

# THE ENVIRONMENTAL LIABILITY REFERRING TO PREVENTING AND REMEDYING THE DAMAGE CAUSED TO THE ENVIRONMENT

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## **Abstract**

The environmental liability, a major current theme, has acquired new dimensions after the adoption of Directive no. 2004/35/EC on environmental liability with regard to the prevention and remedying the damage caused to the environment, transposed into our legislation through the Emergency Ordinance no. 68/2007. This legislative act establishes the regulatory framework for environmental liability, based on the “polluter pays” principle, in order to prevent and repair the damage caused to the environment. Through this study we reanalyze a topic resumed by other authors, however, we highlight, based on the analysis and observation, the peculiarities of the environmental liability, based on the importance of the protecting objective.

**Keywords:** environmental liability, prejudice, preventive measures, remedy, compensatory measures

## **1. PRELIMINARY ISSUES**

The major public interest objective<sup>1</sup>, the environmental protection is nowadays one of the main concerns of the XXI<sup>st</sup> century, the international society becoming more aware of the importance of this issue, thus the relationship environment-human society has acquired concrete dimensions<sup>2</sup>.

The environmental issues are integrated into the social, political and economic problems, being necessary to find a solution that would insure the balance between the interests of public, economic nature and the personal, individual ones.

The formulation and implementation of a public policy in the environment domain have influenced the administrative structures, particularly through the establishment of autonomous organizations in the environment domain, establishing a ministry of the environment, creating a structure of inter-ministerial coordination and collaboration, increasing the role of local public authorities<sup>3</sup>.

The recognition of the fundamental right to a healthy environment has also imposed the “strengthening capacity of legal instruments for achieving the assumed objective”<sup>4</sup>.

Currently, the liability for the prejudices caused to the environment damage is one of the major contemporary issues.

Being considered as a “living institution” that formed and evolved along with the society<sup>5</sup>, legal liability in environmental law is currently an institution which is

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<sup>1</sup> Art. 1 paragraph (1) of the Emergency Ordinance no. 195/2005 on environment protection.

<sup>2</sup> Oțel, Monica-Elena, *Răspunderea internațională în domeniul mediului/The international liability in the environment domain*, Ed. Universul Juridic, Bucharest, 2009, p. 7.

<sup>3</sup> Mircea Duțu, *Introducere în dreptul penal al mediului/Introduction in the criminal law of the environment*, Ed. Hamangiu, Bucharest, 2013, p. 89.

<sup>4</sup> Mircea Duțu, *Introducere în dreptul penal al mediului/Introduction in the criminal law of the environment*, Ed. Hamangiu, Bucharest, 2013.

<sup>5</sup> Daniela Marinescu, *Tratat de dreptul mediului/Treaty of environmental law*, Ed. Universul Juridic, Bucharest, 2010, revised and added 4<sup>th</sup> Edition, p. 613.

increasingly applied, after a diversification of the ecological risks, an increase concern for the damage caused to the environment, amid the deepening of the ecological crisis<sup>6</sup>.

In one of the specialized works<sup>7</sup> it is stated that “environmental protection is a fad”, this statement relying, as the author states, on the lack of consistency of the measures taken in this area as a result of the political changes, and on the lack of government’s vision. The author reinforces the view after analyzing the European Court of Human Rights in this area, concluding that in the court cases in which Romania has been convicted of the non-compliance of the norms on the environment protection, the Romanian authorities failed to fulfill its obligations under article 8 of the Convention<sup>8</sup>.

In this context it was adopted the Emergency Ordinance no. 68/2007 on environmental liability with regard to the prevention and remedying the damage caused to the environment<sup>9</sup> as a result of the obligation to transpose the EU legislation, namely the Directive no. 2004/35/EC<sup>10</sup> on environmental liability with regard to the prevention and remedying the damage caused to the environment.

Also an important role in improving the enforcement of the European Union legislation had the rulings of the ECJ.

## **2. CHARACTERISTICS OF THE ENVIRONMENTAL LIABILITY RELATING TO THE PREVENTION AND REMEDYING THE DAMAGE CAUSED TO THE ENVIRONMENT**

The Emergency Ordinance no. 68/2007 establishes the regulatory framework for environmental liability based on the “polluter pays” principle, in order to prevent and repair the damage caused to the environment.

The mentioned normative act takes under consideration, under article 3, the following areas: a) the environmental damage, caused by any type of professional activity provided for in Annex no. 3 and any imminent threat of such damage determined by any of these activities; b) the damage to species and natural habitats and to any imminent threat of such prejudice caused by any professional activity other than those referred to in Annex 3, whenever the operator acts intentionally or at fault.

