Prevention and remedying of environmental damage

"Liability for environmental damage in Italy: a synthesis of legislation and jurisprudence compared with Directive 2004/35/EC" (*)

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Introduction

This paper contains a comparative examination between the system of Directive 2004/35/EC and Italian legislation (and jurisprudence) in relation to the prevention and remedying of damage with regard to the questions in points 1 and 2, of the Guidelines, prepared for the Conference of 27-28 May 2005.
The following contains some final conclusions.

Legal basis

With regard to the application of the general regulations of the Italian Civil Code for damage to persons or things (art. 2043 and ff.. of the Civil Code) in the case of environmental damage, Italian jurisprudence has taken the following path: 1. Up until the entry into force of the special rules on liability for environmental damage (art. 18 of Law No. 349 of 8 July and subsequent Regulations on the matter: see below), the general rules of the Civil Code were used, in combination with arts. 9 and 32 of the Constitution, in force since 1st January 1948, (on the protection of landscape and of health). In this phase (beginning in the 1970s), the "general" notion of the environment, derived indirectly from the Constitution (art. 9) and a wider notion of the right to health, understood as the right to the healthiness of the environment (art. 32 of the same Constitution) was devised. Therefore, it allowed for and protection based on compensation and protection based on prevention (in the case of risk to health) in the following cases of the breach of the following special regulations: protecting the territory (town planning); protecting natural resources (water bodies and their protected uses); flora and fauna, especially for zones to be used as parks or natural resources; the landscape and cultural heritage (the latter, having special regulations, with administrative penalties, going back to 1939, and considered supplementary of additional and eventual compensation for damages, pursuant to the aforesaid art. 2043 of the Civil Code) and, finally, environmental healthiness (in this last case, also with precautionary and emergency actions originally provided for in defence of property, extended by the Italian Court of Cassation to the inviolable right to health) ([i]).

The general definition of the environment was elaborated by jurisprudence (especially, criminal case law), considering that the legislator had adopted authorising and control regulations and criminal penalties in defence of the single components of the environment (air, water, soil, etc.) and, therefore, recognised that both local bodies (Regions, Provinces, Municipalities), which have to protect those same components, and the individual citizen (for the threat of damage and damage to the healthiness of the environment) have the right to compensation for damage, as a further consequence of the crime (misdemeanour or offence), to be paid by the criminally responsible party.
After art. 18 of Law No. 349/1986 (and the other special rules on liability for environmental damage) entered into force, the traditional rules of the Civil Code were used in jurisprudence for *integrating* the special rule (the aforesaid art. 18) from *two viewpoints*: by applying the provisions of the Civil Code on *absolute* liability for dangerous activities and on *joint and several liability* among parties co-responsible for the occurrence of the damage. In this way, the special rule in art. 18 (which, instead, provides for the fault and liability of any party for its own causal contribution to the occurrence) proved *more stringent* due to its integration with the Civil Code system (art. 2050)([ii]).
In the same sense, we can consider the orientation of the Italian Court of Cassation, which has applied the special rule on compensation for environmental damage (pursuant to art. 18) to acts of environmental damage (of 1963) before, therefore, art. 18 came into force (in 1986), holding that the rules, then made explicit, were already found in the Italian legal order, starting from when arts. 9 and 32 of the Constitution came into force (from 1st January 1948)([iii]).

Environmental damage

2. 1. Subject matter covered in National Law

The three types of damage, included within the field of the application of the Directive, are already included within the “special” national regulation (pursuant to art. 18 of Law No. 349/1986), because this article does not clearly define the components of the environment, as protected assets, but entrusts the judge and interpreter with the task of ascertaining this, through deferment to an open and *in progress* legislative definition. Due its generality, this will automatically receive the content of subsequent laws, which, from time to time, provide protection for other environmental components.
A notion derives from this, which takes on historically decisive content, identified by jurisprudence on the basis of the evolving of the legislation (see, for example , the most

recent regulations on the protection of waters from dumping, which includes, within environmental damage, not only water resources, but also the soil and sub-soil and "other environmental resources"… pursuant to art. 58 (1), Legislative Decree No. 152 of 11 May 1999; or, in other words, in relation to the single environmental permit…) ([iv]).

