

LIABILITY AND ACCOUNTABILITY

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1. LIABILITY OF GERMAN PUBLIC AUTHORITIES

1.1 Liability under the European public order

1.1.1 Liability for violation of the European Convention on Human Rights

The European Convention on Human Rights is a constitutional instrument of European public order. According to the German Federal Constitutional Court the provisions of the German Constitution are to be interpreted in a manner “that is open to international law”.¹ Contracting States are to be held accountable under the Convention for breaches of human rights within their own territory, and, as an exception to the principle of territoriality, for acts of their authorities which produce effects (effective “control and authority” over an individual, and thus “jurisdiction”) outside their own territory.²

Article 5 (5) ECHR provides that the victims of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation that can cover both pecuniary and non-pecuniary loss. The claim is not based on fault. Nevertheless, a substantial award is more likely in cases of deliberate behavior not conforming to laws by the authorities.³ This liability claim is comparable with the German cause of action for unlawful impairment of immaterial goods (*see below 1.5.2*) with the

¹BVerfG, 2BvR2365/09 vom 4.5.2011, Absatz-Nr. (1-178), headnote 2
http://www.bverfg.de/entscheidungen/rs20110504_2bvr236509.html

² See ECHR, CASE OF AL-SKEINI AND OTHERS v. THE UNITED KINGDOM, judgment, Application no. 55721/07, 7 July 2011, paras 130-140 with a review of relevant case law.

³ See for ex. a police conduct that “amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of 15 May 1979” in: ECHR, CASE OF BOZANO v. FRANCE (ARTICLE 50) Application no. 9990/82, 2 December 1987, para 2.

difference that the latter does not include damages for pain and suffering (*Schmerzensgeld*).⁴ The award of damages is not a necessary reaction to a violation of Article 5. The Strasbourg Court has held in many cases under Article 5 (5) that a finding of a violation is sufficient just satisfaction. The specific right to compensation under Article 5 (5) ECHR does not, anyway, limit the general powers of the Strasbourg Court under Article 41 ECHR. The Strasbourg Court had to deal with the provisions of the German Criminal Code on “preventive detention” (*Sicherungsverwahrung*, §§ 66, 106 *Strafgesetzbuch StGB*) which occurred when individuals were considered a danger to public safety and had already committed crimes. These provisions have now been declared unconstitutional by the BVerfG. For an eleven years detention the Court awarded damages for “non pecuniary damage such as distress and frustration, which cannot be compensated solely by the findings of a Convention violation.”⁵

The damages award under Article 41 ECHR is intended to achieve complete reparation for damage derived from a human rights violation. The exercise of discretion by the Strasbourg Court under Article 41 takes following factors⁶ into account: The (deliberate, offensive) conduct of the respondent State or its agent and the State’s record of previous violations, the intensity or degree of loss, the seriousness of the violation, the existence of other measures in response to a violation, the possibility that the finding of a violation is sufficient satisfaction rendering any further monetary award to the applicant unnecessary, as well as consideration of the contributory negligence and the conduct of the

⁴ BGHZ 122, 268 (268 and sequ.).

⁵ ECHR, applications nos. 27360/04 and 42225/07, CASE OF SCHUMMER v. GERMANY Judgment (Merits and Just Satisfaction) 13 January 2011, para 92; ECHR, Application no. 6587/04, CASE OF HAIDN v. GERMANY, Judgment (Merits and Just Satisfaction) 13 January 2011, para 75 (detention must result from a conviction).

⁶ For an analysis of this discretion from a comparative point of view see Gromitsaris, *Rechtsgrund und Haftungsauslösung im Staatshaftungsrecht*, Duncker & Humblot Berlin, 2006.

applicant in general. The application of the causation test is met with difficulties with regard to speculative losses or the broad head of loss of opportunities. Interest is recognized as a pecuniary loss and default interest is paid if the damages awarded by the Strasbourg Court under the Article 41 are not paid by the respondent State within three months of the date of judgment.

Recent cases with Germany as respondent State - apart from a breach of the right to “family life”⁷ under Article 8 of the Convention – deal mainly with breaches of the right to trial within a reasonable time..⁸ The Court reiterated that the reasonableness of the length of proceedings must be assessed with reference to “the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute”.⁹ Claims for pecuniary losses failed on causal grounds. The Court took its regular view that it was not in a position to speculate as to what the outcome of legal proceedings might have been, or as to how the applicant's professional life would have developed, had the violation not occurred, and therefore no causal connection between the pecuniary losses claimed and the breach of the requirements of Article 6 as to their length could be established. Nevertheless, in a case where the domestic authorities did not struck a fair balance between the general interest of legal certainty and the applicant's interest to have his claim examined by a court, and the delays which occurred were mainly imputable to the national court's conduct, although the German procedural law would have allowed declaring the applicant's motion admissible, damages for pecuniary loss were granted. The

⁷ Application no. 20578/07, CASE OF ANAYO v. GERMANY Judgment (Merits and Just Satisfaction) 21 December 2010,para 77.

⁸ The German Highest Court in Civil Matters (*Bundesgerichtshof*, BGH) also found in 2007 that a breach of the duty of the State to organize its courts in a way that avoids delays in bringing proceedings can trigger liability in damages: BGHZ 170, 260-275.

⁹ ECHR, applications nos. 397/07 and 2322/07, CASE OF HOFFER AND ANNEN v. GERMANY, Judgment (Merits and Just Satisfaction) 13 January 2011,para 55.

Court “did not find it unreasonable to regard the applicant as having suffered a loss of opportunity in that he could not obtain a ruling on the merits of his claim”.¹⁰ With regard to non-pecuniary loss the finding of a violation usually would not constitute sufficient just satisfaction for the damage. Accordingly, also in the cases under scrutiny here, damages were granted for distress suffered from the unreasonable length of civil proceedings, or from the clearly excessive length of criminal investigation proceedings which were finally discontinued, and from the lack of an effective remedy to complain about that length.¹¹ Damages as just satisfaction are awarded under three heads: pecuniary loss, non-pecuniary loss, and costs and expenses. The latter cover the costs incurred in domestic proceedings as well as before the Commission and the Strasbourg Court only in so far as they have been actually and necessarily incurred, they were essentially aimed at preventing or redressing a violation of the Convention and they are reasonable as to quantum. In length-of-proceedings cases the protracted examination of a case beyond a “reasonable time” may involve an increase in the applicant’s costs.¹²

1.1.2 The principle of Member State liability under European Union law

The European Court of Justice points out constantly in accordance with settled case law that there is a principle of Member State liability for loss or damage caused to individuals as a result of breaches of EU law for which the Member State can be held

¹⁰ Application no. 71440/01, CASE OF FREITAG v. GERMANY, judgment (merits and just satisfaction) 19 July 2007 para 40,64.

¹¹ ECHR, applications no. 45749/06 and no. 51115/06, CASE OF KAEMENA AND THÖNEBÖHN v. GERMANY, judgment (merits and just satisfaction) 22 January 2009, para 96; ECHR, Application no. 26073/03, CASE OF OMMER v. GERMANY (no. 2), judgment (merits and just satisfaction) 13 November 2008, para 82.

¹² ECHR, Application no. 26073/03, CASE OF OMMER v. GERMANY (no. 2), judgment (merits and just satisfaction) 13 November 2008, para 85; ECHR, CASE OF KAEMENA AND THÖNEBÖHN v. GERMANY, para 100; ECHR, application no. 58911/00 CASE OF LEELA FÖRDERKREIS E.V. AND OTHERS v. GERMANY, judgment (merits and just satisfaction) 6 November 2008, para 112.

responsible. The question as to whether there is a principle of Member State liability is not within the national authorities' remit. This principle is deemed to be inherent in the system of the treaties on which the European Union is based. According to that case-law the duty to pay damages holds good for any case in which a Member State breaches EU law, "whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation".¹³ Individuals harmed have a right to reparation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals. It is, in principle, for the national courts to apply the criteria for establishing the liability of Member States and the extent of reparation for damage caused to individuals by breaches of EU law. The necessity of complying with the familiar principles of equivalence and effectiveness, however, brought about some frictions between the German law of tortious governmental liability and European case law. They concern the nature of the remedy in domestic law, the legitimacy of liability for legislative wrongs, the scope of the rights infringed and the interpretation of the fault requirement in German tort law in relation to the European law requirement of "sufficiently serious" breach.¹⁴

With regard to the Member State liability for breaches of EU-law the ECJ has left it to the domestic legal systems to attune the application of the *Francovich* remedy to their existing legal framework. The federal highest court in civil matters (BGH) considers the *Francovich* remedy as Community law (*sui generis*) remedy which is separate¹⁵ from other

¹³ ECJ, Case C-429/09, 25 November 2010, *Günter Fuß v Stadt Halle*, para 46.

¹⁴ Matthias Ruffert, *AEUV Art. 340 (ex-Art. 288 EGV) [F. Member State Liability]* Calliess/Ruffert, *EUV/AEUV* 4. Auflage 2011, paras 36-76.

¹⁵ See for example recently *LG Hannover*, 14 O 57/10, 25.11.2010, *Zeitschrift für Wett- und Glücksspielrecht (ZfWG)* 2011, 75.

domestic remedies for the liability of public authorities, and especially the domestic head of tort for breach of official duty. On the other hand, it is argued that the cause of action for the remedy should be based on the “europeanisation” of the domestic head of tort (§ 839 BGB in conjunction with Article 23 GG) that provides for the liability of public authorities for wrongful conduct (*see under 1.4*). This view holds that the requirement of the breach of duty owed to a third party as well as the fault requirement should be interpreted in conformity with the community law; they should be modified to comply with the conditions set out by the ECJ. Therefore, according to the condition of “sufficiently serious breach” which amounts to the manifest and grave disregard of the limits of discretion Member States are granted for the measures they take, fault laid down in § 839 BGB turns into a notion of objective organizational “fault”. At any rate, the right to reparation may not be made conditional on “a concept of fault going beyond that of a sufficiently serious breach” of European Union law “such as intentional fault or negligence”.¹⁶ The application of the second condition requiring that the violated Community rule should be designed to confer a right onto the aggrieved party brings about a modification of the national tripartite “protective norm test”: this makes it much easier for the courts to establish that a Community law rule is intended to protect certain individuals and not the public at large.¹⁷ Finally, the reparation of the loss or damage caused by them to individuals as a result of breaches of European Union law must be commensurate with the loss or damage sustained.¹⁸

¹⁶ ECJ, Case C-429/09, 25 November 2010, *Günter Fuß v Stadt Halle*, para 68.

¹⁷ Wolfram Höfling, *Vom überkommenen Staatshaftungsrecht zum Recht der staatlichen Einstandspflichten*, in: Hoffmann-Riem/ Schmidt-Assmann/ Voßkuhle, *Grundlagen des Verwaltungsrechts*, Volume III, 2009, 945, paras 48-60.

¹⁸ ECJ, Case C-429/09, 25 November 2010, *Günter Fuß v Stadt Halle*, para 92.

1.2 Guarantee for governmental liability under the German Constitution

The liability of German public authorities regards the liability not only of the Federation (Bund) and the federal states (*Länder*), but also of other territorial units and entities of public law (for ex. municipalities). According to Article 20 III of the German Constitution (Basic Law, Grundgesetz - GG) law and justice bind the executive to the same extent as the judiciary and the legislature. This is the *Rechtsstaat*-Principle which places its emphasis on the protection of directly enforceable subjective individual rights and the guarantee to effective judicial protection against infringements committed by public authorities (Article 19 IV GG). Art. 34 GG completes this basic principle by establishing a so-called “institutional guarantee” for governmental liability. It makes clear that there must be some form of liability of public authorities. Exclusions and limitations of liability of public authorities are exceptional and need a rigorous justification.¹⁹ The technical prerequisites of state liability are entrusted to the legislator who is not banned from abrogating existing provisions (for instance, the “old-fashioned” § 839 BGB)²⁰ and drafting a new statute.²¹ This is a task the legislator already embarked on with the enactment of the State Liability Act in 1981 as a Federal act which was intended to simplify and co-ordinate the liability law of public authorities. Finally that statute was declared unconstitutional and void by the Federal Constitutional Court in 1982 on the grounds that the Federation lacked legislative competence to enact it.

¹⁹ Fritz Ossenbühl, *Staatshaftungsrecht*, 7th Edition, C.H.Beck, München, 1998, 6, 9, 294; Wolfram Höfling, *Vom überkommenen Staatshaftungsrecht zum Recht der staatlichen Einstandspflichten*, in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Assmann/Andreas Voßkuhle, *Grundlagen des Verwaltungsrechts*, Volume III, C.H.Beck, München, 2009, 945, paras 19-22; Susanne Pfab, *Staatshaftung in Deutschland*, C.H.Beck, München, 1997, 95.

²⁰ See on the reasons for reform: Hans Jürgen Papier, *GG Art. 34*, Maunz/Dürig, *Grundgesetz*, 2011, paras 93-100; Ulrich Stelkens, *Staatshaftungsreform im Mehrebenensystem*, in: *Die Öffentliche Verwaltung (DÖV)* 2006, 770.

²¹ See on this point the decision of the Federal Constitutional Court: BVerfGE 61, 149, 198.

1.3 Tortious liability

1.3.1 General rules

The German law of torts as codified in the Civil Code (BGB) consists of three general clauses, specifically regulated torts, and rules for vicarious liability. Strict liability rules are considered to be exceptional and are provided for by special statutes (for ex. traffic laws). The first general clause enumerates the interests to be protected; it is the “absolute” rights of the individual (which the legal system protects *erga omnes*) that are explicitly brought under the headings of “life, body, health, freedom, property or any other right” (§ 823 I BGB). The courts have brought under the heading of “other right” interests which are valid against all persons (not contractual rights) such as patent rights, trade rights, servitudes, the legal interest of the owner of an established and active business in that business as a going concern, and the general right to personality which grants protection against unauthorized interventions in a person’s private life and other attacks against her/his personality.²² The development of the right to personality could be based on the Bonn Constitution of 1949 (Grundgesetz, GG) that declares the inviolability of the dignity of man (Article 1 GG) and guarantees the individual’s right to the free development of her personality in so far as she does not violate the rights of others or offend against the constitutional order or the moral code. The second general clause of the German law of torts deals with the infringement of laws intended for the protection of others (§ 823 II BGB), and the third concerns intentionally caused damage to another in a manner *contra bonos mores* (§ 826 BGB).²³

²² LG Berlin, judgment, 02.12.2009, 23 O 68/09, in: NVwZ 2010, 851-856.

