

THE EMPLOYER'S LIABILITY FOR THE DAMAGE CAUSED BY POLLUTING THE ENVIRONMENT, IN HIS CAPACITY OF CO-AGENT

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Abstract

The issues regarding environment equally concern all the people of our community, irrespective of the place where they were born or where they perform their jobs. Pollution has no boundaries and does not depend on the political regime in one country or another, on the ethnical origin of the population, the political convictions of the community members, social status or other such criteria taken into consideration, usually, when we analyze a social issue.

As a result, people have to abide by the national legal rules of the European Union or international legal rules regarding the environment, which have to be considered at the international level, and when these rules are broken, the body responsible for it should step in to stop the polluting factor and re-establish the broken rightful order.

The objective of the European Union in the field of the environment protection, constitutes establishing a liable framework for the damages caused to the environment, based on the principle „the polluter is the responsible one”, including the employer as a co-agent for the act of the agent, in order to prevent and repair the damages caused to the environment.

Keywords: Polluter, employer, co-issuer, rightful order, damage, liability.

JEL Classification: K3; K32; Q5; Q50; Q53; Q54.

People have been concerned about the environmental protection ever since the year 242 B.C., when in India, the emperor Asoka decreed the protection of fish, animals and forest by setting up natural reservations².

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² For more details concerning the environment and its protection, see: Daniela Marinescu, *Tratat de dreptul mediului*, 4th edition, Universul Juridic Publishing House, Bucharest, 2010, p. 9 and the next; Mircea Duțu, *Dreptul mediului*, 3rd edition, C.H.Beck Publishing House, Bucharest, 2010, p. 2 and the next, Dumitru Mazilu, *Dreptul comunitar al mediului*, Lumina Lex Publishing House, Bucharest, 2006, p. 5 and the next; Gheorghe-Iulian Ioniță, *Dreptul protecției mediului*, Universul Juridic Publishing House, Bucharest, 2010, p. 20 and the next.

Given the obligation of transposing the community legislation, of Romania as a member state in the European Union and the fact that the objective of the enactment and application of the Directive no. 2004/35/CE regarding the liability towards the environment regarding the prevention and remedy of the damage caused to the environment lies in establishing a unitary legal framework in this field, has resulted into a harmonized Romanian legislation for total application and correct implementation of this directive³.

Thus, by the Emergency Governmental Ordinance no. 68/2007,⁴ regarding the liability towards the environment regarding the prevention and remedy of the damage caused to the environment a they set up legal framework regarding the polluter's liability towards the damage caused, as well as other measures which should be taken by any person, legal or natural person, to prevent pollution and if the pollution was caused, to repair the damage caused.

Article 2 of the Ordinance, defines the terms and phrases used in its contents:

- professional activity – any activity performed within an economic activity, business or enterprise, irrespective of its nature, private or public, profit or nonprofit;
- imminent threat of a damage – a sufficient probability of causing a damage to the environment in the near future;
- damaged right - any fundamental right provided by Constitution or by law, which is prejudiced by an administrative act;
- emission - emission in the environment, as a result of the human activities, of substances, preparations, organisms or microorganisms;
- private legitimate interest – possibility of imposing a certain conduct in achieving a future subjective and predictable right;
- public legitimate interest - possibility of imposing a certain conduct in achieving a fundamental right which is performed either collectively or, accordingly, in defending a public interest;

³ Directive no. 2004/35/CE of the European Parliament and the Council of European Union of the 21st April 2004 regarding the liability towards the environment regarding the prevention and remedy of the damage caused to the environment, was published in the Official Journal of the European Union, L 143/56 of 30.4.2004

⁴ Emergency Ordinance no. 68/2007 regarding the liability towards the environment with reference to the prevention and remedy of the damage caused to the environment, was published in the Romania's Official Journal no. 446 of 29th June 2007.

The Ordinance was modified, including by the Emergency Ordinance no. 64/2011 regarding the geological storing of the carbon dioxide, published in the Official Journal, Part I no. 461 of 30th June 2011.

