Must environmental criminal law always be dependent on administrative law? Assessing the opportunity for a limited number of offences being autonomous from administrative law

Andrea Di Landro
University of Central Sicily "Kore"
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The chapter intends to analyse the pluses and minuses of traditional environmental criminal law's dependence on administrative law. The two possible forms of integration between criminal and administrative law, *i.e.*, the so-called 'purely accessory' and 'partially accessory' models, are evaluated from a comparative perspective, while also considering the European Directive 2008/99/European Community (EC) on the protection of the environment through criminal law, and the new proposal for a Directive, replacing the previous one, put forward by the European Commission in December 2021. Followed by a reflection on the different model of environmental criminal law, autonomous from administrative law (also called the 'purely criminal' model: a model that should be associated with the purely accessory one and the partially accessory one).

Keywords: models of the environmental criminal law; eco-crimes; environmental criminal law's dependence on administrative law; purely accessory model; autonomy of environmental criminal law from administrative law; European Directive 2008/99/EC on environmental crimes; European Commission proposal (2021) for a new 'Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC'

1. Pluses and Minuses of an "Integrated" (Criminal-Administrative) Model of Environmental Protection. An Introduction

A wide ranging and highly debated question in the sphere of environmental criminal law is which techniques of protection are most suitable, in relation to administrative discipline.[1]

For a long time, reference has been made to the concept of "accessory criminal law", or "administrative criminal law" (*Verwaltungstrafrecht*: the concept has been examined in depth by German legal scholars) [2], in the sense that criminal law in this field lives in close and constant interaction with administrative

1 See M. Catenacci, *La tutela penale dell'ambiente. Contributo all'analisi delle norme a struttura 'sanzionatoria'*, Cedam, Padua, 1996, p. 53; A. Fiorella, *Ambiente e diritto penale in Italia*, in C. Zanghì (ed.), *Protection of the Environment and Criminal Law*, Cacucci, Bari, 1993, p. 232; C. Ruga Riva, *Diritto penale dell'ambiente*, Giappichelli, Turin, 2013, p. 13 ff.; C. Ruga Riva, *Parte generale*, in M. Pelissero (ed.), *Reati contro l'ambiente e il territorio. Trattato teorico-pratico di diritto penale*, Utet, Turin 2013, paras 5 and 8.1; C. Bernasconi, *Il reato ambientale. Tipicità, antigiuridicità, offensività, colpevolezza*, ETS, Pisa, 2008, p. 21 ff.; V. Plantamura, *Diritto penale e tutela dell'ambiente*, Cacucci, Bari, 2007, p. 107 ff.; A. L. Vergine, *Ambiente nel diritto penale (tutela dell')*, in *Digesto Discipline Penalistiche*, *IX*, *Appendix*, Utet, Turin, 1995, p. 757 ff.; in European doctrine, see especially the essays of M. G. Faure and G. Heine, and in particular S. F. Mandiberg & M. G. Faure, *A Graduated Punishment Approach to Environmental Crimes: Beyond Vindication of Administrative Authority in the United States and Europe*, in *Colum. J. Envtl. L.*, 2009, vol. 34, p. 447, and in *Lewis & Clark Law School Legal Research Paper Series*, 2008-21; M. G. Faure & M. Visser, *How to Punish Environmental Pollution? Some Reflections on Various Models of Criminalization of Environmental Harm*, in *Eur. J. Crime Crim. L. & Crim. Just.*, 1995, vol. 34, p. 316 ff.; G. Heine, *Elaboration of Norms and the Protection of the Environment*, in *Duke Envtl. L. & Pol'y Forum*, 1992, vol. 2, p. 106 ff. The reflections of the present paper have as their starting point the description of some categories of ecocrimes made by the author in *European Energy and Environmental Law Review*, 2022, p. 272, and in *La cittadinanza europea*, *II/rubriche*, 2022, p. 29.

2 See G. Heine, *Verwaltungsakzessorietdt des Umweltstrafrechts*, in *Neue Juristische Wochenschrift*, 1990, vol. 39, p. 2425; G. Heine, *Zur Rolle des Strafrechtlichen Umweltschutzes*, in *Zeitschrift Fur Die Gesamte Strafrechtswissenschaften*, 1989, p. 722; G. Heine, *Aspekte des Umweltstrafrechts im internationalen Vergleich*, in *Goltdammer's Archiv Fur Strafrecht*, 1986, p. 88; W. Winkelbauer, *Zur Verwaltungsakzessorietat Des Umweltstrafrechts*, Duncker & Humblot, Berlin, 1985.

provisions, adopted at various levels of government: from administrative acts to state regulations, to regional ones, and ending with municipal ones.

The reasons for this traditional and consolidated model of administrative dependence of environmental criminal law are well known.[3]

The first reason (as regards in particular to Continental law systems) is of a historical nature. Environmental criminal law developed as complementary, *extra-codicem* legislation, whereby the permeation between criminal and administrative norms became physiologically more marked.

The second reason is of a criminal policy nature and is connected to the legal interests involved in environmental law. This area of law lives by its nature in the constant, decisive need to balance the protection of environmental assets (understood in a broad sense, also in reference, *e.g.*, to the landscape) with other interests, even constitutionally relevant, such as private economic initiative, employment, the national development policy, the right to housing (if you think of the construction sector), *etc.* Assuming that the prevalence of one interest over the others cannot be determined *a priori* and theoretically, the managing and solving of potential conflicts is left to authorities endowed with the technical qualifications necessary to carry out specific evaluations and checks;[4] according to an "integrated" criminal-administrative protection model, so called in contrast to a "pure criminal" protection technique, in which the conflict between opposing interests seems to be more easily resolved, in the sense of the prevalence of a given interest (the environment, the habitat, the landscape) over the others.[5]

With this in mind, the advantages of the integrated (administrative-criminal) model, instead of the "purely criminal" model of environmental protection, would be appreciated in terms of providing more effective prevention, before arriving at levels of repression; while also allowing a more flexible and timely management of the conflict between the various interests at stake in the area at issue, a management aimed at individual, concrete situations.[6]

In principle, the integrated administrative-criminal model also offers the advantage of guaranteeing an easier orientation for the operators. The administrative authority is considered, with respect to the judge, a subject with greater

3 See Bernasconi, *supra* n. 1, p. 21.

4 See M. G. Faure, *The Revolution in Environmental Crime in Europe*, in *Va. Envtl. L. J.*, 2017, vol. 35 p. 333 f.; Bernasconi, *supra* n. 1, p. 23.

5 For this modelling, see D. Pulitanò, *La formulazione delle fattispecie di reato: oggetti e tecniche*, in CRS (ed.), *Beni e tecniche della tutela penale*, Franco Angeli, Milan, 1987, p. 37; of a "compositional" nature of the protection technique in the environmental field speaks Bernasconi, *supra* n. 1, p. 22; cf. G. Fiandaca & U. Tessitore, *Diritto penale e tutela dell'ambiente*, in G. Neppi Modona et al. (eds), *Materiali per una riforma del sistema penale*, Franco Angeli, Milan, 1984, p. 36 ff.; G. Insolera, *Modello penalistico puro per la tutela dell'ambiente*, in *Dir. pen. proc.*, 1997, p. 737; S. Panagia, *La tutela dell'ambiente naturale nel diritto penale dell'impresa*, Cedam, Padua, 1993, p. 2 ff.

6 Fiandaca & Tessitore, *supra* n. 5, p. 54; Bernasconi, *supra* n. 1, p. 26.

cognitive resources, or in any case able to more easily draw on the technical-scientific information most relevant in this area.[7] And, above all, setting generally valid *ex ante* standards (*e.g.*, about emissions), that provides the operators with precise parameters with which to adapt their activities; with beneficial effects in terms of the certainty of precepts.

