

A joint initiative of the OECD and the European Union, principally financed by the EU



Liability for official fault – The Austrian experience

**Wolfgang Peschorn,
President, Finanzprokurator**

Conference on
„Organisation of the legal services of the ministry
of finance: the experience of EU Member States“
Tbilisi, 25-26 September 2009




© OECD

A joint initiative of the OECD and the European Union, principally financed by the EU



Introductory remarks

- regulations are needed to ensure that losses resulting from wrongful official acts are compensated;
- governmental liability was recognised for instance in France, Germany, the United States, Great Britain and Austria between the end of the 19th century and the middle of the last century;
- in Britain and the United States the scope of public liability is still limited strictly;
- Governmental liability in the Japanese system started in 1916;
- Korea and Taiwan introduced their governmental liability Acts in 1951 and 1980 respectively;




2 © OECD

A joint initiative of the OECD and the European Union, principally financed by the EU



Liability for wrongful official acts


There are two types of liability for official fault:

- 1.) state liability**
which arises when a member state of the European Union breaches EU law and an EU citizen suffers a loss as a result;
- 2.) governmental liability**
which arises as a result of wrongful official acts causing damages to a private person within the State without links to EU law;




3 © OECD



A joint initiative of the OECD and the European Union, principally financed by the EU



Governmental liability I


1. Legal basis

- first principles date back to 1930 and are stipulated in the Austrian constitution;
- the „Amtshaftungsgesetz“ came into force in 1949 and is still the current legal basis;
- implementing provision, which states that regarding governmental liability the Finanzprokurator
 - serves as the central contact point for individuals making claims against the Federation,
 - has to assess the claims and
 - has to give recommendations to the competent authorities whether or not they should admit to the claim.

4 © OECD

A joint initiative of the OECD and the European Union, principally financed by the EU





Governmental liability II

2. Legal entities that can be held liable

the Federation, state governments, municipalities, social insurance carriers as well as all other public bodies;


3. Main concept

- governmental liability must be seen as a special civil liability law;
- ordinary courts are responsible in matters of governmental liability;
 - they have to re-examine the actions of administrative bodies;
 - without intervention in sovereign activities;
 - they only rule whether or not the damage caused has to be restituted in money.

5 © OECD

A joint initiative of the OECD and the European Union, principally financed by the EU



Governmental liability III

4. Prerequisites



a) Damages

- that have already effectively occurred;
- lost profit like an impairment of the economic reputation or financial losses due to wrongful imprisonment or arrest;


The aggrieved party must be put in the same position he/she would be in without the damage.

b) Official acts



- acts;
- non performance; in these cases there must be a legal duty to act;

6 © OECD

 **Governmental liability IV**


A joint initiative of the OECD and the European Union, principally financed by the EU



c) In execution of the laws

- the official has to act in the execution of the laws;
- the differentiation between acting sovereignly and like a private person is one of the most difficult issues of the governmental liability law;
- an act of sovereignty arises whenever the official acts with administrative authority and coercion against the private individual;
- examples for sovereign acts: ordinances; official decisions such as rulings; de-facto acts;
- as the jurisdiction acts sovereignly, governmental liability claims can result from court decisions as well; there is an exception for rulings delivered by the High Court only;

7 © OECD

 **Governmental liability V**

A joint initiative of the OECD and the European Union, principally financed by the EU


d) Unlawfulness

- the infringed legal norm must be designed to prevent the occurrence of damage to the private individual;
- can be caused e.g. by wrongful formal decisions or wrong information or incorrect advice;



e) Culpability (fault)

- to make a claim it is necessary that the official acts culpably (slightly or gross negligently or wilfully);
- an official acts culpably only if his/her act can be considered untenable;
- the official always has to act with the diligence of an expert witness;

8 © OECD

 **Governmental liability VI**

A joint initiative of the OECD and the European Union, principally financed by the EU


f) Further conditions of liability

- causal link between the official act and the suffered loss;
- adequate causation;



g) Burden of proof

- the aggrieved party has to prove:
 - the breach of official duties;
 - the damages that have occurred;
 - the link of causation between the breach and the damage;
 - the facts which establish the fault of the official;
- it is not required to name the individual official;

9 © OECD

 **Governmental liability VII**

A joint initiative of the OECD and the European Union, principally financed by the EU