The principle-rule, which was arrived at from judicial interpretation, may be summarised in this way: liability for environmental damage consists of any modification *in pejus* of the conditions of the quality of the natural components (biotic and abiotic) of the environment and their healthiness as well as their collective uses (for example, for bathing, tourism, irrigation as far as water bodies are concerned), protected by individual laws, even if previously modified by others ([v]). According to the standard of this principle, all the types listed above are included within the notion of environmental damage. Indeed, further clarifications must be made.

Within the sphere of the notion of damage, jurisprudence has also linked cases of harm to the tourist image or to the landscape to a municipality or a park authority as well as cases which can be linked to the effective and full guarantee of the individual right to health of the residents of a particular area, which is the object of pollution (for example, of the natural resources or from noise). Such a guarantee excludes the fact that residents may suffer significant drops in the quality of their life, represented by ordinary occupations (so called existential damage), where the individual laws protecting the environment are infringed ([vi])).

But, as we can see, in this latter case, harming the individual right of certain parties to the development of their personality in relation to particular conditions of the quality of life, which, because of (illegal) pollution, are considered to be jeopardised in a particular area is added, as a further occurrence, to damage to the environment, as an asset of collective use ([vii]).

2. 2. Definitions

Whilst in the text of the Directive, the threshold of damage (understood as significant adverse effects) is defined for the individual environmental resources; its measurability and, therefore, what measures are needed for returning to the status prior to the occurrence causing the damage (also through the technical rules set out in the Annexes); in art. 18 of Law No. 349/1986, which represented the first formal regulation of liability for environmental damage, the occurrence of the damage is described in a general way (deterioration, alteration, destruction "totally or partially of the environment") and it is, therefore, entrusted to the judge, on a case by case basis, to determine the type and seriousness of the deterioration, as a modification *in pejus* of the environmental situation, pre-existing the occurrence of the damage.

For this reason, the judge takes into account, as clarified in paragraph 2.1., all the components of the natural environmental and landscape and their protected uses.

As far as the protection of the soil and water is concerned, it must be noted that, after art. 18 of Law No. 349/1986, two special regulations have survived (art. 17 of Legislative Decree No. 22 of 5 February 1997, with Ministerial Decree No. 471/1999) and art. 58 of Legislative Decree No. 152 of 11 May 1999. The aforesaid art. 17 concerns the protection of the soil, sub-soil and underground and surface waters when faced with the occurrence of exceeding the maximum limits of concentration of polluting substances, in relation to their use, whatever the activity may be which causes that occurrence.. In turn, art. 58, refers to the requirements of art. 17, as far as the maximum limits of acceptability of pollution and the rules, where they are provided for, on procedures for reclaiming the polluted site. Both of the cited provisions safeguard the application of art. 18 of Law No. 349, where there is proof of greater damage to be compensated after remediation and restoration.

Art. 17 is portrayed as a new provision which has a much wider field of application than art. 18 of Law No. 349/1986, which becomes a residual regulation.

In fact, from an objective point of view, art. 17 identifies maximum limits of the acceptability of contamination of the natural environmental components, defined in accordance with the objectives of protection of the environment and of health, in a special table for single polluting factors in relation to the uses to which the same resources are to be put ([viii]).

Exceeding these limits, ascertainable according to special technical criteria (Ministerial Decree No. 471/1999) or the concrete and actual risk of exceeding the limits determines that the person in charge has obligations to report the act to the competent authorities and to adopt emergency safety measures as well as to prepare three plans (description of the polluted site; preliminary and final remediation project with environmental restoration), for the purposes of bringing the site back within the prescribed limits of acceptability (except in exceptional cases of remediation with safety measures, where the remediation is permitted with exceeding the limits but justified by a special and exceptional risk analysis).

All the emergency safety measures – description – remediation are subjected to the control and the requirements of the competent public authority which approves the plans and controls the proper execution of the activities for remediation and environmental restoration.

