THE JURIDICAL REGIME REGARDING THE ENVIRONMENTAL RESPONSIBILITY INSTITUTED BY THE GOVERNMENT URGENT ORDINANCE NO. 68/2007

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Abstract. *By lege lata, The adhesion of Romania on January 1st, 2007 imposed the transposition of Directive 2004/35/CEE on the environmental responsibility regarding the prevention and repair of damages caused to the environment, which aimed at establishing a common framework for the environmental responsibility. The transposition of communitarian regulations was made by means of the Government Urgent Ordinance no. 68/2007 regarding the environmental responsibility which refers to the prevention and repair of the damage caused to the environment. Our research aims at emphasizing the specific features of the new mechanism of engaging and realizing the environmental responsibility.*

Keywords: responsibility, operator, prevention, repair

1. Introduction

The issue of polluting the environment represents one of the most serious problems of the contemporary world, which equally concerns the political, economical and juridical factors.

In juridical terms, the regulation of the responsibility for the ecological damage reveals an institution with multiple particular features reported to the common law[1], adapted to the purpose which aims at preventing and eliminating the environmental risks.

The communitarian law reacted obviously to the issue of responsibility for the ecological damage and developed a more complete and uniform juridical regime. It sets the objectives and results which must be accomplished, leaving the choice of instruments and means for this purpose to the states and sets the fundamental guide lines which must be followed.[2]

In our field of analysis, the legislator elaborated Directive no. 2004/35/CE on the environmental liability concerning the environmental damages prevention and repair which aim at setting a common framework for the environmental responsibility, in order to prevent and repair the ecological damage at a reasonable cost for the company.

Being under the remarkable influence of the principle *polluter pays*[3] the Directive chooses to constitute a responsibility regime with a public character, of an administrative prevailing character, which would contribute more efficiently to accomplishing the environmental obligations.

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2. The transposition of Directive no. 2004/35/CE in the internal law

Directive no. 2004/35/CE is transposed in the internal law by means of the Government Urgent Order no. 68/2007 regarding the environment responsibility referring to the prevention and repair of the damage caused to the environment[4].

The internal regulation assumes: *„the exploiter whose activity caused a damage to the environment or an imminent threat of such a damage will be held financially responsible for the purpose of inciting the exploiters to adopt their own measures and practices that would minimize the afferent financial risks".*

While loyally adopting the communitarian regulation, the Romanian legislator has the same conception marked by the principle 'polluter pays', based on the idea that the operator must bear both the cost of the prevention measures adopted by the public authorities to prevent such damage from happening and of their repair, in case they have already occurred.

2.1. The application field

As a rule, any and all damage to the environment caused by one of the professional activities stipulated in annex no. 3 of the ordinance (for which the responsibility is objective), is subject to the special regime established by this. Furthermore, in the case of biodiversity, one also considers the damages caused by any professional activity, other than those stipulated at annex no. 3, any time the operator acts intentionally or guilty.

I. *The professional activities which originate damages to the environment*

While adopting the communitarian dispositions in this matter, the G.U.O. no. 68/2007 listed in annex no. 3 a series of professional activities presumed as dangerous for the protected natural species and habitats, water and soil. Any damage caused to the environment by an activity stipulated in annex no. 3 will have to have to be prevented or, if applicable, repaired, provided that the respective activity is professional [art. 3 lett. a)]. Thus, one refers to 11 categories of professional activities such as: the functioning of plants subject to the integrated environment authorization, activities of dangerous and safe waste control, transport of dangerous merchandise etc.

II. *The damage to the environment*

As for the damage to the environment, the G.U.O. no. 68/2007 distinguishes among three categories of damage caused to the environment:

a) – damage caused to the protected natural species and habitats;

b) – damage caused to waters and,

c) – damage caused to the soil, damage meaning *„a negative measurable change of a natural resource or a measurable deterioration of a service related to natural*

resources, which can occur directly or indirectly". Thus, one aims at both the direct damages and the mediated, direct ones. Also, the damage caused to the protected natural species and habitats supposes the existence of some „significant effects", the criteria for establishing their significance being mentioned in annex no. 3.
„Service related to the natural resources" is defined by the law as the *„functions insured by a natural resource for the benefice of another natural resource or the public".*

2.2. **The obligations devolving upon the public administration and the operator**

The ordinance forces both the operators and the public authorities to take prevention and/or repair measure of the damage and sets the way of bearing the cost afferent to these.

I. The obligations devolving upon the operator.
To the extent to which the damages caused to the environment are the result of professional activities, both the preventive measures and the remedial ones are the operator's responsibility. The ordinance defines the operator as *„any physical or juridical entity of public or private law having control of a professional activity or, in case the national legislation stipulates this, that was invested with decisive economical power on the technical functioning of such an activity, including the owner of a regulation document for such an activity or the person who registers or notifies such an activity".*

a) The preventive measures (actions).
According to law, any and all operators must avoid, by all possible and legal means, to cause an environmental damage. Thus, in case of an imminent threat to such a damage, it is forced to take the necessary preventive measures immediately and to inform the competent authorities (the county agency for the environment protection and the Environment Guard county commissariat): within 2 hours from acknowledging the threat occurrence; within an hour from finalizing the preventive measures, on the measures taken to prevent the damage and their efficiency and within 6 hours from the moment their inefficiency was ascertained, in case the threat persists.

