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# The Legal 500 Country Comparative Guides

# Austria

# PATENT LITIGATION


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This country-specific Q&A provides an overview of patent litigation laws and regulations applicable in Austria.

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# AUSTRIA
# PATENT LITIGATION

## 1. What is the forum for the conduct of patent litigation?

Patent infringement proceedings in Austria are exclusively handled by the Commercial Court Vienna. The specialized chambers in such patent infringement proceedings are composed of two judges of the commercial court without technical background and lay judge with technical expertise.

The lay judges typically are Austrian patent attorneys. As there are not too many lay judges available to the court and as they also represent various client in their own practise, it is quite important to consider possible conflict situations.

In the second instance the Higher Regional Court Vienna is responsible, also there two professional judges and one lay judge will decide on the case. In cases with important questions of law also an appeal to the Supreme Court is possible.

In Austria, because of the bifurcated system one has to differentiate between infringement and nullity proceedings as regards court competence. Nullity proceedings are handled by the Nullity Department of the Austrian Patent Office in the first instance and by the Higher Regional Court Vienna in the second instance.

Nullity proceedings may be initiated by the alleged infringer before or during the infringement proceeding. The alleged patent infringer may request a stay of the proceedings. An expedited procedure in the nullity proceedings may be requested by a Party.

Infringement proceedings before the Commercial Court Vienna are quite often stayed until a decision in a parallel Nullity proceeding has been made.

## 2. What is the typical timeline and form of first instance patent litigation proceedings?

The duration of main proceeding in a patent infringement case depends heavily on the complexity and a possible stay for the Nullity proceedings. As most of the cases are suspended until a final decision in the Nullity proceedings which takes between 2 and 3 years it takes 3 to 4 years to receive a first instance decision. If the proceedings are not suspended it can take 1 and a half year to 2 years until the decision in the first instance.

As in Austria preliminary injunctions may be requested in patent infringement cases to stop the infringement fast or to preserve evidence it is important to understand that there is no urgency requirement – at least before a main proceeding has been initiated.

In most of the preliminary injunction cases the Commercial Court holds inter-parte proceedings, which take between 3 and 9 months

A typical timeline for an ex-parte preliminary injunctions to preserve evidence according to the Enforcement Directive, unfortunately takes up to 4 months.

The form of a first instance patent litigation procedure can be described as follows:

- Plaintiff files a request for preliminary injunction to preserve evidence (very seldom)
- Plaintiff files online the complaint with the court and pays the court fees
- Court serves the complaint on the defendant
- Defendant files the statement of defence and often initiates a nullity action with the Austrian Patent Office and requests the stay of the proceeding
- Both parties file preparatory briefs
- First hearing before the court with the determination of the further program, expert will be named by court, eventually a decision to stay the proceeding until a decision in the nullity action will be made
- Expert opinion of the court expert will be served to the parties
- Both parties file preparatory briefs
- At least one further hearing

 

- Parties serve their cost notes according to the Attorney tariff act
- Court hands down the judgment

## 3. Can interim and final decisions in patent cases be appealed?

In main proceedings before the Commercial Court Vienna the deadline to file an appeal is 4 weeks. The appeal brief is quite formalistic in its structure and has to contain all relevant grounds and arguments in detail. The appeal has to be directed to the Higher Regional Court Vienna and the first instance decision is not enforceable until a final judgement in the further appeal procedure.

A final decision of the Nullity Department of the Austrian Patent Office in view of the validity of a patent may be appealed –with suspensive effect, which means that the patent stays in force until a final decision. The appeal has to be filed with the Commercial Court Vienna in a deadline of 2 months. Non-final decisions of the Nullity Department of the Austrian Patent Office, except decision of suspension and some others are not appealable independently from a final decision.

A decision of the Higher Regional Court Vienna may be appealed under certain circumstances at the Supreme Court.

The Supreme Court only decides on questions of law, not on questions of fact. Access to the Court is limited in two ways. On one hand, consideration is given to the value of the dispute (EUR 30,000). On the other hand, access to the court depends on the importance of a case in relation to certainty and uniformity of the law, or any prospect that the final decision might produce a development in the law.