A special criminal provision punishes any party which, having caused one of the two occurrences described above (concrete and actual risk; excess of the cited limits), does not perform the remediation within the time limits and in the way laid down by the general provisions of art. 17 or by the competent Public Administration, in the concrete case.

As we can see, art. 17 covers, in general, cases of the threat of damage and damage to the environment for the purpose of avoiding in good time the migration of polluting substances from a site towards its exterior and, therefore, towards other targets.

But, in some cases, exceeding the maximum limits of the acceptability of contamination may also determine real (more serious) occurrences of environmental damage (under art. 18 of

Law No. 349/1986). This is where the residual application of the measures laid down in art. 18 comes into play ([ix]).

However, it should be emphasised that art. 17 has become the *de facto* provision with widest application in matters of the threat of damage- damage to the environment (to which art. 58 also refers), because it includes: a) phenomena of the threat of damage as well as environmental damage; b) it is founded on technical assessments of the case of the excess of the pre-determined limits and according to the methodology of sampling and precise analyses (see Ministerial Decree No. 471/1999) ; c) it includes accidental acts, but also the excess of limits deriving from gradual pollution; d) it imposes immediate obligations of information on the Public Administration and of emergency action by the responsible party; e) it places the remediation and environmental restoration activities under the control of the competent Public Administration; f) it defines the technical rules to be complied with in carrying out the remediation (see Ministerial Decree No. 471/1999); g) it lays down a criminal penalty against any party which breaches the information and final obligations regarding proper remediation (art. 51-*bis* of Legislative Decree No. 22/1997, cited above).

Finally, from a subjective point of view, it does not require fault or negligence as, instead, is required by art. 18, because it bases itself solely on the causal link between the positive or negative behaviour of the responsible party, and the fact of exceeding the limits (or the concrete and actual risk of exceeding the limits).

Nor should it be forgotten that the provisions of art. 18 require that action is taken in court for attributing liability, by the Ministry of the Environment and Protection of the Territory and by a local body (Municipality, Province, Region) before the competent civil court, with the longer period of time and greater costs than those of administrative proceedings, provided for in art. 17, examined above, whether applied for by the responsible party or started by an order of the Public Administration, against the party responsible for the occurrence who has failed to take action.

2. 3. Scope

The general characteristics of damage and the threat of damage have already been discussed, in paragraphs 2.1 and 2.2, as, respectively, provided for by art. 18 of Law No. 349/1986 and, then, by arts. 17 of Legislative Decree No. 22/1997 and 58 of Legislative Decree No. 152/1999.

It is necessary to add that art. 58 (3) of Legislative Decree No. 152 provides for another kind of damage which seems to be general in character. It establishes that, in the case where a party commits an illegal criminal or administrative act in breach of the Legislative Decree ([x]), in the absence of evidence of greater damage from the Ministry of the Environment and Protection of the Territory, the party responsible for the illegal act has to pay the Ministry a

lump-sum, of an amount equal to that of the pecuniary fine inflicted for the illegal criminal or administrative act. ([xi]).

In that case, the environmental damage is, therefore, compensated in an amount equivalent to the penalty provided for by the law for the same illegal act, leaving aside the need to prove effective damage (dealing with so called presumptive damage, with punitive character).

As far as concrete and actual risk of exceeding the maximum limits of environmental contamination is concerned, considering the nature of these limits, which can in most cases be linked to situations of risk for the aforesaid environmental components ([xii]), we can conclude that art. 17 referred to here also lays down the obligations of remediation (and the prior obligations of information of the Public Administration and emergency action) for situations which are defined as a concrete and actual risk of exceeding one of the mentioned limits and, therefore, of the threat of damage which precedes an occurrence of effective risk for the environment.

On the other hand, in the presence of this occurrence of the threat of damage, defined as such "ex lege", the competent Public Administration must, at all times during the procedure laid down in art. 17, impose the proper requirements on the self-reporting party or the party identified by the Public Administration itself ([xiii]).

In civil cases, pursuant to art. 18 of Law No. 349, the judge may adopt all the measures provided for to prevent occurrences of the threat of damage being transformed into occurrences of damage, according to the common rules of the Code of Civil Procedure.

