

# EU Environmental Enforcement

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The state of criminal environmental legislation and  
case law in Italy

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# *The Prosecutor General Office at the Italian Supreme Court and the environmental investigations*

The Office, with the help of the Prosecutor General's Offices of the Italian Court of Appeals, has the power of **surveillance** regarding the uniformed prosecution of all crimes by encouraging the prosecutorial offices to adopt **uniformed practices and shared protocols**.

In order to exercise such power in the environmental matters, in 2016 the Prosecutor General Office at the Italian Supreme Court promoted the ***Environmental Network of the Prosecutor General's Offices*** which:

- ❑ is **comprised** of all the Prosecutor General's Offices of the Italian Court of Appeals and is **coordinated** by the Prosecutor General Office at the Italian Supreme Court;
- ❑ is in charge of the **steady monitoring** of investigations relating to environmental offences, following a Memorandum of Understanding approved in May 2017.

# *The environmental crimes before the Directive 2008/99*

When the Directive 2008/99/EC was approved the Italian system was characterized by:

- **special environmental laws** (for example, concerning water, air and waste pollution, landscape or natural protected areas) with their own **autonomous offences** that safeguarded the Environment **principally punishing violations of administrative management regulations** (for example lack of permits, breach of rules and regulations, failure to provide compulsory information).
- The **lack of environmental offences in the Italian Criminal Code**. This lack has been **compensated** for by resorting to offences that were originally enacted for other purposes. Examples of these crimes are: **(1) disaster** which concerns any types of disruptive macroscopic events, that involves serious possible damage to the life or safety of people in a way that is difficult to define or assess, **(2) damage** to other people's property, or **(3) poisoning waters destined for human consumption** (this crime does not include the water pollution offences with a different destination).

# *Transposition of the Directive 2008/99/EC* (Legislative Decree No. 121 of 7 July 2011)

1. The Decree added in the Italian Criminal Code the following offences concerning the protection of biodiversity:

- “killing, capturing, taking, holding of specimens of protected **wild fauna or flora** species” (Art. 727-bis Criminal Code), transposing the provision under Article 3, letter f) of the Directive;
- “destruction or deterioration of **habitat** within a protected site” (Art. 733-bis Criminal Code) transposing the provision under Article 3, letter h) of the Directive.

Instead, the provision under Article 3 Letter g) in the Directive (“**trading** in specimens of protected wild fauna or flora species or parts or derivatives thereof”) was **already included** in the Italian criminal legislation.

2. According to Article 6 of the Directive, the Decree added these and other environmental offences to the list of crimes (see Legislative Decree, No. 231 of 8 June 2001) for which **legal persons can be held liable**.

# *Law No. 68 of 22 May 2015*

## 1. New Environmental Crimes in the Italian Criminal Code

The main new crimes introduced in 2015:

- ***Environmental pollution*** (Article 452-*bis* Criminal Code), sanctioning significant and measurable impairment or deterioration of: **(1)** water or air, or large or significant parts of the soil or subsoil; **or (2)** an eco-system, or biodiversity of flora or fauna, including agrarian biodiversity (ruled by the Law No. 194 of 1<sup>st</sup> December 2015);
- ***Environmental disaster*** (Article 452-*quater* Criminal Code), sanctioning: **1)** the irreversible disturbance of the balance of an eco-system; **or 2)** the reversible disturbance of the balance of an eco-system when the reparation of the damage is particularly costly or possible only with exceptional measures; **or 3)** the offence to public safety, relevant by extension and/or the number of people involved;
- ***Trafficking and abandonment of highly radioactive material*** (Art. 452-*sexies* Criminal Code);
- ***Impairment, hindrance or avoidance of activities of surveillance and control of the environment*** (Article 452-*septies* Criminal Code);
- ***Violation of the obligation*** – established **(1)** by the law, **(2)** by a judicial order or **(3)** by an order of a public authority – ***to clean-up the affected location, or to restore the Environment*** (Article 452-*terdecies* Criminal Code).

# *Law No. 68 of 22 May 2015*

## 2. New punishments

**Addition of these new crimes** to the list - that was established in 2011 – of the environmental offences for which **legal persons can be held liable**.

Provision, for **these new crimes and the crime of organized activities aiming at illegal waste trafficking** (Article 260 Environmental Code), of:

1. the **prohibition of negotiating** with the Public Administration as an additional sanction for the length of the imposed sentence;
2. **confiscation of instrumentalities** (in general **already possible** for all crimes) and confiscation (which is an **innovation** for environmental offences) of **proceeds** or **property the value of which corresponds** to such instrumentalities or proceeds. In Italy we are debating **whether cost savings** can be considered as proceeds in environmental crimes.

# *Law No. 68 of 22 May 2015*

## 3. Reward schemes

Addition of reward schemes in two cases:

- a **reduced sentence** for the new crimes introduced in 2015 if the defendant **(1)** takes immediate steps to lessen the damage caused or **(2)** restores the affected area to its original condition before the commencement of the trial;
- the possibility to **avoid the prosecution for minor offences provided for by the Environmental Code of 2006** (for example the violation of the conditions given under the authorisation) following the rules imposed by the control body and paying a sum of money.