The disadvantages can instead be firstly grasped on the level of a proliferation of legal sources, especially in legal systems where constitutional provisions require that criminal matters only be governed by Parliament, as the criminal precept in environmental law is often integrated by non-state or subordinate sources of law. Think of the numerous references made by environmental crimes to ministerial decrees, containing threshold values, technical standards, or classifications of certain substances, *e.g.*, as by-product rather than waste.[8] Are they purely specific additions of a technical nature (allowed e.g., by the Italian Constitutional Court[9])? Or do such forms integration veil evaluations of a political nature regarding the balance of environmental and productive interests, evaluations that should rather be remitted to Parliament?[10]

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7 In the most advanced international literature, see M. G. Faure, *Environmental Crimes*, in N. Garoupa (ed.), *Criminal Law and Economics*, 2009, p. 327; on the relationship between judge and legislator, in the field of environmental criminal law, cf. M. G. Faure, *The Implementation of the Environmental Crime Directives in Europe*, in J. Gerardu et al. (eds), *Ninth International Conference on Environmental Compliance and Enforcement (INECE)*, INECE, Washington, 2011, p. 365.

8 On this issue, see A. Di Landro, *Rifiuti, sottoprodotti e "fine del rifiuto" (*end of waste*): una storia ancora da (ri-)scrivere?*, in *Riv. trim. dir. pen. econ.*, 2014, vol. 27, p. 913 ff.

9 On the unfoundedness of a question of legitimacy pursuant to Art. 25 (2) of the Italian Constitution, in the field of drugs, see Constitutional Court, n. 333/1991, in, www.giurcost.org, 1991: "The discretion of the primary legislator was exercised at the time, between the various possible solutions, the legislator opted for the criterion of the average daily dose, as dividing line between criminally and non-criminally sanctioned detention. As the threshold of punishment is so defined, the type of offence is sufficiently described in its essential elements and, beyond this policy option, only a technical determination remains, based on notions of toxicology, pharmacology and health statistics, but not also a choice of criminal policy (so much so that the penal precept could exist autonomously, even without the integration of the ministerial decree […]). It is therefore this technical knowledge that fixes in sufficiently defined terms the coordinates of the integration submitted to the Minister of Health, which is therefore required to exercise only technical discretion: the updates indeed are possible only in the case of 'evolution of knowledge of the sector' (and not of tightening or loosening of the repression of the trafficking). With this in mind, the criterion indicated in *sub* c) of the first paragraph of art. 78 – according to which 'the maximum quantitative limits must be established in relation to the active ingredient for the average daily doses' – appears to bind, in a way sufficiently adequate to the current state of the aforementioned knowledge, the determination of the Minister of Health, to whom the law does not allow any evaluation in terms of prevention or repression, that is, aimed at integrating the choice of criminal policy that only primary legislation can operate".

10 On the problem of the proliferation of the legal sources, especially in the legal systems where constitutional provisions require that criminal matter only be governed by Parliament, and on the problem, in those legal systems, of distinguishing the "technical" and "political"

A possible way out of the problematic and thorny coexistence between principles of criminal law reserved to Parliament and secondary, not exclusively "technical" or regulatory sources, is to introduce relevant shares of democratic legitimacy through the formation process of secondary regulatory rules, on the basis of the general principle of participation for collaborative purposes in the environmental field (principle originating from International and European Law[11]).

The article aims to examine the advantages and disadvantages of the traditional model of the so-called "dependence" of environmental criminal law on administrative law. The two possible forms of integration between criminal and administrative law, *i.e.*, the "purely accessory" and "partially accessory" models, will be analysed from a comparative perspective, while also considering the European Directive 2008/99 on the protection of the environment through criminal law, and the new proposal for a Directive, replacing the previous one, put forward by the European Commission in December 2021. Followed by a reflection on the different model of environmental criminal law, autonomous from administrative law (also called the "purely criminal" model: a model that should be associated with the "purely accessory" and "partially accessory" ones). We will look where these three different types of eco-crimes can be found in legislations of EU Member States, EU, England and Wales; and a critical analysis will be carried out.

2. The Purely Accessory Model as the First Possible Form of Integration Between Criminal and Administrative Law: Examples from the German Law

At this point, it seems useful to introduce a bifurcation between two different integrated protection sub-models corresponding, respectively, to the so-called "purely accessory" (or "purely sanctioning") model on the one hand and the "partially accessory" (or "partially sanctioning") one on the other.

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evaluations, the first ones that can be remitted to non-state or subordinate legal sources, the latter to be governed by the Parliament, see M. Catenacci, *I reati in materia di ambiente*, in A. Fiorella (ed.), *Questioni fondamentali della parte speciale del diritto penale*, Giappichelli, Turin, 2013, p. 368; F. Giunta, *Ideologie punitive e tecniche di normazione nel diritto penale dell'ambiente*, in *Riv. trim. dir. pen. econ.*, 2022, vol. 15, p. 852; A. Manna, *Struttura e funzione dell'illecito penale ambientale. Le caratteristiche della normativa sovranazionale*, in *Giur. mer.*, 2004, vol. 36, p. 2172; Ruga Riva, *Diritto penale dell'ambiente*, *supra* n. 1, p. 42 ff.; Plantamura, *supra* n. 1, p. 151 ff.

11 Provided for by Århus Convention (1998), on *Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, and by Directive 2003/35/EC, *Providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment*.

In "purely accessory" model, the criminal discipline represents the mere sanctioning appendix of precepts and procedures belonging to other fields of the legal system, in our case administrative law at both national and local level. A typical "formal" criminal law,[12] which consists in the punishment of mere "disobedience",[13] regardless of any connection to an event of damage or danger to environmental interests.[14]

It is the most criticized technique of environmental criminal law protection, precisely because of the excessive dependence on extra-criminal legal sources,[15] as regards:

(1) A protection of administrative functions, rather than environmental assets[16];
(2) A protection inherent to the very ineffective form of the environmental misdemeanor:[17] where it is difficult to accumulate evidence (minor crimes usually do not allow probative instruments like wiretapping), and easy to cancel out the crime (through statute barred and bail);
(3) A protection potentially in conflict with the principle of offensiveness, or harm to others: it risks punishing facts that are not conform to the norms, but are harmless;[18]
(4) An incomplete protection: it risks not punishing facts that are conform to the administrative norms, but are offensive to environmental interests.[19]

For legal systems in which criminal law is reserved solely to the Parliament, the purely accessory model is the one that is exposed to major objections: the integration of the criminal law by external, administrative sources, indeed, does not concern detailed aspects, but sometimes the most significant elements of the offence,[20] from a structural and/or value oriented point of view. The penal precept in these cases does not receive "its entire enunciation with the imposition

12 See F. Giunta, *Tutela dell'ambiente (diritto penale)*, in *Enc. dir., Annals, II, tome 2*, Giuffrè, Milan, 2008, p. 1154.

13 See P. Patrono, *I reati in materia di ambiente*, in *Riv. trim. dir. pen. econ.*, 2000, vol. 13, p. 680 ff.

14 See Bernasconi, *supra* n. 1, p. 29.

15 See Plantamura,*supra* n. 1, p. 146 ff.; for more recent criticisms of the "sanctioning model", see A. L. Vergine, *I nuovi delitti ambientali: a proposito del d.d.l. n. 1345/2014*, in *Amb. & Svil.*, 2014, vol. 24, p. 445; G. Amendola, *Il d.d.l. sui delitti ambientali oggi all'esame del Parlamento: spunti di riflessione*, report presented to the Italian Senate and published on *www.lexambiente.it*, 2014.

16 See Faure, *supra* n. 4, p. 329 f.; F. Giunta, *Il diritto penale dell'ambiente in Italia: tutela di beni o tutela di funzioni?*, in *Riv. it. dir. proc. pen.*, 1997, p. 1112.

