Directive 2004/35/CE and Romania

by

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1. Can you give some concise information about your national environmental liability system?

Environmental liability is regulated in Romania both at horizontal level and at vertical level, by specific laws. The framework law on environmental protection (Law no. 256 of 2006) establishes the general principles of environmental liability, which is by definition strict liability.
Law no. 265 of 2006 stipulates the principle of objective liability for environmental damages as a general rule (Article 95, para. 1). "The liability for damages caused to the environment is objective, without fault. In case of damages caused by more sources of pollution the polluters will be held liable jointly".
However, this law stipulates that the liability may be fault based in case of damages caused to the protected species and to the protected natural habitats, according to the specific regulations applicable for those species and habitats.
Environmental liability in Romania is based on the principle of the polluter having to pay. This is specifically recognized both in the framework law (Article 3) as well as in special laws. Article 5 of Law no. 265 of 2006 recognizes the right of the citizens to a healthy environment, being granted to them the right to damages. They can defend their rights individually or through the environmental associations in administrative and/or court procedures. However, this is a general provision which needs to be detailed by implementing laws.

- *Are there specific provisions of civil liability for environmental damages?*

Special laws govern the liability in case of damages caused by waste (Law 426 of 2001), pollution of underground and surface waters (Law no. 107 of 1996), dangerous chemical substances (Government Decision no. 1559 of 2004), biocides (Government Decision no. 956 of 2005), genetically modified organisms (Ministerial Order no. 173 of 2006, Ministerial Order no. 1295 of 2005), nuclear accidents (Law no. 703/2001).
These laws apply only to the specific fields and activities.

- *Is your country party to the international conventions listed in the Annex IV and V of Directive 2004/35/EC?*

Yes, except the Brussels Convention of 17 December 1971 relating to Civil Liability in the Field of Maritime Carriage of Nuclear Materials.

2. Implementation of Directive 2004/35/EC

2.1. General status of implementation

- *Has Directive 2004/35/EC been fully implemented?*
- *If not is under way?*
- *Have deficiencies of the Directive been identified during the national discourse?*

Directive 2004/35/EC has been implemented by the recently issued Government Emergency Ordinance no. 68 of 28 June, published in the Romanian Official Journal of June 29, 2007.
A Draft Government Emergency Ordinance implementing Directive 2004/35/EC was made public early this year and comments to the drafts could be made until February 25, 2007. However, no public information is available concerning the national debate on the implementation strategy and the draft law.
However, it should be mentioned that although through the issuance of the Emergency Ordinance 68/2007 Romania complies with the obligation to transpose Directive 2004/35/EC into its national legislation, the Emergency Ordinance will enter into force only upon its confirmation by the Parliament. The future Law on the approval of the Emergency Ordinance may still amend its provisions.

2.2. The general approach of implementation

- *Has your country reduced the general level of environmental protection as a consequence of the Directive?*

Yes, in comparison to the provisions of the framework law (Law 256/2006), which stipulates no fault based liability (*răspundere obiectivă*) in case of damages to the environment. Thus, I would qualify the EC Directive as a step backwards, compared to the current standard of liability under Romanian law.

- *Did your country opt for a comprehensive piece of legislation to transpose the Directive? A separate Act or a new Chapter of the general law?*

Romania intends to have a separate law on environmental liability according to the Emergency Ordinance 68/2007, which may cause further systemic problems within the very fragmented environmental legislation. By the entering into the force of the Ordinance, conflicting legislation will become void. Its status within the hierarchy of provisions on environmental liability results clearly from Article 3 para.3, which stipulates that the Emergency Ordinance does not hinder stricter community legislation, stricter national legislation which transposes stricter community rules and the conflict laws.
The Emergency Ordinance does not challenge the concept of the Directive by innovative implementing solutions. The Ministry of Environment and Water Management seems to adopt a minimalist and a formalistic approach and not a critical functionalist one, being akin on the textual transposition of the Directive.

The Romanian implementing norms unrealistically pretend to bring little new in terms of principles, elements or conditions of liability into the Romanian system of environmental liability, and presents the new comer as part of the general approximation process, as further concretization of the European principle of environmental law, especially of the principles the polluter pays and the principle of precaution. The Emergency Ordinance makes, in many respects, reference to the framework law on the protection of the environment, repeating some of its provisions and of the specific laws.

