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On the Intersection Between Tort Law and Regulatory Law – A Comparative Analysis

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I. Introduction

It has been said that "regulatory law" is a vague and imprecise term encompassing various instruments of control and constraint.[1] It has also been loosely defined as "any system of rules intended to govern the behaviour of its subjects".[2] In this definition, administrative law and criminal law can both be part of an overarching regulatory framework.[3] Moreover, strictly speaking even private law can be part of a regulatory framework if it is used by the relevant legislative body as a means of meeting regulatory policy aims. In a more concrete and strict sense, regulatory law is said to be "a distinctive set of techniques used by states to control the operations of markets".[4] In this more narrow sense, regulation is traditionally associated with public law – administrative and/or criminal – and is considered to be the domain of government agencies vested with public law powers.[5] As a result, it seems that most lawyers tend to consider regulatory law to be a body of law outside the private law domain and setting rules or standards of conduct in various social situations ranging from occupational health regulation to environmental standards and competition law. Most contributions to this book work from this assumption.[6] 1

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[1] *P. Cane*, Using Tort Law to Enforce Environmental Regulations? Washburn Law Journal (Washburn L.J.) 2002, 450 f. See also *A. Ogus*, Regulation: Legal Form and Economic Theory (1994) 1, stating that the term regulation has acquired a "bewildering variety of meanings". Cf. *A. Ogus*, The Relationship Between Regulation and Tort Law: Goals and Strategies, no. 3.

[2] *H. Collins*, Regulating Contracts (1999) 7.

[3] Although the questionnaire we sent out refers to "administrative law", admittedly regulatory law is the better concept here. Cf. *K. Morrow*, England and Wales, no. 1. Administrative law is the body of law that is used for enforcement purposes of regulatory law, as is criminal law.

[4] *Collins* (fn. 2) 7.

[5] *P. Cane*, Tort Law as Regulation, Common Law World Review 2002, 305.

[6] See, e.g., *M. Jagielska/G. Żmij*, Poland, no. 1; *B. Askeland*, Norway, no. 1 and *U. Magnus/K. Bitterich*, Germany, no. 2 fn. 11. For a mixed definition, cf. *P. Billet/F. Lichère*, France, no. 3.

2 However, in a more abstract way and returning to the aforementioned definitions, tort law can be understood to have a certain regulatory nature as well. For instance, the breach of a statutory provision obliging employers to provide personal safety equipment to their employees may result in both criminal prosecution or the administrative fining of the employer and in tortious liability vis-à-vis an injured employee. In such a situation, tort law can be considered to be one of the enforcement instruments of the substantive rule. To give one example – regulation on European product quality is primarily enforced by means of public law but is also supposed to be "backed up" by private enforcement efforts such as competitors' claims for damages and injunctive relief.[7] Thus, a private law right to compensation can serve as a deliberate policy instrument of strengthening public regulatory policy goals.[8]

3 Moreover, in the broadest definition of "regulatory law" tort law itself can be considered to be an autonomous system of regulation. This is especially true if we define regulation as rules controlling human activity[9] and if we accept that tort law sets standards for behaviour, monitors the behaviour and enforces the standards against those not complying.[10] Admittedly, this is a somewhat instrumental vision on tort law which is not universally shared.

4 In this chapter, the words "regulatory standards" or "regulatory law rules" refer to public law rules – be it either clear-cut and concrete or vague and conceptual, be it in the form of statutory rules, government regulations or public authority orders, guidelines, et cetera. I have not tried to work out a detailed distinction between rules and standards; for the purposes of this comparative analysis the distinction is not essential and the terms are used interchangeably.[11]

5 In this chapter, a comparative analysis is undertaken of the legal systems presented in this volume. On the basis of a questionnaire, we asked the contributors to this volume to present an overview of their legal systems and the intricacies of interplay between tort law and regulatory law. The pictures that

[7] European Court of Justice (ECJ) 17 September 2002, C-253/00, *Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd* [2002] European Court Reports (ECR) I-7289; cf. *G. Wagner*, Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe? Archiv für die civilistische Praxis (AcP) 206 (2006) 414 f.

[8] See also ECJ 20 September 2001, C-453/99, *Courage Ltd v Bernhard Crehan* [2001] ECR I-6297. On that case, see, e.g., *A.P. Komninos*, New prospects for private enforcement of EC competition law: *Courage v Crehan* and the Community right to damages, Common Market Law Review (CML Rev.) 2002, 460 ff.; *A. Jones/D. Beard*, Co-contractors, Damages and Article 81: The ECJ finally speaks, European Competition Law Review (E.C.L.R.) 2002, 246 ff.; *O. Odudu/J. Edelman*, Compensatory damages for breach of Article 81, European Law Review (E.L.Rev.) 2002, 327 ff.; *G. Monti*, Anticompetitive agreements: the innocent party's right to damages, E.L.Rev. 2002, 282 ff.; *Wagner*, AcP 206 (2006) 402 ff.

[9] See, e.g., the references in fn. 1.

[10] For this definition of regulation, see *Cane*, Common Law World Review 2002, 309.

[11] Seminal with regard to the dichotomy rules/standards, see *L. Kaplow*, Rules versus Standards: An economic analysis, Duke Law Journal 1992, 557–629.

emerged from the contributions were disparate and turned out to be difficult to reconcile. As a result, this comparative analysis is at best an impressionistic picture of the European strands in legal development.

The structure of this chapter is as follows. First, I will present a number of 6
general remarks on the interplay between regulatory law and tort law (section II) in order to sketch the elements relevant for the comparative analysis. Section III ("Liability under Administrative Law as a Form of Interplay") analyses both liability *of* public authorities and liability *vis-à-vis* public authorities *for* acts and omissions contravening regulatory law rules and standards.

Then, section IV ("Breach of Regulatory Law as a Wrongful Act") considers 7
the dovetailing of tort law and regulatory law in the specific legal requirements for tortious liability, whereas section V ("Who is Granted Protection under Tort Law in the Case of a Breach of Regulatory Law?") deals with the scope of protection of the relevant regulatory law rule. Who is protected by the rule and hence, who can claim in tort when the rule is not complied with? Section VI ("Specific Consequences of Breach of Regulatory Law in Tort") analyses technical issues of tort law (e.g. burden of proof and causation) in the case of non-compliance with regulatory law rules.

Furthermore, section VII ("Regulatory Compliance and Regulatory Permit as 8
a Defence against Liability") focuses on a specific issue of interplay between tort law and regulatory law, namely the relevance of compliance with regulatory law standards and explicitly issued regulatory permits for the wrongfulness of the damaging behaviour. Here the issue is whether a claim under tort law is pre-empted (i.e., blocked or barred) by the relevant public authority's "permission to infringe".

Both section VIII ("Safeguarding Compensation") and section IX ("Compen- 9
sation in Cases of Lawful (Regulatory) Interference") deal with extensions of and alternatives to tort law as a damage compensating mechanism.

Finally, in section X ("Cases") we consider three complex cases and evaluate 10
the stance of the various legal systems to the problems of concurrence of regulatory law and tort law that the cases pose.

Input for this chapter was received from the country and special reports con- 11
tained in this volume. These reports will be cited in the following way (name of the author(s), country or heading of the special report, marginal number): *M. Lukas*, Austria, *K. Morrow*, England and Wales, *P. Billet/F. Lichère*, France, *U. Magnus/K. Bitterich*, Germany, *A. Menyhárd*, Hungary, *A. Monti/F.A. Chiaves*, Italy, *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, *B. Askeland*, Norway, *M. Jagielska/G. Żmij*, Poland, *P. del Olmo*, Spain, *C. Kissling*, Switzerland, *M.S. Shapo*, USA, *F. Fracchia*, Administrative Tort in Italian Law: Liability of Public Administrations and Diligence of

Private Individuals, *A. Ogus*, The Relationship Between Regulation and Tort Law: Goals and Strategies, *I. Ebert/C. Lahnstein*, Regulatory Law and Insurance, *M. Faure*, Economic Analysis of Tort and Regulatory Law. We asked the contributors to work with a questionnaire (set out at the beginning of this book). For the benefit of the sequence of the issues dealt with in this chapter, the questionnaire is not strictly followed from one question to the next but instead is referred to when applicable. The relevant issues are considered in a thematic order and the relevant questions from the questionnaire are referred to in the footnotes.

II. General Remarks on the Interplay Between Regulatory Law and Tort Law

1. Co-existence or hierarchy?

12 Tort law is an independent body of law coexisting next to administrative law and criminal law.[12] It may be assumed, as Jagielska and Żmij state, that for the same act the wrongdoer may bear civil, criminal and administrative responsibility.[13] In particular, criminal law seems quite separate from tort law: a criminal sanction does not exclude a claim for compensation in tort.[14] Having said this, there is indubitably also interplay between the different fields of law. Some legal systems have a principled hierarchy between private law and regulatory law, envisaging the former as the fallback option – the gap filler – if the latter is non-existent or non-comprehensive.[15] However, most legal systems do not consider regulatory law to have priority over or consider it to be superior to private law. In practice, however, the issue of concurrent competence of administrative and criminal courts, on the one hand, and civil courts, on the other, will inevitably necessitate some sort of demarcation between the areas of judicial competence.

13 From this demarcation usually follows that civil courts follow some sort of "parallel track" in tort law cases and that they tend to evaluate behaviour according to the autonomous concepts of "wrongfulness", "fault", "causation", et cetera. This does not mean, however, that civil courts ignore decisions rendered by specialized administrative courts that have dealt with the same case. For instance, in some jurisdictions "wrongfulness" of an administrative act can only be established by an administrative court before any civil proceedings on

[12] Cf. the answers we received to Question I/5 ("If an administrative law itself governs the consequences of a breach of its own rules, in particular by providing for criminal sanctions, are such rules regarded as comprehensive (that is, excluding a tort claim)? How do the laws of tort and criminal law interact in this respect?").

[13] *M. Jagielska/G. Żmij*, Poland, no. 24. Cf. *C. Kissling*, Switzerland, no. 21.

