Criminal liability for the "unlawful" trafficking of waste in Italy: what relevance for the European Best Available Techniques?

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ABSTRACT

The paper deals with a much-debated topic in Italian criminal law scholarship and jurisprudence, that of criminal liability for carrying on formally authorised polluting activities, with a focus on its EU law profiles. After an overview of the concept of "unlawfulness" in environmental criminal law, the paper turns on the Italian offence of waste trafficking, addressing in particular two recent rulings of the Court of Cassation that held that the violation of EU "Best Available Techniques" can determine the "unlawful" nature of conduct, even when the latter is formally authorised. The author argues that this approach cannot be shared in its absoluteness, but deserves attention in order to avoid that, in certain well-defined hypotheses, authorisation becomes a factor of unjustified impunity for environmental damage.

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1. Introduction

Since Italy implemented directive 2008/99/EC on the protection of the environment through criminal law, introducing a series of environmental offences into the Italian Criminal Code (by Law no. 68 of 2015), there has been much discussion, in scholarship and in case law, on the issue of liability for environmental damage caused by *formally authorized activities*[1]. The issue presents numerous aspects, one of which, probably the most important, concerns the interpretation to be given to the term "*abusivamente*" (henceforth in English, "unlawfully"), which constitutes an essential element of the newly introduced main environmental offences. Italy's Court of Cassation has recently ruled on this point, with regard to some operators who disposed of waste in a manner that was compliant with national authorization but, from a certain point on, differed from the European Best Available Techniques. The Court found that their conduct constituted the offence of unlawful waste trafficking under article 452-quaterdecies of the Italian Criminal Code. This decision was informed by a desire to maintain a high level of environmental protection, yet seems problematic in the light of the criminal law principle whereby rules of conduct must be accessible and

[1] For a detailed discussion of the topic, worthy of attention for its completeness and the importance of the arguments proposed, see A. DI LANDRO, *La responsabilità per l'attività autorizzata nei settori dell'ambiente e del territorio. Strumenti penali ed extrapenali di tutela*, Giappichelli, 2018.

penalties foreseeable. This paper, after briefly going over the main interpretative issues of the "unlawfully" clause (para. 2), focuses on this recent and controversial judicial case, examining the crime of illegal waste trafficking (para. 3.1.), the regulatory framework of the European Best Available Techniques (para. 3.2.) and finally the positions expressed by the Italian courts called upon to deal with the issue. Some critical considerations are then formulated, aimed at proposing a stricter use of the Best Available Techniques for the purpose of ascertaining criminal liability (para. 4). The conclusions propose a key to understanding the "unlawfully" clause, to be related, according to the author, to the criminal law concept of "permitted risk" (para. 5).

2. The "unlawfully" clause and its problematic interpretation

Environmental crimes were introduced into the Italian Criminal Code under Law no. 68 of 2015, which belatedly implemented directive 2008/99/EC on the protection of the environment through criminal law. In implementing the obligations established under art. 3 of the directive to ensure that certain conduct constituted a criminal offence, legislators adopted a model that, building on the legal scholarship that has most theorised the issue[2], could be defined as based on the idea of partial administrative dependence. This means that they did not decide simply to punish under criminal law the mere violation of administrative regulations (pure administrative dependence), nor did they establish completely autonomous offences, i.e. offences which could be committed regardless of a violation of administrative regulations (pure criminal law model). Instead, the choice was to establish offences which, on the one hand, display autonomous characteristics of danger to the environment and/or to humans; and on the other, the commission of which also requires a violation of administrative regulations. This requirement was provided for by inserting, in the definitions of the main types of environmental crime, the clause according to which the conduct had to be carried out "unlawfully".

This clause has led to much debate among Italian commentators[3]. The first problem concerns its inclusion in the crime of *disastro ambientale* ("environmental disaster") (art. 452-quater), which consists of damaging an ecosystem irreversibly, or in a way which may be reversed only by means of exceptional interventions, or

[2] For further information on the various models of criminalization of environmental crimes, see the not recent but still essential essay by M.G. FAURE, M. VISSER, *How to Punish Environmental Pollution? Some Reflections on Various Models of Criminalization of Environmental Harm*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 1995, 4, 316 ff.; more recently, 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 *Columbia Journal of Environmental Law*, 2009, 34, 447 ff.; in Italian scholarship, A. DI LANDRO, *La responsabilità per l'attività autorizzata nei settori dell'ambiente e del territorio*, cit., p. 121 ff. and *ivi* for further bibliographic references.

[3] For an overview, see C. RUGA RIVA, *La nuova disciplina dei delitti ambientali*, in M. PELISSERO (a cura di), Reati contro l'ambiente e il territorio, volume del Trattato teorico-pratico di diritto penale, diretto da F. PALAZZO, C.E. PALIERO, II ed. Giappichelli, 2019, p. 81 ff.

of creating situations which endanger the life and physical integrity of an indefinite number of people. According to one line of thought, this crime should have been defined according to the pure criminal law model, since the inclusion of the "unlawfully" clause presupposes that, paradoxically, a disaster may be occasioned in a non-unlawful and therefore lawful manner, an unacceptable conclusion if the aim is to provide effective protection to the environment[4]. According to another position, however, the clause simply represents the implementation, on a national level, of a requirement set forth in art. 3 of Directive 2008/99/EC, which establishes the obligation to incriminate conduct which is dangerous for humans and/or the environment, provided however that it is, among other things, "unlawful", i.e. carried out in violation of environmental regulations listed in an annex to the directive[5].

