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Op-Ed: “An Italian Perspective on the Private Enforcement of European Environmental Law: The ‘Civil Party’ Mechanism in Environmental Crime Cases”

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This Op-Ed forms part of EU Law Live’s symposium on the Private Enforcement of European Environmental Law and Policy, which has featured Op-Eds by Clemens Kaupa, Christoph Sobotta, Alexandre Biard, Vasiliki Karageorgou, Markus W. Gehring & Nick Scott, and Bolesław Matuszewski & Wojciech Modzelewski. Further Op-Eds on this topic will follow soon on EU Law Live.

General remarks

Currently, the efficacy of private enforcement in the field of European environmental law is heavily dependent on the remedial and procedural frameworks of national legal systems. In this context, the present article intends to shed some light on the Italian ‘Civil Party’ Mechanism (‘*costituzione di parte civile*’, Art. 78 Italian Code of Criminal Procedure) in environmental crime cases, and on the role it can play for private action aiming at compensation for individual harm suffered as a result of the violation of European environmental norms.

Under Italian law, a civil action in criminal proceedings allows the injured party to seek restitution and compensation for damages from the criminal court, acting as a *civil* party. The basis for this is found in Articles 74 et seq. of the Italian Code of Criminal Procedure, and Article 185 of the Italian Criminal Code. The latter establishes that every

offence requires restitution, and, when it has caused pecuniary or non-pecuniary damage, compensation. Examples of pecuniary damage under Italian law would include, e.g.: damage to property; consequential economic loss following property damage or personal injury; pure economic loss; medical and rehabilitation expenses; loss of earnings and loss of earning capacity; costs of repair, replacement, or remediation; costs incurred to prevent or mitigate further loss, *etc.* Compensable non-pecuniary damage would include, e.g.: pain and suffering; emotional distress; loss of enjoyment of life; loss of amenity; anxiety and fear; impairment of dignity, reputation, or personal identity; bereavement and grief; loss of consortium and loss of companionship, *etc.* The right to claim compensation lies with the injured party.

In order to claim compensation under the 'Civil Party' Mechanism, claimants need to qualify as an 'injured party'. The injured party in a crime is not necessarily the same as the victim of the crime: the victim is in fact the holder of the legal right protected by criminal law. For example, whereas the person affected by a homicide is the victim of the homicide – the holder of the legal right to 'life' –, the injured party may be the victim's child, who may then act as a civil party in criminal proceedings.

This distinction is particularly clear, for example, in environmental crime cases. The environment is protected as a public good, so the victim in the criminal law sense may be the State and also the wider community, whereas the accessory civil claim requires an injured party who can allege a specific pecuniary or non-pecuniary damage. The consequences for claims concerning 'public' and 'private' environmental damages are discussed below (under *Compensation for environmental damage in criminal proceedings: 'public' damage and 'private' damage*).

In any case, as mentioned above, the prerequisite for a civil action is asserting the existence of damage that is causally linked to a crime.

From a systemic point of view, civil liability 'for criminal offences' is based on the Aquilian tort model ('*Lex Aquilia*'). Perhaps surprisingly, such an offence is classified in civil law as a *typical* offence, rather than the atypical offence referred to in Article 2043 of the Civil Code. This

has a clear consequence: if a civil claim is filed in criminal proceedings, its acceptance generally requires verification of the elements of the alleged offence, in both objective and subjective terms.

In ordinary civil proceedings, by contrast, the claimant is generally required to prove the existence of a compensable loss (damage), a causal link between the defendant’s conduct and that loss, and a basis for imputing liability under the relevant tort rule (typically fault/negligence where required, or the applicable strict-liability regime). Where the civil claim is brought within criminal proceedings, the court will normally also need to verify the constituent elements of the alleged criminal offence (its objective elements and its subjective element, i.e. the requisite mental element such as intent, negligence, or preterintent), because civil liability is pleaded as arising “from the offence”; however, the burden of proving the defendant’s criminal responsibility remains on the public prosecutor, and an acquittal will, as a rule, preclude a civil award on that basis.