²³ Gert Brüggemeier, From Individual Tort for Civil Servants to Quasi-Strict Liability of the State: Governmental or State Liability in Germany, in: Duncan Fairgrieve/Mads Andenas/John Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective*, BIICL 2002, 571, 571-573. On a comparative analysis of the German approach to tort law on the basis of German case law translated into English see: Walter van Gerven/Jeremy Lever/Pierre Larouche (eds), *Tort Law. Ius Commune Casebooks for the Common Law of Europe*, Hart Publishing, Oxford and Portland, Oregon, 2000, 63-68.

Apart from the general clauses of tort the German Civil Code entails provisions for certain specific tort situations: endangering the credit of another person (§ 824 BGB), liability for inducing others to sexual acts (§ 825 BGB), liability for damage done by animals (§§ 833-834 BGB), liability for damage done by buildings (§§ 836-838 BGB), and a provision dealing with liability for breaches of official duties by civil servants (§ 839 BGB). This provision has recently been complemented by the liability for culpable conduct of court-appointed experts (§ 839a BGB).

1.3.2 Tortious liability of public officials and authorities pursuing ordinary private law activities

When public authorities act under private law (in a so called fiscal matter, or in solely financial or private relationships, not in a public function) the general rules of private law govern their liability. They can be sued for the enforcement of private contracts, for damages for failure to perform and for damages for tortious acts before the ordinary courts in the usual forms of civil procedure. In the event that the civil servants pursue ordinary private law activities, they will be held personally liable under § 839 I 1 BGB. Art. 34 GG will not apply: there will be neither extensive interpretation of the concept of “official” nor any exculpatory shift of liability onto the State (*see below 1.4.1*). Nevertheless, the civil servant will be able to avoid his personal liability if she/he can invoke the vicarious liability of the public authority as an alternative source of compensation for the aggrieved party on the basis of § 839 I 2 BGB. Other public employees (not civil servants) are liable according to the tort provisions applying to private persons. Where civil servants and public employees pursue ordinary private law activities public authorities are held vicariously liable for their civil servants and employees for torts of organs in accordance with § 831 BGB (dealing with liability for vicarious agents as long as there is an employer’s own fault in selecting or supervising the employee) or in accordance with § 31 BGB (dealing with

liability of an association for organs), and § 89 BGB (dealing with the application of § 31 BGB to the treasury and to corporations, foundations and institutions under public law).²⁴

1.3.3 Tortious liability of public officials in case of breach of official duty (§ 839 BGB)

§ 839 BGB is the main provision on liability for unlawful and culpable conduct of public officials. In cases where § 839 BGB is applicable the general rules of tort (§§ 823, 826 BGB) do not apply. § 839 BGB imposes a personal liability to compensate on an “official” who intentionally or negligently violates an official duty and, hence, has to compensate for any damage, and not only for the infringement of the rights named in § 823 or for certain enumerated interests. This special liability is incurred only by “officials” having the status of “civil servants” in the narrow sense. In German administrative law the term “public servant” is used as a generic concept to include “civil servants” (*Beamte*) as well as “public employees” (*Angestellte*) and “public workers” (*Arbeiter*). Historically (during the 18th century) the relation between the public official and the public authority was perceived of through the lenses of a private law contract on mandate based on categories of Roman law. According to this perception, if an official acted illegally, those unlawful acts were *acta contra mandatum*, and as such, they were not attributable to the public authority. They were seen as simple torts committed by a private tortfeasor. Beyond the limits of the mandate the official became a private person that could be sued before the ordinary (civil) courts like every other private tortfeasor: *si excessit privatus est*. Despite all the criticism expressed throughout the 19th century against a legal thinking in terms of a private law mandate contract the idea of a purely private liability of the public official exceeding the limits of his powers is still to a certain extent reflected in § 839 BGB. The codification of private law that entered into force in 1900 did not change the private law

²⁴ Wolfgang Rübner, Basic Elements of German Law on State Liability, in: John Bell/Anthony W. Bradley (eds), *Governmental Liability: A Comparative Study*, UKNCCL-BIICL, Bell and Bain Glasgow 1991, 249, 271-272; Brüggemeier in: Fairgrieve/ Andenas/ Bell, 571, 574.

tort liability of civil servants into some form of liability of the State itself. According to the wording of § 839 BGB the liability claim is directed against the official personally. A regulation on the liability of the State itself was introduced later on with the Weimar Constitution of 1919 which provided in Article 131 for a transfer of liability from the individual official to the State employing the official as its agent. Article 34 of the Basic Law (GG) has adopted this provision with minor changes.²⁵

1.4 Liability for unlawful and culpable conduct in the exercise of public authority according to § 839 BGB in conjunction with Article 34 GG.

1.4.1 Transfer of the personal liability of the public servant onto the public authority

The combination of § 839 BGB with Article 34 GG creates a cause of action for an indirect State liability claim. It presupposes that the prerequisites for a personal liability of the official according to § 839 BGB are met. Pursuant to Article 34 GG the State can be held liable for the wrongs (violations of official obligations) done to the citizens by “any person, in the exercise of a public office entrusted to him”. The State takes over the individual liability of the agent found under § 839 BGB exempting the agent from her/his personal liability. The individual agent as debtor is replaced by the State. The transfer is aimed to provide an efficient judicial protection for the aggrieved party who was often unable to gain compensation from the personally liable officials. Another rationale was that potential personal liability of the civil servants might make them act cautiously. To make sure that officials would not misuse the immunity granted to them from personal liability, Article 34 GG reserves a right of recourse against him on the part of the State to recover damages in case the breach of duty was willful or grossly negligent. Furthermore, Article

²⁵ See on the historical development: Horst Gehre, Die Entwicklung der Amtshaftung in Deutschland seit dem 19. Jahrhundert, Bonn 1958; see also: Stefan Oeter, The Responsibility of the State as Legislator in Germany, in: Eibe Riedel (ed.), German Reports on Public Law, Nomos, Baden-Baden 1998, 103, 104-106.

34 GG extends the meaning of “official” so broadly so as to include any person who is entrusted with a public office or certain public function (*Beliehene*), may he/she be a public servant, a member of an executive or legislative body at federal, regional or municipal level, and a private person or an enterprise²⁶ entrusted in a specific case with public authority. This can include for ex. a schoolchild who has been asked by the teacher to help with supervision or is assisting in physical education classes. Public bodies should not be allowed to escape liability by handing over public law duties to private persons. Even parliament is deemed to act as a “public official” within the meaning Article 34 GG.²⁷

Tort liability for judicial acts is expressly regulated in § 839 II BGB. If judges breach their official duties in a judgment in a legal matter, then they are only responsible for any damage arising from this if the breach of duty consists in a criminal offence. This provision is not applicable to refusal or delay that is in breach of duty in exercising a public function. Tort liability for legislative wrong is not expressly regulated. The key question is how the Courts interpret the prerequisite in § 839 I BGB requiring the violation of an official duty to a third party by an officer, i.e. whether the members of Parliament owe an obligation to eventually aggrieved and individualized citizens and not to the public at large when they participate in legislating.

1.4.2 Fault

The concept of fault (willful or negligent breach of official duty) is understood as an objective standard of care with regard to particular types of behavior of a reasonable

²⁶ On the breach of duty on the part of a private enterprise tearing down a shaky old building that was becoming dangerous see OLG Koblenz, judgment, 05.05.2010, 1 U 679/09, in: DVBl 2011, 60.

²⁷ Manfred Baldus/Bernd Crzeszick/Sigrid Wienhues, *Das Recht der öffentlichen Ersatzleistungen*, C.F.Müller, Heidelberg, 3d Edition, 2009, paras 101-115; Ralph-Andreas Surma, *A Comparative Study of the English and German Judicial Approach to the Liability of Public Bodies in Negligence*, in: Fairgrieve/Andenas/Bell (eds), *Tort Liability*, 2002, 366-368.

public servant in the exercise of a public office entrusted to him. This concept comes very close to the notion of strict liability. There is a dominant trend from individual fault towards “organizational” fault.²⁸ No evidence of an identifiable public servant within the public authority’s hierarchy having committed a wrongful act is necessary.²⁹

1.4.3 Breach of official duty owed towards the aggrieved party

As to the breach of “official duty” provided for by the wording of § 839 BGB, the courts ask the question whether the legal rules governing the activity of the public authority and its relationship to the aggrieved party have been breached. The damage must occur in the fulfillment, not merely incidentally during the performance of the official duty. Article 20 III GG establishes the main general duty incumbent upon public officials: they are bound by law and justice; they have to act lawfully and to exercise their discretion in a lawful manner. The case law has created a whole host of official duties that derive from all kinds of legal rules.³⁰ A discretionary decision may be reviewed by a court in a public wrong case and trigger liability for not plausible exercise of discretionary powers.³¹ This refers to the question whether the aggrieved party suffered a loss because of an erroneous use or no use at all of the public authority’s discretionary powers, or because the exercise of discretion took forms that are not in accordance with the purpose of the respective legal rule that grants the authority discretionary powers.

²⁸ See for an objective fault during a fire brigade rescue operation: Oberlandesgericht (OLG) Hamm, judgment, 28.05.2010, I-11 U 304/0911 U 304/09 para 36.

²⁹ Ossenbühl, Staatshaftungsrecht, 1998, 72-76.

³⁰ Ossenbühl, Staatshaftungsrecht, 1998, 41-50.

³¹ For interesting comparative insights with German case law in English translation see: B.s. Markesinis, J.-B. Auby, D. Coester-Waltjen, S. F. Deakin, Tortious Liability of Statutory Bodies, A Comparative and Economic Analysis of Five English Cases, Oxford & Portland (Oregon), Hart Publishing, 1999.

1.4.3.1 Protection of the claimant or of the public at large

The official duty must be owed to a third party.³² This is the so called theory of the protective norm “*Schutznormtheorie*” which consists in a tripartite test: The object of the duty and the intent of the legal provisions that regulate that duty must be to safeguard not only the interests of the public at large, but must at least also protect the plaintiff or a class to which she/he belongs. The plaintiff must be a member of the class of people protected by the duty and the harm must fall within the scope of the duty. In the field of banking supervision and regulation the legislator excluded any liability of the supervisory authority by specifying that banking supervision is only performed in the public interest at large. This has been accepted by both the BGH and the ECJ.³³ The official duty to supervise banking activities is, hence, not owed to each individual bank account owner, thus excluding the liability of the authority for wrongfully performed supervision.³⁴ A duty towards the plaintiff deems to exist when the latter has a right to claim performance of that duty, when the public authority and the plaintiff have entered into a specific relationship (for example State school and pupil relationship), where the public authority interferes with absolute rights of the plaintiff, or when the legal rule imposing the duty on the public authority aims at the protection of the type of legal interest that is affected. Finally, legal duties incumbent upon the legislator are owed to the public at large. Only special case laws which are an exceptional type of legislation (Maßnahme- or Einzelfallgesetze) may establish a duty

³² BGHZ, judgment 16.09.2010, III ZR 29/10, in: NVwZ 2011, 249-251.

³³ Ossenbühl, Staatshaftungsrecht, 1998, 57-69.

³⁴ Section 4 (4) of the Act Establishing the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – Bafin*) reads: “The Supervisory Authority performs its functions and exercises its powers exclusively in the public interest”. BGH, 20.01.2005 - III ZR 48/01, BGHZ 162, 49; ECJ 12 October 2004 C-222/02 Peter Paul [2004] ECR I-09425.

aimed at protecting certain individuals and trigger a damages claim. Another exception is recognized for a breach of EU-law by the German legislator.³⁵

1.4.3.2 Breach of international law

Violations of international law could also constitute a breach of duty owed to a third party. A distinction is drawn between contemporary cases and infraction of humanitarian law during the Second World War. The solutions are different depending on whether the cases arose before or after the Basic Law entered into force. Claims for damages can be brought by persons injured by the German armed forces when the latter violate international law in the course of their deployment outside Germany's borders and this violation constitutes a breach of duty in the sense of § 389 BGB in connection with Article 34 GG.³⁶ In the *Distomo* case, however, the federal highest civil court (BGH) excluded State liability for illegal acts of sovereign power (of the German military forces committed on foreign soil) that were covered by the principle of sovereign immunity.³⁷ The case was decided on the grounds of the law as it was in 1944: In wartime the application of national State liability law was suspended and replaced by the special regime of the laws of war; individuals were not directly protected by international law, but mediated by their home State. In the same case, the BVerfG came to the conclusion that liability was

³⁵ BGHZ 134, 30-41, 24. 10.1996, III ZR 127/91, NJW 1997, 123.

³⁶ Niclas von Woedtke, Die Verantwortlichkeit Deutschlands für seine Streitkräfte im Auslandseinsatz und die sich daraus ergebenden Schadensersatzansprüche von Einzelpersonen als Opfer deutscher Militärhandlungen, Duncker & Humblot, Berlin 2010; Stefanie Schmah, Amtshaftung für Kriegsschäden, in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 66 (2006), 699, 709; Elke Schwager, The Right to Compensation for Victims of an Armed Conflict, in: Chinese Journal of International Law 4 (2005), 417, 433.

