THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW

SECOND EDITION

Editor
Theodore L Garrett

THE LAWREVIEWS

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PREFACE

Environmental law is global in its reach. Multinational companies make business plans based on the laws and regulations of the countries in which they are headquartered and have manufacturing facilities as well as the countries in which they distribute and sell their products. Moreover, multinational companies have global environmental, health and safety goals and practices that tend to be worldwide in their scope for reasons of policy and operational consistency.

For these and other reasons, this second edition of *The Environment and Climate Change Law Review* is timely and significant. This book offers a review, by leading environmental lawyers, of significant environmental laws and issues in their respective countries around the world, with updates since last year's first edition.

Climate change continues to dominate international environmental efforts, and we have also witnessed efforts to promote sustainability. Many countries are making efforts to promote conservation and renewable or green energy. Changes in reliance on coal and nuclear energy have impacts on the demand for other energy sources. All of these changes have impacts on efforts to reduce greenhouse gases.

Environmental law continues to change and evolve, as new regulations are adopted and existing rules are amended or challenged in courts or interpreted by agencies. In the United States, 2017 has seen the election of a new President and an administration that seems to have different priorities in the related areas of environment and energy. Future editions of this book will continue to focus on changes and developments.

This book presents an overview and, of necessity, omits many details. The book should thus be viewed as a starting point rather than a comprehensive guide. Each chapter of this book, including mine, represents the views of the author in his or her individual capacity, and does not necessarily reflect the views of the authors' firms or clients, or the authors of other chapters, or my views as the editor. This book does not provide legal advice, which should be obtained from the reader's own lawyers.

I wish to thank the many authors who contributed their time and expertise to the preparation of the various chapters to this book. I also wish to thank the editors at Law Business Research for their continued attention to this project. We hope this book helps you to gain a better understanding of environmental law in various countries around the globe.

Theodore L Garrett
Covington & Burling LLP
Washington, DC
United States
January 2018

Chapter 8

ITALY

Gianluca Atzori[1]

I INTRODUCTION

Italian environmental law began on 8 July 1986, with the law setting up the Ministry of the Environment and providing for the first regulation on environmental damage.[2] Sector-based legislation was then adopted, until 2006 when Legislative Decree 3 April 2006, No. 152, introduced the Italian Environmental Code, governing the whole area. Most of the legislation in this field is due to legislation at the European level. However, Italian public opinion, like that in many other countries, is also increasingly sensitive to environmental matters, encouraging public institutions to act and adopt more stringent standards for the protection of the environment.

Indeed, Italian environmental law has recently been subject to significant substantive reforms. In particular:

a the Environmental Impact Assessment (EIA) system has been redesigned, introducing mandatory terms for the conclusion of the procedures and enhancing the integration of the EIA with other environmental permits, such as the Integrated Pollution Prevention and Control (IPPC) permit.[3] In an effort to guarantee compliance by the public administrations with the deadlines for the conclusion of the proceedings, the new law imposes liabilities on the public officials accountable for failure to conclude EIA proceedings within these deadlines. Moreover, oil refineries and power plants with a thermal power above 300MW are now required to provide an assessment of the impact of the plant on public health;

b byproducts have been regulated more thoroughly, in an effort to provide more clarity on the requirements to be fulfilled in order for a material to be classified as a byproduct and exempted from the regulations applicable to waste;[4]

c the IPPC system has been redesigned, introducing significant changes in the content of IPPC permits, and amending the IPPC renewal and amendment process and the penalties system;[5]

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1 Gianluca Atzori is an associate at Cleary Gottlieb Steen & Hamilton LLP.

2 Law 8 July 1986, No. 349; it should be noted that other pieces of legislation addressing sectorial environmental issues were adopted even before 1986.

3 Legislative Decree 16 June 2017, No. 104 amended Title III of Part II of Legislative Decree 3 April 2006, which is the title dedicated, *inter alia*, to the EIA within the Italian Environmental Code.