For the criminal court to uphold the claim for compensation, a criminal conviction is normally required. This link is expressed in Article 538 of the Code of Criminal Procedure, which connects the restitution and compensation ruling to the conviction. However, the rule does not apply in all cases. For example, the possibility of deciding on a civil claim has been recognised even when the defendant is acquitted, due to the particular insignificance of the offence, pursuant to Article 131-*bis* of the Criminal Code, following the declaration of partial illegality of Article 538 of the Code of Criminal Procedure (Constitutional Court, 12 July 2022, No. 173). In this scenario, the facts which would be assessed as an offence – although not a punishable one – remain relevant as the cause of the harm suffered, but the offence no longer needs to be punishable as a necessary prerequisite for the civil decision.

However, the establishment of the offence does not automatically lead to the civil claim being upheld. Article 185 of the Criminal Code states that the offence must have caused damage. The damage therefore needs to be claimed and proven, and the causal link between the offence and the damage established.

The same fact is thus assessed from two different perspectives: the criminal-law perspective for the purposes of criminal liability, and the civil-law perspective for the purposes of civil liability.

To elaborate further, it is worth pointing out that, for certain types of offences, damage is a fundamental element of the offence. In such cases, proof of harm is required in order to establish criminal liability. Once this has been established, it may be argued that, at least in essence, the harm pertinent to civil proceedings has already been proven. However, this does not mean that the specific details of the civil claim do not need to be verified, and that the amount of compensation does not need to be calculated.

The purpose of Article 185 of the Criminal Code is particularly evident in the context of non-pecuniary damage. In civil law, compensation for such damage is regulated by Article 2059 of the Civil Code. Article 185 of the Criminal Code is intended to allow compensation for non-pecuniary damage resulting from a crime, even where the violation of a fundamental right is not immediately identifiable. According to Article 2059 of the Italian Civil Code, as interpreted by case law, compensation for non-pecuniary damage may be claimed if a fundamental right has been infringed, or in any other case specifically provided for by law. In this case, the existence of a criminal offence also constitutes a legal indicator that legitimises access to compensation for non-pecuniary harm.

The link between Article 185 of the Criminal Code and non-pecuniary damage poses a problem when the legal claim is brought before a civil court. In this case, there is some debate as to whether the civil court should ascertain the offence from which the damage arises *incidenter tantum,* and to what extent. One approach requires full assessment of the offence, including the subjective element, and another deems the assessment of the objective element sufficient, leaving the reconstruction of the subjective element to ordinary civil law. This point is crucial because it influences both the subject matter of civil proceedings, and that of the assessments carried out outside the guarantees of criminal proceedings.

In this case, the main issues concern the need to respect the presumption of innocence. The risk is that, without a criminal

conviction, a civil ruling could be seen as effectively finding someone guilty. This issue has also been raised at supranational level. Article 4 of the 'Presumption of Innocence' Directive 2016/343/EU prohibits, until guilt is legally proven, '(…) *public statements by public authorities and judicial decisions other than those on guilt… presenting the person as guilty* (…)'.

In addition, under the so-called equivalence clause in Article 52(3) of the Charter of Fundamental Rights of the European Union (EUCFR), the presumption of innocence provided for in Article 48 EUCFR must offer a level of protection at least equal to that guaranteed by the corresponding Convention rights under Article 6 § 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as interpreted by the European Court of Human Rights (ECtHR; *Karaman v Germany,* Application no. 17103/10, as cited in *AH and Others* (C-377/18), paras 41-42).

According to the ECtHR, the implicit finding of guilt in the absence of a substantive examination of the criminal case risks fuelling unacceptable public suspicion of the accused's guilt, despite the lack of formal recognition of criminal responsibility (*Pasquini v San Marino, Application no. 50956/16*, paras 48 f.).

This framework has influenced thinking on civil rulings in criminal proceedings and, in particular, on the idea that the appeal judge may rule on a claim for damages in criminal proceedings after the criminal investigation is no longer fully viable.

Notes on the Evolution of Italian National Legislation

The premises set out above clarify the meaning of the principle of the accessory nature of civil action in criminal proceedings under Italian law. The claim for compensation is accessory to the criminal action because it depends on the latter. The accessory nature is also evident at a 'genetic' level: Article 79 of the Italian Code of Criminal Procedure allows a claimant to act as a civil party only if criminal proceedings have already been filed. The accessory nature then produces a consequence: when the possibility of a full criminal investigation ceases to exist, there is scope for the civil claim to be removed from the criminal proceedings, and dealt with in the appropriate forum.