³⁷ On jurisdictional immunities of the State in the *Distomo* case see International Court of Justice, 4 July 2011, *Germany v. Italy*; the Court granted Greece permission to intervene in the proceedings as a non-party (15 July 2011). Italian courts had declared Greek judgments based on violation of international humanitarian law by the German occupation forces during World War II enforceable in Italy.

excluded under domestic law anyway by virtue of Section 7 of the Imperial Law on the Liability for Civil Servants. This norm provided that with regard to foreigners the State assumed liability only if reciprocity of liability was secured, something Greece guaranteed only in 1957. The BVerfG concluded that only the liability of the State was excluded, not that of its officials. The Court qualified the “events in Distomo” not as a “typically National Socialist injustice” but as “a general, albeit hard misfortune of war (that is) inherent with violations of international law”, and more particularly, as an illicit excess of “retribution measures against civilians uninvolved with military operations”³⁸. The Court found that such “retribution measures were according to the legal understanding of the time often contrary to international law as to their nature and extent, however, they were considered also by the Allies during the Second World War to be permissible in principle.”³⁹ In contrast with the application of the liability for culpable conduct, the Court held that the rules relating to State liability for unlawful conduct not based on fault cannot be applied to acts of the German military forces during an armed conflict because they are meant to cover only day-to-day administrative activities. In the *Varvarin Bridge* case the Higher Regional Court of Cologne held that the State liability law had developed since the Second World War and could now be considered as applying both in times of peace as war.⁴⁰ The BGH denied, however, compensation to the victims of the NATO attack on the bridge of Varvarin holding that neither international humanitarian law nor any official duty was culpably breached by the German soldiers.

³⁸ BVerfG, 2 BvR 1476/03 vom 15.2.2006, Absatz-Nr. (1 - 33), para 30
http://www.bverfg.de/entscheidungen/rk20060215_2bvr147603.html

³⁹ The court quotes here (para 26) Oeter, in: Fleck (ed.), *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten*, 1994, Nr. 479.

⁴⁰ Stefanie Schmahl, *Amtshaftung für Kriegsschäden*, ZaöRV 66 (2006), 699-718; Markus Rau, *State Liability for Violations of International Humanitarian Law - The Distomo Case Before the German Federal Constitutional Court*, German Law Journal 2005, 701-720, 708.

1.4.4 Causation

The first stage of the causation inquiry consists in establishing a link between the tortfeasor's conduct and the injury of the plaintiff. The conduct of the defendant is "assumed away" or "eliminated in thought" from the sequence of events in order to see whether the same result would then have occurred. In a further step a probabilistic criterion is introduced that excludes all consequences which lie outside the sphere of influence and risk of the defendant (adequacy theory)⁴¹ and focuses on the general suitability of the event to lead in all fairness and reasonableness to the occurrence of the damage. Additionally, the damage must come within the scope of protection of the rules and duties which have been breached (*Schutzzweck*). All in all the assessment of causation is based on the respective "spheres of risk" of the parties. Public authorities are not liable for injuries that represent the realization of a risk that springs from the plaintiff's sphere of influence which therefore entails among others the general risk associated with existence in modern society.

Public authorities can successfully defend themselves against the damages claim by showing that the damage would have occurred in any case whether or not a breach of duty could be established. However, there are two limitations⁴² of this defense of alternative lawful conduct which denies a sufficient causal link between the public authority's unlawful conduct and a damage that would also have occurred, had the authority acted lawfully. The first restriction regards the violation of rules that are designed to protect human rights, such as major procedural rules based on the constitutional protection guaranteed in Article 2 GG (right to self-fulfillment) and article 104 GG (liberty may be restricted only pursuant to a formal law) of the Basic Law, and therefore of such importance that their violation is sufficient in itself to lead to the liability of the public

⁴¹ Ossenbühl, Staatshaftungsrecht, 1998, 70-72.

⁴² Martina Künnecke, Tradition and Change in Administrative Law. An Anglo-German Comparison, Springer, Berlin Heidelberg 2007, 206, 236-238, 240.

authorities. The other restriction to the defense of “alternative lawful conduct” applies to cases in which the public authority had discretion in exercising its powers: The establishment of a causal link will fail unless it can be shown that the authority was under a duty to perform its discretion in a particular way and this exercise would have avoided the damage occurred.⁴³

1.4.5 Alternative remedies

Pursuant to § 839 I 2 BGB, i.e. in the area of tortious liability for breach of official duty, if solely negligence is attributable to the official she/he may be held liable only if the aggrieved party is unable to obtain compensation from another source. The claimant often overlooks the fact that she/he carries the burden of arguing and proving that there is no alternative way of recovering her/his losses.⁴⁴ However, the courts consider this rule out of date because officials and public authorities should not conceal their liability behind the liability of private individuals. This holds true in cases where officials are in the same position as private persons, as for example in their daily activities: they are subject to a duty to take care just like any private person. When the official’s activity creates a source of risk in the same way as any other private person’s activity, this will give rise to a duty of care; the official will be held liable to the same extent and in the same way as private persons in the same situation. The official will have to take the same type of necessary precautions like a private person acting in the same situation to protect others against this risk (*Verkehrssicherungspflichten*).⁴⁵ While using the road officials are held liable according to

⁴³ Baldus/ Crzeszick/ Wienhues, Das Recht der öffentlichen Ersatzleistungen, 2009, paras 152-157.

⁴⁴ Brandenburgisches OVG 2. Zivilsenat, 16.01.2007, 2 U 24/06 para 36, in: Landes und Kommunalverwaltung (LKV) 2008, 190-192.

⁴⁵ VG Aachen 6. Kammer, 05.01.2011, 6 L 539/10 (Winter road maintenance services, violation of a duty to maintain and ensure safety); LG Heidelberg, judgment, 5 O 85/10, 06.10.2010 duty of care towards adult persons using a kids-tube-slide.

the same rules as other road users. Moreover, § 839 I 2 BGB will not apply to social security and private insurance payments. Those payments are not considered as an alternative redress from another source excluding the liability of officials. This is because the social security system should not bear the costs of a culpable breach of public duty. With regard to private insurance the insurer pays the policy holder a sum of money upon the occurrence of a specific event in exchange for periodic payment from the insured. These payments should not therefore be to the advantage of the tortfeasor, and they should not prevent the aggrieved party from obtaining redress from the public authority that has acted in a deficient manner.⁴⁶

1.4.6 Contributory negligence

Where fault on the part of the injured citizen contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid, both depend on the circumstances, and in particular to what extent the damage is caused mainly by one or the other party. Pursuant to § 254 II BGB this also applies if the fault of the injured person is limited to failing to draw the attention of the public authority to the danger of unusually extensive damage, where the public authority neither was nor ought to have been aware of the danger, or to failing to avert or reduce the damage. Contributory negligence regularly brings about only a reduction – not an entire exclusion - of the liability claim equivalent to the responsibility share.⁴⁷ Contributory negligence makes, in particular, a balance of interests possible between the protection of confidence for individual and collective investment on the one hand and contributive fault in cases where unlawfully granted planning permissions are challenged by a third party, on the other

⁴⁶ Reinert, § 839 BGB in: Bamberger/Roth (eds), Beck'scher Online-Kommentar BGB C.H.Beck München 01.03.2011, paras 88-94.

⁴⁷ Ossenbühl, Staatshaftung, 1998, 88-91.

(*Vertrauensschutz und mitwirkendes Verschulden*).⁴⁸ The injured party is (pursuant to § 254 II BGB in conjunction with § 278 BGB) also responsible for fault on the part of her/his legal representative, and of persons whom she/he uses to perform her/his obligation, to the same extent as for fault on her/his own part (for ex. lawyers, architects).⁴⁹

1.5 Liability of public authorities for property damage and impairment of life, health and freedom not based on fault

1.5.1 Liability for lawful conduct: Compensation for breach of equality before public charges

According to the case law of the BGH, when lawful administrative measures affect property interests or personal interests of the citizens the latter are entitled to adequate compensation for the loss they have sustained. They have to show, however, that they were subjected to a special burden through lawful measures taken for the greater common good. Public authority's action sacrifices individual's particular legal interests for the benefit of the general public. The legal basis of this claim is to be found in the principles developed in the case law on the ground of the broad idea of sacrifice for the common weal (*Aufopferung, Sonderopfer*) which had been codified already in §§ 74, 75 of the introduction of *the General Prussian Land Law (Allgemeines Landrecht für die Preußischen Staaten)* of 1794. Compensation for compulsory purchase (expropriation) is simply one version of this general principle which is not limited to infringements of ownership and other property rights but was extended through the case law of the Highest Civil Court (BGH) to the sacrifice of personal immaterial goods (*Aufopferung* in the narrow sense). This explains why the term compensation for "expropriatory measures"

⁴⁸ BGH 149, 50 (55).

⁴⁹ BGH 7. Zivilsenat, judgment 10.02.2011, VII ZR 8/10, para 46, 47.

(*Entschädigung für enteignende Eingriffe*) was used to name the cause of action for lawful encroachments upon property rights.⁵⁰

Compensation for injuries involving property rights is granted when the legal interests and rights affected by the State measures are covered by article 14 (1) GG. This constitutional concept of ownership protects not only ownership, but also other real rights, as well as established and active businesses (*Recht am Gewerbebetrieb*), entitlements under public law and even debt securities (*Forderungsrechte*); chances and expectancies are not protected. Interference with these property rights must exceed the permissible general limits imposed by article 14 II GG on ownership within the relative social context (*Sozialgebundenheit*: “*Property imposes duties. Its use should also serve the public weal*”). In cases of loss in immaterial goods compensation is granted if the legal interests and rights affected by the administrative conduct are covered by article 2 II GG (life, health, bodily integrity, freedom of movement). The broad idea of sacrifice for the sake of the general public is, hence, extended to the sacrifice of personal immaterial goods (*Aufopferung* in the narrow sense). The injury must affect the victim unequally when compared against others. Only those disadvantages which exceed what citizens can be expected to bear in everyday life in modern society (life’s ups and downs, life’s general risk, *allgemeines Lebensrisiko*) can trigger a compensation claim. The special burden on the aggrieved party must be required by the public authorities through compulsory measures and sustained in the public interest of society in general.

⁵⁰ Peter Axer, Article 14 GG, in: Epping/Hillgruber, Beck'scher Online-Kommentar GG, 01.07.2011, paras 138-139. Rübner, in Bell/Bradley, 259; For two BGH-cases in English translation (with notes) see Ius Commune Casebooks - Tort Law: <http://www.casebooks.eu/tortLaw/chapter3/>

1.5.2 Liability for unlawful impairment of property, life, health and freedom not based on fault

The Highest Civil Court (BGH) derived its case law on a cause of action for compensation based on lawful conduct from the principle of sacrifice (*Aufopferung*) in the broad sense. Compensation can be paid only if a special burden (*Sonderopfer*) exceeding the permissible general limits on ownership or life's usual ups and downs is imposed upon the plaintiff. However, in the case of unlawful but inculpable measures touching upon property interests or immaterial goods no special burden needs to be additionally and specifically proved by the plaintiff. In such cases the unlawfulness of the public authority's conduct itself constitutes a special sacrifice for the aggrieved party, since unlawful measures cannot count among the permissible expectations of conduct that everybody is bound to accept as part of life in society under the rule of law. Cases of unconstitutional legislative conduct are not covered by the case law on unlawful but inculpable interference with private property or personal interests. The argument to justify this liability claim was that, if compensation had to be paid for lawful encroachments upon property rights or health and physical integrity anyway, even more had it to be paid for unlawful ones.⁵¹ The BGH focused on a comparison with compensation for lawful infringements on property interests, i.e. for breach of equality before public charges which is the main characteristic of expropriation (*enteignender Eingriff*) and coined the term "quasi-expropriation" (*enteignungsgleicher Eingriff*) in the case of compensation paid for unlawful infringements on property rights without fault. The cause of action does not cover compensation for unlawful interference with occupational freedom (Article 12 GG).⁵² In the field of encroachments upon immaterial goods covered by article 2 II GG the case law does not distinguish terminologically between lawful and unlawful measures, but speaks generally

⁵¹ Rüfner, in Bell/Bradley (op.cit), p. 260.

⁵² For a discussion see Matthias Ruffert, Article 12 GG, in: Epping/Hillgruber (eds), Beck'scher Online-Kommentar GG, 01.07.2011, 31-32.

of sacrifice (*Aufopferung*) in the narrow sense, while the doctrine uses the term “sacrificial encroachment” (*Aufopferungsanspruch*) for lawful and “quasi-sacrificial encroachment” (*aufopferungsgleicher Eingriff*) for unlawful infringements on personal rights.

The public authority’s conduct must cause a damage or loss of property or health as an immediate result of the authority’s action (*Unmittelbarkeit*).⁵³ When a shop becomes inaccessible to the public because of street works, the shopkeeper is entitled to adequate compensation for the loss caused to him by the street works. With regard to compensation for the sacrifice of immaterial goods the case law involves death or injury caused by other prison inmates, injuries or death of an innocent bystander who is the unintended victim of shooting in the course of a police operation, injury from State vaccination programs, or injury of a person who has been paralyzed due to pharmaceutical treatment.

1.6 Liability for omissions

Liability for omissions is important because public authorities have numerous duties to supervise, control or regulate various kinds⁵⁴ of economic activities or even a positive obligation to protect certain constitutionally recognized institutions and certain legal interests of the citizens (for ex. duties of oversight and safety, such as protection from health-threatening dangers of new technology).⁵⁵ Liability can be a tool of supervising supervisors and regulators. However, not all protective duties correlate with corresponding individual rights. Public authorities cannot be held liable for failures to act not based on fault (mere omissions); only a “qualified omission” can engender liability, i.e. the

⁵³ Ossenbühl, *Staatshaftungsrecht*, 1998, 248-252.

⁵⁴ For example liability for culpable omission to adopt precautionary measures on the part of an insolvency court. Heinz Vallender, § 21, in: Uhlenbruck a.o (eds), *Insolvenzordnung*, Franz Vahlen München, 13. Edition, 2010, para 56.

