

Criminal Enforcement of Environmental Law in the European Union

Michael Faure and Günter Heine

This book is the result of a project elaborated in cooperation between the IMPEL working group on criminal prosecution and METRO, with the goal of providing an insight into the systems and methods of criminal prosecution in environmental cases in practice. This book therefore provides an overview of criminal prosecution practice in environmental cases in Austria, Belgium, Denmark, Finland, Germany, Italy, the Netherlands, Portugal, Spain and the United Kingdom. It is based on the results of a comprehensive questionnaire that was answered by various experts in country reports. In addition, the book contains a detailed summary and comparison of the country reports. This provides not only a summary of the criminal prosecution of environmental law in the various countries, but also addresses differences and similarities in practice with respect to environmental criminal law. A critical analysis of the answers is also provided.

Both in the comparative overview and in the analysis, crucial issues with respect to the enforcement of environmental law are discussed, such as the criminal liability of corporations for environmental offences, the role of enforcing bodies and individuals in connection with environmental offences, the possibility of administrative or criminal penalties, the existence of instruments which prohibit individuals from carrying out similar activities, and the criminal liability for environmental offences by public servants and public authorities. Special attention is also given to transfrontier pollution incidents. In their concluding remarks, the editors of the book address the trend towards corporate criminal liability, discuss the difference between administrative and criminal enforcement of environmental law and also pay attention to current moves to achieve a European environmental criminal law.

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7. ITALY

Respondent: Mr. Mario Scaramella

1. Criminal liability of Corporations for Environmental Offences

- (a) No. Unlike other systems of criminal law, which contemplate the possibility of a criminal liability attached to statutorily defined persons, henceforth including corporations, the Italian system only admits criminal liability of physical persons. This is the constant interpretation offered by most Courts and commentators of article 27.1 in combination with article 27.3, Italian Constitution, a principle generally referred to as *societas delinquere non potest*. In cases in which criminal laws refer to the exercise of an economic activity on the part of a juridical person, criminal liability is reconducible to the person(s) acting as the legal representative(s) of the company.

- (b) Yes. (owners, governing directors and general managers, and in principle all legal representatives are always liable; other persons can be considered liable only if they have a specific mandate – responsibility for a certain duty).
- (c) A distinction must be drawn between environmental crimes that determine consequences of a penal or rather of an administrative nature. In the case of the latter it is in many instances irrelevant the presence of a subjective element: the simple occurrence of a polluting event gives way to the obligation to pay damages and restore pristine state. In all other cases liability must always be proven. Based on the governing principle of the responsibility of the legal representative, the environmental safety obligation rests with the persons identifiable as *ex lege* qualified to act on behalf of the company. In cases provided for by the law, these persons have to prove their '*diligentia*' in having adopted all the prevention measures to avoid the accident, thus assuming the burden of the proof. As to the transfer of the security obligation to other individuals that may have acted on behalf of the company or actually caused the pollution accident, its feasibility is governed by the institute of 'delegation', which is constantly undergoing review and clarification on the part of the jurisprudence. Thus far, and by way of a non exhaustive exemplification, it is possible to say that such delegation must be explicit and freely accepted by a subject who possesses both the necessary technical skills to carry out the tasks provided for and a real decision-making autonomy.
- (d) Companies can be condemned to indirect sanctions, such as fiscal and financial fines or the suspensions of activities. Companies can be also condemned to damages.
- (e) Companies are usually responsible for the most dangerous and massive environmental offences, thus rendering such inability a significative weakness of the legal system of protection of the environment. Being imposed to physical persons, penalties (for instance a fine) are measured according to the personal properties and not to the Company's ones. It must be noted though that special laws (such as the one on water pollution) provide also special penalties, such as the condemnation to damages, the restoration of the previous environmental conditions and so forth. Finally, being comminuted to physical persons, penalties 'extinguish' with the non imputability of the offender.
- ### 2. The role of enforcing bodies and individuals in connection with environmental offences
- (a) The trial procedure for environmental offences like for the other criminal offences under Italian law is divided in three consequential moments: 1) acknowledgement of crimes, 2) preliminary investigation about the suspected offences and 3) proper prosecution, including the official investigation and the trial. As far as this latter phase is concerned, the reformed Italian Code of Criminal Procedure (1991) identifies a magistrate, the Public Prosecutor (*Pubblico Ministero*), as the institutional body in charge. All police corps and administrative service with judicial police

qualification collaborate with the judiciary for the investigations on environmental crimes (for further details please refer back to the questionnaire submitted for the first WPG in Copenhagen).