The second problem with the clause in question concerns its indeterminacy. It has been observed that the concept of "unlawfulness" is extremely vague, and could be interpreted as referring only to clandestine conduct, thus excluding conduct which, although carried out within the scope of an authorized activity, violates the technical and legal regulations for its performance[6]. From this point of view, it would be unreasonable to include the clause in question also in other environmental crimes, such as environmental pollution (art. 452-bis) and waste trafficking (art. 452-quaterdecies), insofar as their punishment would be unreasonably limited to conduct carried out in the total absence of authorization. This objection was answered by observing that, in a previous draft of the 2015 reform bill, the clause was formulated in a more precise manner, since it referred to the violation of legal and administrative provisions on environmental matters. Its current formulation was pushed for by environmental organisations, which intervened in the parliamentary discussions, and which actually intended to extend its scope of application rather than restrict it, including, in addition to the violation of any environmental law, also the violation of various other regulations, such as those regarding safety at work, the landscape, urban planning, transport, etc., which may sometimes also have effects on the environment.[7]

This last broad interpretation has also been accepted in case law, which today considers as unlawful[8]: (i) clandestine polluting activity, i.e. carried out without authorization; (ii) polluting activity carried out on the basis of unlawful

[4] G. AMENDOLA, *Il disastro ambientale abusivo non è stato imposto dalla UE ma per introdurre nella nostra legislazione ambientale una restrizione della normale responsabilità penale delle industrie*, in www.lexambiente.it, 26 June 2015.

[5] Along these lines, see C. RUGA RIVA, *Il nuovo delitto di inquinamento ambientale*, in www.lexambiente.it, 23 June 2015, in a part of the essay (section 1.2.) expressly dedicated not only to the offence of environmental pollution, but also to the more serious crime of environmental disaster.

[6] G. AMENDOLA, *Delitti contro l'ambiente: arriva il disastro ambientale "abusivo"*, in www.lexambiente.it, 17 March 2015.

[7] C. RUGA RIVA, *Il nuovo delitto di inquinamento ambientale*, *loc. cit.*

[8] For a detailed reconstruction of the current case-law guidelines on the subject of "unlawfulness" in environmental crimes, see A. GALANTI, *I delitti contro l'ambiente*, Pacini Giuridica, 2021, p. 290 ff.

or expired permits; (iii) polluting activity carried out on the basis of a valid authorization, but in violation of provisions relating, for example, to the type of activity that can be carried out, the correct methods of carrying it out, compliance with emission threshold limits, etc.[9]. Unlawfulness may also derive from the violation of EU Regulations, considering that we are dealing with a derivative right directly applicable to individual operators[10]. It has also been clarified that the unlawful activity need not be exclusive, since it may be combined with activities which are lawful, authorized and correctly carried out[11].

3. The assessment of unlawfulness in the light of European Best Available Techniques: the case of the unlawful trafficking of waste

The illegal trafficking of waste represents a million-euro business in Italy, partly managed by organized crime (eco-mafias[12]), and partly the result of illegal practices carried out by companies which, while carrying out legitimate economic activities, save on waste management and disposal costs. Precisely with reference to the latter activities, straddling legality and illegality, it is crucial to correctly interpret and apply the "unlawfully" clause contained in the provision that governs the illegal trafficking of waste (article 452-*quaterdecies*). In particular, given that a significant number of the technical standards on waste management have a European source, in the form of the Best Available Techniques published by the European Commission, the question is whether and how these provisions may be directly binding for national operators, determining liability, even of a criminal nature, for violations. To this end, it is first of all necessary to examine briefly the fundamental characteristics of the crime of illegal waste trafficking, and then to turn our attention to a very recent case, which came to the attention of the Italian Court of Cassation, regarding precisely the problem of ascertaining unlawfulness on the basis of the European Best Available Techniques.

[9] See Cass. pen. 46029/2008; Cass. pen. 46819/2011; Cass. pen. 46170/2016, CED 268060; Cass. pen. 15865/2017, CED 269491; Cass. pen. 28732/2018. For a recent articulated review, see ALEX H. BELL, *L'inquinamento ambientale al vaglio della Cassazione. Quel che è stato detto e quel (tanto) che resta da dire sui confini applicativi dell'art. 452-bis cod. pen.*, in *Lexambiente - Rivista Trimestrale di diritto penale dell'ambiente*, n. 3, 2022, p. 20 ff.

[10] See Cass. pen. no. 32737/2020; Cass. pen. no. 54703/2018, the latter ruling relating to the violation of the requirements imposed by Chinese legislation for the import of waste, implemented by a 2006 regulation as conditions for exporting to China.

[11] See Cass. pen. 47870/2011.

[12] The expression *eco-mafia* was coined by one of the most important Italian environmental associations, Legambiente, which publishes a detailed report on this form of organized crime every year. For an examination of its criminal law implications, see M. PALMISANO, *Il traffico illecito di rifiuti nel Mediterraneo: fenomenologie e strumenti di contrasto*, in *Diritto penale contemporaneo - Rivista Trimestrale*, n. 1/2018, pp. 93-110.