⁵⁵ Robert Rebhahn, *Public Liability in Comparison – England, France, Germany*, in: Helmut Koziol a.o. (eds) *European Tort Law*, Springer Wien a.o. 2005, 68-93, 84-88.

aggrieved party must be entitled to claim the adoption of a specific measure (she/he must have a claim to the omitted conduct or benefit), for ex. the public authority refrains from deciding upon an application to issue a planning permission although the applicant fulfills all the requirements for getting that permission. Omissions based on fault may engender liability if there was a legal duty to act on the public authority's side and if this duty protects third parties. In this area damages claims for flawed controls of building activities or of banking and insurance markets have been discussed most. The State may not act as an insurer with standards of strict liability.⁵⁶

1.7 Damages and Compensation

German liability law draws a distinction between damages (*Schadensersatz*) and compensation (*Entschädigung*). Tortious liability of public authorities triggers liability in damages. General rules on nature and extent of damages of the Civil Law Code (§§ 249 BGB) apply. The defendant must restore the position that would exist if the circumstance obliging her/him to pay damages had not occurred. Damages comprise lost profits, i.e. profits that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken, could probably be expected (§ 252 BGB). In addition, damages for pain and suffering are awarded in personal injury cases, violation of the plaintiffs general right of personality, and deprivation of personal liberty. The types of damages that can be granted in an official breach of duty do not include payments in kind. This is due to the fact that the civil courts which have jurisdiction over public liability claims do not have authority to impose upon public administration a duty to undertake a particular public law act in order to rectify the harm suffered by the aggrieved party.⁵⁷

⁵⁶ This topic has been mainly discussed in connection with the liability for malfunction of technical equipment, for example traffic lights: Papier, Article 34 GG, in: Maunz/Dürig (eds), Grundgesetz 61. Ergänzungslieferung C.H.Beck München 2011, para 114.

⁵⁷ Ossenbühl, Staatshaftungsrecht, 1998, 110-111; Baldus/ Crzeszick/ Wienhues, Das Recht der öffentlichen Ersatzleistungen, 2009, para 95, 261.

Compensation is granted for lawful or unlawful measures not based on fault. It is calculated according to the rules governing compensation for expropriation. Compensation for affecting property rights is confined to making up the monetary damage which constitutes a special individual burden in contradiction to the principle of equality before public charges. Loss of chances or frustrated expectations of gaining future profits are not recovered. Compensation is also paid in cases of infringement on immaterial goods when the special sacrifice for the common good required by the aggrieved party results in consequential material loss.⁵⁸ Compensation for impairment of immaterial goods is awarded under reference to § 9 Federal War Victims Relief Act (*Bundesversorgungsgesetz, BVG*), according to which the following items are to be taken into account inter alia: the costs of treatment and physical training for disabled, nursing and care allowances, or survivorship annuity.⁵⁹

1.8 Judicial review and liability of public authorities

According to constitutional and administrative law doctrine, actions for damages are not on the same level as judicial review and actions for annulment which are considered as “primary” remedies of legal protection against unlawful conduct; rather, damages are seen as “secondary” protection, as remedies of last resort. Additionally, the relationship between judicial review and liability claims is also a question of division of labor between the administrative courts, the constitutional court and the civil courts. In practice, such a question can determine the outcome of the case: For example the questions as to what extent the liability court is bound to the decisions of the administrative courts or to the administrative decisions (acts) of public authorities that have become final and can no longer be challenged before the administrative courts because of missing the deadline for filing an action for annulment. Pursuant to § 839 III BGB the plaintiff has no right to

⁵⁸ Rűfner, in Bell/Bradley, p. 268.

⁵⁹ BGHZ 45, 46, (77); Baldus/ Crzeszick/ Wienhues, *Das Recht der ۆffentlichen Ersatzleistungen*, 2009, para 334.

choose between public law remedies, especially an action of annulment, and an action for damages. The aggrieved party must first seek redress before the administrative courts which have the authority to declare unlawful the administrative measure that caused the damage, i.e. an act that deals with an individual case (*Verwaltungsakt*), a by-law (*Satzung*) or an executive regulation (*Verordnung*). German legal system recognizes also full judicial review of legislative acts on the ground of constitutionality, but an unconstitutional parliamentary bill may only be brought before the constitutional court. Only a damage that cannot be averted by the use of those “primary” remedies against the wrongful, unlawful and/or unconstitutional act itself before the administrative courts (and finally by a constitutional complaint before the constitutional court) can trigger a civil damages claim. It is the civil courts, according to Article 34 sentence 3 GG that have jurisdiction over damages claims even if directed against wrongful parliamentary acts. If the damage is caused by the implementation of statutes, executive law-making or municipal by-laws (for ex. zoning and development plans) the aggrieved party has to take action against the implementation act before the administrative court in order to quash it. This principle on the pre-eminence of public law remedies is confirmed by of the BVerfG in its Gravel Mining (*Nassauskiesung*) decision⁶⁰ which developed the rule that unlawful encroachments upon property rights do not become lawful when the aggrieved party is granted compensation. There is no choice for the aggrieved party either to petition the administrative courts to invalidate the unlawful impairment of property interests itself or to bring a claim for compensation.⁶¹

⁶⁰ BVerfG 15 July 1981, BVerfGE 58, 300.

⁶¹ BGH 3. Zivilsenat, Judgment III ZR 37/10 10.02.2011, para 37, in: *Versicherungsrecht* (VersR) 2011, 796-80; Ossenbühl, *Staatshaftungsrecht*, 1998, pp. 78-86, 103-108.

1.9 Liability and the doctrinal system of fundamental rights

Fundamental rights are binding for the legislature, the executive and the judiciary as valid enforceable law. Human dignity is a key concept of the liberally democratic constitutional structure of Germany.⁶² It is considered protecting a human being's "right to have rights" (*Enders*) or a human being's "decision-making and planning ability" (*Gröschner*) or human existence "as an end in itself and for its own sake" (*Böckenförde*) within a context of plurality and dissent.⁶³ Public authorities have to refrain from interfering with citizens' rights⁶⁴ in a non-proportional manner, and unlawful administrative conduct can be challenged at court.⁶⁵ In the event that an unlawful administrative act has already been enforced, the citizen can require the public authority to remove the still existing consequences of that act (claim for nullifying the consequences, *Folgenbeseitigungsanspruch*): defamatory public statements must be withdrawn, disturbing

⁶² See for an example of tortious State liability for degrading detention conditions in prison BVerfG, 1BvR409/09 vom 22.2.2011, Absatz-Nr.(1-53), http://www.bverfg.de/entscheidungen/rk20110222_1bvr040909.html

⁶³ See the analysis of the relevant case law of the BVerfG by Christoph Enders, *Die Menschenwürde in der Verfassungsordnung: zur Dogmatik des Art. 1 GG*, Mohr Siebeck Tübingen 1997; Ernst-Wolfgang Böckenförde, *Blätter für deutsche und internationale Politik* 10 (2004), 1216-1227; idem, *Menschenwürde als normatives Prinzip*, *Juristenzeitung* 2003, 809; Rolf Gröschner, *Menschenwürde als Konstitutionsprinzip der Grundrechte*, in: A. Siegetsleitner/N. Knoepffler (ed.), *Menschenwürde im interkulturellen Dialog*, Freiburg/München 2005, 17.

⁶⁴ See on the significance of this negative obligation (and a corresponding claim of the citizen to have an infringement of her/his fundamental rights set aside by the State) for the liability of public authorities: Bernd Grzeszick, *Rechte und Ansprüche. Eine Rekonstruktion des Staatshaftungsrechts aus den subjektiven öffentlichen Rechten*, Mohr Siebeck, Tübingen 2002, and Christoph Enders, *Abwehr und Beseitigung rechtswidriger hoheitlicher Beeinträchtigungen*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, Volume III, 2009, 1063-1131; Wolfram Höfling,

⁶⁵ The general clause of § 40 of the Law on Administrative Courts (*Verwaltungsgerichtsordnung - VwGO*) provides for judicial review proceedings in all non-constitutional public law disputes.

effects of unlawful noise and vibration emissions and immissions by factories run under public law rules must stop. Additionally, a remedy of specific performance (*sozialrechtlicher Herstellunganspruch*) is available if public authorities acted unlawfully in the area of social security law by giving a citizen wrong advice or false information which caused her/him to miss out on a benefit from the State; the remedy enables the aggrieved person to make a claim for that benefit.⁶⁶ A damages claim can only be granted as a remedy of last option. However, infringement of fundamental rights cannot, per se, trigger liability. Despite an extensive discussion in scholarly literature about the introduction of a new liability cause of action for the violation of fundamental rights, the BVerfG takes the view that fundamental rights primarily create negative obligations for public authorities not to interfere with individual's sphere of freedom, and that, even though they also constitute an objective value system giving guidelines for lawful governmental conduct, and although they exceptionally create positive obligations for public authorities to promote individual freedom, they, nonetheless, do not engender *eo ipso* a positive obligation to pay damages in case of violation.⁶⁷

In State liability law fundamental rights play a key role in defining unlawfulness and damage. Any measure reducing the freedom (intrusion, impairment, interference *Eingriff*) covered by the scope of protection (*Schutzbereich*) of a fundamental right must be explicitly justified and based upon law (*verfassungsrechtliche Rechtfertigung*). These three elements are understood as cooperating components in interplay. A diminishment or impairment of the legal interests protected by article 14 I GG (ownership) and article 2 II GG (health, physical integrity, freedom of movement) can take place not only through final, direct and imperative legal measures (commands or prohibitions) but also through physical,

⁶⁶ Mahendra P. Singh, *German Administrative Law in Common Law Perspective*, Springer Berlin a.o. 2001, 267.

⁶⁷ This is consistent case law of the Federal Constitutional Court since BVerfGE 61 , 149 (198); see recently BVerfG, 1 BvR 1541/09 vom 26.2.2010, Absatz-Nr. (1 - 49), 23 http://www.bverfg.de/entscheidungen/rk20100226_1bvr154109.html

“factual” or mediated disadvantages.⁶⁸ This is important for two major case categories: The liability of public authorities for unintended damage caused through factual measures (public works), and the liability for false or incomplete information or (product) warnings. The interference with property rights or immaterial goods must not be intentionally directed against particular assets or goods. Accidental, unintended, unforeseeable damage caused by lawful or unlawful conduct of public authorities can be compensated, as long as immediacy (*see above 1.5.2*) of the damage and special sacrifice imposed upon the aggrieved party are established.

The recent cucumber "war" between Spain and Germany regarding E-coli outbreak shows the significance of public information policy and warnings. With regard to liability of public authorities for providing information the public interest in receiving reliable information in the areas of foodstuffs⁶⁹ industry, safety, and environmental or (mental) health⁷⁰ protection collides with the interests of the entrepreneur or producer of the goods in question who wants to avoid any revenue loss due to the information providing activity of the authorities. Such error-prone dissemination of information in crisis situations can be an intrusion into the scope of protection of fundamental rights. Any mistakes made in the diagnosis of risks and hazards could amount to a breach of the official duty to appropriately assess the situation and to pay close attention to both the suitability of form and the objectivity of content as well as to the possible distortion, misinterpretation and powerful impacts of a statement, recommendation or warning. A claim aimed at cancelling a warning

⁶⁸ On the extensions (Erweiterungen) of the concept of interference with fundamental rights see: Papier, GG Art. 14, in: Maunz/Dürig (eds), Grundgesetz 61. Ergänzungslieferung C.H.Beck München 2011, paras 688-691.

⁶⁹ Laura Schnall, Staatliche Information und Warnung, in: Rudolf Streinz (ed.) Lebensmittelrechts-Handbuch, C.H.Beck München, August 2010, paras 250-251.

⁷⁰ Susanne A. Wagner, V. Im Besonderen: Hinweise und Warnungen in: Rehmann/Wagner, Medizinproduktegesetz (MPG), C.H.Beck, 2. edition 2010, paras 17-20.

unlawfully upheld by the public authority is also available (*see above 1.9*).⁷¹ A causal link between the information and a drop in sales and lost profits must be established. A further liability risk is presented to public authorities by the rules implementing the European service directive that requires a national authority to act as the sole contact institution to a foreign entrepreneur and to operate as one-stop agency to foreign companies offering them advisory services.⁷² The official duties that are to be observed here are subjected to the same principles that apply to the liability of experts for correct and complete advice.

1.10 Special claims and provisions complementing the general State liability law

1.10.1 Liability for breach of quasi-contractual obligations and claims of restitution

The general rules on tortious and inculpable State liability are complemented by three types of causes of action based on quasi contractual obligations that are regulated in the German Civil Code (BGB) and adjusted to the needs of State liability law. The most important relevant provisions are: § 280 BGB (damages for breach of duty), § 688 BGB (typical contractual duties in safekeeping), § 677 BGB (Agency without authorization), and § 812 BGB (unjustified enrichment). Claims for damages for the culpable violation of contractual or quasi contractual duties (and especially of a duty of care, *Führsorge- und Obhutspflicht*) springing from special relationships under public law (*verwaltungsrechtliche Schuldverhältnisse*) can be granted in specific institutional settings, such as in civil service (*Beamtenverhältnis*), in search and seizure or in property securing procedures (*Verwahrung*),⁷³ and in the case of using public facilities and institutions, for example a

⁷¹ Grzeszick, BeckOK GG Art. 34, in: Epping/Hillgruber (eds), Beck'scher Online-Kommentar GG, Stand: 01.04.2011, paras 44.1.

⁷² On those information obligations see § 71c I of the Law on Administrative Proceedings (*Verwaltungsverfahrensgesetz, VwVfG*).