5. Characteristics of the governmental liability law

a) No direct liability of the official

- the official cannot be sued directly by the injured party;
- the injured party has to make claims against the legal entity;
- there is a difference between the organisational and the functional legal entity;


b) Liability of the official (recourse)

- the legal entity can seek recourse from the at-fault official, when he/she acted in a qualified manner;



c) Pecuniary damages

- the damage must always be refunded in money;

10 © OECD

 **Governmental liability VIII**

A joint initiative of the OECD and the European Union, principally financed by the EU


d) Damages not covered

- decisions by the highest courts as well as the area of legislation are excluded from governmental liability;
- if the aggrieved party has failed to avert the damage by making use of appeal procedure („duty to save“);
- contributory negligence reduces the amount of damages;



e) Prescription of a claim

- claims can be asserted within ten years;
- recourses from the at-fault official must be sought within six months after the amount of the damage is stipulated;

11 © OECD

 **Governmental liability IX**

A joint initiative of the OECD and the European Union, principally financed by the EU





6. Enforcement and procedure / Preliminary proceedings

- the aggrieved party should ask the legal entity concerned whether the compensation claim is admitted to or rejected completely or in part;
- call letters sent to the Federation must be addressed to the Finanzprokurator;
- the Finanzprokurator has to
 - be informed by the aggrieved party about the facts;
 - coordinate the conduct of all federal agencies;
 - respond to the private individual within a period of 3 months;
 - give a recommendation to the competent authority by preparing an expert opinion;
- ordinary courts are in charge of litigation regarding governmental liability;

12 © OECD


A joint initiative of the OECD and the European Union, principally financed by the EU



State liability I

1. Principles

- the general principle of state responsibility for non-compliance with European community law has been developed by the European Court of Justice;
- enforcement is carried out through the national courts of the member states;
- national courts have the power to award compensation against the state.

13 © OECD

A joint initiative of the OECD and the European Union, principally financed by the EU



State liability II

2. Landmark rulings

- *Francovich v. Republic of Italy*
the state can be held responsible for the failure of national public authorities to implement European Community law;
- *Brasserie du Pêcheur v. Republic of Germany*
the European Court of Justice considered damages for aggrieved individuals in regard of breaches of European community law committed by the legislation;
- *Köbler v. Republic of Austria*
the court ruled that individuals can claim the member state if its highest court wrongly applied Community law;




14 © OECD

A joint initiative of the OECD and the European Union, principally financed by the EU



State liability III


3. Criteria for a state liability claim

- The European community law breached must have been intended to confer rights on individuals,
- the breach must be sufficiently serious and
- there must be a direct causal link between the state's breach and the loss suffered;

⇒ compensation may be claimed in legal action before a national court;


Violations of European law may result from

- total failure to implement a directive;
- implementation of a directive only in a partial, incorrect or inadequate way.

15 © OECD



A joint initiative of the OECD and the European Union, principally financed by the EU



State liability IV


4. Enforcement and procedure in Austria

- there are no provisions regarding the enforcement of state liability claims;
- the procedure currently in use is based on court decisions;
- according to the Constitutional Court's ruling
 - it is itself authorised to issue the ruling if the wrongful act can be attributed to the legislator directly;
 - the High Court is in charge of matters of state liability unless the damage has resulted from violation of common law, from an incorrect or omitted application of common law by an executive body exercising sovereign authority or by a government body exercising civil law.



16 © OECD

A joint initiative of the OECD and the European Union, principally financed by the EU




Résumé

- governmental liability is characterised by continuous further development of jurisdiction;
- through the accession to the European Union in 1995, Austria became obligated to implement the legal norms of the European Community;
- state liability extends the state's duty to be held responsible for wrong-doing to the legislative sector as well as to jurisdiction of the highest courts;
- the Finanzprokurator plays an crucial role in the context of the summons proceedings and the representation of the Republic of Austria before the courts. Its function consists e.g. of:
 - fighting off unjustified claims,
 - objectively assessing all known arguments and the
 - efficient handling of the proceedings.



17 © OECD

A joint initiative of the OECD and the European Union, principally financed by the EU



Thank you very much for your attention!

Dr. Wolfgang Peschorn, Finanzprokurator,
Singerstraße 17-19, A-1011 Vienna;
wolfgang.peschorn@bmf.gv.at

18 © OECD