DOCUMENTS PRECEDING THE ADOPTION OF DIRECTIVE 2004/35/EC TRANSPOSED IN THE ROMANIAN LAW BY GOVERNMENT EMERGENCY ORDINANCE NO. 68/2007 ON ENVIRONMENTAL LIABILITY

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Abstract

The European legislation realized in 2004 one of the historical challenges of EU environmental legislation. The Community law has had long before the intention to regulate the legal regime of environmental damage, facing though many obstacles: the technical complexity of this task, the opposition of states and sectors affected by the system, including ideological factors and the supremacy of the precautionary principle in the area of environmental law. The regime proposed considers that the environmental liability is based on the "polluter pays" principle, but also on principles 13 and 16 of the Rio Declaration (1992) on Environment and Development which established, on one hand that subjects who pollute, should in principle bear the cost of pollution, and on the other hand, imposed an obligation on states, to develop the national law regarding liability for environmental damage and compensation for victims of pollution and environmental degradation. The Directive is the result of 15 years of attempts to change and adapt the liability regime to the specificity of environmental damage and to exploit developments in this context, especially in the prevention and remedying area; it is an attempt of "green revolution" of the tort liability system. By this normative act, the European Community has known for the first time in its history, a regulation dealing, in a horizontal and systemic manner, the problem of preventing and remedying the environmental damage. The Directive succeeds to establish reference points for the harmonization of the national legislation on measures for preventing and remedying environmental damage at EU level, ensuring a minimum level of legal and administrative rules, on the matter.

Keywords: *environment, damage, liability, Directive 2004/35/EC, "polluter pays" principle*

Introduction

Although the Treaty establishing the European Economic Community[1] did not stipulate competences in the sphere of environmental protection, the awareness of the need for Community action in this regard took shape through the first Environmental Action Programs at Community level, materialized in statements / resolutions of the Council of European Communities and of Member States[2] representatives.

The European Community competence to adopt environmental protection measures was included in the Treaty of Rome, simultaneously with the adoption of the Single European Act[3],

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[1] Adopted at Rome on March 25, 1957 and entered into force on January 1st, 1958.

[2] Milena Tomescu, Serban- Alexandru Stanescu, "Condi iile răspunderii juridice pentru daune aduse mediului potrivit Directivei 2004/35/CE", *Revista Română de Drept al Afacerilor* 6 (2006): 48.

[3] Signed in Luxembourg on February 14, 1986 and in Hague on February 28, 1986 and entered into force on July 1st, 1987.

then in the Treaty on European Union[4], and last, but not least, in the Treaty of Amsterdam[5], finding the explanation in an objective reality, namely that pollution has no borders, its effects affecting people's life and health, their property, the flora and fauna, without taking into account the limits of the national territory, and, on the other hand, measures for pollution prevention, compensation and restoration of the damaged environment are more easily to take, being based on uniform rules of law, which should not vary from state to state[6].

Thus, on May 14, 1993 the ***Green Paper*** on environmental liability[7] was adopted, and in its introduction it mentioned several environmental accidents which had a significant impact on the environment: Seveso, Amoco Cadiz, Sandoz, Coruna and Braer.

Without going into details, we will try to make a summary of the environmental disasters mentioned in the Green Paper:

The Seveso Case 1976

The accident of **Seveso** took place on July 10, 1976, when, after a reactor explosion at a chemical plant in town, 5 km north of Milan, in Italy, a large quantity of dioxin leaked; being one of the most toxic and dangerous toxins, the dioxin sowed death, disease and desolation in the Brianza valley, where the city concerned was located. Within just a few days, a total of 33.00 animals were found dead[8].

The Amoco-Cadiz Case 1978

On March 16, 1978, the Liberian tanker **Amoco-Cadiz** which moved toward Le Havre harbour failed near the French coasts, in Bretagne, after a steering system failure. For nearly two weeks, the entire load (227.000 tones of oil) was discharged into the sea, representing the largest oil slick registered in the history of oil vessels accidents. 360 km of coast were affected, constituting the largest environmental disaster caused by an accident of this type. In the affected area, 30% of the fauna and 5% of the flora were destroyed. About 20,000 seabirds were discovered killed by the oil slick, the marine cultivations of oysters were strongly affected, losses amounting to 9,000 tons, and also the fishing activity, the shellfish harvesting and the tourism were affected on a short term. The compensation amounted to 1,257 billion francs[9].

The Sandoz Case 1986

In November 1986, a fire destroyed a warehouse of the **Sandoz** chemical group, located on the Rhine, at Schweizerhalle. The fire caused the discharge in the river of over 30 tones of chemicals, insecticides, fungicides and herbicides. This first environmental catastrophe that occurred in Switzerland, caused a significant pollution of the Rhine and the death of hundreds of thousands of fish, affecting all neighbouring countries crossed by the Rhine.

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[4] Signed in Maastricht on February 7, 1992 and entered into force on November 1st, 1993.

