EC-Tort Law and the German Legal Family

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This report attempts to identify the degree to which “EC tort law” as described in the different reports is in line with the principles that are in force in the most representative legal orders of the Germanic legal family, i.e. the laws of Germany, Switzerland and Austria. The structure of the report follows, as far as possible, the “Overview” on EC tort law¹ and covers the following issues:

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¹ The reports will be referred to as follows: Antoniolli: Luisa Antoniolli, Community Liability; Durant: Isabelle Durant, Causation; Hinteregger: Monika Hinteregger, Environmental Liability; Howells: Geraint Howells, Is European Product Liability Harmonised?; Koch: Bernhard A. Koch, Other Strict Liabilities; Lukas: Meinhard Lukas, Fault Liability; Martin-Casals/Solé Feliu: Miquel Martin-Casals/Josep Solé Feliu, Liability for Others; Oliphant: Ken Oliphant, The Nature and Assessment of Damages; Pereira: André Pereira, Limitation Periods in EC Law; Rebhahn: Robert Rebhahn, Non-contractual Liability in Damages of Member States for Breach of Community Law; Rogers: W.V. Horton Rogers, «EC-Tort Law» and English Law; Vaquer: Antoni Vaquer, Damage; Wissink: Mark Wissink, Overview.
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I. Aims of Tort Law

18/1 As the "Overview" points out, one of the primary aims of "EC tort law" is the protection of rights derived from Community law. Secondary EC law deals with tort law issues generally in order to hereby contribute to the realisation of the goals set out in the EC treaty, such as the creation and proper functioning of the internal market. Within this frame, EC tort law pursues the classical aims of tort law such as compensation, prevention of damage and allocation of risks and costs.

18/2 The major aim of German, Swiss and Austrian tort law clearly is compensation. It is, however, largely recognized today that tort law also fulfils other,

2 Wissink, no. 15/12.
3 Wissink, no. 15/13 with examples and references to the reports.
secondary functions. In the Germanic legal family, prevention of damages is another well established aim of tort law\(^5\), the idea being that the mere existence of liability creates an incentive to act carefully and to avoid damages. Prevention is not only an aim of liability for fault, but also of strict liability since the latter can create an incentive to implement preventive measures as long as the costs of these measures are lower than the expected amount of damages\(^6\) or to reduce the activity to a level where its benefits still outweigh its costs, including costs for damages payments. In Austrian law, there seems to be to a certain extent also a thought of sanction in the area of fault liability. According to § 1324 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch – ABGB), the extent of damages depends on the gravity of the reproach made to the defendant\(^7\). In the current Austrian proposal for reform, the idea of sanctioning the tortfeasor is, however, abandoned\(^8\). In Swiss law, according to art. 43(1) of the Swiss Code of Obligations (Obligationenrecht – OR), for the allocation of damages the judge has to take into account all features of the case as well as the degree of the tortfeasor’s fault\(^9\). German law, on the contrary, does not attach any importance to the gravity of fault and even the slightest fault obliges the defendant to repair the whole damage (”Alles-oder-nichts-Prinzip”). The authors of the German Civil Code (Bürgerliches Gesetzbuch – BGB) conceived tort law to be free of moral or even punitive considerations\(^10\).

Another aim of tort law is the channelling of liability. The legal orders of Germanic tradition know of numerous legal rules channelling liability to a certain person such as the keeper of a thing or the person who carries on certain activities. The goal of such channelling is to achieve a certain allocation of risks and costs, especially when it is accompanied by a duty to insure against liability or when it goes hand in hand with a possibility to distribute the costs generated by the activity among a (often large) group of persons taking benefit from the

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\(^5\) For German law: Wagner (fn. 4) no. 34 et seq.; Hager (fn. 4) no. 10; Deutsch (fn. 4) no. 18; H.-L. Weyers, Unfallschäden (1971) 446 et seq., Esser/Weyers (fn. 4) 137.


\(^9\) E.g. Bundesgericht (BG – Swiss Federal Court) 7 February 1956, Entscheidungen des Schweizerischen Bundesgerichtes: Amtliche Sammlung (BGE) 82 II 25/31: The obligation of a skier to pay damages is reduced when his fault is only slight.

\(^10\) Motive zu dem Entwurfe eines bürgerlichen Gesetzbuches für das Deutsche Reich, vol. 2 (1888) 17; Wagner (fn. 4) no. 36; Hager (fn. 4).
damaging activity. This is particularly the case for Swiss law where strict liability excludes the applicability of concurrent fault liability rules.

The short overview shows that the rules on torts of the EC and of the Germanic tort systems pursue largely similar goals. They also have in common the understanding that punishing the wrongdoer is not regarded as an aim of EC tort law. Whereas in the English law of torts or in the current proposal on reform of the French law of obligations, aggravated, exemplary or punitive damages are or, in the case of France, are currently suggested to be, a remedy of tort law. According to the dominant view in the systems under review, punishing the wrongdoer must be left entirely to criminal law with its specific procedural guarantees for the person held to be responsible – guarantees private law does not provide.

II. Protected Interests

A. Rights Protected “erga omnes” (“Absolute Rights”) in General

The “Overview” on EC law confirms that EC tort law protects a wide scope of interests, including life, health, bodily integrity, privacy and other fundamental

12 In the field of competition law the ECJ has, however, held that, damages being assessed according to national law, the national law can well provide for punitive damages if considered necessary in order to pursue the aims of efficiency and non-discrimination in the application of EC law, ECJ 13 July 2006, joined cases 295/04 to 298/04, Manfredi [2006] ECR I-6619: “89: In accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see, inter alia, Case 106/77 Simmenthal [1978] ECR 629, paragraph 16, Case C-213/89 Factortame and Others [1990] ECR I-2433, paragraph 19, and Courage and Crehan, cited above, paragraph 25). [...] 92: As to the award of damages and the possibility of an award of punitive damages, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed. 93: In that respect, first, in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law [...]”.
13 See Rogers, no. 16/55 et seq.
14 Art. 1371 of the current proposal provides: “One whose fault is manifestly premeditated, particularly a fault whose purpose is monetary gain, may be ordered to pay punitive damages besides compensatory damages. The judge may direct a part of such damages to the public treasury. The judge must provide specific reasons for ordering such punitive damages and must clearly distinguish their amount from that of other damages awarded to the victim. Punitive damages may not be the subject of a contract of insurance”. Translation available under: http://www.henricapitant.org/article.php3?id_article=47. (“L'auteur d'une faute manifestement délibérée, et notamment d'une faute lucrative, peut être condamné, outre les dommages-intérêts compensatoires, à des dommages-intérêts punitifs dont le juge a la faculté de faire bénéficier pour une part le Trésor public. La décision du juge d'octroyer de tels dommages-intérêts doit être spécialement motivée et leur montant distingué de celui des autres dommages-intérêts accordés à la victime. Les dommages-intérêts punitifs ne sont pas assurables”).
15 For Germany, see Bundesgerichtshof (BGH – German Federal Court of Justice), 4 June 1992, Neue Juristische Wochenschrift (NJW) 1992, 3096. For Switzerland: Rey (fn. 11) no. 17. For Austria: Koziol (fn. 7) no. 24.
rights, intangible property, and the environment\textsuperscript{16}. The precise scope of protection differs from one rule to another\textsuperscript{17}.

In the three national tort laws of the Germanic legal family, life, health, bodily integrity, and property enjoy the most intensive protection. The protection is guaranteed by the Codes’ basic rules on liability for negligent infliction of injury (§ 823(1) BGB, art. 41 OR, § 1295(1) ABGB). Most of the German, Swiss and Austrian laws providing for strict liabilities also mention life, health, bodily integrity, and property as protected interests. This is the case in liability provisions on, e.g., motor cars\textsuperscript{18}, trains\textsuperscript{19}, or pipelines\textsuperscript{20}.

In German law, liability for injury caused in an unlawful and wilful or negligent manner only arises if the injury affects the victim in one of the “absolute rights” expressly enumerated in § 823(1) BGB. The protected interests are: life, bodily integrity, health, freedom, property, and any “other right” (”sonstiges Recht”)\textsuperscript{21} enjoying protection erga omnes. The courts have recognized, as “other right”, in particular a “general right to one’s personality” (“Allgemeines Persönlichkeitsrecht”). In addition, § 823(2) BGB provides for liability in the case of a violation of a law that is aimed at protecting, among others, the plaintiff.

In Swiss law, a person is obliged to repair the damage caused to another person only if he or she acted \textit{wrongfully} or contrary to public morals (contra bonos mores)\textsuperscript{22}. The courts and the majority of the legal literature\textsuperscript{23} define wrongfulness as the violation of a duty to respect the interests of others in the absence of any justification. If an absolute right of the victim has been infringed, the outcome in itself is regarded as wrongful (“illicité de résultat”, “Erfolgsunrecht”). Absolute rights are rights that can be opposed against every person and the protection of which is not subject to any further condition (inter alia: personal rights, property rights, and rights of intellectual property).

\textsuperscript{16} Wissink, no. 15/14 with further references to the other reports.
\textsuperscript{17} Wissink, no. 15/14 et seq.
\textsuperscript{18} § 1 of the Austrian Railway and Motor Vehicle Act (Eisenbahn- und Kraftfahrzeughaftpflichtgesetz). § 7(1) of the German Road Traffic Act (Strassenverkehrsgesetz). Art. 58(1) of the Swiss Road Traffic Act (Strassenverkehrsgesetz).
\textsuperscript{19} § 1 of the Austrian Eisenbahn- und Kraftfahrzeughaftpflichtgesetz. § 1(1) of the German Liability Act (Haftpflichtgesetz). § 1 of the Swiss Gesetz über die Haftpflicht der Eisenbahn- und Dampföffentlichen Verkehrsunternehmungen und der Schweizerischen Post.
\textsuperscript{20} § 1a of the Austrian Reichtshaftpflichtgesetz (RHG – Liability Act) and § 10(1) of the Austrian Rohrleitungsgesetz (Act on Pipelines – RLG) and § 34 of the Austrian Gaswirtschaftsgesetz (Act on the public distribution of gas – GWG); § 2 of the German Haftpflichtgesetz (Liability Act – HaftPfG); art. 33(1) of the Swiss Rohrleitungsgesetz (Act on Pipelines – RohrLG).
\textsuperscript{22} Werro (fn. 4) no. 280.
\textsuperscript{23} BG 12 September 1997, BGE 123 II 577 c. 4; BG 18 March 1993, BGE 119 II 127, c. 3; Rey (fn. 11) no. 670. This conception is, however, criticized by, e.g., Werro (fn. 4) no. 284; Schwerner (fn. 4) no. 50.04.
Under § 1295(1) ABGB, the victim can claim compensation for damage that was inflicted by the tortfeasor in a faulty manner. In order to limit liability, the scope of protected interests is limited by the condition that only wrongful infliction of damage gives rise to a claim for compensation (§ 1294 sent. 1 ABGB). A conduct is considered wrongful if it violates commands or prohibitions of the legal order or if it is contrary to public morals. In many cases, specific rules forbid particularly dangerous conduct which is precisely described by law (“Schutzgesetze” – protective laws). Like in German law (§ 823(2) BGB), a violation of a “Schutzgesetz” gives rise to liability on the ground of § 1311 sent. 2 ABGB if the defendant acts with fault in respect of the violation of the rule protecting the victim. From the recognition of absolute rights follows the duty of any other person not to harm these rights. However, when judging on the wrongful violation of an absolute right, there has to be a balancing of interests between the interests of the claimant and those of the defendant. The value of the endangered rights, the extent of the potential damage, the dangerousness of the defendant’s activity and the interest of the defendant in the activity he carried out have to be weighed against each other.

B. Privacy and Personality Rights

The three legal orders under review protect privacy and personality rights through the law of torts.

In the 1950s, the German Federal Court of Justice derived from art. 1 and 2 of the German Fundamental Law (Grundgesetz – GG, i.e. the German “Constitution”) a general right to one’s personality (“Allgemeines Persönlichkeitsrecht”) as an “other right” enjoying the protection of § 823(1) BGB. In Swiss law, violations of personal rights can also give rise to claims in tort law, art. 28 et seq. of the Swiss Civil Code (Zivilgesetzbuch – ZGB) and art. 49 OR. In Austrian law, tort law also protects personality rights. In the Germanic legal family the protected rights are e.g.: the right to privacy, liberty and freedom of movement, honour, matrimony, the right to a name, the right to one’s own picture, the right to one’s own spoken word, the right to one’s honour, personal rights post mortem, parental care and the right of parents to raise their children.

However, not just any conduct that interferes with the right to privacy or any of such personality rights gives per se a right to compensation. There always has to

24 Koziol/Welser (fn. 7) 312.
25 Ibid., 338.
26 Apathy/Riedler (fn. 4) no. 13/16.
be a balancing between the interest of the person concerned, the interests of the person interfering, and the interest of the public at large, e.g., being informed.

C. Pure Economic Loss

The reports show that the protection against pure economic loss under EC tort law depends on the liability regime that is applicable in the specific case. On the one hand, art. 288 EC and the case-law of the European Court of Justice do not seem to make a general distinction between various heads of loss so that in cases of liability under art. 288 EC, pure economic loss can be recoverable (although the ECJ takes a somewhat cautious approach to liability for pure economic loss). On the other hand, the Directive on Liability for Defective Products, e.g., clearly distinguishes between damage to life, health, property (other than the defective product itself), these damages being covered by the Directive, and pure economic loss which is not covered. Other directives provide for different scopes of recoverable loss so that it seems difficult to find a common policy in this respect.

In the three legal orders under review, the protection of pure economic interests is often limited in scope:

Under German tort law, economic loss can be compensated under § 823(1) BGB only if it flows from an injury to one of the legally protected interests specified in that provision including infringements to any "other (absolute) right". If wilful or negligent conduct causes the victim economic damage unrelated to any absolute right ("reiner Vermögensschaden" - pure economic loss), no claim arises under the general rule of § 823(1) BGB.

A right to compensation for pure economic loss can, however, follow from § 823(2) BGB, § 824 BGB and § 826 BGB. According to § 823(2) BGB, the wilful or negligent violation of a law "designed to protect someone else" triggers a duty to compensate the damage thereby inflicted. This includes pure economic loss. § 824 BGB provides that a person who declares or publishes, contrary to the truth, a statement which is likely to endanger the credit, earnings, or prosperity of another is liable for "any damage" arising therefrom, even if he does not know the untruth but should know of it. In order to obtain

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29 See for German law e.g.: BGH 2 April 1957, BGHZ 24, 72, English translation by Sims in: W. van Gerven/J. Lever/P. Larouche, Cases, Materials and Text on National, Supranational and International Tort Law (2000) 143. For Austrian law, see: Koziol (fn. 4) no. 4/28.
30 Wissink, no. 15/14 e), 15; C. van Dam, European Tort Law (2006) no. 1202–5.
31 Van Dam (fn. 30) no. 1409.
32 Ibid., no. 701–2.
34 However, the scope of the rule is considerably narrowed by § 824(2) BGB which declares that a person who makes a communication, the untruth of which is unknown to him, is not liable if he or the receiver of the communication has a lawful interest in it. See Esser/Weyers (fn. 4) I/2, § 57, 206 et seq. For more information in English, see: Van Gerven/Lever/Larouche (fn. 29) 65 et seq., 189.
compensation under § 826 BGB the damage must have been done intentionally in a manner that is contra bonos mores\textsuperscript{35}.