4 See Ministerial Decree 13 October 2016, No. 264.

5 Legislative Decree 4 March 2014, No. 46 amended the entire Title III *bis* of Part II of Legislative Decree 3 April 2006, No. 152, which is the title dedicated to the IPPC system within the Italian Environmental Code.

d a comprehensive set of environmental crimes has been introduced in the Italian Criminal Code and in the Italian Environmental Code. It includes new crimes concerning conduct that did not have any criminal relevance in the past and provides for much harsher penalties than those generally provided for in the past for the existing environmental offences;[6] and

e a special environmental law system was designed to address the complex scenario in which allegations of mass pollution of the environment were made by the local prosecutor against the largest steel company in the country. However, at the same time, the plant that allegedly caused the pollution employed so many people in an economically depressed area that the Italian government adopted emergency laws to avoid the immediate shutdown of the plant, citing reasons of national interest. This special environmental law system, which to date has been applicable virtually only to this specific scenario, *inter alia*, provides a tool to pierce the corporate veil and attach liability to the shareholders of a company, if the company has caused significant environmental damage.[7]

While the Italian government was required by EU law[8] to implement the IPPC system reform, the new environmental criminal offences and the special environmental law system originated from internal public opinion.

On the issue of climate change, energy policies play a crucial role. In this respect, in the 2011 Italian referendum, the people voted against the development of nuclear power plants. Moreover, in 2013, thanks to a strong incentive policy, Italy already reached its 2020 goal for the production of renewable energy, which was established by the EU.

The current Italian Ministry of the Environment has declared its firm commitment to the Paris Agreement (COP 21), which was ratified by Italy in November 2016.

Recently, Italy has also imposed significant non-financial (e.g., environmental) information disclosure duties on large companies and groups (see Section V below).[9]

II LEGISLATIVE FRAMEWORK

The most important piece of legislation is the Italian Environmental Code. The Italian Environmental Code provides for: (1) the general principles of Italian environmental law; (2) the procedures for EIAs, strategic environmental assessments and IPPC permits; (3) rules for the protection of soil, the fight against desertification and the protection of water sources

6 Law 22 May 2015, No. 68 amended both the Italian Criminal Code and the Italian Environmental Code, introducing a broad variety of new environmental crimes.

7 In particular, under certain conditions, the state commissioner – who, given the emergency, has replaced the administrative board of the company – is entitled to request a competent tribunal to release funds seized from the shareholders of the company in the context of investigations for alleged criminal offences even unrelated to environmental damage. The commissioner must then use the released funds to remediate the environmental damage caused by the company. See Section 11(5) of Article 1 of Law Decree 4 June 2013, No. 61, converted into law by Law 3 August 2013, No. 89.

8 See Directive 2010/75/EU of 24 November 2010 on industrial emissions (integrated pollution prevention and control).

9 See Legislative Decree 30 December 2016, No. 254, implementing Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

from pollution; (4) rules for waste management and clean-up procedures; (5) rules for air emissions and the protection of the atmosphere; (6) rules on environmental damage; and (7) administrative and criminal penalties for infringements of environmental laws.

Other important sources of law are:

a Law 4 November 2016, No. 204, which ratifies the Paris Agreement of 12 December 2015 (COP 21);

b Legislative Decree 22 January 2004, No. 42, the Italian Code of Cultural Heritage and Landscape;

c Legislative Decree 17 August 1999, No. 334, on the control of major-accident hazards involving dangerous substances (the Seveso Law);

d Legislative Decree 8 June 2001, No. 231, which provides for the liability of legal persons for crimes committed by their managers and employees. Many environmental crimes trigger liability for legal persons under this Legislative Decree;

e Presidential Decree 13 March 2013, No. 50, which introduced the single environmental authorisation, an authorisation that materially reduced the regulatory burden on small and medium-sized companies, including a single authorisation for all of the necessary environmental permits (e.g., wastewater discharges and air emissions);

f Legislative Decree 13 March 2013, No. 30, establishing a scheme for greenhouse gas emissions allowance trading within the EU, in respect of the Kyoto Protocol's mechanisms; and

g Legislative Decree 19 August 2005, No. 195, granting access to the public for all environmental information possessed by a public authority.

The Treaty on the Functioning of the EU (TFEU) (Articles 191, 192 and 193) grants competence in the environmental field to the EU. However, EU Directives, as opposed to EU Regulations, require Member States to implement the relevant provisions of EU Directives in national legislation and that implies a margin of appreciation. Moreover, and most importantly, Article 193 of the TFEU provides that the protective measures adopted by the EU 'shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties.' That means that the environment is a field where there is minimum harmonisation: the EU sets a minimum threshold that Member States must meet. However, national law may impose stricter thresholds (gold plating).[10]

III THE REGULATORS

In Italy, environmental law enforcement is managed through a multi-level governance system. The distribution of powers among the various government levels (national, regional, local, etc.) is inspired by the subsidiarity principle.

