature. In assessing to what extent Austrian law provides for the disgorgement of unlawfully gained advantages criminal and private law mechanisms both have to be considered.

Criminal Law

As a start, Austrian criminal law provides regulations aiming at disgorgement of unlawful profits gained in connection with criminal offenses. In the context of the present topic sections 19a and 20 of the Austrian Criminal Code are of special interest.

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Section 19a regulates confiscation of items and thereby determines that *inter alia* items generated through a deliberate crime have to be confiscated. Examples cited in literature constitute goods produced by an environmentally hazardous factory.[1] These products may be confiscated by virtue of section 19a which to some extent serves the aim of disgorging unlawfully gained advantages.

Even more relevant is section 20.[2] It states that assets received *for* committing a criminal act or acquired *through* a criminal act are subject to forfeiture. Other than section 19a, section 20 provides that the asset must already exist at the time the criminal act is committed. In contrast, an item generated through a crime in the meaning of section 19a comes into existence only through the crime.[3] Accordingly, the forfeiture under section 20 captures various kinds of unlawfully gained advantages: Examples are proceeds due to trading with arms or illegal narcotics, bribes an office holder received and generally the remuneration the offender received from a third party for executing his offense. The forfeiture does not only lead to disgorgement of the offender's net profits as his expenses do not reduce the amount subject to forfeiture. Therefore, more than the actual profit has to be given away. This is why forfeiture under section 20 is regarded as a punishment rather than a compensation claim among legal scholars.[4] In addition, interests arising from the asset subject to forfeiture and substitutions that replaced the relevant asset (e.g. consideration for the sold stolen good) may be disgorged by virtue of section 20. Plus, also assets belonging to third parties are subject to forfeiture. However, it is questionable whether expenses the offender saved himself due to the offense may be disgorged by way of section 20. Also, for instance the advantage somebody gained due to bribing an office holder is (as against the bribe itself) not subject to forfeiture. Moreover, naturally section 20 as well as section 19a only encompasses criminal acts and thereby does not capture profits due to unlawful but non-criminal conduct.

The aforementioned restrictions of the scope of application show the limited reach of the provisions: Although sections 19a and 20 do aim at profit disgorgement[5] and thereby encompass certain important kinds of unlawful advantages, the provisions are everything but comprehensive. Therefore, Austrian criminal law contributes to the idea that unlawful conduct should not pay but does not suffice by itself. Concerning disgorgement of unlawful profits Austrian law places the main focus of attention on remedies arising under private law.

[1] Fuchs and Tipold, in: Höpfel and Ratz (2012), § 19a para. 4, 15 and § 20 para. 16.

[2] See as to the following Fuchs and Tipold, in: Höpfel and Ratz (2012), § 20 para. 1 et seqq.

[3] Fuchs and Tipold, in: Höpfel and Ratz (2012), § 19a para. 3 and § 20 para. 12.

[4] Fuchs and Tipold, in: Höpfel and Ratz (2012), Vor §§ 19a-20c para. 13.

[5] Compare Fuchs and Tipold, in: Höpfel and Ratz (2012), Vor §§ 19a-20c para. 3.

Private Law

Unjust Enrichment

When an Austrian private lawyer discusses profit disgorgement, the law of unjust enrichment comes to his mind first. The fundamental principle underlying this branch of law is that nobody is allowed to enrich oneself at another's expense without legal cause; enrichment gained in violation of this principle must be disgorged.[6] Therefore, disgorgement of unlawfully gained advantages through the law of unjust enrichment is a typical legal consequence for illegalities.[7]

Austria's law of unjust enrichment is split into two categories of claims: Firstly, claims that aim at undoing willful benefits the claimant provided for the plaintiff without legal cause and secondly, all other kinds of unjust enrichment.[8]

Given that in typical cases where disgorgement damages are discussed (e.g. infringements of competition law, ip-law or personal rights by mass media) the claimant did not provide a direct benefit for the plaintiff, the latter category is of special interest in this context. The elementary provision here (and of the law of unjust enrichment on the whole) is section 1041 of the Austrian Civil Code of 1811.[9] Its relatively broad interpretation leads to the following understanding of the provision: Whenever a legal interest allocated to a person by the legal order is used by somebody else in a way that contradicts the right of the entitled person, the enriched person has to disgorge the advantages gained by the unlawful usage.[10]

As examples for cases that create disgorgement claims in virtue of section 1041 are cited: Selling another's property, grazing of one's cattle at another's land, infringement of another's hunting right, using another's trademark for own goods, building on another's land while mistaking it for one's own land, infringing the privilege as to one's own image by publishing photos of a famous dancer, making use of a competitor's business secret that was found out unlawfully and outcompeting competitors by providing wrong information.[11]

Therefore, section 1041 serves as the legal basis for disgorgement claims in many cases. However, section 1041 is not all-embracing;[12] it is held that claims in

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[6]Bydlinski (1996), 235.