3.1. The illegal trafficking of waste in the Italian legal system

The repression of waste trafficking under criminal law in Italy goes back a long way. The crime of illegal waste trafficking was introduced by Law no. 93 of 2001, which added art. 53-bis to Legislative Decree no. 22 of 1997; subsequently, the collocation of the offence was moved to art. 260 of the Testo Unico Ambiente or TUA (Legislative Decree no. 152/2006), a consolidation law regarding environmental issues, and in 2018 was further moved to article 452-*quaterdecies* of the Criminal Code. These movements took place without any changes either in the description of the type of crime, or in the penalty envisaged[13], consisting of imprisonment from one to six years (three to eight years in the case of radioactive waste). Law no. 68 of 2015 provided for the mandatory confiscation of the tools used to commit the crime, as well as any profits made from the crime. The commission of this offence by natural persons can also lead to liability of the entity that benefited from it (art. 25-*undecies* (2(f)) of Legislative Decree 231/2001).

The offence established under art. 452-*quaterdecies* of the Criminal Code is made up of three fundamental elements. Firstly, the conduct, which consists alternatively of the transfer, receipt, transport, export, import or unlawful management of waste. For there to be an instance of the crime, several actions must have been performed, in an ongoing and organized manner, and means must have been provided to carry them out. Consequently, occasional conduct or conduct without any organization does not fall within the scope of the definition. It is equally essential, as with other environmental crimes, for the conduct to be "unlawful" in the sense specified above. The second fundamental element is the subject matter of the conduct, i.e. waste, which must be in "substantial" quantities. The third element is the *mens rea*, which is represented by the intention to carry out the trafficking in order to obtain unfair profit.

With reference to the interests protected, case law usually states that this is a multi-offence crime, introduced to protect both the environment (i.e. the environmental context, which may be polluted by waste) and public safety. Some judgments even refer to competition between companies, on which the conduct in question could have distorting effects. However, the reference to public safety is improper, because the crime may also regard non-hazardous waste. It is clear that the accumulation of waste in the environment may potentially always affect public safety (or rather, public health), but this is merely one possible aspect, which therefore cannot be considered an essential element requiring protection on the basis of which the offence was introduced. On closer inspection, the law does not even require proof of danger to the environment having occurred. However, the

[13] For a detailed comment on this offence, see A. GALANTI, *I delitti contro l'ambiente*, Pacini Giuridica, 2021, p. 275 ff.; for a critical analysis of the most significant case law, see M. PALMISANO, *Il reato di attività organizzate per il traffico illecito di rifiuti nell'applicazione giurisprudenziale*, in *Lexambiente – Rivista Trimestrale di Diritto penale dell'ambiente*, 3, 2022, 23 ff.

fact that a "substantial" quantity of waste is required represents a threshold below which there can be no criminal liability.

3.2. The Best Available Techniques: an overview of the European regulatory framework

To better understand the critical issues underlying the judgments examined, it is necessary to extend the focus of attention, specifically taking into consideration the European regulations on Best Available Techniques (BAT). Since the 1990s, European environmental law has attributed to BAT, and to the emission limits associated with their adoption (BAT-Associated Emission Levels or BAT-AELs), a fundamental role in the prevention and control of pollution caused by manufacturing industries (BAT-based policy). The relevant regulatory framework is currently dictated by Directive 2010/75/EU (Industrial Emissions Directive or IED), which has ordered previous directives on the subject to be recast and at the same time amended[14].

It being understood that authorizations for the exercise of polluting installations are the responsibility of Member States, the IED establishes that the BAT and BAT-AELs "serve as a reference" for the national authorities when they set the conditions for the issue of such measures[15]. In Italy, this function is performed by the *Autorizzazione Integrata Ambientale* or AIA ("integrated environmental authorization"), issued by the Ministry of the Environment or by regional administrative authorities (based on the division of responsibilities referred to in Article 7 of the TUA), according to the provisions laid down in Title III-*bis* of the TUA (art. 29-*bis* et seq. TUA), adopted in implementation of the IED[16].

It should be emphasized that, in the light of the *notion* of the BAT and the form of the *procedure* leading to their drafting, the "best available techniques" do not correspond, as one might think at first reading, to the highest level of technology achieved at a given moment in time, but are the result of *cost-benefit assessments*, in the drafting of which all interested stakeholders take part. In general terms, in fact, the "best available techniques" are defined as "the most efficient and

[14] For the evolution of the regulatory framework, see A. MILONE, *L'autorizzazione integrata ambientale dopo il d. lgs. n. 128/10*, in *Riv. giur. edilizia*, fasc. 4, 2011, p. 145 ff.; M.A. LABARILE, *Autorizzazione integrata ambientale, come cambia il ruolo delle BAT (Best Available Techniques)*, in *Riv. giur. amb.*, fasc. 1, 2013, p. 1; S. VERNILE, *L'autorizzazione integrata ambientale tra obiettivi europei e istanze nazionali: tutela dell'ambiente vs. semplificazione amministrativa e sostenibilità socio-economica*, in *Riv. it. dir. pub. com.*, 2015, p. 1698 ff. On the relevance of the IED in the framework of European pollution control policies, with particular reference to the tension between regulations in line with the "command and control" model on the one hand, and with the criteria of decentralization and flexibility on the other, see A. ZERI, *Deconstructing the Industrial Emissions Directive's (2010/75/EU) Regulatory Standards: A Tale of Cautious Optimism*, in *UCL Journal of Law and Jurisprudence*, 2013, p. 173 ff.

