



European Union Action to
Fight Environmental Crime

Fighting Environmental Crime in Italy: A Country Report

Work package 2 on “Instruments, actors, and institutions”



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Abstract

This report provides an overview of the main instruments, actors and institutions relevant in the fight against environmental crime in Italy. The study, based on the analysis of legislative documents, academic literature and case law, covers substantive and procedural aspects. Interviews with high-level practitioners (prosecutor, judge, specialised police, administrative authority) were conducted, in order to provide an assessment of the strengths and shortcomings of the regulatory framework and its enforcement and to formulate experience-based recommendations.

The enactment of Legislative Decree 3 April 2006, No. 152, the so-called Environmental Code, represents a milestone in Italian environmental legislation. It aimed to harmonise the sectorial laws that up to that moment had been regulating the main environmental issues: waste management, water pollution, air pollution. However, relevant environmental issues (such as e.g. the protection of flora and fauna) are covered by other statutes. Criminal protection of the environment is almost entirely based on a series of misdemeanours (*contravvenzioni*), which fall outside the Criminal Code. Criminal offences on waste management, water pollution and air pollution are mainly provided for by the Environmental Code; however, offences in other relevant environmental sectors are provided for by different statutes.

Significant effects accompany the legislative choice to qualify the vast majority of environmental crimes as misdemeanours: if the misdemeanour model, on the one hand, implies that criminal conduct is relevant when committed either intentionally and negligently, on the other hand, it implies modest sanctions, and results in a restriction of the imposition of criminal sanctions due to general rules e.g. on the statute of limitation, which negatively affects their deterrent effect.

Some few felonies exist, the most relevant one being the felony of “Organised activities for the illegal trafficking of waste” provided for by Article 260 of the Environmental Code. This criminal provision could represent a significant model at European level for the prosecution of environmental crimes in which organised crime plays a role.

Legislative Decree 7 July 2011, No. 121, implementing Directive 2008/99/EC on environmental crime and Directive 2009/123/EC on ship-source pollution, did not bring a substantial reform of Italian environmental criminal law, as on the contrary expected by most of the scholars and by practitioners. However, it extended the system of “administrative liability” of legal persons and collective entities to listed environmental crimes committed in their interest or to their benefit; this innovation, although not fully satisfactory, represents a remarkable step in the development of instruments aiming at better fighting environmental crime.

A draft bill, approved by the Chamber of Deputies and currently under discussion in the Senate, aims at introducing four new felonies into the Criminal Code: pollution, environmental disaster, obstruction of controls, illegal transport and abandonment of radioactive materials. The new provisions, if approved, would be in addition to the misdemeanours provided by the Environmental Code and by other environmental statutes. The introduction of environmental felonies into the Criminal Code would represent the completion of a process of progressive recognition of the value and significance of the environment and its adequate protection; according to practitioners, such a reform would produce a relevant added value in terms of increased effectiveness of environmental legislation and its enforcement.

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List of Abbreviations

CC	Criminal Code
Const.	Constitution
Const. Court	Constitutional Court
Court Cass.	Court of Cassation
CCP	Code of Criminal Procedure
DDA	District Anti-Mafia Directorate
DIA	Anti-Mafia Investigation Department
DNA	National Anti-Mafia Directorate
ELD	Environmental Liability Directive
Env. Code	Environmental Code
IPPC	Integrated Pollution Prevention and Control
Leg. Dec.	Legislative Decree
NGO	Non-governmental organisation
ODS	Ozone-depleting substance

1 Introduction

Italian public institutions started to intervene in the sector of environmental protection in the mid-1960s, under the pressure of environmental emergencies related to the process of industrialisation and, in the following years, under the influence of international and European instruments. The most relevant normative instruments on environmental matters enacted during those years were Law 13 July 1966, No. 615 on air pollution,¹ Law 10 May 1976, No. 349 on water pollution² and the Decree of the President of the Republic 10 September 1982, No. 915 on waste disposal, as well as Law 8 July 1986, No. 349 establishing the Ministry of the Environment.

Law Decree 4 December 1993, No. 496 (as converted into Law 21 January 1994, No. 61) established the Environmental Protection Agency (*Agenzia Nazionale per la protezione dell'ambiente*, ANPA), which in 2008 merged with other institutes to become the Institute for Environmental Protection and Research (*Istituto Superiore per la Protezione e la Ricerca Ambientale*, ISPRA); the task of ISPRA is to gather data, supervise compliance and provide technical support in setting environmental standards.

In 1994 *Legambiente*,³ one of the most important environmental non-governmental organisations (NGOs) in Italy, coined the term “Ecomafia” which refers to the illegal activities of (usually mafia-type) criminal associations in the environmental field. In particular, the term refers to criminal associations involved in illegal waste trafficking and disposal, illegal building construction (the so called “cement cycle”), illegal trafficking in flora and fauna, trafficking in cultural heritage, illegal agro-industries and forest arson. The involvement of mafia and organised crime in environmental crime is also regularly mentioned in the reports to Parliament presented by the Anti-mafia Investigation Department (*Direzione Investigativa Antimafia*, DIA), a specialised law enforcement body, set up in 1991 for the fight against organised crime. The link between environmental crime and organised crime has been stressed several times by the Parliamentary Anti-mafia Commission (*Commissione Parlamentare Antimafia*), a bicameral commission of the Italian Parliament, composed of members from the Chamber of Deputies (*Camera dei Deputati*) and the Senate (*Senato*), which is set up at the beginning of each legislature. In addition, over the years Parliamentary Commissions have been appointed to deal with specific categories of environmental matters. Recently, Law 7 January 2014, No. 1 set up a Parliamentary Inquiry Commission on activities related to the illegal waste cycle and related environmental crimes. The Commission carries out several tasks: investigation of all illegal activities connected to the waste cycle and the involvement of organised crime in these activities; identification of the connections between illicit waste management activities and other economic activities; identification of specific activities related to the transnational shipment of waste, etc. On an annual basis, the Commission reports to Parliament on the results of its activities.

The enactment of Legislative Decree 3 April 2006, No. 152 (the so-called Environmental Code, Env. Code) represents a milestone in Italian environmental legislation. It aimed to harmonise the sectorial laws that up to that moment had been regulating the main environmental issues: waste management, water pollution, air pollution. The Environmental Code also covers environmental impact assessment, strategic environmental assessment and integrated environmental authorisation (the IPPC permit), as well as environmental liability. However, relevant environmental sectors, such as e.g. protection of flora and fauna, are covered by different statutes.

Legislative Decree 7 July 2011, No. 121, implementing Directive 2008/99/EC on environmental crime and Directive 2009/123/EC on ship-source pollution, introduced two misdemeanours into the Criminal Code (CC) and extended to some listed environmental crimes the system of “administrative liability” of legal persons and collective entities for crimes committed in their interest or to their benefit, established by Legislative Decree 8 June 2001, No. 231.

¹ The so-called *Legge Anti-Smog*.

² The so-called *Legge Merli*.

³ See <http://www.legambiente.it>.

In the Italian legal system, criminal protection of the environment is almost entirely based on a series of misdemeanours (*contravvenzioni*), which fall outside the Criminal Code. Criminal offences on waste management, water pollution and air pollution are mainly provided for by the Environmental Code; however, it is worth mentioning that the Environmental Code does not contain all provisions on environmental crime, with offences in relevant environmental sectors (e.g. those on protection of flora and fauna) being provided for by other statutes. In this regard, practitioners (prosecutor,⁴ police⁵) note that one of the shortcomings of Italian legislation on environmental crime is that the relevant provisions are found in different acts (e.g. the Environmental Code, the Criminal Code, Leg. Dec. No. 231/2001, etc.). They also underline the excessive proliferation of norms in this field; in particular, practitioners (judge⁶) highlight the fact that the continuous normative changes in administrative environmental laws require a constant updating of knowledge on the part of the enforcement authorities, and this might negatively affect the enforcement of environmental criminal provisions. In fact, the continuous enactment of new domestic and EU-source administrative legislation indirectly influences the legislation on environmental crime, as the latter is largely characterised by a dependence on administrative law;⁷ because of this stratification, and despite the creation of the Environmental Code, the Italian legislation on environmental protection still partially lacks proper legal cohesion.

As far as the structure of environmental crimes is concerned, most of these crimes are abstract endangerment offences that punish the performance of a given activity without the required authorisation, or those who exceed certain “thresholds” or fail to meet reporting requirements and other administrative duties (see below, 3).⁸

As for the statistics on environmental crime, according to the data collected by the Ministry of the Environment - *Comando Carabinieri per la tutela dell'ambiente*,⁹ in 2012, in Italy, 1.955 persons were reported to the judicial authority for offences committed against the environment and 49 persons were arrested, with most of the reported offences being committed in the south of Italy. In 2013, 1.830 persons were reported to the judicial authority and 68 persons were arrested (for more details, see figure 1).

Practitioners (police,¹⁰ judge¹¹) highlight that in comparison to other categories of crime (e.g. drug trafficking) the number of environmental criminal acts being reported, investigated, brought to trial and sanctioned is very small; practitioners (judge¹²) underline that this is due, among other reasons, to the short limitation period for environmental crimes, to the fact that the trial of environmental crimes requires technical knowledge that goes beyond the knowledge normally requested for criminal proceedings, and to the lack of specialisation within police forces (with the exception of *Carabinieri per la tutela dell'ambiente*, which, in any case, cannot cover the exigencies of the whole national territory).

⁴ Interview with Italian prosecutor of 16 July 2014.

⁵ Interview with a member of *Nucleo Operativo Ecologico* (N.O.E.) of *Comando Carabinieri per la tutela dell'ambiente* of 8 July 2014; on the *Comando Carabinieri per la tutela dell'ambiente*, see below, 12 (the references to parts of this report always refer to the number of the chapters).

⁶ Interview with Italian judge of 2 September 2014.

⁷ See below, 3.

⁸ Grazia Maria Vagliasindi, “Liability of Legal Persons and Collective Entities for Environmental Crimes in Italian Law”, *Eucrim* 3 (2012): 132.

⁹ Data available at:

http://www.minambiente.it/sites/default/files/archivio/allegati/vari/controlli_carabinieri_2012.pdf.

¹⁰ Interview with a member of N.O.E. of 8 July 2014.

¹¹ Interview with Italian judge of 2 September 2014.

¹² Interview with Italian judge of 2 September 2014.

Figure 1 – Inspections carried out by Comando Carabinieri per la tutela dell’ambiente (Source: Ministry of the Environment and protection of land and sea - Comando Carabinieri per la tutela dell’ambiente).¹³

Controlli effettuati dal Comando Carabinieri per la Tutela dell’Ambiente per settore operativo e ripartizione geografica - Anno 2013

SETTORE OPERATIVO	Controlli		Persone		Contravvenzioni, in euro	Sequestri, in euro
	numero	di cui non conformi	segnalate	arrestate		
NORD (Piemonte, Valle d'Aosta, Lombardia, Liguria, Trentino -Alto Adige, Veneto, Friuli-Venezia Giulia, Emilia-Romagna)						
Inquinamento acustico	27	1	2	0	0	0
Inquinamento atmosferico	65	10	12	0	7.280	1.000.000
Inquinamento del suolo	360	144	246	15	283.308	257.361.120
Inquinamento elettromagnetico	1	0	0	0	0	0
Inquinamento idrico	181	20	28	0	60.000	285.000
Inquinamento luminoso	0	0	0	0	0	0
Inquinamento paesaggistico/abusivismo edilizio	74	14	16	0	0	1.830.000
Inquinamento radioattivo	2	0	0	0	0	0
Organismi Geneticamente Modificati	0	0	0	0	0	0
Rischio incidente rilevante	2	0	0	0	0	0
Transfrontalieri	19	4	8	0	5.166	0
TOTALE	731	193	312	15	355.754	260.476.120
CENTRO (Toscana, Umbria, Marche, Lazio)						
Inquinamento acustico	12	0	0	0	0	0
Inquinamento atmosferico	82	11	14	0	0	6.700.000
Inquinamento del suolo	315	134	168	1	142.157	23.312.506
Inquinamento elettromagnetico	0	0	0	0	0	0
Inquinamento idrico	122	22	22	0	24.018	8.010.000
Inquinamento luminoso	0	0	0	0	0	0
Inquinamento paesaggistico/abusivismo edilizio	44	18	30	0	0	107.000
Inquinamento radioattivo	2	0	0	0	0	0
Organismi Geneticamente Modificati	0	0	0	0	0	0
Rischio incidente rilevante	0	0	0	0	0	0
Transfrontalieri	7	0	0	0	0	0
TOTALE	584	185	234	1	166.175	38.129.506
MEZZOGIORNO (Abruzzo, Molise, Campania, Puglia, Basilicata, Calabria, Sicilia, Sardegna)						
Inquinamento acustico	46	4	4	0	575	0
Inquinamento atmosferico	205	81	99	0	15.166	15.624.009
Inquinamento del suolo	857	476	759	40	3.032.326	133.403.005
Inquinamento elettromagnetico	0	0	0	0	0	0
Inquinamento idrico	404	182	252	0	627.612	13.020.516
Inquinamento luminoso	0	0	0	0	0	0
Inquinamento paesaggistico/abusivismo edilizio	173	84	165	12	6.258	264.500.600
Inquinamento radioattivo	2	0	0	0	0	0
Organismi Geneticamente Modificati	0	0	0	0	0	0
Rischio incidente rilevante	5	4	5	0	0	0
Transfrontalieri	1	1	0	0	0	15.690
TOTALE	1.693	832	1.284	52	3.681.937	426.563.820
ITALIA						
Inquinamento acustico	85	5	6	0	575	0
Inquinamento atmosferico	352	102	125	0	22.446	23.324.009
Inquinamento del suolo	1.532	754	1.173	56	3.457.791	414.076.631
Inquinamento elettromagnetico	1	0	0	0	0	0
Inquinamento idrico	707	224	302	0	711.630	21.315.516
Inquinamento luminoso	0	0	0	0	0	0
Inquinamento paesaggistico/abusivismo edilizio	291	116	211	12	6.258	266.437.600
Inquinamento radioattivo	6	0	0	0	0	0
Organismi Geneticamente Modificati	0	0	0	0	0	0
Rischio incidente rilevante	7	4	5	0	0	0
Transfrontalieri	27	5	8	0	5.166	15.690
TOTALE	3.008	1.210	1.830	68	4.203.866	725.169.446

Fonte: Ministero dell’Ambiente e della Tutela del Territorio e del Mare - Comando Carabinieri per la Tutela dell’Ambiente

¹³ Legend:

- Inquinamento acustico = Noise pollution;
- Inquinamento atmosferico = Air pollution;
- Inquinamento del suolo = Soil pollution;
- Inquinamento elettromagnetico = Electromagnetic pollution;

2 Definition of “environment”

An unequivocal and unanimously accepted definition of “environment” does not exist in Italy.¹⁴

The Italian Constitution of 1948 did not expressly mention the environment among the values to which constitutional protection is granted; however, the Constitution contained some provisions that have allowed the literature and constitutional jurisprudence to develop a legal concept of “environment” and to recognise it as a fundamental value. These provisions are: Article 2, stating that “The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed”; Article 9, para. 2, that safeguards “the natural landscape and the historical and artistic heritage of the Nation”; Article 32, that protects health “as a fundamental right of the individual and as a collective interest”.

Drawing on these provisions, the literature first developed the so-called “pluralist theories”.¹⁵ Among these theories, Giannini’s approach¹⁶ is worth mentioning. He proposed a tripartite classification of the concept of “environment”, distinguishing the following three areas: landscape-environment, which includes the protection of cultural heritage and landscape; natural-environment, which focuses on the protection of water, air and soil; and urban-environment, concerning territorial government.¹⁷

The increasing attention paid to environmental issues, both at international and European level, led to the development of a unitary notion of “environment”. The different elements (water, air, soil) and the different phenomena involved (urban development, landscape conservation) are considered in a unitary perspective; a unitary interest, that is to say the environment, is what is protected.¹⁸ The development of a unitary notion of the concept of “environment” was facilitated (among other reasons) by the enactment of Law No. 349/1986, establishing the Ministry of the Environment, which in Article 18 recognised, for the first time, the environment as a “unitary public interest”. This approach was also adopted by the Constitutional Court, which in two decisions, delivered in 1987, defined the “environment” as an “immaterial, unitary interest, which the legal system considers as a primary and absolute value, recognised and protected by the norms as a juridical interest”.¹⁹ In particular, the Constitutional Court, in the decision of 28 May 1987, No. 210, expressly refers to the concept of “environment” as a legal interest, including in this concept all natural and cultural resources; according to this concept, environment refers to “the conservation, the rational management and the improvement of the natural conditions (air, water, soil and territory in all their components), the existence and preservation of the genetic heritage of land and sea, of all plant and animal species inhabiting it in the natural state, and, ultimately, the human person in all his manifestations”.

-
- Inquinamento idrico = Water pollution;
 - Inquinamento luminoso = Light pollution;
 - Inquinamento paesaggistico/abusivismo edilizio = Landscape pollution/Illegal building construction;
 - Inquinamento radioattivo = Radioactive pollution;
 - Organismi Geneticamente Modificati = Genetically Modified Organisms;
 - Rischio incidente rilevante = Major accident risk;
 - Transfrontalieri = Transboundary.

¹⁴ On the concept of environment in a criminal law perspective, see Fausto Giunta, “Il diritto penale dell’ambiente in Italia: tutela di beni o tutela di funzioni?”, *Rivista italiana di diritto e procedura penale* (1997): 1097 ff.

¹⁵ Alberto Predieri, “Paesaggio”, in *Enciclopedia del diritto*, XXXI (Milano: Giuffrè, 1981), 510.

¹⁶ See Massimo Severo Giannini, “Ambiente: saggio sui diversi aspetti giuridici”, *Rivista trimestrale di diritto pubblico* (1973): 23.

¹⁷ On these theories and on the related criticisms, see Beniamino Caravita, *Diritto pubblico dell’ambiente* (Bologna: Il Mulino, 1990), 44.

¹⁸ Licia Siracusa, *La tutela penale dell’ambiente* (Milano: Giuffrè, 2007), 9 ff.

¹⁹ Const. Court, 28 May 1987, No. 210, available at <http://www.cortecostituzionale.it/stampaPronunciaServlet?anno=1987&numero=210&tipoView=P>; Const. Court, 30 December 1987, No. 641 in *Giurisprudenza Costituzionale* (1987): 3788.

Following Constitutional Law 18 October 2001, No. 3, the Italian Constitution now explicitly mentions the environment, but it does so only in a provision - Article 117 - giving the State exclusive legislative powers in “the protection of the environment, the ecosystem and the cultural heritage” (para. 2, s) and at the same time entrusting the enhancement of the cultural and environmental assets to the concurrent competence of the State and the Regions (para. 3).²⁰ The Constitution (as amended) does not, indeed, provide a specific definition of “environment”; it only considers the environment as a legislative subject matter and includes it in the system of division of legislative competences between the State and the Regions. However, the constitutional legislator – in giving the State exclusive legislative power in matters concerning the “protection of the environment” and, at the same time, in considering as matters of concurrent legislation those relative to “territorial government” and “promotion of the environmental and cultural assets” – seems to adhere to a notion of environment that sees it as separate from other areas of law, such as the preservation of cultural heritage. Therefore, according to some legal scholars, Article 117 Const. appears to provide for a concept of environment interpreted in a “ecological” sense, including all the physical and chemical conditions existing in nature, necessary to ensure the survival of living organisms, without any consideration for artificial elements modified or created directly by humans.²¹

A wider notion of “environment” arises from Article 5 (c), Env. Code, which states that, for the purposes of the Code, “environmental impact” is “the direct or indirect, short or long term, permanent or temporary, single or cumulative, positive or negative qualitative and/or quantitative alteration of the *environment*, intended as a system of relationships between human, physical, chemical, natural, climatic, landscape, architectural, cultural and economic factors, as a result of the implementation in the territory of plans, programs or projects related to particular installations, works or public or private interventions, as well as of the realisation of related activities”. However, it is worth noting that, although Article 5 gives the definition of environmental impact for the purposes of the Code, the definition is provided in the context of the provisions specifically concerning environmental impact assessments; therefore it is questionable whether an autonomous and truly general definition of “environment” is contained in the Environmental Code.