At the national level, the Ministry of the Environment and of the Territory and Sea Protection (MATTM) is the authority competent for the enforcement of environmental and climate change rules. The MATTM is both a source of regulation, through its decrees, and an enforcer, given that it has the power to grant the main environmental permits (such as

10 In 2013, the President of the Council of Ministries adopted a guideline (Guideline of the President of the Council of Ministries, 16 January 2013) prohibiting any form of gold plating. Nonetheless, laws are a source hierarchically higher than the guideline and therefore can derogate from this prohibition.

IPPC permits and EIAs) for the plants with the most significant environmental footprints and to impose administrative penalties for infringements of such permits. The MATTM is also in charge of the clean-up procedures for contaminated land located in the most polluted areas of the country (sites of national interest). The technical branch of the MATTM is the Superior Institution for Environmental Protection and Research (ISPRA), which is a public entity under the supervision of the MATTM that provides technical support (e.g., through the monitoring of the compliance of the operators with the permits granted by the MATTM or through the performance of environmental assessments commissioned by the MATTM).

Regions are also key players, since they are also a source of laws and regulations (within the limits set out in national law), and they also have the power to grant certain environmental permits (such as IPPC permits and EIAs for plants with a smaller environmental footprint than those authorised at the national level). Regions are in charge of the clean-up procedures for contaminated land located in areas different from the sites of national interest.

Certain competences are also administered at a local level by provinces or municipalities.[11] For instance, certain regions delegate their power to grant IPPC permits and EIAs to the provinces. Moreover, national law establishes that provinces are competent to grant certificates attesting to the successful completion of a clean-up operation.[12] Regions can also delegate to municipalities the power to manage clean-up operations concerning contaminated land located within the municipality's territory.

Each region has its Regional Agency for the Protection of the Environment (ARPA), which plays a similar role to ISPRA, but at a regional level. Thus, each ARPA provides technical environmental support to the region, the provinces and the municipalities.

Every decision adopted by the MATTM, the regions, the provinces and the municipalities can be challenged before Regional Administrative Tribunals for breach of law, lack of competence of the authority that adopted the decision or 'abuse of power'. When the law grants a discretionary power to an authority, the court is not allowed to scrutinise the exercise of such power unless the decision is affected by serious flaws (e.g., obvious incoherence between the conclusions of the decision and the facts ascertained by the decision itself).

IV ENFORCEMENT

Liability for the infringement of environmental laws can be civil, administrative and criminal. The same fact can result in the three kinds of liability. For instance, an unauthorised release of hazardous substances into the environment can lead to civil liability for damage caused to third parties, administrative penalties (such as the suspension or withdrawal of the environmental permit) and criminal liability for the crime of polluting the environment. However, many administrative penalties apply only if the same facts are not punishable under criminal law in order to avoid the duplication of penalties for the same fact.[13]

The administrative proceedings to enforce clean-up liabilities upon a release into the environment can be triggered either by a notification sent to the authorities by the polluter or the innocent landowner (which must notify the authorities immediately upon the discovery

11 Italy is currently in a transition period where provinces are gradually being abolished and their competences are being redistributed between regions, municipalities and new entities called 'metropolitan cities'.

12 Article 242(13) of Legislative Decree, 3 April 2006, No. 152.

13 For instance, Article 20 *quaterdecies*(2), of Legislative Decree 3 April 2006, No. 152.

of the release) or autonomously by the authorities. In order to attach clean-up liability to an operator, authorities must demonstrate a causal link between the operator's activities and the pollution. Until not long ago, prospective buyers of industrial sites, wanting to perform an environmental assessment in order to protect themselves from historical contamination, faced reluctance from prospective sellers. However, recent legislative reforms, amending the Italian Environmental Code, have introduced for many industrial operators the duty to sample soils at least once every 10 years and groundwater at least once every five years.[14] Thus, going forward, thanks to the data from these samplings on the status of the site throughout such time, it should be easier to correctly establish responsibility for any pollution found.