[14] *A. Menyhárd*, Hungary, no. 10; *A. Monti/F.A. Chiaves*, Italy, no. 13; *P. Billet/F. Lichère*, France, no. 7; *B. Askeland*, Norway, no. 8; *U. Magnus/K. Bitterich*, Germany, no. 11; *P. del Olmo*, Spain, no. 20; *C. Kissling*, Switzerland, no. 22.

[15] *K. Morrow*, England and Wales, no. 1.

liability of the public authority for upholding the act in the first place can be commenced.

From the foregoing, one could conclude that tort law and regulatory law are separate circuits of law. Indeed, the answers to the questionnaire bear witness of the watershed between tort law and regulatory law.[16] At closer look, however, there definitely is serious interplay between the two fields of the law. In this respect, the field of safety regulation and environmental protection offers a good example. Take for instance the precautionary principle, which stems from environmental policy and has found its way into environmental protection legislation.[17] There currently is a doctrinal debate on the extent of the applicability of the precautionary principle in environmental torts. If ultimately the precautionary principle has the power to reform or amend the concepts of "wrongfulness" and "duty of care" then regulatory law can be said to have prompted tort law to evolve. A mirror-image development in which tort law prompts the evolution of regulatory law rules is feasible as well. This may have been the case in some jurisdictions with employers' responsibility for certain occupational diseases. 14

Another example is offered by the European Directive 2001/95/EC on general product safety.[18] Art. 5, for instance, states that "producers shall provide consumers with the relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and to take precautions against those risks." If under a national tort law system, there was no previous case law under tort liability to the same effect, then the regulatory framework of the Directive provides the national courts with a tool for formulating a duty of care with respect to product information duties. Thus, the regulatory standard of art. 5 of the Directive can in fact be enforced by use of tort law.[19] This does not necessarily work the other way around. If for instance product liability is based on the "reasonable consumer expectation test",[20] then consumers may expect that manufacturers comply with the safety level provided by administrative rules on product quality and safety.[21] However, they may also – depending on the case – have reasonable expectations *exceeding* those sustained by the statutory regula- 15

[16] See, e.g., the answers to Question I/1 ("What, in general, is the impact of administrative law rules on the tort law of your country?") and Question II/1 ("Of what importance are (a) statutory safety regulations, and (b) provisions aimed at environmental protection for the tort law of your country?").

[17] Cf. *P. Billet/F. Lichère*, France, no. 13.

[18] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, Official Journal (OJ) L 011, 15 January 2002, 4–17. Cf. *M. Jagielska/G. Żmij*, Poland, no. 44; *P. Billet/F. Lichère*, France, no. 14; *M. Lukas*, Austria, no. 4.

[19] Cf. *M. Lukas*, Austria, no. 25.

[20] Art. 6 (1) EC Directive 85/374/EEC reads: "A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account […]".

[21] *B. Askeland*, Norway, no. 20.

tory standards.[22] Hence, in some respects regulatory law can be said to offer a *minimum standard of protection* under tort law. We will return to this matter in section VII.

2. Convergence of objectives of tort and regulatory law?

16 The previous section brings us to the question whether tort law and regulatory law in the field of safety and environment indeed have identical or somehow converging objectives.[23] As already mentioned, at a policy level tort law can be considered to be an autonomous system of regulation: it sets standards for behaviour, monitors the behaviour *ex post* and enforces the standards against those not complying and thus causing damage. Some of the contributors to this book indeed argue that tort law and regulatory law have similar ulterior goals, notably the prevention of harm to private or public interests.[24] At a more closer look, however, some find that there does not seem to be a firm basis in legal theory in the various legal systems on full convergence of tort law and regulatory law objectives. Moreover, courts do not seem to allude *expressis verbis* to any particular goal and legal practice does not seem to reflect on this either.[25]

17 Some of the contributions to this volume emphasize the divergence of the objectives of tort law and regulatory law.[26] The central idea here is that tort law aims at protecting private and individual rights and interests, whereas regulatory law aims at protecting predefined public interests and does not concern itself with individual damage.[27] As a result, some types of damage (e.g. environmental damage) can only be the object of tort law insofar as the damage concerns individual property rights.[28] Finally, an in-between position is held by those who feel that the goals of regulatory law and tort law are similar on an abstract level, but the instruments and the scale of enforcement differs:[29] where regulatory law aims at "direct prevention" and criminal punishment in the case of non-compliance, tort law aims at prevention by means of *ex post* compensation.[30]

[22] Cf. *M. Jagielska/G. Żmij*, Poland, no. 44.
[23] See Question II/2 ("In your country, to what extent are tort law and regulatory law rules on these topics considered to have identical or similar objectives?").
[24] See the table and its references at infra no. 20.
[25] Cf. *A. Menyhárd*, Hungary, no. 17.
[26] *P. Billet/F. Lichère*, France, no. 13; *K. Morrow*, England and Wales, no. 35.
[27] Cf. *P. del Olmo*, Spain, no. 57.
[28] *K. Morrow*, England and Wales, no. 35.
[29] Cf. *M. Jagielska/G. Żmij*, Poland, no. 46.
[30] Seminal *S. Shavell*, Liability for Harm Versus Regulation of Safety, Journal of Legal Studies (JLS) 1984, 357 ff. On the "post facto" features of tort law in this respect, see, e.g., *S. Shavell*, Foundations of Economic Analysis of Law (2004) 585 f.; *S. Shavell*, The optimal structure of law enforcement, Journal of Law and Economics (JLE) 1993, 255 ff. Cf. *C.D. Kolstad/T.S. Ulen/G.V. Johnson*, Ex post liability for harm vs. ex ante safety regulation: substitutes or complements? American Economic Review 1990, 888–901; *Ogus*, Regulation: Legal Form and Economic Theory (fn. 1) 261. Cf. *M. Faure*, Economic Analysis of Tort and Regulatory Law, no. 7 ff. Cf. *W.H. van Boom*, Efficacious Enforcement in Contract and Tort (2006) 18 ff.

At this point, we can introduce injunctive relief as a yardstick for testing convergence of goals of tort law and regulatory law. Indeed, judicial activism with regard to injunctive relief in tort cases has some bearing on the balance between regulatory law and tort law. Take the example of an industrial operator emitting noxious exhaust gases. Usually regulatory law will set standards which can be enforced by issuing administrative stopping orders and shutting down operations. If a civil court has similar powers to grant prohibitory and mandatory injunctions reinforced by recurring penalty payments, then we can compare the use of both administrative and civil tools. Converging use of these tools may then be indicative of convergence of the goals of tort and regulatory law. Moreover, if a civil court refrains from using the aforementioned powers in the case of an operator who complies with all regulatory standards, then that could be an indication for the priority of the regulatory framework over private law and its remedies. If the industrial operator emitting noxious exhaust gases is found to comply with all relevant regulations but the operation of the plant is nevertheless stopped or suspended by means of a civil injunction, then one could argue that apparently tort law standards have primacy over public regulatory law standards. 18

Letting tort law play second fiddle can be the rational thing to do. A tort law system that "merely" compensates but does not stop or deter may indeed be the better position for tort law when the level of protection offered by tort law is inefficiently high. In this structure, the activity itself and its consequences should be endured, but any negative consequences will have to be compensated.[31] If indeed tort law is merely used in such a situation to compensate the negative side-effects of the activity (i.e. internalizing externalities) rather than to forbid or curtail the activity as such, then there is strong indication that the goals of regulatory law and tort law *diverge*. Then, the former aims at prohibiting and allowing certain activities (under certain conditions) whereas the latter aims at compensating (certain) victims. As a result, whether the goals and instruments of tort and regulatory law indeed converge or diverge depends on the powers of the judiciary to provide injunctive relief in tort cases and on the extent to which these powers are applied in practice. 19

From a policy point of view, regulatory regimes covering safety and environmental protection seem to be preferred over tort liability.[32] At the end of the day, preference for either system seems to boil down to a policy choice. In short, the following table shows the possible differences in objectives and instruments of regulatory law and tort law. 20

[31] Cf. *A. Ogus*, The Relationship Between Regulation and Tort Law: Goals and Strategies, no. 31.
[32] *K. Morrow*, England and Wales, no. 34. For a nuanced law and economics approach, see *M. Faure*, Economic Analysis of Tort and Regulatory Law, no. 13.

Regulatory Law	Tort Law
Objectives	
• Protection of the general interest[33] • Prevention of undesirable conduct[34]	• Protection of individual rights against infringement[35] • Compensation of victims of negligence, allocation of loss[36] • Prevention of wrongdoing,[37] i.e. by the behavioural response to the threat of being held liable (deterrence)[38] • Ancillary instrument of enforcement of regulatory objectives
Instruments to Reach These Objectives	
• Ex ante[39] • No damage required[40] • Clear and concrete rules • Command/control structure[41] • Criminal charge[42] • Obligation to restore to original state[43]	• Ex post: financial compensation • Securing compensation (e.g. by compulsory insurance)[44] • Ex ante: injunctive relief in the form of cease-and-desist orders[45]

3. Constitutional restrictions

21 We asked the contributors to elaborate on the constitutional restrictions to the interaction between statutory regulation and tort law, e.g., concerning the re-

[33] *K. Morrow*, England and Wales, no. 34 f.; *P. del Olmo*, Spain, no. 57; *U. Magnus/K. Bitterich*, Germany, no. 11 (with regard to criminal law).
[34] Cf. *P. Billet/F. Lichère*, France, no. 15; *B. Askeland*, Norway, no. 24.
[35] *U. Magnus/K. Bitterich*, Germany, no. 22; *K. Morrow*, England and Wales, no. 35; *M. Jagielska/G. Żmij*, Poland, no. 47.
[36] *A. Menyhárd*, Hungary, no. 17.
[37] *P. Billet/F. Lichère*, France, no. 13; *A. Menyhárd*, Hungary, no. 17; *B. Askeland*, Norway, no. 24. Cf. *M. Faure*, Economic Analysis of Tort and Regulatory Law, no. 2.
[38] Cf. *M. Jagielska/G. Żmij*, Poland, no. 48.
[39] *A. Monti/F.A. Chiaves*, Italy, no. 22; cf. *M. Faure*, Economic Analysis of Tort and Regulatory Law, no. 8.
[40] Cf. *P. Billet/F. Lichère*, France, no. 7.
[41] *A. Monti/F.A. Chiaves*, Italy, no. 22.
[42] *M. Jagielska/G. Żmij*, Poland, no. 46.
[43] Cf. *P. del Olmo*, Spain, no. 15.
[44] See infra no. 51 ff.
[45] *U. Magnus/K. Bitterich*, Germany, no. 1; *M. Jagielska/G. Żmij*, Poland, no. 80; *B. Askeland*, Norway, no. 42; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 46 and *P. Billet/F. Lichère*, France, no. 6 and 13; *M. Jagielska/G. Żmij*, Poland, no. 48; *M. Lukas*, Austria, no. 44.