- preventive measures- any measures taken as a response to an event, an act or a default, which caused an imminent threat of damage to the environment, in order to prevent or diminish the damage;

- reparatory measures – any act or set of acts, including measures of minimizing the damage or interim measures meant to reproduce, to re-establish or replace the natural resources and/or the services damaged or to provide an equivalent alternative for these resources or services;

- operator – any legal or natural person of public or private right who performs or is in responsible for the control of a professional activity or, in case the national legislation provides it, who was vested with decisive economic power on the technical function of such an activity, including the holder of a regulation document for such an activity or the person who registers or notifies such an activity;

- damage – a measurable negative change of a natural resource or a measurable harm to a service related to the natural resources, which may directly or indirectly occur;

- initial state – the state of the natural resources and of services at the time of the damage caused, which would have been registered if the harm to the environment had never been caused, estimated on the basis of the available information.

According to the provisions of the art. 6 alignment (1) of the Emergency Governmental Ordinance no. 195/2005, environmental protection constitutes the obligation and responsibility of the central and local public administration authorities, as well as of all other natural and legal persons, an important role is assumed by the employers, so that by the measures taken they should prevent some acts, be it personally or by their employees, which may cause damage to the environment, irrespective of the its nature.

By the recent measures, the state acknowledge the right of each person to a healthy and balanced ecological environment, guaranteeing to this purpose by the same ordinance, in art. 5:

- the access to the information regarding the environment, observing the confidentiality terms of provided by the legislation in force;

- the right to association in organizations for environmental protection;

- the right to be addressed in the process of decision-taking regarding the development of the environmental policy and legislation, issuing regulation documentation in this field, developing plans and programs;

- the right to appeal, directly or by environmental organization, to the administrative or/and judicial authorities, accordingly, in issues regarding the environment, whether the damage was caused or nor;

- the right to compensation for the damage caused.

The competent authority for establishing and taking preventive and compensatory measures, as well as the evaluation of the significant nature of the damage to the environment is the County Environmental Agency.

Any natural or legal person who is damaged or may be damaged by a harm caused to the environment or who considers himself/herself damaged in his/her right or in a legitimate interest is entitled to:

a) to send to the county officer of the National Environmental Guard any information regarding the cause of a environmental damage or any imminent threat of such a damage;

b) to request the county environmental agency, in writing or by electronic means of communication, to take the measures provided by the emergency ordinance.

The person may also address the county office of the National Environmental Guard and, respectively, the county environmental agency, any non-governmental organization which promotes environmental protection, fulfilling the terms required by the legislation in force, considering that the person is damaged in his/her right or in his/her legitimate interest.

The above-provided application has to be supported by the relevant information and data which underlie the observations sent regarding the respective damage caused to the environment.

In case the application and the information supporting it plausibly show that there is a damage caused to the environment, the county environmental agency analyses it and requires in writing to the respective agent his opinion on application and the information enclosed to it, within a period of 5 days since the application being registered.

The agent has 5 days' delay since the application being registered from the county environmental agency to send it its opinion on the matter.

Within 5 days since the transmission of the application to the agent, the county environmental agency inform the persons who have sent their comments on the decision to act or to refuse to act.

The decision provided will be motivated in fact and in law and it will contain information on the terms and procedures provided by Law no. 554/2004 regarding the administrative contentious⁵.

⁵ Law no. 554/2004 Law of the administrative contentious, in the Official Journal, Partea I no. 1154 of 07th December 2004. It was modified, including by the Law no. 202/2010 regarding some measures for accelerating the resolution of litigations, published in the Official Journal, Part I no. 714 of 26th October 2010.

In case of an imminent threat of a damage, the county environmental agency inform the persons who have sent their observations, only after taking the necessary measures according to the above-mentioned emergency ordinance.

The persons may address the court of the competent administrative contentious (tribunals in case of the documents issued by the local bodies of the state administration or appeal courts in case of the documents issued by the central bodies of the state administration), in order to attack from the procedural point of view, the documents, the decisions and the defaults of the competent authorities provided by the Emergency Ordinance no. 68/2007.

Resolution of the application forwarded to the court is performed according to the provisions of Law no. 554/2004.⁶

In the matter of environmental law, liability is engaged when by the act which breaks the law, the person caused an effective pollution to it, the key element of the special liability in the environmental law is its pollution.

According the art. 2 point 51 of the Emergency Ordinance no. 195/2005,⁷ modified, pollution represents direct or indirect introduction of a polluter (any substance, preparation in solid, liquid or gaseous form, or in vaporous form, or of energy, electromagnetic, ionic, thermic, phonic radiation or vibrations which, introduced in the environment, modifies the balance of its constituents and of the living organisms and brings about damage to material goods, which can endanger human health and/or the environmental quality, cause damage or stop from using the environment in a leisurely manner or for legitimate purposes.