- (b) The initiative for criminal prosecution rests with the Public Prosecutor, but individuals or recognized associations can inform the public authority of the occurrence of an environmental crime (*notitia criminis*). They can also, as damaged subjects, institute a civil action in the criminal procedure.
- (c) Yes, such permission is necessary to commence the prosecution.
- (d) They can inform the authority of the occurrence of events that may integrate an offence under criminal law. In a second moment, only recognized associations (ex. environmental associations or public institutions themselves) can intervene in the proceedings (art. 91 penal procedure code) with all the powers and rights typical of the person offended. They can sue for damages in a civil proceeding (art. 74, penal procedure code).
- (e) Please refer back to the answers to questions b and d.
- (f) Yes, both by helping out the public prosecutor in the gathering of information and by favouring his or her confrontation with the positions of civil society in these that can be at times highly sensitive topics.
- (g) The public prosecutor, according to Italian Criminal Procedure Code, is in charge of the direction of the investigation, the judicial police and all police corps and administrative services with judicial police qualification have the task to support him or her in the official investigation, and are obviously in charge of verifying the *notitia criminis* in the unofficial investigation that precedes. Amongst the environmental police corps we find: Polizia di Stato, which depends on the Minister of Interior, does not dispose of specific environmental offices but sometimes works on nature conservation if related to serious organized crime or if related to public security issue or health safety. Carabinieri, that depend on the Ministry of defence, dispose of an operational ecological unit (Nucleo Ecologico Operativo - NOE). The Guardia di Finanza, which depends on the Ministry of Finance, has worked in hundreds of environmental investigations related to their mandate in fiscal and financial matters, and are now in the process of developing a new role as environmental police experts. The Corpo Forestale dello Stato, depending on the Ministry of Agriculture and Forests, has assumed the role of environmental police with special expertise in fauna and flora protection and protection of national parks (more on this in the report on the first WPG).
- (h) The lack of a sufficient degree of public awareness on environmental issues in Italy results in a weak contribution of both enforcing bodies and civil society to a proper enforcement of environmental law.

3. Criminal penalties

- (a) There is a double system of sanctions: penal and administrative. The administrative ones consist in the payment of a fine that is proportioned to the gravity of the

offence; penal sanctions are imposed only for environmental crimes and consist in the arrest and in the payment of a certain amount of money. There is also another kind of sanctions, 'the complementary sanctions' such as the suspension of the activity. For all kind of offences (including crimes) the law provides for the obligation to pay for the environmental damage and the obligation to the restoration of the previous environmental situation (I. 349/86)

- (b) Administrative sanctions are those that found application most often. By way of an example as to their nature and entity we can cite the following:
 - Water pollution: opening of new water waste pipe without authorization: prison from 2 months to 2 years either alone or with a fine from approximately 300 ECU to 5,000 ECU. Offences in protected areas: prison up to 12 months and fine from approx. 110 ECU to 22,000 ECU. For further details on this topic, please refer back to our annex to the first Impel questionnaire in occasion of the working group in Copenhagen.
- (c) Imprisonment and fines of substantial amounts.
- (d) The discrimination in the application of the typology of sanctions is once again due to the weak public awareness as to the importance of a proper enforcement of the norms protecting the environment, as well as to the strength of the economic interests affected. In this perspective it is readily understandable how administrative sanctions of a limited entity are more easily comminuted, also in consideration of the more informal judicial iter that brings to their imposition.
- (e) Always and necessarily by the court or by the monocratic judicial authority (*Pretore*). In special circumstances, expressly provided for by the law, an injunction (*decreto esecutivo*) can be ordered by the public prosecutor (who is himself a magistrate). It should be noted that such an injunction, although carrying executive consequences, is not a criminal sanction.