Practitioner (judge²²) criticises the trend to include in the notion of environment only air, soil and water, as other relevant elements should also be included in such a notion (e.g. urban environment, landscape, cultural heritage, food safety). In a similar perspective, practitioners (administrative authority²³) note that damage to landscape is not included within the scope of Directive 2004/35/EC on environmental liability and in the national implementing legislation.

3 Definition of environmental crime

There being no legal definition of “environmental crime”, this expression refers to environmental offences punished by criminal sanctions. Most of them are misdemeanours (*contravvenzioni*), which fall outside of the Criminal Code and do not constitute an organic system of provisions, being the results of several interventions of the Italian legislator in different environment-related fields (see also *supra*, 1).

The choice of not qualifying the most serious environmental offences as felonies (*delitti*) is deemed to be one of the causes of the ineffectiveness of environmental criminal law.²⁴ In fact, significant structural effects accompany

²⁰ For more details, see Nicola Lugaresi, “Introduction: Italian Environmental Law Framework”, *IUCN Academy of Environmental Law* (2010): 1; Nicola Lugaresi, *Diritto dell’ambiente* (Padova: Cedam, 2012), 3.

²¹ Siracusa, *La tutela penale dell’ambiente*, 29.

²² Interview with Italian judge of 2 September 2014.

²³ Interview with administrative authority of 3 September 2014.

²⁴ Grazia Maria Vagliasindi, “The European Harmonisation in the Sector of Protection of the Environment through Criminal Law: The Results Achieved and Further Needs for Intervention”, *The New Journal of European Criminal Law* 3 (2012): 328; Vagliasindi, “Liability of Legal Persons”, 131.

this legislative approach: if the misdemeanour model, on the one hand, implies that criminal conduct is relevant when committed either intentionally and negligently, on the other hand it implies modest sanctions, and results in a restriction of the concrete imposition of criminal sanctions due to general rules e.g. on the statute of limitation, which negatively affects their deterrent effect.²⁵ The sanctions for the environmental misdemeanours are of uncertain practical application and therefore of limited effectiveness in the perspective of a strong fight against environmental crimes.²⁶

The misdemeanour nature of environmental crimes also implies a limitation of the investigation methods available to investigators (e.g. the use of wire-tapping is not allowed) as well as the inapplicability of personal precautionary measures; it involves short limitation periods and the frequent possibility that the crime will be extinguished through the payment of a sum of money (*oblazione comune* or *oblazione speciale*, depending on the case) or a conditionally suspended sentence.²⁷ Moreover, attempted violations are not punishable.

Also practitioners (judge²⁸) underline that the misdemeanour nature of the vast majority of environmental crime negatively affects the enforcement of environmental criminal laws.

Some few felonies do exist; for instance, Article 260 Env. Code provides for the felony of “Organised activities for the illegal trafficking of waste”.²⁹ It must also be recalled that Law 6 February 2014, No. 6 introduced Article 256-*bis* Env. Code, providing for the felony of “Illegal burning of waste”.³⁰

The judiciary also makes use of general criminal provisions contained in the Criminal Code, such as those referred to in Article 434 and 449 CC (respectively, “Collapse of buildings or other intentional disasters” and “Crimes of damage committed with negligence”) which are invoked for “environmental disaster”.³¹ The practice of resorting to criminal provisions aimed to protect public safety is a consequence of the lack of specific provisions punishing the most serious forms of pollution.³²

As for the structure of environmental crimes, they consist of abstract endangerment offences that, for the most part, result from non-compliance with administrative provisions.³³

The choice of the legislator to use the model of abstract endangerment offence can be explained by taking into account the difficulties in verification of the causal link between the conduct and the event of harm to the environment, difficulties that could lead to the inapplicability of the criminal legal provisions. According to some legal scholars, the dependency of criminal law on administrative law in the environmental field ensures a balance of the different interests involved by the administrative authority, which considers the environmental protection value as well as the economic production needs.³⁴ Other scholars have criticised this model of environmental crime because of its non-compliance with fundamental principles of Italian criminal law, such as the requirement

²⁵ Vagliasindi, “The European Harmonisation”, 328 ff.

²⁶ Lucia Lotti, “Complessità degli illeciti ambientali ed evoluzione di metodi e strategie di accertamento”, in *I reati ambientali alla luce del diritto dell’Unione europea*, ed. Bartolomeo Romano (Padova: Cedam, 2013), 103.

²⁷ Vagliasindi, “Liability of Legal Persons”, 131.

²⁸ Interview with Italian judge of 2 September 2014.

²⁹ For a detailed description of Article 260 Env. Code, see below, 5.2.

³⁰ For a detailed description of Article 256-*bis* Env. Code, see below, 5.2.

³¹ See, for instance, Court Cass., Section IV, 23 May 1986, Von Zwehl, in *Cassazione Penale* (1988): 1252. See also below, 5.8.

³² See Grazia Maria Vagliasindi, “Enti collettivi e reati ambientali tra responsabilità “penale” e “responsabilità sociale””, in *La costruzione dell’identità europea: sicurezza collettiva, libertà individuali e modelli di regolazione sociale*, ed. Bruno Montanari (Torino: Giappichelli), 381 f. and references therein.

³³ On the ancillary function played by criminal law compared to administrative law, see, among others, Mauro Catenacci, *La tutela penale dell’ambiente* (Padova: Cedam, 1996), 51; Siracusa, *La tutela penale dell’ambiente*, 87; Costanza Bernasconi, *Il reato ambientale. Tipicità, offensività, anti-giuridicità, colpevolezza* (Pisa: ETS, 2008), 37.

³⁴ Catenacci, *La tutela penale dell’ambiente*, 106.

of a clear and express definition of the offence by law and the principle of offensiveness.³⁵ Moreover, according to some legal scholars, the interest protected by this kind of provision is not the environment itself, but the right of the public administration to govern the territory.³⁶

Four different types of environmental crimes can be identified in the Environmental Code:

- 1) crime related to the exercise of an activity without the required permit or with a suspended or revoked permit (see, for instance, criminal provisions concerning water, Article 137, para. 1, Env. Code; concerning waste, Article 256, para. 1, Env. Code; concerning air, Article 279, para. 1, Env. Code);
- 2) crime consisting in failing to provide relevant information to the public authority (see, for instance, Article 137, para. 7, Env. Code and Article 279, para. 3, Env. Code concerning, respectively, water and air pollution);
- 3) crime consisting in exceeding certain “thresholds” specified in an act or a regulation (see, for instance, Article 137, para. 5, Env. Code and Article 279, para. 2, Env. Code);
- 4) crime related to the violation of an order issued by the public administration (see, for instance, Article 137, para. 12, Article 256, para. 4, Env. Code and Article 279, para. 2, Env. Code).

The above considered, environmental criminal law today is still, in some respects, characterised by a multitude of sector offences, sometimes focused on formal violations as such far away from the idea of criminal law as an *ultima ratio*;³⁷ in other respects, today’s Italian environmental criminal law is inadequate, to the extent that individual criminal conduct that is very harmful to the environment cannot be sanctioned in terms of having a deterrent effect.³⁸

It is worth mentioning that the legislator has not introduced felonies of concrete endangerment or damage to the environment or to the health and physical integrity,³⁹ as on the contrary Directive 2008/99/EC seemed to require. Even though the obligations established by Directive 2008/99/EC and Directive 2009/123/EC seemed to imply a substantial reform of Italian environmental criminal law, the legislation remained unchanged, except for the introduction into the Criminal Code of Article 727-*bis* and Article 733-*bis* and for the extension of the system of liability of legal persons and collective entities to (listed) environmental crimes.⁴⁰ This was due to the fact that one of the criteria of the delegation Law 4 June 2010, No. 96 concerned the kind and range of penalties, involving the creation of misdemeanours rather than felonies:⁴¹ therefore, Italian environmental criminal law today still appears to lack those “effective, proportionate and dissuasive” criminal penalties required by the above mentioned directives, for unlawful conduct which causes a concrete endangerment or concrete harm to the various components of the environment or to the life and health of persons.⁴²

Several proposals aiming to introduce into the Criminal Code a new chapter dealing specifically with environmental crimes, have been presented over the years. Among them, it is worth mentioning the reform project for a new Criminal Code, drawn up in the early 1990s by a Governmental Committee chaired by Professor

³⁵ Fausto Giunta, “Ideologie punitive e tecniche di normazione nel diritto penale dell’ambiente”, *Rivista trimestrale di diritto penale dell’economia* (2002): 851.

³⁶ See Riccardo Bajno, *La tutela penale del governo del territorio* (Milano: Giuffrè, 1980); Paolo Patrono, *Inquinamento industriale e tutela penale dell’ambiente* (Padova: Cedam, 1980).

³⁷ Vagliasindi, “Liability of Legal Persons”, 132.

³⁸ Vagliasindi, “Liability of Legal Persons”, 132.

³⁹ Only two new misdemeanours have been introduced into the Criminal Code, punishing concrete endangerment or damage to protected species and habitats; see *infra* and below, 5.4.

⁴⁰ Vagliasindi, “Liability of Legal Persons”, 131. See below, 9.

⁴¹ Vagliasindi, “Liability of Legal Persons”, 131. See also the “Relazione illustrativa dello schema di decreto legislativo di recepimento della direttiva 2008/99/CE sulla tutela penale dell’ambiente”, available at http://www.penalecontemporaneo.it/upload/atto_n._357.pdf, 8 April 2011.

⁴² Vagliasindi, “Liability of Legal Persons”, 132.

Pagliario (“Pagliario Project”);⁴³ the project of the Ecomafia Commission (drafted by the group of substantial criminal law) of 1997; the “Nordio Project” of 2004 and a law proposal of 2007.

Lately, a draft bill, approved by the Chamber of Deputies and currently under discussion in the Senate, aims at introducing four new felonies into a new chapter of the Criminal Code: pollution, environmental disaster, obstruction of controls, illegal transport and abandonment of radioactive materials.⁴⁴ In particular, according to Article 452-*bis* on environmental pollution, “anyone who, in violation of law, regulations or administrative provisions specifically aimed at protecting environment, already to be complied with under criminal or administrative law, causes an impairment or a significant deterioration:

- 1) of the quality of the soil, subsoil, water or air;
- 2) of ecosystem, biodiversity, flora or wildlife

shall be punished by imprisonment from two to six years and fine from €10,000 to €100,000.

When pollution is produced in a protected natural area or in an area subject to landscape, environmental, historical, artistic, architectural or archaeological constraint, or is produced against protected animal or plant species, the penalty is increased”.

Environmental disaster would be dealt by Article 452-*ter*, which states that “Whoever, in violation of law, regulations or administrative provisions, specifically aimed at protecting the environment, already to be complied with under criminal or administrative law, causes an environmental disaster, shall be punished by imprisonment from five to fifteen years.

Environmental disaster is the irreversible alteration of the ecosystem balance, or alteration which is particularly onerous to eliminate (can only be eliminated through exceptional measures), or an offence against public safety objectively assessed on the basis of the extent of the impairment or of the number of people offended or exposed to danger.

When disaster is produced in a protected natural area, or in an area subject to landscape, environmental, historical, artistic, architectural or archaeological constraint, or against protected animal or plant species, the penalty is increased”.

The new provisions, if approved, would be in addition to the misdemeanours provided by the Environmental Code and by other environmental statutes, which are not modified by the draft bill.

The introduction of environmental felonies into the Criminal Code would represent the completion of a process of progressive recognition of the value and significance of environmental interest and its adequate protection and conservation.

Practitioners (judge⁴⁵) claim that the introduction of environmental felonies would produce a relevant added value in terms of increased effectiveness of environmental legislation and its enforcement.

Practitioners (administrative authority⁴⁶) also stress the importance of linking environmental criminal law and environmental liability and, in this perspective, highlight that the introduction of a felony punishing whoever causes a damage to the environment when he does not restore the damage which has been caused, would represent a very relevant tool. Indeed, practitioners (administrative authority⁴⁷) underline that the main aim of the European Union is to prevent damages to the environment and to restore the environment if a damage occurred:

⁴³ For the text of “Progetto Pagliaro”, see *Documenti Giustizia* 3 (1993): 303 ff. In particular, this project proposed to introduce in the Criminal Code a new title concerning environmental protection. According to the proposal, this title would have contained the felony of “alteration to ecosystem” and misdemeanours of “environmental pollution”. The project is also available online at www.giustizia.it.

⁴⁴ The draft bill is available at <http://www.senato.it/leg/17/BGT/Schede/Ddliter/44045.htm>; for a comment, see Carlo Ruga Riva, “Commento al testo base sui delitti ambientali adottato dalla Commissione Giustizia della Camera”, available at www.penalecontemporaneo.it.

⁴⁵ Interview with Italian judge of 2 September 2014.

⁴⁶ Interview with administrative authority of 3 September 2014.

⁴⁷ Interview with administrative authority of 3 September 2014.

according to practitioners, enhancing the role of restoration of the environment within environmental criminal law should therefore play a relevant role in any *de iure condendo* perspective, and compensation for the damage should be limited to those cases where restoration of the environment is impossible.

4 Substantive criminal law principles

4.1 Legality Principle

The *nullum crimen nulla poena sine praevia lege penali* is a fundamental principle of the Italian criminal system. This principle is laid down in relation to crime and punishment in Article 25, para. 2, of the Italian Constitution and in Article 1 CC.

Article 25, para. 2, of the Italian Constitution states that “No punishment may be inflicted except by virtue of a law in force at the time the offence was committed”, and Article 1 CC states that “No one shall be punished for an act that is not expressly considered as a crime by the law, nor by sanctions that are not established by the law”.

Corollaries of the legality principle are:⁴⁸

- only a law of the National Parliament and other sources with the force of law (legislative decrees and law decrees) can introduce criminal provisions;
- the need for the clear and unequivocal definition of the criminal offence by law;
- the prohibition of the retroactive application of a criminal law provision *in malam partem* for the offender;
- the prohibition to interpret criminal law by analogy (*in malam partem* for the offender).

The judiciary cannot create criminal law provisions, and as already mentioned analogy is prohibited.

Concerning the duties of criminalisation arising from the EU directives, only national laws – transposing the directives - shall determine the rules concerning the introduction of new criminal offences and provide for criminal sanctions.

Criminal offences are divided into two main categories: felonies and misdemeanours. The criteria used to distinguish between the two types of criminal offences depend on the different penalties envisaged (Article 39 CC).

4.2 Necessity of criminal law

The legislator chooses to make criminal a certain conduct according to the principle of *extrema ratio*, that is to say that the criminal sanction is ‘necessary’ because it appears as the only effective sanction to protect a specific interest, and other instruments, such as civil or administrative sanctions, seem to be insufficient.⁴⁹ Proportionality between penalties and criminal offences is another fundamental principle which guides the Italian legislator.

Administrative sanction is mainly used for less serious offences to the protected interests.

⁴⁸ Giovanni Fiandaca and Enzo Musco, *Diritto Penale. Parte generale* (Bologna: Zanichelli, 2010), 47.

⁴⁹ Fiandaca and Musco, *Diritto Penale*, 29 ff.

4.3 Causality

Articles 40 and 41 CC provide for the rules on causality.

Article 40 CC establishes that “No one shall be punished for an act which is criminal according to the law, if the harmful or dangerous event on which the existence of the offence depends was not a consequence his own act or omission.

Failing to prevent an event which one has a legal obligation to prevent shall be equivalent to causing it”.

Article 41 CC states that “The pre-existing, simultaneous or supervening causes, even though independent of the act or omission of the offender, shall not exclude a causal relationship between his act or omission and the event.

Supervening causes shall exclude a causal relationship when they were in themselves sufficient to cause the event. If, in that case, the act or omission previously committed constitutes in itself a crime, the punishment prescribed thereto shall be applied.

The previous provisions shall apply even when the pre-existing, simultaneous or supervening cause consists of the unlawful act of another person”.

It is worthwhile to mention the decision of the Grand Chamber of the Italian Court of Cassation of 10 July 2002, (*Franzese* case),⁵⁰ where the Court applied the theory of the *condicio sine qua non* based on the model of subsumption under scientific laws.⁵¹ According to this theory, each cause-effect relation should be subsumed under a “scientific law” (universal or statistical). In the *Franzese* case, the Court held that findings of causation and criminal liability cannot be based merely on increased risk or even a high statistical probability of causation, but rather require resort to a rationally credible “covering law” and proof beyond a reasonable doubt, through particularistic evidence specific to the occasion, of the “real conditioning efficacy of [the conduct at issue] in the causal net”.

4.4 Mens rea rules

The principle of culpability is provided for in Article 27 of the Italian Constitution.

Article 27, para. 1, states that “Criminal responsibility is personal”.

Article 27, para. 3, states that “Punishments (...) shall aim at re-educating the convicted”.

Article 42 CC establishes that no one shall be punished for an act or omission designated by the law as a crime, if the act or omission is not voluntary (i.e. if it is not committed with “*coscienza e volontà*”, the so-called *suitas*). No one shall be punished for an act designated by the law as a felony if he has not committed it intentionally (i.e. with *dolo*⁵²), except in cases of preterintentional or negligent felonies expressly designated by the law. The law

⁵⁰ Court Cass., Grand Chamber, 12 July 2002, *Franzese*, in *Foro italiano* (2002): 601 ff.

⁵¹ In the Italian literature, see Federico Stella, *Leggi scientifiche e spiegazione causale nel diritto penale* (Milan: Giuffrè, 2000).

⁵² It should be noted that *dolo* of different intensity exists: *dolo intenzionale*, *dolo diretto*, *dolo indiretto*, *dolo eventuale*; therefore the term *dolo* includes intent, willfulness, knowledge, recklessness. Unless differently specified in the single criminal provision (or unless the structure of the criminal provision implicitly requires a particular form of *dolo*), a crime is normally punishable when committed with one of the above mentioned declinations of *dolo*. For synthesis reasons, in this report reference to a crime committed “intentionally” or “with intent”, or to an “intentional conduct”, should be read as potentially including all the above mentioned declinations of *dolo*, unless differently and explicitly specified in the provision at stake (e.g. Article 323 CC); no specification concerning the necessity of a particular declination of *dolo* implicitly arising from the interpretation of the structure of a certain offence will be made. When the criminal provision requires a *dolo specifico* (i.e. a particular aim that the author has to pursue for the offence to be committed, but that is not

shall define those cases in which an event will be otherwise attributed to the actor as a consequence of his act or omission. As to misdemeanours, a person shall be liable for his own voluntary act or omission, whether intentional or negligent.

