Applying Analogous Strict Liability Based on Dangerousness to Harmonize Environmental Liability in Austria

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Contents

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A. Introduction

An investigation of whether strict liability based on dangerousness by means of analogy is suitable for harmonization of Austrian environmental liability undoubtedly must begin with the depiction of the existing dissonances within the relevant liability provisions. First, the need for harmonization should be clarified. The discrepancy between environmental liability under public and under civil law should particularly be presented. Consequently, the task requires a comparison of these two systems of liability.

The category of the respectively applicable liability provisions will be analysed in greater detail: Do both systems follow the same mandatory compensation model and form a coordinated image? Or do differences exist between civil law provisions and environmental liability under public law, and do they lack suitability as 'mutually supplementary, reciprocal collective liability systems'[1]?

The following observations focus especially on deviations with respect to the type of liability: fault based or strict liability. In doing so, the scopes of application of the relevant liability provisions are taken into consideration.

The Austrian legal system at present[2] does without a special rule for general environmental liability under civil law that is not limited to the law concerning the respective interests of neighbours or to water rights. Beyond the limits of the law concerning the respective interests of neighbours (and the analogous application of the latter, see page 45) and of water rights, recourse must be taken to general tortious liability as per §§ 1295 et seqq Austrian Civil Code[3] (see page 44). Alternatively, but only within narrow limits, compensation can be pursued through strict liability by means of analogy (see page 50).

Reform efforts in the area of tort law have existed since 2005. In the course of these, the introduction of a strict environmental liability under civil law was discussed. Legal scholars were convinced of its necessity.[4] For national law, there are three reform drafts, one drafted by *Koziol* et al (Diskussionsentwurf, discussion draft, DD)[5], one

[1] Ferdinand Kerschner, *Umwelthaftung* (2012) JBl 477-480, p. 477; translation by the author.

[2] Reforms have existed since 2005.

[3] In German, 'Allgemeines Bürgerliches Gesetzbuch – ABGB' Austrian Collection of Laws 1811/946 as amended most recently by Austrian Federal OJ I 2017/59; all Austrian federal statutes can be accessed via https://www.ris.bka.gv.at/Bund/ with their title, amendments can be found by their OJ number.

[4] For a more detailed account see Kerschner, *Umwelthaftung*, p. 477.

[5] Irmgard Griss, Georg Kathrein and Helmut Koziol (eds.), *Entwurf eines neuen österreichischen Schadenersatzrechts* (Wien: Springer, 2006).

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by *Reischauer/Spielbüchler/Welser* et al (Arbeitskreisentwurf, working draft, WD),[6] and the final so-called fusion draft (FD)[7]: While both DD and WD present a specific rule for environmental liability under civil law, the FD ultimately drops this intent. Therefore, this article aims to clarify why a special rule regarding strict environmental liability under civil law is still desirable.

The following Red Sludge Case should serve the reader as a starting point and as illustration:[8]

An aluminium factory is operated on leased property. When its sludge storage unit breaks, approximately 1 mil. m^3 of a severely corrosive and noxious sludge leak out and sink into the ground. The sludge also spreads out over local towns and agricultural land. Particles of the dry sludge are distributed across the area through the air.

The result is damages to vegetation, species extinction, and pollution of ground water. In addition, losses in value for the property concerned, damages to buildings and moveable property and crop losses on agricultural land are recorded. Neighbours but also third parties who happen to be present suffer impairments to their health, such as allergic reactions or respiratory illnesses.

B. Public law vs. civil law liability for environmental damages

Environmental liability can be embedded in both public and civil law. Austrian environmental liability is subject to a dualistic approach and divides the two liability regimes according to the category of damage to be compensated. As such, compensation is made for supra individual damages underpublic law, and compensation is made for individual damages by way of civil law.

Due to this dualistic approach, the categorization and associated division of the categories of damages must always be made at the beginning.

Supra individual damages are damages to the environment itself (ecological damages). Consequently, this category of damages comprises contamination of land, water, air, species extinction, decreases in population, etc. For this category of damages, allocation is not made to the assets of an individual – be it a private person

[6] Rudolf Reischauer, Karl Spielbüchler and Rudolf Welser (eds.), *Reform des Schadenersatzrechts Band III – Vorschläge eines Arbeitskreises* (Wien: Manz, 2008).

[7] Georg Kathrein, *Zur Reform des Schadenersatzrechts – Eine Skizze aus dem Schattenreich,* in *200 Jahre ABGB, Richterinnenwoche 2011 in Lochau* (Graz: NWV, 2012) 237-256, pp. 237 et seqq.

[8] The case described here is an abstraction and variation of the so-called Red Sludge Case mentioned by Kerschner: Kerschner, *Umwelthaftung*, p. 477.

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or a public law asset holder.[9] Environmental media that belong to all persons or to no person are also included in this category of protected goods.

If this categorization is applied to the Red Sludge Case, impairment of vegetation, species extinction, land contamination and pollution of ground water are supra individual damages, as they constitute damages to the environment itself. These are subject to environmental liability under public law.

As described in the Red Sludge Case, effects to the environment can cause individual damages simultaneously. Contamination of soil can lead to a loss in value of property that belongs to an individual. In addition, moveable items may incur damages, and areas used for agriculture may experience crop losses. Furthermore, damage to human health can occur. Compensation for these individual damages is subject to civil law liability.

C. The need for harmonization

To demonstrate the need for harmonization, the fundamentals of environmental liability under public law must be described first. Next, these will be compared to the provisions of environmental liability under civil law. In the course of this comparison, the type of liability will be focussed on and divergences with respect to the scopes of application of the relevant liability provisions will be identified.

As a preliminary remark it must be pointed out that if a legal system aims to protect the environment, it should abstain from putting individuals in a less favourable legal position. This does not mean that environmentalism is to be neglected. It merely means that individuals should enjoy the same level of protection as the environment itself.

1. Environmental liability under public law

a) Basic Principles

The core of environmental liability under public law is formed by Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental

[9] See also Herwig Hauenschild and Georg Wilhelm, '§ 2 B-UHG', in Herwig Hauenschild and Georg Wilhelm (eds.), *Bundes-Umwelthaftungsgesetz* (Wien: Manz, 2009), para 5.

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damage – Environmental Liability Directive (ELD)[10] and its national transposition acts.

The purpose of the ELD is to establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage.

Recital 1 of the ELD states that there are many contaminated sites in the Community, posing significant health risks. Recital 1 also emphasizes the dramatically accelerated loss in biological diversity in the past decades. Failure to act could result in increased site contamination and greater loss of biodiversity in the future. Therefore, measures for the avoidance and renovation of environmental damages must be taken.[11]

Based on the 'polluter pays' principle and the principle of sustainable development, a common framework for the European Union was created. The underlying maxim of environmental liability according to the ELD is that an operator whose activity has caused environmental damage or the imminent threat of such damage is to be held financially liable. By the threatened financial encumbrance, operators are induced to implement measures to minimize environmental risks.[12]

The ELD applies to environmental damages and any imminent threat of such (Art 3 (1) ELD). Damages or the imminent threat of such are excluded from the scope of application if they are caused by non-commercial activities.

Due to the Austrian division of legislative competencies, a transposition of the ELD by federal law is generally only possible in the area of water damage.[13]

For land damages, the federal legislature is only competent to the extent that it disregards damages to agricultural areas or damages through plant protection products, state-IPPC installations and distribution of genetically modified organisms. For these, as per Art 15 (1) B-VG (Bundesverfassungsgesetz, Austrian Federal Constitutional Law)[14], the respective state legislature is competent.[15] The same applies for the provisions with regard to damage to protected species and natural habitats.

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[10] Directive 2004/35/EC 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, 30.4.2004, p. 56.

[11] Recital 1.

[12] Recital 2.

[13] Monika Hinteregger and Ferdinand Kerschner, Einführung, in Monika Hinteregger and Ferdinand Kerschner (eds.), *Bundes-Umwelthaftungsgesetz* (Wien: Manz, 2011), para 18.

[14] In German, "Bundes-Verfassungsgesetz – BVG" Austrian Federal OJ 1930/1 as amended most recently by Austrian Federal OJ I 2016/106.

[15] Mathias Köhler, *Öffentlich-rechtliche Umwelthaftung* (Wien: Manz, 2008) p. 145.

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These also fall within the competencies of the states.[16] The transposition of the ELD at the federal level occurs in Austria through the Bundesgesetz über Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden (Bundes-Umwelthaftungsgesetz - B-UHG, Austrian Federal Environmental Liability Act).[17] At state level, state environmental liability laws[18] have been issued on one hand[19], and state laws that already existed have been amended on the other[20].