V REPORTING AND DISCLOSURE

Starting from 2017,[15] large EU public-interest entities (i.e., listed companies, credit institutions, insurance companies and other designated entities) are required to include in their management reports a 'non-financial statement' on corporate social responsibility matters. Parents of a group must issue the non-financial statement on a consolidated corporate basis. The non-financial statement must address, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters. The non-financial statement must contain:

> *[I]nformation to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including: (a) a brief description of the undertaking's business model; (b) a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented; (c) the outcome of those policies; (d) the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks; (e) non-financial key performance indicators relevant to the particular business. Where the undertaking does not pursue policies in relation to one or more of those matters, the non-financial statement shall provide a clear and reasoned explanation for not doing so.*[16]

In relation to environmental information, Italian legislation also requires (on top of the minimum information required by EU Directive 2014/95/EU) companies to disclose information concerning:

a the use of energy resources, distinguishing between renewable and non-renewable energy, and the use of water;

b greenhouse gas emissions and air pollution; and

c the impact, including in the medium-term, of the principal risks linked to the company's operations on the environment, and on health and safety measures.

14 Article 29 *sexies* of the Italian Environmental Code.

15 Pursuant to EU Directive 2014/95/EU.

16 Article 1(1) of the Directive, introducing Article 19a into Directive 2013/34/EU.

It also provides for pecuniary penalties for management and control bodies that infringe the disclosure obligations.[17]

The main environmental permits usually provide for the duty to disclose to the competent authorities (indicated in the permit itself) any non-conformity, with specific regard to the emissions limits set for wastewater discharges and air emissions. The operator may claim that the non-conformity is due to a temporary malfunction of the plant, which is sometimes considered a justifiable reason for infringing the emissions limits.[18]

Contamination of land, or suspected sudden or historical contamination, must immediately be disclosed to the competent authorities.[19] However, the Italian Environmental Code only gradually introduced from 2014, for industrial operators, certain duties to carry out periodical sampling of soils and groundwater. Therefore, it cannot be excluded that a number of sites may still be affected by 'unknown' contamination, which has not been notified to any public authority.

The law does not provide for a specific duty to disclose potential environmental liabilities to prospective purchasers. However, general law imposes upon the parties to a negotiation the duty to act in good faith. Omitting to disclose information on known environmental liabilities could be an infringement of this principle, therefore triggering contractual liabilities for the seller.

Currently, the law does not provide any specific protection for whistle-blowers in the environmental field.[20]

VI ENVIRONMENTAL PROTECTION

i Air quality

The categories of industrial plants that may generate emissions with a material impact on the environment are subject to air emission permits.

Among these plants, the ones with the lower environmental impact must obtain an air emission permit pursuant to Article 269 of the Italian Environmental Code. This permit lasts 15 years, and it provides emission limits and monitoring requirements. In case of an infringement of the air emission permit, the competent authority may:

a order the operator to comply with it within a certain term;

b order the operator to comply with it within a certain term and suspend the operation of the plant if there is a threat towards public health or the environment; or

c revoke the air emission permit in case of an infringement of the orders under points (a) and (b) above or when multiple breaches of the permit endanger public health or the environment.[21]

17 See Legislative Decree 30 December 2016, No. 254, implementing Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

18 IPPC permits may allow a certain number of infringements of emission limits for each year, but should never exceed 20 per cent of the maximum intensity allowed (Section 7 *bis* of Article 29 *sexies* of the Italian Environmental Code).

19 Article 242 of the Italian Environmental Code.

20 For future developments on this subject, and on other pending legislation regarding disclosure duties, please see Section VIII.

21 Article 278 of the Italian Environmental Code.

Also, criminal and administrative penalties are provided, depending on the gravity of the infringement of the permit.[22]

Plants with a higher environmental impact are likely to fall within the IPPC system and therefore need an IPPC permit, which includes a section dedicated to air emissions. Under the IPPC system, the emission limits must be coherent with the emission levels associated with the best available technique, established at the EU level.[23] As already highlighted in Section II, above, Member States are allowed to require stricter limits (gold plating), but a guideline issued by the Italian President of the Council of Ministries should prevent Italian authorities from doing so. IPPC permits can last up to 16 years.[24] In the event of an infringement of an IPPC permit, the competent authority has the same powers as those granted by the Italian Environmental Code to the authorities for an infringement of an air emission permit (i.e., order to comply, suspend and revoke the permit, under the same conditions laid down for air emission permits).[25] Moreover, criminal and administrative penalties are provided depending on the gravity of the infringement of the IPPC permit.[26]

ii Water quality

The mechanism for the granting of wastewater discharge permits is designed in a similar way to the system for the granting of air emission permits.