## 4. Which acts constitute direct patent infringement?

A direct patent infringement is constituted by industrially producing the subject matter of the invention, putting it on the market, offering it for sale or using it or importing or possessing it for the said purposes.

If the patent has been granted for a process, it shall be effective to the products directly obtained by such process. It is also a patent infringement if products directly obtained by such processes performed outside Austria are imported into Austria.

## 5. Do the concepts of indirect patent infringement or contributory infringement exist? If, so what are the elements of such forms of infringement?

Both concepts of indirect patent infringement and contributory infringement exist in the Austrian legal system.

Indirect patent infringement is fulfilled by a third party if this third party, without the consent of the patentee, offers or delivers means relating to an essential element of the invention for use of the invention to others than those persons entitled to use the invention, if the third party knows, or if it is obvious due to the circumstances, that the means are suited and intended to be used for the use of the invention.

The concept of indirect patent infringement has only been added to the Austrian Patent Act 16 years ago. Before that only the concept of contributory infringement existed through the general principles laid down in the Austrian civil law.

A contributory infringement requires the conscious support in the infringement by the assistant to the infringer or an incitement by an instigator. A contributory infringer must act with intent. Intent can also be established by knowingly failing to take all necessary care.

A contributory infringer is liable as the infringer.

## 6. How is the scope of protection of patent claims construed?

The skilled person's general technical knowledge at the priority date is decisive for assessing the disclosure content of the patent application or patent.

The scope of protection of patent claims cannot extend beyond the disclosure content of the patent application or patent in its originally filed version.

According to § 22 a of the Austrian Patent Act the scope of protection is defined by the patent claims. The description and the drawings shall be used in the interpretation of the claims. The description shall be used to clarify the meaning of technical terms, and as such the patent specification according to the case law shall be its own dictionary.

But if the language of the claim is clear and unambiguously only the claim shall always prevail. According to the well-established case-law general information contain in the description shall be irrelevant

 

to the scope of protection or in other words the scope of protection cannot be widened up beyond the scope of the claim. According to the Austrian Patent Act also Protocol on the Interpretation of Article 69 EPC shall be used in the interpretation of claims of Austrian Patents.

Beside the word identical patent infringement there is also the equivalent patent infringement. There is no doctrine of equivalence defined in the Austrian laws but there is case law. The equivalence needs to be tested on the feature level of a claim. Also, more than one features might be realized in an equivalent way.

Equivalence between the infringement form and the patented subject matter is evaluated by taking the skilled person's knowledge at the priority date of the patent in suit into consideration. Equivalence is evaluated by comparing the function of the features of the patent claim which contribute to the solution of the technical problem of the patent in suit with the function of the features of the infringement form. Here, the main question is whether the skilled person having knowledge of the claimed invention will be able to solve the technical problem underlying the patented invention with modified but equivalent means, in other words., whether he will arrive at the result with the modified means also leading to the desired result.

The test scheme created by the Austrian Supreme Court based on jurisdiction in other countries consists of three main steps.

1. The infringement form solves the underlying technical problem of the invention in a modified way but with objectively equivalent means. (equal effect)
2. The skilled person can find, using his expert knowledge, the modified means used in the infringement form to solve the underlying technical problem of the invention, as equally effective. (obviousness)
3. The considerations of the skilled person are oriented towards the meaning of the technical teaching protected under the scope of the patent claim in away, that the skilled person will consider the infringement form with its modified means as an equivalent solution to the patented embodiment. (equivalence)

The prosecution history is not used by the infringement courts in the interpretation of the patent.

## 7. What are the key defences to patent infringement?

The main defence of course is that the accused product does not fall within the literal scope of the claim or that the patent is not infringed in an equivalent way.

As also cases in view of indirect patent infringement are more often nowadays, the defence that the necessary additional subjective element for indirect patent infringement is missing become more relevant.

In most of the cases before the Commercial Court Vienna the defendant argues that the patent is invalid. In such a case a nullity action has to be requested with the Nullity Department of the Austrian Patent Office. If there is a likelihood that the patent is invalid the court will stay the proceedings until a final decision in the invalidation procedure.

In some cases, it turned out that a concentration on the question of non-infringement could be positive for the defendant but of course only if the non-infringement arguments are solid. The main advantage can be seen in the much shorter overall duration of the proceedings.