The ELD does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damages. Therefore, compensation claims under general civil law are unaffected by the ELD.[21] Still, recital 1 of the ELD lays emphasis on the contaminated sites in the Community which pose a significant threat to human health. Evidently, the ELD also pursues an anthropocentric objective. Hence, shortfalls of the individual sphere should be prevented.

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[16] Johannes Barbist and Isabell Stahl, *Bundes-Umwelthaftungsgesetz in der Pipeline – ein Überblick*, (2007) ecolex 559-562, p. 559.

[17] Austrian Federal OJ 2009/55 as amended most recently by Austrian Federal OJ I 2013/97.

[18] Transposition acts on state level from here on: L-UHG.

[19] This is the case in the following states: Burgenland Gesetz vom 29.10.2009 über Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden (Burgenländisches Umwelthaftungsgesetz – Bgld UHG), State OJ 2010,5 as amended most recently by State OJ 2013/79; Niederösterreich NÖ Umwelthaftungsgesetz (NÖ UHG), State OJ 2009/77 as amended most recently by State OJ 2013/85; Oberösterreich Landesgesetz über Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden (OÖ Umwelthaftungsgesetz – OÖ UHG), State OJ 2009/95 as amended most recently by State OJ 2013/90; Steiermark Gesetz vom 17.11.2009 über Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden (Stmk Umwelthaftungsgesetz – StUHG), State OJ 2010/10 as amended most recently by State OJ 2013/87; Tirol Gesetz vom 18.11.2009 über die Haftung bei Schäden an geschützten Arten und natürlichen Lebensräumen sowie für bestimmte Schädigungen des Bodens (Tir Umwelthaftungsgesetz – T-UHG), State OJ 2010/5 as amended most recently by State OJ 2013/130; Wien Gesetz über die Umwelthaftung zur Vermeidung und Sanierung von Umweltschäden in Wien (Wr Umwelthaftungsgesetz – Wr UHG), State OJ 2009/38 as amended most recently by State OJ 2013/31.

[20] This is the case in the following states: Kärnten Krnt Naturschutzgesetz 2002 (K-NSG 2002), State OJ 2002/79 as amended most recently by State OJ 2013/85, Gesetz vom 23.5.2002 über die integrierte Vermeidung und Verminderung der Umweltverschmutzung (Krnt IPPC-Anlagengesetz), State OJ 2002/52 as amended most recently by State OJ 2014/2, Gesetz vom 20.11.1990 über den Schutz vor Pflanzenschutzmitteln in der Landwirtschaft (Kärntner Landes-Pflanzenschutzmittelgesetz – K–LPG), State OJ 1991/31 as amended most recently by State OJ 2014/17; Salzburg Gesetz vom 5.5.2010, mit dem das Umweltschutz- und Umweltinformationsgesetz geändert wird, State OJ 2005/59 as amended most recently by State OJ 2016/17; Vorarlberg Vbg Gesetz über Betreiberpflichten zum Schutz der Umwelt (ehemaliges IPPC- und Seveso-II-Anlagengesetz), State OJ 2001/20 as amended most recently by 2015/54.

[21] Recital 14.

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b) Type of Liability

Environmental liability under public law contains both strict liability and fault-based liability.

Strict liability: In practising the activities listed in Annex III, the ELD anticipates a threat for certain protected resources. In consequence of this anticipation, the ELD stipulates strict liability based on dangerousness, therefore, liability regardless of fault, such as negligence or tortious intent (Art 3 (1) lit a ELD).

Fault-based liability: If damages are caused to protected species or natural habitats or the immediate risk of such through a commercial activity that is not listed in Annex III a compensation claim can be raised, but only based on fault-based liability (Art 3 (1) lit b ELD).

Therefore, whether a claim against the operator of the aluminium plant can be based on strict liability or on fault-based liability depends on the commercial practice of a listed activity.

c) The annex catalogue of environmental liability under public law

Environmentally harmful activities as per Annex III ELD, Annex 1 B-UHG
The ELD lists the environmentally hazardous activities in a catalogue. A further prerequisite is that these activities are practiced occupationally. An activity is occupational under § 4 (4) B-UHG if it is carried out in the course of an economic activity, a business or an undertaking, irrespectively of its profit or non-profit character. It is not relevant whether the activities are subject to private law or public law provisions.

Annex III ELD (see full Annex in simplified terms: p. 56; in its transposition, Annex 1 B-UHG see in simplified terms: p. 61) lists every environmentally hazardous activity that results in liability regardless of fault.

Annex III (1) ELD states that the operation of installations subject to permit in pursuance of the IPPC Directive[22] falls under strict liability under public law. In transposition of Annex III (1) ELD, Annex 1 (1) B-UHG states that the operation of installations that must be licensed according to federal regulations such as § 77a in

[22] Council Directive 96/61/EC concerning integrated pollution prevention and control, OJ L 257, 10.10.1996, p. 26; codified by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, OJ L 24, 29.1.2008, p. 8; and recast in Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, p. 17.

conjunction with Annex 3 Austrian Trade Regulations[23], § 37 (3) in conjunction with Annex 5 Austrian Waste Management Act 2002[24], §§ 121 and 121f (1) Austrian Mineral Raw Materials Act[25], § 5 (3) Austrian emission protection law for boiler installations[26] is subject to this strict liability under public law. This does not apply to the activities subject to Annex 1 (12) B-UHG as well as to the operation of plants or parts of plants which are mainly used for research, development and testing of new products and processes.

Therefore, the annex catalogue of strict environmental liability under public law includes facilities that produce energy (firing plants with certain heat provision, petroleum and gas refineries, coke plants and coal gasification and gas liquefaction plants; Annex 3 (1) Austrian Trade Regulations), facilities for the manufacture and processing of metals (Annex 3 (2) Austrian Trade Regulations), mineral processing industry (Annex 3 (3) Austrian Trade Regulations), chemical industry (Annex 3 (4) Austrian Trade Regulations), facilities for waste treatment (Annex 3 (5) Austrian Trade Regulations) etc.

Consequently, the aluminium plant of the Red Sludge Case as a facility for manufacturing and processing of metals in pursuance of Annex 1 (1) B-UHG in conjunction with § 77a and Annex 3 Austrian Trade Regulations is also subject to strict liability under public law. Thus, damages to the environment itself are compensated regardless of fault.

Environmentally harmful activities as per state liability provisions

The state transposition acts also prescribe liability only if the activity is occupational.[27] The bisection within the state liability provisions (strict liability based on dangerousness for damages or the imminent threat of such caused by listed activities, fault-based liability for biodiversity damages from any occupational activity) requires an open formulation of the activities concerned regarding fault-based liability.

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[23] In German, "Gewerbeordnung 1994 – GewO 1994" Austrian Federal OJ 1994/194 as amended most recently by Austrian Federal OJ I 2017/107.

[24] In German, "Abfallwirtschaftsgesetz 2002 – AWG 2002" Austrian Federal OJ I 2002/102 as amended most recently by Austrian Federal OJ I 2017/70.

[25] In German, "Mineralrohstoffgesetz – MinroG" Austrian Federal OJ I 1999/38 as amended most recently by Austrian Federal OJ I 2016/95.

[26] In German, "Emissionsschutzgesetz für Kesselanlagen – EG-K 2013" Austrian Federal OJ I 2013/127 as amended most recently by Austrian Federal OJ I 2015/81.

[27] Mathias Köhler, '§ 4 B-UHG', in Monika Hinteregger and Ferdinand Kerschner (eds.), *Bundes-Umwelthaftungsgesetz* (Wien: Manz, 2011), para 82.

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In determining the types of hazardous activities that are subject to strict liability, the legislation of Vorarlberg merely refers to the catalogue of the ELD, while all other states chose to introduce a new catalogue that corresponds with that of the ELD.[28]

2. Environmental liability under civil law

In contrast to environmental liability under public law, its civil law sister does not cover the compensation of ecological, supra individual damages, but rather the settlement for impairments to human health, property, and assets – the compensation of individual damages. Individual damages can occur concurrently with environmental damages, in the same scenario. Let us remind ourselves of the Red Sludge Case: Due to the leakage and seepage of the highly corrosive and noxious sludge of the aluminium repository, both neighbours and third parties who happen to be present suffer damage to their health. At the same time, a loss in value is observed in the areas concerned, and buildings are damaged. Agricultural land is devastated.

a) General fault-based liability

In the absence of a special rule in the Austrian legal system, we fall back on the general provisions of tort law, initially to fault-based liability. Consequently, one needs to prove damage, causation, wrongfulness, protective purpose of the rule, and fault.