lationship between federal law and state law.[46] With regard to these constitutional restrictions, much depends on the constitutional setting of the specific jurisdiction. The constitutional setting of each individual country by and large decides which are binding rules of law and which are not. According to most legal systems, non-compliance with any kind of regulatory law can be a source of tortious liability,[47] ranging from a statutory framework to delegated rules, standards issued by regulatory agencies, et cetera.[48] If the legal document at hand fails the constitutional requirements for constituting a "binding law" (e.g. in the case of guidelines set by regulatory agencies without statutory basis), there is still the possibility that the document acquires specific status – for instance, a *good custom* or some other source of uncodified duty of care.[49]

III. Liability Under Administrative Law as a Form of Interplay

1. Two types of "administrative liability"

The interplay between tort law and regulatory law may also present itself in another respect, notably in the area of "administrative liability". We put a number of questions to the contributors concerning this type of liability.[50] However, the term "administrative liability" means different things to different lawyers. In the legal systems that consider "administrative liability" to be the liability of the administration and that adhere to a strict separation of jurisdiction between civil courts and administrative courts, administrative liability is the liability *of* public authorities.[51] In some other jurisdictions, the term "administrative liability" is used for reference to liability under administrative law *vis-à-vis* public entities. We will deal with both understandings of "administrative liability". 22

[46] See Question I/2 ("Are there any constitutional boundaries or guidelines for the interaction between administrative law and tort law, e.g., concerning the relationship between federal law and state or local law (if applicable) and the protective purpose of an administrative law rule?"). Cf. also Question I/3 ("Aside from statutory provisions, which types of administrative laws (e.g. regulations, official notifications) can in the case of their violation result in a tort liability?") and Question I/4 ("What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?").

[47] *P. Billet/F. Lichère*, France, no. 5; *A. Monti/F.A. Chiaves*, Italy, no. 11; *C. Kissling*, Switzerland, no. 11.

[48] Cf. *B. Askeland*, Norway, no. 4; *U. Magnus/K. Bitterich*, Germany, no. 7 ff. and 13 ff.; *M. Lukas*, Austria, no. 6 f.

[49] Cf. *P. Billet/F. Lichère*, France, no. 5.

[50] See Question I/8 ("Are legal entities themselves subject to an administrative liability in your country? What are the consequences of such a liability under private law? If applicable, does the administrative liability of a legal entity also result in a tort liability? How does the administrative liability of a legal entity interact with its vicarious liability?").

[51] Cf. *P. Billet/F. Lichère*, France, no. 12.

2. Liability of public authorities

23 Liability of public authorities is not the focus of this volume, but a specific aspect of interplay should be introduced here: the relationship between administrative review of public authorities' acts and decisions, on the one hand, and public authority liability, on the other. Obviously, the interplay of these two legal regimes very much depends on the domestic constitutional and administrative legal framework. In England and Wales for instance, this is a field of the law very much in motion, in part as a result of the enactment of the 1998 Human Rights Act. In the case of *Marcic v Thames Water Utilities Ltd* [2002] Queen's Bench (QB) 929, Thames Water Utilities (TWU) was in charge of an outdated sewerage system and in the face of financial constraints it had to prioritize certain operations. Marcic's regularly swamped back garden was not one of them. TWU faced a considerable financial burden after the Court of Appeal decided that Marcic was allowed to shortcut administrative procedures and sue directly in tort (numerous other owners would undoubtedly follow). Contrastingly, the House of Lords ruled that the regulatory framework of the Water Industry Act 1991 sufficed as a remedy (it provided for administrative procedures and judicial review of the priority setting process), pre-empting liability under common law rules.[52]

24 The contributions to this volume show that public authority liability for wrongful legislation and for violating existing statutory (regulatory) law standards is a complex issue in most legal systems. Because the topic is too complex to deal with extensively here, a few general remarks suffice. Some legal systems seem to be in a transitory phase towards acknowledging state liability for wrongful legislation.[53] Others are moving away from a restrictive approach of immunities to a more citizen-friendly liability regime.[54] Some are struggling with the technical construction of liability for wrongful legislative acts.[55] Usually, some principle of "proximity" between the public authority and the claimant is used to limit the circle of potential deserving claims.[56] Sometimes, establishing the fault of the authority is a difficult hurdle to overcome.[57] The general trend seems to be one of reticence: claims against public authorities are not easily granted.[58]

[52] *K. Morrow*, England and Wales, no. 13.
[53] *A. Menyhárd*, Hungary, no. 8.
[54] Cf. *K. Morrow*, England and Wales, no. 25 ff.
[55] *P. del Olmo*, Spain, no. 17.
[56] See, e.g., *F. Fracchia*, Administrative Tort in Italian Law: Liability of Public Administrations and Diligence of Private Individuals, no. 35.
[57] Cf. *F. Fracchia*, Administrative Tort in Italian Law: Liability of Public Administrations and Diligence of Private Individuals, no. 45.
[58] For more literature on this topic, see *W.H. van Boom/A. Pinna*, Liability for Failure to Regulate Health and Safety Risks; Second-Guessing Policy Choice or Showing Judicial Restraint? in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) 1 ff.

3. Liability vis-à-vis public authorities

"Administrative liability" in the sense of liability under administrative law *vis-à-vis* public entities is a legal construction for financial recourse on specific groups deemed responsible for the financial burden of a specific activity for the benefit of society as a whole. In this respect, liability seems to serve similar purposes as specific taxation does. Liability law is used to this end in a number of jurisdictions.[59] If the conditions under which such recourse action is allowed are not laid down in the general part of tort law but rather in specific legislation, one could call this genuine "administrative liability". A notable example of this, which we will deal with infra (no. 57), is the administrative recoupment action granted to public authorities for environmental clean-up costs. 25

Generally speaking, in a number of legal systems both natural and legal persons can be subject to such obligations to compensate damage under administrative law.[60] However, that mere fact does not decide tortious liability, so specific rules on vicarious liability – or any other construction of imputation of acts to a legal entity – are not pre-empted by the administrative law obligations.[61] This may imply that an executive officer of a business entity can be held personally liable for not intervening in the business process and thus allowing the business entity to breach regulatory standards.[62] Additionally, it seems that conduct of *employees* that constitutes breach of regulatory standards is to be imputed to the employer.[63] 26

IV. Breach of Regulatory Law as a Wrongful Act

Is the mere breach of regulatory law a tortious act? The answer to this question largely depends on the domestic structure of tort law. In short, there seems to be a number of possible approaches: 27

- Non-compliance with the regulatory standard as such constitutes an imputable wrongful act;[64] thus, the non-compliant behaviour by the respondent gives the claimant a solid basis for his claim in tort: by not complying with the regulatory standards, a tort is committed.[65]
- Non-compliance is an unlawful act and fault is *presumed* but the respondent can rebut this presumption.
- Non-compliance is unlawful, but *fault* still has to be proved.[66]

[59] See, e.g., *C. Kissling*, Switzerland, no. 29 and 66; *A. Monti/F.A. Chiaves*, Italy, no. 18.
[60] See, e.g., *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 31; *A. Monti/F.A. Chiaves*, Italy, no. 17; *M. Jagielska/G. Żmij*, Poland, no. 38.
[61] Cf. *A. Monti/F.A. Chiaves*, Italy, no. 18; *P. del Olmo*, Spain, no. 33.
[62] Cf. *U. Magnus/K. Bitterich*, Germany, no. 18.
[63] Cf. *P. del Olmo*, Spain, no. 36; *M. Jagielska/G. Żmij*, Poland, no. 34 ff.; *C. Kissling*, Switzerland, no. 24 ff.
[64] *A. Menyhárd*, Hungary, no. 23; *P. del Olmo*, Spain, no. 94.
[65] Cf. *A. Monti/F.A. Chiaves*, Italy, no. 28 ff.
[66] *M. Jagielska/G. Żmij*, Poland, no. 60.

28 Admittedly, the breach of regulatory law standards is not considered a prerequisite for tortious liability.[67] Imputable wrongdoing is an autonomous concept independent of statutory breach.[68] But the interplay between tort and regulatory law does sometimes lead to priority of the latter over the former. Thus, if regulatory standards have been violated, this usually amounts to an act contravening the law and the violation as such constitutes a wrongful act.[69] In this respect, the regulatory standards act as minimum standards of care.[70] This may have practical relevance for fault-based liability: such regulatory standards may raise expectations of potential victims and can thus be a useful tool for construing liability in cases where these expectations are not met.[71] As a result, non-compliance with regulatory standards may reinforce the claimant's case in the sense that it gives him a benchmark for evaluating the respondent's behaviour.[72]

29 On a more concrete level, one can ask whether the mere breach of a rule of regulatory law *per definitionem* constitutes *wrongfulness*.[73] This depends, as Askeland rightly observes, on the definition of "wrongfulness" under the legal system at hand. For the purpose of tortious liability, some legal systems adhere to a subdivision into "wrongfulness" and "fault" (or "imputability"), while others work with an overarching concept of "fault" that encompasses both the evaluation of the act itself and the motives and reproach concerning the actor.[74] Having said that, it seems that the practical differences between the legal systems do not depend on these definitional differences.

30 A considerable number of legal systems seem to take as a starting point that violating a regulatory law standard suffices for establishing wrongfulness but cannot be sufficient for establishing liability as a whole.[75] Conversely, some legal systems do not automatically consider an unlawful act to be a tortious act.[76] Indeed, most legal systems will require more than just wrongfulness in order for tortious liability to arise. Fault of the wrongdoer is often assumed or a shift of the burden of proof with regard to imputability of the wrongful act

[67] *A. Menyhárd*, Hungary, no. 22; *P. Billet/F. Lichère*, France, no. 17; *P. del Olmo*, Spain, no. 89; *C. Kissling*, Switzerland, no. 6, 15 and 34.

