



SIGMA

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**Finanzprokurator –
Lawyer and legal advisor of the Republic of Austria**

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I. Introduction

As proper legal services ensure the legality of decisions and help prevent or reduce the risk of subsequent cost and time-consuming litigation, the organisation of legal services is of crucial importance for everyone, in particular for governments where lots of decisions have to be made every day.

There are different ways to organise legal services within a state, such as building up legal departments in each ministry or one legal department for the whole government and farming litigation out. In these cases the government would most likely be represented by private lawyers.

Another way to provide profound legal services including legal representation is to establish a federal law office like the Finanzprokuratur, which can be consulted by all ministries and other public bodies. In Austria, ministries basically have their own small legal departments, which are not allowed to represent in court, however.

As the lawyer and legal advisor of the Republic of Austria, the Finanzprokuratur provides counsel on laws to the Government, the federal ministers and ministries, as well as other public bodies and represents them in all court cases.

II. Public/federal law office – Unique in Austria?

Having a public or federal law office with public lawyers is not unique to Austria. There are lots of countries all over the world with similar institutions.¹ Mainly, the head of such an institution is referred to as the “Attorney General” who is in principal comparable to the President of the Finanzprokuratur in Austria. For instance, there are public lawyers in:

➤ **Hong Kong²:**

In Hong Kong, the Secretary for Justice is the principal legal advisor to the Chief Executive, which he is a member of, to the government and to individual government departments and agencies. The position is normally held by a lawyer.

The Secretary for Justice is the defendant in all civil actions brought against the government and has the right to intervene in any case involving a matter of great public interest. The decision to prosecute criminal offences is the sole responsibility of the Secretary for Justice.

➤ **United States of America³:**

In the United States, the Attorney General is the head of the United States Department of Justice and the chief lawyer of the U.S. government. He serves as a member of the President's Cabinet.

The Attorney General represents the United States in legal matters generally and gives legal advice and opinions to the President and to the heads of the executive departments of the Government when so requested.

➤ **Australia⁴:**

In Australia the legal advisor to the Cabinet is also referred to as the Attorney General. He withal is the Minister responsible for legal affairs, national and public security and a member of the Cabinet. He authorises prosecutions for federal crimes. The Attorney General is usually, but not always, a lawyer.

Other examples of public lawyers outside the European Union are Canada, Malaysia, New Zealand, and so on.⁵

¹ All the information set forth hereunder is publicly available.

² Website: www.doj.gov.hk/eng

³ Website: www.usdoj.gov/ag; http://en.wikipedia.org/wiki/United_States_Attorney_General

⁴ Website: www.ag.gov.au

⁵ Canada: www.justice.gc.ca/en; Malaysia: www.agc.gov.my/agc; New Zealand: www.beehive.govt.nz.

In some of these jurisdictions the Attorney General as the main legal advisor to the government may in addition have executive responsibility for law enforcement or responsibility for public prosecutions.

For sure, the role of public or federal lawyers is also well known in **countries within the European Union** such as in Ireland (Attorney General), Italy (Avvocatura dello Stato), Portugal (Procuradoria-Geral da Republica), Slovenia (Državno pravobranilstvo), Spain (Abogacia General del Estado) and so on.

Even **the European Commission** has its own in-house counsel called “The Legal Service” which is an internal department of the Commission. The role of the Legal Service is to provide legal advice to the Commission and its services, and to represent the Commission in all court cases, in particular before the European Court of Justice.

III. The Finanzprokurator

A. Establishment and legal basis of the Finanzprokurator

The historic role of the Finanzprokurator dates back to the 13th century. It was formerly called “Fiskalat”⁶ or “Kammerprokurator” and combined the counsel for the prosecution and the civil lawyers in one function.

The main tasks of the head of the “Fiskalat” or “Kammerprokurator”, who was a civil servant appointed by the Emperor, were to provide advice on legal issues to the Emperor and landlord and to represent them in court in both, civil and criminal law matters.

Liability of public authorities in lieu of the individual damaging officer for damages caused by official acts is an ancient legal concept in Austria as well. The damaging officer cannot in person be sued by the aggrieved party. This special kind of liability can be documented as far back as 1539 (Raitkammerordnung of Lower Austria) and is probably even older. Public liability is one of the main tasks of the Finanzprokurator as a legal representative nowadays.