Disregarding the necessary proof of causation for the moment, proof of fault is particularly difficult: From what information can the claimant derive evidence for fault, and what basis can they find for their claim? Given the use of employees, how can the hurdles of vicarious liability as per § 1315 Austrian Civil Code be overcome? The problem becomes apparent where a claimant seeks compensation from an operator for actions of their employees. In the absence of a contractual relationship between the claimant and the operator, the claimant must prove that the employee is unfit or that the operator knowingly employed a dangerous person, pursuant to § 1315 Austrian Civil Code.[29]

Compensation appears impossibly remote. This is where the conflict and the need for harmonization becomes obvious: damages to the habitat or population of a butterfly caused by the operation of an activity that is listed in the public law provisions

[28] This is the case in the transposition act of the states: Burgenland, Kärnten, Niederösterreich, Oberösterreich, Salzburg, Steiermark, Tirol, Wien.

[29] For additional details, see Helmut Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Wien: Jan Sramek, 2012), 6/95 et seqq; Willibald Posch, ‚Austrian Tort Law' in Britt Weyts (ed.), *International Encyclopedia for Tort Law* (The Hague: Kluwer Law, 2016) Part II pp 65 et seqq.

are compensated on the basis of strict liability and therefore not based on fault. Consequently, the supra individual sphere experiences stronger protection than the individual one does.[30]

To avoid simply accepting this circumstance, further examination is advisable:

b) Resolution of the conflict through settlement claims based on the provisions concerning the respective rights of neighbours

Basic principles

Individual elements of the Red Sludge Case can also be subsumed under the neighbour law provisions of the Austrian Civil Code (§§ 364 et seqq Austrian Civil Code). These are the loss of value of the neighbouring properties (including the buildings standing on them), and the damage to the moveable items found there. Concerning the damage to health of the neighbours, one must bear in mind that the courts[31] and parts of the scholarly community[32] exclude human health from the scope of neighbour law provisions.

The provisions of §§ 364, 364a and b Austrian Civil Code regulate the collision between equitable property rights and impose restrictions in the interests of a peaceful cohabitation of neighbours. For this purpose, compensation claims are granted as well.[33] The damages can occur through immissions in the sense of §§ 364 et seqq Austrian Civil Code on a neighbouring property. In the event of damage through the activity of an officially authorized facility, liability regardless of fault as per § 364a Austrian Civil Code applies (if analogously).

§ 364 Austrian Civil Code

Pursuant to § 364 (2) Austrian Civil Code, a neighbour can prohibit immissions insofar as they exceed the normal level of the local conditions and substantially impair the use of the property. If a case falls under § 364 Austrian Civil Code, compensation claims follow the general provisions of fault-based liability (§§ 1293 et seqq Austrian

[30] Kerschner, *Umwelthaftung*, p. 480.

[31] Austrian OGH 13.7.1978 6 Ob 671/78; all decisions of the Austrian OGH can be accessed via https://www.ris.bka.gv.at/Jus/ with their case number.

[32] Helmut Koziol, Peter Apathy and Bernhard A. Koch, *Österreichisches Haftpflichtrecht* vol III third edn. (Wien: Jan Sramek, 2014) p. 219; Ferdinand Kerschner, 'Kausalitätshaftung im Nachbarrecht?' (1998) RdU 10-15, p. 10; dissenting: Monika Gimpel-Hinteregger, *Grundfragen der Umwelthaftung* (Wien: Manz, 1994) p. 323 et seq; Peter Jabornegg, *Reichen die Bestimmungen des bürgerlichen Rechtes, insbesondere aus dem Nachbarschaftsverhältnis aus, um den zeitgemäßen Forderungen nach einem wirksamen Umweltschutz Rechnung zu tragen? Verhandlungen des Neunten Österreichischen Juristentages* (Wien: Manz, 1985) IV p. 69.

[33] Austrian OGH RS 0010501.

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Civil Code).[34] Consequently, the protection of property continues to remain behind the protection of nature itself, as no strict liability is applicable.

Regarding the right to sue, discrepancies also exist, as claims based on provisions concerning the respective rights of neighbours can be raised by neighbours only and not by all persons.

It remains to be investigated whether a general environmental liability under civil law can be derived from the liability in the case of permitted interference as per § 364a Austrian Civil Code:[35]

§ 364a Austrian Civil Code

First, it should be clarified why the applicability of § 364a Austrian Civil Code is assessed.

If the impairment was caused by (a mine or) an officially authorized facility, pursuant to § 364a Austrian Civil Code the neighbour is only entitled to demand compensation. An injunctive relief is denied. Therefore the injured neighbour, in the interest of his neighbour (the authorized facility), must accept interferences with his property that go beyond the normal obligation to tolerate, as stipulated in § 364 (2) Austrian Civil Code.[36] In order to balance out this obligation, his compensation claim is not based on fault. Consequently, § 364a Austrian Civil Code bears resemblance to provisions governing expropriation.[37]

From this, the Austrian Supreme Court concluded in general terms that it is only justified to deny injunctive relief if the approval of the facility takes the neighbours' interests into account. The decisive factor is whether the neighbours were granted the status of parties.[38] Therefore, a facility approved in the simplified procedure pursuant to § 359b Austrian Trade Regulations[39] is not an officially approved facility within the meaning of § 364a Austrian Civil Code.[40]

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[34] Austrian OGH 12.12.1977 1 Ob 716/77; 7.7.1982 1 Ob 21/82; 9.11.1983 1 Ob 742/83; 26.6.1985 3 Ob 537/85.

[35] For additional details, see Helmut Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Wien: Jan Sramek, 2012), 6/161.

[36] Austrian OGH RS 0010550.

[37] Austrian OGH RS 0010550.

[38] Austrian OGH RS 0126291

[39] In German, „Gewerbeordnung 1994 – GewO 1994" Austrian Federal OJ 1994/194 as amended most recently by Austrian Federal OJ I 2017/107.

[40] Austrian OGH RS 0117838.

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Within its scope, we first achieve conformity between public and civil law, as a claim is based on liability regardless of fault. However, a second glance reveals that this conformity is not comprehensive, nor is it without flaws:

Firstly, we find that there is no unison with regard to the activities concerned. Some activities that already belong to the circle of those subject to strict liability under public law are not included among the facilities as per § 364a Austrian Civil Code, as these are only notifiable or subject to simplified authorization procedures to which § 364a Austrian Civil Code does not apply.

Depending on whether the court decisions[41] and part of legal scholarship[42] that exclude human health from the scope of neighbour law provisions (see page 9), is accepted or rejected, protection of human health is either included or excluded by § 364a Austrian Civil Code.

In any case, a discrepancy exists with regard to the right to sue, as compensation claims under § 364a Austrian Civil Code can only be asserted by property owners or other persons (quasi)[43] entitled by property rights. Claimants who happen to be randomly present on the properties concerned cannot base their claims on § 364a Austrian Civil Code.

§ 364a Austrian Civil Code per analogiam

According to established case law, a compensation claim regardless of fault should also be permissible in cases of § 364 (2) Austrian Civil Code, if there are sufficient indications for an analogous application of § 364a Austrian Civil Code.[44] Let us recall:

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[41] Austrian OGH 13.7.1978 6 Ob 671/78.

[42] Helmut Koziol, Peter Apathy and Bernhard A. Koch, *Österreichisches Haftpflichtrecht* p. 219; Kerschner, 'Kausalitätshaftung im Nachbarrecht?', p. 10; dissenting: Monika Gimpel-Hinteregger, *Grundfragen der Umwelthaftung* (Wien: Manz, 1994) p. 323 et seq; Peter Jabornegg, *Reichen die Bestimmungen des bürgerlichen Rechtes, insbesondere aus dem Nachbarschaftsverhältnis aus, um den zeitgemäßen Forderungen nach einem wirksamen Umweltschutz Rechnung zu tragen? Verhandlungen des Neunten Österreichischen Juristentages* (Wien: Manz, 1985) IV p. 69.