⁷³ Thüringer Oberlandesgericht 4. Zivilsenat, judgment 31.05.2011, 4 U 1012/10, para 27.

municipal sports hall (*Inanspruchnahme öffentlicher Einrichtungen*). It is disputed whether a duty of care also exists (on the part of the public authority) in State schools, prisons or army.⁷⁴ Another specific group of cases regards the claim for the reimbursement of expenses in the context of “agency without specific authorization” (*Geschäftsführung ohne Auftrag*) which is based on the application of §§ 677, 688 BGG with the necessary modifications. A private person who conducts a transaction for a public authority without being instructed by the authority or otherwise entitled towards the authority must conduct the business in such a way as the interests of the administration require in view of the real or presumed will of public administration. The business must be carried out in consideration and not in circumvention of administrative discretionary powers, structures of competencies and any applicable law. In both groups of cases the administrative courts have jurisdiction even in respect of claims for damages.⁷⁵ Finally, claims of restitution because of unjust enrichment are based on the principle of the lawfulness of public administration (Article 20 III GG). The conditions of the restitution claim are the same as in private law (§ 812 BGB). According to this principle of lawfulness public authorities are under a duty to revoke any transfer of assets that was performed without legal grounds at the expense of another person and to make restitution to him. This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur. Public authorities are liable to reverse the enrichment even if they have disposed of the enrichment, they have not obtained a substitute for it and they were in good faith at the time of disenrichment. Keeping the unjust enrichment is in no case compatible with the principle of the lawfulness of the administration.⁷⁶

⁷⁴ Martin Morlok, Retrospektive Kompensation der Folgen rechtswidrigen Hoheitshandelns, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds), *Grundlagen des Verwaltungsrechts*, Volume III, 2009, 1133, paras 93-102.

⁷⁵ Baldus/ Crzeszick/ Wienhues, *Das Recht der öffentlichen Ersatzleistungen*, 2009, para 241.

⁷⁶ Baldus/ Crzeszick/ Wienhues, *Das Recht der öffentlichen Ersatzleistungen*, 2009, para 512.

1.10.2. Specific legislation

The general rules on tortious and inculpable State liability are complemented by particular provisions. The legislation on State liability of the former East Germany that provided for a direct liability of the State for inculpable unlawful conduct irrespective of the nature and category of the legal interests affected is still valid in the form of Federal State law in the *Länder* of Brandenburg and Thuringia (Staatshaftungsgesetz DDR). In the *Land* Saxony-Anhalt (LSA) there is a specific statute (*Gesetz zur Regelung von Entschädigungsansprüchen im Land Sachsen-Anhalt*) which constitutes a legislative expression of the case law (*see above 1.5.2*) on State liability for unlawful property damage not based on fault (*enteignungsgleicher Eingriff*).

Moreover, particular provisions exist in police, environmental or social law. The legislator does not violate the standard of non-arbitrariness (principle of equality according to article 3 I GG) by not providing for compensation of all possible victims of State action, since the *Grundgesetz* does not prevent the legislator from distinguishing between different categories of victims and for opting not to compensate a specific category. The BVerfG has ruled out a violation of Article 3 GG for example in the *Distomo case*⁷⁷. Police law provisions establish the liability of police authorities for lawful or unlawful conduct not based on fault.⁷⁸ Persons or entities directly responsible for causing a danger to public safety and order or persons and entities that own or possess dangerous facilities or sites may not claim compensation for injuries or damage incurred while the police was taking appropriate measures against the dangerous situation they are responsible for. By contrast, compensation has to be paid (based on the principle of special sacrifice) when measures are taken against persons or entities that were not responsible for causing a dangerous situation.

⁷⁷BVerfG, 2BvR1476/03 vom 15.2.2006, para 30(1-33),
http://www.bverfg.de/entscheidungen/rk20060215_2bvr147603.html.

⁷⁸ BGHZ judgment 03.03.2011 III ZR 174/10, in: *Zeitschrift für Schadensrecht (ZfSch)* 2011, 376-378, para 13.

Special provisions in social law or specific compensation provisions for reasons of equity are of great importance. Such provisions are to be found for ex. in the Federal Epidemics Control Act, the Victims Compensation Act⁷⁹, the Federal Act on Pensions of Victims of War, the compensation for non-prevention of riot damages or personal injuries provided for in the Riot Damages Act or in the Personal Injuries Act. In cases of catastrophic damage German law does not provide a single remedy but follows a mixed approach which combines different sources of compensation. Catastrophes raise the question of tortious liability as well as of insurance benefits or of specific State aid for the victims.⁸⁰ Besides the federal government and the *Länder* have established specific institutions, agencies and measures whose task it is to protect the population against catastrophic risk.⁸¹

Compensation duties are also provided for in planning law when necessary precautionary measures are imposed upon project promoters and plant operators for the general good or to avoid detrimental effects on the rights of others; in the event that such precautions and provisos are impracticable or irreconcilable with the project the person affected may claim reasonable monetary compensation (§ 74 II 2, 3 VwVfG). A compensation has further to be paid for the withdrawal of an administrative individual act which gives rise to a right or an advantage but is contrary to law and does not provide for payment of money or for the making of a divisible material contribution. The authority has

⁷⁹ On the scope of § 1 II Gesetz über die Entschädigung für Opfer von Gewalttaten (OEG) see: Landessozialgericht für das Land Nordrhein-Westfalen 10. Senat, decision, L 10 (6) B 8/09 VG, 22.02.2010, in: Gesundheitsrecht (GesR) 2010, 433-435.

⁸⁰ Ulrich Magnus, Germany, in: Michael Faure/Ton Hartlief (eds), Financial Compensation for Victims of Catastrophes: A Comparative Legal Approach, Springer, Vienna, 2006, 119-144, 120.

⁸¹ See for ex. the Civil Protection Act (Zivilschutzgesetz ZSG) Federal Journal for Statutes - (Bundesgesetzblatt BGBl. I 1997, p. 726 ff.) which defines the tasks of the civil Protection or the Federal Act on Civil Protection and Assistance in Catastrophes (Gesetz über den Zivilschutz und die Katastrophenhilfe des Bundes ZSKG) 29. July 2009 (Federal Journal of Statutes I p. 2350).

to make good upon application the disadvantage to the person affected deriving from her/his reliance on the existence of the act to the extent that her/his reliance deserves protection with regard to the public interest (§ 48 III VwVfG). Likewise, revocation of a lawful beneficial administrative act can engender compensation for reliance on the continued existence of the act (§ 49 VI VwVfG).

2. ACCOUNTABILITY

2.1 Rule of law and democratic principle

German administrative law is grounded in the principle of the rule of law and the democratic principle. According to the traditional view the accountability of the executive manifests itself through the hierarchical⁸² organization of the administration and a chain of legitimation which has its origin in Parliament.⁸³ The specific requirements posed by the democratic principle to legitimize the conferment of sovereign powers to the EU are also the starting point for the Lisbon judgment of the BVerfG.⁸⁴ At national level, the minister is accountable to the Parliament, and her/his subordinates are accountable to her/him through her/his right to give binding instructions to them. This is premised on the democratic principle in Article 20 II GG. However, self-government is not simply just another link in a

⁸² On accountability within the administration see: Stephanie Schiedermaier, Selbstkontrollen der Verwaltung, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), Grundlagen des Verwaltungsrechts, Volume 1, 2006, 541, paras 1-59.

⁸³ On parliamentary accountability of the executive in German law see Wolfgang Kalh, Begriff, Funktionen und Konzepte von Kontrolle, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), Grundlagen des Verwaltungsrechts, Volume 1, 2006, 427, paras 73-81.

⁸⁴ BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html; see on this topic Armin Steinbach, The Lisbon judgment of the German Federal Constitutional Court - New Guidance on the limits of European integration?, in: German Law Journal, Vol. 11 No. 04 ,2010, 367-390.

chain of hierarchy. Competent and neutral authorities that have their powers conferred upon them by an authority legitimized by Parliament fulfill their tasks abiding by the Parliamentary statutes. Both the decision makers and the content of their decisions must establish a link to the Parliament. Deficiencies on the one side may be compensated for by intensifying the other side as long as a sufficient level of democratic legitimacy on the whole is attained (*hinreichendes Legitimationsniveau*) which is judicially reviewable. In the case of independent agencies their independence from binding government instructions must be based on constitutional reasons, such as preventing politics from intruding into the freedom of broadcasting or from distorting administrative expertise in the field of environmental or scientific risk analysis.⁸⁵ With regard to full-fledged privatization (material or functional privatization) where public tasks⁸⁶ are delegated⁸⁷ to a private party, public administration is responsible for ensuring that the rights of consumers and recipients of privatized services will be acknowledged and the common good will be taken into consideration.⁸⁸ At any rate, if a private service provider should no longer be able of

⁸⁵ Eberhard Schmidt-Aßmann, Legitimacy and Accountability as a Basis for Administrative Organisation and Activity in Germany, in: Matthias Ruffert (ed.), Legitimacy in European Administrative Law: Reform and Reconstruction, Europa Law Publishing, Groningen 2011, 49, 51-55. Hans-Heinrich Trute, Regulierung – am Beispiel des Telekommunikationsrechts, in: Eberle/Ibler/Lorenz (eds), Der Wandel des Staates vor den Herausforderungen der Gegenwart. Festschrift für Winfried Brohm, C.H.Beck, München, 2002, 328.

⁸⁶ See on this topic and relevant distinctions Susanne Baer, Verwaltungsaufgaben, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), Grundlagen des Verwaltungsrechts, Volume 1, 2006, 717, paras 10-23.

⁸⁷ See on delegation and externalization modi: Helmuth Schulze-Fielitz, Grundmodi der Aufgabenwahrnehmung, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), Grundlagen des Verwaltungsrechts, Volume 1, 2006, 761, paras 91-118.

⁸⁸ Trute, Die demokratische Legitimation der Verwaltung, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), Grundlagen des Verwaltungsrechts, Volume 1, 2006, 307, paras 7-14, 42-58, 60-75, 79.

fulfilling a task, the public sector still stands as some sort of “guarantor”.⁸⁹ This type of State responsibility is explicitly provided for in the Constitution in the area of telecommunications, postal, and railway services (Article 87 f GG). Pursuant to Article 33 IV GG the exercise of sovereign authority (*Ausübung hoheitlicher Befugnisse*) on a regular basis is to be entrusted, as a rule, to members of the public service who stand in a relationship of service and loyalty defined by public law. Tax collection or guard duty in penal institutions would be an “exercise of sovereign authority” in that sense.⁹⁰ In the event that a private law company dominated by the public administration is entrusted with the fulfillment of public tasks (formal or organizational privatization), the public authority is obliged to avail itself of private company law in order to secure sufficient influence on the decisions of the company (*Einwirkungspflicht*).

2.2 Federalism

2.2.1 Executive federalism and joint decision traps

The Federal Republic of Germany is a polycentric organization based on the strong organizational position of the *Länder*.⁹¹ It comprises the federal level and 16 States (*Länder*), including three city States. Distinctive feature of Germany’s federal system is the executive autonomy of the States. While legislation is exercised predominantly by the federation, administration is in the hands of the *Länder* and local authorities. The execution

⁸⁹ Andreas Voßkuhle, *Beteiligung Privater an der Wahrnehmung öffentlicher Aufgaben und staatliche Verantwortung*, in: *VVDStRL* 62 (2003), 266.

⁹⁰ Martin Burgi, *Privatisierung öffentlicher Aufgaben – Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf*, Gutachten für den 67. Deutschen Juristentag, volume 1, Beck 2008, 61, 62.

⁹¹ From a comparative point of view: Anna Gamper, A “Global Theory of Federalism”: The Nature and Challenges of a Federal State, in: *German law journal* 6 (2005), 1297-1318.

of federal laws falls in the purview of the *Länder*.⁹² Previously, Article 84 I of the Constitution (GG) required Federal Council's (*Bundesrat*) approval if a federal law included the establishment of an agency or administrative proceedings at the State level in the execution of a federal law. However, when the political majorities in the *Bundestag* and the *Bundesrat* differed, Article 84 I GG was used by the opposition to block the political agenda of the ruling parties, with recourse to the Mediation Committee between the two chambers, unsatisfactory compromises and increasing political entanglements (*Politikverflechtung*) being a frequent result.⁹³ In 2006 stage one of important federal reforms took place (*Föderalismusreform I*), aimed to distinguish clearly between the legislative powers of the federation (*Bund*) and the States (*Länder*).⁹⁴ The exclusive legislative powers of the federation were increased (Article 71 GG), items of previously "concurrent" legislation (*konkurrierende Gesetzgebung*) were delegated to the *Länder* (Article 74 GG), and federal framework legislation (*Rahmengesetzgebung*, Article 75 of the Constitution before the reform) was completely abolished, delegating legislative competencies either to the federal level or to the *Länder*. The reform was meant to enhance accountability, legitimacy and transparency. A major goal was to reduce the proportion of laws requiring *Bundesrat* consent. According to the newly reformulated Article 84 GG the federal government may still lay down administrative proceedings guiding implementation, but it also gets the possibility to couple these recommendations with the option for the

⁹² Philipp Dann, *Parlament im Exekutivföderalismus*, Berlin 2004.

⁹³ Peter M. Huber, *Deutschland in der Föderalismusfalle ?*, C. F. Müller, 2003; Christian Hillgruber, *German Federalism – An Outdated Relict?* in: *German Law Journal* 6 (2005), 1270; Arthur Gunlicks, *German Federalism and Recent Reform Efforts*, in: *German Law Journal* 6 (2005), 1283-1295; idem, *German Federalism Reform: Part One*, in: *German Law Journal* 8 (2007), 111-131.

⁹⁴ Fritz W. Scharpf, *Community, Diversity and Autonomy: The Challenges of Reforming German Federalism*, in: *German Politics*, 17(2008), 509 — 521; see Simone Burkhart/Philip Manow/Daniel Ziblatt, *A More Efficient and Accountable Federalism? An Analysis of the Consequences of Germany's 2006 Constitutional Reform*, in: Carolyn Moore/Wade Jacoby (eds), *German Federalism in Transition. Reforms in a Consensual State*, Routledge, London and New York, 2010, 16, 18-21.