But, as has already been pointed out, interested parties and, especially environmental associations, prefer, for the reasons described, to press for the quickest and least onerous action by the competent Public Administration, (Municipality or Province), with both measures for protecting health and the environment of an emergency nature (ordinances), and for obtaining the adoption of an order against the responsible parties for beginning the remediation procedure([xiv]).

2.4 Activities which can cause environmental damage

2.5 Parties subject to liability

Both from the point of view of the activities (occupational or not; dangerous or not) and from the point of view of the party (individual or company; private natural person or public administration), there are no distinctions in the cited Laws on the matter of liability for damage, or the threat of damage to the environment. In fact, two of the systems of liability described (under art. 18 of Law No. 349 and art 17 Legislative Decree, No. 22) cover any activity performed by any party ([xv]). In the case of multiparty causation of damage, art. 18 of Law No. 349 provides that each party shall answer for the part of the damage attributable to it (and the burden of proof is on the party suffering the damage); whilst art. 17 of Legislative

Decree No. 22/1997 and art. 58 (1) of Legislative Decree 152/1999 lay down no rules on the matter. As has been mentioned (see paragraph 1), the jurisprudence of the Italian Court of Cassation (Civil) has applied, for dangerous activities, the principle of joint and several liability among parties (apart from that of strict liability), according to the general rules of the Civil Code on damage to persons and things, (art. 2043 C.C.),“ integrating” art. 18.
It is in this context that we believe it is opportune to point out that the different systems of liability for environmental damage require that the activity of “any party” be carried out:

a) with fault or negligence, according to the provision of art. 18;
b) without fault and, therefore, based solely on the causal link between behaviour and the occurrence (of the threat of damage–damage), according to the rules in art. 17;
c) with fault , as far as it is a breach of the provisions laid down in Legislative Decree No. 152/1999, by dumping refluent urban or industrial waters coming from certain sources, under art. 58 (1) of the same Legislative Decree.

It appears obvious that the three systems described here do not appear to be well co-ordinated. ([xvi]).

2.6 Criteria for remedial action

2.8 The economic valuation of environmental damage

Art. 18 lays down as its primary rule “the restoration of the state of the locations at the expense of the responsible party”. The judge may order this in all cases in which it is possible (art. 18(8)). This last expression has been interpreted to mean where it is “technically” possible, in as far as, in this matter, the limit of excessively onerous costs is not in force. Nor, up until today, does it result that jurisprudence has invoked the limit of sustainable development for bringing the remedying measure within the sphere of reasonable costs or of the costs-benefits relationship. Nor does art. 18 provide for the possibility of natural restoration with equivalent resources.
Alongside this priority rule, for all the other sorts of damage (see *retro*, points 2.1, 2.2 and 2.3) the same art 18 establishes, in sub-article 6, another general criterion. That of the monetary award of the same sorts of damage according to the parameter of equity, which can be called upon when, as in the case of the natural resources and their collective use or the tourist image of a Municipality which has been harmed, not being assets having a market price , they cannot be valued according to objective parameters of reference.
Moreover, from the point of view of the certainty of the law, the difficulties in awarding damages are increased by two criteria for calculating the amount of damages. The judge must, in fact, “in any case” take into account “the seriousness of the individual fault and the profit gained by the perpetrator” as well as the cost required for restoration). This means giving the judge a further margin of discretion in quantifying the damage, in monetary terms, both on the

basis of an assessment of the seriousness of the fault (or of the negligence) in breaching the rules regarding environmental protection (and, therefore, of its importance, in the concrete case) and on the basis of the measure of the illegal profit made. But even this latter criteria has not been defined by art. 18 and, therefore, it is referred not only to costs saved by failing to comply with the environmental requirements (the costs of the preventive measures), but also to the profit gained through the unfair competition carried out in practice to the harm of competitors, who have performed the obligations imposed by the environmental legislation ([xvii]).