17 See Ruga Riva, *Diritto penale dell'ambiente*, *supra* n. 1, p. 20 ff.

18 With reference to abstract endangerment crimes, see Mandiberg & Faure, *supra* n. 1, p. 8 ff., para. II A (draft); Faure & Visser, *supra* n. 1, p. 325; Patrono, *supra* n. 13; about the threshold limits in criminal law, F. D'Alessandro, *Pericolo astratto e limiti-soglia. Le promesse non mantenute del diritto penale*, Giuffrè, Milan, 2012, p. 255 ff.

19 See Mandiberg & Faure, *supra* n. 1, p. 8, para. II A; Faure & Visser, *supra* n. 1, p. 325; Patrono, *supra* n. 13, p. 679.

20 For a critique of abstract endangerment offences from the point of view of the principle of legality, see Faure & Visser, *supra* n. 1, p. 322 f.

of the ban"[21]: requirements, characteristics, content and limits of subordinate acts determined as essential for the type of offence are not indicated by the primary law. Think of the type of offence built on the overcoming of threshold limits (regarding discharges, the introduction of chemical substances, electromagnetic wave emission, *etc.*), centred on non-compliance with parameters intended to be specified or modified by the determinations of administrative bodies, or ministerial decrees, permeated with evaluations apparently more political than technical.

The purely accessory model of criminal protection of the environment, despite the limits just highlighted, is still widespread in many countries, in complementary *extra-codicem* legislations as well as in the codes.

We will analyse below some examples of ecocrimes purely accessory to administrative law, taken from German law. We will try to verify what has been said above in general, and will formulate some first conclusions as to whether environmental offences structured in terms purely ancillary to administrative law should be retained in modern criminal law systems.

2.1. Germany (some types of purely accessory offences)

The German Criminal Code in section 327 contemplates various conducts of unauthorized operation of facilities, and in particular in subsection I, punishes with imprisonment for a term not exceeding five years or a fine:

> "Whoever
> 1. Operates a nuclear facility, possesses an operational or decommissioned nuclear facility or in whole or in part dismantles such a facility or substantially modifies its operation or
> 2. Substantially modifies a plant in which nuclear fuels are used or its location without the required permit or contrary to an enforceable prohibition."
> And in subsection II with the slighter penalty of imprisonment for a term not exceeding three years, or a fine:
>
> "Whoever operates
> 1. A facility that requires a permit or any other facility within the meaning of the Emission Control Act (*Immissionsschutzgesetz*) whose operation has been prohibited in order to protect against hazards
> 2. A pipeline facility for the transportation of water-polluting substances within the meaning of the Environmental Impact Analysis Act (*Gesetz über die Umweltverträglichkeitsprüfung*) that requires a permit

21 According *e.g.*, to the teachings of the Italian Constitutional: Italian Constitutional Court, sentence no. 282/1990, *cit.*, as well as previously Italian Constitutional Court, no. 26/1966, in *Giur. cost.*, 1966, p. 255 ff.; and Italian Constitutional Court, n. 168/1971, *ibid.*, 1971, p. 1774, with note of A. Pace.

> 3. A waste disposal facility within the meaning of the Closed Substance Cycle Act (*Kreislaufwirtschaftsgesetz*) or
> 4. A sewage treatment facility under section 60(3) of the Federal Water Act (*Wasserhaushaltsgesetz*) without a permit or the planning approval required under the relevant statute or contrary to an enforceable prohibition based on the relevant legislation."

In the pure sanctioning model, the pivot of the crime structure is towards the unlawfulness of the conduct: unlawfulness that may arise from the violation of the conditions imposed by laws, regulations, statutes, or by the permit itself, as well as the absence of necessary permits or authorizations.

2.2. First Conclusions on Crimes Purely Accessory to Administrative Law

The analysis seems to confirm the critical aspects of the excessive dependence on extra-criminal legal sources, which is characteristic of crimes purely accessory to administrative law: they appear to protect administrative functions, rather than environmental assets; they risk punishing facts that are not conform to the administrative norms, but are harmless; and the protection they offer appears incomplete, as they risk not punishing facts that are conform to the administrative norms, but are offensive to environmental interests.

The presence of these critical aspects does not, however, seem to imply that offences of this kind should be completely removed from criminal law.[22] Although not directly aimed at the protection of environmental interests, these offences are intended to ensure the enforcement of administrative regulations and the cooperation of operators with public authorities and/or administrative agencies: these collective, administrative interests appear worthy of protection, mostly because they are instrumental in preventing conducts that are offensive to environmental interests.

In this framework, environmental interests are placed in the background, as the object of indirect or anticipated protection.

The anticipation of criminal protection through the abstract endangerment offences may be reasonable, due to the high rank of the "final" interest at stake (the environment and/or human health), to the presence of particularly "diffuse" and at the same time "standardized" situations of danger (frequently the result of complex technological processes linked to mass production), as well as to the difficulty in some cases of measuring (*e.g.*) the contribution of individual inputs on the state of the biosphere, which depends on many factors that can interact with individual conduct in terms that are difficult to concretely quantify. Environmental assets, by their nature, are generally damaged above all by cumulative or serial conducts, *i.e.*, by multiple conducts that are repeated

22 See Faure &Visser, *supra* n. 1, p. 328; Mandiberg & Faure, *supra* n. 1, p. 41 ff.

over time: proving in concrete terms the suitability of a single conduct to compromise environmental matrices is often arduous, if not impossible. The precautionary principle too, normatively recognized, as regards environmental policies, in Article 191 of the Treaty on the Functioning of the European Union, nowadays plays an important guiding function at a political-criminal level, contributing to the possible legitimization of anticipated forms of environmental criminal protection.

The preferable approach does not seem, therefore, to be a preconceived criticism of the anticipation of criminal protection implemented using abstract endangerment offences, but rather an approach aimed at verifying, case-by-case, the reasonableness of the single presumption (whether factual or scientific) of the dangerousness of the punished conduct, and the proportion between this conduct and the type and *quantum* of imposed punishment.

Purely accessory offences that respect these prerequisites and are structured in deference to the principle of legality (with particular reference to certainty and legal provision requiring criminal law reserved solely to the Parliament), are a useful first form of protection, to be combined with the other two forms that we will analyse below, *i.e.*, the "partially accessory" one and the "autonomous" one.

The requirement of the reasonableness of the presumption of dangerousness of the conduct, and that of the proportionality between the conduct incriminated and the penalty seem to be respected in the rules and regulations cited above in paragraph 2. In terms of respect for the principle of legality, it seems appropriate, however, to note that an offence such as that provided for in Article 279 (9) of the French Criminal Code, insofar as it refers to the violation of Article L. 541-31 of the French Environmental Code, which in turn refers to the methods of use of certain materials, elements or forms of energy regulated by decrees of the Council of State (*Conseil d'Etat*),[23] could be instead criticised, since it appears integrated by external administrative sources for the most significant elements of the offence, from a structural and/or value-oriented point of view. In norm such as this, it seems that the formal legislator too broadly determines the conditions for criminal liability, leaving all the power to determine the detailed conditions to other authorities.

23 Article L. 541-31 of French Environmental Code states: "Decrees in the Council of State may regulate the methods of use of certain materials, elements or forms of energy in order to facilitate their recovery or that of the materials or elements associated with them in certain manufacturing processes.
The regulations may concern in particular the prohibition of certain treatments, mixtures or associations with other materials or the obligation to comply with certain manufacturing methods".

3. The Partially Accessory Model as the Second Possible Form of Integration Between Criminal and Administrative Law; the EU Law

The so-called partially accessory protection model creates less friction with the principle of harm, the principle of effectiveness, as well as with the legal provisions requiring, in some legal systems, that certain matters only be governed by Parliament.