States to adopt their own, divergent, administrative implementation of a specific federal law. The changes of Article 84 GG try to overcome the so called “joint decision trap” as they now free the federation of the need to obtain the consent of the *Länder* for its legislation by reducing the areas subject to joint policy-making, and at the same token they give the *Länder* a right to deviate from federal legislation, i.e. they give them more autonomy by extending their room for maneuver. A second major feature of the reform was the separation of spheres of jurisdiction between levels of government. In the area of “concurrent” legislative powers the *Länder* obtained the possibility of enacting deviating laws.⁹⁵

2.2.2 Financial federalism and budgetary constraints

A reform of public finance structures appeared to be equally necessary. A particular problem was for instance a practice according to which the federal government used to delegate with the consent of the *Länder* cost intensive responsibilities directly to local authorities without providing them sufficient funding. Stage two of the federal reforms in 2009 dealt with the implementation of new fiscal rules (*Föderalismusreform II*).⁹⁶ The reforms addressed especially a disentangling of public finance structures, the prevention and management of budgetary crises, debt management and tax autonomy for

⁹⁵ Peter M. Huber, *Föderalismusreform I – Versuch einer Bewertung*, in: Durner (ed.), *Reform an Haupt und Gliedern*, Symposium aus Anlass des 65. Geburtstag von H. J. Papier, 2009, S. 25; idem, *Entflechtung der Verwaltungskompetenzen als Leitidee der Föderalismusreform*, in: *Zeitschrift für Staats- und Europawissenschaften* 6 (2008), 255.

⁹⁶ Stefan Koriath, *Die neuen Schuldenregeln für Bund und Länder und das Jahr 2020*, in: Martin Junkernheinrich et. al., *Jahrbuch für öffentliche Finanzen 2009*, Berlin 2009, 389; Dietmar Braun, *Föderalismusreform II: Zur Reform der föderalstaatlichen Finanzverfassung/Reforming Fiscal Federalism, How to Make German Fiscal Federalism Self-enforcing: A Comparative Analysis*, in: *Zeitschrift für Staats- und Europawissenschaften* 5 (2007), 235-262.

the regions.⁹⁷ Central feature of the second phase of federal reforms was the introduction of a debt brake rule. Despite criticism (stressing that fiscal rules tend to be pro-cyclical), the German debt brake rule is a “second generation” budget balance rule designed to avoid the pro-cyclical effects of a more conventional budget balance rule. It includes an exit clause, and an absolute majority of the *Bundestag* can suspend it during emergency situations if it passes at the same time an amortization plan to repay the extra amount.⁹⁸ Within the context of the European sovereign debt crisis the *BVerfG* focuses on the judicial control of the observance of these constitutional rules, leaving it to politics to decide on the issue of economic governance in the Euro Zone.⁹⁹

⁹⁷ On German fiscal system providing insurance for State government budgets against asymmetric revenue shocks see: Ralf Hepp/Jürgen von Hagen, Fiscal Federalism in Germany: Stabilization and Redistribution Before and After Unification, in: Zentrum für Europäische Integrationsforschung Center for European Integration Studies Rheinische Friedrich-Wilhelms-Universität Bonn, Working Paper B 01, 2009, 1-30; On how fiscally strong and fiscally weak States respond to taxing autonomy at the State level see: Helmut Seitz, Minimum Standards, Fixed Costs and Taxing Autonomy of Subnational Governments, in: CESifo Working Paper No. 2341 CATEGORY 1: PUBLIC FINANCE, June 2008.

⁹⁸ Mark Hallerberg, The German Debt Brake in Comparative Perspective – When Do Fiscal Rules Succeed? In: Christian Kastrop/Gisela Meister-Scheufelen/Margaretha Sudhof (eds), Die neuen Schuldregeln im Grundgesetz, Berlin, 288, 293, 294-296; Eric Mayer/Nikolai Stähler, The debt brake: business cycle and welfare consequences of Germany’s new fiscal policy rule, in: Discussion Paper Series 1: Economic Studies No 24/2009, 1-51; on incentives for unsound State fiscal policy see: Alexander Fink/Thomas Stratmann, Institutionalized Bailouts and Fiscal Policy: The Consequences of Soft Budget Constraints in: CESifo Working Paper No. 2827, Category 1: Public Finance, October 2009.

⁹⁹ See the oral hearing (5.7.2011) before the *BVerfG* on the Greek bailout: <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-037>. For the scholarly discussion (mainly from a European law point of view or, also, combining European and German constitutional law) see: Hentschelmann, Finanzhilfen im Lichte der No Bailout-Klausel – Eigenverantwortung und Solidarität in der Währungsunion, *Europarecht (EuR)* 2011, 282; Seidel, Europarechtsverstöße und Verfassungsbruch im Doppelpack, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2011, 241; Polzin, Finanzhilfen für Griechenland: Verfassungsrechtliche Schranken?, *Die Öffentliche Verwaltung (DÖV)* 2011, 209; Sonder, Solidarität in der Währungsunion: Griechenland, Irland und kein Ende? *Zeitschrift für Rechtspolitik (ZRP)* 2011, 33; Herrmann, Griechische

Pursuant to § 7 Federal Budgetary Legislation (*Bundshaushaltsordnung* BHO) the principles of efficiency and economy impose an obligation to consider the extent to which public functions or economic activities serving public purposes may be performed by the private sector. Adequate economic feasibility and efficiency studies must be carried out for all measures taken that have an impact on matters affecting finances. Private-sector contractors must show to what extent they can perform the public tasks and economic activities conferred upon them equally well or better than the public sector. § 65 Federal Budgetary Legislation provides that the Federal Government may participate in a private-law enterprise only if the purpose intended by the Federation cannot be achieved in any better or more cost-effective way. German Courts of Auditors have recently found¹⁰⁰ that so called "alternative funding models" (*alternative Finanzierungsmittel*) such as contractual and institutionalized public private partnerships, leasing, factoring, Special Purpose Vehicles (*Projektfinanzierungsgesellschaften*) can be extensively used in order to circumvent budgetary constraints in so far as they constitute a liability structure that does not fall under the classical definition of budgetary debt (*haushaltsrechtlicher Kreditbegriff*).

2.3 Local Self-Government's double role

Given the German two-tier federal system, the local government level is, from a legal point of view, a constituent part of the *Länder*. On the one hand, local self-

Tragödie – der währungsverfassungsrechtliche Rahmen für die Rettung, den Austritt oder den Ausschluss von überschuldeten Staaten aus der Eurozone, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2010, 413.

¹⁰⁰ See the analysis and caveats by Holger Mühlenkamp, *Ökonomische Analyse von Public Private Partnerships (PPP) - PPP als Instrument zur Steigerung der Effizienz der Wahrnehmung öffentlicher Aufgaben oder als Weg zur Umgehung von Budgetbeschränkungen?* -, Speyer, Januar 2010; Claus Jürgen Diederichs, *Wirtschaftlichkeitsuntersuchungen bei PPP-Projekten*, in: *Neue Zeitschrift für Baurecht und Vergaberecht* 2009, 547-452; see also Christian Jahndorf, *Alternative Finanzierungsformen des Staates - Leasingmodelle, Liegenschaftsmodelle, Parklösungen: Verwaltungsschulden, Veräußerungserlöse oder Krediteinnahmen?* Zur Auslegung des Kreditbegriffs i.S. Art. 115 I GG, in: *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 2001, 620-626.

administration is not a separate order of government, it is deemed to be a form of “indirect State administration” (*mittelbare Selbstverwaltung*) serving to implement federal and Land laws. This is the area of delegated duties. Such delegations can leave to local authorities some degree of discretion as to the way of performing the delegated responsibilities (*Pflichtaufgaben ohne Weisungen*) or they can leave no autonomy at all (*Pflichtaufgaben nach Weisung*). On the other hand, local authorities have a constitutionally recognized general competence in the form of an institutional guarantee to regulate all local affairs on their own responsibility (they do so mostly by issuing municipal by-laws, *Satzungen*) within the limits prescribed by law (Article 28 II GG).¹⁰¹ That means that local authorities, due to their general competence, need not be empowered by a specific law to regulate an issue of local importance. A legal basis in a federal or *Land* statute is only required for by-laws that restrict property and individual freedom of citizens or the rights of enterprises. Article 28 II GG also means that federal and *Land* lawmakers are entitled to delineate the precise scope of local self-government as long as they preserve in principle a core sphere of autonomy and responsibilities of local authorities. Local authorities may invoke Article 28 II GG before the Federal Constitutional Court or the respective courts of the *Länder* to annul statutes violating the constitutional guarantee of local autonomy in a specific proceeding called “process for hearing the constitutional complaints of municipalities” (*Kommunalverfassungsbeschwerde*).¹⁰² They may defend their constitutional right to their own source of tax revenues¹⁰³ (*Finanzhoheit*), to charge fees for public services (*Gebühren*), to create new types of local excise taxes (*Steuererfindungsrecht*).¹⁰⁴

¹⁰¹ Martin Burgi, Federal Republic of Germany, in: Nico Steytler (ed.) *Local Government and Metropolitan Regions in Federal Systems*, McGill-Quenn’s University Press 2009, 137, 141, 143-146; idem, *Kommunalrecht*, 2 edition, C.H.Beck, München 2008.

¹⁰² Eberhard Schmidt-Aßmann/Hans Christian Röhl, *Kommunalrecht*, in: Schmidt-Aßmann (Hrsg.), *Besonderes Verwaltungsrecht*, 13. Aufl. 2005.

¹⁰³ German municipalities are subject to a system of vertical and horizontal fiscal transfers that partly explain a heavy reliance on business taxes: Thiess Buettner/Fédéric Holm-Hadulla, *Fiscal Equalization: The Case of*

The supervision by the State is restricted – with regard to local self-administration matters – to a control of legality (*Rechtsaufsicht*), whereas in the execution of State functions and delegated business local authorities are subject to technical and much tighter supervision by the state authorities (*Fachaufsicht*). In a variety of financial activities local authorities need the prior approval of specially assigned *Land* authorities. Consultancy and supervision failures can trigger the supervising authority’s liability. This liability risk has proven to be, at least since the Oderwitz-decision of the Highest Civil Federal Court (*Bundesgerichtshof*, BGH), a brake in the development of public private partnerships.¹⁰⁵ If local authorities’ budget is not balanced they have to prepare a spending cutting and budget consolidation plan that needs approval.¹⁰⁶ § 103 Municipal Code North-Rhine Westphalia describes the tasks of the local auditors, and § 104 of the same Code provides that the managing director of the local auditing committee must be free of influence of the chief executive officer or the chief financial officer. Taking up (additional) loans is only allowed if no other means of financing is possible and money will be used for investments or investment promotion measures. Prior approval of the supervising authority is also needed for using financial derivatives or engaging in leasing or public private partnerships

German Municipalities, in: Center for Economic Studies and the Ifo Institute for Economic Research, Munich, Journal for Institutional Comparisons 6 (2008), 16-20.

¹⁰⁴ Stefan Koriath, Finanzen, in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann/Andreas Voßkuhle (eds), Grundlagen des Verwaltungsrechts, volume III, C.H.Beck, München 2009, 83, paras 89-93.

¹⁰⁵ *BGH* judgment, Oderwitz, 12. 12. 2002 - III ZR 201/01. <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=e5ce96a333b24046dd3138a0f06581db&nr=24933&pos=0&anz=2>

¹⁰⁶ On liabilities structure and credit-related transactions of municipalities see for instance the following circular of North-Rhine Westphalia: Innenministerium Nordrhein-Westfalen, Kredite und Kreditähnliche Rechtsgeschäfte der Gemeinden MBl.NRW.2006 S. 505, geändert d. RdErl.v.4.9.2009 (MBl.NRW.2009 S. 428), 2009. PPPs and Leasing are considered to be particular credit-related transactions (at paras 5.2, and 5.3).

contracts. However, municipalities are considered as not capable of falling into bankruptcy from a legal point of view as they may not liquidate their assets.

2.3.1 Public services management

Traditionally, German municipalities used to offer a broad portfolio of services to the public. They used to own a single multi-utility company, the so called “city works” (*Stadtwerke*) which (vertically) integrated the various infrastructure services and had the opportunity to cross-subsidize loss-generating, deficit-ridden sectors (for example public transport) by more profitable segments such as energy.¹⁰⁷ Over the last two decades multifunctional local authorities have experienced - under the influence of lean government concept, New Public Management marketisation trend and EU-led market liberalization policies - a transformation of administrative units from the utilities sector and the social or cultural sector into self-standing corporations. Moreover, they have broadened cooperation with public and private partners. Conventional municipal service delivery has been in part replaced by a plurality of single-purpose outside providers selected by competitive tendering. Institutional options have been increased, and varied network structures emerged where public, non-profit and commercial organizations collaborate. As local government performs new roles as stimulator and coordinator new challenges arise for guaranteeing the effective steering and control capacities in such networks.

These developments are obvious in the different sectors of public utilities. The provision of social services was usually based on cooperation between local authorities and a certain type of non-profit organizations, so called free welfare associations (*Freie Wohlfahrtsverbände*). The latter date back to late nineteenth century charities and self-help organizations and reflect the principle of subsidiarity according to which social services ought to be provided by public authorities only if families and non-profit organizations

¹⁰⁷ Hellmut Wollmann/Gérard Marcou (eds), *The Provision of Public Services in Europe. Between State, Local Government and Market*, Edward Elgar UK, USA 2010, 12, 242, 248, 250, 252, 254, 256.

cannot cope. For the non-profit organizations privatization meant that they lost market shares to commercial providers becoming themselves more similar to their competitors.¹⁰⁸ After the introduction of long-term care insurance scheme (*Soziale Pflegeversicherung*) in 1994¹⁰⁹ long-term care insurance funds (*Pflegekassen*)¹¹⁰ have been made responsible for licensing service providers, whereas local authorities restricted themselves to a general responsibility of guaranteeing, albeit not providing the service themselves. The provision of gas and electricity was traditionally seen as a responsibility of the local authorities and as a part of the self-government's task of providing public services for the public good. Expectations of an efficient self-regulation by way of a "negotiated grid access" were disappointed. After that experience, the establishment of the Federal Network Agency (*Bundesnetzagentur*) and the introduction of a procedure for incentive regulation (*Anreizregulierung*) that allows the Agency to check and reduce¹¹¹ grid user fees by way of a benchmarking procedure oriented on the most effective and least expensive provider, exposed municipal corporations in distribution and supply sector to a new competitive context. However there is also a trend on the part of municipalities towards "recommunalization" by forming transmission grid operation companies (*Netzbetriebsgesellschaften*), establishing shared services, or setting up new power plants of

¹⁰⁸ Reinhard Wiesner, § 3 Freie und öffentliche Jugendhilfe, in: Wiesner (ed.) SGB VIII, 4th edition 2011, paras 19-20.