Plants with a lower environmental impact are subject to wastewater discharge permits,[27] while bigger plants fall within the IPPC system.

As to the first regime, in the event of an infringement of a wastewater discharge permit, the competent authority may: (1) order the operator to comply with it within a certain term; (2) order the operator to comply with it within a certain term and suspend the operation of the plant if there is a threat towards public health or the environment; or (3) revoke the wastewater discharge permit in case of an infringement of the orders under point (1) and (2) above or when multiple breaches of the permit endanger public health or the environment.[28] Also, criminal and administrative penalties are provided depending on the gravity of the infringement of the permit.[29]

As to the second regime, as already noted in Section VI.i, above, on air emissions, IPPC permits have to be aligned with the emission levels established at EU level. IPPC permits can last up to 16 years.[30] In the event of an infringement of an IPPC permit, the competent authority has the same powers as those granted by the Italian Environmental Code to the authorities for an infringement of a wastewater discharge permit (i.e., order to comply, suspend and revoke the permit under the same conditions laid down for wastewater discharge permits).[31]

22 Article 279 of the Italian Environmental Code.

23 Article 29 of the Italian Environmental Code.

24 Article 29 *octies* of the Italian Environmental Code.

25 Article 29 *decies* of the Italian Environmental Code.

26 Article 29 *quattuordecies* of the Italian Environmental Code.

27 For industrial discharge and domestic discharge. Rainwater discharge is regulated at a regional level: it is up to each region to decide whether to require a specific permit for the discharge of rainwater. Wastewater discharge permits last four years (Article 124 of the Italian Environmental Code).

28 Article 130 of the Italian Environmental Code.

29 Articles 133 and 137 of the Italian Environmental Code.

30 Article 29 *octies* of the Italian Environmental Code.

31 Article 29 *decies* of the Italian Environmental Code.

Moreover, criminal and administrative penalties are provided depending on the gravity of the infringement of the IPPC permit.[32]

iii Chemicals

The regime for chemicals that are hazardous to health and the environment is regulated at the EU level. In order to guarantee coherence in the manufacture, placement on the market and use of chemical substances, the EU adopted Regulation No. 1607/2006 concerning the registration, evaluation, authorisation and restriction of chemicals (the REACH Regulation)[33] is – like every EU Regulation – directly applicable in all of the EU Member States, without the need to transpose it through national implementing legislation.

Under the REACH Regulation, the manufacture, placement on the market and use of certain substances, mixtures and articles may be subject to restrictions.[34] Manufacturers, importers and downstream users are not allowed to use, or place on the market for use, substances referred to in Annex XIV of the REACH Regulation unless, *inter alia*, the use or placement on the market of the substances has been authorised in accordance with the regulation.[35]

Pursuant to Article 68(1) of the REACH Regulation, where there exists an unacceptable risk to human health or the environment arising from the manufacture, use or placement on the market of substances that needs to be addressed on an EU-wide basis, Annex XVII of the REACH Regulation shall be amended by adopting new restrictions or strengthening the existing ones. Any such decision shall take into account the socio-economic impact of the restriction, including the availability of alternatives. In accordance with Article 69, such process is triggered by Member States or the European Commission and involves the EU Chemicals Agency. For a new restriction to be imposed it must be shown that: (1) the manufacture, placement on the market or use of a substance on its own, or in a mixture or in an article, poses a risk to human health or the environment and (2) such risk is not adequately controlled and needs to be addressed at the EU level.[36] The European Commission adopts the final decisions on proposals for restrictions submitted by Member States or the EU Chemicals Agency.[37]

32 Article 29 *quattuordecies* of the Italian Environmental Code.

33 Regulation (EC) of the European Parliament and of the Council of 18 December 2006, No. 1907/2006, concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396/1), as amended several times.

34 Id., Articles 68-73 and Annex XVII.

35 Id., Article 56.

36 REACH Regulation, Annex XV (Dossiers), Section II.3. Justification shall be provided that action is required on an EU-wide basis, and a restriction is the most appropriate EU-wide measure, which shall be assessed using the following criteria: (1) effectiveness (the restriction must target the effects or exposures that cause the risks identified and be capable of reducing these risks to an acceptable level within a reasonable period of time and proportional to the risk); (2) practicality (the restriction must be implementable, enforceable and manageable); and (3) monitorability (it must be possible to monitor the result of the implementation of the proposed restriction).

