

CRIMINAL LAW AS A DRIVER OF SUSTAINABLE GOVERNANCE:  
A SCHUMPETERIAN APPROACH TO ENVIRONMENTAL COMPLIANCE  
AND LEGAL KNOWLEDGE\*

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SUMMARY: 1.- Introduction; 2.- The Key Concepts of Schumpeter's Thought; 3.- The Transposition of Schumpeterian Theory into Criminal Law; 4.- The theoretical model put to the test: the Italian case.

*ABSTRACT: This paper explores the role of criminal law as an instrument of environmental sustainability and legal knowledge creation, through the interpretative lens of Joseph Alois Schumpeter's theory of creative destruction. Originally conceived to describe how innovation disrupts and renews economic systems, Schumpeter's model offers a compelling framework for understanding the adaptive capacity of criminal law to respond to ecological challenges and global governance needs.*

*The analysis focuses on the criminalization of environmental harm, particularly the offences related to ecomafias and the transnational trafficking of waste - activities that operate across borders and generate complex pollution chains. These phenomena highlight the urgent need for enhanced international cooperation, regulatory harmonization, and traceability mechanisms capable of fostering a coherent "no-pollution area." Within this perspective, criminal law emerges not merely as a tool of repression, but as a generator of legal knowledge: a system that produces, disseminates, and enforces shared standards of responsible conduct in the environmental domain.*

*The paper identifies two essential dimensions of a sustainable criminal framework. First, its preventive function, which should promote compliance mechanisms allowing the regularization of minor infringements before irreversible environmental damage occurs. Second, its restorative capacity, aimed at repairing harm and reinstating the status quo ante through proactive legal and cooperative measures. Both dimensions, if effectively*

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*implemented, could transform environmental criminal law into a driver of sustainable governance rather than a mere reaction to ecological crises.*

*By applying Schumpeter's notion of controlled renewal, the paper argues for a model of Schumpeterian sustainability in criminal law - one that aligns normative innovation with environmental responsibility. Ultimately, fostering legal knowledge and adaptive criminal governance becomes crucial to ensure that the law contributes constructively to ecological resilience and to the long-term sustainability of both natural and legal ecosystems.*

Il presente contributo analizza il ruolo del diritto penale quale strumento di sostenibilità ambientale e di produzione della conoscenza giuridica, attraverso la lente interpretativa della teoria della distruzione creatrice elaborata da Joseph Alois Schumpeter. Originariamente concepito per descrivere il modo in cui l'innovazione sconvolge e rinnova i sistemi economici, il modello schumpeteriano offre una chiave di lettura particolarmente efficace per comprendere la capacità adattiva del diritto penale nel rispondere alle sfide ecologiche e alle esigenze della governance globale.

L'analisi si concentra sulla criminalizzazione dei danni ambientali, con particolare riferimento ai reati riconducibili alle ecomafie e al traffico transnazionale di rifiuti, attività che operano oltre i confini nazionali e generano complesse catene di inquinamento. Tali fenomeni evidenziano l'urgente necessità di rafforzare la cooperazione internazionale, l'armonizzazione normativa e i meccanismi di tracciabilità, al fine di costruire una coerente "area senza inquinamento". In questa prospettiva, il diritto penale emerge non soltanto come strumento repressivo, ma anche come produttore di conoscenza giuridica: un sistema capace di elaborare, diffondere e far rispettare standard condivisi di comportamento responsabile in materia ambientale.

Il contributo individua due dimensioni essenziali di un sistema penale orientato alla sostenibilità. La prima è quella preventiva, che dovrebbe favorire meccanismi di compliance idonei a consentire la regolarizzazione delle violazioni minori prima che si producano danni ambientali irreversibili. La seconda è quella ripristinatoria, finalizzata alla riparazione del danno e alla ricostituzione dello status quo ante attraverso misure giuridiche e cooperative di carattere proattivo. Entrambe le dimensioni, se efficacemente implementate, potrebbero trasformare il diritto penale dell'ambiente in un motore di governance sostenibile, anziché in una mera risposta alle crisi ecologiche.

