

COUNTRY REPORT: ITALY

New Italian Law on Environmental Criminal Offences

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2015 can be considered a year of change in the Italian legislative approach to environmental protection. It signifies a new approach to environmental offences through the introduction in the Criminal Code of section VI-bis about offences against the environment. This report aims to describe the penalty system and new criminal offences.

Directive 2008/99/EC on the Protection of the Environment through the Criminal Law

The European Parliament and Council adopted Directive 2008/99/EC¹ to achieve effective protection of the environment through more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air (including the stratosphere), soil, water, animals or plants (including to the conservation of species). The Directive arose out of concerns by the EU regarding the rise in environmental offences and their effects, which are increasingly extending beyond the borders of the States in which the offences are committed.

The Directive obliges Member States to provide for criminal penalties in their national legislation in respect of serious infringements of provisions of Community law on the protection of the environment. The European Commission adopted a proposal for a directive aiming to ensure the protection of the environment through criminal law because only this type of measure seems adequate, and dissuasive enough, to achieve proper implementation of environmental law.² At the same time, it was observed by the Commission that there are large differences between the Member States in the criminal sanctions applicable to

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¹ Directive 2008/99/EC of 19 November 2008, OJ, 6 December 2008, L 328, pp. 28-37. The European Commission in 2001 had already proposed a Directive on the protection of the environment through criminal law, based on Article 175 of the EC Treaty.

² COM (2007)51 final 2007/0022 (COD), Brussels, 9. February 2007.

environmental offences.³ Moreover, existing criminal sanctions are not sufficiently rigorous to ensure a high level of environmental protection throughout the Community.

From this perspective, Directive 2008/99/EC introduced minimum requirements to be implemented in national criminal laws. It identifies some unlawful actions, which can result in death or serious injury or serious damage to water, soil, air, animals and plants.⁴ In this respect, Article 3 provides that Member States shall ensure that the following conduct constitutes a criminal offence, when unlawful and committed intentionally, or with at least serious negligence:

- the discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water;
- the collection, transport, recovery or disposal of waste, including the supervision of such operations and the aftercare of disposal sites, and including action taken as a dealer or a broker (waste management);
- the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;
- the operation of a plant in which a dangerous activity is carried out or in which dangerous substances or preparations are stored or used and which, outside the plant;
- the production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances;
- the killing, destruction, possession or taking of specimens of protected wild fauna or flora species, 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;
- trading in specimens of protected wild fauna or flora species or parts or derivatives thereof, 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;
- any conduct which causes the significant deterioration of a habitat within a protected site;
- production, importation, exportation, placing on the market or use of ozone-depleting substances.

³ European Commission, *Environmental Crime*, <http://ec.europa.eu/environment/legal/crime/>.

⁴ C. Ruga Riva, *I nuovi ecoreati*, Torino, Giappichelli, 2015, 7.

Therefore, the EU has taken the view that administrative and civil penalties alone are ineffective in deterring wrongful behaviour and considered it appropriate to introduce more dissuasive criminal penalties in the Member States law.⁵ In this regard, Directive 2008/99/EC also provides, in Article 4, that Member States must provide criminal penalties for inciting, aiding and abetting an offence against the environment (listed in Article 3). The same Directive requires that Member States shall ensure that legal persons can be held liable for offences referred to in Articles 3 and 4 where such offences have been committed for their benefit by any person who has a leading position within the legal person, acting either individually or as part of an organ of the legal person (Article 6).

It is important to observe that Directive 2008/99/EC was adopted in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty establishing the European Community, whereby effective protection of the environment cannot be sufficiently achieved by the Member States and can be better achieved by the EU. This principle is very important where the EU is acting in an area such as criminal law or the rules of criminal procedure which do not fall within its exclusive competence. However, the European Court of Justice (CJEU) ruled that, although neither criminal law nor the rules of criminal procedure fall within the Community's competence, it does not prevent the Community legislature

when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective» (Case C-176/03).⁶

⁵ L. Ramacci, *Diritto penale dell'ambiente*, Piacenza, La Tribuna, 2015, 23.

⁶ *Impresa Portuale di Cagliari srl v. Tirrenia di Navigazione spa*, case no. C-176/03 of 23th March 2003. The Court of Justice confirmed that protection of the environment constitutes one of the essential objectives of the Community. The EU has the task of promoting a high level of protection and improvement of the quality of the environment and the Treaty on European Union provides for the establishment of a policy in the sphere of the environment (Article 3 TEU). On Directive 2008/99/EC see A. Gouritin, P. De Hert, *Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law: A new start for criminal law in the European Community?*, *Environmental Law Network International Review*, 1/09, 22.