37 Id., Articles 70–73.

Authorities proposing a restriction are also requested to perform a socio-economic analysis aimed at demonstrating that the net benefits to human health and the environment of the proposed restriction outweigh the net costs to manufacturers, importers, downstream users, distributors, consumers and society as a whole. In addition, available information on alternative substances and techniques shall be provided, including information on: (1) the risks to human health and the environment related to the manufacture or use of the alternatives; (2) the availability of alternative substances, including the respective time scale; and (3) their technical and economic feasibility.[38]

The REACH Regulation also envisages an authorisation system aimed at monitoring the risks posed by substances of very high concern,[39] which must be progressively replaced by suitable alternative substances or technologies to the extent that they are economically and technically viable.[40]

iv Solid and hazardous waste

Waste management is heavily regulated and infringements in this field often lead to criminal penalties. The generation, transport and disposal of waste is regulated by the Italian Environmental Code.

As a general rule, Article 188 of the Italian Environmental Code provides for the liability of the waste generator for the whole chain of treatment of the waste. Indeed, the generator must verify that the transporter and the subject in charge of the recycling or disposal of the waste possesses all of the necessary authorisations, and that the documents that need to be filled in to track each step of the waste management are duly drafted and managed. Recently the Italian Supreme Court submitted a request for a preliminary ruling to the Court of Justice of the EU on the interpretation of EU environmental law concerning the sampling, analysis and classification of waste.[41] The preliminary ruling of the Court of Justice of the EU will hopefully provide clarity on a matter that is crucial for the entire waste management system.

Every operator involved in waste management must provide the competent authority with adequate financial guarantees relating to compliance with applicable environmental laws. In particular, waste transportation, recycling and disposal, as well as the management of solid urban waste, are subject to financial guarantees.

For years the Italian government has tried to switch from an inefficient waste-tracking system based on paper documents to an electronic tracking system, featuring GPS technology and a national database of the waste produced, transported and disposed of in the country (the SISTRI system). So far, the entry into operation of the new tracking system has been postponed several times owing to technical malfunctions. Currently, the paper-based system is still in place, but operators are required to register with SISTRI and provide the system with their data. The Italian government has launched a tender procedure to award to an

38 Ibid. See also REACH Regulation, Annex XVI (Socio-Economic Analysis), which, *inter alia*, sets out the information to be covered in a socio-economic analysis submitted in connection with a proposed restriction.

39 I.e., substances that are: (1) carcinogenic, mutagenic or toxic to reproduction; (2) persistent, bio-accumulative and toxic; (3) very persistent and bio-accumulative; and (4) seriously or irreversibly damaging to the environment or human health, such as substances damaging to the hormone system. Id., Article 57.

40 Id., Article 55.

41 See Italian Supreme Court (*Corte di Cassazione*) Order, 27 July 2017, No. 37460.

operator the management of the SISTRI system. The replacement of the paper-based system is conditioned to the completion of the tender procedure. However, the tender procedure has been challenged in court and the trial is still ongoing. Therefore, the paper-based system still applies. The next hearing is scheduled for 24 January 2018.

v Contaminated land

The remediation of contaminated land and groundwater is based, in Italy and in the EU, on the 'polluter pays' principle.[42] In other words, the system is designed to impose remediation duties and costs on the polluter. If the polluter cannot be identified or fails to adopt the necessary measures, and neither the owner of the site nor any other interested party adopts those measures, they are to be adopted by the competent administrative authorities at the expense of the polluter.[43] Innocent landowners may be required to reimburse the costs relating to the measures adopted by the competent authority that has remediated the site but only within the limits of the market value of the land, determined after the implementation of those measures. The owner or any other interested person may, however, intervene on a voluntary basis at any time in order to clean up the site that they own or use.[44] The innocent landowner that has remediated the polluted site on a voluntary basis is entitled to bring an action for damages against the polluter in respect of costs incurred and any additional damage suffered.[45]

