The Principle Polluter– Pays and the Civil Liability Related to the Environment

Livia Mocanu

Valahia University of Târgovişte,

Faculty of Juridical, Social and Political Sciences

Abstract: The analysis of the liability resulting from the effects on the environment involves also the reference to the principle the polluter – pays. This principle imposes to the operators the cost of the preventive measures and action against the pollution resulting from their activities independently of any culpa. It laid the foundation for a special liability regime instituted at the communitarian level by Directive no. 2004/35/CE regarding the environment liability in order to prevent and repair ecologic damages, transposed into the Romanian law by G.U.O. no. 68/2007 concerning the environment liability with reference to the prevention and repair of the prejudices on the environment. The present study has as object the analysis of the foundations of this special regime and complex of engaging and realizing the operator "liability", as well as the extent to which this liability system represents a corollary of the principle polluter – pays.

Keywords: polluter, responsibility, environment.

1. Introduction

The classical mechanism of civil responsibility forces the author of an illegal fact to repair its damageable consequences, as long as there is a causative relation between generating factor and prejudice. The responsibility based on fault represents the general principle of delictual civil responsibility in regulation art. 998-999 Civ. C.

The social realities, the increase of danger for anonymous accidents, with serious and irreducible effects, determined a reformation of civil responsibility, emphasizing fault objectivation.[1] A new consolidation of delictual civil responsibility justifies the engagement of the obligation to repair the damage, considering first of all the victim's interest to re-establish the previous situation by repairing the damage suffered.

The objectivation of responsibility law corresponds to the transition from fault responsibility to responsibility aiming, before anything, at repairing the damage, the fault being presumed or in the absence of any mistake.[2] This phenomenon is not only specific for environmental law, it can be observed in responsibility law in general.

[1] For details, on the objective consolidation of delictual civil responsibility in the contemporary period see, Lacrima Rodica Boilă, *Răspunderea civilă delictuală obiectivă*, C.H. Beck Publishing House, Bucharest, 2008, p. 37-96.

[2] Agathe Van Lang, *Droit de l'environnement*, Thémis droit, Paris, 2002, p. 270.

The responsibility engagement tends to separate itself from mistake, which facilitates the victim's situation, who doesn't have to make the proof of this.

This objective responsibility is founded on the notion of risk, being particularly adapted in the matter of environment from reasons specific to the ecological damage.

2. Principle *„polluter pays"* and civil responsibility

The principle *„polluter pays"* constitutes a synthesis of some economical and juridical aspects, conjugated by the imperative of environment protection and conservation. Until present, it was juridical expressed, especially at communitarian level and tends to acquire a universal recognition.[3] This principle imputes the cost of prevention and removal measures for the pollution caused by their activities, independent of any fault to the polluters. The obligation to compensate is based on an objective fact, production of noxious substances; here the principle finds its fundament in the notion of created risk. But, by following the internalization of the negative "externalities" cost (of pollutions) triggered by many economical-social activities, the principle does not aim at appointing any responsible, simply a payer able to support the compensation under the form of taxes, for instance.

It is rather a question of insurance system, based on the mutuality of all polluters, of covering the damages caused to the environment, including for the purpose of removing the pollution effects and repair the damaged spaces.[4] Though with an important juridical content, the principle *'polluter pays'* exceeds the framework of juridical responsibility for the damage caused to the environment, and one cannot deduce a civil responsibility system from this principle.

Certainly, engaging civil responsibility supposes the cumulative accomplishment of several conditions, like: the deed, prejudice and the causality relation[5], conditions that are completely foreign to the principle *'polluter pays'*. Considered literally, the principle could only be the source of an absolute or ineluctable responsibility. Absolute responsibility, which originates from the U.S.A. (*absolute responsibility*) supposes un mechanism of automatic compensation, none of the exoneration causes being able to remove it.[6]

Nevertheless, the Lugano Convention on the civil responsibility for the damage caused by running activities that are dangerous to the environment[7], the Green Paper (Green Paper/Livre vert) on the environmental responsibility of the European Commission (May 1993) and the White Paper regarding responsibility for ecological damages (Bruxelles, February 1999), which establish a no-fault responsibility regime, show it as the way to ensure the application of the principle *'polluter pays'*.[8] The explanatory report of the European Council Convention states that

---

[3] See, Michel Prieur, *Droit de l'environnement,* Dalloz Publishing House, Paris, 1991, p. 170-181; Ernest Lupan, *Dreptul mediului,* Lumina Lex Publishing House, Bucharest, 2001, p. 61-62; Mircea Duţu, *Tratat de dreptul mediului*, 3rd Edition, C.H.Beck Publishing House, Bucharest,2007, p. 271.