The meaning given by the ordinance is that the preventive measures are *„any measures taken as a response to an event, an action or a deficiency which created an imminent threat of a damage caused to the environment, for the purpose of preventing or reducing the damage ".*

Taking the necessary preventive measures by the operator can also be required by the county agency for the environment protection which can also provide instructions for this. Also, the respective authority, at any time, can itself take the necessary preventive measures, but not without the previous request of the county agency for the environment protection manager.
As an exception to this rule, the agency can take the necessary preventive measures without the operator's previous request, in case this one: - did not fulfill his obligation to take the preventive measures; - did not respect the instructions or, after the request, did not respond to it; - cannot be identified; - does not have the obligation to bear the costs.
b) The reparatory measures (actions).
According to law, in case a damage to the environment occurred, besides informing *„within maximum 2 hours from the damage occurrence" the* county agency for the environment protection and the county commissariat of the Environment Guard, the operator must *„act immediately to control, isolate, eliminate or, if not, to administrate the respective pollutants and/or other contaminated factors, for the purpose of limiting or preventing the damage extension to the environment and of the negative effects on human health or the aggravation of service deterioration".* The operator identifies *„the most appropriate"*possible repair measures according to annex no. 2 of the ordinance, and transmits them, within 15 days from the accident occurrence to the county agency for environment protection for approval. According to the annex, one can distinguish between the regime of choosing the best measures to ensure damage repair caused to waters, or to the natural protected species, and respectively the one afferent to repairing the damage caused to the soil.
In art. 19 the ordinance constitutes two specific rules regarding the repair:
- The right of the county agency for environment protection to decide which of the damage repair must have precedence over the others, in case several damages caused to the environment occurred and one cannot ensure taking, in time, the reparatory measures and;
- When taking the decision, the county agency for environment protection considers, among others, the nature, size and seriousness of the different damages caused, and the possibility of natural regeneration, while paying attention to the risks presented by the damage for the human health.

II. *The obligations of public authorities*

The responsibility specific instituted by the G.U.O. no. 68/2007 also consists in that the main role in preventing and repairing the damages caused to the environment is granted to the public authorities, the only holders of the actions destined to avoid or remedy the ecological damage taken into consideration. Thus, the competent authority to establish and take the preventive

and reparatory measures, as well as to evaluate the significant character of the damage caused to the environment is the county agency for environment protection; a general consulting role have the county commissariats of the National Environment Guard and another specific one, according to the potentially affected environment factor, is stipulated for: the water basin departments, scientific councils organized at the level of the protected natural areas, county offices of pedological and agrochemical studies, and the territorial inspectorates of forest regime and hunting, as well as the National Agency for the Environment Protection.

The obligations set for the authorities are diverse, such as:
- Identifying the damage caused to the environment and/or to the responsible operator;
- Evaluating the significant character of the environmental damage area and establishing the repair measures;
- Forcing the operator to take the preventive measures and, in their absence, to take the necessary preventive measures;
- Forcing the operator to recover the cost of the preventive or repair measures;
- Forcing the operator to take the preventive measures and, in their absence, to take the necessary preventive measures, etc;
At the same time, the ordinance sets a control and survey organism, as well as a punishment system for non observing the stipulated obligations constituted of contraventions and crimes.

2.3. **The intervention of the interested third party**

Although the main role in preventing and repairing the environmental damage is granted to the competent authority, the ordinance also stipulates a *„mechanism of external control“* within which, based on the *„right to action“*[5], certain physical or juridical entities, including nongovernmental organizations, can ask the public authority to act and even to dispute the way of action (or the absence of action) from its part. Thus, one recognizes the right to transmit observations and asks to take preventive and repair measures, because, according to art. 20 of the ordinance, any physical or juridical entity, including any nongovernmental organization *„promoting the environment protection and that accomplishes the conditions asked by the in force legislation“,* affected or possible to be affected by an environmental damage or which considers itself affected in one of its rights or in a legitimate interest, on the one hand, has the right to transmit the Environment National Guard commissariat any observation referring to causing a damage to the environment or an imminent threat of such a damage, and on the other hand, to ask the county agency for environmental protection (in writing or by electronic means

of communication) to take the prevention measures and/or repair stipulated by the law.

2.4. **Responsibility Exclusion**

The operator is exonerated of responsibility in case of causing an environmental damage or in case of such a damage imminent threat produced by:

- Actions with an armed conflict character, hostilities, civil war or insurrection;
- A natural phenomenon having an exceptional, inevitable and insurmountable character;
- Activities whose main purpose is national defense or international security or those whose sole purpose is to fight against natural disasters;
- Caused by a third party and occurred despite taking the necessary safety measures;
- Took place as a result of observing a compulsory disposition or instruction issued by a public authority, other than an order or an instruction delivered as a result of an emission or incident caused by the operator's activities.