18/17 Under Swiss law as well, the estate ("Vermögen") as such is not protected by the law of torts. "An interference with (purely) economic interests of a person which is not the immediate consequence of an infringement on absolute rights will not be qualified as unlawful as long as no specific rule can be found which protects pecuniary interests precisely and accurately against [the specific] interference\textsuperscript{36}" ("illicité de comportement", "Verhaltensunrecht"). Pure economic loss can be recovered when the tortfeasor has intentionally caused harm in a manner contrary to public morals, art. 41(2) OR\textsuperscript{37}. The judicature has also awarded compensation for false advice, information or expertise on which the victim has relied and thereby suffered damage ("Vertrauenshaftung", "responsabilité fondée sur la confiance")\textsuperscript{38}. However the scope of this liability is narrow\textsuperscript{39}.

18/18 In Austrian law, some special provisions give right to compensation for pure economic loss. One is § 1295(2) ABGB which provides that a person who intentionally injures another in a manner that is in violation with public morals is liable for the damage inflicted\textsuperscript{40}. Another basis in tort is § 1311 sent. 2, second case ABGB which establishes liability in the case of an infringement of a statute which is intended for the protection of others. A third ground for compensation arises for negligent advice or statements given by experts and others with specialized knowledge, §§ 1299, 1300 ABGB\textsuperscript{41}.

18/19 This brief overview shows that in the three tort law systems under review, the protection of pure economic interest is much more limited than the protection of "absolute rights" such as, e.g., health or property. Hence, if the rules on tort law of the EC protected against pure economic loss to a lesser degree than against harm to "absolute rights" such as life, bodily or mental integrity, liberty, and property, this would be well in line with the attitude of the three legal orders of the Germanic legal family.

\textsuperscript{35} See Esser/Weyers (fn. 4) 202 et seq.; for information in English, see Markesinis (fn. 27) 894 et seq. and Van Gerven/Lever/Larouche (fn. 29) 231 et seq.


\textsuperscript{37} For details, see: Schwenzer (fn. 4) no. 51.01.


\textsuperscript{39} See Werro (fn. 4) no. 305 with further references (w. f. ref.); for a critical appreciation, see: Schwenzer (fn. 4) no. 52.04.

\textsuperscript{40} See H. Koziol, Österreichisches Haftpflichtrecht, vol. II (2nd ed. 1984) 95 et seq.

\textsuperscript{41} See ibid., 182 et seq.
D. Damage to the Environment

The environment is protected under secondary EC law by Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remediating of environmental damage\(^\text{42}\). We will deal with this topic infra no. 18/53 et seq.

E. Interests Worthy of Legal Protection

In order for compensation to be due, the infringed interest must be worthy of legal protection. Hence, for instance, gains from a legally prohibited activity are not within the scope of protection under the three legal orders under review and no compensation can be claimed for them\(^\text{43}\). However, not every interest that has been infringed is considered illegal just because the victim pursued an unlawful activity. If, for example a drug dealer is injured in an accident while pursuing his illegal activity, he will receive compensation not for lost profits but for his bodily damage\(^\text{44}\).

III. Types of Liability

A. Liability of the Community for Damage Caused by its Institutions and Liability of the State under National Rules

On the basis of art. 288(2) EC the Community is liable for any damage caused by its institutions or by its servants in the performance of their duties\(^\text{45}\). Community liability in art. 288(2) EC brings together elements that resemble the concept of State liability and elements of vicarious liability. In this part we will only compare Community liability to the rules of State liability in the three legal orders covered by the report. The concept of vicarious liability will be dealt with at a later stage\(^\text{46}\).

Under German law, liability of the State is governed by § 839 BGB which is lex specialis to §§ 823 et seq. BGB\(^\text{47}\) and which establishes a liability under private law for wilful or negligent conduct of officials or other collaborators of the State causing damage to third parties (“Amtshaftung”). § 839(1) reads: “If an official, wilfully or negligently, commits a breach of a duty vis-à-vis a third party, he shall compensate the third party for any damage arising there from. If

\(^{42}\) OJ L 143, 30.4.2004, 56–75.


\(^{44}\) Cf. Koziol (fn. 43) no. 11.

\(^{45}\) See Wissink, no. 15/20 and the report by Antonioli.

\(^{46}\) Infra, no. 18/40.

\(^{47}\) Spraul/Palandt (fn. 28) § 839, no. 3; H. Maurer, Allgemeines Verwaltungsrecht (15th ed. 2004) § 26, no. 45.
he acted negligently, he may be held liable only if the injured party is unable to obtain compensation elsewhere” 48. For questions not specifically addressed by § 839 BGB, the general rules of tort law remain applicable 49. In most of the cases 50 the liability of the official is overtaken by the State or the public authority for which the official was in duty (art. 34 GG) 51. Art. 34 GG reads: “If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. The ordinary courts shall not be closed to claims for compensation or recourse” 52. Under Austrian law, State liability is governed by the “Amtshaftungsgesetz” which provides that liability of the legal entities (“Rechtstrager”) 53 of the Republic of Austria is governed by the provisions of civil law. Under Swiss law, State liability is governed by the provisions of public law of the Federation or of its member states (“Kanton” – Canton), see art. 61(1) OR 54 and art. 59(1) ZGB 55. The liability of officials working for the Swiss Federal State (the “Bund”) is governed by the Verantwortlichkeitsgesetz 56.

Under Austrian, German and Swiss law, the persons acting on behalf of the public entities are not personally liable to the persons injured 57. However, they are subject to a right of recourse by the State in cases where they have acted with intent or gross negligence 58. Sometimes, State liability can cover cases

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48 § 839 BGB: “(1) Verletzt ein Beamter vorsätzlich oder fahrlässig die ihm einem Dritten gegenüber obliegende Amtspflicht, so hat er dem Dritten den daraus entstehenden Schaden zu ersetzen. Fällt dem Beamten nur Fahrlässigkeit zur Last, so kann er nur dann in Anspruch genommen werden, wenn der Verletzte nicht auf andere Weise Ersatz zu erlangen vermag. (...).”

49 Sprau/Palandt (fn. 28) § 839, no. 3.

50 In some cases liability is not overtaken, for instance for notaries, see Maurer (fn. 47) § 26, no. 34 et seq. for further details.

51 Ibid., § 26, no. 7.


53 “Legal entities”, i.e. the Federation, the Laender, districts, municipalities, other bodies of public law, and the institutions of social insurance.

54 According to this article, the liability of officials and of official employees can be governed by the laws of the Federation and of its Member States (“Kantone” – Cantons).

55 According to this article, the rules concerning the bodies of public law are an issue of the administrative law of the Federation and of the States.


57 For Austrian law, see: § 1(1) half-sent. 2 AHG. For German law, this is the absolutely prevailing opinion, Maurer (fn. 47) § 26, no. 45, F. Ossenbühl, Staatshaftungsrecht (5th ed. 1998) 103 et seq. For Swiss law: art. 3(3) VG.

58 For Austrian law: § 3(1) AHG. For German law: art. 34 sent. 2 GG. For Swiss law: art. 7 VG.
which resemble the employer's (vicarious) liability under civil law. For instance, in a case decided by the German BGH, a traffic accident during the performance of official duties was held to satisfy the conditions of § 839 BGB, art. 34 GG 59.

Under Austrian, German and Swiss law, the State can be liable for official acts of the administration and of the judicature 60. Under German law, State liability with respect to acts of the judicature is limited to breaches of duties by judges which are criminal offences 61. In contrast to Community liability under art. 288 EC, German legal practice is reluctant to admit State liability for (purely national) normative acts and only allows liability for certain unlawful ordinances concerning urban planning and building laws 62 and for unconstitutional laws relating to individual cases 63. For the rest, the BGH refuses liability for unlawful normative acts, especially parliamentary laws or statutory regulations 64. Under Austrian law, while State liability under the AHG covers unlawful ordinances the State cannot be held liable for (purely national) legislative acts 65.

On several occasions the national courts in Germany and Austria have applied the principles of Member State liability for breach of Community law, as settled down by the case-law of the ECJ. In Germany and Austria, sometimes, deep changes in the national laws had to be made in order to comply with the principles as they were set out by the ECJ. For instance, one of the essential alterations in the Austrian law of State liability was the possibility of State liability for legislative wrongs, precisely legislative acts in violation of EC law, which was hitherto unknown to Austrian law 66. With respect to general and abstract legislative acts the situation was quite similar in German law 67. In the last few years, several German judgments have dealt with legislative wrongs for

60 For Austrian law, see: Koziol/Welser (fn. 7) 385 et seq. For Swiss law: Cf. art. 1(1) VG.
61 Cf. § 839(1) sent. 1 BGB.
63 BGH 29 March 1971 (obiter dictum), BGHZ 56, 40/46; Maurer (fn. 47) § 26, no. 51. However, no case illustrating this issue was found.
64 Maurer (fn. 47) § 26, no. 51.
65 Koziol/Welser (fn. 7) 388.
67 See Maurer (fn. 47) § 26, no. 51 and no. 18/25.
the breach of Community law. Member State liability can also be incurred for violations of Community law committed by the judicature. In compliance with that rule, the Austrian Constitutional Court (Verfassungsgerichtshof – VfGH) had to decide claims on Member State liability for breaches of Community law alleged to have been committed by the Federal Administrative Court or by the Austrian Supreme Court (Oberster Gerichtshof – OGH). The German BGH had to consider this question in a case decided in October 2004 but held, just as the Austrian VfGH in the aforementioned cases, that the court had committed no evident breach of Community law. Finally, Member State liability can be triggered by a violation of Community law by the public administration. Several Austrian and German judgements address this issue.

B. Fault Liability

1. Primary EC law

In primary EC law, in cases of liability of the Community for administrative acts, fault may not be an express and separate condition for liability, but it seems to be required in at least a certain number of cases. With respect to a case concerning the Member State liability of the Federal Republic of Germany, the ECJ specified that certain objective and subjective factors, relevant for determining fault under a national legal system, may also be relevant for the purpose of determining whether or not a given breach of Community law is serious (sufficient

71 For Germany, see BGH 14 December 2000, BGHZ 146, 153; for Austria, see: OGH 25 July 2000, SZ 73/123; OGH 30 January 2001, SZ 74/15; OGH 12 October 2004, 1Ob 286/03w, not published, accessible under: http://www.ris.bka.gv.at/jus/.
72 See Wissink, no. 15/35.
73 Art. 3(1) VG.
75 Wissink, no. 15/35 with a reference to Antoniolli, no 10/40 in fn. 96.
seriousness of the breach of Community law being a condition for liability of the Community or of a Member State77). The ECJ held, however, that the obligation to compensate for damage caused to individuals can not depend upon a condition based on any concept of fault that would go beyond the concept of a sufficiently serious breach of Community law. The imposition of such a supplementary condition would be tantamount to calling into question the right to compensation under Community law78.

2. Secondary EC law

In secondary EC law, the notion of "fault" has not been defined in any general manner. However, different rules reveal the elements of which fault should be composed. For instance art. 3(1)(b) of Directive 2004/35/CE on environmental liability speaks of "any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent"79. Thus, the notion of "fault" seems to include intentional and negligent behaviour80. Furthermore, according to art. 7(1)(a) and (b) of Council Directive 91/250/EEC on the legal protection of computer programs81, any act of putting into circulation (lit. a) or the possession, for commercial purposes (lit. b), of a copy of a computer program knowing, or having reason to believe, that it is an infringing copy should trigger legal sanctions. In these two cases, measures of protection should apply if the actor has acted with intent or if the facts were obvious to him. In art. 7(1)(c) of the same Directive the distinction between intentional conduct and negligent conduct is apparently of importance since only intentional acting should constitute fault82.

In the three legal orders under review, the notion of "fault" is divided into the two sub-categories of intent and negligence83. Under some rules, liability is only incurred if the defendant acted intentionally, see, for instance, § 826 BGB, art. 41(2) OR, or § 1295(2) ABGB, which provide for liability for intentional infliction of damage contra bonos mores. These rules make it necessary to distinguish between dolus eventualis and conscious negligence84.

77 See on this issue Antonioli, no. 10/48–10/55 for Community liability and for State liability Rebhahn, no. 9/56 et seq.
78 ECJ 5 March 1996, ibid., no. 79 et seq.
79 Highlight by the authors. The same formulations can be found in art. 8(3) of the same Directive.
80 This finding is supported by the German version of Directive 2004/35/CE that speaks of a conduct that has been "vorsätzlicher oder fahrlässig".
82 According to art. 7(1)(c) remedies should be provided by the Member States against "any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program".
83 See, in Austrian law: § 1294 ABGB; in German law: § 276(1) and § 823(1) BGB; in Swiss law: art. 41(1) OR.
84 For German law, see: D. Medicus, Schuldrecht I (16th ed. 2005) no. 315. For Swiss law, see: Honsell (fn. 4) § 7, no. 8.
In the field of liability for negligence, the distinction of the different degrees of negligence is of little significance in German tort law, and, in principle, the degree of fault does not influence the amount of damages that is due. In Swiss tort law the defendant has to answer for intentional and negligent conduct. As a condition for general fault liability, the degree of fault is of no importance. Yet, it can be of importance when the judge has to assess the damages the defendant owes to the claimant. In Austrian tort law, the distinction is important for the Austrian law of damages since slight negligence only obliges the tortfeasor to repair the loss suffered, whereas intentional conduct or gross negligence obliges him to compensate for damnum emergens and lucrum cessans.

To a great extent, the rules of secondary EC law that provide for fault liability reveal that the yardstick to be used provide for an objective approach to fault. This is true, for instance, for art. 20 and 21 of Directive 78/855/EEC concerning mergers of public limited liability companies and also for art. 21 of Directive 2000/31/EC on Electronic Commerce.

In all three legal orders under review, the definition of intent is quite similar. A person acts intentionally if he knows all the conditions which are required for the fulfillment of the legal rule and desires them to be realized. With respect to negligence, the notion is defined in § 276(2) BGB as the violation of the required standard of conduct. Swiss tort law uses the same definition. According to the prevailing opinion in German and in Swiss law, the yardstick in both legal orders is an objective one and, in principle, does not take into account the individual capacities of the defendant. However, the required standard of conduct is adapted to the social sphere in which the defendant has acted (profession, age, education etc.). Under German law, children, old people or handicapped people are only required to meet the standard of conduct that normally can be expected from persons of the same age or type of handicap. In Swiss law, the Federal Court has, despite the objective conception of fault, accepted to appraise the fault of children less severely by reason of their young age.

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85 Markesinis (fn. 27) 72. However, in the field of contract law, it is of some importance.
87 Honsell (fn. 4) § 6, no. 1.
88 See art. 43(1) OR and Werro (fn. 4) no. 277 with further references.
89 Lukas, no. 4/8 and 4/13.
90 For Austrian law, see: Koziol/Welser (fn. 7) 319. For German law, see: Heinrichs/Palandt (fn. 86) § 276, no. 10. For Swiss law, see: Werro (fn. 4) no. 278.
91 Honsell (fn. 4) § 6, no. 17.
92 For German law, see: Heinrichs/Palandt (fn. 86) § 276, no. 15. Medicus (fn. 84) no. 309. For Swiss law, see: Honsell (fn. 4) § 6, no. 20; Werro (fn. 4) no. 241.
93 Medicus (fn. 84) no. 310.
94 Hence, § 828 BGB provides for certain exclusions of children's liability depending e.g. on the age of the child.
95 For instance in § 3(2a) StVO.
96 Medicus (fn. 84) no. 310.
97 See, for instance, BG 19 February 1985, BGE 111 II 89 and Werro (fn. 4) no. 258 w. f. ref. and criticism.
The objective approach to negligence of EC, Swiss and German law is in opposition with Austrian law. Here, as a general rule, the conclusion that the defendant acted negligently can only be drawn if, according to his subjective capacities, he could have discerned that he acted in a dangerous and unlawful manner and if he was able to act differently. Therefore, the yardstick for negligent conduct under Austrian law is a subjective one. However, an objective yardstick is used when the defendant exercised activities which require special expert knowledge, or when he used particularly dangerous things, and in the field of contractual obligations. The current proposal for reform of the Austrian rules on liability suggests in § 1300(1) that fault in torts should continue to be defined as a subjective element.

