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Liability for official fault – The Austrian experience

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I. Introduction

It is well understood and common practice that a private person has to make up for a loss he/she has caused.

As damages are not only caused by private persons, but also by public authorities, regulations are needed which ensure that losses resulting from wrongful official acts are compensated by the competent authority as well.

An effective governmental liability system should be part of every modern state. Such a governmental liability system is a system by which to regulate both substantive and procedural contents of governmental liability.

Governmental liability was recognised in France, Germany, the United States, and Great Britain as well as in Austria between the end of the 19th century and the middle of the last century. However, the recognition of governmental liability does not mean that the governmental liability system in those countries has always developed in the same way.

In Britain and the United States, the scope of liability for official fault is still limited strictly. In the United States, for instance, the state was not liable for any claim arising out of battery, false imprisonment, false arrest, malicious prosecution, abuse of process *etc.*

In Britain it was after the application of principles of European Union law that persons injured by criminal acts or persons wrongly convicted and imprisoned for a criminal offence could get remedies for the first time.¹

The development of governmental liability in the Japanese system started in 1916. Previously, the state and municipalities were not liable for damages resulting from wrongful official acts, even if civil servants had committed an unlawful act concerning police, military, taxation, and expropriation of land tasks and caused damage to citizens by such activities. In these cases, the injured party was allowed to seek damages from the civil servants who had obviously abused their power or carried out an act beyond their legal competence. There was no possibility to make claims directly against the state.²

Korea and Taiwan only introduced their governmental liability Acts in 1951 and 1980 respectively, only.

II. Liability for wrongful official acts in Austria

There are two types of liability for official fault.

The 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 on the one hand, and on the other hand, the governmental liability as a result of wrongful official acts causing damages to a private person within the State without links to EU law.

A. Governmental liability

1. Legal basis

The first principles concerning governmental liability in Austria date back to 1930 and were stipulated in the Austrian constitution (Article 23 B-VG).

¹ See Schwartz, *Administrative Law* (1976), 565;

² Yong Zhang, *Comparative Studies on Governmental Liability in East and Southeast Asia*, 201-220.

The implementing act, the “Amtshaftungsgesetz”³, is based on the constitution and came into force in 1949. It had to be amended a couple of times. Despite several amendments it is still the main legal basis for governmental liability in Austria.

If private persons make claims against the Federation, they have to follow specific procedures which are stipulated in an implementing provision passed by the federal government regarding the enforcement of compensation claims against the Federation. The aforesaid implementing provision states that the Finanzprokuratur as the lawyer and legal adviser of the Republic of Austria serves as the central contact point for individuals making claims against the Federation. The Finanzprokuratur has to assess the claims and has to give recommendations to the competent authorities whether or not they should admit to the claim.

2. Legal entities that can be held liable according to the Amtshaftungsgesetz

Pursuant to Art 23 B-VG, the Amtshaftungsgesetz (governmental liability law) enables a private individual to make claims not only against the federation, but also states, municipalities, social insurance carriers as well as all other public bodies. The prerequisite for successful claims is the presence of harm caused to the private individual in the execution of the law.

3. Main concept

As the provisions regarding the liability of public legal entities go in line with the civil liability stipulated in the Civil Code, governmental liability must be described as a special civil liability law. Due to the fact that ordinary courts are responsible for rulings in civil law, they must also deliver judgements in matters of governmental liability. With this, the Austrian federal constitution permits ordinary courts to re-examine the actions of administrative bodies. Since the Austrian federal constitution is based on the concept of the separation of power between legislation, jurisdiction and administration, this right of review must not cause administrative acts to be directly interfered with by jurisdiction. As a result of the separation of power a court decision in governmental liability can never lead to an intervention in sovereign activities; the court can only rule whether or not the damage resulting from wrongful official acts has to be resituated.

