

Press and Information Division

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Opinion of Advocate General Léger in Case C-224/01

Köbler v Republic of Austria

**FOR THE FIRST TIME, THE COURT OF JUSTICE IS REQUESTED TO
ADJUDICATE ON THE ISSUE OF A MEMBER STATE'S LIABILITY FOR
LOSS OR DAMAGE CAUSED TO INDIVIDUALS AS A RESULT OF A
BREACH OF COMMUNITY LAW BY A SUPREME COURT**

Advocate General Léger is of the opinion that the Member States are obliged to make reparation for the loss or damage caused to individuals in such a case and that the minimum conditions for entitlement to that reparation are governed by Community law

Mr Köbler has, since 1986, been an ordinary university professor in Austria. On the basis of 15 years' university teaching in various Member States, he applied for a special length-of-service increment pursuant to an Austrian law. His application was rejected, because the legislation makes the grant of that increment conditional on 15 years' service as a professor in Austrian universities alone. He appealed against that decision, claiming indirect discrimination contrary to the principle of freedom of movement for workers; the Verwaltungsgerichtshof (Austrian supreme administrative court) made a reference to the Court of Justice.

Since the Court had meanwhile delivered a judgment ¹ in a comparable case, it asked the Verwaltungsgerichtshof whether it maintained its question. In the light of that judgment, the national court withdrew its question and found that the increment at issue was a loyalty bonus justifying a derogation from the principle of freedom of movement for workers, so that the rejection of Mr Köbler's application is not contrary to Community law.

1 Case C-15/96 *Schöning-Kougebetopoulou* [1998] ECR I-47.

Mr Köbler took the view that that decision of the Austrian court infringed a number of Community law provisions and thereby caused him loss. He therefore brought an action for damages against the Republic of Austria before the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna), which has also made a reference to the Court of Justice.

Is the principle of State liability for loss or damage caused to individuals by a breach of Community law to extend to the case of a breach for which a supreme court is responsible, when Austrian law precludes State liability in such a case?

The Advocate General's Opinion is not binding upon the Court of Justice. His role is to propose to the Court, acting with complete independence, a decision on the legal points in order that the cases referred to it may be resolved.

According to Advocate General Léger, the Member States are obliged to make reparation for loss or damage caused to individuals by a breach of Community law by a supreme court. The acknowledgment of such a principle is completely consistent with the Court's case-law on the fundamental principle of State liability for breach of Community law (whichever State organ is responsible for the breach in question) and on the decisive role of the national court in the application of Community law, in particular where it is acting as a supreme court. The Advocate General states that where there is no possibility of an appeal against the decision of a supreme court, only an action for damages serves to ensure that the right infringed is restored. Moreover, the principle of State liability for the breach of a legal rule by a supreme court is generally acknowledged by the Member States or at least a strong tendency in that direction can be detected.

The Member States cannot avoid all liability for the decisions of their supreme courts for reasons which relate, in particular, to respect for the status of res judicata attaching to decisions no longer open to challenge.

The Advocate General next considers the substantive conditions required to found State liability in the particular situation. The definition of those conditions must be consonant with both the particular characteristics of the judicial function and the need to maintain a certain coherence with the rules on liability applicable to legislative or administrative action. As a consequence, the Advocate General proposes the adoption of the three minimum conditions laid down by the Court in respect of the enforcement of State liability for acts or omissions of the legislature or administrative authorities:

1. the legal rule infringed must confer rights on individuals,
2. the breach in question must be sufficiently serious,
3. there must be a direct causal link between the breach in question and the damage sustained by individuals.

As regards the second condition concerning the nature of the breach in question, the Advocate General is of the opinion that the essential criterion is whether the error of law at issue is excusable or inexcusable.

It is incumbent on the Member States to designate the national courts with jurisdiction to hear and decide on such actions for damages and it is on a case-by-case basis that those courts must assess whether those substantive conditions are met. According to the Advocate General, in the present case it can be considered that the Verwaltungsgerichtshof made an inexcusable error when it dismissed Mr Köbler's application; it should *inter alia* have checked whether the relevant length-of-service requirement was proportionate to the alleged objective of rewarding an employee's loyalty to a particular employer. That error is thus capable of giving rise to liability on the part of the Austrian State.

N.B.: Two cases are pending before the Court, in which it is requested to consider issues similar to those raised in these proceedings:

- (a) an action against Italy for failure to fulfil its obligations (Case C-129/00 *Commission v Italy*)
- (b) a reference from the Netherlands for a preliminary ruling (Case C-453/00 *Kühne v Heitz*).

Reminder: The Judges of the Court of Justice of the European Communities will now begin their deliberations in this case. The judgment will be delivered at a later date.

Unofficial document for media use; not binding on the Court of Justice.

Available in all official languages.

*For the full text of the Opinion, please consult our internet page
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at approximately 3 pm today.*

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