On the occasion of the revolution in 1848 and the establishment of a distinct prosecution, the Finanzprokurator remained as the civil lawyer of the state being in charge of civil and public law in the broadest sense. The prosecution on the other hand is the legal party responsible for presenting the case against an individual suspected of violating the criminal law in a criminal trial.

The first provisional regulations stating the organisation and duties of the Finanzprokurator as the civil lawyer came into force in 1898 and remained in force until 1938, when the Finanzprokurator was suspended due to the Second World War.

In 1945 the Finanzprokurator was awarded a statutory basis for the first time, which was replaced by new regulations only last year as a result of the comprehensive structural reform of the Finanzprokurator in 2007 and 2008. It was identified that the statutory basis of 1945 needed re-examining to ensure the Finanzprokurator was fit for the 21st century. Some points needed clarifying.

The structural reform including drafting the bill for the new statutory basis was mainly done in the Presidium of the Finanzprokurator, partly with the assistance of an external consultant.

The current legal basis on which the Finanzprokurator acts is the “Finanzprokurator-Law” passed on 8th of August last year and came into force on the 1st of January this year.⁷ The new law codifies the scattered regulations, especially regarding the statutory clients, and is in keeping with the times again.

⁶ “Fiskus” stands for “treasury” and was used when talking about the state.

⁷ BGBl I Nr. 110/2008.

Previously the Finanzprokurator was structured into 13 departments and 6 sub-units; each department was in charge of one ministry, generally speaking. Since 1st of January 2009 the departments are divided in compliance with the different law areas.

In addition, the clients as well as the duties of the Finanzprokurator have been newly defined and for the first time the new provisions stipulate principles for the organizational structure and the vocational training for the lawyers.

B. Role of the Finanzprokurator within the Austrian state

The Finanzprokurator, the statutory lawyer and legal advisor of the Republic of Austria, is a federal law office with about ninety-three employees including forty-two lawyers and is headed by the President, Mr. Peschorn. Unlike the Attorney General in Australia or Canada, the President of the Finanzprokurator is not a member of the government.

The mission of the Finanzprokurator is basically twofold:

- Providing legal advice to public authorities and other legal entities stipulated in the provisions for the Finanzprokurator, as well as
- Representing public authorities and other legal entities stipulated in the provisions for the Finanzprokurator in all litigation.

Despite some differences in detail, the Finanzprokurator basically does what a private law firm is expected to do.

Additionally, the Finanzprokurator serves as guardian of the Public Interest under specific circumstances.

Organisationally, the Finanzprokurator is a federal agency and for historical reasons a subordinated public office of the Ministry of Finance. It must be stressed that the Minister of Finance has no academic supervision, but deals with the personnel despite the Finanzprokurator being a disciplinary and administrative authority for its employees. The Minister of Finance, for instance, assesses the number of new staff; the recruiting is done by the Finanzprokurator.

The president of the Finanzprokurator, who is a civil servant, is appointed by the Minister of Finance upon the recommendation of a special statutory commission for a period of five years, which is automatically extended for additional periods in equal length except in the case of the President doing something wrong.

In spite of that, the Finanzprokurator has maintained its political neutrality over the years and is non-partisan. The Finanzprokurator is not bound by instructions from the Ministry of Finance in its daily business; actually the lawyers are bound by instructions from its respective clients.

Due to the fact that the Finanzprokurator serves as legal counsel for all ministries and public authorities political neutrality is of paramount importance.

Since the Finanzprokurator is free of political party influence and interference, the legal decisions may be arrived at independently and without concessions to political instructions.

As a result of the high level of technical qualification, the special “state-related” know-how in dealing with governmental problems and its political neutrality, the Finanzprokurator is held in high esteem by the public-at-large as well as the public authorities and can be seen as substantial pillar of public authorities.

C. Clients of the Finanzprokurator

As already mentioned above, the Finanzprokurator acts on the statutory basis of the “Finanzprokurator-law” that exactly specifies the clients who can be legally advised or represented in court cases by the Finanzprokurator. The Finanzprokurator is not allowed to represent any private person before court or to give legal advice to individuals.