We are faced with the regulation of damages with not only a compensatory role but also a sanctioning or punitive role (see sub art. 58 (3) Legislative Decree No. 152, see: paragraph 2.3). Since the Italian legislator has not, however, laid down economic criteria for the monetary assessment of the damage, entrusting this task to the judge on the basis of equity, the judge could well assess the damages on the impossibility to use collective services deriving from environmental resources (for example, for the loss of the underground water table for use as drinking water) or the fact that the community is unable to enjoy the resource until the date of its natural recovery.

For all cases of the pollution of natural resources (and not only for damage to the soil) there is provision for protection against risk to health, also understood as risk for the healthiness of the environment (see *retro:* paragraph 1 and paragraph 2.2 with regard to the limits of acceptability of contamination, pursuant to arts. 17 Legislative Decree No. 22 and 58 (1) Legislative Decree No. 152).

In relation to the system of art. 18, just commented on, the evolutionary path that has been realised in the two systems found in arts. 17 and 58 can be summarised as follows: in art. 17, protection is extended to situations of threat to the environment, defined by means of objective parameters (maximum levels of acceptability of pollution) and a special remedial measure is provided, to be adopted according to stringent technical rules (see Ministerial Decree No. 417/1999). These rules, in turn, enable the “sustainable” costs of the application of the best available technology to be taken into account, in both exceptional cases (where the risk analysis of the site may substitute – for less costs – the rule of compliance with the maximum limits of acceptability for environmental contamination). Nevertheless, there remains the possibility of invoking the application of art. 18, for damage not covered by art. 17.

For the first time, in art. 58 of Legislative Decree No. 152, a “joint” regulation appears (even if there are some uncertainties in the text) for the situation of the threat of damage and damage to the environment, in the sense that it introduces administrative and control procedures of the Public Administration for remediation activities (and environmental restoration), already in force under art. 17. It also provides for presumptive damage (see

retro, paragraph 2.2), which must also be compensated in accordance with objective parameters, and, therefore, no longer left to the judge's discretion. But where damage greater to "presumptive" damage can be proved, art. 18 is (once again) applicable.
In conclusion, the legislator seems inclined to make the system of equitable power marginal and, therefore, at the discretion of the judge of the civil court, in awarding monetary compensation for damage, being fully aware that such a decision is lengthy and involves high costs which discourage taking an action for compensation ([xviii]). For this purpose, the legislator gives art. 18 a completely residual and marginal role. Out of this arises the choice of the two new systems (under art. 17 and art. 58), mentioned above, which acquire a wider field of application because they also include occurrences of a threat risk to the environment and are anchored to pre-established technical requirements, aimed at the remediation of contaminated sites. Compensation for environmental damage (in art. 58) ends up by substituting, with an easy "lump-sum" calculation, the more difficult and complex assessments of the same damage, which could be carried out by the judge of the civil court, in accordance with art. 18. A provisions which, nevertheless, remains, as we have seen, a "last resort".

2.7 Prevention and remediation costs

Here the intention is to underline two important aspects in regulating liability for threat of damage – damage to the environment, defined by art. 17 (and, therefore, by art. 58). Namely, that the local body (the Municipality or, in some cases, the Region) must substitute the responsible party in carrying out the activities related to remediation, where the latter fails to act or cannot be identified. The costs sustained by the local body have a special real property lien on the same areas, which facilitates their recovery.
On the other hand, the owner of the contaminated site is burdened with a constraint (real encumbrance), in the sense that its value constitutes, by law, the security for the payment of the costs of the remediation; a constraint which follows the circulation of the (polluted) asset, even if the owner or subsequent owners have no responsibility for the pollution of the site. It is not unusual for the owner to take on the costs of the remediation to free his property from this real encumbrance, rather than having to be subject to the security towards the Public Administration for the higher costs sustained by it. This is without prejudice to his recourse against the responsible party.
Finally, as far as insurance against environmental damage goes, it is obvious that insurance companies believe that they cannot cover damage to the environment which, for one reason, is not based on economically foreseeable parameters, even more so as its measure depends on the seriousness of the fault and the measure of the illegal profit gained by the responsible party and, therefore, it is left to the assessment, on a case by case basis, of the judge of the civil court, under art. 18. Some cases are covered of the restoration of the state of the

locations and this profile has recently been re-proposed for the reclamation of contaminated sites ([xix]).