[7]Compare e.g. Welser (2007), 273 et seqq.; Koziol in: Koziol et al. (2014), § 1041 para. 4; Enzinger (2012), para. 640.

[8]See e.g. Perner et al. (2014), 368 et seqq.

[9]Koziol in: Koziol et al. (2014), § 1041 para. 1; Bydlinski (1996), 240.

[10]Fundamentally Bydlinski (1996), 239 et seqq.; Perner et al. (2014), 377 et seqq.

[11]Wilburg (1934), 36 et seqq.; see also Perner et al. (2014), 377 et seqq.

[12]Compare Rummel (1971), 385, 394.

unjust enrichment would not encompass profits gained by destruction of another's property because destruction would not constitute "usage" in the meaning of section 1041. Accordingly, whenever an entrepreneur destroys a competitor's machine and thereby is able to increase his profit, the competitor could not demand this profit by a claim under the law of unjust enrichment. Also, when an entrepreneur hurts his competitor physically or in cases where a media company considerably increases its profits by publishing a faked interview with a celebrity[13], the law of unjust enrichment would – according to that opinion – not take effect.[14] It is also held that profits due to the obstruction of competitors would not trigger a claim in virtue of section 1041.[15] Accordingly, not every unlawful advantage may be disgorged by way of a claim in unjust enrichment; the law of unjust enrichment leaves gaps that could imaginably be filled by the law of damages.

Disgorgement Damages

Starting Point: The Civil Code

The Austrian law of damages is mainly governed by the Austrian Civil Code of 1811 and especially by its sections 1293 et seqq. These sections do not contain any provisions that expressly establish a general legal basis for disgorgement damages. For a plaintiff who claims damages under Austrian law the Civil Code offers (at the most[16]) only two ways of calculating the extent of his damages: They may be assessed either abstractly or concretely, which means that the plaintiff may either claim the current market price of e.g. his destroyed good (abstract calculation) or the difference between his actual wealth and his hypothetical wealth he would have without the damaging event (concrete calculation).[17] There is no indication for a third kind of calculation in the Civil Code. Therefore, the Civil Code does not (at least expressly) offer the possibility to demand by claim for damages the advantages gained by the wrongdoer through his unlawful conduct. That is the situation in the Austrian Civil Code of 1811. However, there are special areas of private law where the statutory situation seems to be quite different.

[13]Contrary Wilburg (1934), 44, who supports a claim in unjust enrichment in a comparable case.

[14]Koziol (2009), 237 et seqq., particularly 239; Koziol (2010), para. 2/33 et seqq.; see also Rummel in: Rummel (2000), § 1041 para. 3; again Koziol in: Koziol et al. (2014), § 1041 para. 9.

[15]Enzinger (2012), para. 638.

[16]If damage is not caused by an act of gross fault the plaintiff even has only recourse to one single way of assessing damages (namely the abstract calculation), see e.g. Perner et al. (2014), 298.

[17]Karner in: Koziol et al. (2014), § 1293 para. 8 et seqq.

Intellectual Property Law (Ip-Law)

Remedies Available Under Ip-Law

Austrian ip-law is governed by several statutory acts. Depending on the kind of ip-right infringed following statutes may for example be applicable: The Protection of Trademarks Act of 1970 if trademark rights are held to be violated, the Copyright Act in case of copyrights being infringed and the Patent Act concerning patent right violations. However, although it seems that every ip-right is subject to different, special rules and has its own statutory act, in terms of potential remedies the difference is insignificantly small. All statutes in question give recourse to the same identical remedies.[18]

Besides the right to forbearance and the right to abatement, statutory ip-law especially provides different rights to claim money.[19] At first, it enables plaintiffs to claim an appropriate license fee. This right is held to be a claim belonging to the law of unjust enrichment rather than to the law of damages. Accordingly, the claim is independent from fault.[20] Although this remedy obviously already aims at disgorging an unlawful advantage from the wrongdoer (namely the saved license fee)[21], statutory ip-law still goes further in case of the wrongdoer having acted culpably: It provides (alternatively to the appropriate license fee) the right to either claim regular compensatory damages or to disgorge the whole profit the violator gained through the infringement. Also, if the violator acted deliberately or at least gross negligently (for copyright infringements even slight negligence suffices), the injured party is enabled to claim even double license fee. This is held to be lump sum damage compensation in order to avoid difficulties arising from proving the concrete loss.[22] In order to prepare his actions the infringed party is entitled to claim for submission of accounts.[23]

In Particular: The Claim to Disgorge the Violator's Profits

The nature of the title to disgorge the violator's profits is highly controversial. While some commentators consider it to be a claim within a specific branch of the law

[18] See Heidinger in: Wiebe (2012), 234 et seqq.