[43] Austrian OGH RS0010655; Ferdinand Kerschner and Erika Wagner, '§ 364 ABGB', in Attila Fenyves, Ferdinand Kerschner and Andreas Vonkilch (eds.), *Großkommentar zum ABGB – Klang Kommentar* (Wien: Verlag Österreich, 2011), para 251; Paul Oberhammer, '§ 364 ABGB', in Michael Schwimann and Georg E. Kodek (eds.), *Praxiskommentar zum ABGB*, 4th edn. (Wien: LexisNexis, 2012), para 11; Alexander Illedits, § 364 ABGB in Michael Schwimann (ed.), *Taschenkommentar zum ABGB*, 3rd edn. (Wien: LexisNexis, 2015), para 11; Martin Winner, '§ 364 ABGB', in Peter Rummel and Meinhard Lukas (eds.), *Kommentar zum ABGB*, 4th edn. (Wien: Manz, 2016), para 10; Christian Holzner, '§ 364 ABGB', in Andreas Kletečka and Martin Schauer (eds.), *ABGB-ON*[1.03] (Wien: Manz, 2016), para 5; Bernhard Eccher and Olaf Riss, '§ 364 ABGB', in Helmut Koziol, Peter Bydlinski and Raimund Bollenberger (eds.), *Kurzkommentar zum ABGB*, 5th edn. (Wien: Verlag Österreich, 2017), para 15.

[44] Austrian OGH 24.5.2012 1 Ob 258/11i = Brigitte Lang, 'Case Comment: Austrian OGH 24.5.2012 1 Ob 258/11i', 2012 RdU nr. 138 = Markus Hagen, Case Comment: Austrian OGH 24.5.2012 1 Ob

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if the emitting operation did not fall under § 364a Austrian Civil Code the neighbour could file an action of injunction if the immission meets the criteria of § 364 (2) Austrian Civil Code. If § 364a Austrian Civil Code applies, neighbours are denied this right, which is why a compensation claim is not based on fault. Every analogous application of § 364a Austrian Civil Code must be linked to this basic situation.[45] Thus, an injunctive relief must (if not legally but de facto) be denied.[46] Episodes with comparable interests occur, in particular, if an action for an injunction has come too late. This is successfully argued in the case of an immission from a one-time event.[47] Equally, a situation analogous to § 364a Austrian Civil Code is assumed in cases in which the defence of the infringement remains admissible in itself, but is made difficult or impossible in consequence of the appearance of legality and absence of risk associated with an official authorization.[48] Particularly in the event of officially authorized construction and demolition works[49] or excavations in commercial or recreational areas,[50] this can be argued successfully. Despite the seemingly adequate provisions against immissions, risks that nonetheless exist in these cases are often recognized too late, namely when the violation of property has already occured.[51]

According to established case law, an analogy to § 364a Austrian Civil Code depends on whether the facility causes imissions that are typical for its operation.[52] This is

258/11i' (2012) immolex nr.100 = Albert Oppel, 'Case Comment: Austrian OGH 24.5.2012 1 Ob 258/11i' (2012) ZVB nr. 143.

[45] Austrian OGH 17.11.1993 1 Ob 19/93.

[46] Austrian OGH 7.7.1982 1 Ob 21/82; 16.3.1988 1 Ob 1/88; 24.10.1990 1 Ob 21/90; 20.6.1990 1 Ob 19/90; 16.1.1991 1 Ob 39/90 = Ferdinand Kerschner, 'Case Comment: Austrian OGH 16.1.1991 1 Ob 39/90' (1991) JBl 580-584, p. 580; 29.4.1992 2 Ob 531/92.

[47] Austrian OGH 23.12.1975 5 Ob 145/75; 16.09.1971 1 Ob 236/71; 10.11.1982 1 Ob 28/82; 24.10.1990 1 Ob 21/90.

[48] Austrian OGH 10.7.1985 1 Ob 15/85; 29.1.1985 1 Ob 36/84; 9.11.1983 1 Ob 742/83.

[49] Austrian OGH 21.2.1985 8 Ob 565, 566/84; 3.5.1984 6 Ob 795, 796/83; 12.4.1978 1 Ob 584/78; 12.12.1977 1 Ob 716/77; 15.3.1989 1 Ob 46/88.

[50] Austrian OGH 7.7.1982 1 Ob 21/82.

[51] Austrian OGH 16.3.1988, 1 Ob 1/88.

[52] Austrian OGH 20.1.1988 1 Ob 47/87; 12.3.1992 8 Ob 523/92; 23.11.1994 1 Ob 615/94; 13.12.2011 5 Ob 190/11v; 24.10.1990 1 Ob 90/90; 12.3.1992 8 Ob 523/92 = Peter Rummel, 'Case Comment: Austrian OGH 12.3.1992 8 Ob 523/92' (1992) JBl 641-643, p.641; 23.11.1994 1 Ob 615/94; 29.5.1995 1 Ob 620/94; 9.11.1995 6 Ob 608/95; 3.10.1996 1 Ob 2170/96s; 14.10.1997 1 Ob 135/97b; 25.11.1997 5 Ob 444/97y; 25.2.1999 6 Ob 239/98k; 9.8.2001 2 Ob 193/01y; 24.6.2005 1 Ob 127/04i; 3.11.2005 6 Ob 180/05x = Wolfgang Kleewein, 'Case Comment: Austrian OGH 3.11.2005 6 Ob 180/05x ' (2006) JBl 372-374, p. 372; 28.11.2006 1 Ob 196/06i; 11.2.2009 7 Ob 273/08k; Clemens Limberg, 'Case Comment: Austrian OGH 28.4.2009 5 Ob 66/09f' (2009) immolex nr. 128; 9.11.2010 4 Ob 89/10g = Gerald Michl, 'Case Comment: Austrian OGH 9.11.2010 4 Ob 89/10g' (2011) ZVB nr. 39 = Moritz Zoppel, 'Case Comment: Austrian OGH 9.11.2010 4 Ob 89/10g' (2011) EvBl nr. 67; 13.12.2011 5 Ob 190/11v = Matthias Cerha, 'Case Comment: Austrian OGH 13.12.2011 5 Ob 190/11v' (2012) immolex nr. 50; 16.5.2013 5 Ob 82/13i = Ferdinand Kerschner,

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understood to mean adequately caused consequences.[53] To follow established case law on the theory of adequate causal connections, adequate causation is to be negated if an action appears fully inappropriate according to its nature to cause a result of the type that has occurred, and merely that an unusual chain of circumstances is present.[54] In the process, it must be considered whether there is a calculable or even calculated risk of damage into which the liable parties entered for their own benefit.[55]

If the primary source of pollution is distant and/or secondary causes are present, an analogous application of § 364a Austrian Civil Code must be rejected.[56]

By means of analogy to § 364a Austrian Civil Code, the circle of activities that fall under liability regardless of fault would indeed be expanded. However, no conformity would be achieved for personal damages since established case law[57] and parts of the academic community[58] state that § 364a Austrian Civil Code, due to its embedment in property protection, cannot compensate damages to human health.[59] Nor can an analogous application change this. In addition, the problem of deviation with regard to the right to sue must be addressed. Nor can third parties assert a claim under § 364a Austrian Civil Code in analogy.[60] To include these third parties in the circle of legitimation, general strict liability by means of analogy must be analysed:

'Case Comment: Austrian OGH 16.5.2013 5 Ob 82/13i'(2013) RdU nr.106 = Georg Wilhelm, 'Case Comment: Austrian OGH 16.5.2013 5 Ob 82/13i'(2013) nr. 269.

[53] Austrian OGH 16.5.2013 5 Ob 82/13i = Ferdinand Kerschner, 'Case Comment: Austrian OGH 16.5.2013 5 Ob 82/13i'(2013) RdU nr.106.

[54] Austrian OGH 28.11.2006 1 Ob 196/06i; 13.12.2011 5 Ob 190/11v = Matthias Cerha, 'Case Comment: Austrian OGH 13.12.2011 5 Ob 190/11v' (2012) immolex nr. 50.

[55] Austrian OGH 2.5.2000 10 Ob 33/00a; 28.11.2006 1 Ob 196/06i; 9.11.2010 4 Ob 89/10g.

[56] Austrian OGH 20.1.1988 1 Ob 47/87; 28.4.2009 5 Ob 66/09f'= Clemens Limberg, 'Case Comment: Austrian OGH 28.4.2009 5 Ob 66/09f (2009) immolex nr. 128.

[57] Austrian OGH 13.7.1978 6 Ob 671/78.

[58] Helmut Koziol, *Österreichisches Haftpflichtrecht* vol II 2nd edn (Wien: Manz, 1984) p. 331 FN 10.

[59] Dissenting: Monika Gimpel-Hinteregger, *Grundfragen der Umwelthaftung* (Wien: Manz, 1994) p. 323 et seq; Peter Jabornegg, *Reichen die Bestimmungen des bürgerlichen Rechtes, insbesondere aus dem Nachbarschaftsverhältnis aus, um den zeitgemäßen Forderungen nach einem wirksamen Umweltschutz Rechnung zu tragen? Verhandlungen des Neunten Österreichischen Juristentages* (Wien: Manz, 1985) IV p. 69.