Applicando la nozione schumpeteriana di rinnovamento controllato, il contributo propone un modello di sostenibilità schumpeteriana del diritto penale, nel quale l'innovazione normativa si armonizza con la responsabilità ambientale. In tale prospettiva, la promozione della conoscenza giuridica e di forme adattive di governance penale diviene essenziale affinché il diritto possa contribuire in modo costruttivo alla resilienza ecologica e alla sostenibilità di lungo periodo tanto degli ecosistemi naturali quanto di quelli giuridici.

## Opinioni

KEYWORDS: Criminal law, Sustainability, Environmental offences

### 1.- *Introduction*

The present contribution aims to assess the role of criminal law as an instrument for promoting environmental sustainability, through the interpretative lens of the so-called theory of “creative destruction” developed by Joseph Alois Schumpeter.

The research hypothesis underpinning this analysis is that a reinterpretation of the Schumpeterian model in a prescriptive key may provide useful coordinates for defining environmental criminal policy strategies, through which criminal law can be conceived not merely as an instrument for the imposition and distribution of sanctions, but also as a mechanism capable of generating and disseminating shared standards of responsible behavior.

Such an approach is consistent with the most recent reflections attributing to criminal law not only a repressive function, but also an orienting and shaping role with respect to economic conduct, particularly in fields, such as the environmental one, characterized by high technical complexity and strong interaction between public and private actors.

The choice of an interdisciplinary approach, aimed at reconciling economic theory and criminal law, finds particular justification in the structural features of the criminological phenomenon under consideration.

Environmental crimes – and in particular the illicit trafficking of waste and those variously attributable to so-called “ecomafias” – indeed display a marked transnational dimension, deriving, on the one hand, from the fact that such conduct often develops along supply chains crossing multiple jurisdictions and, on the other hand, from the circumstance that the harmful or dangerous effects they produce frequently transcend individual national borders.

These characteristics make evident the need for a coordinated and multilevel regulatory approach, based both on the harmonization of legal systems (and in particular of criminal offenses) and on the strengthening of international judicial cooperation .

In this context, the use of general theoretical models, such as that of Schumpeter, may provide a solid conceptual foundation for developing harmonized and effective counter-strategies, since such models are not conditioned by the specificities of individual national systems.

### 2.- *The Key Concepts of Schumpeter’s Thought*

Turning now to the core of the discussion, it is appropriate to focus on certain fundamental categories of Schumpeter’s thought which, once suitably adapted, may offer significant insights also for environmental criminal law.

The analysis is structured around four main keywords, which constitute key steps in the economist’s theoretical framework: i) dynamism; ii) creative destruction; iii) entrepreneur; iv) imitation.

#### *i) Dynamism*

Schumpeter's reflection begins with a sharp critique of neoclassical economic models, which tended to represent the market as a system oriented toward equilibrium and therefore essentially static.

By contrast, Schumpeter maintains that the capitalist economy is, by its very nature, a dynamic system, characterized by continuous change and structural instability<sup>1</sup>.

This dynamism largely derives from innovation, a central idea in the economist's theoretical construction: new goods, new methods of production, new markets, new sources of supply, or new forms of industrial organization constantly transform market conditions, conferring upon the capitalist system an evolutionary character that represents its defining feature.

### *ii) Creative Destruction*

Within this dynamic context lies perhaps the most famous concept of Schumpeterian thought: creative destruction. It is defined as the process through which "the economic structure is incessantly revolutionized from within, destroying the old one and creating a new one"<sup>2</sup>.

This notion highlights the intrinsically ambivalent – i.e., two-faced – nature of economic progress: every innovation does not merely "create" (adding something to the existing system), but profoundly alters its balances, simultaneously determining the "destruction" of firms, technologies, and production models rendered obsolete by the innovation itself. Schumpeter emphasizes that this process is not accidental, but constitutes the very essence of capitalism. The system develops precisely through these waves of innovation that periodically redefine entire economic sectors. In this sense, creative destruction is not an anomaly to be corrected, but rather an element coessential to development<sup>3</sup>.

### *iii) Entrepreneur*

At the center of the process of creative destruction stands the figure of the entrepreneur, whom Schumpeter distinguishes both from the capitalist and from the manager.