In detail, the law states that the Finanzprokurator only can be consulted by:

➤ **The Republic of Austria**

The main client of the Finanzprokurator is the Republic of Austria, in particular the Federation, the federal government, the ministers and government ministries, the Federal Chancellor and other federal authorities such as tax offices, police-departments and so on.

➤ **Legal entities with close links to the State:**

- Businesses in which the Republic of Austria holds a majority stake;
- Companies who are fundamentally funded by the Austrian State;
- Legal entities who are administrated by public agencies or individuals who have been appointed by public agencies;
- Public bodies and institutions as well as
- Public foundations and funds.

Examples of legal entities with close links to the State are: Austrian National Railways, Universities or Austrian Federal Forests

➤ **State governments and local government authorities**

➤ **Public interest:**

In order to prevent damage for the Republic of Austria, the Finanzprokurator has to act immediately in any urgent matters as long as the competent authority cannot be traced.

Among these clients the Republic of Austria differs strongly from all other clients, especially as the Republic of Austria is not allowed to hire a private lawyer for representation in ordinary national courts (which is from the court of first instance up to the Supreme Court) without the consent of the Finanzprokurator.

Under the provisions of the Finanzprokurator-law, the Republic of Austria is obliged to be represented in ordinary national courts by the Finanzprokurator; otherwise all legal acts are deemed invalid. Deliveries such as the service of a writ or other court documents are only legally effective when they reach the Finanzprokurator. The time given for the statement of defence for instance does not begin to run before the Finanzprokurator is informed of the pleading.

The Republic of Austria is a so called “obligatory client” of the Finanzprokurator, whereas other clients such as state governments, local government authorities and other legal entities with close links to the State are so called “facultative clients”.

The facultative clients have the possibility to consult the Finanzprokurator, but they are not obliged to do so.

As far as legal advice out-of-court or legal representation beyond ordinary national courts is needed (such as before the Higher Administrative Court), the Republic of Austria could also hire a private lawyer. In this area the Finanzprokurator competes with private lawyers.

In fact, due to the high quality of work of the Finanzprokurator, the Republic of Austria (public authorities) seeks the legal opinion of the Finanzprokurator more and more. Additionally, the Republic of Austria does not have to pay extra for the legal services of the Finanzprokurator.

If there are legal disputes between the Republic of Austria and a facultative client of the Finanzprokurator, which leads to a conflict of interest for the Finanzprokurator, the Republic of Austria will always take priority.

D. Task fulfilment and lawyer's fee

Before giving advice to a client or representing him in court, the Finanzprokurator basically needs a specified order.⁸ When placing the order the clients have to inform the Finanzprokurator about the substantial facts of the case.

The only exception to this rule is in the event of imminent danger to the Republic of Austria or particular need for urgency. In these cases the Finanzprokurator has to act for the public benefit promptly.

An order of the Republic of Austria must be regarded as an internal instruction that has to be obeyed, whereas orders of other clients are seen as private orders which can be recalled or refused acceptance.

Fulfilling its tasks, the Finanzprokurator is subject to official secrecy without exception. All cases shall be treated as strictly confidential by the Finanzprokurator.

As a public agency the Finanzprokurator is committed to the principles of efficiency, usefulness and economy, all three are laid down in the Austrian constitution, as well as to the rule of law. The Finanzprokurator has to safeguard public interests in a comprehensive way.

These are the reasons why the Finanzprokurator does not go to court exclusively for the sake of going to court.

Regarding the lawyer's fee, there is a big difference again between the Republic of Austria and the other clients of the Finanzprokurator.

While the Republic of Austria never has to pay for the provision of services except cash expenditure like law charges, all other clients of the Finanzprokurator including state governments and local government authorities have to remunerate for the legal services of the Finanzprokurator in line with market requirements.

As a benchmark for the remuneration, the Finanzprokurator makes use of the relevant provisions regarding the (private) lawyer's fee such as the Austrian Law of Fees for (private) Lawyers (RATG) and the General Criteria for Fees for (private) Lawyers (AHK).

The aforesaid differentiation is definitely justified as the Republic of Austria has to bear the personnel costs as well as the material expenses of the Finanzprokurator which is a public agency. In return, the legal services are free of charge, no matter whether representation in court cases or legal advice is required.