Article 43 CC establishes that “A felony:

is intentional, or according to intention, when the harmful or dangerous event which is the result of the act or omission, and on which the law makes the existence of the crime depend, is foreseen and desired by the actor as a consequence of his own act or omission;

is preterintentional, or beyond the intention, when the act or omission is followed by a harmful or dangerous event more serious than that desired by the actor;

is negligent, or contrary to intention, when the event, even though foreseen, is not desired by the actor and occurs because of carelessness, imprudence or lack of skill, or failure to observe laws, regulations, orders or instructions”.

4.5 Party to the offences rules

With regard to the “party to the offence”, Article 110 CC establishes that participants in the same crime shall each be subject to the punishment prescribed for that crime.

According to the so-called ‘monistic system’, the relevant provisions in the Criminal Code do not define (neither do they differentiate) the possible forms of participation. The judiciary applies Article 110 CC to any contribution in the form of a relevant contribution, provided at any stage in the planning, organising and executing, which results in a crime being committed.⁵³

4.6 Criminal sanctions

In the Italian criminal system, criminal sanctions are of two types: *pene principali* (major penalties) e *pene accessorie* (additional penalties).

According to Article 17 CC the major sanctions provided for felonies are: *ergastolo* (life imprisonment), *reclusione* (imprisonment), *multa* (fine). The minimum period for imprisonment is 15 days and the maximum period is 24 years. The fine cannot be less than €50 and cannot exceed €50,000.

The major penalties provided for misdemeanours are: *arresto* (arrest) and *ammenda* (fine). The minimum period provided for imprisonment is 5 days and the maximum period is 3 years. The fine cannot be less than €20 and cannot exceed €10,000.

According to Article 20 CC the judge imposes the major penalties; the additional penalties are attached to the conviction by law, as criminal effects of it.

The additional penalties provided for in Article 19 CC for felonies are: disqualification from holding public offices, or from a profession or an art; legal disqualification; disqualification from the executive offices of collective entities and enterprises; the inability to contract with a public administration; the termination of an employment; revocation or suspension of the exercise of parental responsibility. The additional penalties for misdemeanours are: the suspension from the exercise of a profession or an art, or from the executive offices of collective entities and enterprises.

necessary to be achieved), the expression “in order to” will be used and reference to “specific intent” will be made).

⁵³ See Giovanni Grasso, “Pre-Art. 110 c.p.”, in *Commentario sistematico del codice penale*, ed. Mario Romano and Giovanni Grasso (Milan: Giuffrè, 2012) 136 ff.

A common additional penalty for felonies and misdemeanours is publication of the decision of conviction.

Article 240 CC provides for *confisca* (confiscation) of criminal assets - instruments of crime and proceeds of crime -, which is a security measure that the court might apply/has to apply in case of conviction for a crime.

4.7 Liability of legal persons

Leg. Dec. No. 231/2001 provides for a system of administrative liability of legal persons and collective entities only for the offences listed therein (in Articles 24 to 25-*duodecies*), which are committed in their own interest or to their benefit, by an individual acting in a management position or by a person subject to the direction or supervision of the latter, within the corporate body (Article 5 of Leg. Dec. No. 231/2001).

The principle of autonomy of the collective entity's liability should be borne in mind: according to Article 8 of Leg. Dec. No. 231/2001, the liability of the entity exists even if the offender has not been identified or is not eligible, or if the offence is ruled out for a reason other than amnesty.

5 Substantive environmental criminal law

In the Italian legal order environmental crimes are separately considered according to whether they affect air, soil or water or other elements of the environment.

5.1 Air pollution

The air emissions regime is set out in Part V of the Environmental Code. According to Article 279, para. 1, except for cases falling under Article 6, para. 13, Env. Code, whoever starts to install a facility or operates a facility in the absence of a permit or continues operating a facility with an expired, decayed, suspended, revoked permit or after the order of closure of the facility shall be punished with arrest from two months to two years, or a fine from €258 to €1,032. The same penalty applies to whoever carries out substantial modification to a facility in the absence of the permit provided for by Article 269, para. 8; whoever carries out a not substantial modification to a facility without the communication provided for by Article 269, para. 8, shall be punished with a pecuniary administrative sanction of €1,000.⁵⁴

Para. 2 punishes by arrest of up to one year or by a fine of up to €1,032 whoever, in operating a facility, violates the air emission thresholds or the requirements set out in the permit, in the annexes to part. V of Leg. Dec. No. 152/2006, in plans and programmes or in the legislation enacted according to Article 271, or the requirements set out by the competent authority. In these cases, if exceeding the air emission thresholds also causes exceeding the air quality thresholds set out in the law, arrest of up to one year applies (para. 5).⁵⁵

Para. 3 states that, except in the cases sanctioned under Article 29-*quattordecies*, para. 7, Env. Code, whoever operates a facility or starts to exercise an activity without the preventive communication set out in Article 269, para. 6, or in Article 272, para. 1, shall be punished with arrest of up to one year or by a fine of up to €1,032.

Except in the cases sanctioned under Article 29-*quattordecies*, para. 8, Env. Code, any failure to communicate to the competent authority information concerning emission shall be punished by arrest of up to six months or fine of up to €1,032 (para 4).

⁵⁴ In case of failure to communicate a not substantial modification, Legislative Decree 29 June 2010, No. 128 has provided for an administrative pecuniary sanction of €1,000, in place of the previously provided criminal fine of up to €1,000.

⁵⁵ For more details, see Carlo Ruga Riva, *Diritto penale dell'ambiente* (Torino: Giappichelli, 2011), 164.

Para. 6 states that whoever, in cases set out in Article 281, para. 1, does not adopt all the measures necessary to avoid an even temporary increase in emissions shall be punished by arrest of up to one year or fine of up to €1,032.

On the whole, Article 279 Env. Code provides for abstract endangerment offences. Specifically, the offences are misdemeanours and can be committed with intent or negligence.

The misdemeanour nature of these provisions affects the effectiveness of both custodial and pecuniary criminal sanctions. Except in para. 5, it is always possible to dismiss the criminal case through the payment of an amount of money (*oblazione*); the judge may grant this possibility on condition of the elimination of the harmful or dangerous consequences of the crime.

5.2 Waste

The waste sanctioning regime is set out in Part IV of the Environmental Code.

According to Article 256 Env. Code, “except in the cases sanctioned under Article 29-*quattordices*, para. 1, Env. Code, whoever carries out an activity of collection, transport, recovery, disposal, trade and brokerage of waste without the permit, registration or communication provided for by Articles 208, 209, 210, 211, 212, 214, 215 and 216 shall be punished by: a) arrest from three months to one year or fine from €2,600 to €26,000 for non dangerous waste; b) arrest from six months to two years and fine from €2,600 to €26,000 for dangerous waste”.

This is an abstract endangerment offence, punishing the exercise of activity outside the preventive control of the public administration. It is a misdemeanour and can be committed with intent or negligence.

The same penalties provided for by para. 1 also apply to the owners of enterprises and to the persons in charge of entities, when they abandon or deposit waste in an uncontrolled way or insert it in surface water or groundwater in violation of the prohibition laid down in Article 192, paras. 1 and 2 (para. 2). It is worth to note that the uncontrolled abandonment or deposit of waste is a criminal offence only when the author of the conduct is one of the above mentioned subjects (i.e. owners of enterprises or persons in charge of entities); on the contrary, when the author of the uncontrolled abandonment or deposit is “whoever”, the conduct constitutes an administrative offence, as set out in Article 255, para. 1.⁵⁶

Except in the cases sanctioned under Article 29-*quattordices*, para. 1, Env. Code, Article 256, para. 3, punishes by arrest from six months to two years and fine from €2,600 to €26,000 whoever sets up or manages an unauthorised landfill of waste. If the landfill is aimed, even partially, at the disposal of dangerous waste, the penalty is arrest from one to three years and fine from €5,200 to €52,000. In cases of conviction or plea bargaining, the area of the illegal landfill is confiscated, if it is in the property of the author or co-author, without prejudice to the obligations of remediation or restoration of the state of the place.

The penalties set out in paras. 1, 2 and 3 are reduced by one-half in cases of non-compliance with the prescriptions contained or referred to in the permits, as well as in cases of lack of the requirements and conditions requested for registrations or communications (para. 4).

Law No. 6/2014 has introduced into the Environmental Code Article 256-*bis* on “Illegal burning of waste”, which punishes by imprisonment from two to five years whoever sets fire to waste which has been abandoned or deposited in an uncontrolled manner. The provision does not contain a reference to “unauthorised areas”; thus, the offence can be committed whenever anyone sets fire to waste abandoned in public areas and in private areas subject to public use, or accumulated *contra legem*. If the criminal conduct involves hazardous waste, imprisonment is from three to six years. In any case, the author has the obligation to restore the state of the place, to pay for the environmental damage and to bear the costs of remediation.

⁵⁶ Ruga Riva, *Diritto penale dell’ambiente*, 127-128.

Para. 2 states that the same penalties apply to anyone who commits the conduct referred to in Article 255, para. 1, and the criminal conduct referred to in Articles 256 and 259, as a function of the subsequent illegal burning of waste.

The penalty is increased by a third if the offence under para. 1 is committed in the framework of a business activity or other organised activity (para. 3). The penalty is increased by a third also where the facts under para. 1 are committed in territories which, at the time of the conduct or in the previous five years, are or have been concerned by declarations of state of emergency in the waste sector (para. 4).

Article 256-*bis* Env. Code provides for the confiscation of the means of transport used for the commission of the offences under para. 1; moreover, following the conviction or plea-bargaining, the area where the offence was committed is confiscated, without prejudice to the obligations of remediation or restoration of the state of the place.

It is worth noting that, while most environmental offences are qualified as misdemeanours, Article 256-*bis* Env. Code is a felony punished by imprisonment from two to five years. Some scholars have criticised this legislative choice because it seems not to comply with the principle of proportionality of sanctions and it seems to follow a symbolic approach.⁵⁷

As far as the shipment of waste is concerned (listed in Article 3 (c) of Directive 2008/99/EC), Article 259 Env. Code establishes that “whoever carries out a shipment of waste which constitutes an illicit traffic according to Article 26 of the Regulation (CEE) 1 February 1993, No. 259 or carries out a shipment of waste listed in the Annex II to the above-mentioned Regulation in violation of Article 1, para. 3, a), b), c) and d), of the same Regulation, shall be punished by a fine from €1,550 to €26,000 and by arrest of up to two years. The penalty is increased in case of shipment of dangerous waste”.

This is a misdemeanour; the author can be anybody and it can be committed intentionally or negligently. The attempt is not punishable.

In case of conviction or plea bargaining for the offence on trafficking of waste under para. 1 or for the offences on transport of waste under Articles 256 and 258, para. 4, Env. Code, the confiscation of the means of transport is compulsory (para. 2).

Article 260 Env. Code punishes the most serious conduct in illicit trafficking of waste, providing for the imprisonment from one to six years of “whoever, in order to achieve an unfair profit, with multiple operations and through the establishment of means and continuing organised activities, sells, receives, transports, exports, imports or otherwise improperly handles large quantities of waste” (para. 1). If waste is highly radioactive, imprisonment from three to eight years applies (para. 2). According to para. 3, in case of conviction, the additional penalties set out in Articles 28, 30, 32-*bis* and 32-*ter* CC apply, with the limitations of Article 33 CC. The judge, in case of conviction or plea bargaining, orders the restoration of environmental status and may grant the conditional suspension of the sentence on condition of elimination of the damage or danger to the environment (para. 4).

This is the first environmental felony, introduced into the Italian legal order in 2001 (at that time, in Article 53-*bis* Leg. Decree No. 22/1997) in order to tackle the links between illicit trafficking of waste and organised crime.⁵⁸ The qualification of this offence as a felony, and the range of sanctions, allow the adoption of effective investigative measures (i.e. wiretapping) as well as personal precautionary measures, which cannot be used for other environmental crimes because of their misdemeanour nature.⁵⁹ Unlike the crimes of criminal association and mafia-type association, respectively set out in Articles 416 and 416-*bis* CC, Article 260 Env. Code does not require the association of three or more persons; however, although the crime could be committed by one person

⁵⁷ Andrea Alberico, “Il nuovo reato di “combustione illecita di rifiuti”, available at <http://www.penalecontemporaneo.it/upload/1392545278ALBERICO%202014a.pdf>.

⁵⁸ Grazia Maria Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona: verso un nuovo volto del diritto penale ambientale italiano”, *Il diritto del commercio internazionale* (2010): 475.

⁵⁹ Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona”, 475 f.

able to manage large quantities of waste, the reference to the “establishment of means and continuing organised activities” seems to imply an organised structure (even a basic one), where several persons are involved.⁶⁰

The Court of Cassation has recognised that this felony “does not require the existence of a structure operating in an exclusively illegal way, because the criminal activity can also be committed in a context involving waste commercial operations carried out in a lawful way”.⁶¹ According to courts, the expression “large quantities of waste” shall be referred to the whole of the operations realised.⁶²

The *mens rea* is the specific intent to gain an unfair profit. Practitioners (police⁶³) highlight the fact that the key factor of the felony provided for by Article 260 Env. Code is the specific intent of obtaining a profit; the Court of Cassation has clarified that the profit can also be interpreted as a mere cost savings.⁶⁴

Unlike Article 259 Env. Code, confiscation of the means of transport is not foreseen.

5.3 Soil Pollution

Article 257 Env. Code punishes by arrest from six months to one year or fine from €2,600 to €26,000 whoever causes the pollution of soil, subsoil, surface water or groundwater exceeding the risk concentration thresholds, if he does not perform the site remediation in accordance with the project approved by the competent authority under the procedure laid down in Articles 242 ff. In case of failure to perform the communication referred to in Article 242 Env. Code, the offender shall be punished by arrest from three months to one year or by a fine from €1,000 to €26,000. Higher sanctions apply (arrest from one year to two years and fine from €5,200 to €52,000) when pollution is caused by dangerous substances (para. 2).

In case of conviction or plea bargaining, the conditional suspension of the sentence can be granted on condition of the execution of emergency operations, remediation and environmental restoration (para. 3). Compliance with the projects approved under Articles 242 ff. is a condition of non-punishment for environmental crimes provided by other laws for the same fact, as well as for the conduct of pollution referred to in para. 1 (para. 4).

5.4 Protected Species

As it concerns protected species, according to Article 727-*bis* CC - introduced into the Italian Criminal Code by Leg. Dec. No. 121/2011, implementing Directive 2008/99/EC and Directive 2009/123/EC - “unless the fact constitutes a more serious crime, whoever, except in permitted cases, kills, captures or possesses specimens of protected wild fauna shall be punished by arrest from one to six months or by a fine of up to €4,000, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species”.

According to Leg. Dec. No. 121/2011, “in order to apply Article 727-*bis* CC, protected wild animal or plant species are those listed in Annex IV to Directive 92/43/EC and Annex I to Directive 2009/147/EC”.

⁶⁰ Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona”, 475 ff. and references therein; Grazia Maria Vagliasindi, “Effective networking, formal v substantial compliance, conflicting powers: strengths and weaknesses of environmental criminal provisions enforcement networks in Italy”, in *Environmental Enforcement Networks. Concepts, Implementation and Effectiveness*, eds. Michael Faure, Peter De Smedt, An Stas (Cheltenham, UK - Northampton, MA, USA: Edward Elgar Publishing, forthcoming 2015), para. 2.2.1; Ruga Riva, *Diritto penale dell’ambiente*, 146.

⁶¹ Court Cass., 19 October 2011, No. 47870.

⁶² Court Cass., 15 November 2005, CED 234009.

⁶³ Interview with a member of N.O.E. of 8 July 2014.

⁶⁴ See, for example, Court Cass., 2 July 2007, No. 28158.

It is a misdemeanour and the author can be anyone. The expression “unless the fact constitutes a more serious crime” implies the application of similar legal provisions punished more severely, such as, for instance, Article 544-*bis* CC (killing of animals).⁶⁵ The exclusion of liability in “permitted cases” refers to derogations set out by specific laws allowing, in the cases specifically indicated, the killing of protected species, as for instance Article 18 of Law 11 February 1992, No. 157.⁶⁶

The conduct is punishable when committed either intentionally or negligently.

According to the Italian literature, the material scope of this provision is very limited; in particular, it seems to refer only to the negligent killing of animals committed while hunting.⁶⁷

The new offence does not seem to strengthen the criminal law protection of the (animal) environment, as on the contrary required by Directive 2008/99/EC.⁶⁸ The only profile of increased protection, related to the negligent killing of protected wild fauna, could be in contrast with the text of Directive 2008/99/EC, which requires “serious” negligence.⁶⁹ However, as the directive provides for minimum rules, Member States are free to adopt or maintain more stringent measures - which must be compatible with the Treaty - regarding the effective criminal law protection of the environment.

Cases where the conduct concerns a negligible quantity of specimens of protected wild fauna and has a negligible impact on the conservation status of the species are not punishable. Both conditions have to occur at the same time; in practice, their identification can be difficult. For assessing the “impact on the conservation status of the species”, the genus and age of animal and the reproduction possibilities of the species should be taken into account.⁷⁰

Para. 2 of Article 727-*bis* CC states: “Whoever, except in permitted cases, destroys, removes or holds specimens of protected wild flora species shall be punished by a fine of up to €4,000, except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species”. As mentioned above, Leg. Dec. No. 121/2011 specifies the concept of “protected wild flora species”.

The provision fills a gap in the protection of protected wild plant species, since, before its introduction, the offences concerning protected wild plant species, existing in the Italian legal order, punished only the different conduct of import, trade, etc. committed without the required authorisation and documentation.⁷¹

This offence is a misdemeanour; the author can be anyone and the offence can be committed intentionally or negligently. The expression “unless the fact constitutes a more serious crime” has not been used in this case.

The protected legal interest in both paragraphs of Article 727-*bis* CC is the conservation status of the species.⁷² Article 727-*bis* CC punishes the concrete endangerment or damage to the environment. The attempt is not punishable because it is a misdemeanour. The conduct described in paras. 1 and 2 is punishable “except in permitted cases”; this expression aims to exclude the liability in any case where the conduct is allowed.

Some scholars have expressed criticisms on the choice of the sanction, as it could not comply with the EU standards of effective, proportionate and dissuasive criminal penalties.⁷³ Indeed it is always possible the extinction of the crime through the payment of €1,333 (*oblazione*).

⁶⁵ Carlo Ruga Riva, “Il decreto legislativo di recepimento delle direttive comunitarie sulla tutela penale dell’ambiente: nuovi reati, nuova responsabilità degli enti da reato ambientale”, available at www.penalecontemporaneo.it, 2 f.

⁶⁶ Ruga Riva, “Il decreto legislativo di recepimento delle direttive comunitarie”, 4.

⁶⁷ Ruga Riva, “Il decreto legislativo di recepimento delle direttive comunitarie”, 3.

⁶⁸ Ruga Riva, “Il decreto legislativo di recepimento delle direttive comunitarie”, 4.

⁶⁹ Ruga Riva, “Il decreto legislativo di recepimento delle direttive comunitarie”, 4.

⁷⁰ Ruga Riva, “Il decreto legislativo di recepimento delle direttive comunitarie”, 4.

⁷¹ Ruga Riva, “Il decreto legislativo di recepimento delle direttive comunitarie”, 5.