[60] Ferdinand Kerschner and Erika Wagner, '§ 364a ABGB', in Attila Fenyves, Ferdinand Kerschner and Andreas Vonkilch (eds.), *Großkommentar zum ABGB – Klang Kommentar* (Wien: Verlag Österreich, 2011), para 297; Paul Oberhammer, '§ 364a ABGB', in Michael Schwimann/Georg E. Kodek (eds.), *Praxiskommentar zum ABGB*, 4th edn. (Wien: LexisNexis, 2012), para 11; Martin Winner, '§ 364a ABGB', in Peter Rummel and Meinhard Lukas (eds.), *Kommentar zum ABGB*, 4th edn. (Wien: Manz, 2016), para 19; Christian Holzner, '§ 364a ABGB', in Andreas Kletečka and Martin Schauer (eds.), *ABGB-ON*[1.03] (Wien: Manz, 2016), para 9; Bernhard Eccher and Olaf Riss,

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c) Strict liability by means of analogy – the dangerous operation

Austrian civil law does not stipulate a general strict liability for the damages caused by the operation of a company.[61] According to established Austrian case law, 'strict liability of the entrepreneur expressed by the legislature in individual cases (Law on the Liability of Operators of Motor Vehicles and Railways,[62] Aviation Act[63] etc.) for specific operational risks should fundamentally be extended to all dangerous operations'.[64] Therefore, the Austrian Supreme Court stresses that: 'In the time of machines, the legal system does not forbid the establishment of operations that use machines, even if the physical integrity or assets of persons not associated with the operations are thereby endangered. But it must require that whenever possible, damages incurred are not borne by this person, but rather by the company that operates the machines, receives profit from them and who had the ability to decrease the risk as much as possible through appropriate precautions.'[65]

Anyone who operates such a dangerous facility cannot shift the risk of causing damage to life, health and assets of other persons onto the public, but must rather take responsibility for them even if no misconduct of the operators or their employees can be proven.[66]

In accordance with *Ehrenzweig*[67], prevailing case law regards a strict liability of the entrepreneur of a dangerous operation as justified since he/she is permitted to take actions that would be prohibited if the courts only considered the endangered interests of third parties.[68] For example, the entrepreneur may unleash powerful elementary forces, cause heavy weights to move extremely quickly, create or use explosives, undermine the ground, or make the air space unsafe.[69]

'§ 364a ABGB', in Helmut Koziol, Peter Bydlinski and Raimund Bollenberger (eds.), *Kurzkommentar zum ABGB*, 5th edn. (Wien: Verlag Österreich, 2017), para 5.

[61] Austrian OGH 19.3.1952 1 Ob 119/52; 24.10.1956 2 Ob 563/56.

[62] In German, „Eisenbahn- und Kraftfahrzeughaftpflichtgesetz – EKHG", Austrian Federal OJ 1959/48, as amended most recently by Austrian Federal OJ I 2017/19.

[63] In German, "Luftfahrtgesetz – LFG", Austrian Federal OJ 1957/253, as amended most recently by Austrian Federal OJ I 2017/92.

[64] Austrian OGH 30.10.1979 1 Ob 560/79 translation by the author = Helmut Koziol, 'Case Comment: Austrian OGH 30.10.1979 1 Ob 560/79' (1981) 371-375, JBl p. 371.

[65] Austrian OGH 20.2.1958 7 Ob 13/58 translation by the author.

[66] Austrian OGH 10.9.1947 1 Ob 500/47; 16.8.1949 2 Ob 155/49; 18.3.1953 2 Ob 972/52; 20.2.1958 7 Ob 13/58.

[67] Armin Ehrenzweig, *System des österreichischen allgemeinen Privatrechts* vol II/1² (Wien: Manz, 1928), p. 690 et seqq.

[68] Austrian OGH 28.3.1973 5 Ob 50/73

[69] Austrian OGH 14.4.1966 2 Ob 66/66.

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The jurisprudence also emphasizes that the term "dangerous operation" may not be interpreted too broadly. Not every industrial operation can be classified as a dangerous operation that is liable for all damages in consequence of the risk of operation.[70] This applies only to operations that in consequence of their general characteristics rather than coincidental specific circumstances endanger the interests of third parties. The degree of endangerment must be significantly higher than the normal degree of endangerment constantly existing in modern life.[71]

The high degree of likeliness of damage and the unusual extent of potential damage are particularly relevant.[72] Liability based on strict liability by means of analogy is denied if an actually non-harmful operation becomes dangerous in individual cases under certain circumstances. Rather, strict liability applies if such risk is regularly and generally present according to the nature of the operation.[73]

In this context, the so-called 'sandblast decision' merits closer consideration:[74] When operating iron conservation facilities (sandblasting facilities), an iron trade company used filters that were outdated, but approved by trade authorities. On the neighbouring property, there was a parking lot that was also used by third parties, namely customers and service providers of the neighbour. Their motor vehicles were damaged by steel dust from the sandblasting facility. While under § 364a Austrian Civil Code, damages by approved facilities would be compensated regardless of fault, the general analogous strict liability depends on the facility's qualification as a dangerous operation. In the case of the sandblasting facility, the Austrian Supreme Court denied this qualification.

In addition, Austrian courts rejected general risk (and therefore a dangerous operation) in the cases of a motor racing facility,[75] the pursuit of agriculture,[76] a billposting business,[77] a bakery,[78] a construction company,[79] a garage,[80] a water pipeline

[70] Austrian OGH 11.10.1995 3 Ob 508/93.

[71] Austrian OGH 20.2.1958 7 Ob 13/58.

[72] Austrian OGH 11.5.1978 7 Ob 572/78; 22.2.2000 1 Ob 26/00f; 26.1.2010 9 Ob 1/10b; 16.12.2015 7 Ob 203/15a

[73] Austrian OGH 21.12.1976 5 Ob 873/76; 21.10.1971 2 Ob 182/71.

[74] Austrian OGH 11.10.1995 3 Ob 508/93; Ferdinand Kerschner, 'Kausalitätshaftung im Nachbarrecht?', p. 10.

[75] Austrian OGH 27.1.1982 1 Ob 824/81.

[76] Austrian OGH 24.10.1956 2 Ob 563/56; 27.4.1960 2 Ob 53/60.

[77] Austrian OGH 19.03.1952 1 Ob 119/52.

[78] Austrian OGH 29.6.1955 2 Ob 318/55.

[79] Austrian OGH 29.6.1955 2 Ob 318/55.

[80] Austrian OGH 4.4.1956 2 Ob 168/56.

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facility,[81] an installation company,[82] an earth moving company,[83] a tarring company,[84] a ski lift,[85] a circus[86] or a news agency.[87] The business of a logger[88] was also seen as no dangerous operation. The same applies to the business of a freight elevator,[89] a tracked loader,[90] a concrete mixing machine,[91] a caterpillar[92] or the use of a soda water bottle.[93]

However, the Austrian Supreme Court has affirmed that a railway,[94] an industrial railway[95] and a chairlift,[96] as well as an industrial plant that emitted hazardous exhaust fumes (in this case, a magnesite plant) constitute dangerous operations, if the danger readily became evident, in that the waste gases of this plant were suited to cause damage to textiles of average quality, even in case of short exposure, if they were in a horizontal position, or even to living beings. This would be a lasting endangerment of others' property that far exceeds the normal measure of endangerment to be expected in modern life.[97] Equally, hanging wires from a high voltage line,[98] a munitions factory, or a factory for highly flammable materials or gases[99] would qualify as dangerous operations.

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[81] Austrian OGH 27.6.1968 1 Ob 151/68.

[82] Austrian OGH 30.8.1961 1 Ob 353/61.

[83] Austrian OGH 21.10.1971 2 Ob 182/71.

[84] Austrian OGH 6.3.1968 6 Ob 24/68.

[85] Austrian OGH 14.04.1966 2 Ob 66/66, but it must be pointed out that these are subject to the strict liability of the Austrian Law on the Liability of Operators of Motor Vehicles and Railways – in German, EKHG.

[86] Austrian OGH 13.1.1960 6 Ob 402/59.

[87] Austrian OGH 15.4.1971 1 Ob 87/71.

[88] Austrian OGH 19.3.1958 6 Ob 60/58.

[89] Austrian OGH 2.4.1952 2 Ob 255/52.

[90] Austrian OGH 3.2.1972 2 Ob 149, 150/71.