As shown in article 3, paragraph (2) the emergency ordinance shall apply to environmental damage or an imminent threat of such damage caused by pollution of a diffuse character, only when it can be established a causal link between the prejudice and the activities of individual operators.

It should be emphasized that the internal normative act regulating also the ecological prejudices are excluded from being applied<sup>11</sup>.

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<sup>6</sup> *Idem*.

<sup>7</sup> Doina Anghel, *Răspunderea juridică privitoare la protecția mediului/The legal liability on the environment protection*, Ed. Universul Juridic, Bucharest, 2010, p. 5.

<sup>8</sup> ECHR Judgment no. 67021/01, 27 January 2009, case Tatar against Romania.

<sup>9</sup> Published in the Official Monitor no. 446 of 29.06.2007, approved by Law no. 19/2008, as amended by Law no. 249/2013.

<sup>10</sup> Published in the Official Journal of the European Union (OJEU) no. L 143 of 30 April 2004.

<sup>11</sup> Articles 4 and 5 of the Emergency Ordinance no. 68/2007.

In the specialized literature it is shown that liability for environmental damages caused by a dangerous activity should be supported, according to the “polluter pays” principle, the author of that activity, respectively, *the operator*, as this notion is defined in the regarded legislative act<sup>12</sup>.

The ecological prejudice is defined under the Lugano Convention, in terms of three components<sup>13</sup>: the damage caused to persons and property by a dangerous activity, the ones specific to environment and the costs determined by the saving measures in order to prevent, extend or aggravate it, or of tangible or material prejudice, or one caused to the environment.

The concept of prejudice is defined also by the Emergency Ordinance no. 195/2005, article 2 point 52, as being *the quantifiable effect in cost of damages on human health, property or the environment, caused by pollutants, harmful activities or disasters*.

According to Government Emergency Ordinance no. 68/2007, the prejudice is *a measurable negative change of a natural resource or a measurable impairment of a service related to natural resources which may occur directly or indirectly*.

However, the Emergency Ordinance no. 68/2007 distinguishes three categories of ecological prejudices: damage caused to species and natural protected habitats, the damage caused to water, the damage caused to the soil.

It is important to note that the ordinance is applied to “an imminent threat of prejudice” by which it is understood a *sufficient probability of producing a damage on the environment in the near future*.

However, in practice this aspect is difficult to apply as the legislative acts (Directive no. 2004/35/EC and G.E.O. no. 67/2008) do not contain any helping elements.

Regarding *the damage caused to species and natural protected habitats*, the significant feature of these effects is assessed in relation to the initial state, taking into account the criteria listed in Annex no. 1.

The definition of the damage caused to species and natural protected habitats is criticized in the doctrine, as it is considered as being necessary to broaden the applicability of internal legislative act, taking into consideration the zones outside the protected areas<sup>14</sup>. It is also necessary to create a universal system for collecting and using data in their initial state of protected habitats, from all sources of information.

*The damages caused to water* are determined by comparison with certain characteristics of chemical and/or quantitative ecological status and/or ecological potential of the waters in question, as defined in Law no. 107/1996, with subsequent amendments, and also by the Framework Directive 2000/60/EC.

*The assessment of the damage caused to soils* is achieved by considering any soil contamination, that poses a significant risk to human health, that is adversely affected, as a result of direct or indirect introduction of substances, preparations, organisms or micro-organisms into the soil or subsoil.

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<sup>12</sup> According to article 2 point 11, *operator* means any physical or legal entity of public or private law that carries on or controls a professional activity, where the national law so provides, which was invested with decisive economic power over the technical functioning of such activity, including the holder of a regulatory act for such activity or the person registering or notifying such an activity.

<sup>13</sup> Doina Anghel, *op. cit.*, p. 149.

<sup>14</sup> Doina Anghel, *op. cit.*, p. 151.

The Emergency Ordinance no. 68/2007 establishes a special liability regime having a public character, whilst distinct and different from the classic legal civil liability and the administrative liability itself.

According to the legislative act, any person who suffers an injury, before going to the courts in order obtain compensation, the person must apply to the competent authority concerned, i.e. the County Agency for Environmental Protection, in order to take prevention and remedying measures.

According to article 25, paragraph (1) of the Emergency Ordinance no. 68/2007, where the Environmental Protection Agency refuses to act or makes it improperly, the persons provided in article 20, paragraph (1)<sup>15</sup> may apply to the competent contentious administrative court, to attack, in terms of substantive and procedural acts, decisions or omissions of the competent authorities under this emergency ordinance.

Therefore, an individual can use the path of action in justice, only after exhausting all the mentioned administrative channels.