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<sup>1</sup> J. SCHUMPETER, *Capitalism, Socialism and Democracy*, Milan, 2001, pp. 81–82: "Capitalism is by nature a form or method of economic change and not only never is but never can be stationary. This evolutionary character of the capitalist process is not due merely to the fact that economic life takes place in a social and natural environment which changes and which, by changing, alters the data of economic action; that fact is important, and such changes (wars, revolutions, and so on) often condition major industrial transformations, but they are not their primary drivers. Nor is the evolutionary character of capitalism due to a semi-automatic increase in population or capital, or to fluctuations in monetary systems, all factors for which the same is true. The fundamental impulse that sets and keeps the capitalist engine in motion comes from new consumer goods, new methods of production or transportation, new markets, and new forms of industrial organisation created by capitalist enterprise."

<sup>2</sup> S. LUCARELLI, *Distruzione creatrice, sviluppo economico e decadenza: un invito a rileggere davvero Schumpeter*, *Economia e Politica*, 2022, p. 3 ff.

<sup>3</sup> C. ANTONELLI, *Appunti per una lettura schumpeteriana della crisi e implicazioni di politica economica*, *Working Paper Series 14/2009*, Department of Economics, University of Turin, p. 77.

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The entrepreneur constitutes the driving force of the innovative process and the main agent of renewal of the economic system, being entrusted with the function of introducing so-called “new combinations” of production (new products, new processes and production methods, new markets, etc.).

From the Schumpeterian perspective, moreover, entrepreneurial action does not take the form of an individual and isolated activity, but rather of an intrinsically coordinated phenomenon, which presupposes the necessary involvement of economic and political institutions<sup>4</sup>.

Within this framework, the State is assigned the task of ensuring the structural conditions necessary to promote and support the development of entrepreneurial initiative. Equally important is the role of the credit system, which, through the creation of purchasing power, enables the entrepreneur to withdraw resources from their traditional uses and reallocate them into new productive combinations.

### *iv) Imitation*

Schumpeter also draws attention to the phenomenon of imitation, a term used to designate the process whereby, once an innovation has been introduced, other economic operators progressively tend to adopt it, attracted by the competitive advantages it entails.

This process of imitation marks the transition from the initial phase, characterized by extraordinary profits for the sole innovator, to a phase of generalized diffusion of innovation: over time, competitive advantages tend progressively to diminish, as more and more firms adopt the same solutions.

Imitation thus performs an essential function in capitalist dynamics: on the one hand, it allows for the diffusion of technological and organizational progress; on the other hand, it contributes to restoring conditions of competition by eroding the positions of temporary monopoly created by innovation.

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<sup>4</sup>J. SCHUMPETER, *The Theory of Economic Development*, Milan, 1911: “Even the owner of wealth, however large a trust, must resort to credit if he wishes to introduce a new combination which cannot be financed, like an existing one, from the income of previous production ... The far greater part of it does not derive from saving in the proper sense, but consists of funds which are the result of the introduction of new combinations and in which we shall later recognise entrepreneurial profit ... It is not a transformation of existing purchasing power, but the creation ex nihilo of new purchasing power (ex nihilo, even if the credit contract by which it is created rests on certain real guarantees which are not in themselves means of circulation), which is added to the existing circulation ... The banker is not an intermediary of the commodity ‘purchasing power’ but a ‘producer’ of this commodity. ... He is essentially a phenomenon of development, but only where there is no central authority directing the economic process in society. He makes the introduction of new combinations possible: in a sense he issues, on behalf of the economy, the authorisation necessary to introduce them. He is the efor of the exchange economy.”

### 3.- *The Transposition of Schumpeterian Theory into Criminal Law*

The theoretical framework provided by Schumpeter makes it possible, as anticipated, to outline certain essential coordinates for an effective criminal policy in the field of environmental sustainability.

In this regard, however, the keywords analyzed in the previous section must be reinterpreted in light of a unifying idea that allows their transposition into the criminal law domain: the idea of reparation.

If, in the Schumpeterian economic model, innovation represents the driving force of change, in environmental criminal law this function may effectively be fulfilled precisely by reparation, and in particular by those mechanisms that, following the commission of an offense, incentivize the restoration of environmental equilibrium.

The underlying idea is that, for the purposes of environmental sustainability, criminal law cannot be limited to the *ex post* repression of unlawful conduct, but must be structured in such a way as to allow the offender to restore the pre-existing situation.