⁷² For more details on the legal interest protected by Article 727-*bis* CC, see Luca Pistorelli – Alessio Scarcella, “Novità legislative: D. lgs. 7 luglio 2011, n. 121”, available at www.penalecontemporaneo.it, 9.

⁷³ Ruga Riva, “Il decreto legislativo di recepimento delle direttive comunitarie”, 5.

As it concerns trading in protected species, Article 1 of Law 7 February 1992, No. 150 punishes by arrest from three months to one year and fine from €7,746.85 to €77,468.53, except for cases where the conduct constitutes a more serious crime, whoever, in violation of Regulation (CE) No. 338/97 of 9 December 1996, with regard to specimens of species listed in Annex A to the Regulation itself, (among other conduct) imports, exports or re-exports specimens without the required certificate or permit, or with an invalid certificate or permit according to Article 11, para. 2a of the above mentioned Regulation; trades in artificially reproduced plants; possesses, uses for purposes of profit, buys, sells, exhibits or possesses for sale or for commercial purposes, specimens without the required documentation (para. 1). In case of recidivism, the penalty is arrest from three months to two years and fine from €10,329.14 to €103,291.38. If the crime is committed in the exercise of a commercial activity, the suspension of the permit from a minimum of six months to a maximum of eighteen months applies (para. 2).

Article 2 of Law No. 150/1992 punishes by a fine from €10,329.14 to €103,291.38 or arrest from three months to one year, except for cases where the conduct constitutes a more serious crime, whoever, in violation of Regulation (CE) No. 338/97 of 9 December 1996, with regard to specimens of species listed in Annex B and C to the Regulation itself, (among other conduct) imports, exports or re-exports specimens without the required certificate or permit, or with an invalid certificate or permit according to Article 11, para. 2a of the above-mentioned Regulation; trades in artificially reproduced plants; possesses, uses for purposes of profit, buys, sells, exhibits or possesses for sale or for commercial purposes, specimens without the required documentation (para. 1). In case of recidivism, the penalty is arrest from three months to two years and fine from €10,329.14 to €103,291.38. If the crime is committed in the exercise of a commercial activity, the suspension of the permit from a minimum of four months to a maximum of twelve months applies (para. 2).

In any case of falsification or alteration of certificates and permits and other documents as well as in any case of use of false or altered certificates and permits for the importation of animals, Article 3-*bis* of Law No. 150/1992 refers to the penalties of the Book II, Title VII, Chapter III CC concerning offences of falsification.

As it concerns habitats, according to Article 733-*bis* CC, introduced by the Leg. Dec. No. 121/2011 implementing Directive 2008/99/EC and Directive 2009/123/EC, “whoever, except in permitted cases, destroys a habitat within a protected site or otherwise deteriorates it compromising the state of preservation shall be punished with arrest of up to eighteen months and a fine of not less than €3,000”.

In order to apply Article 733-*bis* CC, the expression “habitat within a protected site” refers to any habitat of species for which an area is classified as a special protection area according to Article 4, paras. 1 or 2 of Directive 2009/147/EC, or any natural habitat or a habitat of species for which a site is classified as a special area of conservation under Article 4, para. 4 of Directive 92/43/EC”.

Article 733-*bis* CC provides for a misdemeanour; the author can be anyone and the offence can be committed intentionally or negligently. The provision contains two criminal conduct: destruction of a habitat within a protected site, on one hand, and damage compromising its state of preservation, on the other. The first concerns cases where a habitat is completely suppressed; the second situation is more difficult to identify. To this end, an useful indication can be drawn from the case law concerning the felony of “Damage” (Article 635 CC), which includes among the relevant conduct also the act of “deteriorating” property.

As was already mentioned, Article 733-*bis* CC was introduced by Leg. Dec. No. 121/ 2011; in particular, it was inserted into the Title II of the Book III CC dealing with “misdemeanours concerning the social activity of the public administration”. This collocation has been criticised by some scholars, because Article 733-*bis* CC does not punish the violation of administrative regulations, but rather the damage (in case of destruction) or the concrete endangerment (in the other cases) of a “habitat within a protected site”, which represents the protected legal interest.⁷⁴

The attempt is not punishable. The expression “except in permitted cases” refers to statutory provisions or administrative regulations that allow this conduct.

⁷⁴ Ruga Riva, “Il decreto legislativo di recepimento delle direttive comunitarie”, 5.

5.5 Ozone-depleting substances

As it concerns ozone-depleting substances (ODS), Article 3 of Legislative Decree 13 September 2013, No. 108 states that “unless the fact constitutes a more serious crime, whoever places on the market, except in cases provided for by Article 9 of the Regulation (EC) No. 1005/2009, produces, uses, imports or exports controlled substances, as defined in Article 3, point 4, of the Regulation, shall be punished by arrest of up to two years and a fine of up to €120,000”. The conduct of exportation of these substances is considered in Article 5 of Leg. Dec. No. 108/2013, which punishes, unless the fact constitutes a more serious crime, by arrest of up to two years and a fine of up to €120,000, whoever places on the market, except in cases provided for by Article 9 of the Regulation, imports or exports, products and equipment, other than personal effects, containing or relying on controlled substances as defined in Article 3, point 4, of the Regulation.

The above described offences are misdemeanours; the author can be anyone and the offence can be committed intentionally or negligently. The attempt is not punishable. The protected legal interest is the environment.

5.6 Water pollution

Concerning water pollution, Article 137 Env. Code provides for several offences. The most relevant of them are the following:

- unauthorised discharge of industrial wastewater or discharge with a suspended or revoked authorisation;
- discharge of wastewater exceeding the tabled thresholds limits (indicated in the tables in Annex 5 to part III of the Code);
- failure to comply with the requirements contained in authorisations or regulations or orders of the competent authorities or with prohibitions contained in other provisions.

In detail, according to Article 137, para 1, Env. Code, except in the cases sanctioned under Article 29-*quattordecies*, para. 1, Env. Code, whoever opens or otherwise performs a new discharge of industrial wastewater, without authorisation, or continues or maintains the discharges after the authorisation has been suspended or revoked, shall be punished by arrest from two months to two years or by a fine from €1,500 to €10,000.

When the described conduct concerns the discharge of industrial wastewater containing dangerous substances indicated in the tables in Annex 5 to part III of the Code, the penalty is arrest from three months to three years and fine from €5,000 to €52,000 (Article 137, para. 2).

Except in the cases sanctioned under para. 5 of this Article or under Article 29-*quattordecies*, para. 3, Env. Code, arrest of up to two years applies in case of discharge of industrial wastewater containing dangerous substances indicated in the tables in Annex 5 to part III of the Code, in violation of the requirements of the authorisation or the other requirements imposed by the competent authority (Article 137, para. 3).

Unless the fact constitutes a more serious crime, whoever, in relation to the dangerous substances indicated in table five of Annex 5 to part III of the Code, in discharging industrial wastewater exceeds the threshold limits indicated in the tables three or four of Annex 5 to part III of the Code, or exceeds the stricter limits set out by the competent authority according to Article 107, para. 1 Env. Code, is punished by arrest of up to two years and fine from €3,000 to €30,000; in case of exceeding the thresholds limits for the particularly dangerous substances indicated in the table 3/A of Annex 5 to part III of the Code, the conduct is punished by arrest from six months to three years and fine from €6,000 to €120,000 (Article 137, para. 5).

The violation of the prohibitions of discharge into the soil, underground and groundwater is punished by a penalty of arrest of up to three years (Article 137, para. 11).

The discharge into the sea by ships and aircraft of substances prohibited from being spilled is punished by a penalty of arrest from two months to two years (Article 137, para. 13).

5.7 Ship-source pollution

Articles 8 and 9 of the Leg. Dec. 6 November 2007, No. 202 on “Implementation of Directive 2005/35/EC on ship-source pollution and penalties” respectively provide for intentional and negligent discharge into the sea of pollutants by vessels.

According to Article 8, “1. Unless the act constitutes a more serious offence, the master of a ship, irrespective of its flag, as well as the crew, the owner or the ship-owner, if the infringement took place with their participation, who intentionally infringes the provisions under Article 4 [discharge into the sea of pollutants by vessels] shall be punished by arrest from six months to two years and a fine from €10,000 to €50,000.

2. If the infringement referred to in para. 1 causes permanent damage or, in any case, major damage to the quality of water, or to animal or plant species or parts thereof, the penalty of arrest from one to three years and fine of €10,000 to €80,000 shall be applied.

3. The damage is considered as major when the removal of its consequences is of particular complexity from a technical perspective, or particularly onerous or achievable only with exceptional measures”.

Article 9 establishes that “1. Unless the act constitutes a more serious offence, the master of a ship, irrespective of its flag, as well as the crew, the owner or the ship-owner, if the infringement took place with their participation, who infringes with negligence the provisions under Article 4 [discharge into the sea of pollutants by vessels], shall be punished by a fine of €10,000 to €30,000.

2. If the infringement referred to in para. 1 causes permanent damage or, in any case, major damage to the quality of water, or to animal or plant species or parts thereof, arrest from six months to two years and a fine from €10,000 to €30,000 shall be applied.

3. The damage is considered as major when the removal of its consequences is of particular complexity from a technical perspective or particularly onerous or achievable only with exceptional measures”.

The offences provided for in Articles 8 and 9 are misdemeanours, and are punished by arrest and fine.

The legal interest is the marine environment, which is protected from pollution by ships.

The author is the master of a ship, irrespective of its flag, as well as the crew, the owner or the ship-owner, if the infringement took place with their participation.

The criminal conduct is the ship-source discharge of polluting substances.

Where a permanent or a major damage is produced, a range of higher penalties applies.

The provision already existed before the enactment of Directive 2009/123/EC, and was introduced in order to comply with Directive 2005/35/EC and Framework Decision 2005/667/JHA (which was later annulled by the Court of Justice).⁷⁵

Article 10 of Leg. Dec. No. 202/2007 provides for additional penalties, stating that the master of the ship and the crew recorded in the register of the seafarers held by the competent maritime authorities, convicted for the offence under Article 8, are subject to a penalty of suspension of the professional title for a period not less than one year, pursuant to Article 1083 of the Navigation Code.

Article 11 establishes that the master of the ship and the crew convicted for the offences referred to in Articles 8 and 9 are prohibited to dock in Italian ports for a period of not less than one year, depending on the seriousness of the offence, to be determined by a decree of the Ministry of the Environment.

⁷⁵ For a comment on Directive 2009/123/EC see Licia Siracusa, “Il transito del diritto penale di fonte europea dalla “vecchia” alla “nuova” Unione post-Lisbona. Considerazioni a partire dalla nuova direttiva in materia di inquinamento cagionato da navi”, *Rivista trimestrale di diritto penale dell’economia* (2010): 779 ff.

5.8 General criminal provisions

The judiciary in Italy makes use of some general criminal provisions of the Criminal Code, often in order to overcome some deficiencies in the legislation on environmental crime (see *supra*, 3).

In particular, the judiciary, in order to cover the most serious cases of damage to the environment, i.e. “environmental disaster”, uses Article 434 CC on so-called “Unnamed disaster”. This article provides for a felony against public safety and establishes that whoever commits a fact aimed to cause the collapse of a building or of a part of it or another disaster, if the fact endangers public safety, is punished by imprisonment from one to five years. If the collapse or the disaster occurs, the penalty shall be imprisonment from three to twelve years.

The offence is punished when committed intentionally. However, Article 449 CC states that the same conduct is also punished if committed with negligence, providing in this case for a penalty of imprisonment from one to five years.

On the one hand, practitioners (prosecutor,⁷⁶ police⁷⁷) highlight the fact that the lack of a specific provision on “environmental disaster” and the use of Article 434 CC is problematic, since this Article is characterised by a lack of certainty and could be applied, in principle, to several conduct; on the other hand, practitioners (judge⁷⁸) stress the role of Article 434 CC as a tool to overcome the lack of effectiveness generated by the misdemeanour nature of the vast majority of environmental crimes.

Concerning the protection of water, the judiciary makes use of Article 439 CC, which establishes that “Anyone who poisons water or substances intended for food, before they are drawn or distributed for use, shall be punished by imprisonment of not less than fifteen years. If the act causes the death of a person, life imprisonment applies”. Article 440 CC states that “Anyone who corrupts or adulterates waters or substances intended for food, before they are drawn or distributed for use, making them dangerous for public health, shall be punished with imprisonment from three to ten years”. In both cases, the conduct is punishable if committed intentionally or with negligence; however, in case of negligence, the penalties are reduced (Article 452 CC).

Article 635 CC on “Damage” should also be recalled, which establishes that “Whoever destroys, disperses, damages or makes useless, in whole or in part, movable or immovable things of others’ property, shall be punished, on complaint of the offended person, by imprisonment of up to one year or by a fine of up to €309”. The penalty is of imprisonment from six months to three years (and for prosecution of the offence the complaint is not necessary) in particular circumstances, e.g. the commission of the offence on things which have a public use destination or are of public utility; the judiciary, especially in the past, used this provision to cover the conduct of deterioration of water caused by pollutant discharges, by non-functioning water purifiers or by public sewer systems.⁷⁹

As it concerns air pollution, the misdemeanour of “Dangerous throwing of things” provided for in Article 674 CC, should be recalled; Article 674 CC states that “Anyone who throws or spills things, in a place of public passage or in a private place but of common or others’ use, deemed to offend or deface or harass people or, in cases not permitted by law, causes the emission of gases, vapours or smoke, deemed to cause these effects, shall be punished by arrest for up to one month or by a fine of up to €206”.

Finally, Article 423-*bis* CC on “Forest fire” is worth mentioning, which punishes by imprisonment from four to ten years whoever causes a fire in forests or woods. If the fire is caused by negligence, the punishment shall be imprisonment from one to five years. The penalties shall be increased if the fire endangers buildings or harms protected areas; the penalties shall be increased by half if the fire caused serious, widespread and persistent environmental damage.⁸⁰

⁷⁶ Interview with Italian prosecutor of 16 July 2014.

⁷⁷ Interview with a member of N.O.E. of 8 July 2014.

⁷⁸ Interview with Italian judge of 2 September 2014.

⁷⁹ Court Cass., 20 December 1975, No. 12383; Court of Verbania, 12 May 1999, No. 161; Court of Appeal of Milan, 3 May 1999. See Ruga Riva, *Diritto penale dell’ambiente*, 87 ff.

⁸⁰ For more details, see Ruga Riva, *Diritto penale dell’ambiente*, 182 ff.

6 Substantive criminal law on public servants liability in relation to environmental crimes

In Italy, there are no specific provisions on the liability of public servants for environmental crimes. However, general provisions on criminal liability of public servants may apply. In addition, liability of public servants might be affirmed according to the general principles (e.g., party to the offences, etc.).

According to Article 317 CC “The public official who, through an abuse of his position or of his powers, forces someone to illegitimately give or promise, to himself or to a third party, money or other benefits shall be punished by imprisonment from six to twelve years”.

Article 319-*quarter* CC on undue induction to give or promise benefits establishes that “Unless the act constitutes a more serious offence, the public official or the person in charge of public service who, through an abuse of his position or of his powers, induces someone to illegitimately give or promise, to himself or a third party, money or other benefits shall be punished by imprisonment from three to eight years.

(...) The person who gives or promises money or other benefits shall be punished by imprisonment of up to three years”.

Article 318 CC provides for the felony of corruption for the exercise of the function, stating that “The public official who, in the exercise of its functions or powers, illegitimately receives, for himself or for a third party, money or other benefits or accepts the promise of them is punished by imprisonment from one to five years”.

According to Article 319 CC on corruption for an act contrary to official duties, “The public official who, for omitting or delaying or for having omitted or delayed an act of his office, or for performing or having performed an act contrary to official duties receives, for himself or for a third party, money or other benefits, or accepts the promise of them, shall be punished by imprisonment from four to eight years”.

According to Article 320 CC, the provisions of Articles 318 and 319 CC shall apply also to the person in charge of a public service; in this case, the penalties are reduced by not more than one-third.

It is worth noting that, according to Article 321 CC, the same sanction that applies to the public officer is applied to those who give or promise money or other benefits to the public official or to the person in charge of a public service.

According to Article 323 CC, “Unless the act does not constitute a more serious offence, the public official or the person in charge of a public service who, by performing his functions or services in violation of any relevant law or regulation, or by failing to refrain in case of a personal interest or of an interest of his relative or in other provided cases, intentionally⁸¹ procures for himself or others an unlawful financial advantage or causes an unlawful damage to others shall be punished by imprisonment from one to four years”. The penalty is increased in cases where the benefits or the damages are particularly serious.

7 Substantive criminal law on organised crime

As it concerns the concept of organised crime, it is worth to highlight that the expression “organised crime” refers to illegal acts committed by particular types of organisations or groups, defined as criminal organisations, which have a continuing criminal programme and a permanent organisational structure.⁸²

⁸¹ This crime can be committed only with *dolo intenzionale* (see *supra*, footnote 52).

⁸² On the concept of “organised crime” in Italy, see Giovanni Fiandaca, “Criminalità organizzata e controllo penale”, *Indice Penale* (1991): 5.

The Criminal Code provides for (among others) two main types of “association crimes” that punish the participation in a criminal organisation: the common-type criminal association, set out under Article 416 CC, and the “mafia-type” criminal association, set out under Article 416-bis CC (introduced into the Code by Law 13 September 1982, No. 646) and characterised by a particular “mafia-method”.

According to Article 416 CC, “When three or more persons associate in order to commit felonies, those who promote or constitute or organise the association shall be punished, for that fact, by imprisonment from three to seven years.

The penalty shall be the imprisonment from one to five years for the mere fact of participating in the association.

The chiefs are subject to the same penalty provided for the promoters.

If the persons associated overrun the countryside or the public roads in arms, imprisonment from five to fifteen years applies.

The penalty shall be increased if the number of persons associating is ten or more. (...)”

According to Article 416-bis CC, “Whoever belongs to a “mafia-type” association, made up of three or more persons, shall be punished by imprisonment from seven to twelve years.

Persons who promote, manage or organise the association shall be punished, for that fact, by imprisonment from nine to fourteen years.

An association is considered as being a mafia-type association when its members exploit the intimidating force of the associational bond and the condition of subjection and silence (*omertà*) that derive from it in order to commit felonies, acquire either directly or indirectly the management or control of economic activities, concessions, authorisations, contracts and public services, or to make profits or gain unlawful advantages for themselves or for others, or in order to hamper or obstruct free choice in voting or to buy votes for themselves or for others in elections.

If the association is armed, the imprisonment from nine to fifteen years applies for cases provided for by para. 1 and the imprisonment from twelve to twenty-four years applies in cases provided for by para. 2.

The association is deemed to be armed when the participants have available, to pursue the association’s purposes, weapons or explosives materials, even when concealed or kept in storage areas.

If the economic activities the association intends to take over or maintain control over are financed in whole or in part with the price, proceed, or profit from felonies, the penalties set out in the previous paragraphs shall be increased by one third to half.

Against the convicted, it is always mandatory to confiscate the objects that served and were used to commit the crime, and the items that constitute the price, proceed, profit, or which represent their use.

The provisions of this Article also apply to the camorra, the ‘ndrangheta and other associations, regardless of their local names, including foreign associations, which use the force of intimidation arising from associational bond to pursue goals that correspond to those of mafia-type associations”.