Before the 'Cartabia reform' (Law No. 134 of 27 September 2021; Legislative Decree No. 150 of 10 October 2022), however, accessory liability was interpreted in a relative sense. The decision to pursue criminal proceedings also implied a restriction in terms of the relationship between the two actions, as shown by Article 75, paragraph 3, of the Code of Criminal Procedure. The rules governing appeals 'for civil purposes only' allowed civil cases to continue within criminal proceedings even when the criminal case could no longer be decided on its own merits (for example, because the alleged offence had, in the meantime, become time-barred). The mechanism was regulated by Articles 573 and 578 of the Code of Criminal Procedure.

In this context, the highest court in Italy has verified the compatibility of Article 578(1) of the Italian Code of Criminal Procedure with the presumption of innocence as understood by the CJEU and the ECtHR, and therefore also its compatibility with Article 117(1) of the Italian Constitution, in the light of Article 6(2) ECHR, Articles 3 and 4 of 'Presumption of Innocence' Directive, and Article 48 EUCFR. The Italian Constitutional Court, in its ruling no. 182 of 30 July 2021, rejected the claim of unconstitutionality, emphasising the civil-law nature of the decision on civil effects. The Constitutional Court stated that in such cases (e.g. when the offence is time-barred), the fact to be ascertained for civil purposes no longer has any criminal-law relevance. Therefore, in order to decide on compensation, judges must limit themselves to ascertaining the elements constituting the civil offence. They must not, however, ascertain, even *incidenter tantum*, the elements constituting the criminal offence.

The 'Cartabia reform' radically changed the rules. Legislative Decree No. 150 of 10 October 2022 introduced a rule transferring civil claims to civil courts in almost all cases where it is no longer possible to fully ascertain criminal liability in criminal proceedings. If the claim for compensation remained within criminal proceedings in all cases, the need to decide on compensation would risk imposing incidental determinations of criminal liability. The transfer avoids this outcome, and realigns the system with the principle of accessory liability.

In the new structure, civil proceedings are accompanied by specific rules. Articles 573(1-bis) and 578(1-bis) of the Italian Code of Criminal Procedure govern the transfer and provide for the admissibility, in civil

proceedings, of evidence acquired in criminal proceedings. The purpose is twofold. On the one hand, it protects the presumption of innocence by avoiding a civil decision with 'criminal content' when there is no criminal decision on the merits of the case. On the other hand, it also aims to simplify the process by using evidence already gathered, which reduces duplication and costs. Civil actions are thus brought back to their natural forum without, at least in principle, wasting the evidence gathered in the criminal proceedings.

The picture is completed by Article 622 of the Italian Code of Criminal Procedure, which regulates the Court of Cassation's annulment ruling 'for civil purposes only' with remittal to the civil court. Case law, including that of the Joint Divisions, has clarified that this remittal is not intended to continue the criminal proceedings, but to enable the decision on the claim to be made in accordance with the rules of civil procedure, once the criminal case has been closed. The Joint Divisions ruling No. 22065/2021 emphasised the extraneous nature of civil law in criminal proceedings, once the criminal effects have become irrevocable, and brought the subsequent judgment back under the rules of civil proceedings, including the classification of the offence and the evidence, while allowing the use of the evidence gathered in the criminal proceedings.

Compensation for Environmental Damage in Criminal Proceedings: 'Public' Damage and 'Private' Damage

In proceedings for environmental offences, the right to act as a civil party varies according to the type of damage claimed. The first aspect concerns the definition of the concept of 'environmental damage' in the public-law sense, understood as harm to the general public interest in protecting the environment. For this type of damage, case law has established that the State, and specifically the Minister for the Environment, has legal standing. This approach was upheld even after the entry into force of Legislative Decree No. 152 of 3 April 2006, which granted the Ministry for the Environment exclusive rights to claim compensation for environmental damage of a public nature.

However, the provision in favour of the Ministry does not preclude the possibility of protecting other parties. Even when they cannot claim compensation for public environmental damage, individuals and social

groups remain entitled to claim compensation for further and more specific harms, whether pecuniary or non-pecuniary, which affect their own legal positions and are distinct from the general public interest in the environment, even if they result from the same harmful conduct. In this perspective, it is admissible for citizens to act as civil parties when they do not complain in broad terms about environmental degradation, but allege damage to specific assets, activities, property, or individual subjective rights, in accordance with the general rule of Article 2043 of the Civil Code.