[15] Art. 14 par. 3 IED. On the application of BAT by the Member States, see J. MAŚNICKI, *Decentralised Application of the BAT Conclusions*, in *European Energy and Environmental Law Review*, April 2018, p. 53 ff.

[16] On the tool of the AIA and its European derivation, see S. VERNILE, *L'autorizzazione integrata ambientale tra obiettivi europei e istanze nazionali*, cit., p. 1701 ff.

advanced stage of development of activities and related methods of operation indicating the practical suitability of certain techniques to form the basis of emission limit values and other conditions of authorization intended to prevent or, where impracticable, to reduce emissions and their impact on the environment as a whole"[17]. So far, the notion would seem to refer to concepts of an exclusively technical-scientific nature. However, it acquires another aspect as soon as we consider the sub-notions specifically dictated for the concepts of "available" and "best" techniques.

The former are "techniques developed on a scale which allows their application under *economically* and technically *feasible conditions* within the relevant industrial sector, *taking into account costs and benefits*, whether or not they are applied or produced in the State member in question, provided that the operator has *access to them on reasonable terms*" (emphasis added)[18]. The latter, for their part, are "the most effective techniques for obtaining a high level of protection of the environment as a whole"[19]. European legislators have therefore used defining elements that introduce assessments of a "political" nature, i.e. pertaining to the economic sustainability of the operation and the achievement of a level of environmental protection that is generically specified as "high" [20].

Therefore, the concept of "impracticability" of a measure, which, as we have seen, opens the way to solutions aimed at reducing rather than eliminating polluting emissions, does not only concern its availability or feasibility per se, but also its *cost-effectiveness*, within the framework of *balancing costs and benefits of the operation* considered as a whole[21]. Of course, these will still have to be measures that guarantee a "high level of environmental protection", within the framework of the more general objective of "sustainable development" envisaged by the Treaties and by the EU Charter of Fundamental Rights. However, these concepts, in the absence of further specifications (not to be found even in the preamble of the directive), are destined to have an insignificant prescriptive capacity.

As anticipated, the also "political" nature of the BAT is reflected in the procedures that lead to their development and their subsequent reviews and

[17] Art. 3 para. 10 IED. The same provision also specifies that "techniques" means not only functioning and control measures in the strict sense, but also the methods of design, construction, maintenance, operation and closure of the installation (art. 3 (10) (a)). This notion of BAT was almost verbatim implemented by Italian legislators in art. 5 (1) (l-*ter*) of the TUA. On the strengthening of the role of the BAT in the system of the IED compared to the previous IPPC directive, in order to fill the implementation deficit from which the latter suffered, see ZERI A., *Deconstructing the Industrial Emissions Directive's (2010/75/EU) Regulatory Standards*, cit., p. 184.

[18] Art. 3 (10) (b) IED.

[19] Art. 3 (10) (c) IED.

[20] Along these lines, see S. VERNILE, *L'autorizzazione integrata ambientale tra obiettivi europei e istanze nazionali*, cit., p. 1709; M. BOSI, *Le best available techniques nella definizione del fatto tipico e nel giudizio di colpevolezza*, in *Dir. pen. cont. – Riv. Trim.*, 2018, 1, p. 198.

[21] It is precisely to this rule that the diffusion of the acronym *BATNEEC* (*BAT Not Entailing Excessive Cost*) is connected, as reported by M.A. LABARILE, *Autorizzazione integrata ambientale, come cambia il ruolo delle BAT*, cit., p. 10.

updates, described by the IED and by the guidelines adopted by the European Commission in decision 2012/119/ EU (hereinafter: guidelines)[22]. The BAT relating to the individual sectors are in fact described in a BAT Reference Document, or BREF, which is drawn up as part of a procedure launched by the Commission and focused on the exchange of information among the interested stakeholders. The BREFs are materially drawn up by the Technical Working Groups or TWGs, whose members are chosen on the basis of their technical, economic, environmental and legal expertise by an assembly (so-called forum), set up and chaired by the Commission, in turn composed of representatives of the Member States, the industries concerned and NGOs that campaign for environmental protection. The work of the TWGs is coordinated, directed and supervised by the staff of the European Integrated Pollution Prevention and Control Bureau (EIPPCB), based in Seville, where the plenary meetings of the groups take place (for this reason we often refer to the procedure in question as the "Seville process"). The draft BREF is presented by the EIPPCB to the forum, which expresses its opinion, which the Commission will have to take into account in formulating the so-called *BAT conclusions* (BATC)[23]. The latter include, among other things, the description of the BAT, the information required to evaluate their applicability and the emission levels associated with them[24]. The BATC are formulated according to the comitology procedure[25] and incorporated into a Commission decision addressed to the Member States, published in the Official Journal of the EU in all official

[22] This is the decision "which establishes the rules relating to the guidelines concerning the collection of data and the elaboration of reference documents on the BAT and their quality assurance referred to in Directive 2010/75/EU of the European Parliament and of the Council related to industrial emissions".

[23] Guidelines, chap. 1.3.

[24] The notion of "BAT conclusions" is dictated by art. 3(12) IED.