In the partially accessory model, the conduct must not only violate extra-criminal provisions, but also produce an event of damage or danger.[24]

An intermediate paradigm, which is "halfway" to the "autonomous" criminal law model. The element of causation of the damage or danger is typical of "classic" criminal law, but this model is not autonomous from administrative law, since the violation of extra-criminal legislation remains an essential modality of the offence to the protected interest.

The residual accessory component preserves the principle of unity of the legal system: a behaviour permitted by administrative law cannot be sanctioned by criminal law.[25]

As in the model seen above, the note of unlawfulness connoting the conduct can take the form of the absence of the necessary permissions or authorizations, or the violation of the conditions established by law, regulations, statutes, or by the authorization itself.

3.1 EU Law (Directive 2008/99/EC on Environmental Crime)

The partially accessory model is also utilized in the well-known Directive 2008/99/EC of the European Parliament and in the Council on the protection of the environment through criminal law, in the Article 3 – Offences: "Member States shall ensure that the following conduct constitutes a criminal offence, *when unlawful* and committed intentionally or with at least serious negligence" (emphasis added).

Article 2(a) of the Directive dictates the definition of "unlawful":

> "For the purpose of this Directive:
> (a) 'Unlawful' means infringing:
> (i) The legislation adopted pursuant to the EC Treaty and listed in Annex A; or

24 See Bernasconi, *supra* n. 1, p. 29 f. and 114 ff.; Plantamura, *supra* n. 1, p. 160 ff.; M. Caterini, *L'ambiente "penalizzato". Storia e prospettive dell'antagonismo tra esigenze preventive e reale offensività*, in K. Aquilina & P. Iaquinta (eds.), *Il sistema ambiente, tra etica, diritto ed economia*, Cedam, Milan, 2013, p. 141.

25 Compare M. Maiwald, *Il diritto dell'ambiente nella Repubblica federale tedesca*, in M. Catenacci & G. Marconi (eds.), *Temi di diritto penale dell'economia e dell'ambiente*, Giappichelli, Turin, 2009, p. 325.

(ii) With regard to activities covered by the Euratom Treaty, the legislation adopted pursuant to the Euratom Treaty and listed in Annex B; or
(iii) A law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Community legislation referred to in (i) or (ii).

Article 3 of the same Directive also detail the extensive list of nine offences. Four of these expressly provide for the element of damage or danger to health or the environment, particularly in the following points:

"(a) The discharge, emission or introduction of a quantity of materials or ionizing radiation into air, soil or water, *which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants*" (emphasis added);[26]
"(b) 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), *which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants*" (emphasis added);[27]
"(d) 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, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants*" (emphasis added);[28]
"(e) The production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants" (emphasis added).[29]

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26 Faure, *supra* n. 4, p. 346, clarifies how the aforementioned subparagraph (a) appears, in its first part, to provide for a concrete endangerment crime; while, in its second part, it can result in a serious harm crime. On the provisions of Directive 2008/99/EC on environmental crime, see also G. M. Vagliasindi, *The EU Environmental Crime Directive*, in A. Farmer, M. Faure & G. M. Vagliasindi (eds.), *Environmental Crime in Europe*, Hart Publishing, Oxford, 2017, p. 31 ff.; and G. M. Vagliasindi, *The European Harmonisation in the Sector of Protection of the Environment Through Criminal Law: The Results Achieved and Further Needs for Intervention*, in *New J. Eur. Crim. L.*, 2012, vol. 3, p. 323 ff. Other provisions of the Directive 2008/99/EC, not quoted here, appear instead to belong to the category of abstract endangerment offences: see the provisions of subparagraph "(g) 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"; and subpara. i (in so far as regards production of ozone-depleting substances).

27 This provision associates, with a conduct in itself of abstract danger in the field of waste management, a profile of concrete danger, or damage: see Faure, *supra* n. 4, p. 346 f.

28 Here too, the requirement of concrete danger or harm is added to a conduct that would in itself constitute an abstract endangerment offence: in these terms, see Faure, *supra* n. 4, p. 347.

29 *Ibid.*

The association of a requirement of special unlawfulness, in a function that limits the ability to punish, to profiles of damage or danger to the health, or even the life, of a certain number of persons, or of significant damage to environmental matrices, is therefore present at European level.

On this point, some preliminary remarks:

Firstly, the Directive provides a very concise formulation of the offences, within which different protection perspectives, from the danger to individual environmental matrices to damage to several human lives, are lumped together without distinction.

More analytical and less conditioned by the ancillary component of administrative law seems to be the previous model of criminalization followed by the Convention on the Protection of the Environment through Criminal law of the Council of Europe (1998),[30] where in Article 2(1), types of offences marked by the clause of special unlawfulness (unlawful: see sub-paragraphs b, c, d and e) were placed side by side with offences of an autonomous nature, without such a clause, such as the hypothesis of:

> the discharge, emission or introduction of a quantity of substances or ionizing radiation into air, soil or water which:
> – Causes death or serious injury to any person, or
> – Creates a significant risk of causing death or serious injury to any person (sub-paragraph a).

The second and more general point is that the European rules act as a minimum level of protection, and only in relation to the attainment of those minimum objectives do they impose constraints on the Member States, while leaving Member States free to adopt higher standards of protection.

30 Convention not entered into force. On this Conventions, which forms the basis of approximation attempts of environmental criminal law of EU Member States, and on the path towards the adoption of approximation instruments, see G. M. Vagliasindi, *Directive 2008/99/EC on Environmental Crime and Directive 2009/123/EC on Ship-Source Pollution* in *www.efface.eu,* 2015 p. 6 ff.; and J. L. Collantes, *The Convention on the Protection of the Environment Through Criminal Law: Legislative Obligations for the States*, in *https://huespedes.cica.es.* On the influence exerted, on this Convention, by the Max Planck Institute Project "*Umweltschutz durch Strafrecht?*" (environmental protection through criminal law?), that paid special attention to the relationship between environmental criminal law, administrative and civil law, and suggested the abandonment of the close relationship between administrative and criminal law, see Faure, *supra* n. 4, p. 342 ff.

3.2. A Reflection on the Partially Accessory Model, between EU and Member States Legislations

Having said that, considering the above-mentioned provisions of the Directive, the following question arises spontaneously: Can discharges or emissions potentially causing death or serious injury to several persons not be unlawful, and therefore not punishable?

This question would appear to be answered in the affirmative, according to the wording of the Directive 2008/99/EC, which lays down two different cumulative conditions for punishability: the first of a formal nature (special unlawfulness); the second of a substantive (damage or danger) nature.

A set up of protection deemed agreeable by authoritative doctrine, considering the principle of the separation of powers.[31]

The choice of what is deemed a tolerable level of pollution is political, and therefore falls to legislative powers. According to this reconstruction, the non-punishability even of acts that are seriously damaging to public safety (like disasters), if they are caused by authorized production activities, within the limits of threshold values and sector regulations, is appropriate.

On this point, however, there appears to be a clear contrast with the prevailing doctrine[32] and with most followed exponents of the *engagè* judiciary[33]: The legislative solution of not punishing a disaster caused, for example, by the use of a substance not subject to regulatory requirements and limits, or due to a deficiency in a plant that is not covered by regulations, or, in any event, the solution of making punishment contingent upon noncompliance with administrative rules or deeds is inappropriate, in light of the primary legal interests at stake, such as life and human health.

In looking to trace it back to basic legal principles, a contrast emerges between the principle of the separation of powers, on the one hand, and the

31 See C. Ruga Riva, *I nuovi ecoreati. Commento alla legge 22 maggio 2015 n. 68*, Giappichelli, Turin, 2015, p. 5 ff., p. 29 ff.; C. Ruga Riva, *Il caso ILVA: profili penali*, in *www.lexambiente.it*, 2014, para. 4.