In certain cases, in open contrast with the Italian Environmental Code, innocent landowners have been requested by public authorities to remediate their site when the polluter could not be identified or failed to adopt the necessary measures to remediate the pollution. Recently, a minority of the Italian case law has supported the legitimacy of this approach.[46] However, the Plenary Assembly of the Italian Council of State (i.e., the highest administrative court, in charge of solving case law conflicts, whose ruling is binding for lower administrative courts) has upheld the principle according to which the innocent landowner cannot be required to remediate pollution that it has not caused.[47] The plenary assembly had also requested a preliminary ruling from the Court of Justice of the EU on whether EU environmental principles must be interpreted as precluding national legislation:

> *... which, in cases where it is impossible to identify the polluter of a plot of land or to have that person adopt remedial measures, does not permit the competent authority to require the owner of the land (who is not responsible for the pollution) to adopt preventive and remedial measures, that person being required merely to reimburse the costs relating to the measures undertaken by the competent authority within the limit of the market value of the site, determined after those measures have been carried out.*[48]

42 The 'polluter pays' principle is mentioned in Article 191 of the Treaty on the Functioning of the EU and Article 3 *ter* of the Italian Environmental Code.

43 Article 242 of the Italian Environmental Code.

44 Article 245 of the Italian Environmental Code.

45 Article 253 of the Italian Environmental Code.

46 See, *ex multis*, Council of State Opinion of Section II 23 November 2011, No. 2038/2012.

47 Plenary Assembly of the Council of State Judgment 25 September 2013, No. 21.

48 Plenary Assembly of the Council of State Judgment 25 September 2013, No. 21.

The Court of Justice of the EU ruled that EU environmental law did not preclude such national legislation.[49]

However, the consistency with EU law of the provision of the Italian Environmental Code, as interpreted by the Plenary Assembly of the Council of State, does not exclude *per se* that the Court of Justice of the EU might consider other interpretations of domestic law as compatible with EU law. The Court of Justice of the EU stated that Italian legislation, as interpreted by the Plenary Assembly of the Council of State to the effect that it is not legitimate to impose the duty to carry out remedial actions on innocent landowners, is compatible with EU law. However, the Court of Justice of the EU also pointed out that EU law allows Member States to adopt more stringent measures, including through the identification of additional responsible parties, provided that these measures are compatible with the Treaty on the EU and the Treaty on the Functioning of the EU. Indeed, in July 2017, the Court of Justice of the EU declared compatible with EU law a Hungarian piece of legislation establishing joint liability between the innocent owner of the land on which the pollution occurred and the polluter, without it being necessary to establish a causal link between the conduct of the owner and the damage established.[50] Therefore, it could be argued that the minority opinion in current Italian case law (while in open contrast with the Italian Environmental Code) would also be compatible with EU environmental law.

VII CLIMATE CHANGE

Climate change is addressed in a number of ways in Italy. Italy firmly committed to the United Nations Framework on Climate Change. Italy has recently ratified the Paris Agreement by means of Law 4 November 2016, No. 204, and the Italian Ministry of the Environment has declared that 'for Italy, a green economy is a clear and irreversible choice. On climate change there is no way back.'[51]

In 2006 greenhouse gas emissions trading was established, and it is now governed by Legislative Decree 13 March 2013, No. 30.

A number of incentives are in place for renewable energy and are generally granted for the whole duration of the life of the plant. In 2017, the Italian Constitutional Court upheld the legitimacy of a law that retroactively reduced the incentives contractually granted to operators of photovoltaic plants.[52] The decision was based on, *inter alia*, the following arguments:

a the sudden decrease in the costs of production of energy in the photovoltaic energy market, which the Court took into account to justify the retroactive effect of the law under scrutiny;

b the law was also deemed reasonable and proportionate because it did not completely eliminate the incentives but reduced them by 6–8 per cent, providing alternative compensative measures for the affected operators (e.g., the possibility to obtain subsidised loans);

49 Court of Justice of the EU Judgment 4 March 2015, C-534/13, Fipa et al.

50 Court of Justice of the EU Judgment 13 July 2017, C-129/16, *Túrkevei Tejtermelő Kft v. Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség*.

51 *L'Unità*, 9 September 2016, interview with Mr Galletti, Ministry of the Environment.

52 See Constitutional Court Judgment 24 January 2017, No. 16.

c the law reduced energy costs for consumers, who were charged for the incentives through a component of the energy tariff. The Court weighed this element in favour of the retroactive law, emphasising its positive effects for consumers; and

d the retroactive reduction of the incentives was not unforeseen or unforeseeable at the time of execution of the contracts, because there were a number of provisions of law that anticipated the possibility of a reduction of the incentives. Thus, in the opinion of the Court, a diligent operator should have foreseen such reduction.