[25] Art. 75(2) IED refers to the regulatory procedure pursuant to art. 5 of decision 1999/468/EC (so-called comitology rules), on the basis of which the Commission submits a draft measure to be adopted to a committee made up of representatives of the Member States, which issues an opinion (substantially binding, since in the event of any discrepancy, the matter is submitted to the Council, which can oppose the Commission's proposal). This decision was in the meantime repealed by Regulation (EU) No. 182/2011, which established the rules and general principles relating to the methods whereby Member States could monitor the exercise of the implementation powers attributed to the Commission. Pursuant to the transitional provisions of the regulation, references to the regulatory procedure pursuant to decision 1999/468/EC must be understood as references to the new examination procedure under art. 5 of the regulation itself, according to which, in the event of a negative opinion from the committee (and possibly from the appeal committee), the Commission's proposal is not approved. On the importance of the procedures in question, in order to stem the preponderant role played by industries in the forum (but also on their weaknesses in terms of democratic deficit), see A. ZERI, *Deconstructing the Industrial Emissions Directive's (2010/75/EU) Regulatory Standards*, cit., p. 189 s.

languages[26]. After the decision is taken, the EIPPCB amends the BREF if necessary based on the decision, and makes the final version available to the public[27].

As for the binding nature of the Commission's decisions, it should first of all be underlined that by virtue of a clause usually inserted in art. 2, these are expressly addressed to the States. Furthermore, these decisions contain a standard clause which states that "the techniques listed and described in these BAT conclusions are neither prescriptive nor exhaustive", and consistently that "other techniques may be used which ensure at least an equivalent level of environmental protection". Therefore, these are decisions which establish, on the part of the States, obligations in terms of results but not of means (unless otherwise provided for by specific provisions[28]). This approach is not confirmed in the IED directive, which, as we have seen, merely establishes that the BAT conclusions "serve as a point of reference" for establishing authorization conditions, and that as a rule national limits must be set in such a way that emissions do not exceed the BAT-AELs[29], at the same time providing for situations in which States may envisage more or less rigid authorization conditions[30].

Finally, the IED provides, on the one hand, for the periodical review of the BREFs (ideally at least every eight years)[31], in order to take into account any scientific progress or other intervening factor that could modify the previous assessment; on the other hand, that the States review each single authorization conditions within four years of the publication of the decision containing new BAT conclusions[32], and in any case when levels of pollution or safety require it[33].

3.3. A controversial case of waste management compliant with national authorization, but not with the Best Available Techniques

The Italian courts have recently had to deal with the following question: whether an operator that carries out authorized waste management activity may incur criminal liability for an offence pursuant to art. 452-*quaterdecies* where the

[26] The BAT conclusions are freely downloadable, together with the respective BREFs, at: https://eippcb.jrc.ec.europa.eu/reference/

[27] Guidelines, chap. 1.4. Again on the basis of the guidelines (chap. 1.2.4) the procedure for drawing up a BREF should have a maximum duration of 39 months; for the review of an existing BREF, as a rule, the maximum duration should be 29 months.

[28] For example, decision 2017/1442, laying down the BAT for large combustion plants, alongside the specified clauses also provides that "Where emission levels associated with the best available techniques (BAT-AEL) are indicated for different averaging periods, all the BAT-AELs indicated must be respected".

[29] See, respectively, Arts. 14 (3) and 15 (3) IED.

[30] See Arts. 14 (4) ("stricter authorization conditions"); 15 (4) ("less stringent emission limit values"); 15 (5) ("temporary derogations" to the regulations on BAT and limit values). On the issue, see once more J. MAŚNICKI, *Decentralised Application of the BAT Conclusions*, cit., p. 56 ff.

[31] Along these lines, see Recital no. 13.

[32] Art. 21 (3).

[33] Art. 21 (5).

European BAT, subsequent to the operator's authorization, envisage more stringent standards.

The case concerns a plant for the treatment of solid urban waste which had been authorized, by means of an administrative provision dated 1 December 2017 (AIA), to directly treat waste containing organic putrescible material, without carrying out any preliminary separation from non-organic waste. However, the most up-to-date BAT on the subject (issued with EU implementing decision 2018/1147 of 10 August 2018) establish that if the waste contains a putrescible fraction, it is first necessary to sort the waste to remove any putrescible wet material. For this reason, Rome's Public Prosecutor's Office launched an investigation into six plant operators for the crime of illegal waste trafficking, allegedly carried out between 2017 and 2019. As part of the investigation, on 21 May 2020, the Public Prosecutor's Office asked the Judge for preliminary investigations to place the plant under preventive seizure, in order to prevent illegal conduct from being carried out during the course of the proceedings, which would further aggravate the offence. Following the rejection of the seizure request by the Judge for preliminary investigations, the Public Prosecutor's Office filed an appeal with the Court of first instance of Rome, which nonetheless confirmed the magistrate's decision.

The Public Prosecutor's Office then successfully petitioned the Court of Cassation, which cancelled the appeal ruling and asked the Court of first instance to re-examine the matter (sentence 33089/2021). In support of this conclusion, the Court of Cassation affirmed that the BAT must be considered relevant since they constitute, by law, a fundamental parameter of legitimacy of the AIA (point no. 3)[34]. The passage, formulated in rather obscure language, appears circular, in the sense that it does not fully clarify why the BAT in question should have been respected by the operators[35].

