ENVIRONMENTAL LOSS AND DAMAGE IN A COMPARATIVE LAW PERSPECTIVE

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THE PERMIT DEFENCE BETWEEN THE EU ENVIRONMENTAL LIABILITY DIRECTIVE AND NATIONAL PRIVATE LAW

Some Comparative Law Remarks

Carlo Masieri

1. INTRODUCTION: AIM AND SOME VOCABULARY

"Permit defence" is a common way of addressing Article 8(4)(a) Directive 2004/35/CE,[1] according to which:

> The Member States may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by: (a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event.

The expression "permit defence" is clearly inspired by private law language. In particular, defences in civil trials are submissions made by the defendant, according to which "for some particular reason, plaintiff's claim did not arise, has in the interim been lost, or is barred" or through which "defendant raises an individual right which he enjoys against plaintiff".[2] In legal English, especially

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1 See for instance the European Commission, Report From the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Under Article 14(2) of Directive 2004/35/CE on the Environmental Liability With Regard to the Prevention and Remedying of Environmental Damage, COM(2010) 581 final.

2 See *A. Blomeyer*, Types of Relief Available, in M. Cappelletti (ed.), International Encyclopedia of Comparative Law, Volume XVI: Civil Procedure, Brill, 2014, para. 4–118, p. 58.

American legal English, there is also a "partial defence", which goes "either to part of the action or toward mitigation of damages".[3]

This chapter analyses Article 8(4) Directive 2004/35/CE in order to ascertain the relationship between EU law and private law.

After a short drafting history, the effects of the EU permit defence will be examined, highlighting the problem of distinguishing between legal and illegal activities. The chapter will then explore how private law liability systems of Member States deal with the same problem, paying particular attention to select rules of tort law and nuisance in Germany, France and Italy. Finally, national transposition and implementation measures of the EU Directive will be studied and compared with national private law rules, with the intention of measuring their coherence with the legal traditions of the respective Member States.

2. SOME DRAFTING HISTORY

The original Proposal of this Directive drafted by the European Commission (COM/2002/0017 final – COD 2002/0021) would have allowed a very broad "permit defence", as its Article 9(1)(c) merely stated that "this Directive shall not cover environmental damage or an imminent threat of such damage caused by an emission or event allowed in applicable laws and regulations, or in the permit or authorisation issued to the operator". This was partially due to lobbying efforts of industry and professional associations.

The European Parliament proposed amendments,[4] among which a new Article 11(3) stated that:

> when deciding the level of responsibility and the amount of financial compensation in respect of liability to be recovered from an operator, the competent authority and a reviewing court or tribunal shall take into account the following mitigating factors: (a) an emission or activity specifically and explicitly allowed in applicable laws and regulations, or in the permit or authorisation issued to the operator. An emission or activity and its foreseeable effects, specifically and explicitly allowed in the permit or authorisation issued to the operator, can be considered as an exemption, so far as the usual risks within the framework of the authorisation are concerned. In case of damage, the responsibility shall lie with the issuing authority.

3 See Defense, in B.A. Garner (ed.), Black's Law Dictionary, Thomson Reuters, 10th ed., 2014.

4 See Position of the European Parliament Adopted at First Reading on 14 May 2003 With a View to the Adoption of European Parliament and Council Directive 2003/ … /EC on Environmental Liability With Regard to the Prevention and Remedying of Environmental Damage, EP-PE_TC1-COD(2002)0021.

This formulation shows the clear intent to hold someone liable in any event, whether the operator or the administrative authorities of Member States. However, it must be stressed that – notwithstanding the fact that the final text of the Directive also ultimately attaches the costs of remedial measures to EU countries – such explicit assignment of liability might not have been well received by the states.[5] Additionally, this amendment would have directly charged the government or the judiciary with the task of setting general criteria to establish liability, effectively bypassing state legislatures. As such a solution would potentially violate the principle of separation of powers in some legal systems, it would unlikely have been accepted, especially by civil law countries.