Some other defences might be:

No infringement on Austrian soil, valid license agreement, right of private prior use, exhaustion, anti-trust defence or Bolar exemption in pharmaceutical cases.

## 8. What are the key grounds of patent invalidity?

- Lack of novelty
- Lack of inventive step
- Lack of industrial applicability
- Excluded subject matter
- Insufficiency of disclosure
- Added matter
- Inaccessibility of biological material (Budapest Treaty on the International Recognition of the Deposit of Microorganisms)

Quite interesting is that for Austrian national patent in contrast to European Patents a broadening of the claim after the grant does not make the patent invalid.

Usurpation of the invention is not an invalidation ground per se in a nullity proceeding but a patent can be revoked, or the ownership can be transferred to the true inventor or successor in title, who may file such a request with the Austrian Patent Office.

## 9. How is prior art considered in the context of an invalidity action?

Austria applies the concept of absolute novelty, which

 

means that prior art consists of everything made accessible to the public anywhere on the world before the priority date through written or oral publication, through use or any other way of making it public.

Prior art also includes Austrian, European and international patent applications with an older priority date but a publication date on or after the application of the younger patent application. Those patent applications will only be considered in view of novelty not inventive step.

Like before the European Patent Office also the Austrian Patent Office as well as the Austrian courts apply the Problem Solution Approach developed by the EPO.

## 10. Can a patentee seek to amend a patent that is in the midst of patent litigation?

In the Patent infringement proceedings, the plaintiff (patent owner) can limit in its request for judgment in the complaint to a limited scope of the patent through combination of the independent claim with one or more dependent claims. It can amend the claim just for the purpose of the proceeding before even a formal restriction request has been filed with the Austrian Patent Office. Such an amendment must narrow the claim to be allowable.

During a nullity action before the Austrian Patent Office a limitation request or auxiliary request may be filed. The Nullity Department would also consider by itself whether the patent could be upheld in a limited form based on a combination of an independent and one more dependant claims.

According to § 46 Austrian Patent Act the patentee may waive the patent in its entirety or in parts at any time. Younger case law also allows amendments through the integration of parts of the description into the claim as long as the scope of protection is narrower, there is no added matter to the disclosure, and the remaining parts are sufficient to be subject to an independent patent.

## 11. Is some form of patent term extension available?

In general, there is no patent term extension available for example in case of a slow prosecution.

However, for pharmaceutical and plant protection products Supplementary Protection Certificates (SPC) are available according to EU SPC Regulations ((EC) no 469/2009). Additional protection for a maximum of 5 years can be achieved. Further 6 months extension can be sought for medical products for children for which data has been submitted according to a Paediatric Investigation Plan. ((EC) no 1901/2006).

## 12. How are technical matters considered in patent litigation proceedings?

In the infringement proceedings the lay judges as well as the technical experts appointed by the court play an essential role. Both the lay judges as well as the technical experts are usually Austrian patent attorneys.

Experts appointed by the court may only answer question of fact not legal question. Court appointed experts may also inspect infringing items or may undertake local inspections.

Where a court-appointed expert is used, the expert will provide a written expert opinion and will be usually heard during the oral hearing as an expert witness. During this procedure, the parties can also question the expert.

It is often on the lay judge to decide whether a first instance infringement proceeding before the Commercial Court Vienna should be stayed for the nullity proceedings, because it is not unlikely that the patent is invalid. Most of the times the chambers follow the proposal of the lay judge in that regard.

Private expert opinions are used as evidence filed with the court with the complaint or in the defence of the defendant.

## 13. Is some form of discovery/disclosure and/or court-mandated evidence seizure/protection (e.g. saisie-contrefaçon) available, either before the commencement of or during patent litigation proceedings?

In Austria there is no discovery proceeding. In general, a plaintiff must produce all evidence to proof that the defendant infringes the patent.

In practise there is only one way to access relevant evidence for the infringement question at defendants' plants or third parties. There is the possibility to request a preliminary injunction for preservation of evidence. There where recent cases where machine at customers of the defendant where inspected by a bailiff and a court appointed expert, who collected the evidence and provided a protocol of the onsite inspection.