3. The burden of proof

Instances which provide for fault liability with a reversal of the burden of proof exist only in secondary EC law, such as Directive 95/46/EC on data protection and Directive 1999/93/EC on electronic signatures. Although it is less clear, it seems that both Directive 77/91/EEC on the formation of public limited liability companies and Directive 78/855/EEC on mergers of public limited liability companies likewise provide for fault liability with a reversal of the burden of proof. One could say that a common point of these regulations is that in these cases it is very difficult for the claimant to prove a fault of the defendant either because he would have to be an IT expert or because he has no insight into the internal affairs of public limited liability companies during their creation or during their merger.

In the three legal orders under review, with respect to tort law and as a general rule, the burden of proof of the conditions of liability, i.e. damage, causation and fault of the defendant lies with the claimant. However, with respect to fault, multiple rules of the tort laws of the three countries provide for a reversal of the burden of proof.

In German law, some specific categories of liability with a reversed burden of proof are found in the BGB (§ 831 liability for employees; § 832 liability of the supervisor of minors or handicapped; § 833 sent. 2 liability of the keeper

98 Koziol (fn. 4) no. 5/53; Koziol/Welser (fn. 7) 318 et seq.
99 See § 1299 ABGB and Koziol (fn. 4) no. 5/39.
100 Ibid., no. 5/40.
101 Ibid., no 5/38.
103 Wissink, no. 15/38; Lukas, no. 4/37; Koch, no. 7/94.
104 Wissink, no. 15/38; Lukas, no. 4/16; Koch, no. 7/106.
105 See Lukas, no. 4/7 and 4/8.
106 For Austrian law: § 1296 ABGB provides for an express rule on the burden of proof concerning fault. Also see, Koziol (fn. 4) no. 16/6 et seq. For German law: D. Medicus, Schuldrecht II (12th ed. 2004) no. 845. For Swiss law: Werro (fn. 4) no. 1479.
of an animal for professional purposes; §§ 834 liability of the supervisor of an animal; §§ 836 to 838 liability of the keeper or possessor of a building). A reversal of the burden of proof can also be found in specific laws, for instance in § 18(1) of the Road Traffic Act. The driver of a car is therefore liable for damage he inflicted in an accident if he cannot prove that he was not at fault.

In addition, the courts have reversed the burden of proof especially in the field of liability for defective products. The justification in German law for these reversals is the fact that the claimant has only little possibility to satisfy the requirements of proof because he regularly has no insight into the affairs of the defendant. Several dispositions of Swiss tort law also provide for a reversal of the burden of proving fault. The most prominent cases are the liability of the "head of the family" for losses caused by minors and incapable or mentally ill persons living in his household (art. 333 ZGB), liability of the employer (art. 55 OR) and of the keeper of an animal (art. 56 OR). However, there has been an evolution in the case-law. Today these three liabilities are understood as being independent from fault. In Austrian tort law, the burden of proof for the fault of the defendant is sometimes reversed either in the ABGB or in special statutes if, in the sphere of the defendant, there is some source of increased danger. Thus the ABGB provides for liability of the occupant of an apartment if harm is caused by dangerously placed objects falling down from or out of his rooms (§ 1318 ABGB). The keeper of the rooms is liable unless he can prove that he has taken all necessary precautions. These precautions are determined according to the particular risk involved as well as the extent of the damage that was to be expected. The keeper of a building is liable for harm caused by its collapse, or if parts thereof fall off (§ 1319 ABGB). He can avoid liability by proving that he has observed all due care that was reasonable to be exercised in order to prevent any harm under the circumstances of the case. According to § 1320 ABGB, the keeper of an animal can be held responsible for any harm it causes unless the owner proves that he provided for adequate keeping and supervision of the animal. The adequacy of the measures taken is determined according to objective criteria based on the characteristics of the animal.

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107 The liability of the keeper of a "luxury" animal, however, is strict, § 833 sent. 1 BGB.
108 § 18 StVG. The keeper of the car is subject to strict liability, § 7 StVG.
109 The leading case is BGH 26 November 1968, BGHZ 51, 91: The case was on the liability of a producer of a contaminated vaccine against avian influenza (Hühnerpest). Held: The producer of the vaccine is liable for the death of animals caused by the contaminated vaccine if he cannot prove that his business was organised in a manner that, at no point of the production, the contamination could have taken place.
112 To be determined according to objective standards, ibid., no. 8.
113 Ibid., no. 10.
C. Vicarious Liability

The report of Martín-Casals and Solé Feliu on vicarious liability mentions no examples of rules on extra-contractual vicarious liability under secondary EC law. An extensive comparison with the three national legal orders under review therefore does not seem to be of great interest. Under Austrian law, the principal is liable for damage inflicted by employees who are unfit for the task they have been assigned to ("untüchtiger Besorgungsgehilfe") or by employees who the principal knew to be dangerous\(^{115}\). The damage must be the consequence of the risk presented by the unfitness or the dangerousness of the employee\(^{116}\). Under German law, the principal is liable for the wrongful acts of his employee ("Verrichtungsgehilfe") but only if he has negligently chosen or supervised his employee\(^{117}\). The fault of the principal is presumed. Under Swiss law\(^{118}\) the principal is liable for the damage his vicarious agents have caused during the fulfilment of their tasks. The employer is only liable if he has not acted with due care to prevent a damage of the kind that has realised. Under this rule, the burden of proof of fault is reversed as well.

In the field of contractual liability, in private law in general vicarious liability in German, Swiss and Austrian law do not require that the person that acted was subordinated or dependant on the person that is held liable\(^{119}\). The legal instruments of the secondary EC law which provide for liability for others\(^{120}\) and especially the Package Travel Directive\(^{121}\) are therefore perfectly in line with the rules of contractual vicarious liability in the three legal orders under review.

When it comes to primary EC law, the report of Martín-Casals and Solé Feliu\(^{122}\) draws a parallel between liability under art. 288(2) EC and vicarious liability since the Community is liable for unlawful acts of its officials and agents. Here a comparison with the State liability rules of the three legal orders under revision for damage inflicted by officials seems to be of interest.

Under German and Austrian law, State liability is essentially liability for unlawful acts or omissions of state servants negligently causing damage to third parties in the course of the performance of their duties ("Amtshaftung")\(^{123}\).

\(^{115}\) § 1315 ABGB.
\(^{117}\) § 831 BGB.
\(^{118}\) Cf. art. 55 OR.
\(^{119}\) For Austrian law, see: § 1313a ABGB and Koziol/Welser (fn. 7) 355 et seq. However, it is disputed, if the power to give instructions of the principal is a condition for vicarious liability, see: Koziol/Welser (fn. 7) 356 with further references. For German law, see: § 278 BGB and, for instance: BGH 8 February 1974, BGHZ 62, 119/124; Heinrichs/Palandt (fn. 86) § 278, no. 7. For Swiss law, see: art. 101 OR and Honsell (fn. 4) § 13, no. 36.
\(^{120}\) See Martín-Casals/Solé Feliu, no. 8/39–8/42.
\(^{122}\) Martín-Casals/Solé Feliu, no. 8/15 et seq.
\(^{123}\) For Austrian law, see § 1 AHG; for German law, see § 839(1) BGB.
Under the Swiss Federal Act for the liability of officials, as we have seen, liability does not depend on a fault of the official. All three legal orders follow a "functional" approach to the notion of servant. State liability therefore includes both officials and other collaborators of the State. In this respect, EC law does not seem to materially differ from the national laws under review. Furthermore, EC law is in line with Austrian, German and Swiss laws of State liability when it requires that the servant had to have acted in the performance of his duties. However, the ECJ seems to apply a narrower interpretation of this notion than, for instance, the German BGH. The BGH has held, e.g., that the use of a private car for transport during the performance of official duties can still satisfy the conditions of a sufficiently close relationship with the tasks entrusted to official bodies. In contrast, the ECJ has rejected Community liability based on art. 288 EC in this situation. Swiss legal practice too practises an extensive interpretation of the notion of "acting in the performance of his duties".

D. Strict Liability

1. Introduction

Secondary EC law and certain international conventions provide for strict liability in a number of specific rules (rather than in a general clause on strict liability). Strict liability exists in the fields of product liability, environmental liability, and – following certain international conventions – in cases of dangerous installations (nuclear facilities), transport (e.g. ground damage caused by aircraft or space objects), and maritime transport of dangerous goods (oil pollution by ships). It is less clear if liability is strict in the field of equal treatment as incorporated in Directive 76/207/EEC and Directive 2002/73/EC. On the one hand, the Member States shall introduce into their national legal system measures necessary to ensure an effective compensation or reparation in a way which is dissuasive and proportionate to the damage suffered. However, this provision does not permit one to derive a clear liability concept, since

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124 See supra no. 18/27.
125 For Austrian law, see: Apathy/Risdler (fn. 4) no. 14/27. For German law, see: Sprau/Palandt (fn. 28) § 839, no. 17; Maurer (fn. 47) § 26, no. 12. For Swiss law: Tschanlen/Zimmerli (fn. 74) § 60, no. 18 et seq.
126 BGH 2 November 1978, DOV 1979, 865.
127 9/69, Sayag and Another v. Leduc and Other (Sayag II) [1969] ECR 329.
128 Brehm (fn. 43) art. 61, no. 18.
129 Wissink, no. 15/39.
130 Of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. OJ L 39, 14.2.1976, 40–42.
132 Art. 6 (2) of the Directive 2002/73/EC.
it refers to the national laws of the Member States. On the other hand, the ECJ in the case of Dekker observed that, if the employer’s liability for infringement of the principle of equal treatment were made subject to proof of a fault attributable to him and also to there being no ground of exemption recognized by the applicable national law, the practical effect of those principles would be weakened considerably. Therefore, “if the sanction chosen by the Member State is contained within the rules governing an employer’s civil liability any breach of the prohibition must in itself be sufficient to make the employer liable, without there being any possibility of invoking the grounds of exemption provided by national law.” This suggests strict liability.

In EC law, it is hard to uncover a coherent system of strict liability yet. This state of the law corresponds very much to the situation in German, Swiss and Austrian law. In these countries, strict liability is provided for in numerous specific laws and mostly outside the Civil Codes. The numerous laws diverge in their conditions as well as in the defences to liability and they have not been coordinated in relation to each other. The consequence is that strict liability today is a very complex and fragmented matter.

Traditionally, strict liability in German law follows the principle of enumeration. The German courts have refused to extend strict liability by way of analogy to cases not covered by legislation. This view is shared by Swiss law where the almost unchallenged general opinion of the courts and the doctrine is that strict liability can only be created by the legislator and that, consequently, there is an absolute interdiction for judges to proceed by way of analogy, e.g. by applying the provisions on the liability of a car-keeper to the keeper of a motor boat, for which Swiss legislation does not provide a special liability regime. In contrast, Austrian courts are more flexible in this respect and accept that strict liability laws can be applied by way of analogy. For example, the keeper of a factory emitting dangerous fumes or a fireworker have been held strictly liable by the courts in analogy to the Austrian strict liability laws as a whole, based on the idea of strict liability for “dangerous operations”. However, the judges only make a very cautious use of their possibility to extend strict liability.

133 Lukas, no. 4/11.
135 Ibid., par. 25.
136 See, however, Lukas, no. 4/12.
137 BGH 25 January 1971, BGHZ 55, 229/234; Larenz/Canaris (fn. 33) § 84 I 1. b), 601 et seq.
138 See BGH 25 January 1971, BGHZ 55, 229/234; BGH 7 November 1974, BGHZ 63, 234/237; Larenz/Canaris (fn. 33) § 84 I 1. b), 601 et seq.
140 OGH 20 February 1958, SZ 31/26.
141 OGH 28 March 1973, SZ 46/36.
143 Koch/Koziol (fn. 112) no. 25.
Many areas of strict liability in EC law and international conventions correspond to the traditional areas of strict liability in German, Swiss and Austrian law. Apart from strict liability of the keeper of “luxury animals” under German law and several rules of strict environmental liability in the three legal orders, most laws providing for strict liability apply to damage caused by the use or supply of energies and damage that happened in the course of using means of transportation.\(^{144}\)

It has been said that, although the distinction between fault-based liability and risk-based liability is well known in EC law, it is not as clear cut as it might appear to be.\(^{145}\) This is also true for the Germanic legal family. In German and Austrian law, tortious liability is traditionally divided into liability for fault (“Verschuldenshaftung”) and liability for risk (“Gefährdungshaftung”).\(^{146}\) Swiss law knows a threefold division\(^ {147}\) between fault-based liability on the one hand and the “causal liabilities” on the other hand which are sub-divided into “mild causal liabilities” and “sharp causal liabilities”\(^ {148}\). However, in practice, in none of the three legal orders is the distinction between the different forms of liability clear cut. The borderline between fault and risk based liability is rather blurred by a number of “grey zones” providing for intermediary types of liability, e.g. by shifting the burden of proof or by increasing the standards of due care.\(^ {149}\)

Blurred borderlines between fault liability and strict liability can also be found as far as defences to strict liability are concerned. One example is the Austrian special liability regime for traffic and railway accidents. While the event of a traffic or railway accident triggers liability, the defendant can nonetheless raise the defence of an “unavoidable event” (“unabwendbares Ereignis”). He will not be liable if he proves that the vehicle was not defective and that “all due diligence according to the circumstances of the case” had been employed.\(^ {150}\)

Cf., e.g.: \(\text{Esser/Weyers} (\text{fn. 4})\) § 54 II and § 63 et seq.

\(^{144}\) Cf., e.g.: \(\text{Esser/Weyers} (\text{fn. 4})\) § 54 II and § 63 et seq.

\(^{145}\) \(\text{Lukas}, \text{no. 4/1; Wissink, no. 15/33.}\)

\(^{146}\) For Austrian law, see: \(\text{Koziol (fn. 4)}\) no. 1/3. For German law, see: \(\text{J. Esser, Die Zweispurigkeit unseres Haftpflichtrechts, JZ 1953, 129; Esser/Weyers (fn. 4) }\) § 54, 143 et seq.

\(^{147}\) \(\text{K. Offinger/E. W. Stark, Schweizerisches Haftpflichtrecht, vol. I} \) (5th ed. 1995) § 1 no 101 et seq. 121.

\(^{148}\) In German: “milde Kausalhaftungen” in contrast to “scharfe Kausalhaftungen” = “Gefährdungshaftungen”. In French: “responsabilités causales simples” in contrast to “responsabilités causales aggravées” = “responsabilités pour risque”.

\(^{149}\) E.g., see: \(\text{Koch/Koziol (fn. 112)}\) no. 1–14. For German law, see: \(\text{J. Fedke/U. Magnus, Country Report Germany, in: B.A. Koch/H. Koziol (eds.), Unification of Tort Law: Strict Liability, no. 1–10.}\) For Swiss law, see: \(\text{Widmer (fn. 111)}\) no. 1–9.