This problem subsequently influenced a further ruling by the Court of first instance, which again failed to grant seizure. The judges in fact observed that, on the basis of the provisions of art. 21 (3) IED, implemented by Italy through art. 29-*octies* of the TUA, whenever new BAT conclusions are approved by the European

[34] The English translation of the passage is as follows: "*Verification of compliance of environmental authorizations with the BAT, in relation to the type of activity carried out and to the existence of any discrepancies, and, in any case, compliance with the latter (also in this case taking into account of the type of activity and the relevance of any non-compliance with the BAT Conclusions), is important for the purpose of ascertaining the illegality of the conduct. This because such authorizations contribute to defining the legal or authorizing parameter the violation of which is punished and non-compliance with which, if affecting the content, methods and results of the activity carried out, may determine the unlawfulness thereof, it being carried out on the basis of authorization not compliant with the relevant BAT Conclusions for the purposes of this activity or in violation of such conclusions*".

[35] In criminal law scholarship, the first comments on the sentence were critical: see ALEX H. BELL, *L'inquinamento ambientale al vaglio della Cassazione*, cit., p. 30 ff.; N. PISANI, *Best Available Techniques (BAT) e abusività della condotta nel traffico illecito di rifiuti*, in *Lexambiente – Rivista Trimestrale di diritto penale dell'ambiente*, n. 2/2022, p. 67 ff.

Commission, the Member States have four years (running from publication of the BAT conclusions in the Official Journal of the European Union) to review any authorizations previously issued. In the meantime, plant managers can continue their activity on the basis of the authorization in their possession (art. 29-*octies* (11)). In the case at hand, the Court observed, the request for preventive seizure refers to BAT adopted by the European Commission on 10 August 2018 and published in the Official Journal of the European Union on 17 August 2018, so that the deadline for complying with these technical standards would expire on 17 August 2022. Up to then, they could at most be considered useful technical parameters, in any case non-binding, the violation of which, therefore, could not result in the conduct being declared unlawful.

Following a new appeal by Rome's Public Prosecutor's Office, the Court of Cassation once again ruled on the matter and, again, annulled the order of the Court of first instance (judgment 39150/2022). This time, however, the Cassation did not rely, as in the 2021 ruling, on the direct applicability of the BAT, but on the fact that, according to the Testo Unico Ambiente (art. 29-*bis* (1)), as long as the BAT do not become binding, the authorization conditions must be based on documents periodically published by the European Commission in accordance with the directives on integrated pollution control and prevention (Directive 2008/1/EC, now replaced by the IED). These documents include the *BAT Reference Documents* or *BREFs* (i.e. the preparatory technical documents on the basis of which the EU Commission issues the BAT) which in the present case date back to 2006 and contain provisions very similar to those of the 2018 BAT. In particular, according to the BREF "*Waste Treatments Industries - August 2006*", undifferentiated municipal waste containing some putrescible components cannot be subjected to mechanical treatment only, but must also undergo biological stabilization or drying treatment; that is, exactly the conduct which, in the present case, the operators of the plant under trial were accused of.

4. The relevance of the BAT in criminal matters, in the light of the principle whereby regulations must be knowable and penalties foreseeable

The position adopted by the Italian Court of Cassation, in the two judgments examined, with reference to the relevance of the BATs and the BREFs in determining the unlawfulness of the operator's conduct, and therefore of its criminal liability for illicit trafficking of waste, raises various perplexities.

First of all, the judges do not clarify whether the operators' conduct must be considered unlawful because it fails to comply with European technical standards, which were not implemented in the national authorization measure; or whether it is the authorization measure itself that must be considered incompatible with European standards, making the operator's conduct unlawful because it complies with an illegal authorization. Adopting one approach or the other would probably not have changed the outcome of the decision, but at least it would have made the underlying reasoning clearer.

In any case, the outcome of the decisions appears to be open to criticism, on the basis of considerations concerning both European Union law and, more in depth, the fundamental principles of ascribing criminal liability.

As explained above, BAT conclusions are published by means of a decision of the European Commission explicitly addressed to the States. Therefore, these sources are not binding for individual operators, but for the national administrative bodies that issue authorizations[36]. The same argument, *a fortiori*, applies to the BREFs, since they are, as seen, documents prodromal to the subsequent issue of the BAT conclusions. Of course, since these are technical requirements issued through a participatory procedure which, as we have seen, should guarantee compliance with the most recent scientific and technological knowledge, they should be taken into consideration, also by operators, as an asset useful for carrying out a dangerous activity while minimizing risks for the environment. In this perspective, the BAT and the BREFs could be used to demonstrate possible instances of negligence on the part of the operators, for example where a formally authorized activity has caused damage to the environment, and the operator's *mens rea* needs to be assessed[37].

It is something different, and much more disruptive, to exploit the rules dictated by the BATs and the BREFs with the aim of considering as substantially illegal an activity that is formally lawful, since it was carried out in accordance with an authorization that does not take into account those rules, and to consider that the automatic outcome is an instance of criminal liability for carrying out unlawful activity. Any assessment regarding the use of European technical standards to increase the level of environmental protection imposed on operators must in fact take into account the fundamental principles governing criminal liability. In this case, it is important to focus on the principles of the accessibility of offences and the foreseeability of criminal penalties[38]. Both of these principles can be traced back to the more general principle of legality in criminal matters (*nulla poena sine lege*), enshrined both in national constitutions (the Italian Constitution provides for it in art. 25 (2)), and in art. 7 of the European Convention on Human Rights, as well as in art. 49 (1) of the EU Charter of Fundamental Rights (undoubtedly applicable in this matter, since it is an area in which the EU has

[36] Decisions addressed to the States, like directives, can be appealed to by individuals against States (vertical effect), provided the additional conditions of sufficient precision and expiry of the transposition deadline are met; however, they cannot be appealed to in relations between private individuals (horizontal effect) or *a fortiori* by a (non-performing) State against a citizen (reversed vertical effect). Cf. K. LENAERTS, P. VAN NUFFEL, *European Union Law*, III ed., Sweet&Maxwell, 2011 p. 918.