[19] See regarding this paragraph Koppensteiner (2012), 184 et seqq. (in particular regarding trademark law) and Heidinger in: Wiebe (2012), 234 et seqq.

[20] Koziol (2009), 244; Koziol (2010), para. 2/38; Koppensteiner (2012), 189; Kodek in: Kletečka and Schauer (version 1.01), § 1293 para. 27.

[21] Compare Torggler (1971), 8 et seqq.; Heidinger in: Wiebe (2012), 234 et seqq.

[22] Heidinger in: Wiebe (2012), 234 et seqq.; Guggenbichler in: Kucsko and Schumacher (2013), § 53 para. 47 et seqq., especially para. 49.

[23] Compare Kucsko (2003), 532.

(unjust enrichment, damages etc.),[24] others are of the opinion that it is a title sui generis.[25] In spite of that discussion and independent from the legal category the claim belongs to, it appears that intellectual property law (in contrast to the Civil Code) provides for an instrument that is at least closely related to disgorgement damages: It requires fault and entitles the violated party to claim the net profit arising from the infringement. The net profit amounts to the whole proceeds the violator earned reduced by variable costs. Fixed costs do not reduce the claim. However, the violator is not obliged to hand over those parts of his proceeds that are due to other reasons than the law infringement (e.g. quality of sold products, intensity of advertisement). Given that difficulties in proving the concrete amount of net profits can arise, the Austrian Code of Civil Procedure allows that the deciding judge estimates the amount of net profits.[26]

Although ip-law is the only branch of law where a claim in disgorgement damages (or at least a closely related remedy) is implemented in such a general and distinct way by the applicable statutes, there are some indications for the same kind of remedy in another field too.

Competition Law

Basically, the relevant statutory act aiming at avoiding unfair competition (namely the Act Against Unfair Competition of 1984) does not include any provision that expressly establishes disgorgement damages in general.[27] In this regard, the statutory situation seems to be just like in the Civil Code.[28] However, section 9 para. 4 of the Unfair Competition Act provides recourse to disgorgement damages (or a closely related remedy) under certain circumstances:[29] The provision refers to the Patent Act and thereby declares applicable the remedy to claim the profits gained by the wrongdoer in case of violations of company symbols. Hence, statutory competition law recognizes sort of disgorgement damages to some extent.

[24] Implicitly for a claim in law of damages Kodek in: Kletečka and Schauer (version 1.01), § 1293 para. 26 et seqq.; for a claim in law of unjust enrichment Koppensteiner (2012), 191; see also Guggenbichler in: Kucsko and Schumacher (2013), § 53 para. 38; inconsistently OGH (= Austrian Supreme Court) 14.10.1986, 4 Ob 376/86 (available on http://www.ris.bka.gv.at/Jus).

[25] Compare Koziol (2010), para. 2/45.

[26] Guggenbichler in: Kucsko and Schumacher (2013), § 53 para. 42 et seqq.; see as to variable and fixed costs also OGH 20.01.2014, 4 Ob 182/13p.

[27] Compare section 16 Act Against Unfair Competition of 1984; Kodek and Leupold in: Wiebe and Kodek (2012), § 16 para. 67 et seqq.; OGH 13.07.1953, 3 Ob 417/53 = SZ 26/189.

[28] See above.

[29] Schmid in: Wiebe and Kodek (2012), § 9 para. 178; compare also Kodek and Leupold in: Wiebe and Kodek (2012), § 16 para. 67.

However, the scope of the aforementioned provision is quite narrow and does not include all acts of unfair competition; it only encompasses abuses of names[30], firms[31], special company designations, domain names, titles of print work, special configuration of companies and/or products and non-registered trademarks.[32] Regarding acts of unfair competition going beyond the scope of section 9 para. 4, a legal basis for disgorgement damages is lacking under statutory competition law. Even more surprising, in two judgments[33] the Austrian Supreme Court nonetheless indicated that disgorgement damages were principally available for breaches of competition law. Indeed, the said decisions are relatively old (they date back to 1953 respectively 1962). However, the Court expressly held that beside claiming the plaintiff's missing profit or missing license fee, a third mean of assessing damages was available by resorting to the profit gained by the defendant. The court also referred to the situation under ip-law where explicit provisions provided for disgorgement claims.[34] Both judgments referred to section 273 Austrian Code of Civil Procedure (already indicated above) that allows estimation of the amount of damages in case of difficulties in proving the actual amount of damages.[35] The court argued that by way of section 273 disgorgement damages may be awarded.

The academic echo following this judicial advance was mainly negative.[36] *Honsell* for instance states that the profit gained by the wrongdoer does not constitute the plaintiff's loss. Therefore, by awarding disgorgement damages the fundamental principle of the law of damages – the plaintiff must not be enriched by the award of damages – would be violated. However, he supports that the violator's profits gained by violation of business secrets may be awarded by way of a claim in unjust enrichment.[37] In contrast, *Enzinger* recently argued for a third way of

[30]Compare section 43 Austrian Civil Code.