\(^{150}\) However, the standard of care in this case is higher than the ordinary fault standard. It is not just ordinary care that has to be exercised according to the Eisenbahn- und Kraftfahrzeughaftpflichtgesetz (EKHG), but utmost care ever possible to an experienced expert in a similar case. This defence under the EKHG is further limited to cases when the accident was not caused by the victim himself, some third persons or animals whose behaviour triggered an extraordinary operational hazard (so-called “außergewöhnliche Betriebsgefähr”, § 9(2) EKHG). See: \(\text{Koch/Koziol (fn. 112)}\) no. 72.
of the unavoidable event\textsuperscript{151} by the notion of “höhere Gewalt” (Act of God, force majeure). The StVG was thereby brought in line with the other strict liability regimes in German law in this point. “Höhere Gewalt” represents an external influence (“betriebsfremd”) which cannot be avoided even with utmost care. Thus, the borderline between liability for one’s conduct and for events is not completely clear in German law either. In Swiss law the defence of höhere Gewalt or force majeure is defined by a reference to the causal nexus between the event and the damage. Only an unforeseeable, unavoidable, extraordinary event, external to the sphere of risk of the person liable, will be considered as an event of force majeure\textsuperscript{152}. In the field of authentic strict liability, “utmost care” can under no circumstance be accepted as a defence\textsuperscript{153}.

2. Product liability

Before the implementation\textsuperscript{154} of the EC Directive on liability for defective products\textsuperscript{155}, all three legal orders under review adapted their rules on tort or contract law to the specific needs of product liability cases.

In German law, product liability was and, today, still can be based on the general fault liability regime of § 823(1) BGB which had been, due to numerous modifications by the courts\textsuperscript{156}, virtually turned into strict liability\textsuperscript{157}. Although substantively tightened by reversals of the burden of proof in court practice, fault of the producer remains, in theory, a condition of German product liability based on this rule\textsuperscript{158}. Hence, the producer will not be liable for singular and unavoidable defective goods of his production (“Ausreißer”)\textsuperscript{159} whereas the German Product Liability Act (Produkthaftungsgesetz – ProdHaftG) which transposes European Directive 85/374/EEC into the national law, provides for

\textsuperscript{151} The defence of an “unabwendbares Ereignis” which was available to the operator of a tramway according to § 1(2) HaftPflG was suppressed as well. Today § 1(2) HaftPflG does not mention this special case any more.

\textsuperscript{152} Oftinger/Stark (fn. 147) § 3, no. 142 et seq.

\textsuperscript{153} Widmer (fn. 111) no. 61.

\textsuperscript{154} Although Switzerland is not a member of the European Union, the Swiss Product Liability Act (Produktehaftpflichtgesetz – PHG) closely follows the wording of the European Directive, see: Schwenzer (fn. 4) no. 53.33; Hansell (fn. 4) § 21 no. 24.


\textsuperscript{156} Especially by creating a duty for the producer to organize his business in a manner that defects of products do not occur or are detected by quality controls, a duty to instruct the user of the product, a duty to monitor the product once put on the market (“Produktbeobachtungspflicht”) and a duty to call back the product in case where defects are discovered ex post, see: Sprau/Palandt (fn. 28) § 823 no. 172 w. f. ref. The burden of proof of the breach of these duties is reversed, see, for instance: BGH 26 November 1968, BGHZ 51, 91; BGH 30 April 1991, NJW 1991, 1948; BGH 2 February 1999, NJW 1999, 1028.

\textsuperscript{157} See Medicus (fn. 106) no. 102; K. Larenz, Lehrbuch des Schuldrechts, vol. II/1 (13th ed. 1986) § 41 a), 87 et seq.

\textsuperscript{158} Sprau/Palandt (fn. 28) § 823 no. 169.

\textsuperscript{159} BGH 9 May 1995, BGHZ 129, 353/361; Oberlandesgericht Koblenz (High court of the city of Koblenz) 20 August 1998, Neue Juristische Wochenschrift-Rechtsprechungsreport (NJW-RR) 1999, 1624. See: Wagner (fn. 4) § 823, no. 586 et seq.
a genuine strict liability in this case\textsuperscript{160}. In German law, a special strict product liability regime is set out for drugs\textsuperscript{161} which, in its scope of application\textsuperscript{162}, prevails over the rules on product liability based on EC law\textsuperscript{163}.

In Austrian law, with respect to the liability of producers of defective goods, the deficiencies of traditional tort law were contoured by the contractual remedy of the "contract protecting third persons"\textsuperscript{164}. The advantage for the victim was essentially that the burden of proving fault was reversed (§ 1298 ABGB)\textsuperscript{165}. The producer was directly liable to the buyer of the defective product and was also liable for his auxiliaries on the ground of § 1313a ABGB. However, the producer could free himself from liability by proving the absence of fault on his side\textsuperscript{166}. Thus, the protection of a consumer who suffered damage was not guaranteed through this contractual remedy. In addition, the producer had the possibility to exclude his liability for the breach of a duty of care to the consumer\textsuperscript{167}, and the protection of third persons by the contract did not include liability vis-à-vis "innocent bystanders"\textsuperscript{168}. Under the regime transposing the European Directive, these insufficiencies were abolished\textsuperscript{169}.

Before the enactment of the Swiss product liability scheme\textsuperscript{170}, product liability was based on the rules of vicarious liability\textsuperscript{171}. However, the traditional defence for the employer of an absence of fault had been considerably tightened by the case-law of the Swiss Federal Court\textsuperscript{172} and thereby had been turned virtually into a liability without fault\textsuperscript{173}.

The introduction of strict liability for defective products by the European legislator in 1985 was, with its systematic approach, new to the three legal orders under review. In German and in Swiss law, as far as the results in specific cases are concerned, the impact of the Directive has, however, been rather small\textsuperscript{174}. In Ger-


\textsuperscript{161} § 84 Drugs Act (Arzneimittelgesetz – AMG).

\textsuperscript{162} § 84(1) no. 1 AMG only provides for liability for the use of medicines if they were used according to the purposes they were designed for (bestimmungsgemäßer Gebrauch).

\textsuperscript{163} See § 15(1) ProdHaftG.

\textsuperscript{164} Apa/thy/Riedler (fn. 4) no. 14/50.

\textsuperscript{165} See: Koszio/Welser (fn. 7) 378 et seq. w. f. ref.

\textsuperscript{166} See: § 1298 of the ABGB and Koszio/Welser (fn. 7) 379.

\textsuperscript{167} See e.g. OGH 28 November 1978, SZ 51/169.

\textsuperscript{168} Apa/thy/Riedler (fn. 4) no. 14/50.

\textsuperscript{169} Ibid., no. 14/50; Koszio/Welser (fn. 7) 379.

\textsuperscript{170} Produkthaftpflichtgesetz = Loi sur la responsabilité du fait des produits, Systematische Sammlung des Bundesrechts (SR) 221.112.944.

\textsuperscript{171} Werro (fn. 4) no. 705.

\textsuperscript{172} See especially the cases BG 9 October 1984, BGE 110 II 456 et seq. (Schachtrahmen); BG 14 May 1985, JdT 1986 I 571 et seq. with a comment by P. Widmer in: recht 1986, 50 et seq. (Klappstuhl); BG 20 February 1995, BGE 121 IV 10 et seq. (Hebebühne).

\textsuperscript{173} Honsell (fn. 4) § 21, no. 19; Schwenzer (fn. 4) no. 53.32.

\textsuperscript{174} For German law: Medicus (fn. 106) no. 112; for Swiss law: Schwenzer (fn. 4) no. 53.33.
man law, in order to avoid the threshold of €500, parties often still base their claims on the traditional rules of tort liability instead of the Product Liability Act\textsuperscript{175}. Furthermore, in accordance with the Directive\textsuperscript{176}, the ProdHaftG is not applicable when the product itself was damaged or when the damaged item of property was not one of a type ordinarily intended for private use or consumption\textsuperscript{177}. In Switzerland, there are no published cases applying the Product Liability Act (Produktehaftpflchtgesetz) yet. In Austria, on the contrary, the courts have rather frequently applied the PHG transposing the European Directive. This could be explained by the far better protection the PHG offers to the consumer and especially to the "innocent bystander" than did the traditional remedies of Austrian law.

3. Environmental liability

The environment is protected under secondary EC law by Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage\textsuperscript{178}. The interest protected by the Directive is the environment as such (protection against "pure ecological loss"). Protected interests are namely, protected species, natural habitats, water and land\textsuperscript{179}. There has to be no infringement of interests protected through "classical" tort law such as life, bodily integrity or property through the medium of environmental interferences. In fact, these interests fall completely out of the scope of the Directive, since, according to the Directive\textsuperscript{180}, natural or legal persons shall only be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under the Directive. They have no own right of action against the polluter.

In the three legal orders under review liability for environmental damage is multi-leveled and a complex matter.

Firstly, the environment is protected through public (administrative) law, such as the German Protection of the Soil Act (Bundesbodenschutzgesetz – BBod-SchG). Public law, however, mainly focuses on prevention of environmental damage. Moreover, in the Germanic legal family, liability for damage under public law is limited to specific types of activities or to specific types of damage. Thus, under administrative law, there is no comprehensive system of liability for damage to the natural environment yet\textsuperscript{181}, the rules are, on the con-

\textsuperscript{175} Medicus (fn. 106) no. 111.
\textsuperscript{176} Art. 9(b).
\textsuperscript{177} § 1(2) sent. 2 ProdHaftG.
\textsuperscript{178} OJ L 143, 30.4.2004, 56–75.
\textsuperscript{179} Art. 2(1) of the Directive.
\textsuperscript{180} Art. 12(1).
\textsuperscript{181} See, from a comparative perspective, e.g.: T. Kadner Graziano, Der Ersatz ökologischer Schäden (1995) 37 et seq., 130.
The experiences in the three countries under review show that remedies under public law have the further disadvantage that actions are to be brought by the State or administrative agencies that often have to observe further, conflicting interests as well. It is not rare that the administration is in close contact and has long-lasting relationships with local polluters or depends on their tax payments. This has often led to a lack of enforcement of liability provisions once they existed (problem of "lack of implementation" or "Vollzugsdefizit")\(^\text{183}\).

Secondly, the environment is protected through criminal law. Criminal law, however, rarely provides for compensation of environmental damage and is, as far as compensation for ecological damage is concerned, for multiple reasons highly inefficient\(^\text{184}\).

On the third level, the private law level, it is also often difficult to obtain compensation for damage to the environment. Under the general rules of the Codes, such as § 823(1) BGB, art. 41 OR, or § 1295(1) ABGB, or even under specific legislation such as the German "Environmental Liability Act", the right to compensation for damage is in general linked to the infringement of a protected right of the individual such as health or property\(^\text{185}\). Private law thus protects the individual against damage that occurred "on the path through the environment" ("auf dem Umweltpfad") whereas, in the Germanic legal family, pure ecological damage such as the loss of species or of ecosystems as such does not trigger liability in private law (or triggers such liability in extremely limited situations).

Under German law, several specific environmental liability laws provide for compensation for harm following death or personal injuries or damage to property when the harm was caused through the medium of precisely defined environmental interferences\(^\text{186}\). Only § 22 of the Water Act (Wasserhaushaltsgesetz) goes beyond the protection of absolute rights and also permits the compensation of pure economic loss caused by water pollution\(^\text{187}\). Pure ecological loss as such is not compensable under German private liability law\(^\text{188}\).

Under Swiss private law, damage to the environment is also subject to difficulties. The environment as such receives no legal protection and therefore the mere infringement to common property as, e.g., air, water, protected species, natural habitats etc. ("reiner Umweltschaden" – pure ecological loss) is not considered as interference with an absolute right\(^\text{189}\). Art. 59a of the Law on the

\(^{182}\) Ibid., 68.

\(^{183}\) Ibid., 69; 107 et seq. with many ref. in fn. 128.

\(^{184}\) For details, see ibid., 46 et seq.; 69 et seq. and fn. 140 on page 70.

\(^{185}\) See for instance BGH 18 September 1984, BGHZ 92, 143 ("Kupolofen");

\(^{186}\) Cf. § 1 UmweltHG, § 25 AtG, § 32 GenTG.

\(^{187}\) Esser!Weyers (fn. 4) § 64 4. c), 288.

\(^{188}\) T. Kadner Graziano (fn. 181) 48 et seq., 71 et seq.

\(^{189}\) Honsell (fn. 4) § 22, no. 34.
Protection of the Environment (Umweltschutzgesetz – USG) provides protection for loss of life and damage to body, health and property suffered due to activities dangerous to the environment. However, the compensation for pure ecological damage is not mentioned and therefore not subject to compensation. Hence, for example, the costs for the reintroduction of wildlife cannot be claimed under this law. In contrast, several special liability regimes provide expressly for compensation of pure ecological loss. Under Swiss public law, several legal rules empower public authorities having prevented or remediated environmental harm to enjoin the costs for the prevention or the removal on the polluter (polluter pays principle). This comes close to a liability (in public law) for pure economic loss suffered in order to prevent or remedy ecological damage.

A recent case decided by the Swiss Federal Court perfectly illustrates the lack of a comprehensive liability system in private law for damage to the natural environment (case of the “Bearded Vulture” or “Republic V”) : A foundation for the protection of the environment with its seat in the Netherlands coordinated an international project with the aim of reintroducing bearded vultures in the Alps. The costs of raising and reintroducing the birds amounted to CHF 118,000 per animal. One of the birds was Republic V, born and raised in Austria and then released into freedom. In the Swiss Alps close to Montana, Republic V was illegally shot by a hunter. For this act, the hunter was condemned to 10 days of probationary custody, his hunting license was withdrawn for one year, and he had to pay CHF 20,000 to the State of Wallis as “damages” for the loss of the animal. The Dutch foundation then brought an action against the hunter and claimed damages in the amount of CHF 118,000 that had been spent for raising the vulture. The Swiss courts rejected the claim on the ground that the foundation had not suffered any injury to its own rights, since the animal had been released into nature and the foundation had not kept any right such as property or possession of the animal. The claim of the environmental association for compensation of the CHF 118,000 that had been spent on the animal thus failed.