E. Mission and Activities

As the lawyer and legal advisor of the Republic of Austria, the Finanzprokurator basically has to provide legal counsel and legal representation. In fact, the Finanzprokurator has lots of competences.

➤ Legal counsel

One of the most important jobs of the Finanzprokurator besides legal representation is acting as legal counsel.

Legal counselling includes for instance:

- drafting contracts
- negotiating
- contracting on behalf of the client
- drawing up legal documents in due form
- giving legal opinions; written or oral statements

⁸ The Austrian law assumes that a lawyer always possesses the required power of attorney; therefore it is sufficient that a lawyer refers to it before court.

- conducting conferences
- holding meetings

Despite the fact that legal opinions of the Finanzprokuratur are not binding, they are highly-valued because of their prime quality. Public authorities commonly seek the advice and consent of the Finanzprokuratur before making policy decisions which may later be found to be contrary to the law.

The Finanzprokuratur performs approximately 8.000 legal counsels a year.

➤ **Legal representation**

The Finanzprokuratur represents its clients in legal proceedings in all national and international courts, administrative agencies and tribunals mainly in civil and administrative but also partly in criminal matters (for instance lodging a claim for damages resulting from criminal offences in the course of criminal prosecution).

Concerning the Republic of Austria, the Finanzprokuratur alone is empowered to represent the State in ordinary national courts such as the Court of First Instance, the Court of Appeal and the Supreme Court; all other clients have a free choice of their representative. They need not be represented by the Finanzprokuratur. They can also engage private lawyers.

The Finanzprokuratur may:

- act as plaintiff, such as in the case of an infringement of law or breach of a contract by the contractual partner, or
- act as defendant when actions are brought against the Republic of Austria or against any other of its clients or
- access as intervenor in legal proceedings on behalf of its clients.

Doing these, the Finanzprokuratur has to draft all kind of pleadings and attend all trials.

Every year there are approximately 1.000 new court-cases which the Finanzprokuratur pleads.

➤ **Mediation**

The Finanzprokuratur also has the competence to mediate or to help a legal dispute to be settled out of court.

➤ **Arbitration opinions**

To provide arbitration opinions is another competence of the Finanzprokuratur.

➤ **Legislative advice**

The Finanzprokuratur is becoming more and more involved in the preparation of Government legislation as well as in the commenting on drafted bills.

➤ **Seminars and newsletters**

The Finanzprokuratur can provide its clients with newsletters (for instance about court rulings or other current topics) and hold seminars. There are lots of seminars held for tax offices about tax enforcement or public liability.

➤ **Intervention as legal party**

Prescribed in some legal provisions the Finanzprokuratur is empowered to intervene in specific legal proceedings. To give an example, the Austrian Insolvency Law states that the Finanzprokuratur has to be a part of all big bankruptcy proceedings to represent the Public Interest.

➤ **Central contact point for individuals**

Last but not least, the Finanzprokuratur acts as a central contact point for individuals who intend to sue the Republic of Austria for damages caused by official acts.

In case an individual makes claims against the Republic of Austria for damages, he/she has to follow a statutory preliminary proceeding of which the Finanzprokuratur is exclusively in charge.

The private person has to inform the Finanzprokurator about all the facts and state its financial demands. There is no prerequisite that the private person knows the exact at-fault party.

Subsequently, it is up to the Finanzprokurator to find out the competent authority and to assess the facts. The Finanzprokurator counsels the competent authority whether or not it should admit to the claim. In these cases the Finanzprokurator acts as an authorised expert. Commonly, the competent authority complies with the recommendation given.