Conclusions

Remaining within the sphere of the narrower theme, indicated in the Introduction, we believe it is possible to reach the following conclusions.

If the Community approach to the definition of liability for environmental damage appears, at present, to be reduced, and, therefore, ineffective in setting up a common model for Europe (as was attempted with the Convention of Lugano in 1993 ([xx])), being, furthermore, very broad the area of the most restrictive requirements, left to the discretion of the Member States, we have, nevertheless, to admit that the initial step taken with Directive 2004/35, seems to be impregnated with precise legal and technical rules, coherent with the objectives of sustainable development and the insurable nature of the damage and, after all, its effective remediation.

It can also be appreciated for the action the competent Administration is to take in controlling and stimulating action against those responsible for the occurrence, so that proper remedial measures are carried out. On the other hand, our country must, above all, put order into the multitude of regulations (all in force) on the same matter, increasing the coefficient cause of the certainty of the law. It should, in this regard, decide, whether it intends to chose a compensatory or punitive function of environmental damage, considering the decisive role performed by its capacity to be insured (and by the resulting preventive role to be carried out by insurance companies).

Finally, it should establish simpler technical rules, which can assist the citizen, the Public Administration and the judge in defining preventive and remedial measures for the threat of damage or damage to the environment, because those in force (Ministerial Decree 471/1999, cited above) are too complex and rigid. The recent delegated legislation for a Consolidated Environmental Law (Law No. 308/2004) does not, however, give rise to much optimism ([xxi]).

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[i] In this last case, it concerns the famous decision of the United Civil Divisions of the Court of Cassation, 6 October 1979, No. 5172, which I commented on in my book: “Diritto alla salubrità dell’ambiente”, Giuffrè, 1980, p.101 ff., which has been followed by a consistent consolidated orientation in jurisprudence.

[ii] Also: Cass Civ. Sez. I, 1st September 1995, No.9211, with a note by me in Giust. Civ., 1996,Vol. 3, p.777 ff., under the title of: “Il danno ambientale tra l’ art. 18 L. No. 349/ 1986 e

il regime ordinario di codice civile" and Cass. Civ., 19 June 1996, No.5650. In the same sense, see: Cass. Civ., Sez. III, 3 February, 1998, No.1087.

[iii] This refers to Decision No. 5650/ 1996, referred to in Note 2, which has applied the provisions laid down in art. 18 to the catastrophe of the Vajont, which took place in 1963.

[4] The recent Legislative Decree No.59 of 18 February 2005 which implements Directive 96/61/EC on IPPC takes the same approach as it refers to the protection "of the environment as a whole" (see art. 1 (1); art. 7 (1) of the same Decree) and, therefore, makes an attempt at *reductio ad unum* of one global notion, made up of the various components (and, therefore, complex).

It would, instead, appear anchored to a "traditional" notion of the definition of the material "environment, ecosystem, cultural heritage", which appears, for the first time, in the reform of art. 117 (S) of the Constitution, enacted under Constitutional Law No. 3/2001

[5] Cfr. B. POZZO, "Il danno ambientale. Rassegna di giurisprudenza", in Riv. Giur. Ambiente, 1999, Vol. 5, p. 731 ff.

[6] In this sense, see Court of Appeal of Milan, 14 February 2003, in Ambiente, IPSOA, 2003, p.1170, with a note by L. PRATI.

[7] The Italian Constitutional Court referred to this type of damage in its decision of 11 July 2003, in the case of "damage deriving from harm to (other) interests of constitutional rank belonging to the individual".

[8] There is a large amount of legal literature on the remediation of contaminated sites. There is also administrative jurisprudence on the interpretation of the special system introduced by art. 17. For references, see AA VV, "La bonifica dei siti contaminati", edited by F. GIAMPIETRO, Giuffrè, 2001, p.1- 510, with an Appendix of Jurisprudence, 2004; as well as on the web site: *www. Giuristiambientali.it*

[9] In this sense, art. 18 (4) of Ministerial Decree No. 471/ 1999, lays down: " The obligation of recovery of the state of the locations and compensation for environmental damage in accordance with art. 18 of Law 8 July 1986, No.34 applies in any case without prejudice".