Over the course of an EU law-making co-decision process, the Council's common position[6] (positively commented by the Commission[7]) took a different path. Specifically, the Council rejected the expression providing residual liability of single public authorities, clearly established a specific reference to European legislation as the basis for the permit defence, and assigned more general power to the Member States (rather than single authorities or courts).[8] Despite the European Parliament criticising this approach – lamenting that too much discretion would have been given to the Member States[9] – the final text of the Directive allows individual Member States to adopt or reject the permit defence.

Indeed, in addition to the final version of the defence, which is written into Article 8(4)(a) Directive 2004/35/CE, Recital 20 of the very same Directive also states that "Member States may allow that operators who are not at fault or negligent shall not bear the cost of remedial measures, in situations where the damage in question is the result of emissions or events explicitly authorised".

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5 See *A. Gouritin*, EU Environmental Law, International Environmental Law, and Human Rights Law, Brill, 2016, p. 264.

6 See Common Position 10933/5/03 REV 5.

7 See Communication SEC(2003) 1027 final.

8 See SEC(2003) 1027 final: "Article 8(4) replaces Articles 9(1)(c) and (d) and (2) of the Commission proposal and provides that Member States may allow the operator not to bear the costs in two types of situation which can be succinctly described as follows: when the damaging emission or event is expressly authorised under Community law or was not considered likely to cause environmental damage according to the state of scientific and technical knowledge." The Commission observed that "the thrust of Parliament's amendment seems to be reflected" in the new proposal, but the different setting of the rules is almost self-evident; see also Gouritin, supra, note 5 at pp. 268–269. Instead, the Commission admitted that "parts of the amendment on the liability of competent authorities and on the use of an environmental audit and management system by operators have not been incorporated in the Common Position".

9 See Recommendation for 2nd Reading Issued by the Committee on Legal Affairs and the Internal Market of the European Parliament, Document A5-0461/2003, RR/332617EN, saying that "the broad margin of discretion given to Member States by the Council will have serious repercussions on the functioning of the internal market".

3. THE EFFECTS OF THE PERMIT DEFENCE

It is undisputed that environmental damage – which is defined under this EU Directive as a harm caused by the operator to the environment – can be split into two parts. On the one hand, "'damage' means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly" (Article 2(2) Directive 2004/35/CE). On the other, an "imminent threat of damage" is also relevant. This means that legal consequences may arise where there is "sufficient likelihood that environmental damage will occur in the near future" (Article 2(9) Directive 2004/35/CE).

This twofold nature of damage thus produces two distinct legal effects. First, "where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures" (Article 5(1) Directive 2004/35/CE). It is noteworthy that such preventive measures are defined as "any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage" (Article 2(10) Directive 2004/35/CE). Second, only when "environmental damage has occurred" (Article 6(1) Directive 2004/35/CE), i.e. only when an "adverse change … or a measurable impairment of a natural resource" has already effectively resulted, shall remedial measures be taken (see Articles 6(1) (b) and 7(2) Directive 2004/35/CE). Such remedial measures are "any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services as foreseen in Annex II [of the Directive]" (see Article 2(1) Directive 2004/35/CE).[10]

A careful reading of the provisions reveals that the choice to employ the expression "to be liable" may prove problematic as, in common law systems, this expression typically recalls tort law remedies (in particular the obligation to pay monetary compensation in the form of damages). Here, the aims and the legal effects of environmental liability are very different from tortious liability, as long as the "remedy" means to cure rather than "to pay damages". In any event, the liable party "pays", but the form of payment changes.

Since Article 8(4) Directive 2004/35/CE makes mere reference to "remedial actions", the permit defence "allows the operator not to bear the costs of restoration, but does not exempt the operator from prevention costs".[11]

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10 On remedial measures see also Case C-379/08, ERG and Others [2010] ECLI:EU:C:2010:127; Case C-478/08, Buzzi Unicem and Others [2010] ECLI:EU:C:2010:129, in particular Ruling 2.