190 See Honsell (fn. 4) § 22, no. 39.
191 Cf., for instance, art. 15 II Fishery Act (Fischereigesetz) which provides for compensation for perished fish and other water-animals and art. 59abis IX USG and art. 31 of the Genetic Engineering Act (Gentechnikgesetz – GTG) which provide for compensation for pure ecological loss in connection with pathogenous organisms or genetically modified organisms. For a comprehensive overview of the situation under Swiss law, see A.-S. Dupont, Le dommage écologique – Le rôle de la responsabilité civile en cas d’atteinte au milieu naturel (2005).
192 Art. 2 USG provides expressly: “Wer Massnahmen nach diesem Gesetz verursacht, trägt die Kosten dafür”.
193 See, e.g.: art. 20 USG (costs for the prevention of noise emitted from buildings); art. 32d USG (costs for the remediation of sites contaminated by toxic waste); art. 59 USG (costs for the prevention and remediation of harm to the environment).
195 This payment was due according to art. 23 of the Hunting and Wild Mammals and Birds Act (Bundesgesetz über die Jagd und den Schutz wildlebender Säugetiere und Vögel). Art. 23 states: “In Pachtgebieten ist der Pächter, in den übrigen Gebieten der Kanton oder die Gemeinde berechtigt, für den durch ein Jagdvergehen oder eine Übertretung entstandenen Schaden Ersatz zu verlangen. Im übrigen gelten die Bestimmungen des Obligationenrechts.”
In order to establish an efficient system of liability for damages to the natural environment, in order to avoid the weaknesses of remedies under administrative and criminal law, and in order to use the strengths of private law remedies for the purpose of protecting the environment, several proposals have been made in the last years to introduce a more complete and coherent system of liability for ecological damage under private law.\footnote{See art. 45d of the Swiss proposal of a Federal Act on the "Revision and Unification of Tort Law". For Germany, see, e.g.: Kadner Graziano (fn. 181) with a proposal of an Act introducing "Rights for Environmental Associations to bring actions for damages to the natural environment" (Gesetzesentwurf einer zivilrechtlichen Verbandsklage auf Ersatz ökologischer Schäden) 318 et seq.}

When starting to work on the Directive in the field of damage to natural resources, the European Commission first considered following such proposals and to introduce private law remedies, including remedies for environmental associations. During the legislative process, for political reasons, the private law approach was abandoned and a public law approach was finally chosen\footnote{See e.g. L. Bergkamp, The Commission July 2001 Working Paper on Environmental Liability: Civil or Administrative Law to Prevent and Restore Environmental Harm? Environmental Liability 2001, 207.} in Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remediing of environmental damage\footnote{OJ L 143, 30.4.2004, 56–75.}. Hence, today the approach chosen by the European Community is rather one of administrative law, mixed with elements of civil liability.\footnote{The outcome is a "strange mixture of genres", N. De Sadeleer, La directive 2004/35/CE relative à la responsabilité environnementale: avance ou recul pour le droit de l'environnement des États Membres? in: G. Viney/B. Dubuisson (eds.), Les responsabilités environnementales dans l'espace européen, no. 59: "Il ressort de notre analyse que la directive 2004/35/CE s'inscrit davantage dans la perspective d'une redéfinition des mesures de police administrative et, plus particulièrement, de la prise en charge de leur coût par les exploitants. Pour arriver à cette fin, le législateur communautaire a manifestement emprunté largement aux concepts de la responsabilité civile, ce qui a parfois conduit à un étonnant mélange des genres".}

In the field of liability for damage to the environment, it seems that very much could have been learned from the experiences in the three legal orders under review: In the three national systems, liability for damage to the environment is, in principle, based on the compensation of harm following death or personal injuries or damage to property when the harm was caused through the medium of environmental interferences. The environment is not protected as such. It is only protected as a reflex of the protection of rights of the individual, such as property. Another limit is that, under the traditional approach, it depends on an individual (often the owner of the land on which environmental resources are damaged) if a claim is brought for environmental liability. However, the individual who suffered from a damage to the environment must not necessarily be interested in the protection of the environment (e.g. the owner of the land on which environmental resources are damaged) and he will not necessarily be capable or willing to engage in long and costly procedures in environmental
matters. The Swiss case of the “bearded vulture” and many more similar cases show that environmental associations, on the contrary often have the knowledge, the competence and the willingness to engage in such procedures.

Rights under private law for environmental associations could, if well shaped, be an efficient remedy to obtain compensation for damage to the environment. Art. 45d of the Swiss proposal for the revision of the rules on liability in the Swiss Code of Obligations provides an example of how private law remedies could be shaped and how they could be used in the field of environmental protection.

IV. Causation

A. Conditio sine qua non

Causation is a condition for liability both in EC law and in the law of all Member States. As in EC law, in none of the three national legal orders under review has the notion of causation been defined by law.

As in EC law, the first condition to establish causation in German, Swiss and Austrian law is the conditio sine qua non test, also called test on natural or “equivalent” causation (“äquivalente Kausalität”). Under this test “an activity or conduct (...) is a cause of the victim’s damage if, in the absence of the activity, the damage would not have occurred” (cf. art. 3:101 of the Principles of European Tort Law). In case of omissions, the question is if the damage would not have occurred had the defendant acted as required.

According to the ECJ, the question if there is a causal link between the violation of EC law through a Member State and a damage is to be answered by the national courts. However, if the ECJ had all necessary information it has sometimes ruled on the issue itself.

200 See on these problems Kadner Graziano (fn. 181) 73 et seq.
202 The proposal provides: “(1) Bei Einwirkung auf die natürliche Umwelt umfasst der ersatzfähige Schaden namentlich die Kosten von Massnahmen, die nach Treu und Glauben ergriffen werden, um: a. eine drohende Einwirkung abzuwehren; b. die Folgen einer andauernden oder eingetretenen Einwirkung zu mindern; c. zerstörte oder beschädigte Bestandteile der Umwelt wiederherzustellen oder sie durch gleichwertige Bestandteile zu ersetzen. (2) Sind die be- drohten, zerstörten oder beschädigten Umweltbestandteile nicht Gegenstand eines dinglichen Rechts oder ergreift der Berechtigte die nach den Umständen gebotenen Massnahmen nicht, so steht der Ersatzanspruch dem zuständigen Gemeinwesen oder gesamtschweizerischen oder regionalen Umweltschutzorganisationen zu, die entsprechende Massnahmen tatsächlich vorbereitet oder ergriffen haben und dazu ermächtigt waren”.
203 For Austrian law: Koziol/Welser (fn. 7) 310. For German law: Medicus (fn. 84) no. 596. For Swiss law: Werro (fn. 4) no. 176.
204 Wissink, no. 15/48.
205 Durant, no. 3/59.
Several examples from German and Austrian case-law illustrate the application of the conditio sine qua non test in the field of Member State liability. In a case decided by the Austrian OGH\textsuperscript{206}, the high court of the city of Vienna had systematically favoured female applicants for vacant positions. The OGH had to decide if a male judge who was not promoted had therefrom lost an increase in his salary. In a first step the OGH concluded that, indeed, the Austrian legislator had omitted to introduce a savings clause which would have permitted it to consider the specific personal situation of all applicants – male or female – and had hereby violated the Community principles of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The OGH then stated that the omission to transpose EC law into national law would be the (natural) cause of the plaintiff’s loss only if the transposition had been possible and if it had avoided the damage from occurring. However, in the view of the court, the claimant had advanced no facts which would have fulfilled the requirements of the savings clause, had it been properly transposed into Austrian law, and, therefore, had not established natural causation between the non-transposition of the Directive by the Austrian legislator and any loss.

In a case decided by the German BGH\textsuperscript{207} the claimant had lost investments due to the bankruptcy of a capital company which had never published its annual accounts. In a first step, the court stated that according to a judgment of the ECJ, the Federal Republic of Germany had breached its duties under Directives 68/151/EEC and 78/660/EEC because it had not introduced adequate measures to ensure the publication of the annual accounts of capital companies. The court stated that the claimant had, however, never tried to gather information on the economic situation of the company through the annual financial statements although he had the possibility to do so. The court therefore denied Member State liability for the breach of Community law by the Federal Republic of Germany on the ground that the breach of Community law attributable to the defendant had not caused the damage suffered by the claimant.

In another case, the German BGH\textsuperscript{208}, in a decision following the preliminary ruling of the ECJ in the affair of \textit{Brasserie du Pêcheur}\textsuperscript{209}, might have given another example of the application of the conditio sine qua non test, even if it said it was determining the causal connection between a breach of Community law and a damage with the help of normative criteria. The plaintiff, a French brewery, imported beer into the Federal Republic of Germany. It was forced to cease business in Germany because a) in German law the marketing of beer under the label “Bier” was not allowed, when the beer was not brewed in accordance with German laws, and b) German law prohibited the sale of beer that contained additives that were not permitted under the national legislation.

\textsuperscript{206} OGH 30 January 2001, SZ 74/15, no. 5.
\textsuperscript{207} 24.11.2005, NJW 2006, 690.
\textsuperscript{208} 24 October 1996, BGHZ 134, 30.
Both rules, a) and b), constituted breaches of Community law. The question before the BGH was if these breaches were i) “sufficiently serious” and if ii) they directly caused the damage suffered by the plaintiff.

Ad i): The court held that the first breach, i.e. the interdiction to call beer “Bier” when it was not brewed in accordance with German law (supra a), was a “sufficiently serious” breach of Community law because the ECJ had already declared earlier that the German law was incompatible with Community law and still the German legislator upheld the interdiction. As far as the second breach (supra b) was concerned (i.e. the interdiction of the sale of beer brewed with additives) the situation was, however, much less clear when the German administration took its decision to forbid the sale of the beer since the second issue concerned the field of the protection of public health where the Member States disposed of a large margin of discretion. Therefore, and in default of a clear statement of the ECJ, this breach was, according to the BGH, not “sufficiently serious” at the time the administration acted.

Ad ii): The court held, however, that the claim had to be dismissed for a lack of direct causation. The German authorities had not referred to the first reason when taking measures against the brewery and its distributors, but had used exclusively the second argument, which, however, did not constitute a “sufficiently serious” breach. Since the damage would also have occurred had the first (i.e. the only legally relevant) breach not been committed, natural causation was missing.

B. Legal Cause

1. “Adequacy”

In order to be recoverable, in all three legal orders under review the damage must have been foreseeable and must not have been too remote (test of “adequate” causation). Hence some of the cases in which the ECJ applied a test of “direct causation” could, in the Germanic legal family, be solved with the theory of “adequate causation”.

In Austrian law, the test of adequacy is met if an activity or conduct is apt to bring about a result and if this result is not due to a particularly improbable sequence of events. In German law, the most current formula to describe adequate causation is that the event must have been likely to cause the damage under normal circumstances and not only under very improbable circumstances.

According to the BGH, adequate causation (“unmittelbare Kausalität”, “Zurechnung der Haftungsgolgen gemäß dem Adäquanzgedanken”) was lacking. We doubt, however, and would rather qualify this issue as one of “natural causation”.

Koziol/Welser (fn. 7) 311: “Adäquanz (Adäquität) liegt vor, wenn die Ursache ihrer allgemeinen Natur nach für die Herbeiführung eines Erfolges wie des eingetretenen noch geeignet erscheint und der Erfolg nicht nur wegen einer ganz außergewöhnlichen Verkettung von Umständen eingetreten ist”.

210 211
es not foreseeable in the normal course of events\textsuperscript{212}. In applying this standard, account is to be taken of all the circumstances foreseeable for an ideal observer at the time the event occurred and of all further circumstances known to the person held liable\textsuperscript{213}. Swiss judges also apply the theory of adequacy. The defendant’s activity must, in the ordinary course of events and on the basis of the experiences of life, have been apt to generate the outcome that has actually occurred\textsuperscript{214}. The standard applied is that of an objective prognosis ex post\textsuperscript{215}.

2. Protective purpose of the rule

In EC law the theory of the protective purpose of the rule is well received. It has been of particular importance for the outcome of liability claims under Art. 288 EC, and with respect to Member State Liability for violations of EC law\textsuperscript{216} and with respect to Directive 2004/35/CE on Environmental Liability\textsuperscript{217}.

Under both German and Austrian law, it is well established that damage must fall within the protective purpose of the rule that has been violated in order for the tortfeasor to be liable\textsuperscript{218}. This is true for tort law in general and for State liability in particular.

\textsuperscript{212} BGH 25 September 1952, BGHZ 7, 199/204: “Das Ereignis muss im allgemeinen und nicht nur unter besonders eigenartigen, außergewöhnlichen und nach dem gewöhnlichen Verlauf der Dinge außer Betracht zu lassenden Umständen geeignet sein, einen Erfolg der eingetretenen Art herbeizuführen”. See also: BGH 14 October 1971, BGHZ 57, 141 or BGH 6 November 1986, NJW 1986, 1331.

\textsuperscript{213} Markesinis (fn. 27) 100.

\textsuperscript{214} See, for instance: BG 21 February 1961, BGE 87 II 117/127; BG 18 June 1963, BGE 89 II 239/250; BG 17 November 1970, BGE 96 II 392/395; Oftinger/Stark (fn. 147) § 3, no. 14 et seq.

\textsuperscript{215} Honsell (fn. 4) § 3, no. 11.

\textsuperscript{216} Antonioli, no. 10/53; Rebhahn, no. 9/39 et seq.; Lukas, no. 4/47.

\textsuperscript{217} Wissink, no. 15/16.

\textsuperscript{218} For Germany, see, e.g., BGH 22 April 1958, BGHZ 27, 137 = NJW 1958, 1041 = JZ 1958, 742. English translation by F. Lawson and B. Markesinis in: Markesinis (fn. 27) 622 et seq. The court decided that a victim of a traffic accident cannot claim compensation for the costs of defending himself against a criminal charge in connection with this accident since this damage is not one that the law intends to avert when casting the protection of § 823(1) BGB over integrity of health and property. In another case before the BGH impatient drivers blocked in the traffic jam caused by an accident contoured the accident site and thereby damaged the green stripe on the side of the road. The court decided that the owner of the green could not claim damages from the persons involved in the accident since this damage did not fall into the protective purpose of § 7 of the Road Traffic Act (Straßenverkehrsrecht – StVG) which provides for protection against infringements of integrity of health and property (BGH 16 February 1972, BGHZ 58, 162 = NJW 1972, 904 = JZ 1972, 559. English translation of the judgment by Lawson and B. Markesinis, in: Markesinis (fn. 27) 624 et seq.) See also E. Deutsch, Regressverbot und Unterbrechung des Haftungszusammenhangs im Zivilrecht, JZ 1972, 551. For more recent illustrations, see BGH 23 October 1984, NJW 1985, 791; BGH 17 September 1991, NJW 1991, 3275.

For Austria, see, e.g., OGH 17 October 1956, Zeitschrift für Verkehrsrecht (ZVR) 1958/58; OGH 16 December 1956, ZVR 1966/151: Driving without a driver’s licence does not trigger liability when it is proven that the damage is not the consequence of improper driving. See also Koziol (fn. 4) no. 8/17.
Several judgments of German courts deal, in cases of State liability under EC law, with the question of the protective purpose of the rule.219 The Austrian Constitutional Court of Justice220 has also had the occasion to apply the theory of the protective purpose of the rule in a case concerning State liability for breach of EC law.221 The theory of the protective purpose of the rule being well established in both German and Austrian tort law, in applying this condition of EC tort law the courts largely benefit from their national experience with this condition of tortious liability.

C. Secondary or “Indirect” Victims

The concept of “indirect causation” is used in EC law to deny a claim by secondary victims. In a famous case, the relatives of a Community official who had been severely injured in a traffic accident while being in service brought a claim for the non-material harm due to the injury of their relative. The ECJ refused to compensate them for their grief due to the injury of a family member.222

Concerning the question of a right to compensation of secondary victims, all systems under review provide for compensation of certain heads of damages, such as funeral costs or the loss of financial support and subsidies to which the family members of the deceased would have been entitled had the primary victim not been killed (§§ 844, 845 BGB; art. 45(1), (3) OR; § 1327 ABGB).