¹⁰⁹ Oliver Bechtler, § 4 Die gesetzliche Krankenversicherung und die Grundzüge der Pflegeversicherung, in: Michael Terbille, Münchener Anwaltshandbuch Medizinrecht 1.edition 2009, paras 71-74.

¹¹⁰ See the introductory and explanatory notes by Karl Peters, § 46 Pflegekassen, in: Stephan Leitherer (ed.) Kasseler Kommentar, Sozialversicherungsrecht, C.H.Beck München, 69. Ergänzungslieferung 2011.

¹¹¹ The BGH has now got the opportunity to rule on the application of the calculation methods provided for in the Ordinance On Incentive Regulation (*Anreizregulierungsverordnung*): Kartellsenat 28.6.2011, EnVR 34/10 <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=e7bcea3308a0dd38c9a1b05135b2bcd3&nr=56877&pos=0&anz=64>.

their own.¹¹² In the water sector privatization did not have any sweeping effects.¹¹³ Political control plays here a stronger role than in other sectors due to the specific features of the public good at stake (no optimal conditions for market competition and lack of political will to decouple water service management and water resource management). There has been a disputed partial privatization of water supply in Berlin. Details of agreements for the partial privatization of the Berlin Water Works (Berliner Wasserbetriebe, BWB) were disclosed after a referendum held in February 2011 in Berlin. The European Commission shall now (12 years after the partial privatization) examine to what extent the grantor takes part in the financing through minimum-revenue streams or other forms of guarantees, including compensation for short-falls, that might meet not only the definition of a financial guarantee contract but also that of an unlawful State aid measure.¹¹⁴ Privatization has been particularly strong in waste management.¹¹⁵ The 1994 Recycling Waste Management Act reassigned responsibilities in the sector. The private producer or owner of waste has been made responsible for ecologically acceptable recycling and disposal and municipalities' responsibility has been reduced to household waste.¹¹⁶

¹¹² Isabel Stirn, Speyerer Kommunalstage – Rekommunalisierung der Versorgungsaufgaben (7.-8. Oktober 2010), in: Zeitschrift Kommunaljurist (KommJur) 2011, 48.

¹¹³ Torsten Schmidt, Liberalisierung, Privatisierung und Regulierung der Wasserversorgung, in: Landes- und Kommunalverwaltung (LKV) 2008, 193.

¹¹⁴ Redaktion beck-aktuell, EU-Kommission überprüft umstrittene Teilprivatisierung der Berliner Wasserwerke, Verlag C.H. Beck, 21. Juli 2011.

¹¹⁵ For a review of developments since the 1994 Act and an outlook over implementation of upcoming EU law see: Gerhard Friedrich, EU erzwingt neues Kreislaufwirtschaftsgesetz Kommunen und Privatentsorger streiten sich um Abfälle, in: Zeitschrift für Rechtspolitik (ZRP) 2011, 108.

¹¹⁶ See for a description of public service management in Germany in English: Hellmut Wollmann/Gérard Marcou (eds), The Provision of Public Services in Europe, Edward Elgar UK, USA 2010, 12, 23, 25, 53, 59, 69, 103, 112, 152, 155, 169, 177-179, 196, 199, 213, 223, 228, 232, 233, 242, 246, 254.

2.3.2 Municipal enterprises and private law corporations

There is a wide range of institutional forms of service management that may be adopted by German municipalities.¹¹⁷ A scholarly classification of these forms encompasses direct management of service delivery (*Regiebetrieb*), public law semi-autonomous municipal enterprises (*Eigenbetriebe*) or institutions under public law (*Anstalt des öffentlichen Rechts*) that can be designed on a case by case basis with regard to powers, legal personality and public or private partners. Intermunicipal consortiums or special purpose associations (*Zweckverbände*) are associations of municipalities which are endowed with legal personality and constitutionally guaranteed by article 28 II GG. Increasing involvement of private corporate forms of organization enhanced the trend towards corporatization over the last few decades due to financial straits. Apart from private-law enterprises fully owned by municipalities (*Eigengesellschaften*), stock corporations (*Aktiengesellschaften, AG*) and limited companies (*Gesellschaften mit beschränkter Haftung, GmbH*) are widely used. In the case of public private partnerships mixed companies are formed when private partners are included among the shareholders of a limited or joint stock company. Various cooperation models have been developed, differing mainly with regard to ownership and control of the relative assets, service provision and residual value. In the operator model (*Betreibermodell*) for instance, the private partner agrees not only to build and finance an infrastructure project but also to run it for a certain period. Lease contracts, outsourcing of management and service concession arrangements finally also belong to the municipal variety pool. In 2005, the PPP Acceleration Act (*ÖPP-Beschleunigungsgesetz*) was adopted aimed at accelerating such

¹¹⁷ Werner Hoppe/Michael Uechtritz (ed.), *Handbuch Kommunale Unternehmen*, 2 edition, Verlag Dr. Otto Schmidt, Köln 2007; Helmut Cox, *Public Enterprises and Service Providers in Institutional Competition and Undergoing Structural Change. New challenges to the theory of public economics and public services in Germany*, *Annals of Public and Cooperative Economics* 79 (2008), 527; Dalia Omer, *Enterprise and Innovation and PPPs in Germany: Recent Developments*, in: *European Public Private Partnership Law Review* 3 (2010), 132; see further Silvia Bolgherini, *Local Government and Inter-Municipal Cooperation in Italy and Germany*, in: Alexander Grasse (ed.) *Politische Italien-Forschung, Occasional Papers*, No 12/2011, 1-64, <http://www.italienforschung.de>.

partnerships through partially abolishing the real estate transfer tax in (*Gründerwerbssteuer*) connection with PPP projects, and at allowing the participation of open property funds (*Offene Immobilienfonds*) in PPP.¹¹⁸

2.4 Methods of steering and control

Whatever the public service provision model (direct municipal management, municipal or commercial law corporation) the ultimate responsibility for service conditions and quality lies with local authorities that have to maintain some form of control over the service provision operations of the provider. Against this backdrop many municipalities have adopted at least selected elements of the New Steering Model which is the predominant model of administrative reform efforts in German local government since the 1990s.

2.4.1 Corporate governance and municipal holdings

The most widespread corporate type today is the limited company. It is attractive because it offers sufficient managerial freedom combined with flexible possibilities of influencing the governance structure, while German stock-company law protects the autonomy of the corporation and does not allow sufficient influence by the owning municipality. Municipalities ensure their influence by way of appointing directors of the service provider company, for ex. by the creation of a supervision board (*Aufsichtsrat*) in joint stock companies, where the municipality nominates at least a majority of members. Conflicts of goals and interests between the political activity of supervisory board members and their involvement in the economic control of private corporation and of service

¹¹⁸ On the impact of tax law reform (Zinsschranke § 4h EStG, § 8a KStG) on PPP : [BMF-Schreiben vom 4. Juli 2008 - IV C 7 - S 2742-a/07/10001](#)

providers must be resolved in the light of the fulfillment of public policy goals and not only of market led decisions and profit maximization.¹¹⁹

Large municipalities usually form municipal corporate groups. Transparency, accountability, and efficiency in this multi-actor institutional world do not emanate from contractual arrangements in a reflex manner. Rather, governance structures depend on the interplay of different sectors of law: the law on limited liability companies and stock corporations as well as municipal law on economic activity of municipalities. Therefore, municipalities reestablished on a new their organization adopting a holding model (*kommunaler Konzern*) burrowed (with adjustments) from the business sector and commercial law. The law on holdings becomes an administrative steering tool. Municipal Budget Codes (*Gemeindehaushaltsordnungen*) provide for some necessary adjustments of the commercial law rules to the particularities of municipal holdings.¹²⁰ However, the impact of international accounting standards on the commercial accounting law has brought about changes which are not followed by a parallel development of the municipal accounting rules.¹²¹ The degree of divergence between the two systems of rules depends on the question whether municipal codes make a “dynamic” reference to commercial law as

¹¹⁹ Thomas Mann, Steuernde Einflüsse der Kommunen in ihren Gesellschaften, in: Verwaltungsblätter für Baden-Württemberg, 2010, 7.

¹²⁰ For explanatory details see: Modellprojekt Neues Kommunales Finanzmanagement, Praxisleitfaden zur Aufstellung eines NKF-Gesamtabchlusses, 4. Auflage, Düsseldorf, September 2009.

¹²¹ Andreas Glöckner, "Modernising" commercial accounting law in Germany - effects on public sector accrual accounting? An analysis of the federal government legislation on the reform of the German Commercial Code, Deutsches Forschungsinstitut für öffentliche Verwaltung Speyer, Discussion Papers, 2009, 1-59; Alexander Reuter, Objekt- und Projektfinanzierungen zwischen Zurechnung und Konsolidierung nach HGB, IFRS und US-GAAP, in: Betriebs-Berater (BB) 61 (2006), 1322.

from time to time amended or, rather, a “static” reference to the law as it stood at a specific point of time.¹²²

2.4.2 Responsibility centers and accrual accounting

Another major reform and new steering instrument has been the introduction of new budgeting procedures marking a turning point from input-orientation to output- and outcome-based orientation and triggering a transition from cash accounting, the so called “*Kameralistik*”, to a resource-based accrual accounting system. With the use of activity-based budgeting and management, responsibility or “result centers” and catalogues of “products” have been introduced as new tools of output steering (*produktorientierte Steuerung*). These tools are aimed at making budget responsibilities identifiable and making cost monitoring and accounting control more efficient. However, not all municipalities that have defined such “products” use them to negotiate budgets or to really reorganize administrative processes.¹²³ The German accrual accounting system for public authorities is traced from the German commercial code, not from the International Public Sector Accounting Standards (IPSAS). Roughly speaking, in this area, “each federal State has reinvented the wheel for its own local level”.¹²⁴ There is an ongoing discussion of the relation between modernized cash accounting or German commercial accrual accounting on

¹²² For example, pursuant to § 49 Gemeindehaushaltsordnung of North-Rhine Westphalia the commercial code shall apply with the necessary modifications (*entsprechend*) as last amended by Act of 24 August 2002.

¹²³ Sabine Kuhlmann/Jörg Bogumil/Stefan Grohs, Evaluating administrative modernization in German local governments: success or failure of the ‘New Steering Model’?, in: Public Administration Review 68 (2008), 851.

¹²⁴ Ulf Papenfuß/Christina Schaefer, Public financial reporting in true and fair terms - discussion on shortfalls in Germany and recommendations for the reform agenda, in: International Review of Administrative Sciences 75 (2009), 715, 722.

the one hand and the impact of IPSAS on the other.¹²⁵ The new accounting system is of great importance for financial reporting in the area of municipal holdings, public spending, leasing and public private partnerships. For instance, the ownership of the underlying asset in a PPP-Project is established according to criteria that are not premised on the legal provisions relating to ownership but on economic or beneficial ownership. Pursuant to § 39 German Tax Code (*Abgabenordnung*, AO) an economic owner is the owner who exercises absolute rights over an investment good for the total useful economic life in such a way that he/she can, as a rule, economically exclude the civil law owner from affecting the economic good during the normal period of its useful life. In such a case the economic good is attributable to the economic owner who is responsible for the accounting and can be a different owner than the owner according to civil law. Economic ownership is the criterion used to decide whether the underlying asset in PPPs represents a State asset or an asset from the private partner. For the fiscal handling of leasing the German Finance Ministry has issued leasing decrees that stipulate who is the economic owner of the leasing object at which point in time of a lease agreement. Economic ownership is a concept that comes close to the notion of "control" within the meaning of the IPSAS Exposure Draft 43 (2010) on Service Concession Arrangements. Likewise, International Financial Reporting Standards (IFRS) rule 12 (IFRIC 12) requires the private sector reporting of PPP assets on the basis of a "control" test whereas the statistical treatment of PPPs as required by the Eurostat for measuring the impact of PPPs on government debt and deficit is based on a "risks and rewards" test. Introduction of a consistent uniform test and a change in Eurostat's rules would not be possible without a revision of Maastricht rules anyway. As Eurostat notes, Germany has opted not for double reporting of the accounting and statistical

¹²⁵ Norbert Vogelpoth, Internationale Rechnungslegung für öffentliche Verwaltungen, in: Die Wirtschaftsprüfung 14/15 - 2001,752; idem, Vergleich der IPSAS mit den deutschen Rechnungslegungsgrundsätzen für den öffentlichen Bereich, in: Die Wirtschaftsprüfung, Sonderheft 2004, 23.

treatment of PPPs on the basis of different tests, but “for a single reporting notwithstanding the negative impact on debt and deficit generated by the substantial over-reporting.”¹²⁶

2.4.3 Pricing service concession assets and the laws on public fees

The pricing strategies a private infrastructure operator is allowed to pursue are restricted by the public law on infrastructure user fees. Pricing constraints become an accountability tool. In PPP-Concession models the private operator of the asset used to provide a public service is compensated for its service over the period of the contractual arrangement through user payments. There are tensions here between market oriented pricing of service provision and the laws on public user fees. The Law on public fees is based on some key principles regarding usage pricing: The Equivalence Principle means that all fees and charges must be in an appropriate ratio to the service provided (*Äquivalenzprinzip*). The equality principle (*Gleichbehandlung der Gebührenbemessung*) refers to the non discriminatory distribution of resources across different groups. The cost-recovery principle (*Kostendeckungsprinzip*) stipulates that the price level of user fees may not amount to selling public services at a price less or higher than what they cost. The user fee must reflect the actual asset usage and service provision cost (*Wirklichkeitsmaßstab der Inanspruchnahme der Einrichtung*). Only where doing so is particularly difficult or economically unreasonable a probabilistic cost assessment is allowed (*Wahrscheinlichkeitsmaßstab*).