Options taken during the transposition process (please focus on innovations in your country legislation with respect to the Text of the Directive)

Definitions

- *How is the definition of environmental damage implemented?*

The Emergency Ordinance uses the wording of the Directive.

- *Did your country include in the notion "protected species and natural habitats "habitats or species not listed in the Annexes of the Birds and habitat Directives?*

No

- *Is land damage protected just in case of significant risk of adverse effect on human health?*

Yes

- *When is the conservation status of a natural habitat taken as favorable?*

According to para. 19 of Article 2, the conservation status of a natural habitat is considered favorable in case when the following conditions are cumulatively met: its natural area and surface within the territory are stable and developing, the specific structures and specific functions necessary for its long term maintenance are given, their existence in the (estimable) future is possible as well, and its specific species are in a favorable conservation status.

- *What about the definition of the operator?*

Same as in the Directive.

2.3. Scope

- *Did your country opt for a double system of liability (strict and fault based) or of a more stringent regime as allowed by art. 3.2?*

Yes, Romania makes use of a more stringent regime, allowed by Article 3.2 of the Directive.

2.3.3. Exceptions

- *Which are the exceptions to the scope of the liability regime of your country? (art.4)*

Art. 4 of the Emergency Ordinance stipulate a new exception besides those enlisted in Article 4 of Directive 2004/35/EC: "damages caused by the use for agricultural purposes

of mud resulting from sewerage treatment, according of an approved standard". There are no environmental protection reasons why such an exception should exist in the framework of Article 4.

- *What about the permit defense and the state of art defense (art.8. para 4)?*

Article 28 of the Emergency Ordinance transposes the provisions of Art. 8 (4) of the Directive with a slight wording difference in defining the state of the art defense "if the operator demonstrates that *it was not possible to produce environmental damages according to the state of science and technology of the moment of release of the pollution or at the moment when the polluting activity took place*, instead the wording of the Directive: "was not considered likely to produce environmental damages".
However, such implementation of Article 8 of the Directive can be also interpreted in the sense that the operator can only invoke the exemption if the possibility of damages was absolutely excluded at the time of the emission or at the time of the activity.
Article 27 of the Emergency Ordinance provides that the operator should not be held liable in case when the damages have occurred as a result of compliance of the operator with the mandatory requirement or the mandatory instructions of public authorities, others than orders or instructions issued by the authorities after an emission or accident caused by the operator has taken place.

2.3. 4. Preventive and remedial actions

- *When are preventive (art. 5) and remedial actions (art. 6) taken by the operator?*

In case of an immediate threat to the environment, the operator must take preventive measure within 2 hours from the time when he had knowledge of the threat and to inform the County Agency for Environmental Protection and the County Commissariat of the Environmental Guard (Article 10). In case the imminent threat to environment is not dispelled despite the preventive measures taken by the operator, the operator has to inform both agencies within 6 hours starting from the time when have noticed the inefficiency of the measure.
Articles 11 and 12 of the Emergency Ordinance have the same wording as Article 5 (3) and (4).
The operator has to inform the authorities about the nature of the damages, the elements of environment affected by the damage, the measures taken to prevent extension or the aggravation of the damage and any other information the operator considers necessary.

In case the environmental damage has occurred the operator shall inform the competent authorities (at county level) within maximum 2 hours from the time when the damage occurred, and is obliged to take measures in order to control, contain or remove the pollution or otherwise manage the relevant contaminants in order to limit or to prevent further environmental damages and adverse effect on human health or further impairment of services (Article 13 and Article 14), and to take the necessary remedial measures.

The Emergency Ordinance stipulates that the remedial measures enlisted in Article 14(2) must be proportional to the damages caused and to lead to the elimination of the effects of the pollution, taking into consideration the principle of precaution.