The Emergency Ordinance no. 68/2007 states in article 3, paragraph (4) that the ordinance does not give the physical or legal entities of private law the right to compensation as a consequence of the damage caused to the environment or the imminent threat of such damage. In such cases there are applied the provisions of common law.

The Emergency Ordinance no. 68/2007 establishes a set of consequences of liability for the damages caused to the environment.

According to article 7, paragraph (1) the implementation of the preventive measures<sup>16</sup> and remedies rests for the County Environmental Protection Agency, which may act directly or contracting physical or legal entities, according to the provision of the law.

The preventive measures in the design of the Directive no. 2004/35/EC are divided into measures taken in case of an imminent threat of injury and measures taken to mitigate the caused damage.

With regard to the time at which such measures should be taken, according to article 10, paragraph (1) in the case of an imminent threat with a damage caused to the environment, the operator shall take immediate necessary preventive measures and within 2 hours of becoming aware of the emerging threats, it shall inform the Environmental Protection Agency and the County Commission of National Environmental Guard.

Analyzing this text it can be easily deduced the importance given to these measures, respecting the principle of proportionality, based on the precautionary principle. The fact that the liability for taking preventive measures lies primarily to the operator and secondarily to the competent authorities, it is emphasized the principle which this ordinance takes into consideration, according to the stated purpose in article 1, i.e. “polluter pays” principle.

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<sup>15</sup> Any physical or legal entity that is affected or likely to be affected by a damage caused to the environment or that is deemed to be injured in its rights or in a legitimate interest.

<sup>16</sup> Preventive measures are any measures taken in response to an event, action or omission that created an imminent threat with a damage caused to the environment, in order to prevent or reduce the prejudice.

When despite the preventive measures, it is possible that the environment may suffer a damage, the repairing measures may interfere, that can be restorative/remedying measures and compensatory measures<sup>17</sup>.

The obligation of taking repairing measures belongs to the operator, according to article 14. Thus, it is obliged to act immediately in order to control, isolate, remove, or otherwise, to manage the concerned pollutants and/or any other contamination factors, in order to limit or prevent the expansion of the prejudice caused to the environment and the negative effects on human health or further damage to services. It should also be taken the necessary remedying measures according to articles 17-19.

The remedying measures are provided in Annex 2, and they are divided according to two criteria, namely, the affected environment element (water, species and natural protected habitats, soil) and according to the existent measures of restitution or compensation.

Compensation measures, mentioned in the Annex 2, represent *any action taken to compensate for the interim losses of natural resources and/or services that occur between the date of producing the prejudice and the moment in which that primary repair produces its full effect* (article 1, letter c).

The purpose of the compensatory remediation is established by the compensation of the interim loss of the natural resources and services that are under repair.

In the specialized literature it is estimated that between three types of measures (preventive, restorative, compensatory) provided by Emergency Ordinance no. 68/2007 there is a link<sup>18</sup>, in the sense that, if the primary repair does not lead to the restoration of the environment to its original state, additional remedying measures are taken. However, in order to compensate for the suffered interim losses, it is applied the compensatory repair.

### 3. CONCLUSIONS

The environmental liability, arising in the context of the need to find appropriate solutions to the prevention and remedying the damage caused to the environment, has a “special” legal nature, as shown in the specialized literature, with a status and own contents. Beyond the many points of view expressed in the literature regarding the legal nature of environmental liability, we share the view<sup>19</sup> according to which we are in the presence of a specific regime of achieving the public interest of preventing and remedying the damage caused to the environment, a regime based on the principle “polluter pays”, the administrative action having a predominant role.

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<sup>17</sup> The remedying measure is any action or set of actions, including measures to reduce the prejudice or interim measures designed to restore, rehabilitate or replace the damaged natural resources and/or services or to provide an equivalent alternative to those resources or services, in accordance with the Annex 2.

<sup>18</sup> Doina Anghel, *op. cit.*, p. 165.

<sup>19</sup> Mircea Duțu, *op. cit.*, p. 102.

**Bibliography:**

1. Doina Anghel, *Răspunderea juridică privitoare la protecția mediului/The legal liability on the environment protection*, Universul Juridic, Bucharest, 2010.
2. Mircea Dușu, *Introducere în dreptul penal al mediului/Introduction in the criminal law of the environment*, Hamangiu, Bucharest, 2013.
3. Oțel, Monica-Elena, *Răspunderea internațională în domeniul mediului/The international liability in the environment domain*. Universul Juridic, Bucharest, 2009.
4. Daniela Marinescu, *Tratat de dreptul mediului/Treaty of environmental law*. Universul Juridic, Bucharest, 2010, revised and added 4<sup>th</sup> edition.
5. ECHR Judgment no. 67021/01, 27 January 2009, case Tatar against Romania.