Environmental Protection: Administrative and Criminal Penalties. The Example of Water Law

The Italian legal system provides administrative and criminal penalties for environmental offences.⁷

However, the provisions of the Italian legislation do not appear to be effective in the broader context but are constrained in that they apply specifically only to defined illegal cases. Providing for both criminal and administrative penalties is a good starting point for ensuring that the environment is protected. However, more needs to be done to ensure the effectiveness of these provisions. Undoubtedly, the difficulty of choosing the appropriate penalty also depends on the challenge of achieving the right balance between the protection of private economic interests (such as those connected with individual citizens and businesses) and the protection of public interests (such as those associated with sustainable development).⁸

Therefore, it is clear that the regulation of environmental damage liability must result from an assessment and the application of the best 'protection tools' with respect to environmental policy objectives.⁹

In this regard, Legislative Decree n.152/2006 (*Italian Code of Environment*)¹⁰ confirmed the previous general framework of penalties. Legislative Decree n. 152/06 provides administrative and criminal penalties with prevalence of the first kind. Thus, Legislative Decree n. 152/2006 provides the same penalties as the old Law n. 319/76 on water, based on administrative penalties for domestic waste-water and criminal penalties for industrial waste-water. The Legislative Decree provides administrative penalties especially for exceeded water discharge limits, the absence of a discharge license and the revocation or suspension of domestic waste-water license. Criminal penalties, instead, are provided for the absence of a waste-water license, waste-water not in conformity with the standards prescribed, violation of the prohibition of direct discharges of pollutants into groundwater, soil

⁷ Law n. 689 of 24 November 1981 generally regulates administrative penalties and it decriminalised some offences punished by fine in relevant sectors like environment, urban planning, food, etc.

⁸ P. Brambilla, Environmental penalties in Italy, in *Environmental Law Network International Review*, 1/09, 3: «The legislation in case – sporadic as it was – led to the creation within the Italian legal system of both administrative and criminal penalties which, with regard to criminal offences, overlap with a whole set of pre-constitutional legal provisions dating back to 1930 that only protected environmental assets directly».

⁹ F. Degl'Innocenti, I criteri di imputazione della responsabilità per danno ambientale, in *Contratto e impresa*, 2013, at 743, n. 3.

¹⁰ Legislative Decree No. 152/06 of 3 April 2006

and subsoil¹¹. The reading of the Legislative Decree shows that the boundary between administrative and criminal penalties is represented by the type of water discharge. Thus, administrative penalties are applied to domestic water discharge; criminal penalties are applied to industrial waste-water.

This system was influenced by the opinion that the command and control approach does not achieve efficient environmental protection. Nevertheless, the Italian legislator considers the penalty system an important instrument to ensure respect for the law and to achieve virtuous environmental behavior. In this respect, it is possible to identify two kinds of penalties in water law: Penalties to redress broken public interests and penalties to punish violations of law. Inside this general system, Italian legislators showed a preference for administrative penalties for two reasons: the influence of environmental regional law and the slowness of criminal trials. However, some scholars criticize this choice because criminal penalties should be used by judges to punish major violations and because Public Administration inefficiency could limit the effectiveness of administrative sanctions. Added to this, if public bodies infringe environmental law there is a risk that the controller and the controlled are one and the same.¹²

Given these problems, Legislative Decree n. 152/06 did not re-organise the penalty system. It can be argued that Italian legislators has still not managed to strike the right balance between command and control and economic instruments (like environmental tax, incentives, etc.) to realise a system of effective environmental protection. It cannot be ignored that for a long time the Italian legislator has disregarded EU directives by favouring administrative penalties over criminal ones with regard to the protection of the environment. This is because often the penalty is applied on the basis of administrative proceedings and not judicial proceedings and this results in a more effective and immediate penal sanction.¹³

¹¹ Article 130 of the Legislative Decree provides legal notices, with suspended or revoked permission, in case of water permission infringements. The aim is to enforce the penalty system by introducing measures that are able to have economic effects on companies. Indeed, sometimes administrative and criminal penalties are considered just like a cost element. Instead, suspension or revocation of the permission is a real deterrence because they do not allow the authorized exhaust to continue.

¹² The circumstance would apply to a company owned by a public body (e.g. Province or Municipality) that is found guilty of environmental crimes would have its penalty applied by the same public body. In addition an administrative penalty can be imposed by the Province to a Municipality with respect to a treatment plant of urban waste water that exceeds the prescribed parameters (Art. 133 of Legislative Decree n. 152/06).

¹³ P. Brambilla, *op. cit.*, 6.