[68] Although technically speaking, the tort of breach of a statutory duty under the law of England and Wales would be the exception to this rule, of course there are other torts that can possibly be invoked (such as the tort of negligence) in which the breach of the statutory duty itself may be relevant but not decisive. Cf. *K. Morrow*, England and Wales, no. 46.

[69] *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 53; *P. Billet/F. Lichère*, France, no. 18; *P. del Olmo*, Spain, no. 90.

[70] *U. Magnus/K. Bitterich*, Germany, no. 20 and 28.

[71] *B. Askeland*, Norway, no. 29; *C. Kissling*, Switzerland, no. 34.

[72] *B. Askeland*, Norway, no. 29; *A. Menyhárd*, Hungary, no. 16.

[73] See Question III/A/1 ("What role does a breach of safety regulations and environmental law rules play in the field of fault-based liability?") and Question III/A/2 ("Does the mere breach of such a rule constitute wrongfulness or are there any additional requirements, such as, e.g., the violation of a duty of care and fault?").

[74] On these different approaches, see, e.g., *C. van Dam*, European Tort Law (2006) no. 801 ff.

[75] Cf. *A. Menyhárd*, Hungary, no. 24.

[76] Cf. *B. Askeland*, Norway, no. 25.

is allowed.[77] Other legal systems, however, are more reticent in automatically linking breach of regulatory law with any element of tortious liability.[78] German law seems to hold an intermediate position as it more or less tends to link non-compliance with regulatory standards and liability on the basis of § 823 subs. 1 Bürgerliches Gesetzbuch (German Civil Code, BGB) in cases where the standard constitutes a *Verkehrspflicht* (a duty of care not to infringe upon a subjective right of the claimant).[79] Moreover, breach of a statutory duty as such constitutes wrongfulness.[80]

V. Who is Granted Protection Under Tort Law in the Case of a Breach of Regulatory Law?

We asked the contributors to report on the so-called "scope of protection" of regulatory law under tort law.[81] When the tortfeasor has violated a rule of regulatory law, to what extent does his liability depend on the protective purpose of this rule? Or, to put it differently: can all those suffering damage as a consequence of the breach of a regulatory law rule claim damages from the person in breach? The answer must surely be negative. Tort law usually sets boundaries to the number of claimants and the extent of their claims. This is aptly illustrated by the Spanish case of employees who were working in a factory on a Sunday and were injured as a result of an explosion nearby. Their claim for compensation against their employer – for breaching the regulatory law forbidding factory work on Sundays – was denied for lack of "protective purpose": the statute aimed at safeguarding rest and recuperation but not at preventing safety hazards such as explosions.[82] 31

What are the instruments used in tort law for assessing the scope of protection? Unsurprisingly, these instruments for "containment" differ from one legal system to another. In some jurisdictions these questions are considered as issues of "protective purpose" or the "scope of protection" of the regulatory law rule.[83] 32

[77] *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 53; *P. Billet/F. Lichère*, France, no. 18; *B. Askeland*, Norway, no. 31.

[78] See, e.g., *M. Jagielska/G. Żmij*, Poland, no. 51.

[79] *U. Magnus/K. Bitterich*, Germany, no. 30. Note that *Verkehrspflicht* as such is an autonomous concept in tort law. In practice, however, a breach of a regulatory standard may well amount to the breach of a *Verkehrspflicht*.

[80] *U. Magnus/K. Bitterich*, Germany, no. 31.

[81] See Question I/6 ("Under what conditions are administrative law rules regarded as so-called "rules with a protective purpose"? Is the protective purpose of an administrative law rule only determined by administrative law or also by the general principles of tort law?"), Question II/3 ("Are these regulations and provisions per se regarded as statutes with a protective purpose? Are individuals covered by the protective purpose of these rules? Does a breach of such rules constitute a wrongful act in your legal system? Or does it bring about a strict liability?") and Question III/A/3 ("If the tortfeasor has violated an administrative rule, to what extent does his liability depend on the protective purpose of the rule?").

[82] *P. del Olmo*, Spain, no. 29.

[83] *A. Monti/F.A. Chiaves*, Italy, no. 28; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 23 ff.; *B. Askeland*, Norway, no. 32; *K. Morrow*, England and Wales, no. 46 f.; *P. del Olmo*, Spain, no. 91; *M. Lukas*, Austria, no. 15.

These concepts usually address two related issues. First, whether the injured party is part of the class of *persons* that the rule purports to protect, according to the legislative intentions. Second, whether the legislator devised the rule at hand in order to protect against the type of damage as was suffered. Obviously, the systems may diverge on the wording and extent of the concept of "protective purpose". In Norwegian law, for instance, the concept of *relevance* or *parallelity* is used to the same end as the concept of *Schutzgesetz* is used under German law, the doctrine of "relative wrongfulness" under Polish law, and the concept of *relativiteit* is used in the Netherlands.[84] In England and Wales, the related concept of *statutory interpretation* is decisive in ascertaining whether a statute purports to allow a claim in tort for breach of the statute at hand.[85]

33 Other legal systems operate more covertly by using other concepts to express a similar "containment policy". Under French tort law, for instance, "protective purpose" of the regulatory standard is non-existent.[86] The requirement is, however, directly relevant under French law when evaluating the *nature of the damage suffered*: if the claimant has suffered damage of a different kind than the damage that the legislator tried to prevent with the enactment of the regulatory standard, he would not be able to claim compensation.[87] Sometimes, the concept of "protective purpose" is cloaked in the *causation requirement*. The causation requirement is then used to confine the extent of liability to the interests protected by the piece of legislation.[88]

34 Determining the actual scope of protection of a regulatory law rule may be extremely difficult, as Jagielska and Żmij note.[89] Interpreting statutes that are ambiguous in this respect offer less guidance for court decisions than would be desirable.[90] This is even more so the case when the interests protected by the public law standards seem to refer to "public goods" such as clean environment and healthy competition climate. In some jurisdictions a lack of legislative clarity may lead to the presumed denial of protective purpose.[91] Hence, the court may then have to shift from regulatory law to general principles of fault-based liability and ignore the regulatory framework altogether.

35 Alternatively, within the field of "public goods" sometimes a subdivision is made of public goods with specific persons or groups of persons on the receiving end, on the one hand, and public goods with no specific recipients, on the

[84] *B. Askeland*, Norway, no. 32; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 23 ff ; *U. Magnus/K. Bitterich*, Germany, no. 32; *C. Kissling*, Switzerland, no. 41 ff.; *M. Lukas*, Austria, no. 3 and 35; *M. Jagielska/G. Żmij*, Poland, no. 14. See also the Swiss concept of *Rechtswidrigkeitszusammenhang* as explained by *C. Kissling*, Switzerland, no. 23.

[85] *X (Minors) v Bedfordshire County Council* [1995] 2 Appeal Cases (AC) 633; cf. *K. Morrow*, England and Wales, no. 5.

[86] *P. Billet/F. Lichère*, France, no. 8.

[87] *P. Billet/F. Lichère*, France, no. 19.

[88] *A. Menyhárd*, Hungary, no. 11 and no. 25.

[89] *M. Jagielska/G. Żmij*, Poland, no. 61 f.

[90] Cf. *M.S. Shapo*, USA, no. 3 ff.

[91] *U. Magnus/K. Bitterich*, Germany, no. 14. Cf. *M. Lukas*, Austria, no. 24 and 27.

other hand. Sometimes, courts consider regulation aiming at environmental protection in general to be part of the second category, denying individual claims for compensation based on breach of such regulation.[92] An illustration of the use of such a subdivision is offered by a Dutch case concerning a negligently executed safety inspection of a Rhine barge by a public authority. The authority was admittedly negligent and as a result a third party suffered property damage when the negligently inspected barge sank and damaged the claimant's property. The *Hoge Raad der Nederlanden* decided against state liability nonetheless. The regulatory law rules obliging the public authority to perform inspections according to a specific standard were held to aim at transport safety in general and not at protecting specific particular (property) interests.[93] Hence, the state was not held liable for the damage that the barge caused to the other vessel as a consequence of its unsafe condition.[94] Similar tools for restricting the protective ambit of regulatory law are used in other legal systems as well.[95]

VI. Specific Consequences of Breach of Regulatory Law in Tort

1. Burden of proof

What are the consequences of a breach of regulatory law rule on the allocation of the burden of proof, e.g., concerning causation, wrongfulness and fault?[96] Most legal systems do not attach specific consequences to breach of regulatory standards,[97] although citing a statutory rule that has been breached may help the claimant in substantiating his claim. Moreover, in specific circumstances the court may be more willing to reverse the burden of proof with regard to liability and causation if the non-compliance was of a serious nature.[98] This is illustrated by the Spanish Supreme Court Decision of 22 January 1996 36

[92] Cf. *A. Monti/F.A. Chiaves*, Italy, no. 24; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 34; *M. Jagielska/G. Żmij*, Poland, no. 47.

[93] Hoge Raad 7 May 2004, case C02/310HR, Nederlandse Jurisprudentie 2006, no. 281 (duwbak Linda). The Hoge Raad also argued that admitting liability in this case would allow protection to an unlimited group of third party interests for potentially unforeseeable damage.

[94] Hence, effectively the marine limitation of liability of the ship-owner was upheld. Note that if the negligent inspection had led to personal injury, the decision might have been different (the Court's reasoning is unclear on whether the decision would also apply to personal injury). On the differentiation between personal injury, property damage and pure economic loss, cf. *R. Rebhahn*, Staatshaftung wegen mangelnder Gefahrenabwehr (1997) 482.

[95] Cf. *M.S. Shapo*, USA, no. 9 and 19, referring to Restatement (Second) of Torts § 288 (1965). See also *K. Morrow*, England and Wales, no. 36, referring to *Stovin v Wise* [1996] AC 923. Cf. the concepts of general and specific reliance (on enforcement by the public authorities) used in, e.g., *Pyrenees Shire Council v Day; Eskimo Amber Pty Ltd v Pyrenees Shire Council* [1998] High Court of Australia (HCA) 3.