The mafia-type association crime has been defined by the Italian legislator, observing the typical *modus operandi* of the traditional Sicilian mafia. However, the result was a general legal definition, which applies to any criminal group acting in the same way, regardless the part of the country where the group is active and regardless the name of the group. For this reason, the Italian legal definition of mafia-type association may be of some interest also in other countries, where new mafia-type criminal associations could come to life.

In Italy, mafia-type associations are increasingly involved in illegal environmental activities. In 1994 Legambiente coined the term “ecomafia” which refers to the illegal activities of (usually mafia-type) criminal associations in the environmental field. The term “ecomafia” is more and more used in the common language. A threat assessment published by Europol in June 2013 on Italian organised crime reports as follows: “95 ‘Ndrangheta clans were amongst 296 clans involved in illegal waste dumping; 346,000 tonnes of waste [was]

seized heading for 10 European, 8 African and 5 Asian countries in 2011. (Of the other clans involved: 86 Camorra, 78 Mafia and 23 Apulian.)”⁸³

Practitioners (police⁸⁴) underline that, at present, environmental crime does not seem to play a key role among the provisions on organised crime and they recommend the introduction of a specific felony for organised environmental crime.

In this perspective, a relevant starting point is represented by Article 260 Env. Code, which punishes by imprisonment from one to six years “whoever, in order to achieve an unfair profit, with multiple operations and through the establishment of means and continuing organised activities, sells, receives, transports, exports, imports or otherwise improperly handles large quantities of waste”.

As already mentioned (see *supra*, 5.2), this is the first environmental felony, introduced into the Italian legal order in 2001 in order to tackle the links between illicit trafficking of waste and organised crime.⁸⁵ Unlike the crimes of criminal association and mafia-type criminal association, respectively set out in Articles 416 and 416-*bis* CC, Article 260 Env. Code does not require the association of three or more persons; however, although the crime could be committed by one person able to manage large quantities of waste, the reference to the “establishment of means and continuing organised activities” seems to imply an organised structure (even a basic one), where several persons are involved.⁸⁶ The Court of Cassation has recognised that this felony “does not require the existence of a structure operating in an exclusively illegal way, because the criminal activity can also be committed in a context involving waste commercial operations carried out in a lawful way”.⁸⁷

This criminal provision could represent a significant model also at European level, as shown in the European Parliament resolution of 25 October 2011 on organised crime in the European Union which, in point 42, calls on the Commission to “develop innovative instruments for the prosecution of those who commit environmental offences in which organised crime plays a role, for example by submitting a proposal to extend to the EU Italy’s positive experience with the offence of “organised illegal waste trafficking”, since 2011 classed as an offence with a major social impact (and thus dealt with by the District Anti-mafia Bureau)”.⁸⁸

⁸³ EUROPOL, “Threat Assessment: Italian Organised Crime”, 2013, 11, available at

https://www.europol.europa.eu/sites/default/files/publications/italian_organised_crime_threat_assessment_0.pdf

⁸⁴ Interview with a member of N.O.E. of 8 July 2014.

⁸⁵ Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona”, 475 f.

⁸⁶ Vagliasindi, “La direttiva 2008/99/CE e il Trattato di Lisbona”, 475 ff. and references therein; Vagliasindi, “Effective networking”, para. 2.2.1; Ruga Riva, *Diritto penale dell’ambiente*, 146.

⁸⁷ Court Cass., 19 October 2011, No. 47870. It is worth to recall that a general criminal law provision on organised crime that can be applied in cases of “Organised activities for the illegal trafficking of waste” is Article 7 Leg. Dec. 13 May 1991, No. 152 which provides for an aggravating circumstance (from one-third to a half) for “felonies punishable by a penalty different than life imprisonment, committed through the conditions set out under Article 416-*bis* CC or in order to support the activity of associations provided for by the same article”.

⁸⁸ European Parliament resolution of 25 October 2011 on organised crime in the European Union (2010/2309(INI)), Strasbourg, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0459+0+DOC+XML+V0//EN>. It is worth to recall that a general criminal law provision on organised crime that can be also applied in cases of “Organised activities for the illegal trafficking of waste” is Article 7 Leg. Dec. 13 May 1991, No. 152 which provides for an aggravating circumstance (from one-third to a half) for “felonies punishable by a penalty different than life imprisonment, committed through the conditions set out under Article 416-*bis* CC or in order to support the activity of associations provided for by the same article”.

8 General criminal law influencing the effectiveness of environmental criminal law: sanctions in practice

In the Italian legal system criminal offences are indictable only within a certain period after they have been committed, except for the most serious offences that have no time limitation.

The period of limitation is regulated by Article 157 CC, which establishes that limitation extinguishes the crime after the expiry of the time corresponding to the maximum penalty prescribed by law, and in any case after not less than six years for felonies and four years for misdemeanours, even if these crimes are punished with only a fine. The accused person may always expressly renounce the statute of limitation.

Limitation is suspended or interrupted in certain circumstances, listed in Articles 159 and 160 CC. These circumstances are connected to the different phases of the trial (for example, the period of limitation is interrupted when a conviction is pronounced).

The misdemeanour nature of environmental crime implies short limitation periods, which are considered by scholars⁸⁹ and practitioners (prosecutor⁹⁰) as one of the causes of the ineffectiveness of environmental criminal law.

In cases of misdemeanours which are punishable by a fine only, Article 162 CC (*oblazione comune*) allows the offender to pay, before the opening of the trial, or before the decree of conviction, an amount of money corresponding to the third part of the maximum penalty established by law for the committed offence, as well as the costs of the proceeding. The payment extinguishes the crime.

Article 162-bis CC (*oblazione speciale*) establishes that, in cases of misdemeanours which are punishable alternatively by arrest or fine, the offender may be allowed to pay, before the opening of the trial, or before the decree of conviction, an amount of money corresponding to half of the maximum fine prescribed by law for the committed offence, as well as the costs of the proceeding. The payment extinguishes the crime.

According to Articles 163-168 CC, probation (*sospensione condizionale della pena*) can be granted under the following conditions:

- imprisonment or arrest sentence not exceeding 2 years (3 years for minors; 2 years and 6 months for young persons from eighteen to twenty-one years old and for persons over seventy years old) (Article 163 CC);
- the judge presumes that the convicted person will not commit further offences (Article 164, para. 1, CC).

The probation cannot be granted when:

- the convicted person has been already convicted to imprisonment for a felony or if he is considered as a habitual or professional offender (Article 164, para. 2, 1, CC);
- a personal security measure shall be added to the penalty imposed (Article 164, para. 2, 2, CC).

The judge may impose obligations on the convicted person, according to its discretionary powers and considering the individual case. The obligations are provided for in Article 165 CC: the restitution or compensation for damage and the publication of the decision; the elimination of the harmful or dangerous consequences of the offence; non-remunerated community work. It is worth to mention that some provisions of the Environmental Code establish that probation can be granted on condition of the elimination of the damage or danger to the environment (e.g. Article 260, para. 4, Env. Code).

⁸⁹ See *supra*, 3.

⁹⁰ Interview with Italian prosecutor of 16 July 2014.

The probation period is five years in case of conviction for felony and two years in case of conviction for misdemeanour (Article 163, para 1, CC). Once this period elapses and the convicted person does not commit another felony or a misdemeanour of the same nature and complies with the obligations established by the judge, the crime is extinguished (Article 167 CC).

The above considered, a sentence to one year's imprisonment could mean in Italy only probation.

9 Responsibility of corporations and collective entities for environmental crimes

In Italy, Leg. Dec. No. 121/2011 implementing Directive 2008/99/EC and Directive 2009/123/EC introduced the liability of legal persons and collective entities for environmental crimes.⁹¹ It represents a significant change, after a long time and having been advocated by many,⁹² in order to tackle environmental crime more effectively, given the genetic correlation between environmental crimes and business activities.⁹³

In particular, Leg. Dec. No. 121/2011 extends to some listed environmental crimes the system of “administrative liability” of legal persons and collective entities for crimes committed in their interest or to their benefit, as provided by Leg. Dec. No. 231/2001.⁹⁴ Although expressly qualified as administrative by the legislator, such liability is considered as having a substantial criminal nature by most of the scholars as well as by the courts.⁹⁵ The liability does not apply to the State, to local public authorities, to other non-economic public entities and to entities carrying out functions of constitutional relevance (Article 1, Leg. Dec. No. 231/2001).

In this framework, Article 25-*undecies* of Leg. Dec. No. 231/2001 provides for the liability of collective entities in relation to some of the crimes referred to in Leg. Dec. No. 152/2006. This means, almost all crimes therein relating to waste management and the remediation of contaminated sites,⁹⁶ some crimes concerning the protection of waters against pollution,⁹⁷ and only one crime concerning air protection and the reduction of emissions into the

⁹¹ For this chapter, see Grazia Maria Vagliasindi, “Liability of Legal Persons and Collective Entities for Environmental Crimes in Italian Law”, *Eucrim* 3 (2012): 131-137.

⁹² See for instance Siracusa, *La tutela penale dell'ambiente*, 526.

⁹³ Vagliasindi, “Liability of Legal Persons”, 131; Vagliasindi, “Enti collettivi e reati ambientali”, 387 ff.

⁹⁴ For a detailed analysis of this topic, See Vagliasindi, “Enti collettivi e reati ambientali”, 367 ff. and literature therein.

⁹⁵ On the issue, see Giancarlo de Vero, *La responsabilità penale delle persone giuridiche* (Milano: Giuffrè, 2008).

⁹⁶ Collection, transport, recovery, disposal, trade, and brokerage of waste in the absence of the required authorisation, registration, or communication (Article 256, para. 1, a) and b), Env. Code), construction or operation of an unauthorised landfill (Article 256, para. 3, first and second sentences, Env. Code), inobservance of the requirements contained in the permit to operate a landfill or other waste activities (Article 256, para. 4, Env. Code), unauthorised mixing of waste (Article 256, para. 5, Env. Code); temporary deposit of hazardous medical waste at the place of production (Article 256, para. 6, Env. Code); pollution of the soil, subsoil, surface water, and groundwater with remediation failure and lack of prescribed communication to the competent authorities (Article 257, paras. 1 and 2, Env. Code); creation or use of a false certificate of waste analysis (Article 258, para. 4 and Article 260-*bis*, paras. 6 and 7, Env. Code); illegal waste trafficking (Article 259, para. 1, Env. Code); organised activities for the illegal trafficking of waste (Article 260, Env. Code), violations of the control system on the traceability of waste (Article 260-*bis*, para. 8, Env. Code).

⁹⁷ Unauthorised discharge of industrial wastewater containing dangerous substances (Article 137, para. 2, Env. Code), discharge of industrial wastewater containing dangerous substances contrary to the requirements imposed by the authorisation (Article 137, para. 3, Env. Code), discharge of industrial wastewater in violation of tabled “thresholds limits” (Article 137, para. 5, first and second period, Env. Code); violation of the

atmosphere.⁹⁸ Article 25-*undecies*, Leg. Dec. No. 231/2001 also provides for the liability of collective entities in relation to those environmental crimes already provided for by Italian law and deemed to meet the additional obligations imposed by the Directives with regard to the protection of the ozone layer,⁹⁹ trade in protected species,¹⁰⁰ and pollution caused by ships.¹⁰¹ To such cases, Article 25-*undecies*, Leg. Dec. No. 231/2001 adds, finally, those crimes that Leg. Dec. No. 121/2011 introduced into the Criminal Code in order to comply with the obligations of criminal protection imposed by Directive 2008/99/EC on protected wild animals and plant species¹⁰² and protected habitats.¹⁰³ It is worth mentioning the exclusion from Article 25-*undecies* of criminal offences in the field of integrated environmental authorisation (the IPPC permit) and abandonment of waste.¹⁰⁴

With regard to sanctions, Article 25-*undecies*, Leg. Dec. No. 231/2001 provides for a fine (“*sanzione amministrativa pecuniaria*”, monetary sanction) in relation to all predicated offences listed therein. The system of monetary sanction is based on so-called “shares” (“*quote*”); it is inspired, although it is not identical, by the German model of day-fines.¹⁰⁵ The sentencing ranges prescribed by law are diversified according to the seriousness of such offences.¹⁰⁶ It can be observed that, for the most part, the highest sanctions provided in

prohibitions of discharge to the soil, groundwater, and underground (Article 137, para. 11, Env. Code); discharge into the sea by ships and aircraft of substances prohibited from being spilled (Article 137, subsection 13, Env. Code).

⁹⁸ Exceeding the emission limit values that determines exceeding also the limit values of air quality (Article 279, para. 5, Env. Code).

⁹⁹ Violation of the provisions on the use of substances harmful to the ozone layer (Article 3, para. 6, of Law 28 December 1993, No. 549).

¹⁰⁰ Import, export, transport, and use of animals and illegal trade in artificially propagated plants (Article 1, paras. 1 and 2 and Article 2, paras. 1 and 2 of Law No. 150/1992), falsification or alteration of certification and licensing and use of forged or altered certifications and licenses for the importation of animals (Article 3-*bis*, Law No. 150/1992).

¹⁰¹ Intentional spilling at sea of pollutants by vessels (Article 8, paras. 1 and 2, Leg. Dec. No. 202/2007); negligent spilling of pollutants at sea by vessels (Article 9, paras. 1 and 2, Leg. Dec. No. 202/2007).

¹⁰² Killing, destruction, catching, taking, possession of specimens of protected wild fauna and flora (Article 727-*bis* CC).

¹⁰³ Destruction or deterioration of habitats within a protected site (Article 733-*bis* CC).

¹⁰⁴ Vagliasindi, “Enti collettivi e reati ambientali”, 417 ff.

¹⁰⁵ Cristina de Maglie, “Principi generali e criteri di attribuzione della responsabilità”, *Diritto Penale e Processo* (2001): 1349; de Vero, *La responsabilità penale delle persone giuridiche*, 317.

¹⁰⁶ According to Article 25-*undecies*, Leg. Dec. No. 231/2001, the pecuniary sanction of up to 250 shares applies in any case of violation of Article 727-*bis* dealing with protected species; the pecuniary sanction from 150 to 250 shares applies in any case of violation of Article 733-*bis* concerning habitats (para. 1).

According to para. 2, concerning crimes provided for by the Environmental Code, the following pecuniary sanctions apply:

- a) for crimes under Article 137 concerning water protection, the pecuniary sanction is from 150 to 300 shares;
- b) for crimes under Article 256 concerning illicit management of waste, the pecuniary sanction is from 150 to 300 shares;
- c) for crimes under Article 257 concerning the failure to remediation, the pecuniary sanction is from 150 to 250 shares;
- d) in any case of violation of Article 258, para. 4, second period, the pecuniary sanction is from 150 to 250 shares;
- e) in any case of violation of Article 259, para. 1, the pecuniary sanction is from 150 to 250 shares;
- f) for the felony set out in Article 260, the pecuniary sanction is from 300 to 500 shares, in cases provided for by para. 1, and from 400 to 800 shares in cases provided for by para. 2;
- g) for violation of Article 260-*bis*, the pecuniary sanction is from 150 to 250 shares in cases provided for by paras. 6 and 7, second and third period, and 8, first period, and the pecuniary sanction is from 200 to 300 shares in cases provided for by para. 8, second period;
- h) for violation of Article 279, para. 5, the pecuniary sanction is up to 250 shares.

relation to offences covered by Article 25-*undecies* are between 150 and 250 “shares”. In the light of the general criteria for the determination of each share (Article 10, Leg. Dec. No. 231/2001), the shares imply the applicability of sanctions, at a maximum between €232,350 and €387,250. Much more severe is the range from a minimum of four hundred to a maximum of eight hundred shares, provided for the most serious crime listed in Article 25-*undecies*, namely the crime of organised activities for the illegal trafficking of radioactive waste (Article 260, para. 2, Env. Code): this involves the applicability of a maximum fine of €1,239,200.

Besides the fine, interdicting sanctions (e.g. disqualification) - a very important tool to discourage corporate environmental crime and to encourage restoration (see *infra*) - are provided, for a period not exceeding six months, in case of conviction for the crimes of unauthorised discharge of industrial wastewater containing dangerous substances; crossing the thresholds given in Table 3/A of Annex 5 to part III Env. Code when discharging industrial wastewater; violation of the prohibition on discharge into the soil, groundwater, and underground water; construction and management of an unauthorised landfill of dangerous waste; organised activities for illegal trafficking of waste; intentional discharge of pollutants at sea by vessels causing harm to the sea and negligent discharge of pollutants at sea by vessels causing harm to the sea. The interdicting sanctions are listed in Article 9, para. 2, of Leg. Dec. No. 231 of 2001: the prohibition to carry out the activity at stake; the suspension or revoking of authorisations or permits connected to the perpetration of the crime; the prohibition to make agreements with the public administration (with the exception of those aimed at obtaining a public service); the barring from obtaining public subsidies and the eventual revocation of those already obtained; the prohibition of advertising goods and services. Definitive interdiction from carrying out the activity is provided when the collective entity or one of its units are permanently used for the sole or main purpose of enabling or facilitating the commission of the offences of organised activities for the illegal trafficking of waste and intentional spills of pollutants at sea by vessels.

In addition to these provisions, introduced by Leg. Dec. No. 121/2011 with specific reference to the liability of collective entities for environmental crimes, general provisions of Leg. Dec. No. 231/2001 are applicable. For instance, Leg. Dec. No. 231/2001 provides for a reduction of the fine (Article 12) and the exclusion of disqualification (Article 17) if, prior to the opening of the trial of first instance, the collective entity puts in motion remediation of the damage and the dangerous consequences of the offence, or adopts and makes operational a suitable organisational model, or (but only with reference to the disqualification sanctions) provides the profit gained for the purpose of confiscation.

As it concerns the objective criteria for attribution of responsibility, the collective entity will be held “administratively responsible” for environmental crimes listed in Article 25-*undecies*, Leg. Dec. No. 231/2001 if these crimes are committed in the interest or to the benefit of the collective entity itself by a person in a management position or by a person subject to the direction or supervision of the latter (Article 5). With respect to the subjective criteria of attribution of responsibility, the existence of a “guilty organisation” has to be established. The entity may obtain the exclusion of liability if it adopted and effectively implemented, prior to the commission of the offence, organisational models specifically designed to prevent the commission of crimes listed in Article 25-*undecies*.

In particular, in the case of crimes committed by senior officers of the collective entity, the latter is not liable if it proves that it has adopted and effectively implemented organisational and management models designed to prevent offences of the kind that occurred. It must also prove that it has entrusted, to a body with autonomous powers of initiative and control, the task of supervising the functioning and monitoring of the models and their updating; the collective entity must also demonstrate that the perpetrators acted by fraudulently evading the models of organisation and that there has been no lack of, or insufficient, supervision by the supervisory authority (Article 6, Leg. Dec. No. 231/2001).

In the case of offences committed by subordinates, the entity is liable if the commission of the offence was made possible by non-compliance with management or supervision obligations. In any case, this non-compliance is excluded if the entity, prior to the commission of the offence, has adopted and effectively implemented a model

Sanctions referred to in para. 2 (b) are reduced by a half in cases of commission of crimes set out in Article 256, para. 4, Env. Code.

of organisation, management, and control, to prevent offences of the type that occurred. Depending on the nature and size of the organisation and its activity, the model must provide suitable measures to ensure that its activity is carried out in compliance with the law and to discover and quickly eliminate risk situations. Effective implementation of the model requires periodic review and possible amendment of the same when there are significant violations of regulations or changes in the organisation or business; successful implementation also requires an adequate disciplinary system to sanction non-compliance with the measures specified in the model (Article 7, Leg. Dec. No. 231/2001).