[91] Austrian OGH 1.10.1969 7 Ob 163/69.

[92] Austrian OGH 30.11.1971 4 Ob 643/71.

[93] Austrian OGH 29.10.1970 1 Ob 173/70.

[94] Austrian OGH 16.8.1949 2 Ob 155/49; but it must be pointed out that these nowadays are subject to the strict liability of the Austrian Law on the Liability of Operators of Motor Vehicles and Railways – in German, EKHG .

[95] Austrian OGH 2.4.1958 1 Ob 150/58.

[96] Austrian OGH 18.3.1953 2 Ob 972/52; 22.12.1954 2 Ob 931/54; but it must be pointed out that these are subject to the strict liability of the Austrian Law on the Liability of Operators of Motor Vehicles and Railways – in German, EKHG.

[97] Austrian OGH 20.2.1958 7 Ob 13/58.

[98] Austrian OGH 10.9.1947 1 Ob 500/47.

[99] Austrian OGH 2.4.1952 2 Ob 255/52.

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Through this strict liability by means of analogy, third parties – not only neighbours – can finally raise compensation claims regardless of fault.

D. Qualification of environmentally hazardous facilities in light of public law as dangerous operations in light of civil law

Kerschner describes the case law regarding strict liability by means of analogy as 'indistinct',[100] which appears accurate at least to a certain degree. It is difficult to predict which facilities qualify as dangerous operations in the sense of the court rulings described above, and which are excluded from analogous strict liability.[101]

Despite this, it is useful to transfer the established findings to the catalogue of the B-UHG. In other words, to qualify environmentally hazardous facilities as per Annex 1 B-UHG (see full Annex in simplified terms: p. 61) as dangerous operations in the sense of this case law, and therefore, are subject to strict liability by means of analogy?

- The operation of installations subject to permit in pursuance of IPPC-Directive[102] (**Annex 1 (1) and (12) B-UHG**): In some cases, facilities will fall under the heading dangerous operations (e.g. facilities that manufacture pyrotechnics), while the subsumption will fail in others (facilities that manufacture animal feeds).
- Waste management operations (**Annex 1 (2) B-UHG**): In most cases, these will not fulfil the criteria for a dangerous operation.
- Operations managing mineral waste (**Annex 1 (3) B-UHG**): If these are easily flammable, they may be qualified as dangerous operations in reference to 2 Ob 255/52. Alternatively, categorization as a dangerous operation can be made in reference to 7 Ob 13/58. For this, however, lasting dissemination of hazardous exhaust fumes and damage even in the case of short exposure must be substantiated.
- All discharges, introductions or disposals in water that require approval under the Austrian Water Act[103] (**Annex 1 (4) B-UHG**) and water withdrawals and impoundment of water also requiring approval under the Austrian Water Act (**Annex 1 (5) B-UHG**): In most cases, these will not fulfil the criteria for a dangerous operation.

[100] Kerschner, 'Kausalitätshaftung im Nachbarrecht?', p. 10; translation by the author.

[101] Koziol, *Österreichisches Haftpflichtrecht* III[3] p. 381.

[102] Council Directive 96/61/EC concerning integrated pollution prevention and control, OJ L 257, 10.10.1996, p. 26.

[103] In German, "Wasserrechtsgesetz – WRG" Austrian Federal OJ 1959/215 as amended most recently by Austrian Federal OJ I 2017/58.

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- Manufacture, use, storage, processing, filling, release into the environment and onsite transport of hazardous materials in the sense of §§ 2 and 3 Austrian Chemicals Act[104], of plant protectants and biocides (**Annex 1 (6) B-UHG**): In reference to 7 Ob 13/58 (lasting distribution of hazardous waste fumes through industrial plants), these would fall under the term of dangerous operations in the event of release into the environment if the damage occurs even in the case of short exposure. In mere manufacture, use, storage, and bottling, cannot be subsumed under this term.
- Transportation by road, rail, inland waterways, sea or air of dangerous or polluting goods in the sense of § 1 (1) to (3) Austrian Hazardous Goods Transportation Act[105] (**Annex 1 (7) B-UHG**): Mere transportation during which no release of dangerous goods occurs does not qualify as a dangerous operation.
- Facilities in the sense of **Annex 1 (8) B-UHG** such as coke ovens, oil refineries, coal gasification and liquefaction plants, thermal power stations etc.: In reference to 7 Ob 13/58 (lasting distribution of hazardous waste fumes through industrial plants), these would fall under the term of dangerous operations in the event of release into the atmosphere if the damage occurs even after short exposure.
- Use of, transportation, intentional release and any other intentional output of genetically modified organisms (**Annex 1 (9), (10), (14) B-UHG**): In reference to 7 Ob 13/58 (lasting distribution of hazardous waste fumes through industrial plants), if such genotypically altered organisms were of a dangerous nature, these companies could fall under the term dangerous operations if damage occurs even in the case of short exposure.
- Shipment of wastes that require authorization or are prohibited under Regulation (EC) No 1013/2006[106] (**Annex 1 (11) B-UHG**): Mere shipment, during which no release of dangerous wastes generally occurs, does not qualify as a dangerous operation.
- Use of hazardous materials and preparations, plant protectants and biocides to protect plants against illness and pests (**Annex 1 (13) B-UHG**): In reference to 7 Ob 13/58 (lasting distribution of hazardous waste fumes through industrial plants), these would be included under the term dangerous operations in the

[104] In German, "Chemikaliengesetz 1996 – ChemG 1996" Austrian Federal OJ I 1997/53 as amended most recently by Austrian Federal OJ I 2015/109.

[105] In German, "Gefahrgutbeförderungsgesetz – GGBG" Austrian Federal OJ I 1998/145 as amended most recently by Austrian Federal OJ I 2012/50.

[106] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190, 12.7.2006, p. 1.

event of release into nature or use in nature if the damage occurs even in the case of short exposure.

- Geological carbon dioxide storage sites (**Annex 1 (15) B-UHG**): Geological carbon dioxide storage sites in most cases will not fulfil the criteria of a dangerous operation.

E. Conclusion

This article set out to clarify the discrepancy between the environmental liability mechanism of Austrian civil law and that of public law.

Differences exist on multiple levels: As a central criterion for differentiation, the type of liability must be determined. Does the system under consideration compensate by means of fault-based liability, or by means of strict liability? Environmental liability under public law – concerning damage caused by listed hazardous activities – is conceived as strict liability. An equal (particularly with regard to the circle of persons with the right to sue) level of protection offered through civil law strict liability can only be constructed in dependence on the 'indistinct'[107] case law regarding dangerous operations. By no means all annex activities of the B-UHG come under the term dangerous operations. For these facilities, the gaps described above remain: Indeed, comprehensive protection of the environment is provided through public law strict environmental liability, but with regard to individual damages, strict liability by means of analogy is nonetheless denied. Consequently, compensation of individual damages falls short because the plaintiff has to prove fault.

Recital 1 of the ELD emphasises contaminated sites in the Community that pose a significant risk to human health. Evidently, the preservation of the environment should simultaneously protect human health. Therefore, it can be concluded that shortfalls in the compensation of individual damages should be avoided. For this reason, a special rule regarding strict environmental liability under civil law is to be desired.[108] To prevent new inconsistencies, a provision that refers to the facility catalogue of B-UHG is advisable.

[107] Kerschner, 'Kausalitätshaftung im Nachbarrecht?', p. 10; translation by the author.

[108] See also Stephanie Nitsch, *Dissonanzen innerhalb der österreichischen Umwelthaftung* (Vienna 2014).

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F. Annex I - Environmentally hazardous activities as per Annex III ELD in simplified terms, with reference to the Austrian federal transposition act

1. The operation of installations subject to permit in pursuance of Council Directive 96/61/EC concerning integrated pollution prevention and control[109] (codified by Directive 2008/1/EC[110] and recast in Directive 2010/75/EU[111]): This includes facilities that produce energy (firing plants with certain heat provision, petroleum and gas refineries, coke plants and coal gasification and gas liquification plants), facilities for the manufacture and processing of metals, mineral processing industry, chemical industry, facilities for waste treatment etc. (Annex III (1) ELD, Annex 1 (1) and (12) B-UHG).
2. Waste management operations (collection, transport, recovery and disposal of hazardous and non-hazardous waste, including the supervision of such operations and after-care of disposal sites), if these require a permit or registration in pursuance of Council Directive 75/442/EEC[112] and Council Directive 91/689/EEC[113] (Annex III (2) ELD, Annex 1 (2) and (3) B-UHG).
3. All discharges into the inland surface water, which require prior authorisation in pursuance of Council Directive 76/464/EEC[114] (codified by Directive 2006/11/EC[115]) (Annex III (3) ELD, Annex 1 (4) B-UHG). The discharge of organic halogen compounds, phosphorous compounds, tin compounds, mercury and mercury compounds, cadmium and cadmium compounds, existing hydrocarbons derived from petroleum and crude oil, persisting plastics, etc. can be named as examples.