[4] Marilena Uliescu, *Dreptul mediului înconjurător*, Publishing House of „România de Mâine Foundation ", Bucharest, 1998, p. 25.

[5] For details, see, Constantin Stătescu, Corneliu Bârsan, *Drept civil. Teoria generală a obligaţiilor"*, 3rd Edition, All Beck Publishing House, Bucharest, 2000, p. 145-202; Simona – Maya Teodoroiu, *Răspunderea civilă pentru dauna ecologică*, Lumina Lex Publishing House, Bucharest, 2003, p. 25 – 45.

[6] Agathe Van Lang, *op.cit.*, p. 271-272.

[7] ***Convention sur la responsabilité civile des dommages résultant d'activités dangereuses pour l'environnement,*** Conseil de L'Europe, 1993

[8] For details, on the content of these documents see, Simona – Maya Teodoroiu, *op.cit.*, p. 154-159, p. 183-188.

the financial charge represented by this responsibility has repercussions on the products and services that the polluter (*l'exploitant responsible)* produces or supplies, according to the principle *'polluter pays'*.[9]

In this context, the French doctrine considered that deducing a civil responsibility system from the principle *'polluter pays'* is a contestable approach, as long as putting the cost of pollution on a potential polluter and appointing a responsible for the pollution, forced by this title, to repair the damages caused, represents two different things.[10]

3. Directive regarding environmental responsibility in order to prevent and repair environmental damages

After a series of previous actions, on the 23rd of January 2002, the proposal of the European Parliament and Council regarding environmental responsibility in order to prevent and repair the ecological damages which was modified on the 26th of January 2004 was published, and a final text was reached on the 21st of April 2004, in the form of Directive no. 2004/35/CE on environmental responsibility regarding the prevention and repair of damages caused to the environment. As shown in the first article, the directive aims at establishing a common framework for the environmental responsibility, based on the principle *'polluter pays* .

Therefore the directive does not escape an amalgam between civil responsibility and the principle *'polluter pays'*. The result is a complex repair regime, but an unsatisfactory one. In the statement of reasons one shows that according to the principle *'polluter pays' (pollueur – payeur)* an exploiter causing a serious damage to the environment or creating an imminent threat of such a damage, must, as a principle, bear the cost related to the necessary prevention and repair measures (point 18). Though ostentatiously invoking the principle *'polluter pays'*, the directive does not put in the polluters' charge neither the pre-existent pollutions nor the obligation to insure or to contribute to a compensation fund; it does not institute the presumption of the causality relation between their activities and the ecological damages they generate. That is why one stated that the directive does not apply the principle *'polluter pays'* but marginally, as one cannot find here the origin of a regime to prevent and repair the ecological damage imputing mainly to the State the charge of repair or of a civil responsibility regime, a hybrid one, 'keeping a surprising part to the fault responsibility'.[11]

Certainly, the directive establishes a mechanism of administrative policy, conferring an essential part to the public authority, called in the directive 'the competent authority' (l'autorité compétente) for the definition and application of the obligation to prevent and repair devolving upon the exploiter.

The repair obligation occurring in case of producing an ecological prejudice is regulated in article 6: the competent authority can constraint the exploiter to take all necessary measures for the

---

[9] Agathe Van Lang, *op.cit.,* p. 271.

[10] C. Larroumet, *La responsabilité civile en ma tière d'environnement. Le projet de convention du Conseil de L'Europe et le Livre vert de la Commission des Communautès européennes,* Dalloz, Paris, 1994, p.101; X. Tunis, *Le droit de la responsabilité civile en ma tière écologique : entre relecture et création,* în *Quel avenir pour le droit de l'environnement,* F. Ost et S. Gutwitrh, Presses Universitaires de Saint – Louis, p. 355.

[11] Agathe Van Lang, *op.cit.,* p. 273. On the characteristics of the regime instituted by the Directive, see: Michel Prieur, *La responsabilité environnementale en droit communautaire,* Revue europeénne de droit de l'environnement no. 2/2004, p. 129; *Estudios sobre la Directiva 2004/35/CE de Responsabilidad por Danos Ambientales y su Incidencia el el Ordenamiento Espanol,* special number of the Magazine „Aranzadi de Derecho Ambiental", 2005.

purpose of immediately removing, reducing or eliminating or treating the effects of pollution or to take itself the necessary repair measures if the exploiter is incapable, does not submit to the administrative authority or cannot be identified or is exempted from supporting these costs. We must state that, compared to the first versions of the text establishing a genuine intervention as the state responsibility, the directive does not establish its subsidiary responsibility but allows it to assess the opportunity of repairing the damages ascertained.

The directive actually mentions that the exploiter must bear the cost of the prevention and repair actions, in accordance with the principle *'polluter pays'*.