It should be noted that, according to the principle of autonomy of the collective entity's liability, this liability exists even if the offender has not been identified or is not eligible and if the offence is ruled out for a reason other than amnesty.

Finally, it is worth mentioning that, according to Article 22, Leg. Dec. No. 231/2001, "administrative penalties" elapse for the collective entity within a period of five years from the date of commission of the crime; the period of limitation is interrupted by a request for precautionary disqualification measures and contestation to the entity of the administrative offence, depending on the commission of the crime (pursuant to Article 59, Leg. Dec. No. 231/2001). Due to the interruption, a new period of limitation begins. If the interruption occurs through the contestation of the administrative offence, depending on the commission of a crime, the period of limitation does not begin until final judgment against the accused person is given. According to Article 60, Leg. Dec. No. 231/2001, it is not possible to proceed with contestation if the crime that the entity should be liable for is eliminated by limitation with regard to the physical person who actually committed it.

Practitioners (judge¹⁰⁷) positively evaluate the introduction of the liability of corporations and collective entities for environmental crimes; however, they underline that relevant areas and/or relevant offences are still not included (air, waste abandonment and environmental disaster).

10 General procedural provisions

As it concerns criminal procedure, it is first of all worth to recall the Constitutional provisions establishing, among other, the inviolability of personal liberty and the need of a reasoned measure issued by a judicial authority, and only in the cases and the manner provided for by law, for any restriction of personal liberty (Article 13 Const.); the right to defence, which is "inviolable at every stage and instance of legal proceedings" (Article 24 Const.); the principle according to which "no defendant shall be considered guilty until the final conviction" (Article 27 Const.).

The Italian criminal procedure system is based on the accusatorial model. There is a clear-cut separation between pre-trial and trial proceedings as well as between the body responsible for investigating and prosecuting a crime and the body responsible for judging the case.¹⁰⁸

In particular, according to Article 111 Const., "Jurisdiction is implemented through due process regulated by law.

All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials.

In criminal law trials, the law provides that the alleged offender shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defence. The defendant shall have the right to cross-examine or to have cross-examined before a judge the persons making accusations and to summon and examine persons for the defence in the same conditions as the prosecution, as well as the right to produce all other evidence in favour of the defence. The defendant is entitled

¹⁰⁷ Interview with Italian judge of 2 September 2014.

¹⁰⁸ See Ennio Amodio, "The Accusatorial System Lost and Regained: Reforming Criminal Procedure in Italy", *The American Journal of Comparative Law* (2004): 489 ff.

to the assistance of an interpreter in the case that he or she does not speak or understand the language in which the court proceedings are conducted.

In criminal law proceedings, the formation of evidence is based on the principle of adversary hearings. The guilt of the defendant cannot be established on the basis of statements by persons who, out of their own free choice, have always voluntarily avoided undergoing cross-examination by the defendant or the defence counsel.

The law regulates the cases in which the formation of evidence does not occur in an adversary proceeding with the consent of the defendant or owing to reasons of ascertained objective impossibility or proven illicit conduct.

All judicial decisions shall include a statement of reasons.

Appeals to the Court of Cassation in cases of violations of the law are always allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts. (...)

As it concerns prosecution, Article 112 Const. states that “the public prosecutor has the obligation to institute criminal proceedings”. Indeed, in the Italian criminal procedure system a “duty to prosecute” applies: the public prosecutor - who is responsible for investigations and institutes criminal proceedings (Articles 50 ff. CCP) – has the obligation to institute criminal proceedings concerning any offence for which sufficient evidence exists.

11 Procedural provisions on environmental crimes

In the Italian legal system, the above mentioned obligation to institute criminal proceedings applies to environmental crimes, as to any other crime.

Among the general procedural provisions, it is worth to recall the so-called alternative procedures, which may lead to a reduction of the sanctions imposed.

Among these alternative procedures, it is worth to mention the “plea bargaining” (*Applicazione della pena su richiesta delle parti*, the so-called *patteggiamento*). This procedure enables the parties to dispose of the case before the beginning of the trial. In particular, according to Article 444, para. 1, CCP, as modified by Law 12 June 2003, No. 134, “the defendant and the public prosecutor may ask the judge for the application, in type and level specified, of a substitute sanction or a pecuniary criminal sanction, reduced by up to one-third, or of a custodial criminal sanction when the latter, taking into account the circumstances, and reduced by up to one-third, does not exceed five years of imprisonment or arrest, alone or together with a pecuniary criminal sanction”.

This procedure does not apply in organised crime proceedings (para. 1-*bis*). If the two parties agree and the judge considers the proposed sentence appropriate, the judge applies the negotiated sentence and provides a written statement of reason explaining why he accepted the parties’ request (para. 2). It is worth noting that the judge can approve or reject the parties’ request and he is not bound by it. However, according to the Italian Court of Cassation, if the judge accepts this request, he cannot modify it by amending the requested sentence.¹⁰⁹ In case of a request for a custodial sanction of up to two years, the defendant can subordinate the request’s efficacy to the granting of probation (para. 3).

Generally, the advantages for the defendants arising from this alternative procedure are the reduction by up to one-third of the sentence and the exclusion of the possibility of being subject to any security measures.

¹⁰⁹ Court Cass., 12 May 1992, *Cassazione penale* (1993), No. 234.

Environmental crimes fall under plea bargaining and, actually, it is this procedure which is most likely to apply (except for the recurring cases of extinction of the crime through the payment of a sum of money, i.e. by *oblazione*).¹¹⁰

Although plea bargaining is the most wide-ranging procedure, there are other alternative procedures that can apply to the environmental crimes and influence the level of the sanctions.

For instance, the “abbreviated proceedings” (*giudizio abbreviato*) enables the defendant to ask for a decision which is pronounced on the basis of the evidence collected during the preliminary phase (Article 438, para. 1, CCP). Apart from this feature, it is a normal criminal trial in which the defendant can be acquitted. If the judge pronounces a sentence, the penalty is reduced by one-third. After Law 16 December 1999, No. 479 (enacted following the decisions of the Constitutional Court No. 442 of 1994 and No. 92 of 1992), the consent of the public prosecutor is not needed and the defendant may also subordinate his request to an integration of evidence necessary to the decision. In this case, the judge has the discretionary power to evaluate whether the integration is really necessary to the decision, and whether it complies with the standards of procedural economy (Article 438, para. 5, CCP). This judge’s decision is incontestable.¹¹¹

Generally, the request for abbreviated proceedings may involve any crime.

Another alternative procedure is “proceeding by decree” (*procedimento per decreto*). When the public prosecutor believes that a pecuniary criminal sanction alone should be applied – even if in replacement of a custodial one – he may ask the judge for preliminary investigations to decide the case by decree, indicating the level of the sanction (Article 459, para. 1, CCP). The request has to be presented within six months from the date when the defendant’s name was written in the *notitia criminis* register. The public prosecutor may ask for the application of a penalty reduced by up to half of the *minimum* level (para. 2).

If the judge does not accept the request, he gives the acts back to the public prosecutor (para. 3); if he accepts it, *inaudita altera parte*, he issues a decree which contains the sentence in the level indicated by the public prosecutor. The defendant may appeal against the sentence within fifteen days from the notification of the decree (Article 461 CCP).

12 Procedural provisions - actors and institutions mentioned in legal texts

Courts

The Italian Courts are: the Tribunal (*Tribunale*), the Assise Court (*Corte di assise*), the Court of Appeal (*Corte di appello*), and the Court of Cassation (*Corte di Cassazione*).

In the first instance of trial, before the Tribunal or the Assise Court (which deals with the most serious felonies), three separate phases of procedure occur: the preliminary investigative phase, the preliminary hearing phase and the trial phase. During the pre-trial phase, the judge of the preliminary investigations is involved whenever the investigations may conflict with constitutional rights, such as the right to individual freedom; he guarantees the protection of individual rights while validating the arrest of suspects and authorising coercive precautionary measures. At the end of the pre-trial phase, the judge, after a request of the public prosecutor (see below), decides whether to dismiss the case or to go to trial.

The Court of Appeal reviews the decision of the Tribunal.

¹¹⁰ For more details on “*oblazione*”, see *supra*, 8.

¹¹¹ Const. Court, 27 February 2002, No. 54.

The highest Court in Italy is the Court of Cassation, which has a competence limited to reviewing decisions on points of law and cannot judge on the merit of the case.

Public Prosecutor's Office

As it concerns the Public Prosecutor competent for prosecuting environmental crimes, the general rules apply.

In particular, prosecution is exercised by the Public Prosecutor's Office (Articles 50 ff. CCP), a body of professional magistrates who has an independent status from the executive power and from any other power provided for by the Constitution.

The Public Prosecutor is a public office which acts in the collective interest. During the judicial investigations, the Public Prosecutor is, directly and continuously, in contact with the police, since he leads the investigations which are carried out by the judicial police. The public prosecutor is responsible for instituting criminal proceedings, regardless they are initiated *ex officio* or after a complaint (*querela*). As already mentioned, according to the "duty to prosecute", the public prosecutor is obliged to prosecute any offence for which sufficient evidence to support a trial exists. Therefore, when the preliminary investigation is completed, if no sufficient evidence exists, the prosecutor will request the judge to dismiss the case (*archiviazione*); in the opposite case, he will formulate the charge and request the judge to go to trial.

Practitioners (prosecutor,¹¹² judge¹¹³) note that there are some deficits concerning the enforcement of the national legal framework on environmental criminal law, which are due to the lack of resources and expertise on environmental crime. Practitioners (prosecutor¹¹⁴) recommend the creation, within the Public Prosecutor's Office, of a pool of experts on environmental crime, as well as the creation of databases.

Police

The Italian Police is composed of different national police forces. The main ones are the *Polizia di Stato* and the *Carabinieri*. The competences of the two police forces are similar. Both forces have duties and tasks in criminal investigations. Besides these two police forces, there are specialised forces such as the *Guardia di Finanza*, operating as financial police, and the *Corpo forestale dello Stato*.

The above mentioned police forces compose the *Polizia giudiziaria* (judicial police). According to Article 55 CCP, the members of the judicial police shall, also on their own initiative, acquire crime reports (*notizia di reato* or *notitia criminis*), prevent crimes from being brought to further consequences, search for their authors, take the steps necessary to secure the sources of evidence and gather anything else that may serve for the application of the criminal law. Moreover, they "shall conduct any investigation and activity requested or delegated by the judicial authority". The judicial police is competent to receive complaints, to acquire crime reports, to search for evidence and apprehend suspects. Following a *notitia criminis*, the judicial police must notify the public prosecutor of the facts and sources of proof without delay (Article 347 CCP).

The judicial police operates under the authority of the Public Prosecutor, and should be available at any moment to receive assignments regarding a case under investigation (Articles 59 and 327 CCP). The main task of the police is to discover and identify the sources of evidence.

Practitioners (prosecutor¹¹⁵) say that the most part of crime reports concerning environmental crimes is drafted by the judicial police.

According to Article 8, para. 4, of Law No. 349/1986 (Law on the institution of the Ministry of the Environment), for the prevention and repression of environmental offences, the Ministry of the Environment relies on the

¹¹² Interview with Italian prosecutor of 16 July 2014.

¹¹³ Interview with Italian judge of 2 September 2014.

¹¹⁴ Interview with Italian prosecutor of 16 July 2014.

¹¹⁵ Interview with Italian prosecutor of 16 July 2014.

Carabinieri for the protection of the Environment (*Comando Carabinieri per la Tutela dell'Ambiente*),¹¹⁶ which is placed under the functional dependence of the Ministry of the Environment, as well as on the *Corpo forestale dello Stato*, the special departments of the *Guardia di Finanza* and the *Capitanerie di porto* (coast guard).

In particular, the *Comando Carabinieri per la Tutela dell'Ambiente* is a branch of the *Carabinieri* police force, which carries out the typical functions of the judicial police in environmental matters (with the exception of scientific-technical assessment, which is carried out by other public bodies, e.g. the National Health Service).¹¹⁷ The main areas of intervention are: pollution of soil, water, air and noise pollution; the preservation of the natural heritage; the use of dangerous substances and activities presenting a high risk of major accident; strategic radioactive materials and other radioactive sources; protection from electric, magnetic and electromagnetic exposures; situations of uncontrolled spread of genetically modified organisms (GMOs). The *Comando* supports numerous requests for intervention which come, among others, from the Ministry of the Environment, the judicial authorities and the citizens.¹¹⁸

Practitioners (judge¹¹⁹) recommend investment in training of specialised police forces; in fact, investigations of environmental crimes are very complex, as they require specific technical knowledge normally lacking in the ordinary police forces.

NGOs

Environmental NGOs can participate as a *civil party* in criminal proceedings, according to general principles provided for by the Code of Criminal Procedure (Articles 74-89 CCP), although this participation is controversial: despite the fact that several Court decisions recognise the possibility for NGOs to take part in criminal proceedings¹²⁰, some scholars do not admit this possibility.¹²¹

In general, environmental NGOs can take part in procedures that govern the issue of environmental permits and file related objections; NGOs can also file a petition with the Public Prosecutor to start a criminal investigation.¹²²

Procedural provisions on organised crime

Due to the complexity of mafia-type organised crime and its roots in different Italian regions, in 1991 it was deemed necessary to assign the investigations on organised crime to a specialised pool, as this allows to perform investigations in a coordinated manner in order to avoid the shortcomings arising from a fragmented vision of the criminal phenomenon under consideration.¹²³

The District Anti-Mafia Directorates - DDAs (*Direzioni Distrettuali Antimafia*) and the National Anti-Mafia Directorate - DNA (*Direzione Nazionale Antimafia*) were created by Law Decree 20 November 1991, No. 367,

¹¹⁶ Originally, *Nucleo Operativo Ecologico dei Carabinieri*.

¹¹⁷ On the *Carabinieri per la tutela dell'ambiente*, see Vagliasindi, "Effective networking", para. 2.1.

¹¹⁸ See http://www.carabinieri.it/Internet/Cittadino/Informazioni/Tutela/Ambiente/02_Compiti.htm.

¹¹⁹ Interview with Italian judge of 2 September 2014.

¹²⁰ Court Cass., 25 May 2011, No. 25039, available at www.dirittoegiustizia.it; Court Cass., 16 June 2010, No. 33170, *Diritto e giurisprudenza agraria, alimentare e dell'ambiente* (2011): 422; Court Cass., 21 May 2008, No. 35393, in *C.E.D. Cass.*, No. 240788; Court Cass., 28 March 2007, No. 20681, *Cassazione penale* (2008): 2540; Court Cass., 7 April 2006, No. 33887, *Guida al diritto* 43 (2006), 82.

¹²¹ Serena Cinelli, "Sulla legittimazione a costituirsi parte civile delle associazioni ambientaliste", *Cassazione penale* (1995): 1934 ff.; Giuseppe Barone, "Ancora in tema di costituzione di parte civile dei soggetti collettivi", *Cassazione penale* (1993): 2649; Pasquale Landi, *La tutela processuale dell'ambiente* (Padova: Cedam, 1991), 99 ff.

¹²² Aristide Police, Q&A on Environmental Law in Italy, available at http://www.cliffordchance.com/briefings/2012/12/q_a_on_environmentallawinitaly.html.

¹²³ See Vagliasindi, "Effective networking", para. 2.2.

which was converted with amendments into Law 20 January 1992, No. 8. The DDAs are specialised units operating as part of the various prosecutorial offices throughout the country. The DNA has the task to coordinate investigations on organised crime.¹²⁴ For their investigations, the DNA and the DDAs make use of the *Direzione Investigativa Antimafia* (DIA), a specialised law enforcement body.¹²⁵ The provisions on DDA, DNA and DIA have been implemented in the “Code of Anti-Mafia Laws”, introduced by Legislative Decree 6 September 2011, No. 159 respectively in Article 102 (DDA), Article 103 (DNA) and Article 108 (DIA).

As already mentioned (see *supra*, 7) the felony of “organised activities for the illegal trafficking of waste” provided for in Article 260, Env. Code is classed as a crime with major social impact, referred to in Article 51, para. 3-*bis*, CCP, dealt with by the DDAs and DNA¹²⁶ and subject to the peculiar regulation provided for organised crime procedures, with specific rules as regards the secrecy of preliminary investigations, personal precautionary measures, exclusion of broadened plea bargaining, restrictions on the right to evidence and doubling of the period of limitation. The choice of including Article 260 Env. Code in the competence of the DDAs produced another very important consequence, namely the possibility of the immediate application of patrimonial measures of prevention against the person suspected of such a felony, even apart from the proof of the habitual reiteration of the illegal conduct.

Practitioners (police¹²⁷) highlight some problems of coordination between the attribution to the DDAs and the DNA of the competence to deal with the felony of Article 260 Env. Code, and other applicable procedural provisions.

Cooperation with other Institutions

Concerning the cooperation with EU States, the European Arrest Warrant (EAW) should be recalled, which is a judicial decision issued by a Member State with a view to arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. Member States shall execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States (Article 1).

Italy implemented the Framework Decision 2002/584/JHA by Law 22 April 2005, No. 69.¹²⁸

Article 8 of Law No. 69/2005 provides for cases of “mandatory surrender”, regardless the double criminality requirement when the accusation is punished either by a custodial sentence exceeding three years’ imprisonment or a custodial safety measure of a similar duration and falling within one of the categories of offence listed by the same Article; this Article describes, among others, the conduct of “endangering the environment through the unauthorised discharge of oil, waste oil or sludge arising from the purification of water, emission of harmful substances into the atmosphere, soil or water, treatment, transportation, storage, the elimination of dangerous waste, the discharge of waste into the soil or water and the management of an illegal landfill; detention, trade, capture of protected plant and animal species”. This provision does not coincide with the definition provided for in the list of Article 2, para 2, of the Framework Decision 2002/584/JHA which, with a more comprehensive phrasing, refers to “felonies and misdemeanours against the environment, including illegal trafficking in endangered animal species and endangered plant species and varieties”.

With regard to the EU instruments on judicial cooperation, Italy has not yet implemented most of the Framework Decisions on mutual recognition, nor the EU Convention of 29 May 2000 relating to judicial assistance in criminal matters between the Member States of the European Union. Thus, Italian judicial authorities use traditional mutual legal assistance instruments.

¹²⁴ See Vagliasindi, “Effective networking”, para. 2.2.2.

¹²⁵ See Vagliasindi, “Effective Networking”, para. 2.2.2.

¹²⁶ See Vagliasindi, “Effective networking”, para. 2.2.2.

¹²⁷ Interview with a member of N.O.E. of 8 July 2014.

¹²⁸ For a comment, see Mario Chiavario et al., *Il mandato di arresto europeo. Commento alla legge 22 aprile 2005 n. 69* (Torino: Giappichelli, 2006).

Italy has implemented the Council Decision 2002/187/JHA of 28 February 2002, setting up Eurojust with a view to reinforcing the fight against serious crime, by Law 14 March 2005, No. 41, and participates through its National Member in the activities of this EU Judicial Cooperation Unit.

Concerning police cooperation, Italy participates to relevant EU and International institutions, such as Europol and Interpol.