As far as compensation for non-material harm of relatives is concerned (i.e. the issue addressed by the ECJ in the case cited supra no. 18/79), the solutions in the three legal orders under review differ considerably.223

Under German law, a person who has lost a family member, their fiancé, or partner receives compensation only if the loss causes injury to the person’s own health in the sense of § 823(1) BGB (“nervous shock”-cases). According to German legal practice, the shock has to go beyond the grief a person usually suffers in a similar situation.224 The courts refuse to award damages for

220 Which is competent for Member State liability claims for the violation of EC law by the legislator or the highest jurisdictions of Austria: cf. art. 137 of the Federal Constitutional Law and B. Raschauer, Allgemeines Verwaltungsrecht (2nd ed. 2003) no. 1362d.
224 BGH 11 May 1971, BGHZ 56, 163; BGH, NJW 1984, 1405; BGH, NJW 1986, 777; BGH, NJW 1989, 2317. See, for a critical opinion on this restriction: Oetker (fn. 43) § 249, no. 144 w. f. ref.
the (pure) *non-material* damage caused by the loss of close relatives\(^{225}\). The reason is that § 253(1) and (2) BGB state that non-material loss is compensated for only if the plaintiff suffered an injury to his own bodily integrity, health, freedom or sexual self-determination. In the absence of such injury to a protected interest of the plaintiff, his claim will fail. Thus, the loss of a beloved person in itself does not trigger liability for the non-economic harm suffered by the person’s relatives under German law – just as in the ECJ’s decision in the case of the Community official who suffered damage as a result of the accident. As we can see, the problem of compensation of secondary victims for their non-material harm due to the loss of a beloved person is, in German law, not regarded as a problem of causation but as a problem of the scope of protection.

18/83 Austrian law has recently undergone several important changes in this field. In 1995, the OGH introduced liability for “nervous shock” due to the loss of a beloved person\(^{226}\). In a second step, in 2001, the OGH for the first time held that, under Austrian law, damages could be awarded for the pain and suffering due to the loss of a close relative (independant of any “nervous shock”). The court, however, limited such awards to cases of intent or gross negligence of the tortfeasor\(^{227}\).

18/84 Swiss law has always been more open and liberal in this matter. According to art. 47 OR the judge can award damages for non-material harm suffered due to the *loss* of a close relative. The courts have extended such payments also to cases in which the first victim was not killed but severely injured\(^ {228}\). In the case of severe injury, the Federal court based the rights of the relatives on art. 49 OR which provides for damages in the case of injury to one’s personality right. The court stated that being confronted with a severe injury of a beloved person can completely change one’s living conditions and hereby constitute an infringement to one’s personality rights.

18/85 The position of the ECJ and of German law which both refuse to award damages for the grief due to the loss or the severe injury of a beloved person clearly is a minority position. The tendency in European private law clearly points towards compensation for the grief due to the loss or to the severe injury of a beloved person\(^{229}\). Art. 10:301 par. 1 sent. 3 of the Principles of European Tort Law confirm this development.

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228 BG 27 October 1992, BGE 118 II 404; see Kadner Graziano, ZEuP 1996, 135/140 et seq.
229 Kadner Graziano, ZEuP 2002, 834 w. f. ref.
D. Multiple Tortfeasors and Multiple Causes

The issue of attribution of damage in case of multiple tortfeasors is a complex matter in all three legal orders under review. For the purpose of this report, we will limit the comparison to some basic issues.

The “Overview” on EC tort law shows that several solutions exist when the infliction of damage is caused by more than one tortfeasant. In the field of primary EC law, it has been said that the EC is principally not liable under art. 288 EC if Member States fail to comply with their obligations under EC law. However, joint liability of the Community and a Member State is possible in specific cases. The report of Antoniolli points out that in that case the aggrieved party would be in a difficult situation, since the national courts are competent for the claims against the Member State while the Community institution must be sued before the ECJ.

In secondary EC law some acts expressly deal with the case when more than one person is liable for damage. While Directive 2004/35/CE on Environmental Liability refers, as far as the apportionment of liability is concerned, to national law (proportional or joint liability), art. 5 of the Product Liability Directive, declares the producers of a defective product jointly and severally liable for the same damage.

Under Austrian law, the liability of multiple tortfeasors is governed by the §§ 1301 and 1302 ABGB. However, the rules do not completely match and need further explanation. When multiple tortfeasors have acted negligently and independently from each other and when the respective fraction of damage inflicted by each tortfeasant can be identified, the liability of each defendant is limited to his fraction of damage only. However, if the respective fractions cannot be identified or if every tortfeasant has potentially caused the whole damage, their liability is joint and several. If all tortfeasors acted in a con-

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230 Wissink, no. 15/22, 15/75.
232 Cf. Antoniolli, no. 10/27.
233 Hinteregger, no. 5/32.
234 Art. 1301 ABGB reads: “Für einen widerrechtlich zugefügten Schaden können mehrere Personen verantwortlich werden, indem sie gemeinschaftlich, unmittelbar oder mittelbar Weise, durch Verleiten, Drohen, Befehlen, Helfen, Verheilen u. dgl.; auch nur durch Unterlassung der besonderen Verbindlichkeit das Übel zu verhindern, dazu beigetragen haben”. Art. 1302 ABGB reads: “In einem solchen Falle verantwortet, wenn die Beschädigung in einem Versehen gegründet ist, und die Anteile sich bestimmen lassen, jeder nur den durch sein Verschulden verursachten Schaden. Wenn aber der Schade vorsätzlich zugefügt worden ist; oder, wenn die Anteile der Einzelnen an der Beschädigung sich nicht bestimmen lassen; so haften Alle für Einen, und Einer für Alle; doch bleibt demjenigen, welcher den Schaden ersetzt hat, der Rückersatz gegen die Übrigen vorbehalten”.
235 See esp.: Koziol (fn. 4) no. 14/01 et seq.
236 Koziol (fn. 4) no. 14/10 et seq.
certed way, their liability is joint and several. Tortfeasors who are jointly and severally liable might have a right of recourse against each other.

Under German law the question of multiple tortfeasors is governed by § 830 BGB: “(1) If several persons through a jointly committed delict have caused damage each is responsible for the damage. The same applies if it cannot be discovered which of several participants has caused the damage through his action. (2) Instigators and accomplices are in the same position as joint actors.” § 830(1) sent. 2 BGB is applicable to cases of alternative causation (i.e. multiple persons have each set a potential cause for the whole damage), as well as to cases of cumulative causation (i.e. multiple persons have each set the cause for a fraction of the damage) but where the respective fractions caused by the participants cannot be determined. Once the conditions of § 830 BGB are fulfilled, liability is joint and several (and follows § 840 BGB).

In Swiss law, the issue of multiple tortfeasors is governed by art. 50 and art. 51 OR. According to art. 50(1) OR several participants are jointly and severally liable for a jointly committed damage. The right of recourse against the other tortfeasors in this case is decided by the court at its discretion. If the liability of several persons is governed by different rules (e.g. fault liability and strict liability), their liability is governed by art. 51(1) OR. Their right of recourse is ruled by art. 51(3) OR: “The damage shall, as a rule, primarily be borne by the person who caused it by its unlawful acts and lastly by the person who is liable by virtue of the law without personal guilt or contractual obligation.” If several persons have each acted negligently but independently their joint and several liability follows from art. 51 OR in analogiam. If several persons are all liable on the ground of strict liabilities and in the absence of special rules, their liability is joint and several on the basis of art. 51(1) OR in analogiam as

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237 § 1302 sent. 2 case 1 ABGB. Also, see: Koziol (fn. 4) no. 14/12.
238 Cf. 1302 sent. 2, half-sent. 3 ABGB. Cf. on this question: Koziol (fn. 4) no. 14/16 et seq.
240 Spraul/Palandt (fn. 28) § 830, no. 8 et seq.
241 Ibid., § 830, no. 15.
242 Art. 50(2) OR.
243 Art. 51(1) OR reads: “Where several persons are liable for the same damage on different legal grounds (such as tort, contract, ex lege), the provisions regarding contribution among persons who caused the damage jointly shall apply”. Translation by S.L. Goren, The Swiss Federal Code of Obligations (1984). “Haften mehrere Personen aus verschiedenen Rechtsgründen, sei es aus unerlaubter Handlung, aus Vertrag oder aus Gesetzessvorschrift dem Verletzten für denselben Schaden, so wird die Bestimmung über den Rückgriff unter Personen, die einen Schaden gemeinsam verschuldet haben, entsprechend auf sie angewendet.”
245 Rey (fn. 11) no. 1443 et seq.
246 For instance: art. 66 Luftfahrtschutzgesetz (Aviation Act – LFG).
well. In the last two cases the right of recourse is shaped analogously to the
rule of art. 50(2) OR (decision by the court at its discretion).

When secondary EC law declares two or more persons jointly and severally
liable for the same damage, this is therefore well in line with the principles of
the three legal orders under review. On the other hand, especially in Austrian
and in German law, the situation where a victim has to sue each tortfeasor
separately for the damage caused to him only arises when the fraction of dam-
age caused can be determined and when the defendants did not act jointly.
Therefore the rule under which national courts are competent for the claims
against Member States while the Community institution must be sued before
the ECJ may reveal particularly disadvantageous results for the victim and can
only be explained by the separation of powers between the EC and the Member
States.

The issue of multiple causes has recently been excellently and comprehen-
sively addressed by the European Group on Tort Law in their “Principles
of European Tort Law”, art. 3:102 et seq. For this issue we prefer to refer to these
articles which are much more comprehensive and complete than the rules con-
cerning multiple causes in the three legal orders under review.

E. Conduct of the Victim

In a case concerning Member State liability for the breach of Community law,
the ECJ has expressly held that the principle that damages can be reduced due
to the victim’s own conduct applies also in EC law. According to the ECJ,
in determining what amount of damages is due, the national court may also
consider whether the injured person showed reasonable diligence in order to
avoid or to limit the damage and whether, in particular, the victim used all the
legal remedies available to him or her.

Applying these rules, the German BGH decided in 2003 that, in principle, a
claim based on Member State liability can be reduced or even excluded if
the victim contributed to the damage through his own fault (§ 254(1) BGB),
or, in the field of State liability, when the victim has either intentionally or
negligently omitted to mitigate his loss by making use of legal remedies avail-
able against the official having allegedly acted wrongfully (§ 839(3) BGB).
It needs, however, to be established that, had the victim used all available legal
remedies, the damage would actually have been avoided.

247 Rey (fn. 11) no. 1453 et seq.
248 Ibid. no. 1509 et seq.
249 For the application of the Principles, see: T. Kadner Graziano, topics 5.28.1, 6a-d.28.1, 7.28.1,
250 C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame [1996] ECR I-1131, 1153, 1155,
1157, par. 67, 74, 83–85.
Taking into account the victim’s contributory conduct, activity, or fault is totally in line not only with the Principles of European Tort Law (art. 8:101), but also with laws of the three legal orders under review. According to § 254(1) BGB, art. 44(1) OR and § 1304 ABGB, liability can be reduced or even excluded having regard to the victim’s contribution to the occurrence of the damage.252

F. Loss of a Chance

In Moritz v. Commission253 the European Court of First Instance decided a case in which a candidate’s application for an appointment to a superior position had been treated with negligence and his chances to be chosen were thereby reduced. The candidate brought a claim for damages. The plaintiff could not prove with certainty that, but for the negligence, he would have been appointed. The only “damage” he could invoke was the “lost chance” to be promoted to the position.254 The European Court of First Instance partially compensated the candidate for the loss of a chance to be promoted to a higher position.255

The concept of “loss of a chance” is used and applied in situations in which natural causation between an activity or conduct and a damage cannot be proved with the necessary degree of certainty. In “loss of a chance” cases, it might be that a certain activity has caused a damage but it is not sufficiently certain according to the general rules. That was exactly the situation in the Court of First instance’s case Moritz v. Commission: It might be that the negligent treatment of the candidate’s application has prevented him from being appointed to a higher position, but it is not sufficiently certain that, had the fault not been committed, he would have succeeded with his application.

According to the concept of “loss of a chance”, the fact that triggers liability is the “loss of a chance” of a favourable outcome. Contrary to traditional approaches that provide for compensation according to the principle of “all or nothing”, the concept of “loss of a chance” leads to partial compensation of the damage corresponding to the chance lost. In the case-law of the European Union, some decisions adopt the concept of “loss of a chance” and allow for

252 § 1304 ABGB: “Wenn bei einer Beschädigung zugleich ein Verschulden von Seite des Beschädigten eintritt, so trägt er mit dem Beschädiger den Schaden verhältnismäßig; und wenn sich das Verhältnis nicht bestimmen lässt, zu gleichen Teilen”. § 254(1) BGB: “Hat bei der Entstehung des Schadens ein Verschulden des Beschädigten mitgewirkt, so hängt die Verpflichtung zum Ersatz sowie der Umfang des zu leistenden Ersatzes von den Umständen, insbesondere davon ab, inwieweit der Schaden vorwiegend von dem einen oder dem anderen Teil verursacht worden ist”. Art. 44(1) OR: “Hat der Geschädigte in die schädigende Handlung eingewilligt, oder haben Umstände, für die er einstehen muss, auf die Entstehung oder Verschlimmerung des Schadens eingewirkt oder die Stellung des Ersatzpflichtigen sonst erschwert, so kann der Richter die Ersatzpflicht ermäßigen oder gänzlich von ihr entbinden”.


254 See the comment on this case by Magnus/Bitterich (fn. 231) no. 10.27.1.

255 See on this case: Wissink, no. 15/52; Vauger, no. 2/42. See also: Magnus/Bitterich (fn. 231) no. 10.27.1 et seq.
partial compensation of damage in an amount corresponding to the chance lost. In other situations, however, EC courts rejected partial compensation in situations of lost chances. This is particularly true in the field of “distribution decisions”, i.e. cases relating to EC funding operations. Here the EC courts require full proof that the applicant would have obtained the requested funds if the correct procedure had been followed. 256

In the tort laws of Germany and Switzerland compensation for “loss of a chance” is still largely unknown. In Austria the situation has traditionally been very much the same. However, in 1996, the OGH decided a case in which it could only be determined on the balance of probabilities if the damage had been caused by a tortfeasor or by circumstances within the victim’s own sphere. The 4th chamber of the OGH awarded damages corresponding to the likelihood of causation and thereby reached a result that was very close (and functionally equivalent) to compensation for the “loss of a chance” 257. Other chambers of the OGH have, however, refused to adopt this approach to solve the problem of uncertain causation 258.

In comparison with the three national legal orders of the Germanic legal family, the European Courts seem, in some situations, to be remarkably more open than the national courts when it comes to the question of compensation for the “loss of a chance”.

G. Proof of Causation

As a general rule, in German, Swiss and Austrian tort law, the burden of proof of causation lies with the party bringing the claim 259. However, in the field of environmental liability, German law 260 and legal practice 261 have sometimes substantially facilitated the burden of proving causation if an installation was likely to have produced environmental damage. The corresponding Swiss legislation, however, does not provide for such an alleviation and, therefore, the burden of proof in these cases rests with the claimant 262.


258 For references, see: G. Mäusch, Chance und Schaden (2004) 161 et seq.

259 For Austrian law: Koziol (fn. 4) no. 16/11. For German law: Esser/Weyers (fn. 4) § 55 II 2.b), 163. For Swiss law: Werro (fn. 4) no. 241.

260 § 6 UmweltHG. See Esser/Weyers (fn. 4) § 64, 7.e), 293 et seq., who compare this rule to the principles of a proof prima facie.


262 Schwenger (fn. 4) no. 54.18.
V. Damage

A. Notion of Damage

EC law still lacks a general definition of "damage". The report on Damage\(^{263}\), however, points out that liability might arise from the infliction of, in principle, any kind of damage\(^{264}\).