The directive leaves to the States the faculty of not to cover the completeness of the born costs when the expenses necessary to this effect are superior to the stake or when the exploiter cannot be identified. The exploiter is exempted of his financial obligation if he can prove that the damage was caused by a third party or was caused by the non-observance of an order or an instruction emanating from a public authority (art. 8 – 3). Finally, the member States have the possibility to stipulate other exoneration causes especially if the exploiter shows that he did not commit the damage by mistake or negligence and that the damage is caused by an emission or an expressly authorized event or it corresponds to the development risk[12]. One stated that article 8 operates 'a curios distinction between juridical and financial responsibility' the exploiter benefiting of a repair exemption without being exempted of his responsibility.[13]

As for „the financial security" of the new system, that is the effective coverage of the financial obligations resulting from this, one must also note a lack of coherence. The issue is to stress a breach between the Commission, Parliament and the NGO's on the one hand, favourable for the institution of a compulsory regime under the form of an insurance, and on the other hand certain States, industrials and insurance media, estimating it as premature, while considering the difficulty of measuring the probability to realize the risk and the ecological damage estimation risk.

A contradiction between the terms of article 8 – 2 and those of article 14, regarding financial warranty, based on which the member States encourage the development of financial warranties tools and markets, including of financial mechanisms for insolvency cases. Article 14 stipulates though a re-debate of this issue in 2010.

Without putting any constraints on the exploiter to have insurance or to constitute financial warranties or to contribute to the compensation fund, the Directive marks a regress compared to the Geneva, Lugano and Bâle Conventions (1999) which impose collective systems of financing the ecological damage repair or a regime of compulsory insurance.

Essentially, the directive installs a regime of hybrid responsibility, keeping objective responsibility for those professional activities presenting a risk to health or the environment, and which are stipulated in annex III. Thus, it confirms the classical relation between risk and no-fault responsibility and it joins the direction of Geneva and Lugano conventions.

This responsibility dominated by the care to repair the damage and, therefore to appoint the debtor of a financial obligation, rather than a guilty one, is certainly the closest to the logics *'polluter pays'*. But the directive seems to hide this principle as long as it allows the member States to exempt from the repair cost that exploiter whose damageable activity would observe the administrative prescriptions.

---

[12] On the development risk,: Constantin Teleagă, *Armonizarea legislativă cu dreptul comunitar în domeniul dreptului civil. Cazul răspunderii pentru produsele defectuoase,* Rosetti Publishing House, Bucharest, 2004, p. 216-224; Juanita Goicovici, *Riscul de dezvoltare,* in magazine Dreptul no. 6/2005, p. 13-46.

[13] C. Jarlier – Clement, M.A. Gautier – Sicari, *La directive sur la responsabilité environnementale: originalités et incohérences d'un régim juridique novateur,* BDEI, 2004, nr. 4, p. 10.

For those activities that are not listed in annex III, considered to be harmless for the environment, the directive constitutes an easy special regime: the exploiters' responsibility is not engaged unless they committed a mistake or a negligence and only for those damages suffered by species and inhabitants.

4. The Government urgent Ordinance no. 68/2007

The Directive of 21st of April 2004 was transposed in the internal law by the Government urgent ordinance no. 68/2007 regarding environmental responsibility referring to preventing and repairing the environmental prejudice.[14]

According to article 1, environmental responsibility is based on the principle *'polluter pays'* in order to prevent and repair the environmental damage, which expresses a faithful repetition of the correspondent text in the communitarian regulation.

In this context, the normative document conception is based on the idea that the operator must bear both the cost of prevention measures adopted by the public authorities to prevent causing a damage, and that of its repair, when it took place. Determined are the event which originated the prejudice and the nature itself of the damage caused to the environment. As a consequence, the ordinance establishes the professional activities which originated the damage caused to the environment[15] and defines the notion of damage caused to the environment.[16]

Similar to the other responsibility regimes based on risk, the environmental responsibility regulated by the Government urgent Order no. 68/2007 is characterized by directing responsibility towards the operator of the activity, as he has technical knowledge, resources and the operational control of his activity and is best placed to assume the devolving risks.[17]

In the ordinance conception and as an expression of the specific for the responsibility instituted, the main part in preventing and repairing damages caused to the environment is attributed to the public authorities, which are the only holders of actions destined to avoid or remedy the ecological damages considered by the normative document.

When applying the directive requirements, the ordinance establishes a mechanism of control and survey, as well as a punitive system for non-observing the stipulated obligations, made up of offences and crimes (art. 40 - 42). Together with internal control, the ordinance also stipulates'a mechanism of external control' granting certain physical or juridical entities, including non-governmental organizations 'the right to action' so they can ask the public authorities to act or to contest the way of action (or the absence of action) from their part. More generous than the communitarian legislator, the national legislator recognizes the determined subjects the right to

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

[15] In annex no. 3, 11 categories of professional activities are considered, viewed as dangerous for the natural protected species and habitats, water and soil, like: functioning of the installations subject to the integrated environment authorization, activities of dangerous or non-dangerous waste administration, evacuation in the internal surface or underground waters, evacuation or injection of pollutants into these, transportation of dangerous merchandises etc.