[10] On reading the provision, it appears to refer solely to illegal criminal and administrative acts, provided for by breaching the provisions of Legislative Decree No.152/ 1999,(on the dumping of refluent waters), but in dealing with a new case of "presumptive" damage it is difficult to understand why the same cannot be invoked for any other illegal criminal or administrative act, provided for by other environmental laws (for example, on air protection, waste management, etc.)

11 In the case under examination, the only party with standing to seek damages is the Ministry of the Environment and the Protection of the Territory, making an exception to the provisions of art. 18 (3) cited here. Therewith, according to the immutability of the jurisprudence of the Cassation and the Constitutional Court, the Regions and local bodies (Municipalities and Provinces) also have standing to take proceedings for damages.
Art. 58 (3) establishes criteria of the equivalence of the sum due for the damage for both the criminal penalty (pecuniary penalty or fine), inflicted in practice, and for every day of jail inflicted.

12 Art. 2 (1) (b) of Ministerial Decree No. 471/1999, cited here, states that the levels of contamination or chemical, physical or biological alterations of the of the soil or subsoil or of the surface or underground waters are "such to determine a risk to public health or for the natural or built environment"; and it defines a "contaminated site" as even that in which only a single of the limits of acceptable concentration is exceeded.

[13] This consequence is believed by commentators to be too strict and formalistic, because starting a bureaucratic administrative proceedings disproportionate to the very modest nature of the occurrence. The same provision in art. 58 (1) discussed up until now (which refers to the substantive and procedural requisites of art. 17) are textually reproduced for the cases of threat of damage-damage to the environment by art. 22 (2) of Legislative Decree No. 206 of 12 April 2001 on the restricted use of GMMs (Genetically Modified Micro-organisms) and by art. 36 (2) of Legislative Decree No. 204 of 8 July 2003 on intentional emissions of GMOs (Genetically Modified Organisms) in the environment.

[i]4 In the former case, the Municipality, Province and Region (see, for example, art. 14 of Legislative Decree No. 22/1997) may enact emergency measures in order to protect the environment and health; in the latter case, the Municipality or the Region, having identified the party responsible for the pollution of the site, shall order the party to begin the procedure for remediation under art. 17, (see art. 8 of Ministerial Decree No. 471/1999).

15 In this sense, the reading of art. 18 is clear: "Any act based on fault or negligence … which jeopardises the environment", of art. 17 (2) "Any party which causes"… Art. 58 (1) is not to be understood in this way which states: "Whoever, with its behaviour, either by omission or commission, in breach of the provisions of this Decree".. In fact, despite the general formulation, art. 58 applies solely to behaviour involving dumping of refluent waters, defined in art. 2 of the same Legislative Decree.

16 Some experts have talked about a "third way" of environmental damage represented by art. 58 in its relationships with arts. 17 and 19, cited herein: Cfr. L. PRATI and S. D'ANGIULLI, in *Ambiente*, IPSOA, 1999, Vol. 11 p. 1044 ff. and Vol. 12, p. 1139 ff. and my article on "Dal danno ambientale alla disciplina dei siti contaminati", in *Danno e Responsabilità,* 2003, p. 16 & ff. in relation to the Draft Directive of 2002 (Doc COM/2002/0017 def.)