Reparation thus assumes a dual function: on the one hand, as an instrument for environmental restoration; on the other, as a mechanism for the responsabilization of the offender.

This perspective also allows for overcoming the purely retributive paradigm of punishment, in favor of models that enhance restorative and compensatory components. Granting the offender the possibility of mitigating or even entirely avoiding criminal sanctions through reparative conduct does not constitute a mere act of leniency, but responds to a functional logic: that of maximizing the effectiveness of environmental protection.

Naturally, in order to prevent such a model from being subject to possible instrumentalization – or, worse, from producing counterproductive effects, such as encouraging the commission of offenses in view of a subsequent “regularization” through reparation – it is necessary that reparative conduct meet strict and well-defined requirements<sup>5</sup>.

First, reparation must be *voluntary*, that is, the result of a free and conscious choice by the offender, not imposed by external factors nor determined solely by the prospect of obtaining procedural advantages. The spontaneity of the restorative intervention constitutes a significant indicator of the degree of responsabilization of the agent and of their genuine adherence to environmental protection values.

Second, it is essential that reparation be *timely*, i.e., carried out as close as possible to the commission of the offense, ideally even before the initiation of criminal proceedings. Timeliness, in addition to reducing the extent of environmental damage and limiting its long-term consequences, enhances the concrete effectiveness of the restorative intervention, preventing it from degenerating into a merely late and instrumental compliance.

Moreover, reparation must be *complete* and *effective*, that is, capable of restoring, as far as possible, the condition of the affected sites and natural resources, according to appropriate and verifiable technical standards. Only reparation possessing these characteristics can justify, at a systemic level, differentiated sanctioning treatment.

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<sup>5</sup> F. COPPOLA, *Il postfatto penalistico quale possibile strumento di co-gestione del rischio da IA e di tutela contro l’"hate speech" nella prospettiva europea, Iura and Legal System*, 2024.

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In this interpretative key and in light of the foregoing premises, it is possible to reread the fundamental categories of Schumpeter's thought in order to derive significant insights also in the field of environmental criminal law protection.

### *i) Dynamism*

A first insight derived from Schumpeterian thought concerns the need to overcome a static conception of criminal law: the traditional model of environmental criminal law, based on the sequence of fact-finding, attribution of responsibility, and imposition of sanctions, has notoriously shown over time significant deficits in terms of the effectiveness of protection.

On numerous occasions, punitive intervention proves in fact to be irredeemably delayed, intervening when environmental damage has already occurred and has become irreversible; therefore, such an approach proves inadequate with respect to the specific nature of the legal interests involved, characterized by high vulnerability, the tendency toward irreversibility of harm, and a marked collective dimension of protection.

This leads to the opportunity to enhance a paradigm (dynamic) focused on timeliness and effectiveness of reparation, capable of preventing irreversible environmental effects and of ensuring more adequate protection of the interests of persons harmed by the offense.

The advantages of such a model are evident: on the one hand, it allows for faster and more effective results in terms of environmental protection, anticipating the moment of restoration with respect to the often lengthy times of criminal proceedings. On the other hand, it produces deflationary effects on the judicial system, reducing the number of proceedings destined to reach trial and thus contributing to a more efficient allocation of resources.

### *ii) Creative destruction*

The reference to creative destruction allows for the introduction of a particularly fruitful reflection from a criminal law perspective.

If, in Schumpeter's thought, every innovation simultaneously implies a process of creation and destruction, a similar ambivalence may also be found in criminal dynamics, where it is associated with the offense: the latter, in fact, should not be understood exclusively as a factor of disintegration, but also as an occasion for a process of reconstruction and rebalancing of the violated legal order.

In this perspective, the pathological moment of the violation does not exhaust the meaning of criminal intervention, but is inserted into a broader dynamic which, far from merely recording the rupture of the normative framework, may actively contribute to its recomposition.

### *iii) Entrepreneur*

The centrality of the entrepreneur in the Schumpeterian model suggests, on the criminal law level, a reconsideration of the role of the offender.

Traditionally, the offender is conceived as a passive recipient of the sanction. In a reparation-oriented perspective, instead, he becomes an active protagonist of the process of restoring the violated equilibrium.