Italy is Party to several European Conventions of the Council of Europe, such as the European Convention on mutual assistance in criminal matters (Strasbourg, 20 April 1959), and to Bilateral or Multilateral Agreements which contain norms establishing specific procedures for judicial and police cooperation in criminal matters.

13 Administrative environmental offences: instruments

The expression “environmental administrative offences” refers to cases where non-compliance with environmental legal provisions is sanctioned by administrative penalties. In these cases, which generally concern less serious offences, the sanction is imposed by administrative authorities at the end of an administrative proceeding. Environmental administrative offences concern interests entrusted to the care of the public administration. Administrative sanctions do not cause the same consequences as a criminal penalty (for instance, there is no annotation in particular records).¹²⁹

Environmental administrative sanctions usually consist in the payment of a fine proportionate to the seriousness of the offence. If the law so provides, it is also possible to apply disqualification sanctions, such as the suspension or revocation of permits and closure of the industrial plant.¹³⁰

The fundamental principles of environmental administrative offences are provided for by Law No. 689/1981, which concerns administrative offences in general. According to Article 1, “no one can be subjected to an administrative sanction except by virtue of a law that was in force before the act was committed. The laws providing for administrative sanctions only apply in the cases and times considered” (legality principle). Therefore, only the ordinary laws of the State, legislative decrees and law decrees can introduce an administrative offence and sanction; however, unlike in criminal matters, the Italian literature and jurisprudence agree that the Regions can enact administrative offences in the sectors devoted to their competence by the Constitution¹³¹.

Article 5 of Law No. 689/1981 affirms that “when several persons contribute to an administrative violation, each of them shall be punished by the sanction provided for it”. It is a model of concurrent liability similar to criminal provisions on party to the offence (Article 110 CC)¹³².

Article 6 of Law No. 689/1981 foresees the joint responsibility of the person (e.g. the owner of things used to commit the offence) who has not committed the fact but is nevertheless obliged to pay an amount corresponding to the sanction applied; however, Article 6 allows this person to obtain the whole from the author of the offence.

As it concerns the *mens rea* of administrative offences, Article 3 of Law No. 689/1981 states that anyone is responsible for its own voluntary act or omission, whether it is intentional or negligent. If the violation is committed by a mistake of fact, the agent is not responsible if the error is not caused by his fault.

¹²⁹ For a detailed distinction between administrative and criminal offence, see Stefano Maglia, *Corso di legislazione ambientale* (Milano: Ipsoa, 2008), 38.

¹³⁰ According to a general classification model, administrative sanctions can be distinguished in major and additional, pecuniary and disqualification sanctions. See Stefania Pallotta, *Manuale delle sanzioni amministrative ambientali* (Santarcangelo di Romagna: Maggioli, 2011), 24.

¹³¹ Fiandaca and Musco, *Diritto Penale*, 864.

¹³² Fiandaca and Musco, *Diritto Penale*, 865.

Among the administrative offences in the sectors listed by EU Directive 2008/99/EC, it is worth mentioning Article 255 Env. Code, which punishes with a pecuniary administrative sanction from €300 to €3,000 whoever abandons or deposits waste or inserts it into surface water or groundwater, in violation of the prohibitions laid down in Articles 192, paras. 1 and 2, 226, para. 2, and 231, paras. 1 and 2, Env. Code. If the abandonment concerns dangerous waste, the administrative sanction is increased of up to double. If the author is the owner of an enterprise or the person in charge of an entity, criminal sanctions apply (Article 256, para. 2 Env. Code).

Moreover, administrative sanctions are provided for the un-correct or incomplete maintenance of registers of waste loading and dumping and of formularies concerning the transported waste (Article 258 Env. Code) as well as for non-compliance with certain law provisions in case of registration in the system for waste traceability control (SISTR).

Concerning air pollution, an administrative offence is set out in Article 279 Env. Code, which - in case of failure to communicate a not substantial modification concerning an installation - provides for an administrative pecuniary sanction of €1,000.

Concerning water pollution, Article 133 Env. Code states that “whoever, unless the act constitutes a crime, except for cases punishable under Article 29-*quattuordecies*, paras. 2 and 3, in a discharge exceeds the thresholds set out in the tables in Annex 5 to the part III of this decree, or the different thresholds set by the regions in accordance with Article 101, para. 2, or those set by the competent authority in accordance with Article 107, para. 1, or Article 108, para. 1, shall be punished with an administrative sanction from €3,000 to €30,000. If the failure to comply with the thresholds concerns discharges in areas of protection of water resources intended for human consumption referred to in Article 94, or in hydro-bodies placed in protected areas set out in the law, an administrative sanction of not less than €20,000 applies” (para. 1). Other administrative sanctions are set out concerning discharge of domestic water or drainage systems without permit, or with a suspended or revoked permit (para. 2) or failing to comply with the requirements indicated in the permit (para. 3).

Concerning administrative sanctions, practitioners (prosecutor¹³³) say that the system of administrative sanctions cannot be considered really effective; practitioners (judge¹³⁴) specify that monetary administrative sanctions are not effective in the fight against environmental offences, as the cost of the sanction is normally inferior to the profit of the offence. However, practitioners (prosecutor¹³⁵) say that the administrative authorities very rarely deal with the case themselves.

It is worth to recall that in Italy, Leg. Dec. No. 121/2011 extended to some listed environmental crimes, the system of “administrative liability” of legal persons and collective entities for crimes committed in their interest or to their benefit, as provided by Leg. Dec. No. 231/2001. As it was already mentioned, although this liability is formally qualified as “administrative”, it is considered to be substantially criminal by most of the scholars and by the courts (see *supra*, 9). For this reason, the issue is dealt above, within chapter 9 on liability of corporations and collective entities for environmental crimes.

14 The role of administrative authorities

Administrative sanctions are imposed by administrative authorities, at the end of an administrative proceeding, through an act named order-injunction (*ordinanza-ingiunzione*).¹³⁶

¹³³ Interview with Italian prosecutor of 16 July 2014.

¹³⁴ Interview with Italian judge of 2 September 2014.

¹³⁵ Interview with Italian prosecutor of 16 July 2014.

¹³⁶ See Pallotta, *Manuale delle sanzioni amministrative ambientali*, 23.

As it concerns the competent authority, Article 17, para. 5, of Law No. 689/1981 states that the competent office is that of the area where the infringement has been committed. However, specific rules are provided for by the Environmental Code. For instance, as it regards water protection, according to Article 135 Env. Code, in the field of administrative offences, administrative pecuniary sanctions are imposed, by an order-injunction, by the region or the autonomous province where the offence was committed, except for the penalties provided for by Article 133, para. 8, Env. Code for which the municipality (*Comune*) is competent, without prejudice to the powers assigned by the law to other public authorities. Therefore, the Regions cannot delegate to local authorities the competence to issue administrative sanctions in the water pollution sector; the reference to the “powers assigned by law to other public authorities” exclusively concerns national laws.

This said, it is worth to recall that Law No. 349/1986 established the Ministry of the Environment, currently named Minister of the Environment and of protection of the territory and sea (*Ministero dell’ambiente e della tutela del territorio e del mare*). The Minister of the Environment is the competent authority for the implementation of the environmental policy. Its competences encompass the protection of environment, ecosystem, marine heritage and hydrogeological heritage; it has tasks in the procedures concerning the environmental impact assessment as well as the strategic environmental assessment and the integrated environmental authorisation (the IPPC permit). It is also worth to mention that the Ministry of the Environment is the competent authority for the enforcement of the provisions on environmental liability; while this topic will be analysed in the following chapter (see below, 15), it is here worth to note that practitioners (administrative authority¹³⁷) stress the relevance of the circumstance that, although the Ministry of the Environment has competence for the whole national territory, it does not have local articulations and cannot therefore fully undertake controls on the territory.

Law Decree 4 December 1993, No. 496 (as converted into Law 21 January 1994, No. 61) established the Environmental Protection Agency (*Agenzia Nazionale per la protezione dell’ambiente*, ANPA), which in 2008 merged with other institutes to become the Institute for Environmental Protection and Research (*Istituto Superiore per la Protezione e la Ricerca Ambientale*, ISPRA). The task of ISPRA – which acts under the vigilance and policy guidance of the Ministry of the Environment - is to gather data, supervise compliance and provide technical support in setting environmental standards.

Among the authorities having a relevant role for the enforcement of environmental law (on the *Comando Carabinieri per la tutela dell’ambiente* see *supra*, 12) it is worth mentioning:

- *Guardia di Finanza*, which may carry out activities in the field of environmental protection when related to its tasks in financial matters. *Guardia di Finanza* is included, by Article 312 Env. Code, in the list of public bodies which can collaborate with the Ministry of the Environment in order to identify offenders and enforce environmental law;

- *Corpo Forestale dello Stato e delle Regioni a statuto speciale*, having the functions of environmental and forest police as well as those of judicial police, responsible for order, public security and civil protection, as stated by Law 6 February 2006, No. 36. The significant role of the *Corpo Forestale* in environmental protection is also confirmed by some provisions of the Environmental Code and by the Decree of the Ministry of Interior of 28 April 2006. The *Corpo Forestale* has competences in the prevention of environmental offences, in the water and soil protection, in the waste sector and landscape safeguard (especially in areas of agro-forestry interest), in the protection of forests as well as in the safeguard of flora and fauna biodiversity, in the monitoring of national and international protected natural areas, in agriculture and food security and in the monitoring and control of the territory.

- *Capitanerie di porto*, competent for the protection of the marine and coastal ecosystem, the surveillance of marine reserves and protected areas, the control on cross-border trafficking of waste by sea. In particular, according to Article 135 Env. Code, the organisation of the *Capitanerie di porto* “shall ensure supervision and

¹³⁷ Interview with administrative authority of 3 September 2014.

assessment of infringements referred to in Part III of this Code when the conduct can cause damage or endangerment to the marine and coastal environment”. Moreover, according to Article 195, para. 5, Env. Code, for the purposes of surveillance and detection of offences in violation of the legislation on waste as well as for the purpose of repression of illegal trafficking and disposal of waste, the competence is on the *Comando Carabinieri per la Tutela dell’Ambiente* and the *Capitanerie di porto*; the *Corpo Forestale* may also intervene and the *Guardia di Finanza* and *Polizia di Stato* can contribute.

It is worth mentioning that practitioners (judge¹³⁸) underline that ex-post enforcement prevails over ex-ante monitoring.

15 Implementation of the Environmental Liability Directive and links between environmental liability and responsibility for environmental crimes

15.1 Introduction

Before the implementation of Directive 2004/35/EC on environmental liability (hereinafter: ELD), two different sets of provisions concerning environmental liability already existed in the Italian legislation: general provisions on environmental damage (Article 18, Law No. 349/1986) and specific provisions on damage to soil or to groundwater (Article 17, Legislative Decree 5 February 1997, No. 22).

The ELD was originally implemented through Article 299 ff. Env. Code;¹³⁹ however, these provisions led to the opening of an infringement procedure (No. 2007/4679).¹⁴⁰ The process of implementation of the ELD was completed by the “2013 European Law” (Article 25, Law 6 August 2013, No. 97), which brought the original implementing provisions (already contained in the Environmental Code) into compliance with the European legislation.¹⁴¹

Both the above mentioned pre-existing rules, significantly amended, and the ELD implementing provisions are now contained in the Environmental Code: the general ones together with the rules which implemented the ELD

¹³⁸ Interview with Italian judge of 2 September 2014.

¹³⁹ Franco Giampietro (ed.), *La responsabilità per danno all’ambiente* (Milano: Giuffrè, 2006); Ugo Salanitro, *Il danno ambientale* (Roma: Aracne Editrice, 2009); Barbara Pozzo, “La direttiva 2004/35/CE e il suo recepimento in Italia”, *Rivista giuridica dell’ambiente* (2010): 70 ff.; Guido Alpa et al., *Rischio d’impresa e tutela dell’ambiente: precauzione, responsabilità, assicurazione* (Napoli: Edizioni scientifiche italiane, 2012), 225 ff.; Ida Nicotra and Ugo Salanitro (eds.), *Il danno ambientale tra prevenzione e riparazione* (Torino: Giappichelli, 2010); Alessandro D’Adda, Ida Nicotra and Ugo Salanitro (eds.), *Principi europei e illecito ambientale* (Torino: Giappichelli, 2013).

¹⁴⁰ Barbara Pozzo, “Note a margine delle recenti iniziative comunitarie in materia di responsabilità ambientale”, *Rivista quadrimestrale di diritto dell’ambiente* (2013): 94 ff.

¹⁴¹ Franco Bonelli, “Il risarcimento del danno all’ambiente dopo le modifiche del 2009 e del 2013 al T.U. 152/2006”, *Diritto del commercio internazionale* (2014): 3 ff.; Carlo Castronovo, “Danno all’ambiente rivisitato”, *Vita notarile* (2014): 1025 ff.; Ugo Salanitro, “La novella sulla responsabilità ambientale nella legge europea del 2013”, *Nuove leggi civili commentate* (2013): 1310 ff.; Franco Giampietro, “Danno ambientale e bonifica dopo la legge 97/2013”, *Ambiente e sviluppo* (2013): 973 ff.

(Article 311 ff. Env. Code); the special ones, in the part of the Code providing for the rules on waste management and site remediation (Article 239 ff. Env. Code).

The system of provisions is therefore quite articulated; each of the above mentioned sets of provisions will be briefly analysed.

15.2 ELD Implementing Provisions

As it concerns the ELD implementing provisions, the competent authority is the Ministry of the Environment, which uses its central departments for assessing the damage and taking action against the liable subjects; the Ministry uses governmental decentralised bodies (*Prefettura*) only to receive reports of damage.

The extent of the notion of “environmental damage” is broad, as it includes the damage to species and habitats protected by the national legislation as well as the damage to water in the territorial sea.¹⁴²

The operator can invoke the optional defences as well as the state of the art defence and the permit defence (Article 308 Env. Code).

The ELD implementing provisions, like the Italian linguistic version of ELD, state that the competent authority has a faculty (not a duty, nor a power) to carry out preventive and remedial measures (Articles 304, para. 3, and 305, para. 2, Env. Code).

It is not clear¹⁴³ whether the authority can claim all costs incurred even from those who only contributed to damage (jointly and severally liability).

The implementing rule on the limitation period is different from the ELD rule. In particular, under the Italian legislation the limitation period of five years for claiming the costs incurred does not start from the later date on which preventive or remedial measures were completed or the liable operator, or third party, was identified; in the national legislation there is a limitation period, “within which the authority should identify the liable person”, which starts from the date when the Ministry of the Environment anticipates the costs for the preventive or remedial measures (Article 304, para. 4, and Article 305, para. 3, Env. Code).

In addition, the ELD rule which allows the competent authority to obtain security over property or other appropriate guarantees for recovering the costs incurred, does not seem to have been implemented. However, the Italian legislation allows the Ministry of the Environment to require the liable persons to pay the amount of money needed to prevent or remedy environmental damage, before carrying out the measures (Article 311, para. 2, Env. Code): this is the most important national rule that fills a gap in the ELD system (see also below, 15.3).

15.3 General legislation on environmental liability

The scope of the general pre-existing provisions on environmental liability - already existing but amended at the time of implementation of the ELD - is wider than the ELD implementing rules, as the provisions at stake encompass not only the damage caused by the operator of an occupational activity (listed or not in the Annex III of the ELD), but also the damage caused by anyone.

Also in this case, the competent authority is the Ministry of the Environment, who can take legal action or issue an administrative order against the liable person (Article 311, para. 1, Env. Code).

If the damage is caused by an occupational activity listed in Annex III to the ELD, the operator is liable under the rule of strict liability and can use all defences provided for in the ELD (even the optional ones). Besides these

¹⁴² It should be noted that now Article 38 of Directive 2013/30/EU extends the ELD rules to the damage to water in the territorial sea caused by offshore oil and gas platforms.

¹⁴³ See Article 304, para. 4, and Article 305, para. 3, Env. Code; in the opposite direction, see Article 311, para. 3, Env. Code.

cases, the environmental damage - not only biodiversity damage - will be compensated by anyone who has caused such damage intentionally or negligently (Article 311, para. 2, Env. Code).¹⁴⁴

As already mentioned, the Ministry of the Environment can require the liable persons to pay a sum of money corresponding to the expected cost of preventive or remedial measures; these measures are the same as those set out in Annex II to ELD. When the Ministry of the Environment claims money before carrying out the measures, each person bears a proportionate share of liability in relation to his/her contribution to the damage (Article 311, para. 3, Env. Code).

In addition to the liable person, also the person in whose interest the liable person has adopted the unlawful behaviour or the person who has benefited from this behaviour may be requested to pay the expected cost of preventive and remedial measures: this rule provides for joint and several liability between the liable person and the other interested or benefited person (Article 313, para. 3, Env. Code). This rule seems to be interpreted as referring to the employer, even a legal person¹⁴⁵; in this perspective it therefore seems to somehow ‘complement’ those national provisions on liability of legal persons and collective entities for environmental crimes, which were enacted in the implementation of Article 6 of Directive 2008/99/EC. According to some authors, the same rule should be used, under certain conditions, against clients, parent companies or shareholders or lenders.¹⁴⁶

The statutory limitation period is five years after apprehending the news of damage; when the damage is caused by a criminal conduct, the limitation period is variable and related to the limitation periods in criminal law (Article 313, paras. 4 and 5, Env. Code).

15.4 Specific legislation on soil contamination

The pre-existing provisions (now in the Environmental Code) on soil and groundwater contamination do apply to damage caused by events or emissions which occurred before the entry into force of the Environmental Code.

The provisions at stake provide for an analytical procedure to find contamination and to assess the risks to human health; they also provide analytical procedure to approve and carry out remedial measures (Articles 240 and 242 Env. Code). This procedure is compatible with the ELD; nevertheless, the implementation of the ELD rules on request for action and on review procedures (Articles 12 and 13 ELD) is still missing.

Before the entry into force of the Environmental Code, the provisions on soil contamination stated that the liable person, obliged to remediation or to reimburse the costs of remediation, was under a strict liability rule; now, on the contrary, there is no explicit rule on the criteria of imputation of liability in this part of the Environmental Code, and on this issue there is a variety of opinions aiming at filling this gap.¹⁴⁷

¹⁴⁴ According to an opinion, with which the Report from the Italian Government to the European Commission of 25 July 2013, at page 8, agrees, the notion of environmental damage in the national rules is broad and includes the damage to any natural resource, such as air, landscape, habitat and species without protection, any land, all waters etc.: see Luca Prati, “Le criticità del danno ambientale: il confuso approccio del codice dell’ambiente”, *Danno e responsabilità* (2006): 1049 ff. According to a different opinion, more attentive to the wording of the law, the extent of environmental damage in the national rule is the same as in the ELD: see Ugo Salanitro, “Il risarcimento del danno ambientale tra vecchia e nuova disciplina”, *Rivista giuridica dell’ambiente* (2008): 939 ff.

¹⁴⁵ Salanitro, *Il danno ambientale*, 111.

¹⁴⁶ Salanitro, *Il danno ambientale*, 112 ff.