11 See *Gouritin*, *supra*, note 5 at p. 263; similarly, *A. Di Landro*, La responsabilità per l'attività autorizzata nei settori dell'ambiente e del territorio, Giappichelli, 2018, p. 227. It has

An analysis of Article 5 and Recital 21 Directive 2004/35/CE is necessary to better understand how preventive measures work. Article 5(1) provides that the operator must take necessary preventive measures "[w]here environmental damage has not yet occurred but there is an imminent threat of such damage occurring, … without delay". Paragraph 3 allows "[t]he competent authority … at any time [to] (a) require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat; (b) require the operator to take the necessary preventive measures; (c) give instructions to the operator to be followed on the necessary preventive measures to be taken; or (d) itself take the necessary preventive measures". Then, according to paragraph 4, "[t]he competent authority shall require that the preventive measures are taken by the operator. If the operator fails to comply with the obligations laid down in paragraph 1 or 3 (b) or (c), cannot be identified or is not required to bear the costs under this Directive, the competent authority may take these measures itself". Moreover, Recital 21 states that "[o]perators should bear the costs relating to preventive measures when those measures should have been taken as a matter of course in order to comply with the legislative, regulatory and administrative provisions regulating their activities or the terms of any permit or authorisation".

Finally, it has to be noticed that Article 8 establishes an exception to the "polluter pays" principle, as long as – pursuant to Recital 18 of the Directive – the polluter is an "operator causing environmental damage", which "should, in principle, bear the cost of the necessary … remedial measures". At the same time, as environmental law scholars have adopted language similar to that used in private law, the EU "permit defence" and "partial defence" have the same meaning, as both only partially shield the operator from legal effects. Indeed, the operator always bears some consequences in any case, like the obligation to take preventive measures. In addition, even the obligation of taking remedial measures could initially bind the operator, as Article 8 speaks about "costs" that can also be shifted after the measures are taken.

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to be said that the Committee on Legal Affairs and the Internal Market of the European Parliament, Document A5-0461/2003, RR/332617EN warned about this: "Operators who cannot be held liable should not be asked to take preventive or remedial action nor to advance the costs of such measures. Exceptions based on permit compliance or state of the art knowledge should have the same standing as those based on third party causation and compliance with a compulsory public order or instruction. The wording of the common position risks undermining the current permit system and the development of appropriate financial security instruments. The downgrading of the exceptions originally provided for by the Commission to factors that would diminish the costs would introduce an unacceptable element of uncertainty into production related costs (which will affect the operator's financial exposure)".

4. SOME COMPARATIVE LAW QUESTIONS ARISING FROM THE EU "PERMIT DEFENCE"

Scrutiny of permit defence under Directive 2004/35/CE raises several questions. For example, the wording of the permit defence recalls the distinction between strict liability and negligence. If the European model, generally speaking, adheres to a strict liability framework,[12] the fact that Article 8 Directive 2004/35/CE clearly refers to negligence and fault, implying that there still can be negligence even if the operator has acted according to the permit,[13] is problematic. Although this topic warrants further discussion, it is too complicated to be addressed, even superficially, in the present chapter. Instead, this chapter will focus on another aspect of the "permit defence".

The term "defence" pursuant to Article 8 is obviously related to the problem of distinguishing between legal and illegal activities. The following paragraphs will illustrate how traditional private law liability rules address this problem, highlighting the differences between Member States' legal systems. Moreover, it will be discussed whether European environmental law and private law adopt similar provisions in response to this "legality problem". Finally, national transposition and implementation measures in select national jurisdictions – specifically, in Germany, France and Italy – will be analysed to better understand if, and eventually how, the "permit defence" is applied in each of these jurisdictions.

4.1. THE GERMAN SYSTEM

Under §823 BGB, unlawfulness is a requirement of German tort law. This means that compensation depends on the establishment of harm, which must result from either a violation of a right of the defendant or of a statutory provision. Property violations provide a prime example of how such requirement is assessed, especially when it interacts with other areas of law.