[109] Council Directive 96/61/EC concerning integrated pollution prevention and control, OJ L 257, 10.10.1996, p. 26.

[110] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, OJ L 24, 29.1.2008, p. 8.

[111] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, p. 17.

[112] Council Directive of 15 July 1975 on waste, OJ L 194, 25.7.1975, p. 39.

[113] Council Directive 91/689/EEC of 12 December 1991 on hazardous waste, OJ L 377, 31.12.1991, p. 20.

[114] Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances, discharged into the aquatic environment of the Community, OJ L 129, 18.5.1976, p. 23.

[115] Directive 2006/11/EC of the European Parliament and of the Council of 15 February 2006 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, OJ L 64, 4.3.2006, p. 52.

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4. All discharge of substances into groundwater which require prior authorisation in pursuance of the water framework directive[116] (codification of Council Directive 80/68/EEC[117]) (Annex III (4) ELD, Annex 1 (4) B-UHG): indirect discharge of materials such as organic halogen compounds, phosphorous compounds, and tin compounds, materials that can have a carcinogenic, mutagenic, or teratogenic effects in or through water, mercury and mercury compounds, cadmium and cadmium compounds, petroleum and hydrocarbons and cyanide and direct and indirect discharges of materials such as metalloids and metals, biocides, materials that worsen the taste or scent of ground water and compounds that form such materials in ground water and make it unsuitable for human use, poisonous and persistent organic silicon compounds, inorganic phosphorous compounds, pure phosphorous, fluoride, ammonia, and nitrite.
5. The discharge or injection of pollutants into surface water or groundwater which require a permit, authorisation or registration in pursuance of the water framework directive (Annex III (5) ELD, Annex 1 (4) B-UHG).
6. Water abstraction and impoundment of water subject to prior authorisation in pursuance of the water framework directive (Annex III (6) ELD, Annex 1 (5) B-UHG).
7. Manufacture, use, storage, processing, filling, release into the environment and onsite transport of hazardous materials (Annex III (7) ELD, Annex 1 (6), (13) B-UHG)
    - as defined in Art 2 para 2 of Council Directive 67/548/EEC[118] (Annex III (7) lit a ELD). Materials and preparations are listed as dangerous

[116] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1.

[117] Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances, OJ L 20, 26.1.1980, p. 43.

[118] Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous substances, OJ 196, 16.8.1967, p. 1.

therein if they are potentially explosive[119], oxidizing[120], easily flammable[121], flammable[122], toxic[123], harmful[124], corrosive[125], or irritant.[126]

- as defined in Art 2 para 2 of Directive 1999/45/EC[127] (Annex III (7) lit b ELD). Here too, a differentiation is made between explosive, oxidizing, flammable[128], harmful, corrosive, and irritant materials and preparations. In addition, there are also categories for sensitizing[129], carcinogenic[130], mutagenic[131] substances and preparations, substances

[119] These are substances and preparations which may explode under the effect of flame or which are more sensitive to shocks or friction than dinitrobenzene (Art 2 (2) lit a Council Directive 67/548/EEC).

[120] Substances and preparations which give rise to highly exothermic reaction when in contact with other substances, particularly flammable substances (Art 2 (2) lit b Council Directive 67/548/EEC).

[121] Substances and preparations which may become hot and finally catch fire in contact with air at ambient temperature without any application of energy, or solid substances and preparations which may readily catch fire after brief contact with a source of ignition and which continue to burn or to be consumed after removal of the source of ignition, or liquid substances and preparations having a flash point below 21° C, or gaseous substances and preparations which are flammable in air at normal pressure, or substances and preparations which, in contact with water or damp air, evolve highly flammable gases in dangerous quantities; (Art 2 (2) lit c Council Directive 67/548/EEC).

[122] Liquid substances and preparations having a flash point between 21° C and 55° C (Art 2 (2) lit d Council Directive 67/548/EEC).

[123] Substances and preparations which, if they are inhaled or taken internally or if they penetrate the skin, may involve serious, acute or chronic health risks and even death (Art 2 (2) lit e Council Directive 67/548/EEC).

[124] Substances and preparations which, if they are inhaled or taken internally or if they penetrate the skin, may involve limited health risks (Art 2 (2) lit f Council Directive 67/548/EEC).

[125] Substances and preparations which may, on contact with living tissues, destroy them (Art 2 (2) lit g Council Directive 67/548/EEC).

[126] Non-corrosive substances and preparations which, through immediate, prolonged or repeated contact with the skin or mucous membrane, can cause inflammation (Art 2 (2) lit h Council Directive 67/548/EEC).

[127] Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations, OJ L 200, 30.7.1999, p. 1.

[128] Distinction is made between highly flammable, easily and simply ignitable substances and preparations (Art 2 (2) lit b - e Directive 1999/45/EC).

[129] Substances and preparations which, if they are inhaled or if they penetrate the skin, are capable of eliciting a reaction of hypersensitisation such that on further exposure to the substance of preparation, characteristic adverse effects are produced (Art 2 (2) lit k Directive 1999/45/EC).

[130] Substances or preparations which, if they are inhaled or ingested or if they penetrate the skin, may induce cancer or increase its incidence (Art 2 (2) lit l Directive 1999/45/EC).

[131] Substances and preparations which, if they are inhaled or ingested or if they penetrate the skin, may induce heritable genetic defects or increase their incidence (Art 2 (2) lit m RL 1999/45/EG).

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and preparations toxic for reproduction[132] and environmentally dangerous[133] substances and preparations.

- such as plant protection products as defined in Art 2 para 1 of Council Directive 91/414/EEC[134] (Annex III (7) lit c ELD). Substances and preparations that contain active substances put up in the form in which they are supplied to the user and which have the task of protecting plants and plant products from harmful organisms or preventing the action of such organisms. Substances and preparations that influence life processes of plants other than as nutrients, preserve plant products, destroy undesired plants or parts of plants or block undesired plant growth.
- such as biocidal products defined in Art 2 para 1 lit a Directive 98/8/EC[135] (Annex III (7) lit d ELD): This includes substances and preparations containing one or more active substances, put up in the form in which they are supplied to the user, intended to destroy, deter, render harmless, prevent the action of, or otherwise exert a controlling effect on any harmful organism by chemical or biological means.. Annex V Directive 98/8/EC provides an exhaustive list of these products. Disinfectants and general biocidal products, preservatives, pest control, and other biocidal products.

8. Transport by road, rail, inland waterways, sea or air of dangerous goods or polluting goods as defined either in Directive 2008/68/EC[136] (recodification of the Council Directive 94/55/EC[137] and Council Directive 96/49/EC [138]) or as

[132] Substances and preparations which, if they are inhaled or ingested or if they penetrate the skin, may produce, or increase the incidence of, non-heritable adverse effects in the progeny and/or an impairment of male or female reproductive functions or capacity (Art 2 (2) lit n Directive 1999/45/EC).

[133] Substances and preparations which, were they to enter the environment, would or could present an immediate or delayed danger for one or more components of the environment (Art 2 (2) lit o Directive 1999/45/EC).

[134] Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market, OJ L 230, 19.8.1991, p. 1.

[135] Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market, OJ L 123, 24.4.1998, p. 1.

[136] Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods, OJ L 260, 30.9.2008, p. 13.

[137] Council Directive 94/55/EC of 21 November 1994 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road, OJ L 319, 12.12.1994, p. 7.

[138] Council Directive 96/49/EC of 23 July 1996 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by rail, OJ L 235, 17.9.1996, p. 25.

defined in Council Directive 93/75/EEC[139] (Annex III (8) ELD, Annex 1 (7) B-UHG).