As the general rules for the request of preliminary

 

injunctions where not design for the preservation of evidence this newer possibility is not implemented very well and case-law is not well established.

But especially in view of evidence collecting for indirect patent infringement proceedings the preliminary injunction for preservation of evidence is of importance and helpful.

For specified documents only accessible to the defendant the plaintiff in a running infringement proceeding may request that such a document shall be produced by the defendant.

It is interesting to mention that in Austria a patent infringement in a commercial way is not only a question of civil law but also for criminal law. Patent infringement is an offence with private prosecution, which is only prosecuted upon the request of the injured party. Such a criminal proceeding offers more possibilities to access evidence at the patent infringer or third parties.

## 14. Are there procedures available which would assist a patentee to determine infringement of a process patent?

The general rule is that the plaintiff has the burden to prove that a patent is infringed. This also holds true for process patents. However, if proof as such is not possible the plaintiff might try to gain evidence by way of an inspection by a court appointed expert.

Moreover, there is one further exemption to the burden of proof for processes of manufacturing a new product. In this case, the same product having essentially the same features as the new product shall be deemed to have been made using the patented process unless proof to the contrary is produced by the defendant to the court. This can be seen as a limited reversal of the burden of proof. In such a case the plaintiff has to proof that the product as a direct result of the protected method is new and that the properties of the atacked product are the same as those of the also protected method end product. The defendant has then to proof that the product has been achieved through a different method.

## 15. Are there established mechanisms to protect confidential information required to be disclosed/exchanged in the course of patent litigation (e.g. confidentiality clubs)?

There are no such established mechanisms in the history of Austria's legal system as there are in countries with discovery proceedings.

The EU Directive on Know-How and Trade Secrets ((EU) 2016/943) (2) demands that the EU members states shall take measures to protect trade secrets of parties accessible because of the proceedings in case of a specified and founded request of party through specified measures from misappropriation.

Austria implemented the Directive only in the Austrian Unfair Competition Act and not in the CPC. There it is possible to limit the access to trade secrets only to a court expert or if the court insists on the production of trade secret evidence the court has to obligate all persons who had access to the trade secrets to secrecy.

## 16. Is there a system of post-grant opposition proceedings? If so, how does this system interact with the patent litigation system?

Yes. An opposition may be filed against an Austrian Patent within 4 months from the announcement of the grant of the patent.

The opposition grounds are:

- Lack of novelty
- Lack of inventive step
- Lack of industrial applicability
- Excluded subject matter
- Insufficiency of disclosure
- Added matter
- Inaccessibility of biological material (Budapest Treaty on the International Recognition of the Deposit of Microorganisms)

Clarity is not an opposition ground.

The opposition can be filed by anyone.

An opposition procedure shall be expedited, if the infringement proceeding is stayed for the clarifying the preliminary question of validity. In practise such a situation is quite seldom due to the short opposition period and several months duration until a first hearing in a patent infringement matter takes place. So, such a situation may only occur when an opposition is already running.

## 17. To what extent are decisions from other fora/jurisdictions relevant or influential, and if so, are there any

 

### particularly influential fora/jurisdictions?

Probably the most influential jurisdiction on the jurisdiction in Austria is the German jurisdiction. As most of the patent infringement cases in Europe are handled by the German courts in Dusseldorf, Mannheim and Munich there is plenty of case law missing in Austria. In general, the basic principles of law are very similar in Austria and Germany.

For validity questions especially for cases involving European Patents the case law of the European Patent Office is of relevance. Austrian courts for example also apply the Problem Solution Approach and the Protocol on the Interpretation of Article 69 EPC applies also for Austrian national patents.

### 18. How does a court determine whether it has jurisdiction to hear a patent action?

Patent infringement proceedings in Austria are exclusively handled by the Commercial Court Vienna so there is no question on a national level which forum has jurisdiction.

For the question of validity of the Austrian part of European patents the Nullity department of the Austrian Patent Office is responsible according to § 9 a Patent treaty implementation act PatV-EG).

According to Article 24 (4) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in proceedings concerned with the registration or validity of patents, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State of the European Union in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place shall have exclusive jurisdiction, regardless of the domicile of the parties.

### 19. What are the options for alternative dispute resolution (ADR) in patent cases? Are they commonly used? Are there any mandatory ADR provisions in patent cases?