[96] See Question III/A/4 ("To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?") and Question III/A/5 ("What are the consequences of a breach of an administrative law rule on the allocation of the burden of proof, in particular where causation, wrongfulness and fault are concerned?").

[97] *A. Menyhárd*, Hungary, no. 27; *B. Askeland*, Norway, no. 34; *K. Morrow*, England and Wales, no. 49. Cf. *M.S. Shapo*, USA, no. 65. Contrast Austrian law, see *M. Lukas*, Austria, no. 29.

[98] Cf. *M. Jagielska/G. Żmij*, Poland, no. 66.

(Repertorio de Jurisprudencia (RJ) 248), where an illegally employed worker died on a mining exploitation site that did not hold an exploitation licence and did not follow applicable regulations. The Supreme Court held that the owner of the site was liable, reversing the burden of proof regarding fault. Since the full facts of the fatal accident had remained unclear, this also seems to have been a case of a presumption of causation.[99]

37 With regard to causation, the following is relevant. The proof of causation remains the most difficult in case of breach of a number of regulatory standards.[100] For instance, in the case of regulatory standards aiming at preventing the accumulation of individual trifle damage – small emissions adding to the total of environmental damage – the individual cases of non-compliance with the law do not cause the entire damage to the environment, and assessing the extent of the (small) contribution of the wrongful act to the total of the detriment is either impossible or unfeasible. So, the more general the interests that the regulatory law aims to protect – the environment, fair competition et cetera – the more difficult it will be to pinpoint the exact damage caused by one wrongful act.

38 Some legal systems allow the reversal of the burden of proof with regard to causation in cases of non-compliance with a regulatory standard that purports to protect against the damage that was in fact suffered by the claimant. As a rule of thumb, the onus of disproving causation can then be shifted to the respondent (prima facie evidence).[101] In some jurisdictions the breach of statutory rules is proof of *fault*. For instance, in Italian law the breach of administrative provisions per se may imply "fault" on part of the tortfeasor.[102] Thus, under Italian law, a breach of administrative rules characterized by a protective purpose amounts to fault in the sense of art. 2043 Codice civile (Italian Civil Code, CC).

39 The reverse situation may be relevant as well: does acting in compliance with regulatory law have an effect on the burden of proof concerning tortious liability?[103] If the respondent proves that he complied with all relevant regulatory standards, does this change the distribution of the burden of proof regarding liability? Naturally, if the default position is such that the claimant must prove the imputable wrongful behaviour and causation, then there clearly is no need for shifting the burden of proof: it already lies with the claimant.[104]

[99] *P. del Olmo*, Spain, no. 98.
[100] *P. Billet/F. Lichère*, France, no. 21.
[101] Cf. *U. Magnus/K. Bitterich*, Germany, no. 36; *M. Lukas*, Austria, no. 29; *R.J.P. Kottenhagen/ P.A. Kottenhagen-Edzes*, The Netherlands, no. 36 ff.
[102] *A. Monti/F.A. Chiaves*, Italy, no. 9.
[103] See also Question III/B/3 ("Does it make a difference for the allocation of the burden of proof concerning wrongfulness and fault whether the tortfeasor succeeds in proving that he has acted lawfully (as far as the relevant administrative law rules are concerned)?").
[104] Cf. *M. Jagielska/G. Żmij*, Poland, no. 75.

However, as the defence of compliance is raised by the respondent, he will typically have to prove the underlying facts.[105]

2. Elements of causation

To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?[106] In most jurisdictions this defence is allowed.[107] Delivering the necessary proof is more difficult. For instance, a respondent accused of not having complied with a local regulation ordering the bestrewing of icy surfaces, may argue – and prove if necessary – that the accident would also have happened if he had in fact complied. Under German law this is referred to as the defence of the "rightful alternative behaviour".[108] The cases in which such a defence succeeds seem scarce. In a recent Polish case, the Polish Supreme Court even stated that, "The defendant against whom a claim for redressing the damage is filed, cannot plead that if he had acted lawfully the wronged party would have sustained the same damage – while the actual action of the defendant constituted a breach of the norms supposed to prevent the damage".[109] 40

In some cases, however, the defence may be more successful. Consider for instance a case in which a plant operator does not have the required permits and thus acts contrary to strict legal requirements but in substance he does comply with the material rules that he would be obliged to comply with if he had been granted the permit. In such a case, there is an unlawful act but the unlawfulness does not seem to be the cause of the damage. Admittedly, this does not preclude liability on a basis *other* than the breach of regulatory law. The damaging act itself may still be wrongful on alternative grounds.[110] 41

3. Compensation not punishment

Breach of regulatory law is treated under tort law like other grounds for liability. As a result, the compensatory function of liability seems to be in the foreground.[111] The general position on the European continent is that punitive 42

[105] Cf. *K. Morrow*, England and Wales, no. 54.

[106] See Question III/A/4 ("To what extent is the tortfeasor allowed to prove that he would also have caused the damage if he had acted in compliance with the relevant rule?").

[107] *A. Menyhárd*, Hungary, no. 26; *A. Monti/F.A. Chiaves*, Italy, no. 32; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 55; *B. Askeland*, Norway, no. 33; *U. Magnus/K. Bitterich*, Germany, no. 33; *M.S. Shapo*, USA, no. 64. Note that such a defence does not preclude liability on another basis (viz., negligence instead of breach of statutory duty). See also *M. Lukas*, Austria, no. 36, for a distinction between what would be considered "property rules" and "liability rules" in law and economics (cf. *M. Faure*, Economic Analysis of Tort and Regulatory Law, no. 7).

[108] *U. Magnus/K. Bitterich*, Germany, no. 33. Cf. *C. Kissling*, Switzerland, no. 55.

[109] *M. Jagielska/G. Żmij*, Poland, no. 64.

[110] *P. Billet/F. Lichère*, France, no. 20.

[111] See Question III/A/6 ("Can a breach of an administrative law rule result in a claim for punitive damages?").

damages are not allowed, neither under principles of private law nor under regulatory law.[112] Admittedly, in the process of assessing non-pecuniary loss there may be consideration of a punitive element.[113] Contrastingly, the common law action for *exemplary damages* is punitive by nature.[114] Although this action is only allowed in a restricted number of cases, it could be relevant in cases where the respondent's conduct had been calculated to make a profit that would exceed any payment of compensation made to the claimant.[115] So, exemplary damages may be awarded in case of deliberate breach of regulatory standards with the aim of making a profit exceeding the possible detriment of others.

VII. Regulatory Compliance and Regulatory Permit as a Defence Against Liability

43 Acting in compliance with regulatory law may be a relevant factor in deciding liability. In general, the relevance of compliance seems to depend on the nature, aim, and ambit of the regulatory rule at hand. Hence, the relevance of acting in compliance with statutory provisions depends on the nature of these provisions. If these rules set minimum quality standards, then there does not seem to be a relevant obstacle for liability. If, however, the rules aim at complete harmonization and do not leave any room for autonomous decision-making, then compliance may in fact pre-empt liability altogether.

44 An example of such a complete bar can be found in art. 7 (d) Product Liability Directive: "The producer shall not be liable as a result of this Directive if he proves: […] that the defect is due to compliance of the product with mandatory regulations issued by the public authorities".[116] A similar example is offered by art. 8 (3) of the Environmental Liability Directive: "An operator shall not be required to bear the cost of preventive or remedial actions taken pursuant to this Directive when he can prove that the environmental damage or imminent threat of such damage: […] (b) resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities."[117]

[112] *A. Monti/F.A. Chiaves*, Italy, no. 34; *A. Menyhárd*, Hungary, no. 28; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 58; *P. Billet/F. Lichère*, France, no. 22; *P. del Olmo*, Spain, no. 100 ff.; *M. Jagielska/G. Żmij*, Poland, no. 67; *C. Kissling*, Switzerland, no. 62; *M. Lukas*, Austria, no. 39. For an economic rationale of punitive damages, see cf. *M. Faure*, Economic Analysis of Tort and Regulatory Law, no. 35.

[113] Cf. *B. Askeland*, Norway, no. 36; *U. Magnus/K. Bitterich*, Germany, no. 38.

[114] See also *M.S. Shapo*, USA, no. 66.

[115] *K. Morrow*, England and Wales, no. 50.

[116] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 7 August 1985, 29–33. Cf. *C. Kissling*, Switzerland, no. 17.

[117] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30 April 2004, 56–75.

Central to these exceptions is the idea of *regulatory compliance defence*. This, however, is by no means an absolute defence against liability; much will depend on the level of compulsion that the regulation employs. Generally speaking, it seems logical that the more leeway regulation leaves for, e.g., the choice of the instruments for achieving the prescribed regulatory outcome, the more likely it seems that tortious liability is not pre-empted. The *regulatory permit defence* deals with a more specific issue: the relevant authority has used its power under law to allow specific harm doing, e.g., river pollution. Allowing the tortfeasor to invoke the regulatory permit defence bars victims' claims for compensation. 45

We asked the contributors to give an account of how the respective legal systems deal with the regulatory compliance defence and the regulatory permit defence.[118] Some legal systems flatly reject the idea of such defences; others are hesitant to allow them.[119] Moreover, it is commonly held that a general duty of care can surpass the precautions demanded by public law regulation.[120] As noted by Ebert and Lahnstein, this is reflected in the general practice of liability insurance inclusions.[121] 46

So, in European legal systems there is a firmly rooted rule that duties of care under tort law can surpass the level of care set by regulatory law. However, exceptions are feasible. Much will depend on the specific regulatory law standards that are applicable. Perhaps the legislative intent is indeed to justify the damaging nature of the challenged acts without any compensation. For instance, if the regulatory framework itself explicitly pre-empts civil law liability, then obviously there is in fact a defence to the described effect.[122] If there is no explicit pre-emption, statutory interpretation would have to be applied to assess whether the legislative body did in fact consider a claim in tort to be possible in case of compliance.[123] If the regulatory standards already balanced the interests of the claimant and respondent, then that could be a ground for 47

[118] Question III/B/1 ("Can a tortfeasor be held liable in tort (for the purposes of obtaining either compensation for damage or an injunction) even if he acted in compliance with all relevant administrative law rules, or does your legal system allow the "regulatory permit defence"?") and Question III/B/2 ("Can the general duty of care go beyond these rules?").