Traditionally, user fees are intended to cover the costs incurred through the development, financing, operation and maintenance of an asset used for public services. They are not aimed primarily at profit making. An appropriate imputed return for the private investor is provided for in the § 3 IV of the Private Financing of Highway Construction Act of 1994 (*Fernstraßenbauprivatfinanzierungsgesetz - FStrPrivFinG*)

¹²⁶ Eurostat, Treatment of Public-Private Partnerships. Purposes, Methodology and Recent Trends, European PPP Expertise Centre 2010, 1-32, 27.

which meanwhile has been amended twice (in 2002 and 2005), and in the Municipal Charges Acts of the *Länder* (*Kommunalabgabengesetze – KAG*). The main principles of this imputed return for the private investor have been developed in the case law of the administrative courts¹²⁷ and are based on the annual average returns for ten-year German government bonds plus an appropriate private company-specific risk-premium. The latter is limited to 7% whereas a risk-premium of at least 15% could be in line with the market and the infrastructure project risk situation. The tension between private pricing policy and administrative fees regulation is explained by the following factors: Administrative fees regulation is based on the logic of having to align oneself with the local network and to use the local infrastructure system (duty to connect to and use local public infrastructure, *Anschluss- und Benutzungszwang*), there is neither competition and substitution risk nor infrastructure project based demand risk. A cost-coverage-shortfall can only be offset (for example pursuant to § 6 II 3 KAG NW) within three years after the end of the calculation period and under the condition that the reason for the difference between anticipated costs and actual costs incurred was a forecasting error.¹²⁸ Against this backdrop the service concession asset operator is not allowed to practice behavioral, peak load, penetration, or differential pricing and to discriminate among different user groups in order to benefit from their varying readiness, ability or unwillingness to pay. He is limited, from a legal point of view, in his efforts to guide demand in the appropriate direction over the life cycle of the service concession arrangement.¹²⁹ However, different levels of utilization of asset capacity

¹²⁷ See the seminal case law of the Oberverwaltungsgericht (OVG) Münster, North-Rhine Westphalia, and recently the judgment of 13.4.2005 – 9 A 3120/03.

¹²⁸ See the the commentary on § 6 KAG NW in the loose-leaf edition of Driehaus, *Kommunalabgabenrecht*, author: Brüning, 43. Ergänzungslieferung (September 2010), paras 49-50, 104-105a (Verlag Neue Wirtschafts-Briefe, Herne/Berlin).

¹²⁹ See on this topic Erik Gawel/Christopher Schmidt, *Finanzwissenschaftliche Probleme der Gebührenfinanzierung von Verkehrsinfrastruktur nach dem Fernstraßenbauprivatfinanzierungsgesetz (FStrPrivFinG)*, Duncker & Humblot Berlin 2010, 130-141, 194-198.

and services offered can, from a legal point of view, justify different levels of user fees. Only actual differences in cost generated by differences in intensity of use can legally justify price discrimination among different groups of users. A good example is the surcharges for heavy polluters in the area of public sewage treatment.¹³⁰

2.5 Legal forms and the two-fold mission of administrative law

The two-fold mission of German administrative law is seen in the guarantee of both protection and effectiveness. This guarantee is based on the development of standard legal instruments and forms that are deemed to have the function of a “repository” of rules normally applicable to the typical category of administrative activity under consideration (*Speicherfunktion*). The most important legal forms are the statutory regulation (*Rechtsverordnung*), the by-law or ordinance (*Satzung*) and the administrative directives or guidelines (*Verwaltungsvorschrift*) for the purposes of administrative rule making, and the administrative act (*Verwaltungsakt*) as well as the administrative contract (*Verwaltungsvertrag*) for the purposes of adjudication.¹³¹ Enacting a regulation is part of the delegation doctrine which is based on the rule of law and the principle of democracy (articles 20 III GG and 80 GG). Both the citizen and the courts must be able to foresee and control what kind of authorization is granted to the executive, in which cases this authorization will be used (article 80 I 3 GG), and whether the administrative rule maker has exceeded the limits of delegation.¹³² Statutory law is the product of parliament and all

¹³⁰ Obergerverwaltungsgericht (OVG) Schleswig, judgment of 21.06.2000 – 2 L 9/99, in: *Kommunale Steuer Zeitschrift (KStZ)* 2001, 51, 52. For an application on toll roads see Malte Müller-Wrede, *Änderung des Fernstraßenbauprivatfinanzierungsgesetzes*, in: idem (ed.) *ÖPP-Beschleunigungsgesetz: Leitfaden mit Fallbeispielen, Praxishinweisen und Checklisten*, Köln 2006, 117.

¹³¹ Eberhard Schmidt-Aßmann/Christoph Möllers, *The Scope and Accountability of Executive Power in Germany*, in: Paul Craig/Adam Tomkins (eds), *Oxford University Press*, Oxford, 2005, 268, 275-279.

¹³² From a comparative point of view: Uwe Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, in: *Administrative Law Review* 46 (1994), 213-256.

administrative power is bound to parliament. Delegated legislation is produced by governmental bodies, whereas autonomous bodies such as municipal authorities have the power to issue a special kind of rules, i.e. bylaws (*Satzungen*), in order to regulate within the limits of the law the matters that take their roots in local community. Rules that affect the legal interest of citizens must be made by parliament itself; In case of delegation of rule making power to a private party, ministers must retain the ultimate responsibility as long as the rules do not entail simply technical standards but also policy judgments that private parties are not entitled to make. Accountability of private regulations depends on control over private power by contract, corporate law, consolidation theories that bring private regulators within the realm of public law, for example, through the application of municipal law. That means that sometimes there is a conflict between municipal law and corporate law (see above 2.4).

2.6 Judicial accountability and participatory values

Access to justice is a constitutionally enshrined right to independent and neutral courts (article 19 IV GG). This guarantee of comprehensive legal protection of the citizens against all government actions is characterized by the high intensity of a thorough judicial control from both a factual and a legal point of view.¹³³ The courts scrutinize the facts of the case for themselves. Even in the exceptional cases where the executive is legally entitled to decide in the last resort the courts control whether the administrative decision is justifiable, the margin of appreciation set by the law has been observed, and the authorities made use of their powers according to the purpose of the authorizing act. The courts apply the

¹³³ The principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, is interpreted by the ECJ as meaning “that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer”. Paragraph 122(1) of the Code of Civil Court Procedure (*Zivilprozessordnung, ZPO*) was examined in the light of this principle in: ECJ, Case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, 22 December 2010, paras 59.

principle of proportionality (a suitability, necessity, and adequacy test) to all administrative measures and strike the balance between the protection of individual freedoms and the stabilization of a trustworthy and effective administrative action.¹³⁴ Given the thoroughness of judicial control the rules on standing to sue are strict. Assertion of a violation of the claimant's own rights is necessary, a mere sufficient interest will, unless it has been specifically provided for, not suffice.¹³⁵ § 42 of the *Verwaltungsgerichtsordnung* (Administrative Court Rules; 'the VwGO') provides that: Except where otherwise provided by law, an action for annulment of an administrative measure (*Anfechtungsklage*) or an action for enjoinder (judicial order to adopt an administrative measure in the event of an administrative refusal or failure to act, *Verpflichtungsklage*) is admissible only if the claimant asserts that her/his rights have been impaired by the administrative measure or by the refusal or failure to act. § 113(1) of the VwGO provides that 'in so far as the administrative measure is unlawful and the claimant's rights have thereby been impaired, the court shall set aside the administrative measure together with any internal appeal decision where appropriate'. Third parties may have the right to sue under certain circumstances, when, for instance, they are neighbors or competitors. The courts are reluctant to expand the law of standing generally to associations (*Verbandsklage*). The Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz – UmwRG*) with the amendments which took effect in 2010 transformed European law into national legislation. This Act provided that recognized environmental protection organizations may only bring actions against the infringement of environmental law provisions in cases which would also give citizens a subjective right and access to courts. According to the European Court of

¹³⁴ Schmidt-Aßmann/Möllers, in: Craig/Tomkins (eds) 2005, 268, 286.

¹³⁵ On the „systemic decision“ of an individual-based legal protection against public authorities and its consequences for administrative law see: Friedrich Schoch, Gerichtliche Verwaltungskontrollen, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), *Grundlagen des Verwaltungsrechts*, Volume 1, 2006, 687, paras 4-16.

Justice¹³⁶ however, this does not meet supranational requirements: European law calls - under the influence of the Aarhus Convention - for a wider access to justice, and environmental protection organizations must have the right to rely on all environmental provisions that are relevant to the authorization of a project although German procedural law does not permit such a challenge, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals.

The German conception of the rule of law places its emphasis traditionally on the comprehensive protection of subjective individual rights and thorough judicial control of government action rather than on participatory values, i.e. the participation of the public in administrative rule-making and decision-making procedures.¹³⁷ The traditional view was that the civil service is accountable to the law and to the minister, rather than to affected citizens; the latter have the possibility to seek legal protection as long as they have a standing to sue. Besides, access to administrative data was restricted, traditionally, to parties directly affected by administrative activities. These principles explain why the transposition of, for instance, the European Information Directive or the European Impact Assessment Directive was fraught with difficulties. The significance of public participation, however, has started to change in recent years, and this despite the high thoroughness and rigor of the judicial review of administrative decisions in substance. Public authorities are increasingly committed to enable those affected by the regulations and guidelines to

¹³⁶ Reference for a preliminary ruling from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany) lodged on 27 March 2009 — Bund für Umwelt und Naturschutz Deutschland, Landesverband

Nordrhein-Westfalen e.V. v Bezirksregierung Arnsberg, intervening party: Trianel Kohlekraftwerk Lünen GmbH & Co. KG, (ECJ, Case C-115/09).

¹³⁷ See from a comparative point of view: Michael Fehling, Der Eigenwert des Verfahrens im Verwaltungsrecht, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL) Bd. 70/2011.

participate in their making.¹³⁸ An “information law” is being developing.¹³⁹ At the local government level there has been a move towards introducing direct democratic and participatory procedures. In the 1990s the *Länder* introduced local referendum procedures¹⁴⁰ and the direct election of municipal mayors and the head of county administration, the *Landrat*. Opportunities for public participation in local authority rule-making exist already for a long time in planning procedures in the area of building law (*Bauplanungsrecht*) where a notice-and-comment procedure is required. In administrative licensing procedures (*Genehmigungsverfahren*) and planning permission hearings and approvals (*Planfeststellungsverfahren*) which both are legal proceedings for the adjudication of individual cases and lead to issuing an individual administrative act, i.e. a license or the approval of a major infrastructure project, public participation is guaranteed and enforceable. Participation in administrative rule-making is more restricted than participation in proceedings for the adjudication of individual cases. Anyway, according to

¹³⁸ Schmidt-Aßmann/Möllers, in: Craig/Tomkins (eds) 2005, 268, 277; Schmidt-Aßmann, Das allgemeine Verwaltungsrecht als Ordnungsidee, 2nd edition, Springer-Verlag, Berlin, 2006, chapter 2, para 114; Arno Scherzberg, Öffentlichkeitskontrolle, in: W. Hoffmann-Riem/ E. Schmidt-Aßmann/A. Vosskuhle (eds), Grundlagen des Verwaltungsrechts, Volume 1, 2006, 613, 29-38: „Access to information as a new general principle of law“ (at para 29).

¹³⁹ Friedrich Schoch, Informationsrecht in einem grenzüberschreitenden und europäischen Kontext, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2011, 388.

¹⁴⁰ A requirement of congruence of facts and criteria is provided for in the municipal codes (see for ex. § 26 GemO NW, § 26 Abs 2 S 1 GemO NW), i.e. a congruence of the justification of the referendum proposal, the wording of the determined question and the funding proposals is necessary. See Oberverwaltungsgericht (OVG) für das Land Nordrhein-Westfalen 15. Senat, 01.04.2009, 15 B 429/09, in: NWVBI 2009, 442-443. A good example is the referendum held in Berlin (*Volksbegehren*) on the disclosure of hitherto secret PPP-arrangements regarding water supply in Berlin (Berlin Water Works, Berliner Wasserbetriebe). The city-senate had declared the referendum inadmissible but this decision was annulled by the city-state’s constitutional court. Verfassungsgerichtshof des Landes Berlin Geschäftsnummer: VerfGH 63/08, 6.10.2009: <http://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=VerfGH%20Berlin&Datum=06.10.2009&Aktenzeichen=VerfGH%2063/08>.

prevailing scholar opinion a distinction between participatory rights and rights to co-decision is to be drawn. Moreover, participation cannot replace, but only complement democratic legitimacy if administrative decisions are not to be taken at the expense of people who have not participated in the administrative decision-making.

3. WEBSITES

[Bundesverfassungsgericht](#)

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[Entscheidungen des Bundesgerichtshofs](#)

[Staatliche Finanzkontrolle in Deutschland](#)

[Deutsches Institut für Sachunmittelbare Demokratie an der TU Dresden e.V.](#)

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[Kommunale Gemeinschaftsstelle für Verwaltungsmanagement \(KGSt\)](#)

[Lexikon zu Begriffen aus Doppik/NKF und Kameralistik](#)

[Das Neue Kommunale Finanzmanagement](#)

[Public Private Partnerships Partnerschaften-Deutschland](#)