For instance, §1004 BGB establishes remedies of injunction and removal in cases of interference with property. At the same time, a claim may be rejected when a duty to tolerate the interference has been established. Although the text

12 Cfr. *B. Pozzo*, La nuova direttiva 2004/35 del Parlamento Europeo e del Consiglio sulla responsabilità ambientale in materia di prevenzione e riparazione del danno, Riv. giur. amb. 2006 (1), p. 6; Case C-378/08, ERG and Others [2010] ECLI:EU:C:2010:126, para. 63: "In the case of the occupational activities falling within Annex III to Directive 2004/35, environmental liability on the part of operators active in those areas is strict liability".

13 See *L. Bergkamp & A. van Bergeijk*, Exceptions and defences, in L. Bergkamp & B. Goldsmith (eds.), The EU Environmental Liability Directive: A Commentary, Oxford University Press, 2013, paras. 4.45–4.46.

of this paragraph does not refer directly to unlawfulness, according to most scholars, the interference is deemed illegal when these remedies are issued.[14] Compliance with public law by the defendant is not always relevant. Thus, some activities – despite having been performed after a permit has been issued – are not protected by a consequential defence from actions arising from §1004 BGB. For example, industrial property permits, building permits and police permits did not shield a club from the application of §1004 BGB.[15]

The introduction of gases, steam, smells, smoke, soot, warmth, noise, vibrations and similar influences emanating from another plot of land is regulated by §906 BGB. If these phenomena significantly interfere with the owner's property, such owner is entitled to damages or may seek an injunction. German courts have been assessing these nuisance cases in a way that does not put their decisions in excessive conflict with public law legality thresholds.[16] In addition, the legislature takes into great consideration statutes, statutory orders and administrative provisions that have been issued under §48 of the Bundes-Immissionsschutzgesetz (BImSchG, Federal Environmental Impact Protection Act) and represent the state of the art. If the wording of §906(1) does not automatically imply shifts of the burden of proof, compliance with public law thresholds is considered strong evidence for dismissing the case. On the other hand, non-compliance is considered strong evidence in favour of the plaintiff's case.[17] Even if the defendant shows that he has complied with public law regulations, the plaintiff may nonetheless offer further evidence of the significance of the impairment. Accordingly, there is no defence in such cases. If the defendant uses the land in compliance with local custom, a duty to tolerate alleged interference pursuant to §906 (2) BGB[18] may be established. In these cases, even if the activity is held to be perfectly legal under private law[19] and no injunction is issued, a defendant may nonetheless be ordered to compensate the plaintiff. Once again, public law thresholds play a relevant role in decisions whether to issue the aforementioned compensation.[20] And once again, a permit does not exclude application of any specific remedy. Indeed, this was the case when a shooting range, which was built in compliance with the required building permit, polluted the ground with lead powder.[21] These rules are also applied

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14 See *C. Baldus*, §1004 BGB, in R. Gaier (ed.), Münchener Kommentar zum BGB, Volume 7, 7th ed., 2017, Rn. 192–198.

15 See BGH, urt. vom 27.5.1959 – V ZR 78/58 (KG), in NJW 1959, 2013.

16 See *B. Brückner*, §903 BGB, in R. Gaier (ed.), Münchener Kommentar zum BGB, Volume 7, 7th ed., 2017, Rn. 60; *B. Brückner*, §906 BGB, in R. Gaier (ed.), Münchener Kommentar zum BGB, Volume 7, 7th ed., 2017, Rn 8, 19.