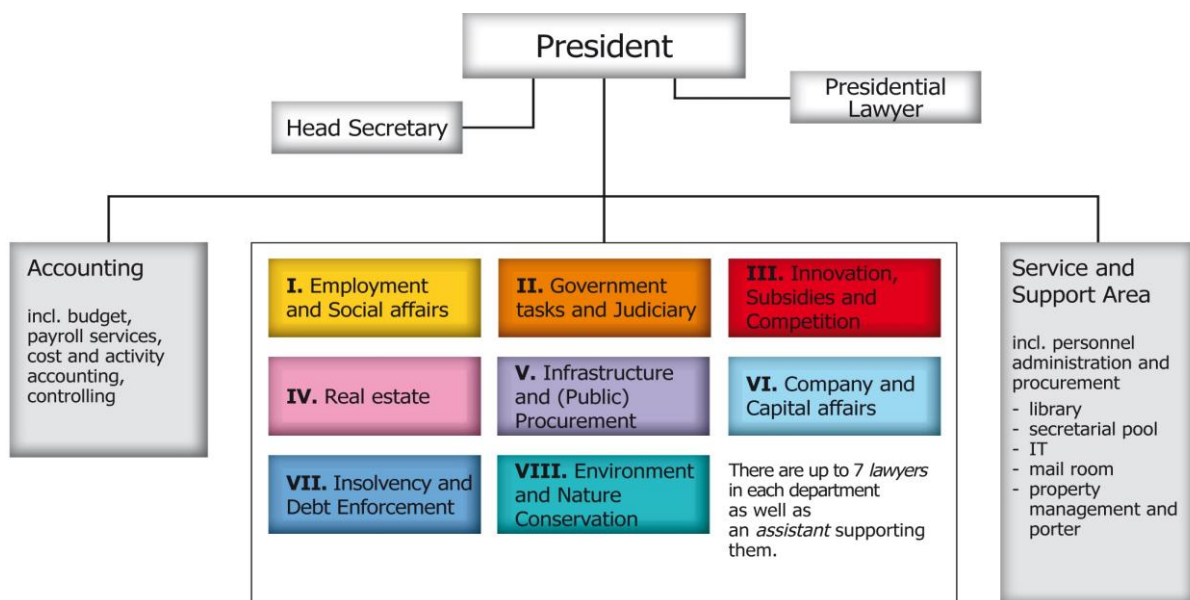
As this proceeding ensures prompt and simple help as well as equal treatment, it is on the one hand a substantial easement and improvement for private persons making complaints.

On the other hand, this proceeding saves the general public and the public administration considerable expenses for hopeless trials.

Fulfilling all these tasks the Finanzprokurator plays an important role regarding the coordination of official acts and the development of law as well.

F. Organisation of the Finanzprokurator including the provided areas of law

The graphics set forth hereunder shows the organisation of the Finanzprokurator:



At the top there is the Presidium, which is headed by the President and responsible for the organisation, Human Resource Management, the coordination of the lawyers' activities as well as the representation of the Finanzprokurator. In special or sensitive cases, legal counsel as well as legal representation is also done by the Presidium (for instance drafting contracts concerning the financial crisis).

The accountancy as well as the service and support area supports the lawyers in fulfilling their tasks.

Ordinarily, the legal counsel and representation is provided by eight law-departments which are divided into different law areas. As the Finanzprokurator has to provide legal counsel for all the activities and areas of responsibility of the Republic of Austria (for instance reversion law which is unique for states), at least a broad legal knowledge of all state-related law areas is needed.

The different departments for instance deal with⁹:

1. Employment and social affairs =>

Employment (dispute) law, social security law, labour law, service law

2. Government tasks and judiciary =>

Military law, monument protection law, university law, European law, public law, police law, criminal law, constitutional law, administrative law, asylum law, food law

3. Innovation, subsidies and competition =>

Antitrust law, patent law, press law, copyright law, law of competition, intellectual property law, consumer protection law, data protection law, restitution law

4. Real estate =>

Building law, land law, tenancy law, law relating to registration of deeds, expropriation law, servitudes

5. Infrastructure and public procurement =>

Transport law, road traffic law (including car accidents), public procurement law, energy law, communication law

6. Company and capital affairs =>

Corporate law, banking law, law of balance sheets, stock exchange law, trade law, tax law, insurance law, law relating to associations, capital market law, budget law

7. Insolvency and debt enforcement =>

Insolvency law, reversion law, customs law, financial law, enforcement law, annulment law

8. Environment and nature conservation =>

Environmental law, water rights, forestry law, wildlife law

G. Requirements for working at the Finanzprokurator and vocational training

As a federal agency the Finanzprokurator must have a vacant permanent post before recruiting new staff. The number of permanent posts per federal agency is laid down in the staff establishment plan launched by the Austrian government.