9. Operation of installations subject to authorisation in pursuance of Council Directive 84/360/EEC[140] (Annex III (9) ELD, Annex 1 (8) B-UHG).
10. Any contained use, including transport, involving genetically modified micro-organisms as defined by Directive 2009/41/EC[141] (recast of Council Directive 90/219/EEC[142]) (Annex III (10) ELD, Annex 1 (9) B-UHG).
11. Any deliberate release into the environment, transport and placing on the market of genetically modified organisms as defined by Directive 2001/18/EC of the European Parliament and of the Council[143] (Annex III (11) ELD, Annex 1 (10) and (14) B-UHG).
12. Transboundary shipment of waste within, into or out of the European Union, requiring an authorisation or prohibited in the meaning of Regulation (EC) No. 1013/2006[144] (recast of Council Regulation (EEC) No 259/93[145]) (Annex III (12) ELD, Annex 1 (11) B-UHG). Wastes containing metal (such as waste from iron and steel manufacturing), waste that primarily contains inorganic materials, possibly mixed with metals or organic materials (such as sand jet residues) and primarily organic materials, possibly mixed with metals and inorganic materials (such as hydraulic fluid and brake fluid, antifreeze) can be named as examples.
13. The management of extractive waste pursuant to Directive 2006/21/EC of the European Parliament and of the Council on the management of waste from

[139] Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods, OJ L 247, 5.10.1993, p. 19.

[140] Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants, OJ L 188, 16.7.1984, p. 20 which has been repealed by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, OJ L 24, 29.1.2008, p. 8.

[141] Directive 2009/41/EC of the European Parliament and of the Council of 6 May 2009 on the contained use of genetically modified micro-organisms, OJ L 125, 21.5.2009, p. 75.

[142] Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms, OJ L 117, 8.5.1990, p. 1.

[143] Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC - Commission Declaration, OJ L 106, 17.4.2001, p. 1.

[144] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190, 12.7.2006, p. 1.

[145] Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, OJ L 30, 6.2.1993, p. 1.

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extractive industries[146] (Annex III (13) ELD, Annex 1 (3) B-UHG). These are wastes that occur through the exploration, extraction, preparation and storage of mineral raw materials and in the operation of quarries (Art 2 para 1 RL 2006/21/EG).

14. Operation of CO2 storage sites pursuant to Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide[147] (Annex III (14) ELD, Annex 1 (15) B-UHG).

G. Annex II - Environmentally hazardous activities as per Annex 1 B-UHG in simplified terms

1. The operation of installations subject to permit in pursuance of Council Directive 96/61/EC concerning integrated pollution prevention and control (IPPC Directive)[148] and that must be licensed according to federal regulations such as § 77a in conjunction with Annex 3 Austrian Trade Regulations[149], § 37 (3) in conjunction with Annex 5 Austrian Waste Management Act 2002[150], §§ 121 and 121f (1) Austrian Mineral Raw Materials Act[151], § 5 (3) Austrian emission protection law for boiler installations[152]. This applies neither to the activities subject to Annex 1 (12) B-UHG nor to the operation of plants or parts of plants which are mainly used for research, development and testing of new products and processes. (Annex 1 (1) B-UHG)
2. Waste management operations such as collection, transport, recovery and disposal of non-hazardous and hazardous waste, including the monitoring of such operations and the monitoring of landfills after closure, provided that such measures are carried out by a waste collector or treatment contractor in accordance with § 2 (6) (3) or (4) Austrian Waste Management Act 2002 (Annex 1 (2) B-UHG)

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[146] Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries, OJ L 102, 11.4.2006, p. 15.

[147] Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide, OJ L 140 5.6.2009, p. 114.

[148] Council Directive 96/61/EC concerning integrated pollution prevention and control, OJ L 257, 10.10.1996, p. 26.

[149] In German, "Gewerbeordnung 1994 – GewO 1994" Austrian Federal OJ 1994/194 as amended most recently by Austrian Federal OJ I 2017/107.

[150] In German, "Abfallwirtschaftsgesetz 2002 – AWG 2002" Austrian Federal OJ I 2002/102 as amended most recently by Austrian Federal OJ I 2017/70.

[151] In German, "Mineralrohstoffgesetz – MinroG" Austrian Federal OJ I 1999/38 as amended most recently by Austrian Federal OJ I 2016/95.

[152] In German, "Emissionsschutzgesetz für Kesselanlagen – EG-K 2013" Austrian Federal OJ I 2013/127 as amended most recently by Austrian Federal OJ I 2015/81.

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3. Operations to manage mineral waste such as minimization, treatment, recovery and disposal of mineral wastes; these are wastes resulting directly from the prospecting, extraction, processing and storage of mineral resources, as well as the operation of quarries, through facilities and companies that use mineral resources in opencast mining or underground mining for economic purposes, including mining and drilling of the recovered materials. This does not apply to the introduction of water and the reintroduction of pumped ground water, which is permissible under water law without special authorization. This also does not apply to the extent that the competent authority has reduced or suspended the requirements for the deposition of non - hazardous waste arising from the prospecting of mineral resources, with the exception of oil and evaporites other than gypsum and anhydrite, as well as the deposition of unpolluted soil and waste, processing and storage of peat. (Annex 1 (3) B-UHG)
4. All discharges, introductions or disposals in waters that require approval under the Austrian Water Act[153] (Annex 1 (4) B-UHG)
5. Water withdrawals and impoundments of water that also require approval under the Austrian Water Act (Annex 1 (5) B-UHG).
6. Manufacture, use, storage, processing, filling, release into the environment and onsite transport of hazardous materials in the sense of §§ 2 and 3 Austrian Chemicals Act[154], of plant protection materials in the sense of Art 2 (1) Regulation (EC) No 1107/2009[155] and biocide products in the sense of § 2 (1) (2) Biocide Products Act[156] provided that these operations are not covered by Annex 1 (13) B-UHG (Annex 1 (6) B-UHG).
7. Transport by road, rail, inland waterways, sea or air of dangerous or polluting goods in the sense of § 1 para 1 to 3 the Austrian Hazardous Goods Transportation Act[157] (Annex 1 (7) B-UHG).
8. Operation of facilities such as coke ovens, oil refineries (excluding undertakings manufacturing only lubricants from crude oil), coal gasification

[153] In German, "Wasserrechtsgesetz – WRG" Austrian Federal OJ 1959/215 as amended most recently by Austrian Federal OJ I 2017/58.

[154] In German, "Chemikaliengesetz 1996 – ChemG 1996" Austrian Federal OJ I 1997/53 as amended most recently by Austrian Federal OJ I 2015/109.

[155] Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ L 309, 24.11.2009, p. 1.

[156] In German, "Biozidproduktegesetz" Austrian Federal OJ I 2000/105.

[157] In German, "Gefahrgutbeförderungsgesetz – GGBG" Austrian Federal OJ I 1998/145 as amended most recently by Austrian Federal OJ I 2012/50.

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and liquefaction plants, thermal power stations and other combustion installations with a nominal heat output of more than 50 MW, roasting and sintering plants with a capacity of more than 1 000 tonnes of metal ore per year, integrated plants for the production of pig iron and crude steel, ferrous metal foundries having melting installations with a total capacity of over 5 tonnes, plants for the production and melting of non-ferrous metals having installations with a total capacity of over 1 tonne for heavy metals or 0,5 tonne for light metals, plants for the production of cement, and rotary kiln lime production, plants for the production and processing of asbestos and manufacture of asbestos-based products, plants for the manufacture of glass fibre or mineral, fibre, plants for the production of glass (ordinary and special) with a capacity of more than 5 000 tonnes per year, plants for the manufacture of coarse ceramics notably refractory bricks, stoneware pipes, facing and floor bricks and roof tiles, chemical plants for the production of olefins, derivatives of olefins, monomers and polymers, chemical plants for the manufacture of other organic intermediate products, plants for the manufacture of basic inorganic chemicals, plants for the disposal of toxic and dangerous waste by incineration, plants for the treatment by incineration of other solid and liquid waste and plants for the chemical production of paper pulp with a production capacity of at least 25 000 tonnes per year (Annex 1 (8) B-UHG)

9. Use of, transportation, intentional release and any other intentional output of genetically modified organisms (Annex 1 (9), (10), (14) B-UHG)
10. Shipment of wastes that require authorization or are prohibited under Regulation (EC) No 1013/2006[158] (Annex 1 (11) B-UHG)
11. The operation of installations subject to permit in pursuance of Council Directive 96/61/EC concerning integrated pollution prevention and control (IPPC Directive)[159] and that must be licensed according to state regulations (Annex 1 (12) B-UHG)
12. Use of hazardous materials and preparations, plant protective materials and biocide products to protect plants against illness and pests (Annex 1 (13) B-UHG)
13. Geological carbon dioxide storage sites in the sense of Directive 2009/31/EC[160] (Annex 1 (15) B-UHG)

[158] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190, 12.7.2006, p. 1.

[159] Council Directive 96/61/EC concerning integrated pollution prevention and control, OJ L 257, 10.10.1996, p. 26.

[160] Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European

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