4. Administrative Sanctions

- (a) Yes, administrative bodies can impose fines without any criminal proceeding.
- (b) No, they are administrative in the legislative definition of the illicit event, as well as in the nature of the judicial proceeding and the authoritative body to whose competence they are submitted.
- (c) The Italian law system, as already noted, does have two types of sanction of environmental offences. The first type, administrative or contraventional sanction, is generally comminuted for less serious offences; usually it is more immediate and damages the wealth of the offender. The second, carrying penal consequences, is provided of in the case of heavy offences. It can only be comminuted as the result of the completion of a full criminal proceeding and therefore requires much more time and formal complexity. Needless to say, given the disparity of the consequences for the offender, the relationship of criminal to administrative sanctions is one of major to minor, both in scale and deterrent effect.

- (d) Such fines are not frequently imposed, although more often than criminal ones.
- (e) It does not contribute to the significant extent that we all would hope for, because administrative fines are seldom concretely imposed, due to lack of controls in environmental law enforcement.

5. Existence of Instruments which Prohibit individuals from carrying out a similar activity

- (a) Yes. The entire system of Italian environmental legislation is based on the principle of responsibility towards the environment in the carrying out of an economic or other activity. Henceforth, several examples can be found of such provisions, invalidating licences or otherwise banning the continued exercise of a profession or of an activity in cases of environmental offences.
- (b) It can be both an administrative sanction and an accessory sanction to a criminal sentence.
- (c) The notice or other provision in case can be served by the Court, by the public prosecutor or by the competent administrative authority, depending on the nature of the offence and therefore of the sanction, as specified under c.
- (d) As already said, such notices are accessory sanctions of widespread provision and application. By way of an absolutely not exhaustive example, we can cite the suspension of the fishing licence and the interdiction from the exercise of maritime fishing comminuted to those who violate the normative on the protection of biological resources and maritime fishing.
- (e) Very frequently employed.
- (f) Although often used, these instruments do not always achieve satisfactory levels of effectiveness, mainly due, as correctly suggested in the question to the difficulty of tracking back the effective owner or referent of an economic activity.

6. Transfrontier pollution incidents

- (a) The Prosecutor office of Reggio Calabria, in agreement with other seven district prosecutors, investigated on the hypothesis of the sinking of about 80 ships, containing radioactive waste coming from different countries, in Italian and international waters. The person suspected is the Italian manager of a Swiss firm involved in army traffic and radioactive waste disposal at sea. The ships were identified on the bottom of the sea in different areas (up to the depth of 2,500 meters and the distance of 30 miles from the coasts) and the criminal evidence about the nuclear traffic was obtained by a strong co-operation with judicial police (Carabinieri), secret services (SISMI and SISDE) and international consultants (Special Research Monitoring Centre experts).
- (b) In our experience, the main problems faces are concerned with very little or no

assistance offered in support of the investigating and prosecuting magistrate, no enforcement on the part of Interpol and customs police authority, a lack of exercise of jurisdiction on the part of European Union organisms and institutions and, above all, an almost complete absence of collaboration in the exchange of confidential information at the international level.

- (c) Most definitely not. In the case described sub a), to bring one clear example, the captain and the shipowner of one of the sunk ships object of the investigation, both Greek citizens, took refuge in the territory of that State and did not make themselves available for collaboration with the investigation. No support was offered on the part of Greek authorities.

7. Criminal liability for environmental offences by public servants and public authorities

- (a) Yes, civil servants and public authorities are capable of being held criminally liable for environmental offences.
- (b) —
- (c) Besides criminal responsibility, civil servants have accounting responsibility for damages to the State.
- (d) Not in a way that would be auspicious, due to the scarcity of control of the law.

8. Miscellaneous

- (a) The administrative sanctions would in principle be more effective because of their direct application and because they damage the wealth of transgressor. Unfortunately, this effectiveness suffers for reasons exposed sub 4.e and 5.f.
- (b) A tolerance of minor breaches is definitely to be found sometimes due to the perceived impossibility to intervene in a very strict manner on a highly difficult and deteriorated territorial situation, sometimes with a more or less official collusion of public authorities.
- (c) No.
- (d) About the monitoring knowledge of crimes, the police often receives inputs to open a preliminary investigation by the intelligence services. The two main offices of intelligence for security and information are SISDE of the Ministry of Interiors and SISMI of the Minister of Defence. A call was recently directed to them by the President of the Government for a special effort in the new challenge of national and international security: environmental security issues, to testify of a new role for them in this field.