# *The concept of “unlawful” conduct*

Several environmental crimes are punished if the conduct is “unlawful” (in compliance with the general clause provided for in Article 3 of the Directive 2008/99/EC).

The Italian Supreme Court (No. 46170/2016 and successive sentences conform) has followed a **broad definition** of unlawful conduct.

It has affirmed that this general clause does **not only** refer to cases where activities are “secretly” carried out, that is **when they don’t have the required authorisations**, but also when:

1. they are working with **expired or clearly unlawful permits**;
2. the authorisations **do not conform to the type of activity engaged in**;
3. the activities are **in breach (a)** of *State or Regional legislation*, or **(b)** of *administrative provisions*, or **(c)** are in *violation of the conditions given under the authorisation*.

Furthermore, unlawful conduct does not necessarily relate to the Environment, but to **any sector** referring to the management of activities, provided that **the breach is linked** to environmental damage or threat of such (for example, the violation of legislation concerning work safety which deals with risk factors or polluting agents).



## *The case of “sea cucumber” species*

The Supreme Court hasn't only strictly applied these principles to industrial pollution, but it has also applied them (sentence No. 18934/2017) to a case of “*holothuroidea*” fishing (i.e. an aquatic species known as “*sea cucumber*”).

- This species had been **completely uprooted from the sea bed**, which led to serious damage of the biodiversity in the Puglia sea area, as well as a serious and irreversible changes to the marine eco-system (investigations reported that there was a high increase in the fishing of these species which were later exported to the Asian markets, where the sea cucumbers are marketed for food, medical and cosmetic purposes).
- This activity was regarded as unlawful, **although there was no special ban on the fishing of this marine species** (the prohibition only concerned its marketing), since it was carried out by the means of *forbidden devices* and by *agents who lacked the necessary fishing permits*.

# *The broad notion of biodiversity*

The Supreme Court defined a broad notion of biodiversity including cases where **the species or the habitat were integrated as a result of man's action.**

This principle has been applied:

**1)** When a **farmed species** is introduced into the wild, if this species is assessed to live – even on a temporary basis - around the area in the wild (sentence No. 23085/2013).

**2)** When **artificial woodlands** are created by planting trees (sentence No. 30303/2014: *“the definition of criminally relevant woods for the protection of the environment takes no account of the natural or artificial origin of wooded areas, thus including both of them, and the only limit in its application is referred to trees that are exclusively devoted to wood production”*).

# *The criteria of penal protection of wild fauna or flora species*

The Supreme Court has not yet had the opportunity to clarify when the killing, destruction, possession or taking of specimens of protected wild fauna or flora species concern a **negligible quantity** of such specimens and have a **negligible impact** on the conservation status of the species (in this case the behaviours are **not crimes** as provided for under Article 3, letter f) of the Directive 2008/99/EC, transposed by Article 727-bis Criminal Code).

Legal scholars, on the basis of the conservation status of a species definition in Article 1, letter i) of the Council Directive 92/43/EEC, affirm:

1. the **protected interest** is the survival of the species (either animals or plants);
2. the **crime does not exist** if the conservation of the protected species is not at risk;
3. we must refer to **criteria** such as *gender*, *age* and *reproductive capacity* of an animal for the purposes of a **negative impact on the conservation** of a protected species;
4. therefore, we can speak of an offence even in the event of the killing, taking, etc ... of **just one (or a few) specimens**, *when a protected species is in danger of extinction*.

## *The criteria of penal protection of a natural habitat*

The Supreme Court has not yet had the opportunity to clarify when a behaviour causes the significant deterioration of a habitat within a protected site (this conduct is a crime as provided for under Article 3, letter h) of the Directive 2008/99/EC, transposed by Article 733-bis Criminal Code).

Legal scholars, on the basis of the conservation status of a natural habitat definition in Article 1, letter e) of the Directive 92/43/EEC, affirm:

1. needs to be considered the impact of the conduct on the ecological function represented by the habitat, more than on the quantity of habitat involved;
2. for example, it is possible to consider deteriorated the state of conservation of a forest where the birds of protected species nest, when many – but not all - the trees have been cut down and the birds, even in part, refuse to utilize this site as a place of rest and reproduction.

## *The consequences in criminal trials*

- It seems clear that the approach contained in the letters f) and h) of the Directive 2008/99/EC and the corresponding Italian rules leave **considerable uncertainty** in identifying the threshold for criminally relevant offences.
- By the way, a satisfactory assessment can only be made if we are aware with certainty of the **previous environmental site situations**, which must be accompanied by the collection of adequate proof that highlights the violations following the general principles of presenting evidence in criminal trials.
- Thus, it is **important for the administrative bodies** of management and control **be prepared to carefully monitor and document the state** of preservation of the species or the protected habitat, so that **sure elements of proof** relating to the impact of alleged unlawful conduct can be presented in criminal trials.