Attributing to the offender the possibility of repairing environmental damage, in addition to the aforementioned advantages in terms of environmental sustainability, also fosters processes of individual responsabilization, reducing the risk of recidivism. Nor should it be overlooked, moreover, that such a model significantly attenuates the desocializing effects connected to custodial punishment, especially in areas where offenders are often embedded in economic and productive contexts.

However, just as the Schumpeterian entrepreneur does not operate in isolation, neither can the offender be left to himself. It is therefore necessary for the State to provide an adequate legal and institutional framework capable of making reparative conduct concretely feasible: this entails, among other things, the definition of clear criteria for the assessment of reparation, the provision of technical instruments for environmental restoration, and more generally the construction of a coherent and functional system of incentives.

#### *iv) Imitation*

Finally, reference to the mechanism of imitation allows for the identification of a further relevant aspect for environmental criminal policy.

If innovative behaviors tend to spread through imitative processes, then reparative conduct may also generate systemic effects: a criminal model that effectively rewards those who restore environmental damage is destined to produce an emulative effect, because other subjects, finding themselves in similar situations, will be incentivized to adopt similar behaviors.

Thus, a virtuous dynamic is created in which the response to the unlawful act is not exhausted in the individual case, but contributes to the formation of widespread behavioral standards. Criminal law, in this perspective, operates as a mechanism of indirect regulation, capable of orienting the choices of economic operators also beyond the strictly repressive sphere.

It is important to emphasize that such an imitative effect does not occur automatically, but depends on the coherence of the legal system. Only if the benefits associated with reparative conduct are clear, foreseeable, and concretely accessible can they influence individual decision-making.

#### *4.- The theoretical model put to the test: the Italian case*

A significant testing ground for verifying the operational robustness of the theoretical model outlined so far is represented by the Italian system of environmental criminal law, which, even beyond certain persistent critical issues, nonetheless shows relevant openings in the indicated direction.

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In recent years, the Italian legislator has profoundly innovated the environmental protection system, intervening both at the constitutional level and at the level of ordinary legislation, placing at the center a legal interest that for a long time had remained at the margins of criminal law reflection.

From the first perspective, the rewriting of Articles 9 and 41 of the Constitution (Constitutional Law No. 1/2022) marked a particularly significant step, elevating the protection of the environment, biodiversity, and ecosystems to a primary constitutional value, as well as introducing an explicit constraint on private economic initiative, which, following the reform, may not be carried out in such a way as to cause harm to health and the environment<sup>6</sup>.

At the legislative level, instead, this evolution has been translated into the introduction, by Law No. 68 of 2015, of an autonomous title of the Criminal Code devoted to crimes against the environment, among which the offenses of environmental pollution and environmental disaster assume particular importance. These are crimes that mark an evident strengthening of the punitive response to the most serious forms of aggression against the legal interest of the environment, through the introduction of harsher sanctions and more incisive investigative tools<sup>7</sup>.

However – and this is where the most interesting aspects emerge with respect to the Schumpeterian model – alongside this strengthening of the repressive dimension, the legislator has also provided mechanisms that enhance the logic of reparation.

In particular, for less serious offenses (contraventions), a specific mechanism for the extinction of the offense has been introduced (Articles 318-bis et seq. of the Environmental Code), based on compliance with specific prescriptions issued by the administrative authority or judicial police, operating on condition that the environmental damage or danger has not assumed a serious or irreversible character.

The functioning mechanism is rather simple: once the violation has been ascertained, the offender is assigned a deadline within which he must carry out the conduct necessary to eliminate the dangerous situation or to restore the state of the environment. Timely compliance with such prescriptions, together with the payment of a sum of money, results in the extinction of the offense<sup>8</sup>.

For more serious offenses (felonies), instead, the legislator has not introduced a similar extinction mechanism, but has limited itself to recognizing an attenuating circumstance (Article 452-decies of the Criminal Code) in favor of those who effectively take action

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<sup>6</sup> C. RUGA RIVA, *L'ambiente in Costituzione. Cambia qualcosa per il penalista?*, SP, 2023; L. SIRACUSA, *Ambiente e diritto penale: brevi riflessioni fra le modifiche agli artt. 9 e 41 Cost. e le prospettive di riforma in ambito internazionale*, LP, 2023; G. DE FRANCESCO, *Note brevi sulla 'questione ambientale'. Una lettura evolutiva delle esigenze e dei livelli della tutela*, LP, 2023.