¹⁴⁷ According to the prevalent opinion, the liability is fault based: see TAR Milano 14 November 2013, No. 93; Pozzo, “La direttiva 2004/35/CE”, 70 ff. According to a different opinion, there is still a strict liability rule: see Marisa Meli, “Il principio ‘chi inquina paga’ nel codice dell’ambiente”, *Danno e responsabilità* (2009): 811 ff. According to a third opinion, aiming at assuring consistency with the statutes on environmental liability, there is a rule of strict liability when the damage is caused by a dangerous activity and there is a fault-based rule in any other case: see Ugo Salanitro, “Danno ambientale e bonifica tra norme comunitarie e codice dell’ambiente: i

The provisions on soil contamination also state that the owner of the contaminated soil is obliged to reimburse the costs of the clean up to the limit of the value of the land, if the authority cannot identify the liable person (Article 253 Env. Code).

15.5 Links between environmental liability and criminal liability

Concerning individual criminal liability, a criminal offence is provided for by Article 257 Env. Code (see *supra*, 5.3), punishing whoever causes the pollution of soil, subsoil, surface water or groundwater exceeding the risk concentration thresholds, if he does not perform the site remediation in accordance with the project approved by the competent authority under the procedure laid down in Articles 242 ff. In case of conviction or plea-bargaining, the conditional suspension of the sentence can be granted under condition of the execution of emergency operations, remediation and environmental restoration (para. 3). The compliance with projects approved under Articles 242 ff. Env. Code is a condition of non-punishment for environmental crimes provided by other laws for the same event as well as for the conduct of pollution referred to in Article 257 para. 1 (para. 4).

As it concerns the responsibility of legal persons and collective entities for environmental crimes, pursuant to Leg. Dec. No. 231/2001 - as modified by Leg. Dec. No. 121/2011 implementing Directive 2008/99/EC -, legal persons can be held responsible for the criminal offence provided for by Article 257 Env. Code when the physical person has committed this offence in the interest or to the benefit of the legal person or collective entity.¹⁴⁸

It should also be recalled (see 15.3) that the general provisions on environmental liability foresee the possibility of requesting the person in whose interest the liable person has adopted the unlawful behaviour - or the person who has benefited from this behaviour - to pay the expected cost of preventive and remedial measures. This rule seems to be interpreted as referring to the employer, even if a legal person; in this perspective it therefore seems to somehow ‘complement’ those national provisions on the liability of legal persons and collective entities for environmental crimes, which were enacted in the implementation of Article 6 of Directive 2008/99/EC.

It is also worth recalling (see 15.3) the rule on the limitation period, established by the general legislation on environmental liability: the statutory limitation period is five years after apprehending the news of damage; when the damage is caused by a criminal conduct, the limitation period is variable and related to the limitation periods in criminal law (Article 313, paras. 4 and 5, Env. Code).

As it regards the specific provisions implementing the ELD, no links to the damage or imminent threat of such damage covered by the ELD were found in the national criminal provisions.

Finally, it is worth pointing out the need to take into account the possible links between the notion of environmental damage under environmental liability rules and the criminal offence of “environmental disaster”, covered by the courts under Articles 434 (unnamed disaster) and 449 CC.

15.6 Evaluation

As to the question whether the transposing instruments of Directive 2004/35/EC on environmental liability did bring important changes to the national law or whether these changes have been only limited or symbolic, it is worth to recall that the preexisting provisions on environmental liability have been interpreted as rules with purposes of deterrence, because the regulation was based on unlawful conduct, fault and percentage split, and the

criteri di imputazione della responsabilità”, in *Rischio d’impresa e tutela dell’ambiente: precauzione, responsabilità, assicurazione*, ed. Guido Alpa et al. (Napoli: Edizioni scientifiche italiane, 2012), 225 ff.

¹⁴⁸ See *supra*, 9.

damage was considered punitive.¹⁴⁹ Despite this interpretation, case law admitted strict liability for dangerous activity and joint and several liability, directly applying tort law (Articles 2043, 2050, 2055 Civil Code).¹⁵⁰

With the implementation of the ELD, the strict liability rule for dangerous activity has been formally incorporated by the current national law on environmental liability. However, in the law in action it is not clear whether there is a joint and several liability rule, nor whether the extent of environmental damage is less broad than in the past.

By contrast, it seems certain that the new rule does not admit punitive damage, because it is restore-oriented: therefore, in trials which have started under the current statute, the tortfeasor shall bear a lower cost than those that were incurred under the pre-existing statutes, which, according to the interpretation of case law, admitted punitive damage.¹⁵¹

At a practical level, the changes are limited.

The most important change, also at a practical level, should be the increased efficiency of the rule that requires the tortfeasor, by an administrative order, to pay, in advance, the costs of the remedial measures. The pre-existing rules provided for less efficient solutions, as they required the anticipation of remedial costs (better, compensation for damage) to be issued by a court judgment, after a very long trial, or they foresaw the possibility of requiring, by an administrative order, the reimbursement of the site remediation costs already carried out by the authority (which usually did not have sufficient funding to anticipate costs).

At a practical level, the rule that extends liability to the benefited or interested person (usually an employer, even if a legal person) might not be seen as a decisive innovation, as a similar solution would have been reached by the application of the tort law general rule on “vicarious liability” (Article 2049 Civil Code). More relevant seems to be the rule that allow to hold the legal persons responsible for the crime under Article 257 Env. Code committed at their benefit, which, as already mentioned, was enacted in implementing directive 2008/99/EC on environmental crime.

16 Summary

Substantive environmental criminal law

Neither an unequivocal definition of “environment” nor a legal definition of “environmental crime” exist in the Italian legal order. The expression “environmental crime” refers to environmental offences punished by criminal sanctions. Most of them are misdemeanours (*contravvenzioni*), which fall outside of the Criminal Code and do not constitute an organic system of provisions, being the results of several interventions of the Italian legislator in different environment-related fields. The continuous enactment of new domestic and EU-source administrative legislation indirectly influences the legislation on environmental crime, as the latter is largely characterised by a dependence on administrative law; because of this stratification, and despite the creation of the so-called Environmental Code, the Italian legislation on environmental protection still partially lacks proper legal cohesion. In this regard, practitioners (prosecutor, police) note that one of the shortcomings of Italian legislation on environmental crime is that the relevant provisions are found in different acts (e.g. the Environmental Code, Criminal Code, Leg. Dec. No. 231/2001, etc.) and they also underline the excessive proliferation of norms in this field. Moreover, practitioners (judge) highlight the fact that the continuous normative changes in administrative

¹⁴⁹ Salanitro, “Il risarcimento del danno ambientale”, 939 ff.

¹⁵⁰ Court Cass., 1 September 1995, No. 9211 (Giustizia civile): 1996, 777 ff.

¹⁵¹ Court Cass., 22 March 2011, No. 6551, *Danno e responsabilità* (2011): 820 ff.; Alessandro D’Adda, “Danno ambientale e tecniche rimediali: le forme del risarcimento”, *Nuova giurisprudenza civile commentata* (2013): 407 ff.; Salvatore Patti, “La quantificazione del danno ambientale”, *La responsabilità civile* (2010): 485 ff.

environmental laws require a constant updating of knowledge on the part of the enforcement authorities, and this might negatively affect the enforcement of environmental criminal provisions.

As far as the structure of environmental crimes is concerned, most of these crimes are abstract endangerment offences that punish the performance of a given activity without the required authorisation, or those who exceed certain “thresholds” or fail to meet reporting requirements and other administrative duties. The choice of the legislator to use the model of abstract endangerment offence can be explained by taking into account the difficulties in the verification of the causal link between the conduct and the event of harm to the environment, difficulties that could lead to the inapplicability of the criminal legal provisions. According to some legal scholars, the dependency of criminal law on administrative law in the environmental field ensures a balance of the different interests involved by the administrative authority, which considers the environmental protection value as well as the economic production needs. Other scholars have criticised this model of environmental crime because of its non-compliance with fundamental principles of the Italian criminal law, such as the requirement of a clear and express definition of the offence by law, and the principle of offensiveness.

According to the literature, the choice not to qualify the most serious environmental offences as felonies (*delitti*) is considered as one of the causes of the ineffectiveness of environmental criminal law. In fact, significant structural effects accompany this legislative approach. The misdemeanour model implies modest sanctions, and results in a restriction of the imposition of criminal sanctions due to general rules e.g. on the statute of limitation, which negatively affects their deterrent effect. Also practitioners (judge) underline the fact that the misdemeanour nature of the vast majority of environmental crime negatively affects the enforcement of environmental criminal laws.

Even though the obligations established by Directive 2008/99/EC and Directive 2009/123/EC seemed to imply a substantial reform of Italian environmental criminal law, the legislation remained unchanged, except for the introduction into the Criminal Code of Article 727-*bis* and Article 733-*bis* and for the extension of the system of liability of legal persons and collective entities to (listed) environmental crimes.

Several proposals aiming to introduce a new Chapter into the Criminal Code, dealing specifically with environmental crimes, have been presented over the years. A recent draft bill, approved by the Chamber of Deputies and currently under discussion in the Senate, aims at introducing four new felonies into a new chapter of the Criminal Code: *pollution, environmental disaster, obstruction of controls, illegal transport and abandonment of radioactive materials*. Practitioners (judge) claim that the introduction of environmental felonies would produce a relevant added value in terms of increased effectiveness of environmental legislation and its enforcement.

Public servants' liability in relation to environmental crimes

In Italy, there are no specific provisions on the liability of public servants for environmental offences. However, general provisions on criminal liability of public servants may apply. In addition, liability of public servants might be affirmed according to the general principles (e.g., party to the offences, etc.).

Organised crime and environmental crime

The expression “organised crime” refers to the illegal acts committed by particular types of organisations or groups, defined as criminal organisations, which have a continuing criminal programme and a permanent organisational structure.

The Criminal Code provides for (among others) two main types of “association crimes” punishing the participation in a criminal organisation: the common-type criminal association, set out under Article 416 CC, and the “mafia-type” criminal association, set out under Article 416-*bis* CC and characterised by a particular “mafia-method”.

In Italy, mafia-type associations are increasingly involved in illegal activities which are highly dangerous to the environment. In 1994 Legambiente coined the term “ecomafia” which refers to the illegal activities of (usually mafia-type) criminal associations in the environmental field.

Practitioners (police) underline that, at present, environmental crime does not seem to play a key role among the provisions on organised crime and they recommend the introduction of a specific felony for organised environmental crime.

In this perspective, a relevant starting point is represented by Article 260 Env. Code, which punishes by imprisonment from one to six years “whoever, in order to achieve an unfair profit, with multiple operations and through the establishment of means and continuing organised activities, sells, receives, transports, exports, imports or otherwise improperly handles large quantities of waste”.

This felony was introduced into the Italian legal system in 2001, in order to tackle the links between illicit trafficking of waste and organised crime. Although the crime could be committed by one person able to manage large quantities of waste, the reference to the “establishment of means and continuing organised activities” seems to imply an organised structure where several persons are involved.

This criminal provision could represent a significant model also at European level, as shown in the European Parliament resolution of 25 October 2011 on organised crime in the European Union.

With regard to procedural provisions, it is worth mentioning that Article 260 Env. Code is classed as a crime with major social impact, referred to in Article 51, para. 3-*bis* CCP, dealt with by the District Anti-mafia Bureau and subject to the peculiar procedural regulation provided for organised crime. Practitioners (police) highlight some problems of coordination between the attribution to the DDA and the DNA of the competence to deal with the felony of Article 260 Env. Code, and other applicable procedural provisions.

Responsibility of corporations and collective entities for environmental crimes

Concerning the responsibility of corporations and collective entities for environmental crimes, Leg. Dec. No. 121/2011 extended to some listed environmental crimes, the system of “administrative liability” of legal persons and collective entities for crimes committed in their interest or to their benefit, established by Leg. Dec. No. 231/2001. Although expressly qualified as administrative by the legislator, such liability is considered as having a substantial criminal nature by most of the scholars as well as by the Courts.

As it regards the objective criteria for the attribution of responsibility, the collective entity will be held “administratively responsible” for environmental crimes listed in Article 25-*undecies*, Leg. Dec. No. 231/2001 if these crimes are committed in the interest or to the benefit of the collective entity by a person in a management position or by a person subject to the direction or supervision of the latter (Article 5). With respect to the subjective criteria of attribution of responsibility, the existence of a “guilty organisation” has to be established. The entity may obtain the exclusion of liability if it adopted and effectively implemented, prior to the commission of the offence, organisational models specifically designed to prevent the commission of crimes listed in Article 25-*undecies*.

It should be noted that, according to the principle of autonomy of the entity’s liability, this liability exists even if the offender has not been identified or is not eligible, or if the offence is ruled out for a reason other than amnesty.

Scholars and practitioners (judge) positively evaluate the introduction of the liability of corporations and collective entities for environmental crimes; however, they underline that relevant areas and/or relevant offences are still not included (air, waste abandonment and environmental disaster).

Procedural provisions on environmental crimes - actors and institutions mentioned in legal texts

The Italian procedure system is based on the accusatorial model. There is a clear-cut separation between pre-trial and trial proceedings and between the body responsible for investigating and prosecuting a crime and the body responsible for judging the case.

The “obligation to institute criminal proceedings” applies to environmental crimes, as to any other crime. According to this principle, the public prosecutor, who leads the investigations which are carried out by the judicial police, is obliged to prosecute any offence for which sufficient evidence exists.

Courts

In the first instance of trial, before the Tribunal or the Assises Court (which deals with the most serious felonies), three separate phases of procedure occur: the preliminary investigative phase, the preliminary hearing phase and the trial phase. The Court of Appeal reviews the decision of the Tribunal. The highest Court in Italy is the Court of Cassation, which has a competence limited to reviewing decisions on points of law and cannot judge on the merit.

Public Prosecutor’s Office

Concerning the Public prosecutor competent for prosecuting environmental crimes, the general rules apply. In particular, the prosecution is exercised by the Public Prosecutor’s Office (Articles 50 ff. CCP), a body of professional magistrates who has an independent status from the executive power and from any other power provided for by the Constitution.

Police

The Italian Police is composed of different police forces: the *Polizia di stato* and the *Carabinieri*, whose competences are similar; specialised forces, such as the *Guardia di finanza* operating as financial police, and the *Corpo forestale dello Stato*. These police forces compose the *Polizia giudiziaria* (Judicial police).

Institutions responsible for combating environmental crime are the *Comando Carabinieri per la Tutela dell’Ambiente* (Carabinieri for the protection of Environment), which is a branch of the *Carabinieri* police force, placed under the functional dependence of the Ministry of the Environment, as well as the *Corpo forestale dello Stato*, the special departments of the *Guardia di Finanza* and the *Capitanerie di porto*.

Administrative environmental offences and administrative authorities

In the Italian legal order, the expression “environmental administrative offences” refers to cases where non-compliance with environmental legal provisions is sanctioned by administrative penalties. In these cases, generally concerning less serious offences, the sanction is imposed by the competent administrative authority at the end of an administrative proceeding through an act named *ordinanza-ingiunzione* (order-injunction).

Environmental administrative sanctions usually consist in the payment of a fine proportionate to the seriousness of the offence; if the law so provides, it is also possible to apply disqualification sanctions, such as the suspension or revocation of permits and the closure of the industrial plant.

Practitioners (prosecutor) consider that the system of administrative sanctions cannot be considered really effective; practitioners (judge) specify that monetary administrative sanctions are not effective in the fight against environmental offences, as the cost of the sanction is normally inferior to the profit of the offence. However, practitioners (prosecutor) say that the administrative authorities very rarely deal with the case themselves. Practitioners (judge) stress that ex-post enforcement prevails on ex-ante monitoring.

Implementation of Environmental Liability Directive and environmental crime

Directive 2004/35/EC on environmental liability was originally implemented through Article 299 ff. Env. Code; however, these provisions led to the opening of an infringement procedure. The process of implementation of the ELD was completed by the “2013 European Law”, which brought the original implementing provisions into compliance with the European legislation.

As it concerns the question whether the transposing instruments of the ELD did bring important changes to national law, or whether these changes have only been limited or symbolic, it is necessary to recall that, before the implementation of the ELD, two different sets of provisions concerning environmental liability already existed in the Italian legislation: general provisions on environmental damage (Article 18, Law No. 349/1986) and specific provisions on damage to soil or to groundwater (Article 17, Leg. Decree No. 22/1997). Both the pre-existing rules, significantly amended, and the ELD implementing provisions are now contained in the Environmental Code.

The preexisting provisions on environmental damage have been interpreted as rules with purposes of deterrence, because the regulation was based on unlawful conduct, fault and percentage split, and the damage was considered punitive. Despite this interpretation, case law admitted strict liability for dangerous activity and joint and several liability, directly applying tort law.

With the implementation of the ELD, the strict liability rule for dangerous activity has been formally incorporated by the current national law on environmental liability. However, in the law in action it is not clear whether there is a joint and several liability rule, nor whether the extent of environmental damage is less broad than in the past. It seems certain that the new rule does not admit punitive damage, because it is restore-oriented: therefore, in trials which have started under the current statute, the tortfeasor shall bear a lower cost than those that were incurred under the pre-existing statutes, which, according to the interpretation of case law, admitted punitive damage.

At a practical level, the changes are limited. The most important change, also at a practical level, should be the increased efficiency of the rule that requires the tortfeasor, by an administrative order, to pay, in advance, the costs of the remedial measures. The pre-existing rules provided for less efficient solutions, as they required the anticipation of remedial costs (better, compensation for damage) to be issued by a court judgment, after a very long trial, or they foresaw the possibility of requiring, by an administrative order, the reimbursement of the site remediation costs already carried out by the authority (which usually did not have sufficient funding to anticipate costs).

Concerning the links between environmental liability and responsibility for environmental crime, it is worth mentioning the criminal offence provided for by Article 257 Env. Code, punishing whoever causes the pollution of soil, subsoil, surface water or groundwater exceeding the risk concentration thresholds, if he does not perform the site remediation in accordance with the project approved by the competent authority. As regards the responsibility of legal persons and collective entities for environmental crimes, pursuant to Leg. Dec. No. 231/2001 - as amended by Leg. Dec. No. 121/2011 implementing Directive 2008/99/EC -, legal persons can be held responsible for the criminal offence provided for by Article 257 Env. Code when the physical person has committed this offence in the interest or to the benefit of the legal person or collective entity.

As it concerns the specific provisions implementing the ELD, no links to the damage or imminent threat of such damage covered by the ELD were found in national criminal provisions.

It is worth pointing out the need to take into account the possible links between the notion of environmental damage under the environmental liability rules and the criminal offence of “environmental disaster”, covered by the courts under Articles 434 (unnamed disaster) and 449 CC.

Recommendations

Practitioners (police, prosecutor, judge, administrative authority) stress the fact that there are some deficits concerning both the regulatory level and the enforcement level for environmental crimes. They recommend:

Regulatory level:

- The introduction into the Criminal Code of a new Chapter, specifically dealing with environmental crimes (felonies);
- The introduction of a felony punishing whoever causes a damage to the environment, when he does not restore the damage which has been caused;
- The introduction of a specific felony on organised environmental crime;
- The introduction of a specific criminal provision on “environmental disaster”, committed intentionally or with negligence;
- To avoid the continuous modification of the relevant environmental administrative regulations;
- Enhancing the role of confiscation.

Enforcement level:

- A better application of the existing legislation on environmental crime;
- Enhancing the role of conservative seizure;
- The creation, within the Public Prosecutor’s Office, of a pool of experts on environmental crime, as well as the creation of databases;
- Investing in training of specialised police forces; in fact, investigations on environmental crimes are very complex, as they require a specific technical knowledge normally lacking in ordinary police forces;
- Enhancing training on environmental damage also in a civil law (tort law) perspective.

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