With respect to the notion of damage, Austrian law is the only legal order of the three legal orders under review with a legal definition of damage in its Civil Code. According to § 1293 sent. 1 ABGB, "damage is every detriment which was inflicted on someone's property, rights or person" ("Schade heißt jeder Nachteil, welcher jemandem an Vermögen, Rechten oder seiner Person zugefügt worden ist"). Under this broad definition, damage includes actual damage as well as the loss of profit, if the profit was almost certain and if a right to make the profit already existed\(^{265}\). On the other hand, the notion of damage includes economic as well as non-economic loss\(^{266}\). § 1293 sent. 2 ABGB distinguishes damage from loss of profit\(^{267}\): "Damage is distinguished from the loss of profit a person has to expect in the usual course of events" ("Davon [i.e. vom Schade] unterscheidet sich der Entgang des Gewinnes, den jemand nach dem gewöhnlichen Lauf der Dinge zu erwarten hat."). However, the notion of loss of profit in the sense of § 1293 sent. 2 ABGB has been narrowed by the recent legal practice which defines the loss of almost certainly attained profits as actual damage\(^{268}\). In other sections of the ABGB, the term damage is used in a wider sense including lost profit\(^{269}\).

In German and Swiss law, both the Codes and the courts tend to avoid a general definition of the notion of damage. The BGB uses the notion of damage ("Schaden") in §§ 823 et seq. BGB as one of the conditions for tortious liability. Instead of giving a definition of this term, the BGB, in §§ 249 et seq., focuses on the kind and the extent of damages ("Art und Umfang des Schadensersatzes"). In German scholarly writing, damage is defined as any loss suffered with respect to a person’s legally protected rights, goods and interests\(^{270}\). In Switzerland courts and legal doctrine often use a formula according to which damage is the diminution of the wealth of a person occuring

\(^{263}\) Vaquer.
\(^{264}\) Vaquer, no. 2/2–2/4.
\(^{265}\) Koziol (fn. 4) no. 2/34 et seq.; Apathy/Riedler (fn. 4) no. 13/6.
\(^{266}\) Koziol (fn. 4) no. 2/3; Apathy/Riedler (fn. 4) no. 13/7.
\(^{267}\) For this distinction, see infra no. 18/111.
\(^{268}\) Apathy/Riedler (fn. 4) no. 13/6; See for instance OGH 24 June 1994, SZ 65/94.
\(^{269}\) Cf. § 1294, 1295, 1324 ABGB; damage in the sense of the first sentence of § 1293 ABGB is called "erlitten Schaden", § 1324 ABGB, or "wirklicher Schaden", § 1330 ABGB). Koziol (fn. 43) no. 17.
without her consent ("Nach allgemeiner Auffassung entspricht der haftpflicht-
rechtlich relevante Schaden der Differenz zwischen dem gegenwärtigen, nach
dem schädigenden Ereignis festgestellten Vermögensstand und dem Stand, den
das Vermögen ohne das schädigende Ereignis hätte.")\textsuperscript{271}. Such broad formulas
can, however, only serve as guiding principles, the application depending on
further considerations for each type of situation\textsuperscript{272}.

In EC tort law, not each and every damage is to be compensated for. The inter-
est that has been injured must be worthy of legal protection\textsuperscript{273}, whereas illegiti-
mate losses or lost income from immoral activities or means are not recover-
able. In this respect European tort law coincides with the tort laws of the three
legal orders under review (for the interests protected, see supra no. 18/21)\textsuperscript{274}.

B. Requirements for Damage to be Recoverable

In primary EC law, damage must be certain, quantifiable, and specific\textsuperscript{275}. Cer-
tainty refers to the requirement that the damage must already have occurred or,
with respect to future damage, is imminent and can be foreseen with sufficient
certainty\textsuperscript{276}.

The requirement of certainty with respect to damage is also used in German,
Swiss and Austrian law\textsuperscript{277}. Lucrum cessans will be compensated for if it is
predictable according to the ordinary course of events\textsuperscript{278}. Damage is not suf-
ficiently certain if it will occur only possibly under the condition that a certain
risk realises\textsuperscript{279}. Some national provisions provide expressly for the compensa-
tion of future damage. These rules often concern future damage in the case of
bodily harm\textsuperscript{280} or in the case of death of a person\textsuperscript{281}.

C. Burden of Proof

As a general rule, in EC law the injured party must prove the existence of a
damage\textsuperscript{282}. This position corresponds to the general rules of proof in German,

\textsuperscript{271} BG 19 January 2001, BGE 127 III 73/76 w. numerous f. ref.
\textsuperscript{272} See, for instance, Oetker (fn. 43) § 249, no. 15, Heinrichs/Palandt (fn. 86) Vorb v § 249, no. 7;
\textsuperscript{273} Vaquer, no. 2/5.
\textsuperscript{274} For German law, see, e.g.: BGH 30 November 1979, BGHZ 75, 368; Heinrichs/Palandt
(fn. 86) § 252, no. 2.
\textsuperscript{275} Vaquer, no. 2/10–2/16.
\textsuperscript{276} Oliphant, no. 11/4; Vaquer, no. 2/12, 2/32.
\textsuperscript{277} For Austrian law, see: Koziol (fn. 43) no. 62. For German law, see: U. Magnus (fn. 270) no. 48.
For Swiss law, see: Werro (fn. 4) no. 963.
\textsuperscript{278} See § 1293 ABGB; § 252 BGB; art. 42(2) OR.
\textsuperscript{279} See Werro (fn. 4) no. 935.
\textsuperscript{280} See, for instance: § 842 BGB; art. 46 OR.
\textsuperscript{281} See, for instance: § 844(2) BGB; art. 45(3) OR.
\textsuperscript{282} Vaquer, no. 2/44; Wissink, no. 15/55.
Swiss and Austrian law. In principle, strict proof of both the existence and the exact amount of the damage are required in order for a claim to succeed\textsuperscript{283}, i.e. no reasonable doubts about the damage shall remain\textsuperscript{284}. German law, for instance, requires a degree of probability that is next to certainty (§ 286 ZPO)\textsuperscript{285} whereas in Swiss law, legal practice requires a "convincing probability"\textsuperscript{286}.

In the three national systems under review, there are exceptions in which the burden of proof of damage is alleviated or reversed. Austrian and German law use special rules according to which the court can estimate the damage, in particular when lost profits or future income losses have to be assessed\textsuperscript{287}. Moreover, the three national systems provide for an assessment of the amount of damage by the judge according to his conviction if proving a certain amount reveals to be unreasonably difficult\textsuperscript{288}.

D. Types of Damage

EC tort law as well as the three national systems distinguish between different categories of damage. In EC tort law, material damage includes, in principle, both damnum emergens and lucrum cessans\textsuperscript{289}. In German and Swiss law, "material damage" includes both damnum emergens and lucrum cessans\textsuperscript{290}. Under Austrian law lucrum cessans is regularly recoverable only if the wrongdoer acted with intent or gross negligence\textsuperscript{291}. The three legal orders under review distinguish between these two types of damage, among others for purposes of evidence. Given the fact that future losses or lost profits (arising out of actual injuries) can often be established with a lesser degree of certainty than damage that has actually occurred, the standard of proof for future losses usually is reduced and a mere probability is sufficient\textsuperscript{292}.

Costs of preventive measures are regarded as damage in cases falling under Directive 2004/35/CE on Environmental Liability\textsuperscript{293}. With respect to environmental liability, §§ 7, 10(1) sent. 1 of the German Protection of the Soil Act (Bundesbodenschutzgesetz) provide that the owner, the possessor, or the per-

\textsuperscript{283} For Swiss law: Brehm (fn. 43) art. 41, no. 117; Werro (fn. 4) no. 957.
\textsuperscript{284} See for German law e.g.: BGH 17 February 1970, BGHZ 53, 245; BGH 6 June 1973, BGHZ 61, 169; BGH 14 January 1993, NJW 1993, 935; A. Baumbach/W. Lauterbach/J. Albers/P. Hartmann, Zivilprozessordnung (65th ed. 2007) § 286, no. 18. For Swiss law: Brehm (fn. 43) art. 41, no. 117.
\textsuperscript{285} "Mit an Sicherheit grenzender Wahrscheinlichkeit", Baumbach/Lauterbach/Albers/Hartmann (fn. 284) § 286, no. 16.
\textsuperscript{286} "Überwiegende Wahrscheinlichkeit" = "probabilité convaincante". See e.g. BG 29 January 2004, BGE 120 III 321; Brehm (fn. 43) art. 41, no. 117 et seq. § 1293 ABGB; § 252 BGB.
\textsuperscript{287} § 273 of the Austrian Zivilprozessordnung (Code of Civil Procedure - ZPO); § 287 of the German ZPO; art. 42(2) of the Swiss OR.
\textsuperscript{288} Vaguer, no. 2/19 et seq.
\textsuperscript{289} For German law: Medicus (fn. 84) no. 593. For Swiss law: Schwenzer (fn. 4) no. 14.13.
\textsuperscript{290} § 1293 sent. 2 ABGB. See, however, supra no. 18/104.
\textsuperscript{291} See § 252 BGB; art. 42(2) OR and supra no. 18/110.
\textsuperscript{292} Art. 8(1) of the Directive.
son having undertaken activities on premises, can – at their own expenses – be obliged to carry out preventive measures to protect the soil from environmental damage. Many other public laws provide for similar obligations.

The case is much more difficult if the person that has created a danger for a legally protected interest does not act and if, instead, the person whose goods are threatened incurs (preventive) expenses to avoid the threat. In private law in general, in the three national systems, recovery of the costs of preventive measures is a rather difficult issue. In principle, tortious liability is triggered by the occurrence of a damage to a protected interest. Expenses incurred in order to prevent a damage from occurring remain in the forefield of tortious liability and therefore are difficult to recover under tort law in the absence of an immediate interference with an object of legal protection. In addition, preventive measures usually constitute pure economic losses, liability in tort for pure economic loss being much more limited in the three systems than, for instance, liability for damage to property (i.e. “Schäden am Eigentum”). Whereas, e.g., art. 6:96 of the New Dutch Civil Code (Burgerlijk Wetboek) expressly provides for the recoverability of certain costs of preventive measures, the three main representatives of the Germanic legal family do not know of such an express provision in their rules on tort law. In some cases, the costs of preventive measures may be recoverable under the rules on “Geschäftsführung ohne Auftrag” or “Gestion d’affaires sans mandat” (i.e. § 677 et seq. BGB, art. 419 et seq. OR, §§ 1035 et seq. ABGB). The system is, however, far from complete.

In environmental law, since restoration is often impossible once the damage has occurred, prevention is particularly important. Prevention, however, is preferable not only in the case of damage to the environment but in the case of imminently threatening injury to any legally protected interest. Whereas both EC law and the national systems under review provide for liability for preventive measures only in a few specific cases, the Principles of European Tort Law declare in art. 2:104 that “Expenses incurred to prevent threatened damage (to a legally protected interest, see art. 2:101, 2:102 PETL) amount to recoverable damage in so far as reasonably incurred”. They hereby propose to close gaps that exist both in EC tort law as in most national systems – including the three systems under review.

Under EC tort law, non-material damage is to be compensated for irrespective of the degree of the defendant’s negligence. In the case-law of the ECJ, it is accepted that natural as well as legal persons may recover compensation of non-material damage.


295 Vaqueur, no. 2/38.
All three legal orders under review recognise that non-material harm must be compensated for in the case of tortious injuries to the body or health of the injured party. They also recognize the possibility to award damages for non-material loss as the consequence of an infringement of the right of personality. In Swiss law, while the issue is controversially dealt with in legal writing, the courts have awarded compensation for immaterial harm also to legal entities. In Austrian and German law moral persons can, under certain circumstances, rely on such protection too. Only Austrian law compensates for non-material harm resulting from damage to things.

The Product Liability Directive has left the issue of recovery of non-material harm to national law. The German Liability for Defective Products Act now expressly provides for compensation of non-material damage. The Swiss Product Liability Act 1994 leaves the question open. Swiss doctrine discusses the issue controversially. However, the prevailing legal opinion seems to deny this possibility. In Austrian law, since compensable damage is determined according to the general rules of civil law, liability under the law transposing the Directive also includes non-material harm.

Thus neither in EC law nor in the national systems under review has the notion of damage (including both material and immaterial harm) been definitely defined. As far as the fundamentals and general issues of the law of damages are concerned, EC tort law and the three systems under review seem very much in line and differences lie in details. As far as modern trends in the law of damages are concerned, such as compensation for "preventive measures", EC tort law still seems reluctant, though a little less reluctant than, for instance German and Swiss law.

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296 For Austrian law: § 1325 ABGB. For German law: § 253 BGB. In Swiss law, immaterial harm is called "tort moral" or "immaterieller Schaden" leading to a "Genugtuungsanspruch": art. 47 OR.

297 In German law this has been decided extra legem by the BGH. See e.g.: BGH 14 February 1958, BGHZ 26, 351 (Herrenreiter); BGH 19 September 1961, BGHZ 35, 363 (Ginsengwurzel). For Swiss law: see art. 49 OR and art. 28 et seq. 2GGB.

298 See: Brehm (fn. 43) art. 49, no. 40 et seq. w. f. ref.

299 BG 21 March 1969, BGE 95 II 481.

300 For Austrian law: Koziol (fn. 4) no. 11/2, fn. 5. For German law: Sprau/Palandt (fn. 28) § 823, no. 92.

301 § 1331 ABGB. It is required that the injurer has intentionally violated criminal law or inflicted wanton damage or acted with malicious intent.

302 Howells, no. 6/18; Wissink, no. 15/61.

303 § 8 ProdHafG.

304 See: Honsell (fn. 4) § 21, no. 51 w. f. ref.

305 Koziol/Welser (fn. 7) 380.

306 § 1325 ABGB.
VI. Damages and Other Remedies

A. Damages

EC-law follows the principle of full compensation, i.e. the victim should be put into a situation most similar to the one he would have been in had there been no wrongful act or omission\(^{307}\).

This state of the law coincides with German law where the compensation that is due depends exclusively on the loss suffered by the injured party\(^{308}\). It further coincides with the starting point in Swiss law, which also follows the principle of full compensation\(^{309}\). However, according to art. 43(1) OR, the judge can adapt the damages to be awarded according to the circumstances of the case or the degree of fault of the wrongdoer\(^{310}\). In Austrian law, in determining the amount of compensation, the degree of fault is taken into consideration, § 1324 ABGB: In cases of slight negligence, loss actually suffered is compensated whereas lost profits and immaterial harm are compensated only in cases of gross negligence or intent. However, exceptions to this rule have been made by statute and case-law\(^{311}\).

Just as in secondary EC law, in the three national legal orders exceptions to the principle of full compensation are made. First, when transposing the EC-Directive 85/374/EEC on product liability, the three legal orders have taken over the threshold of € 500\(^{312}\). With respect to the possibility given to the national legal orders by art. 16 no. 1 of Directive 85/374/EEC on Product liability, only Germany has adopted a liability cap of € 85 Million\(^{313}\). In Austrian law, some special statutes on strict liability provide for caps on damages\(^{314}\). The same is true for German law where liability caps have been adopted in some, but not all, statutes providing for strict liability for specific dangers\(^{315}\). In contrast, limitation caps for liability, especially with respect to strict liability, are virtually unknown to Swiss law\(^{316}\).