<sup>7</sup> M. CATENACCI, *L'introduzione dei delitti contro l'ambiente nel codice penale. Una riforma con poche luci e molte ombre*, Riv. Quad. Dir. Amb., n. 2, 2015, pp. 32 ss.; L. CORNACCHIA, *Diritto penale dell'ambiente. Diritto penale d'impresa e reati ecologici*, Bologna, 2024, pp. 307 ss.; C. RUGA RIVA, *I nuovi eco-reati: commento alla legge 22 maggio 2015, n. 68*, Turin, pp. 1 ss.

<sup>8</sup> G. BALLARINI, *Il procedimento di estinzione delle contravvenzioni di cui agli artt. 318-bis e ss. T.U.A. tra criticità e difficoltà applicative*, [www.lexambiente.it](http://www.lexambiente.it), 2024; P. FIMIANI, *Gli aspetti problematici nel sistema di estinzione dei reati ambientali previsto dal Titolo VI-bis del T.U.A.*, *Lex Ambiente*, n. 3, 2019, pp. 23 ss.; A. MARTUFI, *La "diversione" ambientale tra esigenze deflattive e nuove tensioni sistemiche*, *DpC*, 2018, pp. 293 ss.

for safety measures, remediation, and, where possible, restoration of the state of the environment. In this case, reparative conduct does not extinguish the offense but affects the level of punishment, according to a more traditional reward-based logic.

These institutions present undeniable elements of coherence with the theoretical framework outlined above: they introduce elements of i) dynamism into the criminal system, allowing intervention at a stage temporally close to the commission of the offense and promoting a rapid restoration of the compromised environmental balance; the offense is conceived – in terms not dissimilar to the logic of ii) “creative destruction” – not only as a moment of rupture of the legal order, but also as a phenomenon that contains within itself the possibility of its own overcoming, through the initiation of processes of reconstruction and renewal; they enhance the active role of the iii) offender, who is required to take responsibility for the consequences of his conduct, in line with the figure of the “entrepreneur-offender”; and they are potentially capable of generating iv) imitative effects, insofar as they make the adoption of restorative behaviors of environmental equilibrium legally and economically convenient.

However, significant critical issues remain that characterize the Italian regulatory system, partially weakening its effectiveness.

First, the scope of the extinction mechanism appears uncertain and, in some respects, restrictive. Its application is in fact limited to less serious offenses (environmental contraventions) and presupposes, among other things, that the damage or danger has not assumed a serious or irreversible character. This creates a clear fracture between the regime of minor and more serious offenses, with respect to which – paradoxically – the need for prompt and effective reparation would be more strongly felt.

Second, the actual activation of the mechanism is not mandatory but merely optional, granting significant discretion to enforcement authorities and leading to differentiated application across the national territory.

Third, the legislative formulation and administrative practice do not always clearly define the conditions for access to the extinction procedure, nor the criteria for determining prescriptions. Such uncertainty risks weakening the incentive effect of the institution, undermining the orienting function that, in the present perspective, should instead constitute one of its defining features<sup>9</sup>.

In conclusion, the Italian experience shows that environmental criminal law has already embarked, albeit in an incomplete manner, on a path of transformation in a dynamic and reparative direction. However, in order to fully realize the potential of this model, a further effort of systematization and rationalization appears necessary, aimed at making reparation one of the cornerstones of criminal intervention in environmental matters.

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<sup>9</sup> It should be noted that, due also to the lack of coordination between Articles 318-*bis* and 318-*quater* of the Environmental Code, the scope of application of the extinction procedure remains controversial. The interpretative conflict concerns, in particular, the categories of offences to which the institution applies: according to one approach, the procedure would apply to all contraventions under the Environmental Code punishable by a fine, whether provided exclusively, alternatively to arrest, or jointly with it, with the sole exclusion of offences punishable only by custodial sentences; another approach, instead, excludes from access to the procedure contraventions punishable by the combined penalties of arrest and fine.