4. Prerequisites

The cumulative presence of the following prerequisites is required for a legal entity to be liable.

a.) Damages

For a claim for damages, damage must exist that has occurred in the estate of the aggrieved private individual. Not only a damage that has already effectively occurred, but also lost profit comes into question. With this, the damage resulting from impairment of the economic reputation ("good will") for example can be claimed, but also financial losses due to wrongful imprisonment or arrest.

To determine the compensation, private law principles apply. According to this, the aggrieved party must be put in the same position by the compensation that he/she would be in without the damage.

b.) Official acting

According to the Austrian governmental liability law, a legal entity can not only be held responsible for damages resulting from acting but also for those resulting from non

³ Federal law of 18 December 1948, BGBl 1949/20.

performance. To be liable for non performance, however, it is necessary that the official had a statutory duty to act and that this action was left undone.

c.) In execution of the laws

The acting of the official must have been performed in the execution of the laws. The Austrian legal system allows the state to act both sovereignly as well as like any other private individual. The differentiation between these two kinds of governmental acting is one of the most difficult issues of the Austrian governmental liability law.

For differentiation, it is crucial in which form the official acts, whether he acts like a private person or as an official in execution of the laws. An official acts in the "execution of the laws" if it specifies an act of sovereignty to reach its aims. An act of sovereignty arises whenever the legal entity, through its official acts with administrative authority and coercion against the private individual.

In the administrative sector sovereign acts are for instance ordinances, official decisions such as rulings or a de facto acting of an official.

An act under private law is present if it avails itself of the same means that the legal system makes available to everyone.

Due to the fact, that the jurisdiction acts sovereignly too, governmental liability claims could result from court decisions as well. In this context, it is to stress, that according to the Austrian law governmental liability can never arise from rulings delivered by the highest courts. Nevertheless, they could be a reason for a state liability claim. Thereby, governmental liability claims can only be derived from court rulings that cannot be appealed to the High Court (Oberster Gerichtshof) based on special procedural regulations.

d.) Unlawfulness

Due to the official's action, a legal norm must be violated that is also designed to prevent the occurrence of damage to the private individual.

For this reason, it is important to differentiate between statutory duties serving only the public interest or also the particular interest of citizens. This differentiation is also used to deny governmental liability for legislative acts. The official duties of those involved in the legislative process exist only in the interest of the general public and not in the interest of individual citizens who happen to be affected by the laws. In general, governmental liability does not apply at all to legislation.

Unlawfulness can be caused by a wrongful formal decision such as a verdict or a ruling, which can result for example from an incorrect application of the law that leads to faulty decision in substance or from the violation of procedural regulations.

Unlawfulness can also be based on wrong information or incorrect advice.

e.) Culpability (fault)

According to the Austrian law regarding damages, an at-fault party is only liable to the aggrieved party in cases where the damage could have been prevented by him by applying appropriate care.

The Austrian law differentiates fault into slightly or grossly negligent and deliberate causation of damage. Due to the governmental liability law it does not matter which kind of fault has arrived. As a consequence, an official ruling is culpable only if it can be considered untenable.

As far as an official action is based on careful deliberations and if it takes into account the applicable law and doctrine enacted thus far regarding the issue in question, it is unlikely that the action will be untenable.

If, however, controlling jurisdiction and doctrine is deviated from, this decision must be justified in a very special way because it can otherwise be qualified as untenable.

Whenever an official has a scope of discretion, the abuse of discretion or exceeding its discretionary powers leads to fault. Any unlawful use of discretion is a breach of an official duty.

The official always has to act with the diligence of an expert witness.

f.) Further conditions of liability

Any unlawful acting of the official must have been causal for the damage that has occurred. Causality prevails if the damage had not occurred in hypothetical consideration without the damaging act.

Additionally, the unlawful act has to be adequate to causing the damage. Therefore, the damaging act claimed must be suitable for causing such a damage from an ex ante consideration. A claim for compensation is excluded if the damage was caused as the result of an extraordinary link of circumstances.

g.) Burden of Proof

The burden of proof is stated by the provisions applicable for all claims in private law. The claimant has to prove all facts necessary for a successful claim. This means that 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 and the facts which establish the fault of the official.