32 See Heine, *Elaborations of Norms*, *supra* n. 1, p. 110 f.; G. Heine & C. Ringelmann, *Towards an European Environmental Criminal Law – Problems and Recommendations,* in *Studia Iuridica Auctoritate Universitatis Pecs Publicata*, 2005, vol. 138, p. 45; Faure & Visser, *supra* n. 1, p. 332 f.; Mandiberg & Faure, *supra* n. 1, p. 29 ff.; Faure, *supra* n. 4, p. 337 ff.; A. Manna, *La legge sui c. d. eco-reati: riflessioni generali critiche di carattere introduttivo*, in A. Cadoppi, S. Canestrari, A. Manna & M. Papa (eds.), *Trattato di Diritto Penale. Parte Generale e Speciale. Riforme 2008–2015*, Utet, Turin, 2015, p. 980 ff.; Patrono, *supra* n. 13, p. 12; Vergine, *supra* n. 15, p. 445.

33 See G. Amendola, *La Confindustria e il disastro ambientale abusivo*, in *www.questionegiustizia.it*, 2015; G. Amendola, *Non c'è da vergognarsi se si sostiene che nel settore ambientale la responsabilità penale degli industriali dovrebbe essere più limitata di quella "normale"*, in *www.lexambiente.it*, 2015; Amendola, *supra* n. 15; M. Santoloci, *In Italia ci si ammala e si muore di 'parametri'. I disastri ambientali a norma di legge (da evitare con la nuova legge sui delitti ambientali)*, in *www. dirittoambiente.net*, 2015.

principle of protecting human health, together with the environment, on the other hand.

This contrast is not easily resolved.

In reference to the less serious crimes of pollution, and therefore the protection of the environment without implications for human safety, the search for a point of equilibrium between conflicting interests (production, employment, *etc.*), as well as the preference to entrust the search for this equilibrium, *ex ante*, to the lawmaker, rather than to the judicial power *ex post facto*, seems to be justifiable.[34] It seems therefore also justifiable to structure the various types of offences in a partially accessory sense with a special unlawfulness clause.

But to admit that the same is true about more serious crimes, like disasters, in so far as they also protect the value of human health, and thus to admit balance, with a possible loss, enshrined in legislation, of this primary interest in relation to other values, as much as it may be considered by somebody as unavoidable, in terms of *real-politik* (perhaps an outlook that is a slightly cynical), does indeed seem "painful", both for the jurist and layman.

One can attempt to introduce limitations to this power of balancing opposing interests (which certainly lie within the competence of political bodies), in cases where the outcome of this balance is manifestly unfavourable to primary rights.

Legislation determining the prevalence of interests that are opposed to human health assets may result from a knowledge *deficit* on the part of political bodies, which can be seen *ex post facto* by the subsequent evolution of scientific knowledge, or already due *ex ante* to the failure to keep up to date with currently available scientific evidence.

In both the first and the second case, where obsolete standards are not autonomously updated at the administrative or political level, remedies that can be easily accomplished seem to be the judicial review of the legality of administrative acts, or the review of the constitutional legitimacy of laws, albeit while remaining aware of their limitations.

These remedies seem scarcely feasible in case of gaps in the legislation, or where there are no rules imposing restrictions on the operator, with possible penal repercussions. Examples of this would be damages caused by substances not subject to limits or regulations, or by deficiencies in a plant that are not covered by specific regulatory; think also of threshold values that have not yet been transposed into legislation, but are regulated, for example, only by professional associations.

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34 For reasons related above all to the *lex certa* principle, and *ex ante* clarity of the criminalized behaviours: on this point, see FAURE, *supra* n. 4, p. 333, where it is also noted how, in assessing the non-socially tolerable levels of pollution, "administrative authorities may be far better qualified (given their experience and thus their information advantage) than the judge".

It must be said that the partially accessory model of environmental protection, like all other models, has inevitable criticalities.

Although it represents a positive development in many respects compared to the purely sanctioning model, the partially accessory model does not make it possible to overcome one of the characteristic problems of the so-called integrated protection paradigms, namely the incompleteness of the protection itself. Considering the persistent dependence of these models on administrative law, there will continue to be facts which are offensive for the interests at stake, but which do not conform to the type of offence, and therefore remain unpunishable.[35]

These are the risks associated with the so called "fragmentary nature" of criminal law, as pointed out by Binding more than a century ago and in terms as graphic as they are topical:

> "the legislator lets actions play out before his feet, and then he picks up these actions with a lazy hand, to elevate them to criminal offences because of their intolerability. In the beginning, he perceives only the coarsest forms of manifestation. *He does not perceive, or does not know how to grasp what is more sophisticated and rarer, even when it exists. This often has a more serious illicit content than what has already been sanctioned*"[36] (emphasis added).

The limits of a model of environmental protection that relies heavily on the role of public authority in setting standards has also recently been highlighted by authoritative administrative doctrine: The so called integrated (administrative-criminal), or accessory model of protection presupposes an exhaustive knowledge, on the part of the public authority, of the situations subject to regulation; whereas the necessary information for the setting of standards is often held by the private sector.[37]

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35 In addition to the authors quoted in footnote 32, see Patrono, *supra* n. 13, p. 679; Plantamura, *supra* n. 1, p. 163; the most heated criticism is by Santoloci, *supra* n. 33: "It has been clear for a long time that in Italy one falls ill and dies of parameters. There are environmental disasters permitted by law. This is the real black hole of our current legal and regulatory legal system, and it is the keystone that has long been pleasantly discovered and exploited by those who want to operate (in the small, medium and large/criminal) illegally in all environmental sectors […]. In our country we have radicalized and totalized the whole environmental legal/regulatory system, basing it solely and exclusively on tables and parameters, avoiding foreseeing also and contextually the possibility of identifying environmental disasters, and along with the consequent damage to public health, regardless of this formal bottleneck. […] Therefore, in this context, what (formally and on paper) is 'polluting' today, may not be so tomorrow, and vice versa. To make an environmental/health damage disappear in our country, it has always been enough to change the numbers of the parameters".

36 K. Binding, *Lehrbuch des Gemeinen Deutschen Strafrechts. Besonderer Teil*, von Wilhelm Engelmann, Leipzig, 1902, 20.

37 See F. Fracchia, *Introduzione allo studio del diritto all'ambiente. Principi, concetti e istituti*, ES, Naples, 2015, 29 ff.

The tendency towards rigidity in the so-called integrated or accessory model makes the protection system less rapid in adapting to emerging environmental problems, while requiring long and complex processes of political-legislative mediation and administrative implementation.[38]

The functionality of the accessory model of criminal protection appears to be directly proportional, in essence, to the qualitative level of administrative regulation.

Where a positive regulation determines the loss of health assets with respect to interests theoretically inferior on a constitutional level, in the partially accessory model the judge's action tend to be subordinate to the legislator's choice (without prejudice to possible recourse to the Constitutional Court).

The requirement of special unlawfulness, characteristic of the partially accessory model of protection, poses fewer problems when incorporated in cases which are "neutral" from the point of view of material disvalue, such as Article 3 (c) of Directive 2008/99/EC:

> "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 (1) and is undertaken in a nonnegligible quantity, whether executed in a single shipment or in several shipments which appear to be linked."

The use of the partially accessory model, with its special unlawfulness profiles, seems inevitable to criminalize behaviours which seems abstractly feasible also in a legal way, such as the hypotheses referred to in: sub-paragraph g): "Trading in specimens of protected wild fauna or flora species or parts or derivatives thereof"; sub-paragraph i): "The production, importation, exportation, placing on the market or use of ozonedepleting substances"; and finally, sub-paragraph f): "The killing, destruction, possession or taking of specimens of protected wild fauna or flora species".

The integrated, administrative-criminal, model of protection appears inevitable in a large part of environmental criminal law: despite the potential problems of incomplete protection, due to the possible presence of acts that are in fact offensive, but not conform to the type of offence, the composite nature of the interests that characterizes environmental criminal law does not seem to allow us to renounce (at least for less serious criminal offences) coordination with the administrative system, as the first line of protection for the environment.