Since 2017, owing to EU constraints, incentives for renewable energy plants have been awarded only through reverse auction systems, while in the past there were also forms of direct access to incentives, already pre-determined by law. Also, renewable energy dispatching has been prioritised in respect of other sources of energy. Thanks to these incentives, Italy is already satisfying more than 17 per cent of its energy needs through renewable energy, reaching the goal established by the EU for 2020.

Since 2004, energy efficiency has also been incentivised, through white certificates, also known as energy efficiency certificates (EECs). EECs are granted by the competent public authority upon proof of the achievement of energy savings through energy efficiency improvement projects. Electricity and natural gas distributors are required to achieve yearly quantitative energy savings targets, expressed in tonnes of oil equivalent saved. Each certificate is worth one tonne of oil equivalent saved.

Finally, Article 29 of the Italian Environmental Code provides that IPPC permits must include greenhouse gas emissions limits when necessary to prevent local pollution of the environment.

VIII OUTLOOK AND CONCLUSIONS

Currently, the Italian parliament is considering a legislative reform that would have an impact on the national environmental law system. It is doing so in order to comply with its obligations arising from the ratification of the 2003 United Nations Convention Against Corruption, which occurred in Italy through Law 6 November 2012, No. 190.

The reform concerns the protection of whistle-blowers in relation to the denunciation of environmental non-compliance. Indeed, while the Italian legal system already affords a certain degree of protection to whistle-blowers in certain specific fields (e.g., banking law), such protection is not currently afforded in the environmental field. The pending legislation would require companies to provide for such protection in their organisational models. If this legislation is approved, companies will be obliged to provide whistle-blowers with protection, applicable, *inter alia*, to the disclosure of a number of environmental non-compliance matters.

In conclusion, the recent reforms described in Section I, above (namely, the reform of the EIA and IPPC systems, the introduction of new environmental crimes and the special environmental law system), and the pending legislation mentioned in this section, all have an element in common. This common element is the tendency of the system towards providing real, actual and substantial protection of the environment, as opposed to the old schemes, which often focused on formal obligations that constituted unnecessary burdens on operators and were not always linked to a concrete environmental benefit. One example of this tendency is the new penalties system applicable to infringements of IPPC permits. Before the reform, every IPPC permit infringement, even a minor one with no impact on the

environment, constituted a criminal offence and was punished with modest penalties. Today, only the infringements that actually impact the environment constitute criminal offences, but the penalties are generally higher than they were in the past.

Thus, national environmental law seems to be moving, slowly but steadily, towards more effectively protecting the environment, removing unnecessary constraints on operators and strengthening the penalties for conduct that actually impacts on the environment.

Appendix 1

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Gianluca Atzori's practice focuses on environmental and administrative law issues, concerning, among other things, the management of environmental and administrative permitting and compliance.

He has provided legal advice in connection with EU and national environmental law to leading companies in the automotive, manufacturing, metals and mining, chemical, oil, energy and pharmaceutical industries, with particular reference to environmental issues arising from the operation of existing plants and the development of new projects, with third parties and public authorities.

In the context of M&A and financing transactions, Gianluca advises on the drafting of contracts, with specific regard to the management of environmental liabilities.

He also deals with sustainable development issues, including green public procurement and climate change, also with reference to the related financial and non-financial disclosures for large companies, banks and insurance institutions.

With respect to administrative law matters, he has provided legal advice to leading companies operating in heavily regulated environments, such as the supply of railway transportation services and the management of highways, airports, gas and water distribution networks.

In 2017, Gianluca lectured at the Northwestern Pritzker School of Law on the Cleary Gottlieb Pro Bono Project 'International Environmental Protections During and After Armed Conflict', undertaken for Dr Marie Jacobsson, member of the United Nations International Law Commission.

In 2016, Gianluca advised the World Bank in relation to the Italian section of the worldwide project 'Enabling the Business of Agriculture', on the laws and regulations affecting agricultural productivity, market access, and the policy environment for agriculture.

Gianluca regularly publishes on environmental law matters. He graduated *summa cum laude* from Cagliari Law School, where he also lectured in corporate human rights compliance and corporate social responsibility from 2011 to 2015. In May 2009, he obtained an LLM degree with honours in international human rights law from Northwestern Pritzker School of Law.

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