[119] *P. del Olmo*, Spain, no. 11, 53 and 106; *B. Askeland*, Norway, no. 37; *P. Billet/F. Lichère*, France, no. 10 in fine and 23; *A. Monti/F.A. Chiaves*, Italy, no. 35; *A. Menyhárd*, Hungary, no. 29; *M. Lukas*, Austria, no. 12 and 40.

[120] Cf. *M. Jagielska/G. Żmij*, Poland, no. 72 (although there is some doctrinal controversy on the exact dogmatic form this duty should have; see also the interesting dogmatic discussion in Poland on the concept of "wrongfulness" as described by *M. Jagielska/G. Żmij*, Poland, no. 13–14); *P. del Olmo*, Spain, no. 107; *U. Magnus/K. Bitterich*, Germany, no. 43; *B. Askeland*, Norway, no. 39; *P. Billet/F. Lichère*, France, no. 24; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 62. For an economic rationale, see *M. Faure*, Economic Analysis of Tort and Regulatory Law, no. 38 ff.

[121] *I. Ebert/C. Lahnstein*, Regulatory Law and Insurance, no. 2.

[122] Cf. *U. Magnus/K. Bitterich*, Germany, no. 41 (*Genehmigung mit Präklusionswirkung*).

[123] *K. Morrow*, England and Wales, no. 51 ff.; *A. Ogus*, The Relationship Between Regulation and Tort Law: Goals and Strategies, no. 38. See also supra no. 31 ff.

dismissing later claims in the civil court.[124] Thus, as Menyhárd rightly observes, it boils down to the question whether "the regulation itself makes causing harm lawful and exempts – explicitly or implicitly – the tortfeasor from the obligation to provide compensation".[125]

48 A notable example of a case in which the duty of care exceeds the regulatory standard is given by the March 2005 decision by Rome Court of Appeal. In this case cigarette manufacturers were found liable for the failure to inform smokers of the risks of smoking. Although before 1990 there was no regulatory rule law imposing on manufacturers the duty to place warnings on cigarette packets informing consumers of the risks connected to smoking, the court found cigarette manufacturers liable for failure to inform smokers of such risks even though the tobacco industry had complied with all existing regulations governing the sale of tobacco products at the time.[126]

49 Other legal systems start from a different point but arrive at roughly the same conclusion by holding that a regulatory permit is in principle a valid defence which can be countered by alleging that a more stringent duty of care is applicable. The Polish case on self-igniting television sets illustrates this point: the manufacturer was held to a stringent duty of care vis-à-vis his customers, rendering the fact that the products complied with relevant regulatory standards irrelevant.[127] Interesting in this respect is also the German system of neighbour liability law (§ 906 BGB) which seems to have a mixed system in the sense that emissions which do not exceed marginal or approximate values (*Grenz- oder Richtwerte*) under administrative law principally have to be tolerated, but only "as a rule", i.e. as a guideline, not a binding provision for the civil courts. So, in effect, the courts should take the administrative permit *into account* when ascertaining tortious liability but they should not take the permit as a complete defence against liability.[128]

50 Finally, we asked what the consequences are of compliance with *wrongful* regulation.[129] Can tortfeasors be excused for complying with wrongful rules? Assuming that a court – be it a civil court or an administrative court – is allowed to assess the wrongfulness of the piece of legislation at hand,[130] then the matter turns to whether "mistake of law" and "acting on authority" are indeed valid defences. In criminal law, sometimes the "compliance with a legal duty" de-

[124] Cf. *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 61.
[125] *A. Menyhárd*, Hungary, no. 32.
[126] *A. Monti/F.A. Chiaves*, Italy, no. 36. Cf. *van Boom/Pinna* (fn. 58) no. 21 ff. on the French tobacco "saga".
[127] *M. Jagielska/G. Żmij*, Poland, no. 73.
[128] *U. Magnus/K. Bitterich*, Germany, no. 2 and 49. Cf. *M. Lukas*, Austria, no. 44.
[129] Question I/4 ("What are the consequences (under private law), if any, when an administrative law (i.e., law or decision by a government or public entity acting as such) itself violates statutory provisions? Is liability excluded for persons who cause damage by acting in compliance with a wrongful administrative law to which they are subject? If so, is it in any way relevant that that person knew or could have known that the administrative law was wrongful?").
[130] On that problem, see, e.g., *A. Menyhárd*, Hungary, no. 9.

fence can be raised.[131] With this defence, there usually is some sort of foreseeability test.[132] Then, the relevant question is whether the respondent knew or could have known that the piece of regulatory legislation was wrongful or not. It seems that a similar test may decide tortious liability of the respondent.[133]

VIII. Safeguarding Compensation

1. *Compulsory insurance and funds in the case of a breach of regulatory law*

As we have seen throughout this volume, breach of regulatory law may be sanctioned by a claim for damages in tort. How do tortfeasors pay for such claims? Usually, voluntary third party insurance is the funding mechanism used for compensation. However, there may be local circumstances impeding the proper functioning of this loss spreading mechanism. In that case and for whatever reason legislative policy may then aim at alternatives for safeguarding compensation by, e.g., rendering third party insurance compulsory (as reported by the contributors).[134] The alternative paths chosen seem to depend on the features of the domestic insurance market. 51

In the area of safety regulation and environmental protection, some countries use compulsory insurance schemes quite often, while others hardly make use of these schemes at all. For instance, German law tends to combine strict liability with compulsory insurance (viz., concerning motor vehicle liability, civil aviation, transport of goods).[135] Another example is offered by the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC 1969) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. These Conventions have established a regulatory framework for limited liability, compulsory insurance, and an international compensation fund for excess damage caused by oil transporting sea vessels.[136] Similar international arrangements exist regarding nuclear energy.[137] 52

Additionally, *de facto* compulsory liability insurance can be the result of a regulatory law rule compelling an operator of a specific activity to avail him- 53

[131] *A. Monti/F.A. Chiaves*, Italy, no. 12; *P. Billet/F. Lichère*, France, no. 6.
[132] *A. Monti/F.A. Chiaves*, Italy, no. 12; *B. Askeland*, Norway, no. 7.
[133] Cf. *P. del Olmo*, Spain, no. 18.
[134] Question II/4 ("If applicable, please elaborate on statutory schemes with regard to safety regulations and/or environmental protection that introduce compulsory liability insurance.").
[135] *U. Magnus/K. Bitterich*, Germany, no. 27. Naturally, the compulsory liability insurance of motor vehicle owners applies in all EU countries, but this is not part of liability for breach of regulatory law. See also *M. Lukas*, Austria, no. 30 ff.
[136] Cf. *P. Billet/F. Lichère*, France, no. 16; *M. Jagielska/G. Żmij*, Poland, no. 55.
[137] See the (amended) Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 and the (amended) Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960.

self of sufficient financial cover against liability risks. This is a widely used instrument with regard to licensees under environmental regulation.[138]

54 An even more radical alternative to compulsory third party insurance is the complete replacement of liability law by a comprehensive compensation scheme. In particular, personal injury suffered by employees in the course of their occupation is usually covered by a social security scheme.[139] This shift towards alternative compensation schemes is outside the scope of this volume.[140]

2. Alternative sources of compensation

55 What alternative sources of compensation are there in connection with regulatory law? First, contract law may be a source of obligation to compensate the injured party for non-compliance with regulatory law.[141] Second, there may be an alternative procedure for obtaining compensation. Notably in the case of a criminal offence, some legal systems allow the compensation of damage as an ancillary claim for compensation by the injured party in a criminal prosecution.[142] Third, in some legal systems altruistic intermeddling (*negotiorum gestio*) may be a source of compensation for the state when it decides to intervene after the infringement of regulatory law. Under this heading, the "intermeddling state" can sometimes claim reimbursement from the wrongdoer of the cost incurred "on behalf of " the wrongdoer.[143] Roughly speaking, this amounts to liability vis-à-vis the public authority as mentioned in section III. Fourth, in some jurisdictions specific rules on neighbour law, as far as these are codified outside the common framework of tort law, can also be a source of obligations to compensate damage caused by non-compliance with regulatory standards.[144] Fifth, there may be specific legislation regarding liability "outside" the common framework of tort law. A number of jurisdictions have specific statutes outside the common framework of tort law providing for a legal ground for compensation.[145] For instance, a 1997 Italian decree renders the wrongdoer liable for redress of soil contamination;[146] specific Norwegian statutes on environmental liability and liability of fun fair operators can cause liability in cases of non-compliance with public law safety

[138] *K. Morrow*, England and Wales, no. 44; *U. Magnus/K. Bitterich*, Germany, no. 27; *A. Menyhárd*, Hungary, no. 21; *P. Billet/F. Lichère*, France, no. 16; *C. Kissling*, Switzerland, no. 50.
[139] *A. Monti/F.A. Chiaves*, Italy, no. 27; *B. Askeland*, Norway, no. 27.
[140] See, e.g., *W.H. van Boom/M. Faure* (eds.), Shifts in Compensation between Private and Public Systems (2007).
[141] *U. Magnus/K. Bitterich*, Germany, no. 40.
[142] *P. Billet/F. Lichère*, France, no. 26; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 64.
[143] *U. Magnus/K. Bitterich*, Germany, no. 46; *C. Kissling*, Switzerland, no. 66.
[144] *B. Askeland*, Norway, no. 42; *U. Magnus/K. Bitterich*, Germany, no. 47; *M. Jagielska/G. Żmij*, Poland, no. 80; *C. Kissling*, Switzerland, no. 67.
[145] Cf. *M. Jagielska/G. Żmij*, Poland, no. 76 (product liability outside tort law).
[146] *A. Monti/F.A. Chiaves*, Italy, no. 38.

standards;[147] specific legislation in England and Wales concerns liability of polluters for clean-up costs;[148] specific legislation in the USA provides relief for injured consumers in the case of a violation of a consumer product safety rule".[149] Sometimes, the relevant administrative statute refers back to the general principles of tortious liability.[150]