The problem of incomplete protection could only be solved by "emancipating" environmental criminal law from administrative law, *i.e.*, by resorting to a so-called "pure" criminal model, with offences that are "autonomous"

38 *Ibid.*, p. 30.

to the criminal system: in these crimes, independent from administrative law, the description of the typical fact is entirely contained in the incriminating provision, and focuses on the cause of damage or concrete danger to the protected interest, without reference to the acts of the public administration, or in general to sub-legislative sources.[39]

But this criminal policy option is not without its difficulties (see *infra*, paragraph 4).

3.3. A recent proposal by the European Commission (2021) for a new "Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC". Critical Analysis

On 15 December 2021, the European Commission put forward a "Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC".

The Explanatory Memorandum of the proposal expounds the reasons for and the objectives of this proposal:

> "1. Improve the effectiveness of investigations and prosecution by updating the scope of the Directive.
> 2. Improve the effectiveness of investigations and prosecutions by clarifying or eliminating vague terms used in the definitions of environmental crime.
> 3. Ensure effective, dissuasive and proportionate sanction types and levels for environmental crime.
> 4. Foster cross-border investigation and prosecution.
> 5. Prove informed decision-making on environmental crime through improved collection and dissemination of statistical data.
> 6. Improve the operational effectiveness of national enforcement chains to foster investigations, prosecutions and sanctioning."[40]

In the context of the "Impact assessment" of the proposal, with particular reference to the first objective mentioned above, the Commission expressly takes into consideration the option of "defining environmental crime in the Directive without the requirement of a breach of relevant EU sectoral legislation", but finally prefers not to move away from the previous model of the accessory nature of criminal protection, a model capable of

39 On this model of protection, see Catenacci, *supra* n. 1, p. 258; Bernasconi, *supra* n. 1, p. 29; Plantamura, *supra* n. 1, p. 166 ff.

40 European Commission, *Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment Through Criminal Law and Replacing Directive 2008/99/EC*, Brussels, 15 Dec. 2021, COM (2021) 851 final, 2021/0422 (COD), p. 1.

guaranteeing a greater level of "legal clarity concerning which breaches of sectoral legislation constitute environmental crime".

Then, in evaluating the proposal's impact on the various public and private subjects operating within the EU, immediately after the Member States and the public authorities, the Commission takes into consideration the EU businesses, with the following specification, of a reassuring tenor for the latter: "As environmental crime will continue to be linked to a breach of administrative laws, there is limited risk that businesses could be sanctioned for environmental activity that is permitted under administrative law, with the exception of specific and well-defined situations mentioned in the Directive".

Thus, the concept of permit defence is introduced, with some limited exceptions, later articulated in detail.

Moving on to the analysis of the normative text proposed for the new Directive, in Article 3, on the matter of "*Offences*", the Commission re-presents the well-known unlawfulness clause (already present in Directive 2008/99/ EC, currently in force), whereby "Member States shall ensure that the following conduct constitutes a criminal offence *when it is unlawful* […]" (emphasis added).

In Article 2, about "*Definitions*", the notion of "unlawful" is modified:

> "For the purpose of this Directive, the following definitions apply:
> (1) 'unlawful' means a conduct infringing one of the following:
> (a) Union legislation, which irrespective of its legal basis contributes to the pursuit of the objectives of Union policy of protecting the environment as set out in the Treaty on the Functioning of the European Union;
> (b) a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the Union legislation referred to in point (a).
> The conduct shall be deemed unlawful even if carried out under an authorisation by a competent authority in a Member State when the authorisation was obtained fraudulently or by corruption, extortion or coercion.

Point (a) above is intended to replace points (i) and (ii) of Directive 2008/99/EC,[41] which referred instead to lists of legislations contained in Annexes A and B of the 2008 Directive. The proposed new formulation appears appreciable in that it is more elastic and constructed in more general terms than that of the 2008 Directive, which currently poses the problem of updating the list of legislation in the two Annexes.

41 See *supra,* para. 3.1.

Subsection (b) reproduces *verbatim* what was provided for in the 2008 Directive (except, logically, for the reference to subsection a, instead of subsections i–ii of the 2008 Directive).

A novelty, however, seems to be represented by the final clause to the notion of "unlawful", whose intention seems to regulate the permit defence and some exceptions to this defence: four situations are expressly provided for in which

"the conduct may be deemed unlawful even if carried under an authorisation by a competent authority":

– fraud,
– corruption,
– extortion,
– coercion.

The final clause in question, however, does not appear to be properly formulated and seems to lead to a lowering (instead of the raising, which seems to be the Commission's intention) of environmental protection.

The final clause indeed seems overly restrictive and ill-conceived in terms of legislative technique.

The hypotheses taken into consideration are basically three, because the concepts of extortion and coercion seem to partly overlap, in the sense that coercion in criminal law normally represents a component of extortion, so that reference to coercion alone would seem sufficient; it would probably be even better to use the concept of threat, which is more psychologically connoted and broader than coercion, which instead seems generally refer more to physical violence, that is overall much rarer in the context of possible criminal activities aimed at obtaining authorization, compared to threat.

There is no reference to the concept of collusion, which instead seems appropriate to place alongside corruption, within the framework of the exceptions to the permit defence: In many cases, indeed, the public official benefits the operator with an illegitimate authorization, with the agreement of the operator or, in any case, aided or abetted by him or her, without the public official obtaining from the operator a direct compensation in money or other benefit, as remuneration for the performance of the unlawful administrative deed; in other terms, without there being the elements of corruption. The unlawful authorization is consciously granted for other reasons, whether or not linked to a co-interest of the public official with the beneficiary of the administrative deed. This abuse of the public official may consist in the violation of specific rules of conduct, expressly provided for by law, or in the omission to abstain in the presence of self-interest or a close associate's interest; conduct from which an unfair advantage derives in favour of the private party. Such abuse, which is less serious than corruption, is normally punished and in several criminal law systems expressly

mentioned among the exceptions to the permit defence: *e.g.*, in the German Criminal Code rule on abuse of rights (*Rechtmissbrauch*), § 330 d, no. 5, which expressly provides for collusion among the hypotheses of punishability of the beneficiary of a permit; or in the well-established jurisprudence of the Italian Supreme Court on collusion or complicity of the private individual in the offence of abuse of authority by a public official, pursuant to Article 323 Italian Criminal Code.[42]

The main problem with the final clause to the concept of unlawfulness appears, however, from a broader perspective: this clause refers only to authorizations that are the result of criminal activity, whereas unlawfulness, which is a prerequisite for the offence, consists in the violation of legislation in general, and therefore not necessarily in the violation of criminal legislation (which is clearly only a subset of public law).

It follows that, among the hypotheses of conduct that can be considered unlawful, even if authorized, should be included not only hypotheses of authorization obtained through criminal activity, but also, more generally, hypotheses of unlawfulness of the authorization, *i.e.*, hypotheses of violation of the law. Violation of the law is a flaw of the administrative deeds that is different from the flaw of competence, the only one that seems to have been taken into consideration in the Commission's proposal: the proposal indeed dictates that the authorization must come from a "competent authority in a Member State", and not be the result of criminal activity, but there is clearly a wide range of authorizations issued by competent authorities and, nevertheless, illegitimate due to violation of the law, even if they are not the result of criminal activity such as fraud, corruption, *etc.*

Since the concept of unlawful is not assimilable to that of criminal, the former should extend to all authorizations that are unlawful due to violation of the point (a) or (b) of the Article 2 (in the above proposed text), and not only cover authorizations emanating from incompetent authorities or resulting from criminal activity (as seems to be inferred from reading the proposal).