In order to start working at the Finanzprokurator as a trainee-lawyer, applicants have to fulfil certain prerequisites such as:

- University degree in Austrian law
- Court-experience of at least nine months
- Comprehensive legal knowledge checked during the job interview

If someone has already had professional experience during his career it would be a big advantage in getting the job.

As all lawyers at the Finanzprokurator are civil servants who cannot be dismissed without cause, new employees are on temporary contracts for the first year to see whether they prove themselves. After this period they get a permanent contract or if they fail, they would have to leave the Finanzprokurator.

Once working with the Finanzprokurator, trainee-lawyers have to successfully pass within a period of five years

- the lawyer's exam as well as
- the public office exam,

otherwise the employment is automatically terminated.

During the period of education new employees pick up skills mainly whilst working along side experienced lawyers at their place of work (so called "on-the-job-training"). In this way they get used to practical experience dealing with day to day requirements of the job.

⁹ Contracts and civil procedure as well as torts are done by each department.

Trainee-lawyers at the Finanzprokurator have to attend the courses for judges that take place at the court of appeal in Vienna two days a month.

Apart from that, trainee-lawyers as well as examined lawyers have to attend lots of seminars at the Academy of Lawyers for instance, which are fully funded by the Finanzprokurator. A lawyer gets paid to attend approximately four seminars a year by the Finanzprokurator.

To sum up, candidates for the position of a lawyer at the Finanzprokurator must meet demanding professional criteria.

Due to the widespread vocational training and the fact that every single lawyer at the Finanzprokurator has to pass two extensive legal exams (he is so called “double-examined”), the quality of work is at a very high level. This is also confirmed by the high customer satisfaction and the large number of gained litigations.

The Finanzprokurator wins more than two thirds of its civil litigations per year.

IV. Federal law offices in general

A. Advantages

To summarise, the main advantages of a federal law office are:

- The State has lawyers who are specialised in dealing with public authorities’ problems and therefore have special “state-related” know-how. Private lawyers often need to read up on a specific public subject that usually is time and cost-consuming.
- There is no time needed for finding an appropriate private law-firm at short notice and negotiating a framework agreement complying with public procurement provisions.
- The federal law office can be consulted anytime and in an uncomplicated way. Normally a close relationship between the public authorities and the federal lawyers accrues.
- The State gets profound legal services of high quality without paying lawyer’s fee. (The Finanzprokurator serves legal counsel as well as representation for the Republic of Austria with an average value of € 8 Mio a year.)
- As a federal law office is not primarily profit orientated, there is no need to litigate for the sake of litigation. Going to court is carefully considered. Private lawyers get a fee regardless of the outcome.
- A federal law office also acts as a guardian of the Public Interest.
- Federal offices can be involved in the preparation of Government legislation.
- Governmental tasks as being the head of the prosecution can be vested in a federal law office.
- If the federal law office counsels or represents other public bodies than the Federation for money, all the earnings belong to the State. (In 2008 the Finanzprokurator brought in € 2.1 Mio.)

B. Disadvantages

The following points can be regarded as main disadvantages:

- The Federation has to bear all the personnel as well as the material costs throughout the whole year. (The personnel costs of the Finanzprokurator amount to € 5.4 Mio a year, its material costs amount to € 0.5 Mio a year. In fact, the creation of value is nearly twice as high as the average costs per year.)
- The fixed costs accrue regardless of whether or not legal counsel or representation is needed.
- Possibly, the federal law office does not have expert knowledge in certain cases.

C. Statutory framework

In order to establish a federal law office a statutory basis is essential stating for instance:

- Who can consult the federal law office on what terms (different kinds of clients);
- All competences of the federal law office (legal advice; legal representation; legislation, guardian of the Public Interest, arbitration, etc.);
- Orders and principles for task-fulfilment;
- Provisions concerning the power of attorney as well as the possibility for substitution;
- Liability provisions;
- Provisions dealing with conflicts of interests;
- Lawyer's fees (reimbursement of costs and other expenses occurring through the fulfilment of legal tasks – such as travel expenses, court fees);
- Provisions regarding the organisational structure and
- Provisions concerning the employment-relationship including job-requirements, lawyer's exam, vocational training and the salary as well as a competition clause.