The damage represents the costly quantifiable effect of damage on the health of people, goods or the environment, caused by polluters, harmful activities or disasters (art. 2 point 52).

As far as the employers' liability for the damage caused to the environment by their own facts or those of the employees, there have been opinions according to which the liability for the environment is subjective, being engaged by the rightful subjects to whom they imposed legal obligations which they break by an act or a default, causing damage.

⁶ For more details regarding the procedure before addressing the courts of the administrative contentious and the procedure during the resolution of these litigations, also see Florea Măgureanu, *Drept procesual civil*, 12th edition, Universul Juridic Publishing House, Bucharest, 2010, p. 278 and the next.

⁷ Emergency Ordinance no. 195/2005 regarding the environmental protection, was published in the Official Journal, Part I no. 1196 of 30th December 2005, modified, including by the Emergency Ordinance no. 164/2008, published in the Official Journal, Part I no. 808 of 03rd December 2008.

According to the provisions of art. 95 align. (1) of the Ordinance, liability for the damage caused to the environment is objective, irrespective of the guilt, and in case of plurality of the authors, liability is common.

Exceptionally, liability may be also subjective for damage caused to the species and natural habitats, according to the specific regulations (art. 95 align. 2).

What is specific is the capacity of victim of the pollution, namely the environment.

Specific provisions regarding liability for damage caused to the environment, of the Emergency Ordinance no. 195/2005 and the Emergency Ordinance no. 68/2007, are completed by the provisions of common right, namely those of the art. 998 – 1003 Civil Code⁸.

According to the provisions of the art. 998 Civil Code, the core of liability for torts „Any human act which may cause damage to another a human being binds the one whose fault it is or who performs the tort for the second time.”

According to the legal provisions mentioned, art. 1000 Civil Code sets forth “We are equally responsible for the damage caused by the fact of the persons for which we are responsible or for the things which we protect The masters and the co-agents (the employers), for the damage caused for their servants and agents (employees) in the positions fulfilled”.

In legal literature they stated that liability for torts is the liability which arises as a result of causing damage by doing wrongs which broke the objective right and the subjective rights of the damaged person⁹.

For engaging liability for torts, in case of damage caused to the environment by torts, general conditions of the liability for torts should be fulfilled, namely:

- a) a wrong was committed;
- b) a damage was caused;
- c) there is a relationship of causality between the wrong and the damage;
- d) the wrong-doer was guilty;

⁸ Romania's Civil Code was published in the Brochure no. 0 of 26th July 1993. Also see the new Civil Code, published in the Official Journal, Part I no. 511 of 24th July 2009, modified and completed by Law no. 71/2011, published in the Official Journal, Part I no. 409 of 10th June 2011.

⁹ For other definitions and details, see: Constantin Stătescu, Corneliu Bârsan, *Drept civil. Teoria general a obligațiilor*, ALL Publishing House, Bucharest, 1993, p. 114; Gheorghe-Iulian Ioniță, the quoted work, p. 406 and the next; George Măgureanu, *Drept curs pentru Facultatea de Economia Turismului Intern și Internațional*, Universul Juridic Publishing House, Bucharest, 2009, p. 307 and the next.

e) the wrong-doer had the capacity of liability for torts at the time the tort was committed, that is to say the person who caused a damage by its tort, to be mentally healthy, to be conscientious of the legal consequences of its harmful wrongs.

Although a person is liable for its own tort, in cases provided by law natural and legal persons, are also liable for the torts committed by the persons under their protection (art. 1000 Civil Code). The basis for the liability is the presumption of guilt which consists in default of protection.

By these forms of liability for harmful torts of the employers for the acts committed by their employees, their agents, the basis for such a liability lies, on the one hand, on the fact that the authors of the damage possess, generally, no fortune and, as a result, they are incapable of paying the damages to the victim, and on the other hand, on the fact that the employers are considered guilty for not having carefully supervised their employees.

The liability of employers is total, that is they cannot exonerate the presumption of guilt, pleading that, although they took all the necessary measures, they could not stop the wrong committed, while the other persons responsible for the wrongs committed by the others can exonerate this liability bringing proofs to it, which means that their presumption of guilt is relative. The employers have a regress action against the employee, retrieving in this way the amount paid by the employer for the damage caused by the employee.