17 In this regard, reference should be made to a prevailing trend in jurisprudence which distinguishes "damage suffered" from "damage provoked" and considering sufficient, for the purpose of the proof of evidence and its effects on property, its definition as "harm in itself" of interest to the safeguarding of the environment (where there is resort to the criterion of equity for its assessment), holds that "it is enough to behave in such a way to be solely at fault in breaching the provisions of the law, that art. 18 specifically recognises to be adequate for jeopardising the environment as an unjust act implying *presumptive* harm to a protected legal value". In other words, faced with the factual requisites, just mentioned, "the environmental damage is in *re ipsa*"…(In this sense, see Cass. Pen., sez. III, 24 September 1993, No. 2092; Id., 10 September 1993, ric. Matiussi; Id., 10 June 2002, No. 22539, ric. Kiss; Id., [11] November 2004, ric. Brugnolaro and others). Instead, the view expressed in Cass. Pen. , sez. III, 25 May 1992, in *Ambiente*, IPSOA, 1993 p. 65, ff. (with a Note by F. GIAMPIETRO and P.F. PAGLIARA), and by Cass. , Sez. III, 30 October 2001, ric. Curchiara +1 (unpublished), according to which there is no case for damage to the environment for formal or dangerous offences, because it is necessary to show (under art. 18) "what concrete alteration, deterioration or destruction of the environment have been verified in the case" (this related to damage that was claimed, valued by way of equity at 50,000.00 Euro, by the Court of Appeal of Milan in favour of the Park Authority of Ticino which had was acting as an aggrieved party in the criminal proceedings in order to recover damages (so called "*parte civile*")) remains dissenting opinion.

[18] It could be said that, to the standards of prevailing jurisprudence, referred to in Note 17, presumptive damage under art. 58 (3) (even with its limits of a punitive kind…) has attempted to "contain" the discretionary power of the judge in assessing the damage, saving it from a quantification, case by case, but only in the cases of illegal criminal and administrative acts, provided for under Legislative Decree No. 152/1999. In this way, an ad hoc system is created, vitiated, in any case, by the disparity in treatment compared to other environmental criminal or administrative acts (see retro sub Note 10)

19 The debate among industrial associations and insurance companies is still open in regard to possible insurance coverage. On this issue, see the synthesis of D. DE STROBLE, "Direttiva 2004/35/CE e la relativa problematica assicurativa", in Dir. and economia dell'assicurazione, 2004, Vol. 3, p. 661 ff. and, finally, the Proceedings of the Conference: "Sostenibilità ambientale. Strumenti per la riparazione del danno". Swiss/Re. Rome, 6 April 2005, in the course of publication.

20 On the "model-law" of the Convention of Lugano, drafted by the Council of Europe, see the positive views of C. ZILIOLI, "Il risarcimento del danno derivante da incidenti industriali trasnazionali". Giuffrè, 1995, Quad. No. 6 of the Riv. Giur. Ambiente, p. 228 ff.; on the initial competition between the European Commission and the Council of Europe, see my article: "Responsabilità per danno all'ambiente: la Convenzione di Lugano, il libro verde della Commissione *CEE E LE NOVITA' ITALIANE*", in Riv. Giur. Ambiente, 1994, Vol. 1, p. 19 ff.; as well as that in collaboration with S. MICCOLI, "Assessment of Damage to the environment", Council of Europe, Strasbourg 1992.

On the history of the problems of the application of art. 18, it is sufficient to mention: AA.VV., "Per una riforma della responsabilità civile per danno all'ambiente", edited by P. TRIMARCH, IPA, Giuffrè, 1994 and, finally, R. PANETTA, "Il danno ambientale", Giappichelli, Turin, 2003, with references to European problems. For an early critical analysis of art. 18, see my book: "La responsabilità per danno all'ambiente", Giuffrè, 1988

21 Here, reference is made to art. 1 (9) (e) of Law No. 38 of 15 December 2004, which establishes the object of delegated legislation to the Government on the matter of environmental liability, making reference: to administrative penalties (to be up-dated); to the obligations for restoration (of which it is necessary to guarantee the effectiveness); to the quantification of the damage (to be defined with regard to the way it is to be performed), but without determining the guiding criteria of the proposed reform and, therefore, objectives and instruments for renewing the legislation in force. In this regard, see my comments in: "Testi unici ambientali: i criteri direttivi specifici (?)", on the web site: Hwww.giuristiambientali.itH Finally, for an initial comparative examination between the cited Directive and the Italian legislation in force, the reader should refer to : "La direttiva 2004/35/CE sul danno ambientale e l'esperienza italiana", in Ambiente, IPSOA, 2004, Vol. 9, p. 805 ff.