The remedial actions to be taken are the following: identification of the remedial measures and their notification to the competent authorities within 15 days starting from the time the damage has occurred, except the case when the authorities took themselves the remedial measures. The territorial agency decides which measures to be taken, upon consultation with the polluter. After the 15 days deadline, or upon having knowledge about the pollution, the county authority may ask a written opinion on the measures proposed from the persons affected, or who may be affected by the environmental damage, or who consider themselves as being affected in their rights or protected interest (*interes legitim*). Natural and legal persons may send their opinion within 15 days, after which the authority in charge will issue an order about the remedial measures. Thus, the total length of the procedure in case of damages would be 40 working days.

- *Which is the role of the competent authority?*

The competent authorities collect the data on the damage, assess the situation together with the operator and propose remedial measures in consultation with the operator. The authorities may also take measures on their own.

- *Is there any way for environmental organizations to participate in the negotiations between the polluter and the administration on the restoration?*

Yes, the Emergency Ordinance considers that non-governmental organizations in the field of environmental protection as affected in their rights or their "legitimate interests" (Article 20).

- *Are these discussions public?*

No information available.

- *Are there provisions to develop in further details the common framework concerning the remedy of environmental damages (Annex II)?*

The Emergency Ordinance, in its Annex II fully transposes Annex II of the Directive 2004/35/EC.

2.3.5 Preventive and remedial costs

- *Is there any system of security over property or other appropriate guarantees (art. 8.3)?*

The county agency on environmental protection has a mortgage right over all immovable of the operator and may also order the blocking of the operator's accounts for any further payments as guarantees to cover the costs related to the preventive and remedial measures (Article 29, para. 2). The mortgage is registered in the Land Registry.

However, the right of action to cover the costs of preventive and remedial measures lapses after 5 year time, starting from the moment when the measures have been taken or when the operator of the third person liable has been identified (Article 32, para. 2).

- *Is it a preventive system or shall such measures only be taken after environmental damage has occurred? How the system works?*

The Emergency Ordinance stipulates the obligation of the operators to report to the Territorial Agency of Environmental Protection and to the County Commissariat of the Environmental Guard the imminent dangers to the environment, within two hours, from the moment when they took knowledge of the imminent threat. The preventive measures should be proportional to the imminent threat and to avoid the occurrence of the environmental damage, taking into consideration the precautionary principle by decision-making. The operator should inform within 1 hour upon the implementation of the preventive measure the competent authorities. In case the risk persists despite the preventive measures, the operator has further obligation to inform the authorities within 6 hours about the measures taken, the evolution of the situation as result of the measures taken, and about the further measures which are planned to be taken in order to prevent the worsening of the situation.
However, the competent authorities may at any moment ask the operator to implement certain measures they consider necessary to be taken, to request additional information, may give instructions about the measures to be taken, and may also take on their own measures (Article 11). In case the operator responsible for the causation of the imminent danger can not be identified or does not have the obligation to support the costs of prevention, or did not comply with the obligations of Article. 10, para. 1 and Article 11 lit. b and lit.c, the head of the County Agency for Environmental Protection may take the necessary preventive measures.

- *Is there a special provision to give effect to art? 8.3. in fine (appropriate measure to enable the operator to recover the costs incurred in cases the operator shall not be required the bear the costs of preventive or remedial actions)? Most the operator in such cases nevertheless takes the remedial measures? Or the authorities take them?*

Article 27 para.2 of the Emergency Ordinance transposes Art. 8.3 and provides for the operators not obliged to support the costs of remedial measures the possibility to obtain reimbursement from the state of the costs related to the remedial measures. This provision does not mention the obligation of the operator to take the remedial measures. However, from the provision of Article 11 results that in such cases the state will take the necessary measures.

2.3.6. Cost allocation

- *Is there national provision within the meaning of art.9?*

Yes, Article 31 of the Emergency Ordinance stipulates the joint liability (*răspundere solidară şi indivizibilă*) of the operators, in cases when more than one operator caused the

environmental damage. The general provisions of the civil law govern the effects of joint liability. However, the Emergency Ordinance states that the rules governing the allocation of liability between the producer of a product and the user of a product will also be taken into account.