17 See *B. Brückner*, §906 BGB, *supra*, note 16 at Rn. 219.

18 Id. at Rn. 93.

19 Id. at Rn. 183.

20 Id. at Rn. 186.

21 See BGH, urt. vom 20.4.1990 – V ZR 282/88 (Stuttgart), in NJW 1990, 1910.

in tort actions arising from the very same facts, in order to run the illegality check under §823 BGB.[22]

According to other statutory provisions, a number of permits works as defence from some private law effects. Among these,[23] §14 BImSchG shields the defendant that has been issued with a permit that allows installations on his property from injunctions by private law courts to cease activity.[24] However, the plaintiff may still bring action against the defendant for forcing him to take some precautions, or at least for damages. This kind of provision stems from a traditional idea of German law that investments in activities that have already been deemed legal by public authorities must be protected.[25] A defence seldom excludes damages claims; §16 Wasserhaushaltsgesetz (WHG, Federal Water Management Act) is an exception.

Lastly, §1 Umwelthaftungsgesetz (UmweltHG, Environmental Liability Act) is a major statute that regulates damages under private law. In particular, it applies to damages arising from certain types of installations, providing for strict liability when the environmental impacts caused by specific plants result in the death or personal injury, or in damage to individual property.[26] Permits are also influential under this statute. Specifically, they do not conclusively exclude liability, but set aside the presumption of causation in favour of the plaintiff that would have otherwise been granted by §6 UmweltHG. In other words, an installation that is likely to have caused harm is presumed to have effectively caused such harm where its operation was not performed in compliance with the permit conditions.[27]

In 2007, Germany took measures to transpose and implement the EU Directive by enacting the Gesetz über die Vermeidung und Sanierung von Umweltschäden (Law on the Prevention and Remedying of Environmental Damage, also referred to as the Umweltschadensgesetz, USchadG). An official EU Commission report indicates that German legislature decided not to expressly allow the permit defence from environmental liability.[28] This is at least questionable. The Umweltschadensgesetz establishes that a "liable person" is "any natural or legal person who carries on or is in charge of a professional

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22 See *Brückner*, *supra*, note 17 at Rn. 224.

23 For a list, see *E. Rehbinder*, §14 BImSchG, in M. Beckmann et al. (eds.), Landmann/Romer Umweltrecht, 85. EL Dezember 2017, Rn. 4–7.

24 Even if it is not mentioned by the statute, the activity should comply with the permit as a condition for these private law effects, see id. at Rn. 22–25.

25 For the historical background of §14, see id. at Rn. 3.

26 See id. at Rn. 1, 4.

27 See *G. Hager*, §6 UmweltHG, in M. Beckmann et al. (eds.), Landmann/Romer Umweltrecht, 85. EL Dezember 2017, Rn. 3, 14, 39 ff.

28 See European Commission, Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Under Article 14(2) of Directive 2004/35/CE on the Environmental Liability With Regard to the Prevention and Remedying of Environmental Damage, COM(2010) 581 final.

activity, including the holder of an authorisation or a permit for such activity" (§2 no. 3 USchadG), but some "permit defence" seems to be allowed. According to §9(1) USchadG, the Federal Government has attributed the application of Article 8(4) EU Directive to the *Länder*. This means that the "permit defence" provided by EU environmental liability law may be granted at a local level. Thus, we cannot clearly affirm that Germany, as a federation of *Länder*, applies Article 8: it depends on the specific locality. Moreover, it is noteworthy that German legal scholars find that this defence does not amount to a full legalisation of the operator's acts, which cause some effects anyway (e.g. information and avoidance obligations).[29]

4.2. THE FRENCH SYSTEM

Article 1240 of the current version of the Code civil states that "Any act of man, which causes damage to another, shall oblige the person by whose fault it occurred to repair it". Additionally, Article 1241 provides that "Everyone is responsible for the damage he has caused not only by his own actions, but also by his negligence or imprudence". French statutory law does not expressly require unlawfulness as a requirement of torts. Still, scholars believe that *illicéité* is an objective element that implies *faute* under Article 1240. However, when it comes to identifying it, such unlawfulness stems from the violation of either single legal obligation or a general duty of care.[30] Nonetheless, the violation of any right or interest protected by the law may result in tort action.