From a collective perspective, environmental associations play a central role. The associations referred to in Articles 13 and 18 of Law No. 349 of 8 July 1986 are considered legitimate parties in civil proceedings for environmental crimes, as they have the right to appear in court when conduct may have caused damage to the environment or to its essential components. Case law has also clarified that their legitimacy can extend to the protection of environmental interests in broader terms, including the conservation and enhancement of the environment as a whole, the urban and rural landscape, the natural landscape, as well as monuments and historic centres. It has also been recognised that, although the Ministry has exclusive jurisdiction over compensation claims for public environmental damage, environmental associations may act as civil parties to obtain compensation for damage resulting from environmental degradation. In some rulings, it has also been held that, where they are solidly established in a territory, claims for compensation may also be accepted from associations that do not meet the requirements of Article 13 of Law No. 349/1986, when they allege direct financial damage or non-financial damage such as injury to their statutory purposes, pursuant to Articles 2043 of the Civil Code and Article 185 of the Italian Criminal Code.

As for local public authorities, the status of regions and local authorities as claimants has been recognised with regard to environmental damage, understood as land-use planning, because it is connected to the interests of said authorities and their land management functions.

In essence, therefore:

'(...) the right to act as a civil party in proceedings for environmental offences relating to actions committed after 29 April 2006, following the abrogation of Article 18, paragraph 3, of Law No. 349 of 1986 resulting from the entry into force of Article 318, paragraph 2, letter a) of Legislative Decree No. 152 of 2006, lies exclusively with the State for the compensation of public environmental damage, understood as damage to the public interest, to the integrity and health of the environment, while all other individuals or associations, including regions and other local public authorities, may bring civil action in criminal proceedings only to obtain compensation for further and specific pecuniary and non-pecuniary damage resulting from the infringement of their other specific rights distinct from the public interest in environmental protection, even if arising from the same harmful conduct.' (Criminal Cassation, Section III, 9 July 2014, No. 24677)

Conclusions

In the Italian system, the right to bring a civil action in criminal proceedings by acting as a civil party is not limited to specific types of offences and does not depend on whether the offence is mentioned in the criminal code or in special legislation. The rule is generic. When the legal system classifies an act as a crime and criminal proceedings are filed, the person who claims to have been harmed may request restitution and compensation in that forum, under the conditions set out in Articles 74 et seq. of the Code of Criminal Procedure and Article 185 of the Criminal Code. The decisive point is not the source of the provision establishing the offence, but the existence of criminal proceedings and the correlation between the damage and the fact-offence.

Under Italian law, a civil action in criminal proceedings applies, in principle, whenever criminal proceedings are permitted and there is damage causally linked to the alleged offence. It does not operate as a special instrument tailored to specific sectors. It follows that, in the environmental field, once the violation of the relevant obligations has been made a criminal offence and prosecuted before the criminal court, the claim for compensation may be filed in the same proceedings under ordinary rules. This also applies where environmental criminal law has been introduced to implement EU obligations. Therefore, if the adoption of EU directives on

environmental sanctions (see, in particular, EU Directive 2024/1203; see also, for example, Article 79 of EU Directive 2024/1785, amending EU Directive 2010/75; Article 29 of EU Directive 2024/3019; Article 29 of EU Directive 2024/2881) involves the introduction or adaptation of offences punishable under criminal law, civil action in relation to those offences may also automatically be filed.

The practical consequence is that the issue is not whether the rules on compensation claims apply to environmental matters. The issue is to verify whether, in each case, the offence is treated as a crime and whether the person acting as a civil party can prove that they have suffered harm. The aforementioned common requirements therefore remain key. There must be compensable damage, whether pecuniary or non-pecuniary. There must be a causal link with the fact of the offence committed. The injured party must, under the limits stated, have legal standing, whether it be an individual, an entity or an association.

Therefore, the environmental sector does not, in itself, require a special rule for civil claims in criminal proceedings. Rather, it presents specific difficulties in terms of evidence and in identifying the damage, especially when the latter is widespread or constitutes public environmental damage.

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