2.3.7. Competent authorities?

- *Which authority or authorities were designed for the purposes of art. 11?*

Two categories of authorities are in charge to fulfill the duties provided in the Directive: the county agencies of environmental protection (*Agenția Județeană de Mediu*) and the county commissariats of the Environmental Guard (*Comisariat Județean al Gărzii de Mediu*).
The county agencies for the protection of the environment are empowered to establish and implement the preventive and remedial measures, and in charge to assess the significance of the damages caused to the environment (Article 6).
According to Article 9 of the Emergency Ordinance the National Environmental Guard (Garda Națională de Mediu), through its county commissariats, is in charge of assessing the damages, assessing imminent threats of damages, and of the identification of the responsible operator.
The Emergency Ordinance does not provide for any special provision on the content of the decisions of the above authorities, neither on the remedies available for the operators to make appeal against such decisions, nor on the time limits. Accordingly, the general rules apply in such cases, as provided by Law no. 554/2004 on administrative litigations.

- *Which remedies are available when preventive or remedial measures are imposed (art. 14.1)?*

2.3.8. Request for action

- *Which of the alternatives listed in art. 12.1 were chosen?*

The Emergency Ordinance has chosen the solution (b) of Article 12.1.
In case the request for action, submitted by third parties is reasonably grounded, the competent authorities may ask the operator concerned to deliver its opinion within 5 days, from the arrival of the request. The operator shall have another 5 days at disposal to deliver its opinion. The authorities are obliged to provide to the person a written opinion within 15 days, after they receive the written answer of the operator (Article 22). Against the decision of the authorities the persons affected may submit complaints at the administrative court, according to the provision of Law 554/2004 on administrative litigation. However, in case of imminent threat of damage, the county agency shall inform the third parties concerned, who have submitted comments according to Article 20, para.1 only after the measures provided in the Emergency Ordinance have been taken.

- *Is article 12 only applied in cases of remediation of environmental damage or also in cases of imminent threat of damages? (art. 12.5)*

Article 12 is to be applied in both cases.

- *What type of review procedure is available under the national law (art. 13?)*

The common provisions are applicable (Law 554/2004).

2.3.9.Financial security

- *How was article 14 implemented?*

The Emergency Ordinance does not contain specific measures in this regard; it only sets up an action plan in Article 33 for the adoption of guarantee measures, including those to be taken in case of bankruptcy and for the measures aiming the development of financial instruments on environmental liability. Such measures will be taken in 12 months time following the entering into force of the Emergency Ordinance. Those legal measures will be enacted by the Government in form of a Government Decision.
Article 33 also states the criteria which will be taken into account for establishing the forms of financial guarantees, such as degree of danger of the type of the activity concerned, considering the potential damages which may be caused by such activities. The potential damages are to be assessed on the basis of the environmental impact assessments and/or the risk assessments submitted by the operators.

2.3.10. National Law

- *Where additional activities included in the scope of the liability regime? Were additional responsible parties identified (art. 16.1)*

- *Is there special provision to prevent a double recovery of costs in cases of concurrent action? (art.16.2)*

Yes, Article 39 of the Emergency Ordinance prohibits the double recovery of the costs in case both the authorities and the persons whose properties have been affected undertook remedial measures.

2.3.11.Temporal applications

- *How was article 17 implemented?*

Article 4, lit. g of the Emergency Ordinance fully transposes the provisions of Article 17 of the Directive (including the 30 year time limit).

2.3.12. Transboundary environmental damage

Article 35 of the Emergency Ordinance provides for the cooperation of the Romanian authorities with their counterparts in the EU in case of transboundary environmental damages, in form of information exchange in the scope of implementing preventive and if necessary remedial measures. According to Article 36 in case the environmental damage has been caused on the territory of Romania the County Agency of Environmental Protection is obliged to provide information to the environmental authorities of the other

states concerned, within 24h from the time when they had knowledge about the environmental damage. The information provided to the other Member States must contain the place, time of the damage occurrence, the nature of the damage, the elements of the environment affected by the damages, and the measures taken by the Romanian authorities to prevent the extension and the aggravation of the damage.
However, the effectiveness of the cooperation is subject also to the bilateral treaties concluded in the field of protection of the environment and territorial planning with the states affected or being under the threat to be affected by the environmental damage (Article 35, para.2).

How the system works in case of environmental damage in a transboundary context?