Also, the normative act excludes certain types of damages that are already covered by specific international law rules, that is:

- The damage caused to the environment or any imminent threat of such a damage (caused by hydrocarbures) derived from an incident for which responsibility or compensation are regulated by one of the international conventions stipulated in annex no. 4, to which Romania is part;
- Nuclear risks or the environmental damage or imminent threats of such a damage, which can be caused by activities under the incidence of the Treaty regarding the European Atomic Energy Community or are caused by an incident or activity for which responsibility or compensation are regulated by any of the international instruments stipulated in annex no. 5, to which Romania is part.

One must mention the fact that the damages that are not covered by these conventions are not considered by the exclusion regulated in the normative act.

The communitarian directive stipulated the possibility for the member states to set two exoneration causes, and the urgent Ordinance no. 68/2007 used this.

Thus, according to art. 28, by exception, the operator does not bear the cost of the repair measures taken, if it can prove its actions were not intentional or guilty and that the environmental damage was caused by:

- an emission or an especially authorized event and completely in accordance with the conditions stipulated by the regulation act issued according to the norms implementing the measures stipulated in annex no. 3, in force on the emission or the event date;

- an emission, activity or any other way of using a product during an activity, for which the operator shows it was impossible, according to the technical and scientific knowledge stage existing when the emission was released or when the activity took place, to produce a damage to the environment.

Regarding these dispositions, we will mention the following:

- the evidence charge is the operator's responsibility, who must prove the fact that he did not act intentional or guilty;
- the exoneration cause does not act without an intention or guilt, these two notions being of strict interpretation, as it is a waiver from the environmental principle of the entire repair;
- these exoneration causes are limited to the reparatory actions (measures), and, as a result, do not cover the preventive measures cost;
- the operator can meet some difficulties while proving all the conditions („entire concordance") from the regulation act.

Conclusions

Mainly, the responsibility regime for the ecological damage instituted by the G.O. no. 68/2007 has the following characteristics:

A special responsibility regime is instituted, with a public character, responsibility which is mainly administrative, 'of environmental law', distinct and different from the classical civil responsibility and from the administrative responsibility itself.

The environmental responsibility represents rather a reparation (by supporting the cost of the preventive and reparatory measures) than a responsibility in the classical meaning of civil law, character expressed by the rules afferent to its specific regime: objective responsibility (by the actions stipulated in annex no. 3) passive solidarity among operators, in certain conditions and financial warranties.

A mechanism of administrative policy is established, granting an essential role to the public authority in defining and applying the obligation to prevent and repair, which is the operator's responsibility.

A hybrid responsibility regime is instituted, leaving objective responsibility to the professional activities presenting a risk to the health or the environment, stipulated in annex III.

As for the relation to the dispositions of art. 95 of the G.U.O. no. 195/2005 concerning the environment protection, which regulates, as a principle, the responsibility for the damage caused to the environment, one has to keep in mind that the G.U.O. no. 68/2007 has a special regulation character compared to the G.U.O. no. 195/2005, the regime instituted by this one being of strict interpretation and applying to the damage caused to the environment mentioned in it (considering the damage caused to the natural protected species and habitats, to water and soil). The difference of application field related to the area of damages taken into consideration, follows the rules imposed in art. 95 of the G.U.O. no. 195/2005.

[1] On the specific of the responsibility for ecological damages, see: Mircea Duțu, *Tratat de dreptul mediului,* 3rd Edition, C.H. Beck Publishing House, Bucharest, 2007, p. 514 – 517; Daniela Marinescu, *Tratat de dreptul mediului,* Universul Juridic Publishing House, Bucharest, 2007, p. 634-638; Simona - Maya Teodoroiu, *Răspunderea civilă pentru dauna ecologică,* Lumina Lex Publishing House, Bucharest, 2003, p. 66-78; Lacrima – Rodica Boilă, *Răspunderea civilă delictuală obiectivă,* C.H. Beck Publishing House, Bucharest, 2008, p. 436-456. Fn French litterature, see: M.Despax, *Droit de l'environnement,* Litec, Paris, 1980; M. Prieur, *Droit de l'environnement,* Dalloz, Paris, 1991; Agathe Von Lang, *Droit de l'environnement* , Thémis droit, Paris, 2002.

[2] On the work at communitarian level, see: Mircea Duțu, *op.cit.*, p. 484-486; Simona – Maya Teodoroiu, *op.cit.*, p. 183 – 194.

[3] At point 18 of the reasons list for the text of the Directive one shows: *according to the principle pollutor pays, an exploiter that causes a serious ecological damage or that creates an imminent threat of such a damage, must, as a principle, bear the cost related to the necessary prevention* or repair *measures.* On the principle notion and significances, see: M. Prieur, *Droit de l'environnement,* Dalloz, Paris, 2001, P. 171-181 and the work quoted there.

[4] Published in the Off. G. no. 446 of June 29th, 2007.

[5] On „the right to action" in matter of the environment, see, Mircea Duțu, *op.cit.*, p. 324 – 339; Daniela Marinescu, *op.cit,*. p. 77-87.