To give a fair burden of proof, the courts do not require the claimant to name the individual official who acted.

5. Characteristics of the governmental liability law

a.) No direct liability of the official

The official that has caused the damage to the aggrieved party cannot be sued directly by the injured party.

The aggrieved party must adhere to the legal entity that the official has intervened for.

It should be noted that in Austria, federal and state governments together perform administration. Based on this principle, state officials regularly perform tasks for the federation. According to the governmental liability law, the aggrieved party can sue both the legal entity where the damaging official works (organisational legal entity) as well as the legal entity whose tasks the official fulfils (functional legal entity). According to the Austrian law the organisational legal entity is authorised to withdraw completely in case of payment liabilities to the functional legal entity.

b.) liability of the official (recourse)

The legal entity that is ultimately liable to pay can withdraw from the official if the latter is at fault for causing the violation in a qualified manner. So if the official has caused the damage through gross negligence or wilful intent, the legal entity can recourse.

c.) Pecuniary damages

Basically the Austrian law states the principle of natural restitution. According to this principle, all disadvantages suffered by the aggrieved party must be compensated.

Due to governmental liability law, the damage must always be refunded in money, which is an exception of the aforesaid principle. This is why the aggrieved party can obtain neither revocation nor omittance. The restriction to monetary replacement is designed, among others, to prevent intervention of the jurisdiction into (sovereign) administration.

d.) Damages not covered

Decisions by the highest courts (Constitutional Court, Administrative Court, and High Court) as well as the area of legislation are excluded from governmental liability. If damage results to a private individual from the incontestable decision of a highest court, then at best a state liability claim can be made.

Furthermore, the claim for damages is excluded if the aggrieved party has failed to avert the damage by making use of appeal procedures.

This principle referred to as “duty to save” obligates the aggrieved party to take any legal remedy to avoid the occurrence of the damage. This obligation is a manifestation of the general duty to reduce damage.

Additionally to this principle, contributory negligence reduces the amount of damages that can be claimed and may even exclude the claim entirely if the contributory part of the citizen is overriding.

e.) Prescription of a claim

According to the governmental liability law, claims can be asserted within ten years. The legal entity has to recourse against the damaging official within 6 months after the amount of the damage is stipulated.

6. Enforcement and procedure

Pursuant to an express provision of the governmental liability law, an aggrieved party should ask the legal entity concerned in writing prior to filing the claim, to inform him/her within a period of three months whether the compensation claim is admitted or rejected completely or in part. Call letters sent to the federation must be addressed to the Finanzprokurator.

The purpose of the Finanzprokurator, as a federal agency, is to coordinate the conduct of all federal agencies and to respond to the private individual before the deadline provided. To fulfil this task, the Finanzprokurator must obtain information regarding the issue from all public agencies concerned and subsequently issuing a recommendation for further proceedings to the competent public agencies by preparing an expert opinion. Ultimately, the Finanzprokurator shall inform the private individual of the decision of the competent authority regarding admission or rejection.

The governmental liability law defers to civil procedure laws⁴ with respect to the jurisdiction and type of proceedings. Therewith, a governmental liability claim must be dealt with in ordinary courts that are responsible for matters of civil law. In these proceedings, the sued legal entity and the suing private individual confront each other with equal rights before the judge.

B. State liability

In European Union law, state liability arises when a Member State of the European Union breaches European community law and an EU citizen suffers a loss as a result. The effect of state liability is that damages may be recoverable in respect of the loss suffered.

1. Principles

The European Court of Justice has developed a general principle of state responsibility for non-compliance with European community law. State liability derives from the fact that EU

⁴ JN (Law of 1 August 1895, RGBI 1895/110) and ZPO (Law of 1 August 1895, RGBI 1895/113).

Member States are responsible for the creation and above all for the implementation and enforcement of European community law. Enforcement of state liability for violations of rights granted to individuals by European community law is carried out through the national courts of the Member States.⁵

National courts of the Member States have the power to award compensation against the state for such breach regardless of national constitutional decision.