[37] On negligence as a breach of the duty of care, see J. KEILER, D. ROEF (eds.), *Comparative concepts of Criminal Law*, 3rd ed., Intersentia, 2019, p. 195.

[38] For an extensive discussion of the topic, see M. FAURE, M. GOODWIN, F. WEBER, *The Regulator's Dilemma: Caught between the Need for Flexibility and the Demands of Foreseeability. Reassessing the Lex Certa Principle*, in *Albany Law Journal of Science and Technology*, 24/2, p. 291 ff.

exercised its own competence)[39]. The basic idea is that citizens must be able to foresee the criminal consequences of their actions, since otherwise they would be unable to trust in the lawfulness of their behaviour, exactly as would happen if a criminal law unfavourable to them were applied retroactively[40]. The use of the technique of "blanket reference" or "legislation by reference" (i.e. the technique where substantive provisions of criminal law, when setting out the constituent elements of criminal offences, refers to legal provisions outside criminal law, such as the clause under examination) is not in itself incompatible with the requirements of accessibility and foreseeability, provided that both norms (the referencing and the referenced provision) taken together enable the individual concerned to foresee, if need be with the help of appropriate legal advice, what conduct would make him or her criminally liable[41]. Conversely, the lack of foreseeability can be due to various factors, such as the obscurity of the criminal law or of the law referred to, or a sudden change in case law[42].

With respect to the matter under examination, we should distinguish between two different scenarios. On the one hand there are situations in which the authorization is illegitimate from the outset, as it is in conflict with the BAT conclusions already issued by means of a Commission decision published in the EU Official Journal. In these cases it can be assumed that the operator may be aware of the situation of illegality, and therefore that the criminal penalty is a predictable effect of its conduct. These cases could be equated to that in which new

[39] For an overview of the principle of legality in criminal matters and its articulations, in a comparative and supranational perspective, see J. KEILER, D. ROEF (eds.), *Comparative concepts of Criminal Law*, cit., Ch. III.

[40] The connection between legality, knowability of the regulations and foreseeability of the penalty, which the Constitutional Court in Italy has focused on since the sentence no. 364 of 1998 regarding the concept of innocent mistake in criminal law, has now also been clearly confirmed in the case law of the European Court of Human Rights: see Grand Chamber, Del Rio Prada v. Spain, 2013, para. 91: "*When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability […]. These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries*".

[41] Cf. European Court of Human Rights, Grand Chamber, 29 May 2020, Advisory opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law. For the conclusion according to which, overall, the case law of the European Court does not yet offer a satisfactory level of protection of the foreseeability of the criminal penalty, see M. FAURE, M. GOODWIN, F. WEBER, *The Regulator's Dilemma*, p. 315; V. MAIELLO, on the other hand, underlines the fundamental role that the rule of foreseeability has played in introducing a "hinge" between legislative legality and case law activism in *La legalità della legge e il diritto dei giudici: scossoni, assestamenti e sviluppi*, in *Sistema penale*, n. 3, 2020, p. 135.

[42] See, with reference to a case in which criminal law intersects with administrative law, European Court of Human Rights, 10 October 2006, Pessino v. France, where the European Court recognized the violation of art. 7 ECHR in the fact that the national courts had for the first time charged an appellant with the offence of building without planning permission, when the appellant had continued the construction of a building despite a subsequent administrative decision suspending the building permit initially granted (and then effectively cancelled).

BAT have been published and the four years granted to the States to review authorizations previously issued have actually elapsed. Otherwise, moreover, the illegitimate authorization would become a factor of de-responsibilization, a pretext for carrying on an activity that is no longer permitted and therefore ultimately a factor of impunity.

On the other hand, there are situations in which the formally legitimate authorization does not comply with the new, more up-to-date European technical provisions, but the national legislator is still within the time limit to review the previous authorizations. In these hypotheses, if it were held that the operator's conduct is "illegal", we would find ourselves faced with the paradoxical situation whereby the European decision is not yet binding on national legislators (that is, on its only addressee), to whom a longer period of time is given for compliance; but is already so for the single operator, under threat of a criminal penalty. This solution, in addition to being contrary to the principle of the separation of powers, since it leads to a judicial modification of a legislative measure, involves an intolerable sacrifice of the trust placed by the operator in its own conduct and therefore the violation of the principle of accessibility of criminal regulations and foreseeability of penalty[43]. In conclusion, in similar cases, coinciding with the one examined by the Court of Cassation in the sentences referred to above, the conduct cannot be considered "unlawful" [44].