In EC law, damages must be assessed, as far as possible in a concrete manner. This is also true for German and Swiss law\(^{317}\). The situation in Austrian law is more nuanced. If, in the case of slight negligence, the tortfeasor has to indem-

\(^{307}\) Oliphant, no. 11/2.
\(^{308}\) Heinrichs/Palandt (fn. 86) no. 4.
\(^{309}\) Schwenzer (fn. 4) no. 15.07.
\(^{310}\) Honsell (fn. 4) § 9, no. 5.
\(^{311}\) Koziol (fn. 43) no. 5.
\(^{312}\) For Austrian law: § 2 no. 2 of the PHG. For German law: § 11 ProdHaftG. For Swiss law: art. 6(1) PrHG with a threshold of CHF 900.
\(^{313}\) § 10 I ProdHaftG.
\(^{314}\) Cf. Koziol (fn. 43) no. 7 et seq.
\(^{315}\) Cf. Magnus (fn. 270) no. 8.
\(^{316}\) Oftinger/Stark (fn. 147) § 7, no. 78 et seq.
\(^{317}\) For German law, see: Heinrichs/Palandt (fn. 86) no. 50. For Swiss law, see: Werro (fn. 4) no. 924 et seq.
nify only for loss already suffered (§ 1324 ABGB), the prevailing opinion is that assessment has to be carried out in an objective and abstract way, i.e. the replacement value is due. In contrast, if the damage was caused with gross negligence or intent, the tortfeasor has to compensate for the victim’s loss as the loss is subjectively felt by the victim (including sentimental value). For instance, if a damaged thing had a special value because it was part of a collection, the plaintiff is compensated for this special damage too, even when it goes beyond the replacement value.

Where appropriate (e.g. in the case of non-material damage), in EC law damages may be assessed ex aequo et bono. In the case of injury to one’s bodily integrity, Austrian, German and Swiss law do not distinguish between different heads of non-material harm; one single sum for all immaterial losses following from bodily harm is awarded. In determining the amount of damages, all relevant factors must be taken into account, such as the significance of the injury, the consequences for the state of the victim’s health and the duration as well as the intensity of physical pain or emotional strain. However, whereas the social situation of the victim (especially the financial situation of the victim) do not matter under Austrian or German law for the assessment of damages, the Swiss legal practice has taken these factors into account.

B. Restoration in Kind

The three national legal orders compared in this report diverge when it comes to the question of the mode of making good the damage. While German and Austrian law consider restoration in kind as the general principle, in Swiss law money payments are the principle. However, all systems provide for exceptions from the general principle. In Swiss law, for example, in the case of a violation of personality rights by mass media, the obligation to make the damage good by publishing a judgment in favour of the plaintiff is combined with an obligation to pay damages. In a recent judgment concerning defamation by the press, the Swiss Federal Court awarded restitution in kind as the only appropriate remedy. On the other hand, German and Austrian law admit that restoration in kind is often inappropriate to make good damage because the wrongdoer is neither apt nor willing to restore the damage in kind or

318 Koziol/Welser (fn. 7) 323, 352 w. f. ref.
319 Ibid., 324 et seq. w. f. ref.
320 Example taken from: Apathy/Riedler (fn. 4) no. 13/53.
321 Wissink, no. 15/66 w. f. ref.
322 For Austrian Law: Koziol/Welser (fn. 7) 344 et seq. For German law: Heinrichs/Palandt (fn. 86) § 253, no. 19. For Swiss law: Schwenzer (fn. 4) no. 17.12.
323 For Austrian law: OGH 15 November 1989, SZ 62/176. For German law: Heinrichs/Palandt (fn. 86) no. 19.
324 BG 10 January 1997, BGE 123 III, 10. For a critical view: Werro (fn. 4) no. 1282.
325 For Austrian law: Koziol (fn. 43) no. 9. For German law: Medicus (fn. 84) no. 587.
326 Werro (fn. 4) no. 1105 et seq.
because the victim shall be free to decide whom to confide his or her goods in order to repair the damage. For this reason, in both legal orders the victim has, in many situations, a large freedom to choose between restoration in kind and compensation in money.\(^\text{329}\)

In the context of State liability, both in German and Austrian law restoration in kind is, as a general rule, deemed to be impossible.\(^\text{330}\)

**VII. Limitation Periods and Other Defences**

**A. Limitation Periods**

In the field of non-contractual liability, *primary* EC law only knows a single type of limitation period depending on a combination of objective and subjective criteria.\(^\text{331}\) According to the ECJ, in case of claims against Member States for the infringement of EC law, limitation periods are to be determined by the law of the Member States. In application of this principle, the Austrian OGH\(^\text{332}\) has applied the limitation rules of the Austrian Amtshaftungsgesetz by way of analogy. According to § 6(1) of this law, compensation claims are time-barred three years after the victim has knowledge of his damage but in no case before one year after the unlawful decision or decree has become legally binding.

The report on limitation periods points out that *secondary* EC law knows of several rules providing for limitation rules.\(^\text{333}\) We will briefly present the limitation periods of German, Swiss and Austrian law for tort cases and point to some differences with EC rules.

Under German law, claims in tort law are subject to a standard limitation period of three years, § 195 BGB. § 199(1) BGB sets out criteria for the limitation period to begin running: the claim must have arisen and the victim must have become aware of the circumstances giving rise to the claim and of the identity of the person responsible.\(^\text{334}\) The limitation period begins to run at the end of the year in which these conditions are fulfilled. Claims for the loss of life, injury to body, health or deprivation of personal freedom, are time-barred in any case 30 years after the event giving rise to the claim has occurred, § 199(2) BGB.\(^\text{335}\) According to § 199(3) BGB, all other compensation claims are time-barred at the latest 10 years after they arose and irrespective of when they arose.

\(^{329}\) For Austrian law: Koziol (fn. 43) no. 10. For German law: § 249 (2) BGB for damage to person or damage to things. § 250 BGB with an obligation to set out a delay in the case of destruction of things.

\(^{330}\) For Austrian law: Koziol/Welser (fn. 7) 386. For German law: Maurer (fn. 47) § 26, no. 44.

\(^{331}\) Pereira, no. 13/24 et seq.

\(^{332}\) 12 October 2004, 1 Ob 286/03w, not published.

\(^{333}\) Pereira, no. 13/4 et seq.

\(^{334}\) Or ought to have become aware of those matters but for his gross negligence, see below.

\(^{335}\) However, it is irrelevant if the harm arises out of a contract or out of a tort, K. Larenz/M. Wolf, Allgemeiner Teil des Bürgerlichen Rechts (9th ed. 2004) § 17, no. 19.

\(^{336}\) § 199(3) no. 1 BGB.
30 years from the date on which the act, breach of duty or other event having caused the loss occurred\(^{337}\). These limitation periods do not begin at the end of the year but start to run from the day of this event that triggered liability\(^{338}\).

18/129 In the field of torts, art. 60 OR provides for a threefold division of limitation periods. The ordinary limitation period amounts to one year. It starts when the victim has knowledge both of the damage and of the person that is liable\(^{339}\). The second limitation period (the so-called “absolute limitation period”) amounts to ten years. It starts to run when the event giving rise to liability happened\(^{340}\). In the case of repeated violations of the rights and interests of the victim, according to the legal practice and the dominant opinion, the limitation period begins to run the day when the last wrongful act was committed\(^{341}\). According to art. 62(2) OR, if damage arises out of a conduct that is punishable under penal laws, longer limitation periods under penal laws apply instead of shorter limitation periods of private law\(^{342}\).

18/130 In Austrian law claims for contractual or extra-contractual liability are subject to a limitation period of three years. The period begins to run when the victim has knowledge of both the damage and the person liable\(^{343}\). In the case of repeated violations of the rights and interests of the victim, a separate limitation period begins to run once the victim has knowledge of each new wrongful act. When the victim has knowledge of neither the damage nor the tortfeasor, a long limitation period of 30 years is applied. The limitation periods also apply to wrongful acts which represent at the same time penal infringements of a certain graveness, § 1489 ABGB.

18/131 Compared to Austrian, German and Swiss\(^ {344}\) law, secondary EC tort law uses a similar “dual system” of, on the one hand, a flexible limitation period the beginning of which depends on subjective criteria such as the victim’s knowledge of certain factors and, on the other hand, an absolute limitation period beginning on an objectively defined moment in time. However, regarding the flexible limitation period, there is a noteworthy difference between German law and secondary EC law. The limitation period in German law only starts to run at the end of the year of the fulfilment of the subjective criteria. It therefore not only is flexible but also variable, and its length can in some cases amount de facto up to four (instead of three) years.

\(^{337}\) § 199(3) no. 2 BGB.
\(^{339}\) Werro (fn. 4) no. 1427 et seq.
\(^{340}\) Ibid., no. 1448.
\(^{341}\) BG 15 February 1966, BGE 92 II 1; Honsell (fn. 4) § 12, no. 4. According to Werro (fn. 4) no. 1452, the limitation period should only begin to run from the moment when the victim’s rights are violated.
\(^{342}\) Werro (fn. 4) no. 1454.
\(^{344}\) With the exception of the Swiss law which adapts the civil limitation period to the limitation period of the applicable penal law, art. 62(2) OR.
B. Other Defences

In EC law, the tortfeasor has two defences based on the victim’s conduct. First, as we have seen\(^{345}\), the victim’s contributory negligence can lead to the reduction of the amount of damages. In the three legal orders under review, this defence is well known and contributory negligence always has to be taken into account when assessing damages\(^{346}\). Gross contributory negligence can preclude liability altogether\(^{347}\), even if the claim is based on strict liability\(^{348}\). In the field of strict liability, gross contributory negligence can also be seen as “höhere Gewalt” (Act of God, force majeure) for the tortfeasor and exclude liability altogether\(^{349}\). Furthermore, the victim has to mitigate the loss once it has occurred\(^{350}\).

The second question is if the conduct of third parties may serve as a defence. In the field of Member State liability for the violation of Community law, in three German cases the defendant argued that the breach of Community law was attributable to the EC itself\(^{351}\). The rule to be extracted from these German decisions could be stated as follows: If a regulation, directive or decision of a Community institution itself violates superior primary EC law and if the national legislator or the national administration confines itself to simply transpose this secondary EC law into national law without adding further breaches of Community law, it is not for the Member State to compensate the victim but solely for the Community on the ground of art. 288 EC\(^{352}\).

In certain situations, under EC law, lawfulness of the event is a defence. Examples can be found in Directive 2004/35/CE on environmental liability and in Directive 85/374/EEC on product liability. The defence of lawfulness is known in German (public) environmental liability law as well. For example, under the (public) law for the protection of the soil, the polluter of soil can raise the defence that he acted in compliance with an express authorisation of a public authority\(^{353}\). Under § 22 of the German Water Act (Wasserhaushaltsgesetz), liability for the pollution of water resources is barred if the polluter acted under

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345 Supra, no. 18/94 et seq.
346 § 1304 ABGB; § 254 BGB; art. 44(1) OR.
347 For instance in German law: Heinrichs/Palandt (fn. 86) § 254, no. 61.
348 For Austrian law: Koch/Koziol (fn. 112) no. 79–81. For German law: Fedke/Magnus (fn. 149) no. 50. For Swiss law: Widmer (fn. 111) no. 62 et seq.
349 For Austrian law: Koch/Koziol (fn. 112) no. 79. For German law: Heinrichs/Palandt (fn. 86) § 254, no. 69. For Swiss law: Honsell (fn. 4) § 9, no. 21.
350 In Austrian law, this principle is derived from § 1304 ABGB which provides for the defence of contributory negligence, see: Koziol (fn. 4) no. 12/88 et seq. In German law, § 254(2) BGB expressly provides for this rule. In Swiss law, this principle is based on art. 44(1) OR, see: Honsell (fn. 4) § 9, no. 17 et seq.
express authorisation of the competent authority.\textsuperscript{354} Compensation may however be due under the concept of “Eingriffshaftung”\textsuperscript{355}. According to other provisions, for instance § 14 sent. 2 of the German Federal Act on the Protection against Nuisances (Bundes-Immissionsschutzgesetz\textsuperscript{356}) or § 7(4) of the Act on the Peaceful Use of Atomic Energy and on the Protection against its Dangers (Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren), acting in accordance with administrative authorisations does not preclude liability. This is most understandable and reasonable, since as in the Germanic legal family strict liability is typically intended to compensate for the fact that hazardous activities or the use of dangerous objects is permitted by law\textsuperscript{357}.

18/135 In the field of product liability, in accordance with the EU Directive 85/374/EEC, all three jurisdictions have adopted rules that bar the liability of the producer if the defect is due to the compliance of the product with mandatory regulations\textsuperscript{358}.

18/136 According to the same Directive, the observation of the state of the scientific and technical knowledge is a defence against a product liability claim. In all three jurisdictions the state of the art defence has been taken over into the national laws transposing the Directive\textsuperscript{359}. However, beyond the scope of the Product Liability Act, German legal practice is very reluctant to accept this defence. One example is the special liability for drugs and medicines based on § 84 of the German Drugs Act (Arzneimittelgesetz) which supersedes the ProdHaftG and does not accept a state of the art defence\textsuperscript{360}. Furthermore, if a producer has breached his duty to monitor his products and those of other producers which are likely to be used with his products, or if he has breached his duty to warn users of newly discovered dangers or if he has breached his duty to call his products back, he is held liable under § 823(1) BGB\textsuperscript{361}. Another example is the refusal of the state of the art defence to the polluter of the soil. He cannot defend himself by alleging that the dangerousness to the environment of his acts were neither known to him nor were they cognisable from scientific and technical knowledge at the time the polluting acts were committed\textsuperscript{362}.

\textsuperscript{354} § 11 Wasserhaushaltsgesetz (WHG); Esser/Weyers (fn. 4) § 64 4, d), 289.
\textsuperscript{355} Liability for lawful interferences.
\textsuperscript{356} Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche und ähnliche Vorgänge.
\textsuperscript{358} § 1(2) no. 4 of the German ProdHaftG; art. 5(1)(d) of the Swiss PrHG; § 8(1) of the Austrian PHG.
\textsuperscript{359} § 1(2) no. 5 of the German ProdHaftG; art. 5(1)(e) of the Swiss PrHG; § 8(2) of the Austrian PHG.
\textsuperscript{360} Sprau/Palandt (fn. 160) § 15 ProdHaftG, no. 2.
\textsuperscript{361} BGH 17 March 1981, BGHZ 80, 199; Wagner (fn. 4) § 823, no. 597 et seq.
\textsuperscript{362} Verwaltungsgerichtshof München (VGH – Supreme Administrative Cout of the Land of Bavaria), Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1992, 905; Kloepfer (fn. 353) § 12, no. 155.
Force majeure or Acts of God can be defences in certain types of strict liability in EC law. An external influence which caused or contributed to the harm with force of nature is one of the most common defences to strict liability in the three national systems as well. However, the defence is not applied in all areas of strict liability and some laws which provide for particularly strict liability regimes do not admit “Act of God” as a defence. On the other hand, some instances of strict liability under Austrian law allow the defence that the harm could not have been avoided with “all due diligence” or similar descriptions of a higher-than-average standard of care. This defence is to some extent reminiscent of fault liability. Still it goes beyond fault liability as not only ordinary diligence has to be exercised by the defendant in order to successfully avoid liability. Instead, he must prove that even the utmost care ever possible could have prevented such harm.

363 Hinteregger, no. 5/30; Koch, see on the one hand (external influences with elemental force exonerate) no. 7/9 (Nuclear Energy), 7/69 (Maritime Transport), 7/82 (Transport by Rail), 7/100 (Hotel Keepers), and on the other hand (no such exoneration), 7/32 (Air Carriage), 7/60 (Outer Space).


365 For instance, the German Luftverkehrsgesetz or Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren (AtG), cf.: Esser/Weyers (fn. 4) § 63 II. 2. b).

366 § 9 EKHG.

367 Koch/Koziol (fn. 112) no. 72.