When it comes to property, it is interesting that the French legislature has not enacted any specific provision regulating nuisance cases. Consequently, scholars and courts have had to develop doctrines without referring to the Civil Code or to a specific statute.[31] Under the *trouble de voisinage* doctrine, the acts of a defendant who abnormally disturbs his neighbour can be perfectly legal – in the sense that they represent a legal way of exploiting his piece of land – and not characterised by *faute*.[32] However, the same defendant may still be held liable.[33] This is because, to use French legal reasoning, the "chain of legality" that connects public and private law (public law > individual permit > general lawfulness of the acts compliant with the permit) is broken. Indeed,

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29 See *A. Wittmann*, §1 USchadG, in M. Beckmann et al. (eds.), Landmann/Romer Umweltrecht, 85. EL Dezember 2017, Rn. 25.

30 See *P. Jourdain*, Art. 1382 à 1386 – Fasc. 120-10: DROIT À RÉPARATION – Responsabilité fondée sur la faute – Notion de faute: contenu commun à toutes les fautes, in JCl. Civil Code, 2011, para. 13.

31 See *V. Gaillot-Mercier*, Troubles de voisinage, in Dalloz.fr – Répertoire de droit civil, 2002 (act. Janv. 2019), paras. 24–25.

32 Id. at paras. 23, 27–28.

33 Id. at paras. 3–4.

case law illustrates that permits are always issued subject to the rights of third parties,[34] as recalled also by particular statutes, like Article L. 514–19 of the Environmental Code.

Therefore, building permits do not grant defence from nuisance claims.[35] Even if a permit has been issued for the construction of a garage, its building could nonetheless represent an abnormal disturbance for neighbours.[36] Likewise in cases of industrial authorisations. Thus, a pig farm that had been authorised under administrative law can nonetheless be liable from a private law point of view for olfactory nuisance.[37] The remedies issued by the courts in these cases are many: compensation, injunction, *astreintes*, etc.

Article L. 112–16 of the Code de la construction et de l'habitation (Construction and Housing Code) provides an exception. Under this article no compensation should be given to the plaintiff where some activities that are legal under public law are already being performed by the defendant. This is the so-called "pre-occupation exception", which the defendant can enjoy if his activity started before the plaintiff began dwelling there, and if the very same activity has always been deemed to be legal. But when it comes to the environment, the aforementioned provision should be interpreted as it "does not preclude an action in liability based on fault",[38] due to the higher level of protection granted by the Charte de l'environnement (Environmental Chart).[39]

As regards French law deriving from the EU Environmental Liability Directive, only Law no. 2008-757[40] and Decree n° 2009-468[41] are official French "transposition measures communicated by the Member State" to the European Union. Notably, these statutes do not mention the permit defence pursuant to Article 8(4) EU Directive at all. Finally, further relevant environmental legislation has been enacted in the field of private law: Law no. 2016-1087 inserted a new *Titre* (Title) on the *réparation du préjudice écologique* (ecological damage remediation) into the Code civil, and the "*préjudice écologique*" regulated thereby seems very similar in some aspects to environmental damage in Directive 2004/35/CE.[42] However, not even this statute mentions the permit defence.

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34 See cases referred to by *G. Courtieu*, Art. 1382 à 1386 – Fasc. 265-10: RÉGIMES DIVERS. – Troubles de voisinage, in JCl. Civil Code, para. 84.

35 See *Gaillot-Mercier*, *supra*, note 31 at paras. 17, 56.

36 See Cass. 3e civ., 20 juill. 1994, no. 92-21.801, Numéro JurisData: 1994-001365.

37 See Cass. 1re civ., 13 juill. 2004, no. 02-15.176, Numéro JurisData: 2004-024670.

38 See Cons. const., 8 avr. 2011, no. 2011-116 QPC, ECLI:FR:CC:2011:2011.116.QPC.

39 Loi constitutionnelle no. 2005-205 du 1er mars 2005 relative à la Charte de l'environnement.

40 Loi no. 2008-757 du 1er août 2008 relative à la responsabilité environnementale et à diverses dispositions d'adaptation au droit communautaire dans le domaine de l'environnement.