[31]Compare section 17 et seqq. Austrian Enterprise Code.

[32]Enzinger (2012), para. 420 et seqq.

[33]OGH 13.07.1953, 3 Ob 417/53, although the judgment is about an infringement governed by section 9 Act Against Unfair Competition the court could not argue with paragraph 4 (and the express claim to disgorge the violator's profits therein contained) because the said paragraph was not enacted until 1999 (see Markenrechts-Novelle BGBl. I 111/1999; compare also the research of Torggler (1971), concerning the old legal situation); OGH 08.05.1962, 4 Ob 319/62 = ÖBl 1962, 69.

[34]OGH 13.07.1953, 3 Ob 417/53.

[35]See as to the application of section 273 in competition law Kodek and Leupold in: Wiebe and Kodek (2012), § 16 para. 37 et seqq.; see also Enzinger (2012), para. 625.

[36]Honsell (1980), 61 et seqq.; Torggler (1971), 2, 4, 6; Kodek and Leupold in: Wiebe and Kodek (2012), § 16 para. 70 et seqq. and para. 38; Rummel (1971), 391; see also Kodek in: Kletečka and Schauer (version 1.01), § 1293 para. 26 et seqq.; differing opinion Enzinger (2012), para. 624.

[37]Honsell (1980), 62 et seqq.; see also Wilburg (1934), 44; see also Torggler (1971), passim, who also sticks up for a claim of unjust enrichment as against a claim in law of damages in order to disgorge the violator's profits (concerning company symbol violations).

assessing damages and states that for some kinds of competition law infringements plaintiffs have recourse to disgorgement damages.[38] In addition, he supports the opinion that by way of a claim in unjust enrichment disgorgement of profits is – in some cases – possible.[39] Ostensibly, he deems – in principle – both ways being available.

Given this state of opinions and the statutory situation, it is doubtful whether disgorgement damages (or an at least closely related remedy as it exists under ip-law) do exist under Austrian competition law. Plus, the fact that in 1999 the legislator amended the Act Against Unfair Competition and thereby enacted an express disgorgement claim in section 9 exclusively for company symbol violations[40] could be used as a counter argument. However, it seems that concerning some[41] kinds of competition law violations scholars at least do support profit disgorgement by way of claims in unjust enrichment.[42] In any case, implementation of an express provision providing or excluding disgorgement claims by the legislator would clarify the situation. In 2008, the Austrian minister for consumerism stuck up for an amendment of the Act Against Unfair Competition concerning this matter by including an express disgorgement claim for acts of unfair competition.[43] Apparently, the attempt failed.

Disgorgement Claims in General?

In recent literature indication is visible as to the tendency of Austrian private law being to acknowledge disgorgement claims in general: Recently, *Helmut Koziol*[44] analyzed cases in which the infringer gains profit by destroying another's legal interest (e.g. by physically hurting a competitor so that the competitor has to shut down his business or by destroying machines of a competitor) and cases where a media company considerably increases its profits by publishing a faked interview with a celebrity. He holds that under such circumstances it was not possible to claim the unlawful profits by way of a claim in law of unjust enrichment.[45] Neither a claim in law of damages would result in profit disgorgement because law of damages focused exclusively on the disadvantage of the infringed party. Consequently, only disadvantages of the infringed party (as against advantages of the infringing party) could be claimed; the problem would remain that the advantages of the wrongdoer

[38]Enzinger (2012), para. 624.

[39]Enzinger (2012), para. 636 et seqq.

[40]Markenrechts-Novelle BGBl. I 111/1999.

[41]Compare Rummel (1971), 385, 394.

[42]Compare also Wilburg (1934), 44 et seqq.

[43]See *inter alia* the press release on http://www.sozialministerium.at from 13.04.2008 and the report on http://diepresse.com from 25.03.2008.

[44]Koziol (2009), 237 et seqq.; again Koziol (2010), para. 2/33 et seqq.

[45]See already above.

could still be considerably higher. Therefore, *Koziol* argues for the admission of disgorgement claims in general under private law for cases like those mentioned above where the law of unjust enrichment does not take effect. As against the law of unjust enrichment, a breach of duty was precondition for this special kind of claim. In order to back up his argumentation he refers to the provisions under ip-law that explicitly contain disgorgement claims and holds that by way of analogy these provisions applied in general. *Koziol* does not classify this disgorgement claim into the law of damages or into the law of unjust enrichment but holds that it constituted a *sui generis* claim that is situated in between the law of damages and the law of unjust enrichment. It remains to be seen whether his thesis will be adopted by the courts.

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