However, in the matter of liability for torts to the environment, they tend to harden the position of one's own special liability, the ecologic liability. Emergency Ordinance no. 195/2005, modified, attributed to the objectivity, irrespective of the guilt for the damage caused by the environmental pollution, with the common responsibility in case of plurality of authors.

In the matter of the law on the environment the sanctions applied depend on the seriousness of the tort, as it follows: they represent torts and are fined with an amount ranging between 3.000 lei and 6.000 lei, for natural persons, and between 25.000 lei and 50.000 lei, for legal persons, breaking some legal provisions such as: the obligations of legal persons to achieve self-monitoring systems and to report to the public local authority for environmental protection the results of the self-monitoring and/or other data required, as well as the accidents and incidents which may cause potential accidents; the obligations of the legal persons to track a strict account of the substances and dangerous preparations and to provide the information and the data required by the competent authority for environmental protection; the obligation of the local public authorities not to change the destination of the lands as green spaces and provided as such in the urbanism documentations and/or, not to

diminish their surfaces or the obligation not to alienate them; the obligation of the land-owners with or without an ownership title, to maintain the forest curtains and the protection alignments, the green spaces, parks and green fences for improving the capacity of regeneration of the air, phonic and wind protection; the obligation of the land-owners with or without an ownership title, to prevent, on the basis of the regulations in the field, from ruining the quality of the geologic environment so on (art. 96 align. 1 of the Ordinance).

Also, according to the provisions of the art. 96 align (2) of the Ordinance, torts are considered and are fined with an amount ranging between 5.000 lei and 10.000 lei, for natural persons, and between 30.000 lei and 60.000 lei, for legal persons, breaking provisions such as: the obligation of natural and legal persons to apply for and obtain the regulation documents according to the legal provisions as well as the agreement on the importation/exportation and of the warrants regarding genetically modified organisms, according to the legal provisions, within the time limits established by the authority; the obligations of the authorities of the local public administration regarding the improvement of the urban microclimate, by arranging and preserving the springs and the lakes within localities and the areas surrounding them, to develop and protect the landscape, to keep the localities clean; the obligations of the natural and legal persons to provide and use correct information for performing the environmental assessments, the evaluations of the impact on the environment, of the balances on the environment and the reports on the placement; the obligations of the natural and legal persons to provide measure and special arrangements for the phonic isolation and protection of the sources generating noise and vibrations, to check their efficiency and to turn into account only the ones which do not exceed the agreed phonic level; the obligations of the natural and legal persons to provide, maneuver, transport and commercialize chemical fertilizers and products for plant protection packaged with identifiable inscriptions, weather forecast, security prescriptions and usage, so as they should not cause contamination to the means of transport and to the environment; the obligations of the natural and legal persons not to exercise acts which could destroy the natural habitats, the wild flora and the fauna all over the country; the obligations of the legal persons to apply measures for the dilution of chemical refuse resulted from the activities which imply genetically-modified organisms etc.

Numerous other acts, such as: the obligation of the natural persons to perform according to the provisions of the warrant for the environment protection and of legal persons to perform according to the provisions of the integrated warrant for the environment for the activities which constitute the

objective of the regulation procedures from the point of view of the environment protection; the holder's obligation to notify the competent authority for the environment protection when new elements arise, unknown elements at the time of the issuance of the regulation documents regarding any modification of the terms underlying their issuance, before the modification occurred; the obligations of the natural and legal persons to diminish, modify or cease the activities generating pollution at the express request of the authorities for environmental protection; the obligations of the natural and legal persons to pay the cost for damage remedy and to eliminate the consequences caused by it, re-establishing the conditions prior to the damage, according to the principle "the polluter is the one who pays" etc. constitute torts and are fined in the amount ranging from 50.000 lei to 100.000 lei, for legal persons (art. 96 align. 3 of the Ordinance).

According to the provisions of the art. 97 align. (1) of the Emergency Governmental Ordinance no. 195/2005, the statement of the torts and the application of the sanctions are fulfilled by:

- a) commissars and the persons empowered in the National Environmental Guard and the Administration of the Biosphere Reservation «Delta Dunării»;
- b) the authorities of the local public administration and the personnel empowered by them;
- c) the National Commission for the Control of Nuclear Activities, the Ministry of National Defense and Internal Affairs by the personnel empowered, in their field activities, according to the attributions established by law.