Furthermore, the concept of trust also constitutes the limit through which to prevent the protective function of the "unlawfulness" clause from turning into an undesirable factor of impunity. In other words, the operator could not invoke the formal legitimacy of its activity in the face of clear alarm signals, just as a motorist who has caused an accident cannot defend himself by appealing to formal compliance with a speed limit if the actual circumstances made it clear there was a need to further reduce speed or even stop the vehicle. *A fortiori*, an operator could not seek protection behind formal compliance with an authorization if[45], by means of corrupt activities[46], or even simply by concealing information of which it was aware, it unduly influenced the decision-making process on which its authorization was based. On the contrary, according to authoritative Italian criminal law scholarship, it would be possible to derive from the precautionary

[43] Along these lines, see N. PISANI, *Best Available Techniques (BAT) e abusività della condotta nel traffico illecito di rifiuti*, cit., p. 74-75.

[44] In favour of this solution, on the basis of arguments in part coinciding with those developed here, see M. BOSI, *Le best available techniques nella definizione del fatto tipico e nel giudizio di colpevolezza*, in *Diritto penale contemporaneo – Rivista Trimestrale*, n. 1, 2018, p. 206 ff.

[45] Along these lines, see ALEX H. BELL, *L'inquinamento ambientale al vaglio della Cassazione*, cit., p. 30. On the importance of the role of industries in the "Seville process" for drafting the BAT, on the asymmetrical availability of information and how this may negatively affect the quality of available information, see A. ZERI, *Deconstructing the Industrial Emissions Directive's (2010/75/EU) Regulatory Standards*, cit., p. 187.

[46] Along these lines, see M. BOSI, *Le best available techniques nella definizione del fatto tipico e nel giudizio di colpevolezza*, in *Diritto penale contemporaneo – Rivista Trimestrale*, n. 1, 2018, p. 207.

principle, which as a rule is addressed to the authorities and not to the operators, a real obligation on the part of the operators to share information on the risks available to them, including information relating to situations of doubt regarding a certain risk situation, in order to contribute to the drafting of more effective preventive rules[47]. These considerations should reassure those interpreters, such as the Italian Court of Cassation, which have expressed concern that an excessive focus on formalities may result in undue de-responsibilization of polluters.

5. Concluding remarks: the "unlawfully" clause as an expression of "allowed risk"

The above analysis has highlighted that there are still some issues to be resolved in relation to the correct interpretation of the "unlawfully" clause. In the background emerge a series of interests worthy of protection, which often appear in conflict with each other: private economic initiative and environmental wellbeing; the protection of the trust placed by operators in the legitimacy of activity compliant with administrative authorizations; and the responsibility of the operators themselves in the face of conduct dangerous to the environment. In reality, if correctly interpreted, the "unlawfully" clause should allow for the reconciliation of the interests at stake, establishing reasonable points of equilibrium that allow for their coexistence.

To this end, it may be useful to relate the function of the "unlawfully" clause to a broader concept of the general theory of crime, that of "acceptable risk"[48]. This is an old concept, coined to justify the exclusion of culpable liability in the event of the occurrence of foreseeable harm caused by the exercise of dangerous yet socially useful activities, such as the construction of bridges and tunnels, the trade in alcohol and tobacco, the movement of motor vehicles and so on. Acceptable risk is based on the awareness that, when dealing with inherently dangerous human activities, there are basically two viable solutions: either the activity in question is prohibited altogether (as happened in Italy, for example, with respect to the extraction of asbestos or the production of nuclear energy); or it is authorized within certain limits, which are the result of balancing interests, considered in the light of scientific knowledge but also of political assessments[49].

[47] G. FORTI, *Accesso alle informazioni sul rischio e responsabilità: una lettura del principio di precauzione*, in *Criminalia*, 2006, 155 ff.; for a more radical view, in favour of basing liability also on the failure to *search* for new information, in the light of which preventive standards should be raised with respect to those formally envisaged ("development risk liability"), a view moreover tempered by recourse to the mechanism of "prospective overruling", see M. FAURE, M. GOODWIN, F. WEBER, *The Regulator's Dilemma*, cit., p. 340 ff.

[48] In favour of this approach, see C. RUGA RIVA, *Diritto penale dell'ambiente*, 2021, p. 258.

[49] On the notion of acceptable risk in Italian criminal law, with extensive references to the corresponding German theory of *erlaubtes* Risiko, see V. MILITELLO, *Rischio e responsabilità penale*, Giuffrè, 1988, p. 56 ff.; 140 ff.; G. FORTI, *Colpa ed evento nel diritto penale*, Giuffrè, 1990, p. 457 ff.; F.

When this second solution is opted for, as happens for the activities regulated by the BATs, it is completely normal for the limits of what is allowed to change over time, in line with changes in social consciousness and/or technical and scientific progress. But that does not mean that operators may be held criminally liable for conduct that complies with previously permitted risk levels. In fact, this would mean violating the rationale underlying the principle of unfavourable non-retroactivity, sacrificing the trust legitimately placed by the operator on the legitimacy of its actions and imposing a criminal penalty that was unforeseeable *ex ante*.

It is not important here to join the academic dispute on acceptable risk, and in particular regarding the category of offence to which it belongs (actus reus, justifications or culpability); and whether it is a concept that merely repeats conclusions based on other principles (certainty of law, separation of powers, non-retroactivity, accessibility and foreseeability) or is a principle which independently restricts the scope of criminal liability[50]. What is important is to highlight how the reasoning behind this concept, i.e. the acceptance that risks cannot always be eliminated but must be tolerated within certain limits, could be useful in trying to change the direction of case law, which, as examined above, is often characterized by an excessively repressive attitude towards private operators.

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