Apart from all these specific sources of compensation, Spanish administrative law seems to present a unique feature of a general framework for liability in the case of non-compliance with regulatory standards. Under Spanish administrative law, there is the possibility to base liability for breach of regulatory standards on the administrative legislation itself. According to art. 130 *Ley 30/92 del Procedimiento Administrativo Común*, the offender is obliged to restore the situation to its original state and to pay the corresponding losses and damages. So, apart from any administrative sanctions that may apply, a wrongdoer may also be obliged to repair and/or compensate any harm caused as a result of the breach.[151] 56

When comparing the various legal systems, a common denominator seems to present itself in the form of the recoupment action by public authorities for environmental clean-up costs. A number of legislators have chosen to implement a specific piece of legislation outside tort law to facilitate the claiming of clean-up costs by public authorities or agencies.[152] Surely, this is no coincidence. Possible reasons for governments designing a separate administrative framework for recoupment of soil clean-up costs seem to be the following. First, in some jurisdictions a claim in tort law presupposes a proprietary interest in the contaminated soil. If the public authority does not own the land, a tort claim is barred. Second, tort law may have inherent traits such as prescription periods, causation requirement, standard of proof, proof of negligence, et cetera that may not suit the pursuit of public policy. 57

To conclude, the alternative routes to compensation are manifold and the justifications diverge. The justification may be to facilitate recoupment actions for public authorities or to replace tort law by an alternative source of swift and efficient compensation, but may also lie in the classical division of the law of obligations, e.g., altruistic intermeddling as a source of compensation in absence of negligent behaviour. 58

IX. Compensation in Cases of Lawful (Regulatory) Interference

We asked the contributors to this volume to report on regimes providing for compensation (either from the party who benefited, a fund, or government) in 59

[147] *B. Askeland*, Norway, no. 41.
[148] *K. Morrow*, England and Wales, no. 24; *C. Kissling*, Switzerland, no. 66.
[149] *M.S. Shapo*, USA, no. 48.
[150] Cf. *A. Menyhárd*, Hungary, no. 32.
[151] *P. del Olmo*, Spain, no. 44 ff.
[152] See also *M.S. Shapo*, USA, no. 41 ff. on the USA Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

the case of the *lawful* infringement of interests of another person under regulatory law.[153] It seems that there is no broadly applicable principle to this topic except for public indemnification for expropriation, either in the strict sense or in a more broad sense (forced easements, et cetera). This naturally constitutes a firm ground for indemnification.[154] Indeed, compensation of the expropriated person is usually constitutionally safeguarded.[155]

60 Obviously, outside the strict ambit of expropriation, interference in accordance with regulatory standards may also cause damage. Some jurisdictions then allow for liability for lawful interference.[156] In line with this ground for liability, lawful interference with someone's property justified by the public interest – e.g., nuisance caused by an airport – may be in accordance with regulatory standards but may nevertheless result in a duty to compensate the injured party.[157] A related but somewhat different construction is sometimes followed in Dutch law. Art. 6:168 Civil Code provides that, in case of tortious liability (e.g. industrial nuisance), the civil court may reject an action for obtaining a prohibitory injunction on the ground that the tortious conduct should be tolerated in the common overriding interest of society, however without prejudice to the right to compensation of the damage ensued.[158] Hence, although in principle tortious activities can be stopped by filing for injunctive relief, here an exception is allowed leaving the victim with "mere" compensation from the tortfeasor. Other jurisdictions seem to file this problem under the heading of the law of civil procedure, e.g., by rendering injunctive relief a discretionary matter for the court rather than a substantive right to cessation of the activity.

61 Finally, there is the matter of liability for "excessive lawful burdening" as a result of *lawful* regulatory acts or justified "regulatory inactivity". The legal systems vary in this respect. For instance, French law presents a very elaborate picture. Under French law, first the statute itself must be evaluated. If it offers some form of compensation, this is deemed exhaustive. If not, then the legislative intentions must be reconstructed; if nothing implies that the legislature has excluded financial responsibility of the state, then the concept of administrative liability for the excessive burdens of public policy (*égalité devant les charges publiques*) can come into play.[159] Active state intervention can thus

[153] See the answers to Question IV/2 ("Does your legal system provide for compensation (either from the party who benefited, a fund, or government) if an administrative law rule permits an infringement of interests of another person? What are the requirements for such an "indemnification" claim?") and Question IV/1 ("Are there any other sources of law besides tort law, e.g., in administrative law itself or in the broader field of the law of obligations, which impose liability for damage caused by a breach of such a rule?").

[154] Cf. *P. del Olmo*, Spain, no. 111 f.; *C. Kissling*, Switzerland, no. 68 ff.; *A. Menyhárd*, Hungary, no. 33.

[155] *A. Monti/F.A. Chiaves*, Italy, no. 39; *M.S. Shapo*, USA, no. 71; *C. Kissling*, Switzerland, no. 68.

[156] In Poland for instance, lawful performance of public authority may give rise to "equity liability". Cf. *M. Jagielska/G. Żmij*, Poland, no. 70.

[157] *K. Morrow*, England and Wales, no. 14.

[158] *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 75.

[159] *P. Billet/F. Lichère*, France, no. 28.

result in financial compensation of the extraordinarily burdened citizen, provided the damage is special and abnormal. Moreover, under Polish law, both "personal injury" caused by the exercise of public powers and the retraction of an administrative decision with the aim of avoiding a specific danger to life or health or to the benefit of overriding public interests give rise to a claim for (limited) compensation.[160]

X. Some Cases

Finally, in this section we consider a number of concrete cases. In the questionnaire we sent out to the contributors, we asked them to tackle these cases in order to test the more general questions we put to them. 62

1. Case I (Question V/1)

In 1976 a chemical plant, operated by company A, was granted a permit to emit a certain amount of exhaust gases into the air. According to the most recent technological standards, this amount could be significantly reduced at a reasonable cost. However, the government regulations have not been updated since the 1970s. Can a local farmer, who suffers damage to his crop as a result of the emissions, claim damages from either the government or the plant operator? Is it relevant that the farmer could have applied for review or withdrawal of the permit according to an administrative review procedure?

The focal point of this case is that the plant operator did not breach any statutory duties. In fact, his chemical process was in full conformity with the public regulation standards, so there is no basis for tortious liability for breach of a statutory duty.[161] However, in this case the public regulation standards were obviously not in conformity with the scientific "state of the art". As a result, according to all legal systems, this may constitute a wrongful emission (viz., a wrongful act of nuisance). 63

In some legal systems, specific rules on neighbour nuisance apply. In these countries, the principles of neighbour law demand that the burden of emissions does not exceed a certain threshold. If it does, the excessive burden constitutes "trouble anormal de voisinage".[162] A balancing of the costs and benefits of the precaution may be needed to assess whether there is in fact an excessive burden.[163] If there is, this may either result in the pursuit of a prohibitory injunc- 64

[160] *M. Jagielska/G. Żmij*, Poland, no. 82–83.
[161] Cf. *U. Magnus/K. Bitterich*, Germany, no. 49.
[162] *P. Billet/F. Lichère*, France, no. 28; cf. *A. Monti/F.A. Chiaves*, Italy, no. 40. Cf. Granneloven 16 June 1961 no. 15 (the Norwegian Neighbour Act, grannel.) § 2 and § 9 as mentioned by *B. Askeland*, Norway, no. 42 and 44.
[163] *B. Askeland*, Norway, no. 44; *U. Magnus/K. Bitterich*, Germany, no. 49. Cf. *M.S. Shapo*, USA, no. 72.

tion or a claim for compensation of damage.[164] Some jurisdictions even adhere to *strict liability of the emitting plant operator*.[165]

65 The question is whether an admittedly outdated permit can be a defence against liability? The relevance of the permit seems negligible, especially in those legal systems that do not find regulatory permits relevant at all for deciding tortious liability. Naturally, the fact that the statute is out of date in scientific terms does not render it inapplicable. So, in effect the statutory requirements must be applied even after this considerable lapse of time.[166] However, the standards laid down by statute are not decisive: the emission may be found intolerable even if the amounts permitted by the public regulation were not exceeded. As a result, the chemical plant operator cannot invoke the full defence of a public permit.[167]

66 Is it relevant that the affected farmer could have applied for a review or withdrawal of the permit according to an administrative review procedure? In a number of legal systems, the fact that the farmer claims compensation for damage that he could perhaps have prevented himself by applying for review of the permit seems not to stand in the way of allowing the claim in tort.[168] It may perhaps amount to contributory negligence.[169] Other jurisdictions are more strict: if the farmer knew or should have known about the emissions, and could have prevented the damage by applying for review, the farmer is indeed contributorily negligent.[170]

67 With regard to claims against the public authorities, the situation may be more complex. Here, some legal systems adhere to a strict order between (administrative and/or judicial) review of public law permits and tort law. *Marcic v Thames Water Utilities Ltd* confirms the primacy of the statutory regime.[171] But even if we isolate this technical obstacle to compensation and focus on the substantive issue of liability for not updating regulation, the chances of winning such a case seem very slim indeed. State liability for not updating regulation is exceptional.[172] In principle, it seems that in most countries the state – being the legal entity to which the legislative bodies of the state belong – cannot be held liable in tort for not updating the statutory standards to

[164] *A. Monti/F.A. Chiaves*, Italy, no. 41.
[165] *B. Askeland*, Norway, no. 45 and 22; *A. Menyhárd*, Hungary, no. 35; *C. Kissling*, Switzerland, no. 72 ff.
[166] *K. Morrow*, England and Wales, no. 58.
[167] *P. Billet/F. Lichère*, France, no. 28. Cf. *P. del Olmo*, Spain, no. 114 ff.; *M. Jagielska/G. Żmij*, Poland, no. 85; *A. Menyhárd*, Hungary, no. 34; *M. Lukas*, Austria, no. 47.
[168] *M. Jagielska/G. Żmij*, Poland, no. 85; *B. Askeland*, Norway, no. 46; *C. Kissling*, Switzerland, no. 83 at lit. c); *P. Billet/F. Lichère*, France, no. 28.
[169] *P. del Olmo*, Spain, no. 114.
[170] *U. Magnus/K. Bitterich*, Germany, no. 49. A complete bar of the farmer's claim seems appropriate according to Austrian law; see *M. Lukas*, Austria, no. 48.
[171] *Marcic v Thames Water Utilities Ltd* [2002] QB 929. Cf. *K. Morrow*, England and Wales, no. 57.
[172] Note that under Polish law there is the immunity for acts and omissions dating before 1 September 2004. See *M. Jagielska/G. Żmij*, Poland, no. 86.