A mediation is possible in Austria based on the mediation in civil matters act (ZivMediatG). Also, due dates would be stayed for such a proceeding. But is very unusual in patent matters in Austria as the parties would have to ask for such a mediation and would need to agree on it.

Often the judges in Austria discuss the possibilities of out of court solutions with the parties in the first hearing.

### 20. What are the key procedural steps that must be satisfied before a patent action can be commenced? Are there any limitation periods for commencing an action?

There are no specific procedural steps necessary before filing a complaint. Of course, a party needs to be represented by an Attorney at Law admitted in Austria and the court fee according to the value in dispute needs to be paid.

The regular statutory limitation periods also apply in infringement matters

(a) either 3 years after becoming aware of the damage and the infringer or

(b) 30 years after the infringement took place (absolute time limit)

### 21. Which parties have standing to bring a patent infringement action? Under which circumstances will a patent licensee have standing to bring an action?

The patent owner, joint owners together or each of them, an exclusive licensee or a licensee entitled to start infringement proceedings based on the license contract.

In Austria the ownership as well as a license can be registered with the patent register. In such a case no further evidence for the standing is necessary.

### 22. Who has standing to bring an invalidity action against a patent? Is any particular connection to the patentee or patent required?

Anybody can initiate invalidity action against a patent no interest or connection to the patentee or patent is required.

### 23. Are interim injunctions available in patent litigation proceedings?

In Austria there are no specific interim injunctions, but

 

preliminary injunction may be requested also during pending infringement proceeding. The big difference in Austria compared to Germany is that there is no need for urgency for the most common inter partes preliminary injunctions.

The key factors that the court will take into account in assessing whether to grant a preliminary injunction are that the requesting party can convince the court that the party is entitled to start such a proceeding, that the patent is valid and that it is infringed.

All necessary readily available evidence must be included in the request for preliminary injunction. The standard of proof is lower in comparison with the main proceedings but still high. To get the preliminary injunction granted the requesting party must show the predominant probability of validity of the patent and of the infringement.

As there is the risk of liability for potential damages on the side of the opponent, if the preliminary injunction is granted but the patent is revoked or the court rules in the main proceeding rules that there is no infringement there are not so many cases of preliminary injunctions. It might be necessary that the requesting party places a security for potential damages.

In very seldom cases a preliminary injunction is granted ex parte if requested. In nearly all the cases especially if main proceedings are pending already the other party will be heard. Most of the times the proceedings are held in writing. In Austria it usually takes longer as for example in Germany to get a preliminary injunction. Several weeks to 3 months are usual.

The main claim in such preliminary injunctions is the injunctive relief to be able to stop the infringing use and distribution of the infringing embodiment.

For the opponent there is the possibility to appeal against a granted preliminary injunction, but the injunction is enforceable as soon as it has been served to the opponent.

## 24. What final remedies, both monetary and non-monetary, are available for patent infringement? Of these, which are most commonly sought and which are typically ordered?

Remedies of the patentee are:

- Injunction for the remaining lifetime of the patent
- Rendering of account for damages calculation and information on distribution channels
- Declaratory ruling on obligation to pay damages
- Destruction of infringing products
- Publishing of the judgement in media at infringers expense
- Recall of infringing products

## 25. On what basis are damages for patent infringement calculated? Is it possible to obtain additional or exemplary damages?

- Reasonable compensation

In case of a culpable patent infringement damages based on:

- Lost profits
- License analogy
- Infringer’s profits

In Austrian patent litigation an action by stages can be used which means that after having obtained all relevant financial information by the infringer, who must render full account, the plaintiff can adjust its claims for compensation.

Independently from the proof of an accrued damages the successful plaintiff may ask for a doubled remuneration if the infringement has been found deliberate or grossly negligent.

## 26. How readily are final injunctions granted in patent litigation proceedings?

Final Judgment will be granted by the court if the plaintiff can poove validity and infringement of the patent. The defendant in such a case must immediately stop all infringing acts upon the full force of the judgment.

Public interest factors are not considered in deciding whether to grant a final injunction.

If an injunction has been requested and the validity and infringement of the patent are given there is no possibility that the court orders a license payment instead of the injunction.