European community law demands that individuals get compensation when their rights are infringed by a breach of European community law committed by a Member State.

2. Landmark rulings

Unlike governmental liability, state liability can arise from wrongful official acts regarding legislation, execution and jurisdiction.

The European Court of Justice first held in *Francovich and Bonifaci v Republic of Italy*⁶, that the state could be held responsible for the failure of national public authorities to implement European Community law. The European Court of Justice stated that individuals have a right to sue member states in their own courts for violation of the European Community treaties.

In *Brasserie du Pêcheur v Federal Republic of Germany*⁷ the European Court of Justice considered damages for aggrieved individuals in regard of breaches of Community law committed by the legislation.

Finally the court's ruling in *Köbler v Republic of Austria*⁸ has established that also the third power of state, the jurisdiction, can cause liability for the member state.

In the case of *Köbler*, the Supreme Administrative Court misinterpreted Community law. The European Court of Justice ruled that individuals can claim the Member State if its highest court wrongly applied Community law.

3. Criteria for a state liability claim

The European Court of Justice defined the criteria for establishing state liability as:

- 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.

If these elements are established, compensation may be claimed in legal action before a national court.

State liability relies on the basic principle of the EU legal order that national courts must protect the rights conferred by European Community law on individuals, including enforcement of these rights where the state is responsible.

Violations of European law may not only result from a total failure to implement a directive, but also when a member state implements a directive in a partial, incorrect or inadequate way. There are numerous decisions of the European Court upholding complaints against Member States for wrongful implementation of a directive.

Finally it is to be stressed that the state is responsible for all acts of public law bodies or others to which the state has delegated the performance of its responsibilities.⁹

⁵ http://en.wikipedia.org/wiki/State_liability.

⁶ EJC, Cases C-6 and 9/90.

⁷ ECJ, Cases C-46 and C-48/93 [1996], ECR I-1029.

⁸ ECJ, Cases C 224/01.

4. Enforcement and procedure in Austria

According to the jurisdiction of the European Court of Justice, national legal systems must determine which domestic court is responsible for community law state liability claims. The codified Austrian legal system does not know any express norms for the enforcement of state liability claims. A code of procedure for the enforcement of a state liability claim that is based on European Community Law norms and on the jurisdiction of the European Court of Justice has not been issued to this day.

There would be many reasons to support that the procedural regulations of the governmental liability law should also be applied to the enforcement of state liability claims in Austria.

Moreover, since no express regulations have been issued by the Austrian legislator regarding the jurisdiction on the ruling on state liability claims, the procedure currently in use is based on court decisions. According to the Constitutional Court's ruling¹⁰ it is itself authorised to issue the ruling if the actions or acts of omissions that have resulted in the claim can be attributed to the legislator directly, perhaps because the authorisation of a government body to perform an activity to that effect is legally (*e.g.* in the event the legislator remains inactive when implementing community law provisions) not intended at all.

The High Court, as supreme authority in civil and criminal matters, is, however, in charge of decisions in 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.

III. Résumé

In Austria, accountability for wrongs committed by the state has been characterised by the continuous further development of jurisdiction to the governmental liability law since the end of the Second World War. Through the accession of the Republic of Austria to the European Union in 1995, Austria as well became obligated to implement the legal norms of the European Community and the jurisdiction of the European Court of Justice enacted in this respect.

State liability extends the state's duty to be held responsible for wrongdoing to the legislative sector as well as to jurisdiction of the highest courts.

As the institutional contact point of the federation in the context of the summons proceedings and the representation of the Republic of Austria before the courts, the Finanzprokuratur plays a crucial role. Its function not only consists of fighting off unjustified claims but also in particular of objectively assessing all known arguments and efficient handling of the proceedings.

⁹ <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/stateliability.htm>

¹⁰ VfGH 6.3.2001, A 23/00 ua., VfSlg 16.107.