An issue different from the existence of unlawfulness is that of ascertaining the offence, which requires, in addition to unlawfulness, a finding of one of the offences listed in Article 3 of the Directive and the *mens rea* of the perpetrator, in the form of intention or gross negligence (gross negligence, incidentally, limited in the new proposal only to some of the offences listed in Article 3, which again, compared to the Directive 2008/99/EC, results in a lowering of protection, whose rationale is not clear). The *mens rea* of the authorized person, when the authorization is unlawful, but not the result of

42 See, among others, Italian Supreme Court, Criminal sect. III, 17 Jul. 2012 (public hearing 16 Feb. 2012), no. 28545, Cinti, in *DeJure*.

criminal activity by the authorized person, could in fact be lacking, due to the private operator's confidence on the public authority and its deeds.

The assessment of the private operator's trust on the administrative deed, for the purposes of the private operator's excusability, must be carried out in concrete terms, in relation to various factors, such as: the type of pathology afflicting the deed (the more serious the flaw in the administrative deed, the less easy it is for the authorized person to be excused[43]), the novelty of the matter, the level of clarity and precision of the law violated, the presence of a consolidated case law, and above all, the different professional, technical and legal qualifications and skills of the private operator. For a layperson, not well equipped in terms of knowledge and/or experience, an error as to the lawfulness of an administrative act could indeed be more easily excusable; whereas it would be more difficult for a qualified expert to invoke this reason for the exclusion of guilt.

In conclusion, the final clause of the concept of "unlawful" could be reformulated in the following terms: The conduct shall be deemed unlawful even if carried out under an authorisation by a competent authority in a Member State when the authorisation is unlawful".

If one wish instead to regulate the permit defence in criminal proceedings, in this Directive, the appropriate forum for such regulation does not appear the definition of the general concept of unlawfulness, but the *mens rea* of the offender: here it could be provided that where the activity has been unlawfully authorized and the authorized person has however relied on the administrative permit, the *mens rea* of the authorized person is excluded; specifying that the authorized person may not invoke such confidence when:

> (1) he obtained the authorization through threat, corruption, collusion, incomplete or inaccurate statements, or
> (2) was aware of the unlawfulness of the authorization or was unaware of it due to gross negligence.

The Commission proposal excludes any possible form of environmental criminal protection autonomous from administrative law.

With reference to the most serious forms of crimes, this also appears to be inappropriate, as it does not guarantee adequate protection of primary interests such as human health and the environment: in some cases even a person who has acted without infringing administrative law – which may be lacking, deficient or obsolete – may deserve criminal blame, if that person is aware

43 Consider the distinction made in Germany, as well as in Italy, between annullability (*Rechtwidrigkeit*) and the more serious nullity (*Nichtigkeit*), the latter due, *e.g.*, to a lack of essential elements of the deed: in the case of nullity, the deed is considered *ab initio* ineffective, both in administrative and criminal law.

of the particular harmfulness or dangerousness of his or her conduct for the interests of health and/or the environment, or if that person is unaware of it due to gross negligence. The Member States, it seems to us, should not have the power to consider legitimate (or legalize), at an administrative and criminal level, hypotheses (*e.g.*) of environmental disaster, that irreversibly or nearly irreversibly affect environmental interests, or have repercussions on public safety (see more extensively *infra*, para. 3.2).

The proposal could therefore be supplemented by a form of autonomous offence, characterized either by multi-offensiveness, *i.e.*, by an offence not only against the environment, but also against a significant number of persons, damaged or exposed to danger; or characterized by a very serious offence against environmental interests, such as irreversible damage or damage the repair of which is particularly costly and achievable only by exceptional means.

4. The Autonomous, or Purely Criminal Model: The Elimination of the Link with Administrative Law

4.1 Features and Advantages of the Autonomous or Purely Criminal Model

The traditional, integrated paradigm of criminal-administrative protection of the environment can be surpassed, in some cases, if we assume that the conflict between different interests, which are at stake, can be resolved in absolute terms, without the mediation of rules and/or administrative acts, but by identifying *a priori* the prevailing legal interest; and thus establishing a direct relationship between criminal law and the judge called upon to ascertain the offence.[44]

This is the so-called "purely criminal", or "autonomous" model of protection, in which the type of offence is entirely described in the criminal norm, and is structured around the causing of a danger or damage to the protected interest, without the presence of normative elements that refer to other branches of the legal system.

This model of protection normally concerns only the most critical hypotheses of environmental pollution, the effects of which tend to be long lasting, or to affect public/individual safety, outside of a possible balance with interests pertaining to the economic sphere.

44 See Bernasconi, *supra* n. 1, p. 23 ff.

The elimination of the link with administrative law occurs through the uncoupling of the offence from the violation of other legal norms, or conditions imposed by authorizations, licenses or permits.[45]

While the accessory or "political-administrative" model of environmental protection, "conceives of environmental protection as a moment of unitary and articulated program of territorial management, and as such, under the primary responsibility of the public administration"[46], the autonomous, or purely criminal model of environmental protection, instead, enhances the role of the judge as a direct protagonist in the fight against pollution.[47]

In this case, criminal law intervenes autonomously from administrative law, because the offence is of a greater magnitude than that contemplated by administrative law.[48] This type of protection assumes that the administrative discipline can never allow damage of this magnitude.

In this perspective, the effects of the polluting activity are characterized by their extreme nature. The idea is to contain both the provisions and the practical applications of the criminal figures belonging to the pure/autonomous criminal model within a rigorous canon of *extrema ratio* (last resort option).

Criminal law, emancipated from the administrative sphere, recovers full functional autonomy: criminal law can identify premises and elements that are worth making a fact "deserving of punishment"[49], within a logical framework of legal asset protection characterized in an empirical-effective sense, and detached from any conditioning by the political-administrative model "of government" of the community.

In this way, it seems possible to overcome even residual reservations, under the profile of legal provision requiring that certain matters only be governed

45 See Mandiberg & Faure, *supra* n. 1, p. 29; Faure, *supra* n. 7, p. 327: "Administrative law, however, cannot be the sole source of environmental criminal law since some serious cases of environmental pollution should be directly punishable, even if no violation of administrative provisions is at hand"; more recently, on the "autonomous"/purely criminal offence for the protection of the environment, in a general-preventive view, see M. G. Faure, C. Gerstetter, S. Sina & G. M. Vagliasindi, *Instruments, Actors and Institutions in the Fight Against Environmental Crime*, in *www.efface.eu*, 2015, para. 3.3.4; Faure, *supra* n. 4, p. 335 ff.; M. G. Faure, *The Development of Environmental Criminal Law in the EU and its Member States*, in *Rev. Eur. Comp. & Int'l Envtl. L.*, 2017, p. 139 ff. 61

46 Fiandaca & Tessitore, *supra* n. 5, p. 35.

47 See Insolera, *supra* n. 5, p. 739: "In a purely criminal model […] it is the judge who through a direct appreciation of the damage or the danger (in the example given, damage to natural beauty; in the environmental field stricto sensu, damage to an ecosystem), is the direct author of the mediation between specific (of the concrete case) opposing interests"; in favour of this model, see more recently EFFACE, *Conclusions and Recommendations*, in *www.efface.eu*, 2016, p. 28 ff.

48 Mandiberg & Faure, *supra* n. 1, p. 29 ss.

49 See Faure & Visser, *supra* n. 1, p. 342.

by Parliament, and raised by offences integrated by threshold values, outside the criminal law, resulting from "technical" evaluations, as referred to by administrative sources, only apparently "neutral"[50].

The pure criminal paradigm serves to remedy the problem of incomplete protection, *i.e.*, the problem of facts which are substantially offensive, but not illegal under administrative norms (a problem of both the purely accessory and the partially accessory models). The problem is remedied by establishing, between judge and criminal offence, a relationship that is not mediated by administrative norms and/or acts.[51]

It's worth noting that the offences that respond to this model of protection are relatively rare in the criminal law of European countries and the USA.