Brief information on the system of investigation and criminal prosecution of suspected environmental crimes (Structure of the national legal prosecution system)

Investigation Prosecution

Within the penal jurisdiction sphere, it is possible to identify different consequential moments of prosecution (*latu sensu*):

- 1) the acknowledgement of crimes;
- 2) the first investigation about a suspected offence;
- 3) the official investigation able to produce evidence for the judiciary and
- 4) the preliminary judgement. Following procedures regard the different levels of trial.

The new Italian criminal procedures code (1991) identifies in the role of the Public Prosecutor (a magistrate), the direction of the investigation, leaving to judicial police only the proceedings sub points 1 and 2 above mentioned (with the duty to inform the judiciary in 48 hours after the acquisition of the 'notitia criminis' and the task to support the Prosecutor in the following actions.

All the police corps and administrative services with 'judicial police' qualification are in charge for the investigation about environmental crimes. Few cases of cooperation between the corps, in environmental matters, are acknowledged. The most important police corps are the state police (Polizia di Stato), the military police (Carabinieri), the revenue military police (Guardia di Finanza), the foresters (Corpo Forestale dello Stato). These corps are legitimized by the 1991 Penal Procedure Code (artt. 55 and ss.) and by the Law n. 349.86 (institution of the Ministry of the Environment) to work as environmental police and to organize special units in charge for environmental issues.

The 'Polizia di Stato' (100,000 agents), which depends on the Minister of Interior, does not dispose of specific environmental offices but sometimes works on nature conservation if related to serious organized crime activities (for instance the confiscation of hundreds of billions of Italian lire was done in 1991 against Mafia patrimony in application of environmental laws) or if related to public security issues or health safety.

The 'Carabinieri' (112,000 agents), Ministry of Defence, dispose of an operational ecological unit (Nucleo Operativo Ecologico - NOE), the oldest in Europe together with the Spanish Gendarmeria ecological group, which is formed at present by 140 elements depending on the Minister of the Environment and which are related to the territorial structure of the corp (hundreds of offices, stations and special groups). In the last three years the NOE made 80,000 controls identifying 43,000 offences and 47,000 offenders (47 of which were arrested); real estates for 35 millions of ECU were sequestrated during 1,500 operations. The development of this body is confirmed by a special section involved in radioactive waste investigation and by the recent institution of NOE offices in each town. The new waste law (the so-called 'Decreto Ronchi' includes provisions (art. 20 cm. 5) which give to the NOE special and 'typified' functions of environmental police. It is then possible to identify the 'Carabinieri' as the main environmental investigation service.

The 'Guardia di Finanza' (66,000 agents), which depends on the Minister of Finance, worked in hundreds of environmental investigations, sometimes related to fiscal, treasury of financial inquires, and has created specialized units care of their naval and air services. The Corp has recently requested to the University of Naples the high

qualification in environmental police strategies of the Commanders in charge for the different judicial, naval and air services, so that they will be able on their turn to form their subordinates: in a few months also the revenue service will be in charge as an expert environmental police corp.

The 'Corpo Forestale dello Stato', Ministry of Agriculture and Forests, is the corp in charge for forest police at national level. After the institution of the Ministry of the Environment it changed tasks and aims, developing the role of environmental police with special expertise in fire investigations, fauna and flora protection (CITES Convention application included), protection of National Parks and much more.

A new National Environmental Agency (ANPA) and some regional agencies (ARPA) are in charge as environmental authorities and their role include functions of judicial and administrative police with special power and typified functions. In the next future these administrations will represent the operational instruments for 'full' investigations in environmental matters considering the availability in legislative enforcement and scientific analytical employment.

Other judicial police services involved at national or local level in environmental investigations are:

- the coast-guard, maritime authority in charge as coastal environmental police
- the zoophilous guards (Law 611.1913), which depends on the Society for the protection of animals and other voluntary guards which depends by environmental associations if authorized by the Ministry of the Interior
- the officers of the Ministry of Industries (Law RDL 2033.1925);
- guards authorized for the surveillance of public and private waters (Law RD 1604.1931)
- health officers (Law RDL 1265.1934)
- commanders of local and departmental bodies of the Armed Forces (art. 301 c.p.m.p.)
- fire brigade officers of the Ministry of Interior
- postal inspectors of the Ministry of Telecommunications (Law DPR 156.1973; DM 14.8.1943)
- fishing inspectors (Law DPR 747.1954)
- mine corp inspectors and engineers (Law DPR 128.1959)
- agriculture frauds inspectors (Law 1304.1961)
- custom services (DPR 43.1973)
- public works ministry officers (Law 64.1974)
- hunt officers (Law 157.92)
- national mineral office (Law 886.1979)
- municipal corps and guards (Law 65.1986)
- provincial services and guards (Law 133.1992)

(...)