41 Décret no. 2009-468 du 23 avril 2009 relatif à la prévention et à la réparation de certains dommages causés à l'environnement.

42 See *L. Neyret*, La consécration du préjudice écologique dans le code civil, in Rec. Dalloz 2017 (17), p. 924.

4.3. THE ITALIAN SYSTEM

Article 2043 of the Italian Civil Code represents a general tort law provision and establishes that, in order to grant compensation, an illicit harm must be caused by the defendant. Furthermore, such harm must be committed with either negligence or intent. Still, it is significant that several strict liability rules are established by other articles of the Code, or by additional statutes. Italian scholars and courts have construed the *danno illecito* requirement so that a violation of any interest protected by the law implies tort liability.[43] Again, property violations may give rise to a number of remedies under private law.

It is undisputed that the Italian Civil Code was greatly influenced by the French Civil Code, which does not expressly govern nuisance cases. Thus, the Italian discipline drew from the German experience and the ideas of von Jhering.[44] According to Article 844 Civil Code, *immissioni* (nuisance) that are considered tolerable according to a "usual" standard are deemed legal and may persist as long as they do not exceed the threshold of "normal tolerability". If *immissioni* exceed this threshold, aggrieved parties may be entitled to compensation and/or injunction.[45] In any case, Italian scholars[46] do not consider these "intolerable *immissioni*" illegal, especially when they just end in compensation for the plaintiff: in this case, defendant has to pay a sum for the taking of another's property or – which is the same – give compensation for externalities.

When activities also endanger human health and the environment, there is a tendency in current case law to regard the violation of public law thresholds as intolerable,[47] and to issue injunctions under the nuisance doctrine. Still, compliance with thresholds does not mean that the defendant is shielded from private law remedies.[48] The authorisation of an activity under public law is not relevant for the application of Article 844.[49] Thus, a properly

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43 See *C. Salvi*, Responsabilità extracontrattuale (dir. vig.), in Enciclopedia del diritto, Volume XXXIX, Giuffrè, 1988, p. 1189. On *ingiustizia del danno* see also *R. Sacco*, L'ingiustizia di cui all'art. 2043, in Foro pad. 1960, I, p. 1420; *P. Schlesinger*, L'ingiustizia del danno, in Jus 1960, p. 366; *S. Rodotà*, Il problema della responsabilità civile, Giuffrè, 1964; *G. Cian*, Antigiuridicità e colpevolezza, Cedam, 1966; for some examples of *ingiustizia*, see *F. Gazzoni*, Manuale di diritto privato, Edizioni Scientifiche Italiane, 2013, pp. 716–722.

44 See *A. Gambaro*, Il diritto di proprietà, in Trattato Cicu-Messineo, Giuffrè, 1995, pp. 498–501; *A. Gambaro*, La proprietà: beni, proprietà, possesso, in Trattato Iudica-Zatti, Giuffrè, 2017, p. 274.

45 See *A. Gambaro*, Il diritto di proprietà, *supra*, note 44 at p. 505; *A. Gambaro*, La proprietà: beni, proprietà, possesso, *supra*, note 44 at pp. 276–277.

46 See *A. Gambaro*, Il diritto di proprietà, *supra*, note 44 at p. 521.

47 See *A. Gambaro*, La proprietà: beni, proprietà, possesso, *supra*, note 44 at pp. 282–283.

48 See Cass. civ., sez. III, 16 ottobre 2015, no. 20927, in *DeJure*.

49 See *Gambaro*, Il diritto di proprietà, *supra*, note 44 at pp. 511–512.

authorised heliport[50] or bakery[51] can still cause *immissioni intollerabili* to the neighbours according to private law standards. From this perspective, the Italian solution seems to be more similar to the French experience rather than to the German one.