In these cases, the link with administrative regulations is eliminated by removing the "protective umbrella" provided by authorization, or by eliminating the so-called "special unlawful" component from the structure of the crime.[52]

Where the legislator follows this approach, the criminal norm knows no (so to speak) "formal-intrinsic" application limits, due to the possible non-violation of administrative/authorizing prescriptions.

4.2 (continued)…The Possible Problematic Aspects of the Autonomous Model: Unity of the Legal System, Uncertainty, *Mens rea*. What Answers? Between Criminal and Extra-criminal Responsibility

By adopting a model of protection that refers the task of ascertaining the offence directly to the judge, regardless of factors of interaction and mediation with administrative law – factors that "convey" the criminal instrument of protection in the furrow already traced by administrative norms – there is a real risk that applicative certainty can be weakened. A risk which seems to be contained through a severe reduction in the number and content of such autonomous offences, limited to the most serious ones.

Another principle that potentially comes into discord with the autonomous/purely criminal model of protection is the unity of the system,[53] with eventually connected, negative repercussions on the principle of guilt. If the operator complies with the administrative norm, but may nevertheless incur, for the same fact, the violation of the criminal norm, a dystonia may be produced between the two levels of the system, the administrative one and the

50 *Ibid.*, p. 342 f.; Catenacci, *supra* n. 1, p. 191 ff.; Plantamura, *supra* n. 1, p. 166.

51 See Faure & Visser, *supra* n. 1, p. 345.

52 See Mandiberg & Faure, *supra* n. 1, p. 30 ff.

53 *Ibid.*, p. 40.

criminal one. Moreover, at the same time producing a contrast with principles of the subsidiary and fragmentary nature of criminal law, which requires criminal law to intervene as a last resort of protection, within a field of action that is more restricted than the overall sphere of the "unlawfulness".

To limit the scope of such systematic problems, the range of action of the autonomous/purely criminal types of offence must be based on profiles of "merit of punishment" such as to justify the prevalence of the criminal norm over another, possibly conflicting, administrative source: the operative terrain that would be ideal for the autonomous model of protection seem to be the hypotheses in which the administrative norm is obsolete or non-existent (see *supra*, para. 3.2).

In the event of an alternative evaluation of the conduct, from administrative to criminal law, possible inconveniences seem to arise with regards to the principle of guilt.[54]

By making the choice to leave these possible inconveniences as unresolved on the level of *actus reus*, the autonomously/purely criminal model requires that they be appropriately addressed in ascertaining *mens rea*. The confidence placed by the operator in the administrative deed or in the administrative law framework legitimizing him to act must be examined. This confidence may vary in relation to several factors: first and foremost, the different professional, technical and legal qualifications and skills of the subject in question, capable of making him understand or not the harmfulness of his conduct to the interests of the environment and/or human health.

With the *caveat* that it appears logically easier to affirm the liability of the operator in the case where he acts on the basis of an unlawful permit (see above, para. 3.3)[55], compared with the case where he acts without infringing administrative rules, or on the basis of a permit that is lawful under national administrative law: in the latter case, criminal liability may be affirmed only exceptionally, when the person is aware of the extreme harmfulness of his conduct for the protected interests (whereas the competent public authority is unaware or delays its action); or even when the operator is not aware, through gross negligence, of the extreme harmfulness of his or her conduct.

Where, instead, there is no *mens rea* of the operator, or where the operator's trust or good faith is found, the most appropriate solution for the protection of the interests in question does not seem to be criminal, but

54 Also with reference to the US system, *ibid.*, p. 39 ff.

55 In the case of an unlawful administrative deed, it will be necessary to consider in principle, in addition to the various professional, technical and legal qualifications and skills of the person in question, the pathology afflicting the act (*i.e.*, the level of seriousness of the administrative flaw: the more serious the administrative flaw of the deed, the more difficult it will be to recognize the good faith of the beneficiary of the deed), the novelty of the matter, the level of clarity and precision of the rule, the presence of established case law.

extra-criminal law: solutions such as those stated by Directive 2004/35/EC (European Community), so called Environmental Liability Directive (or ELD: "Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage"), which designs a system of imputation of damage based on strict liability (*i.e.*, regardless of intention, recklessness or negligence), when such damage is caused by a professional activity that poses a risk to human health or the environment. It is true that Directive 2004 on environmental (extra-criminal) liability provides for, in favour of the operator, the controversial permit defence,[56] at an optional level, in the sense that the EU has left the Member States free to choose whether or not to introduce such a clause.[57] But the operating margins of the permit seem to be interpreted restrictively in extra-criminal law (unlike in criminal law[58]): in extra-criminal law (in the Member States that have opted to introduce permit defence in extra-criminal proceedings), the permit defence seems to be understood as a clause excluding costs (and not liability);[59] it does not seem to be applicable

56 The permit defence clause in extra-criminal proceedings raised perplexities, as it seems to contrast with the basic regime of strict liability, dictated by the Directive 2004/35/EC itself for operators carrying out activities with the greatest environmental impact. The permit defence clause ends up by attributing the costs necessary to remedy environmental damage to the community, rather than to the operators, who are instead deemed to have to bear such costs (preferably compared to other subjects) as costs of doing business.

57 The Directive 2004/35/EC in question, in Art. 8 on *Prevention and remediation costs*, para. 4, states that: "The Member States may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive where he demonstrates that he was not at fault or negligent and that the environmental. damage was caused by:
(a) an emission or event expressly authorised by, and fully in accordance with the conditions of an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event".

58 In criminal law (unlike in extra-criminal law) strict liability is generally not admitted, and therefore the operating margins of the permit defence seem to be wider.

59 According to the first interpretation (permit defence as a ground for exclusion of the costs of environmental liability, in extra-criminal proceedings), the operator would in any case be obliged initially to repair the damage, and could subsequently claim reimbursement, from the State, of the costs incurred to that end.
According to the second thesis (permit defence as a cause of exclusion of environmental liability, in extra-criminal proceedings), instead, the operator would be exempt from the restorative obligations, being able to contest its own liability from the outset: only when the exception of the permit defence, raised by the operator, is unsuccessful, the operator would be subject to the request to carry out the restorative actions; whereas in the case where the operator successfully invokes the permit defence, the carrying out of the remedial activity would be the responsibility of the public authority.
In favour of the first thesis, which ensures a more effective and rapid protection of the environment, see V. Fogleman, *Study on Analysis of Integrating the ELD into 11 National Legal Frameworks. Final Report*, 15 Dec. 2013, in *www.ec.europa.eu*, 2014, p. 89; S. Salès, S. Mudgal & V. Fogleman, *ELD Effectiveness: Scope and Exceptions, Final Report Prepared for European*

in the case of accidents;[60] in order to benefit from the permit defence, the operator must demonstrate that he is not at fault or negligent;[61] this defence does not seem to apply to unlawful authorizations.[62]

Commission – DG Environment, in *www.ec.europa.eu*, 2014, p. 133; V. Fogleman, *The Polluter Pays Principle for Accidental Environmental Damage; Its Implementation in the Environmental Liability Directive*, in A. D'Adda, I. Nicotra & U. Salanitro (eds.), *Principi europei e illecito ambientale*, Giappichelli, Turin 2013, 142.

60 Accidents seem to fall outside the concept of "emission or event expressly authorised" (Art. 8, para. 4 of the Directive 2004/35/EC): see U. Salanitro, *Directive 2004/35/EC on Environmental Liability*, in *www.efface.eu*, 2015, p. 17.

61 This is expressly provided for in Art. 8 (4) of the Directive 2004/35/EC.

62 This because Art. 8 (4) of the Directive 2004/35/EC refers to "an authorisation conferred by or given under applicable national laws and regulations".