In theory § 36 Austrian Patent Act provides a possibility for compulsory licenses in a very limited. May be more relevant compulsory licenses based on antitrust law and Art 40 TRIPS and Art 102 AEUV could become even though there is no case law in Austria up to now.

 

## 27. Are there provisions for obtaining declaratory relief, and if so, what are the legal and procedural requirements for obtaining such relief?

In fact, there are 2 possible ways in Austria to receive a declaratory judgement.

The first possibility is to file a complaint for declaratory judgment with the Commercial Court Vienna according to § 228 Civil Procedure Code (CPC). As a preventive defence for an injunction this complaint can be filed by an interested party, for example a party that is endangered by an arrogation of patent. Additionally, it can be used to precautionary receive a decision that an internal prior use right exists which excludes the owner of the protective effects of the patent against the prior user. This complaint can not be used to receive a declaratory judgment on the validity of the patent. In this case a nullity action needs to be launched.

The second possibility is a request for declaratory judgment with the Austrian Patent Office according to § 163 Patent Act. Here the patent owner or exclusive licensee can ask the responsible Nullity Department to judge on the question whether the patent is infringed by a certain embodiment. A possible infringer can ask for a judgment that a certain embodiment does not infringe the patent. In both cases a request has to be rejected if an infringement proceeding between the parties is already pending.

The relevance of both proceedings is of minor relevance in the Austrian practise.

## 28. What are the costs typically incurred by each party to patent litigation proceedings at first instance? What are the typical costs of an appeal at each appellate level?

The costs of course very much depend on the complexity of the issue and how much costs arise for the court appointed experts as well as for experts.

For the first instance in the main proceedings the costs vary between EUR 25.000 and EUR 150.000. The second instance typically cost much less between EUR 15.000 to EUR 50.000.

For the nullity action the costs for the first instance typically range between EUR 15.000 to EUR 50.000 and for the second instance between EUR 10.000 and EUR 25.000.

The cost for the third instance both for the infringement proceedings as well as for the nullity action between EUR 15.000 to EUR 50.000.

Cost for requesting preliminary injunction vary too much to give a reasonable range. But especially the costs for preliminary injunction for preservation of evidence are sometimes considerably high and can rage up to the costs for a first instance main proceeding.

## 29. Can the successful party to a patent litigation action recover its costs?

The losing party is required to reimburse the winning party's costs calculated based on the Attorney tariff act. Both parties have to present their costs in a cost schedule, including legal fees, expert and translation costs as well as Attorney's fees at the end of the final hearing or together with the final brief. The parties may request independently from an appeal in the merits that certain costs are not admitted to compensation.

In infringement cases, the reimbursable fees are usually well below the actual cost to the parties.

## 30. What are the biggest patent litigation growth areas in your jurisdiction in terms of industry sector?

Life science will continue to play the key role in Austrian patent litigation. The reason for that is that quite a few Austrian companies, start-ups and universities are active in this field and a patent litigation in this field is also cost effective for a smaller but good market as Austria.

## 31. What do you predict will be the most contentious patent litigation issues in your jurisdiction over the next twelve months?

Since a lot of suppliers in the Automotive industry as well as OEM-producers have to change dramatically their product portfolio and to concentrate on E-mobility many parts are not necessary anymore. So many companies work on the most relevant parts and technologies needed for electro-cars. There is also a dramatic rise of patent applications in this field in Austria. So, there will be litigation in this narrowing field over the next twelve months and beyond that.

## 32. Which aspects of patent litigation, either substantive or procedural, are most

 

### in need of reform in your jurisdiction?

Especially in view of evidence collecting for patent infringement proceedings the preliminary injunction for preservation of evidence is of importance but the tool set based on the preliminary injunction does not fit all the needs and special requirements for such a proceeding. Therefor it should be considered to install a specific procedure for the preservation of evidence.

### 33. What are the biggest challenges and opportunities confronting the international patent system?

The biggest challenge for the international patent system for sure is the rise of China to the largest patent filing country worldwide by far. The strategy seems to protect the important and strong home market in China also against western market leading companies. Chinese companies also start to file abroad. Even world market leading Austrian companies do not have large patent portfolios to balance such a situation.

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