[16] In art. 2 pt.13, the law distinguished three categories of prejudices caused to the environment: those caused to the natural protected species and habitats, caused to waters and respectively to soil, by prejudice understanding a measurable negative change of a natural resource or a measurable deterioration of a service related to natural resources, which can occur directly or indirectly".

[17] Mircea Duţu, *op. cit.*, p. 497.

transmit observations and to demand them to take preventive and reparatory action (not just a simple 'authorization').

All these points of internal regulation lead to conclusions that are similar to those accompanying the comment on Directive 2004/35/EC, in the sense that the environmental responsibility instituted by these norms is rather a repair than a responsibility in the classical meaning of common law.

It considers bearing the costs of preventive and reparatory actions, objectively, independent of fault, for the activities stipulated in annex no. 3 of the ordinance, passive solidarity among operators, within certain financial conditions and warranties.

Although it stipulates the obligation of financial warranties, which would allow the operators their use to guarantee the obligations devolving upon them, the ordinance does not determine them, stating that the definition of financial warranties forms, including for cases of insolvency and measures for developing the offer of financial tools regarding responsibility in the matter of environment are established by a Government decision.

5. Conclusions

The principle *'polluter pays'* constitutes a synthesis of some economical and juridical aspects, determined by the need to protect and conserve the environment.

The relation between civil responsibility and the principle *'polluter pays'* is emphasized by two distinctions, opposing for one chronic and accidental pollution, and for the other potential and real pollution. The principle *'polluter pays'* was conceived to impute the cost of chronic pollutions, whose particular features (diffuse and progressive damages) come with difficulty to the conditions of engaging civil responsibility. This means that the repair of accidental damages can be related to a civil responsibility system.

At the same time, if applying the principle *'polluter pays'* supposes paying pollution taxes or royalties, before any damage occurred, by those susceptible to produce it, which are the potential polluters, by civil responsibility only the real polluters have to support the repair, once the damage was caused. Hypothetically, potential polluters are more numerous than real ones.

Consequently, the reasoning determining civil responsibility in the matter of ecological damage interferes but not overlaps completely the objective 'polluter pays'.

References

Lacrima Rodica Boilă, *Răspunderea civilă delictuală obiectivă,* C.H. Beck Publishing House, Bucharest, 2008.

Agathe Van Lang, *Droit de l'environnement*, Thémis droit, Paris, 2002.

Ernest Lupan, *Dreptul mediului,* Lumina Lex Publishing House, Bucharest, 2001.

Mircea Duțu, *Tratat de dreptul mediului,* 3rd Edition, C.H.Beck Publishing House, Bucharest, 2007.

Marilena Uliescu, *Dreptul mediului înconjurător,* Publishing House of „România de Mâine" Foundation, Bucharest, 1998.

Constantin Stătescu, Corneliu Bârsan, *Drept civil. Teoria generală a obligaţiilor",* 3rd Edition, All Beck Publishing House, Bucharest, 2000.

Simona – Maya Teodoroiu, *Răspunderea civilă pentru dauna ecologică,* Lumina Lex Publishing House, Bucharest, 2003.

C. Larroumet, *La responsabilité civile en matière d'environnement. Le projet de convention du Conseil de L'Europe et le Livre vert de la Commission des Communautès européennes,* Dalloz, Paris, 1994.
X. Tunis, *Le droit de la responsabilité civile en matière écologique : entre relecture et création,* în *Quel avenir pour le droit de l'environnement,* F. Ost et S. Gutwitrh, Presses Universitaires de Saint – Louis.
Michel Prieur, *La responsabilité environnementale en droit communautaire,* Revue europeénne de droit de l'environnement no. 2/2004.
Estudios sobre la Directiva 2004/35/CE de Responsabilidad por Danos Ambientales y su Incidencia el el Ordenamiento Espanol, special edition of Magazine „Aranzadi de Derecho Ambiental", 2005.
Constantin Teleagă, *Armonizarea legislativă cu dreptul comunitar în domeniul dreptului civil. Cazul răspunderii pentru produsele defectuoase,* Rosetti Publishing Juanita Goicovici, *Riscul de dezvoltare,* in the magazine Dreptul no. 6/2005
C. Jarlier – Clement, M.A. Gautier – Sicari, *La directive sur la responsabilité environnementale: originalités et incohérences d'un régim juridique novateur,* BDEI, 2004, nr. 4.