Article 308 para. 5 of the Codice dell'ambiente (Environmental Code) contains a "permit defence". This part of the Italian transposition and implementation measure of the EU Directive has been poorly drafted, as it reads:

> The operator may not bear the cost of *comma* 5 measures … where he demonstrates that he was not at fault or negligent and that the preventive measure has been taken due to: a) an emission or event expressly authorised by an authorisation given under applicable laws and regulations which implement those of the Community specified in Annex 5 to Part VI of this decree, as applied at the date of the emission or event, and fully in accordance with the conditions thereby stated.

Firstly, "*comma* 5 measures" means "the measures regulated by paragraph 5" of Article 308 itself, not of a different article. Thus, the costs that "the operatory may not bear" are not expressly defined. Second, the paragraph refers to a "preventive measure" that "has been taken". This has led some commenters to believe that this "permit defence" works as a shield from the costs of preventive measures,[52] whereas other scholars seem to relate the defence only to remedial measures.[53] Even if the latter interpretation is inconsistent with the wording of Article 308, it is preferable because any other interpretation would conflict with Article 8(4) of the EU Directive (which expressly and exclusively refers to "remedial actions"). It is common knowledge that Italian national law cannot contrast with EU law, and that, should contrast between national and EU law exist, Italian judges must apply EU law over national law.

5. CONCLUSION

The idea that compliance with public law excludes legal consequences under the private law of EU Member States is unpersuasive, as property remedies issued

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50 See Cass. civ., sez. II, 14 agosto 1990, no. 8271, in *DeJure*.

51 See Cass. civ., sez. II, 18 maggio 2015, no. 10169, in *DeJure*.

52 For *M. Benozzo*, La disciplina del danno ambientale, in A. Germano et al., Commento al codice dell'ambiente, Giappichelli, 2013, pp. 994, 996 this defence would be related only to preventive measures; *S. Masini*, Art. 308 cod. amb., in L. Costato & F. Pellizzer (eds.), Commentario breve al codice dell'ambiente, Cedam, 2012, p. 1118 seems to exonerate the operator from all the legal consequences of environmental liability, and in any case from costs related to preventive measures.

53 See *B. Pozzo*, La responsabilità per danno ambientale, in S. Nespor & A.L. De Cesaris (eds.), Codice dell'ambiente, Giuffrè, 2009, p. 875.

under private law and environmental public law differ in aim and instrument. When it comes to protecting the individual property of neighbours, private law courts do not base their judgments only on the fact that the harming activity has been authorised. It must be stressed that the public administration cannot authorise an operator to damage neighbours and at the same time exempt him from liability, as such allowance would result in expropriation without compensation (which is frowned upon in European legal culture). Thus, private law provides different standards from those of public law: "relevant interference" or "abnormal disturbance" or "intolerable nuisance". In these cases, permits do not usually play a significant role, as thresholds are frequently set directly by statutes or regulations. On the other hand, permits are very relevant under public law because they require the public administration to assess standards directly related to the environment, not to individual properties. This separation between private law and public law functions differently in each of the legal systems that have been analysed here. Germany is characterised by a very strong importance of unlawfulness as a basis for private law remedies; nonetheless, the "permit defence" seldom shields the defendant from each and any private law consequences, and this is notably due to public law statutes.[54] In the French and Italian systems, public law and private law standards run on parallel lines, except for Italian cases in which health and the environment tend to be protected with property remedies.

In any event, national private law and the EU Environmental Liability Directive seem to share a common aspect: neither appear to consider permits a general exemption from any legal consequences provided by their respective liability schemes. Additionally, given the differences between private law legislation in the aforementioned European countries, allowing Member States to decide whether to adopt the Article 8 "permit defence" is laudable.

Finally, as for transposition and implementation measures, while the German and French statutes are consistent with their legal traditions, the Italian solution seems to be rather innovative, albeit full of interpretative problems.

54 E.g. §14 BImSchG.