the level of scientific knowledge available.[173] There may be an exception to this principle if the inaction of the government is lacking all justification[174] or constitutes a qualified degree of negligence.[175] Possibly, there could be a claim in tort if there is a statutory duty for a public authority to update the rules.[176] Moreover, there may be constitutional grounds for allowing such claims if the inaction of the state runs counter to the constitutional duty to safeguard life or maintain a habitable environment.[177]

Note that the French approach to liability of the state may be more forthcoming to claimants. In France, administrative liability has been tightened by the *scandale de l'amiante*. Indeed, the asbestos scandal prompted debate on state liability for not enacting safety regulations against the dangers of asbestos. The 2004 Conseil d'Etat decisions[178] held that the state is under the obligation to adopt regulation in the face of scientific knowledge of the serious health risks concerning asbestos. Moreover, not adapting existing regulation to new insights can also amount to administrative liability under French law.[179] 68

2. Case II (Question V/2)

A specific statute with regard to occupational hazards compels employers to have certain protective measures in their workshops. B runs a one-man workshop in which no employees or visitors are ever present. Assuming that in that case the regulatory provisions do not apply, can B nevertheless be held liable in tort by a one-time visitor to the workshop that is injured as a result?

This case purports to address the issue of extending the protective ambit of the public law regulation under tort law. Occupational health and safety standards aim to protect employees. Can the protectionary ambit of such statutory rules be extended to cover others than employees as well? Could it be argued that B is liable according to the specific public law duties that he would have to comply with if he had employed others in his company, although these rules would not directly apply in this case? 69

The answers in the contributions to this volume present a mixed picture. Some of the reports state that there are no specific extensions of statutory duties under 70

[173] *P. del Olmo*, Spain, no. 116 ff.; *A. Menyhárd*, Hungary, no. 37.
[174] *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 78.
[175] Cf. *B. Askeland*, Norway, no. 16 and 46.
[176] Cf. *P. del Olmo*, Spain, no. 118 ff.
[177] *Van Boom/Pinna* (fn. 58) no. 1 ff.
[178] Conseil d'Etat (High Administrative Court, CE), 3 March 2004, *Min. de l'emploi et de la solidarité v Xueref, Thomas, Botella, Bourdignon*, Juris-classeur périodique. La Semaine juridique (JCP) 2004.II.10098, with note *G. Trébulle*; Droit Administratif 2004, no. 87, with note *G. Delaloy*; Responsabilité civile et assurances (Resp. civ. ass.) 2004, no. 234, with note *G. Guettier*.
[179] *P. Billet/F. Lichère*, France, no. 28.

public regulation.[180] Otherwise, the normal rules of tortious liability apply.[181] A Norwegian case illustrates this point. In this case, a 12-year-old boy had joined his father while the latter was working inside a train tunnel. The boy was hit by a train partly due to the fact that the train driver had not given a signal in accordance with the safety regulations given for the safety of the workers. The boy claimed compensation from the railway operator. The Norwegian Supreme Court was divided in its opinion, but the majority denied compensation. The majority put weight on the fact that the safety regulations were given to protect the workers, not other persons illegally located inside the tunnel. The decision is reportedly criticized for not extending the protectionary ambit of the regulatory standard to cover third parties such as the child as well.[182]

71 In some legal systems, the relevant occupational regulatory standards are thought to reflect expert knowledge of health hazards in the workshop. This may be taken into account when evaluating the general duty to take due regard of the interests of passers-by. As a result, the wrongfulness of B's behaviour may in part be decided by the regulatory standards although these do not directly apply.[183] Then, the public law standard would be "one piece of evidence of negligence".[184]

72 Note that in some countries this case does not seem to pose a specific problem of wrongfulness at all: if the accident was caused by a tangible object (viz., an unsafe machine), some form of strict liability applies independent of regulatory law.[185]

3. Case III (Question V/3)

Company B has for years been violating all sorts of regulations with regard to public safety rules. Although there is a government agency that has the legal powers to fine and even close company B down, this agency has seldom acted upon information of the violations. It has visited the company once and has issued a list of shortcomings that the company was supposed to remedy. The company did not remedy the shortcomings and the agency never returned or reprimanded the company. Some time afterwards, a serious accident occurred at company B, which would have been prevented from happening if the company had complied with the safety rules.

[180] *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 80.
[181] Cf. *K. Morrow*, England and Wales, no. 58; *P. del Olmo*, Spain, no. 123.
[182] *B. Askeland*, Norway, no. 32.
[183] In this vein, *U. Magnus/K. Bitterich*, Germany, no. 51. Cf. *P. del Olmo*, Spain, no. 122; *C. Kissling*, Switzerland, no. 87.
[184] *M.S. Shapo*, USA, no. 73; cf. *M. Lukas*, Austria, no. 49.
[185] *A. Monti/F.A. Chiaves*, Italy, no. 42; *M. Jagielska/G. Żmij*, Poland, no. 87; *P. Billet/F. Lichère*, France, no. 29 (also noting that vicarious liability of the employer for personnel may exist). Cf. the Norwegian report, stating that strict liability for "continuous, typical and extraordinary risk" may even apply (*B. Askeland*, Norway, no. 47).

a) Can the injured persons hold the company liable for the damage? And if so, could the company raise the defence of lack of supervision by the regulatory agency?

b) Could the injured persons claim damages from the government agency?

The company can be held liable, assuming that there is a sufficient causal link between the violations and the damage incurred.[186] Lack of supervision is not considered to be a valid defence vis-à-vis the injured person.[187] As the French and Spanish reporters rightly observe, the basis for denying this defence is the Roman maxim *nemo auditur propriam turpitudinem allegans*.[188] As a result, the victim could claim compensation in full from the liable company.[189] 73

In some countries, the lack of supervision by the responsible public authority is considered to be a valid ground for tortious liability of that public authority.[190] References are made to court cases of liability of the financial market authority for not diligently supervising,[191] and a case of "faute" concerning control of forests.[192] 74

Other jurisdictions are more reticent in allowing claims for compensation against government agencies. Clearly, courts and legislatures showing restraint with regard to liability of the administration for negligent supervision are exercising their powers to leave the administration sufficient space to prioritise policy objectives.[193] The legal method by which these legal systems reach the objective of semi-immunity of the administration usually is some form of high threshold for liability.[194] 75

Sometimes, a threshold of qualified negligent omission has to be passed before a claim succeeds.[195] Under Spanish law, for example, the mere omission to supervise a third party's activities does not suffice to hold the public authority liable: the claimant must instead argue the inadequacy of the public services, which the courts would not automatically assume in the case at hand.[196] 76

[186] Cf. *P. Billet/F. Lichère*, France, no. 30.
[187] *A. Monti/F.A. Chiaves*, Italy, no. 43; *K. Morrow*, England and Wales, no. 59; *U. Magnus/K. Bitterich*, Germany, no. 52; *M. Jagielska/G. Żmij*, Poland, no. 88; *R.J.P. Kottenhagen/P.A. Kottenhagen-Edzes*, The Netherlands, no. 81; *A. Menyhárd*, Hungary, no. 42; *C. Kissling*, Switzerland, no. 19 and 89; *M. Lukas*, Austria, no. 50.
[188] *P. Billet/F. Lichère*, France, no. 30; *P. del Olmo*, Spain, no. 128.
[189] *B. Askeland*, Norway, no. 50.
[190] *A. Menyhárd*, Hungary, no. 43; *A. Monti/F.A. Chiaves*, Italy, no. 44; *P. Billet/F. Lichère*, France, no. 31; *M. Lukas*, Austria, no. 51.
[191] *A. Monti/F.A. Chiaves*, Italy, no. 44.
[192] *P. Billet/F. Lichère*, France, no. 31.
[193] Cf. *P. del Olmo*, Spain, no. 130.
[194] Polish law seems to allow claims against the agency only in cases where there was a positive statutory duty to act. See *M. Jagielska/G. Żmij*, Poland, no. 89.
[195] *B. Askeland*, Norway, no. 51.
[196] *P. del Olmo*, Spain, no. 129 ff.

77 With respect to the threshold mentioned, the fact that the public authority presented the company with a list of shortcomings can work either way: either as a ground for finding the public authority liable for not using control instruments to guarantee compliance or as mere evidence of their simple negligence. The example given by the Norwegian report shows the difficulty of evaluating the evidence of knowledge of the public authority: the Consumer's Ombudsman had knowledge of illicit conduct by a travel agency and did not act upon this information. Such negligence in itself does not constitute the qualified negligence necessary under Norwegian law for liability of the public entity.[197]

78 In other jurisdictions, the claim for compensation against the public authority might fail for lack of a protective purpose of the statute at hand. The position under the law of England and Wales is that the claimant would have to show that he or she was part of a specific class for whose benefit the statutory regime was brought into being.[198] A seemingly comparable test is used with the German concept of *drittbezogene Amtspflicht.*[199] Obviously, this requirement gives the courts some leeway in autonomously ascertaining the protective purpose of the statute, because in most cases the phrasing of the statute itself and the relevant parliamentary proceedings tend to be vague if not silent on the class of protected persons. Under the concept of *drittbezogene Amtspflicht* the victim could in fact be considered to be part of the class of protected "third parties".[200]

[197] *B. Askeland*, Norway, no. 52.
[198] *K. Morrow*, England and Wales, no. 60.
[199] *U. Magnus/K. Bitterich*, Germany, no. 53.
[200] *U. Magnus/K. Bitterich*, Germany, no. 53. Note that the subsidiary nature of German state liability would be a further obstacle to claiming compensation, unless gross negligence of the civil servant was involved.