DENOUNCER PARTIES

Citizens, private-law associations, grass roots movements, political parties, local and national administrations are typical denouncer and informer subjects which give to the criminal prosecution machine the starting input. A brief analysis conducted at

local level confirms that the main part of the investigations developed by the authorities above mentioned starts by local authorities and non-governmental organizations. Procedures initiated by municipalities are the most relevant part in statistics but sometimes they regard cases not well reported by media or not discussed at all (cases which seem not interesting for the community); cases reported by important NCO's and political parties (in Italy strictly related) are generally show-effects notices of illicit cases which obtain attention by the media and by the judiciary. It is necessary to underline the lack of participation in the judgement of NCO's and local authorities, for instance as civil parts or victims of environmental crimes (after the first years the special fund of the Environmental Ministry for legal expenses of the NCO involved in judgements was abolished because no money had been used!).

Police and administrative authorities (ministries, regions, provinces, municipalities, national parks, agencies and others) must inform as soon as possible the Judicial Public Prosecutor about suspected environmental crimes. The judge, when it is possible, confirms the police in the investigation under his control and provides for the acquisition of all the criminal evidences that will be discussed in front of a Preliminary Judgement Court and, if necessary, in front of the different jurisdiction.

PROSECUTORS AND COURTS

Environmental prosecutions at judicial level can involve different types of courts:

- An offence against water, soil, air, wildlife or natural beauties generally involves the 'single' judgement of the 'Pretore', a judge which can punish with penalties up to four years of prison and related fines (as sanctioned in the penal code for the different hypothesis); almost every municipality has a 'Pretore' which is part of a 'Pretura Circondariale', a provincial office which includes a Public Prosecution body (sometimes these prosecution offices have a specialized section working on environmental matters).
- Environmental crimes involving organized criminality or public officers and other serious illicit actions related to nature conservation are under the jurisdiction of a Tribunal which can punish the offender with sanctions up to 24 years of prison and related fines (as indicated in the penal code). Each province or 'important' town has a Tribunal which includes a Public Prosecutor office.
- Crimes punished by the law with imprisonment up to life sentence and related sanctions (for instance genocide related with environmental crimes) are a competence of special Courts 'de Assize ed Appello' which are present in the main town. A General Public Prosecutor Office, in charge for the prosecutions 'in Assize' and for the appeal judgements, is located by these Courts and is in charge for the coordination of the other prosecutors in the district.

Final appeals are possible by the 'Corte Suprema di Cassazione', located in the capital city, whose sentences are the most important under the legislative interpretation profiles and jurisprudence. A General Prosecutor by the Supreme court is the national coordinator of Public Prosecutors offices and policies.

No administrative courts in charge for criminal jurisdiction exist in environmental

matters (they exist for example for juvenile delinquency). There are some Courts which are able to punish with administrative sanctions some illicit cases identified by rules or administrative laws, for instance in water matters (Tribunale delle Acque).

COOPERATION BETWEEN ADMINISTRATIVE AND JUDICIAL BODIES

Cooperation between administrative bodies and judiciary often represents an important instrument for the application of the environmental law: some legal provisions enable the magistrates (including the prosecutors) to nominate individual consultants or to use adviser services of administrations. Cooperation between these administrations and the police is also possible and it is often used by the officers to support the enforcer with analysts and environmental experts.

If the advice is requested by the Prosecutor, this part of the investigation can only be used in the contradictory (judgements must be given after full agreement by both sides); if it is requested by the Court or by the Police in the immediateness of the crime (before the activation of the Prosecutor) it represents an evidence which can be used directly by the judge.

Prosecutors and Judges, in any moment of the prosecution, can request the administrations the production of relevant documents for the proceedings.