The personnel of the administration departments and the guards of the natural environmentally protected areas are also entitled to sanction torts, only on the environmentally protected area administered.

The wrongs which caused damage to the environment and which represent a higher degree of danger and which are liable to endanger human, animal and vegetal life and health, such as: the burning of clearings, the thatch, bushes and herbal vegetation of the areas protected and the lands prone to ecological regeneration or accidental pollution due to the unsupervised performance of the new constructions, the functioning of the plumbing, the technological equipment and treatment and neutralization, mentioned in the provisions of the agreement on the environment and/or integrated environmental warrant, represent torts and are punishable by from 3 months' to a year's imprisonment or a penal fine ranging from 30.000 lei to 60.000 lei (art. 98 align. 1 of the Ordinance).

Other wrongs with serious consequences, which if they were not likely to endanger human, animal or vegetal life and health, such as: pollution by express exhaustion in the water, in the air or on the soil of refuse or dangerous substances; non-observance of the restrictions and interdictions established by water and air protection, provided by the legal documents in force; the continuance of the activity after the recalling of the agreement on the environment and the integrated environmental warrant; importation and exportation of some dangerous substances and preparations interdicted or restricted, thus breaking the legal provisions in force etc., represent torts punishable by 6 months' to 3 years' imprisonment or fined with a penal fine ranging from 50.000 lei to 100.000 lei;

Even more serious sanctions, respectively 1 year to 5 years' imprisonment, were provided by the Ordinance, for some torts, such as: non-fulfillment of the interdictions regarding the use of products of plant protection on the agricultural lands or chemical fertilizers; unloading dirty waters and the refuse on the ships and floating platforms directly into the natural waters or expressly causing pollution by the exhaustion or emerging in to the natural waters directly or from the ships or floating platforms some substances or dangerous refuse etc., if they were likely to endanger human, animal and vegetal life or health.

Torts punishable by 2 to 7 years' imprisonment are considered wrongs committed such as: the continuance of the activity after the decree of ceasing this activity; not taking the necessary measures for totally eliminating dangerous substances or preparations which were converted into refuse; the decline of intervention in case of accidental pollution of waters and coastal areas etc.

In the event some of the torts provided by the law endangered the health and corporal integrity of a large number of people, or they had serious consequences or caused an important material damage, they are punishable by 3 to 10 years' imprisonment and the interdiction of some rights, and in the event of causing the death of one or more persons or important damage to the national economy, the punishment is 7 to 20 years' imprisonment and the interdiction of some rights.

References

- Romania's Constitution.
- Civil Code.
- Commercial Code.
- Criminal Code.

- Directive no. 2004/35/CE of the European Parliament and the Council of European Union of the 21st April 2004 regarding the liability towards the environment regarding the prevention and remedy of the damage caused to the environment.
- Law no. 554/2004 Law of the administrative contentious.
- Law no. 202/2010 regarding the measures for accelerating the solution of trials.
- Emergency Ordinance no. 68/2007 regarding the environmental liability towards the prevention and remedy of the damage caused to the environment.
- Emergency Ordinance no. 64/2011 regarding the geological storing of the carbon dioxide.
- Emergency Ordinance no. 195/2005 regarding the environmental protection.
- Constantin Stătescu, Corneliu Bârsan, Drept civil. Teoria general a obligațiilor, ALL Publishing House, Bucharest, 1993.
- Daniela Marinescu, Tratat de dreptul mediului, 4th edition, Publishing House Universul Juridic, Bucharest, 2010.
- Mircea Duțu, Dreptul mediului, 3rd edition, C.H.Beck Publishing House, Bucharest, 2010.
- Dumitru Mazilu, Dreptul comunitar al mediului, Lumina Lex Publishing House, Bucharest, 2006.
- Florea Măgureanu, Drept procesual civil, 12th edition, Universul Juridic Publishing House, Bucharest, 2010.
- Gheorghe-Iulian Ioniță, Dreptul protecției mediului, Universul Juridic Publishing House, Bucharest, 2010.
- George Măgureanu, Drept. Curs pentru Facultatea de Economia Turismului Intern și Internațional, Universul Juridic Publishing House, Bucharest, 2009.