The New Environmental Criminal Offences in 2015

Legislative Decree n. 68 of 22 May 2015 represented a change of course in the Italian penalty system. Indeed, it introduced new offences and stronger criminal penalties. Legislative Decree n. 68/2015 is the end of a long course characterised by different attempts to set down a law on environmental crimes.¹⁴ The Legislative Decree introduced section VI-*bis* into the Criminal Code (from article 452-bis to article 452-terdecies). It is entitled *Crimes against the environment*. It introduced four new crimes:

- *Environmental pollution* (art. 452-bis)¹⁵ for which the penalty is a jail sentence of 2 to 6 years and a fine between € 10.000 and € 100.000 imposed on anyone who causes damage to: water, air, soil, subsoil, ecosystem or biodiversity. This penalty can increase in the case of: i) perpetration of the crime in protected areas; ii) damages to protected animal and plant species; iii) pollution followed by death or bodily harm (art. 452-ter).
- *Environmental disaster* (art. 452-quater) for which the penalty is a jail sentence of 5 to 15 years. The article considers environmental disaster to mean: i) the irreversible damage of ecosystem; ii) damage to an ecosystem which requires exceptional interventions; iii) an offence against public safety caused by the extension of damage or the number of injured persons. The penalty can increase in the case of: i) perpetration of the crime in protected areas; ii) damage to protected animal and plant species.
- *Trafficking and neglect of highly radioactive material* (art. 452-sexies) for which the penalty is a jail sentence of 2 to 6 years and a fine between € 10.000 and € 80.000 for anyone, who, in violation of the law, sells, purchases, receives, transports, imports, exports, holds or transfers highly radioactive material.
- *Obstruction of checks* (art. 452-septies) carries a sentence of 6 months to 3 years in jail for anyone who prevents, hampers or disrupts environmental checks.

¹⁴ In this regard, in 1999 Italian Government proposed to add to the Criminal Code a new section entitled *Crimes against the environment*. Italian Government proposed again the bill on environmental crimes in 2007, after the introduction of the *Italian Code of Environment* (Legislative Decree n. 152/06). These attempts were followed by Legislative Decree n. 121/2011 (about the extension of administrative responsibility, arising from environmental crimes, to legal entities) and by *Land of Fires Decree* (passed into Italian law in February 2014). In this regard, C. Petteruti, Introduction Italy Environmental Law in 2013: The Waste Management Policy, *lucael EJournal*, 5, 2014, 247.

¹⁵ Article 452-bis refers to intentional environmental pollution. Article 452-quinquies provides the unintentional environmental pollution with penalties reduced between one third and two-thirds.

Also: *Failure to carry out remediation* (art. 452-terdecies) carries a sentence of 1 to 4 years in jail and a fine between € 20.000 and € 80.000 for failing to implementing required remediation.

These new crimes resolved some existing problems which had resulted from applying other provisions of the criminal code to environmental offences, in light of the absence of sufficient protection for the environment in the criminal law.¹⁶ For example, article 635 of the Criminal Code about criminal damage or article 674 about dangerous disposal of objects were relied upon in the past to sanction air or electromagnetic pollution. These legal provisions were introduced to address other types of crimes and were not well suited for use in the environmental context.

The new crime of 'environmental disaster' was also introduced to ensure effectiveness of environmental protection and remedy an existing lacuna in the criminal penalty system. It is the answer to the Constitutional Court which exhorted the Italian legislator in the past to introduce this particular type of environmental criminal offence. Indeed, before the new criminal law provisions, the protection against environmental disaster was realized through the 'unnamed disaster' (artt. 434 and 449 of Criminal Code) provision, a 'judicial formulation of criminal offence'. Although some scholars criticize this type of crime, the Constitutional Court, with sentence n. 327 of 1° August 2008, confirmed this type of criminal offence, as qualifying as an extraordinary event that causes serious damage to the life and health of an indeterminate number of people. At the same time, the Constitutional Court underlined the need for a particular type of criminal offence in relation to serious environmental damage.¹⁷

Legislative Decree n. 68/2015 introduced two other interesting articles; 452-decies and 452-duodecies that have remedial aims. Article 452-decies provides for a reduction of sentence in the case of a person who takes action to prevent further consequences of criminal conduct (rehabilitation of sites, restoration of the places, etc.). Article 452-duodecies introduces the obligation to recover and restore the condition of the premises in the event of a conviction or plea bargain.¹⁸ Along with these legislative provisions, the Criminal Code now

¹⁶ Legislative Decree n. 152/06 provides different hypothesis of environmental criminal offenses but all of the kinds contemplated are of an infringement nature. Nowadays Legislative Decree n. 68/2015 introduced criminal offenses for which there are prison sentences.

¹⁷ Article 452-quater refers to Article 434 allowing the application of general unnamed disaster whenever there are no conditions for environmental disaster.

¹⁸ Article 452-undecies provides for this.

provides, in terms of article 452-undecies, for specific confiscation¹⁹ of things which are the result, or profit of the environmental crime or which are used to commit the offence. The proceeds of confiscation should be made available to the public administration for the rehabilitation of sites.

There is no doubt that new environmental criminal offences represent a strengthening of environmental protection and a further guarantee of the effectiveness of sentences. However, only time will reveal the effectiveness of the new articles of the Criminal Code in protecting the environment. Some problems of interpretation and coordination of new dispositions will be overcome only through the work of the Courts which always contribute, for better or for worse, to the evolution of environmental law.

¹⁹ The article provides the possibility of confiscation for equivalent too.