[5] The Treaty of Amsterdam amending the Maastricht Treaty, Treaties establishing the European Communities and other related documents signed on October 2nd, 1997 and entered into force on May 1st, 1999; art. 12 provides the renumbering of articles, titles and sections of the Treaty establishing the European Community, so that Title XVI – Environment becomes Title XIX - Environment (Milena Tomescu, Serban- Alexandru Stanescu, *op cit*.., p. 49, notes 10 and 11).

[6] Milena Tomescu, Serban-Alexandru Stanescu, *op. cit*., p. 49.

[7] COM (93) 47 final. The Green Paper is a notice of the Commission (complementary source of community law, without specific legal effects) which presents various options, without taking a position, with the exact purpose of opening a debate with Member States. (Augustin Fuerea, *Drept comunitar european. Partea generală* (Bucharest, All Beck Publishing House, 2004) 135, note 5)

[8] http://en.wikipedia.org/wiki/Seveso_disaster

[9] Serban-Alexandru Stanescu, *Protec ia mediului marin împotriva poluării cu hidrocarburi. Prevenirea, limitarea efectelor, angajarea răspunderii*, (Bucharest, Hamangiu Publishing House, 2010), 37-38; Mircea Dutu, *Tratat de Dreptul mediului*, Issue 3, (Bucharest,CH Beck Publishing House, 2007), 478.

The Coruna Case 1992

The Greek-flagged tanker Aegean Sea failed during a severe storm, on December 3, 1992, and trying to enter La Coruna harbour (Spain), it got on fire. Over 300 km of coast were affected by pollution when the 66, 800 tones of oil were discharged into the sea. The accident affected the work of more than 4,000 fishermen, gatherers of shellfish and aquaculture producers[10].

The Braer Case 1993

On January 5, 1993, the **Braer** tanker failed in southern Shetland Islands (United Kingdom) following an engine damage occurred during a severe storm. The 84,500 tons of spilled oil affected the marine cultures of salmon, the sheep, and over 2,000 victims sought compensation for damages caused by pollution, damages totaling 58, 4 million pounds[11].

The questions raised in the content of the Green Paper are conceived to arouse discussions that the Commission pursues on this topic of remedying the environmental damage, in order to better inform its future actions in this area.

First, the Green Paper states that the civil liability is a legal and financial tool used to determine those who are responsible for causing damages, to pay compensation for costs of remedying such damage. Secondly, the Green Paper seeks to investigate the possibility of remedying the environmental damage which is not covered by the principles of civil liability.

The Green Paper was received with great interest by European Union Member States, by the industrial sector, but also by NGOs for environmental protection.

In April 1994, the European Parliament adopted a resolution inviting the Commission to develop a proposal for a directive on the regulation of environmental damage[12]. In this regard, on January 29, 1997, the Commission decided to develop ***a White Paper***[13] on environmental liability, which was adopted on February 9, 2000. The purpose of the White Paper is to investigate how "the polluter pays" principle, one of the key principles in environmental matters, may be applied to best serve the needs of the Community environmental policy[14].

Also, the White Paper refers to two environmental disasters: the Aznalcóllar case and the Erika case, which we shall briefly present below:

The Aznalcóllar Case 1998

The accident was represented by the breaking of the dam from Aznalcóllar (Spain). The Boliden Mine, from the town above mentioned, used to produce about 125,000 tones of zinc and 2, 9 million ounces of silver per year. The residue pool of the mine broke on a length of about 50 m, in late April 1998, spilling a toxic wave of about 3 million m3 of mud and 4 million m3 of acidic water into the Agri River, in an area next to the Coto Donana National Park, one of the largest natural reserves in Europe.

The accident caused damage on an area of 30 km, destroying rare species of flora and fauna. The cost of the cleaning done by the public authorities was $ 44 million and the costs of the Regional Council of Andalusia amounted to $ 53.3 million. The company spent a total of EUR 96 million to clean the discharge and received more EU funding, worth 37.7 million euros. By May 2002, the total cost of the disaster had been calculated at 377.70 million euros. The mine was permanently closed on September 20, 2001[15].

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[10] Serban-Alexandru Stanescu, *op. cit*., 39.

[11] Serban-Alexandru Stanescu, *op. cit*., 39.

[12] Simona-Maya Teodoroiu, *Dreptul mediului şi dezvoltării durabile*, (Bucharest, Legal Universe Publishing House, 2009), 230.

[13] The White Paper is a notice of the Commission (complementary source of community law, without specific legal effects) used to take position on a certain issue (Augustin Fuerea, *op cit*.., 135, note 4)

[14] http://ec.europa.eu/environment/legal/liability/white_paper.htm;

[15] http://www.arpm7c.ro/twinning/twinning-phase1/downloads/WEBPAGE%20FINAL/04_Horizontal%20Assessments/Mission52/07b_ELV_cases_impact_RO.pdf

The Erika Case 1999

The Maltese-flagged tanker Erika, with 30,000 tons of oil on board, was caught in a storm on December 11, 1999, sinking in the Bay of Biscay (France). 20,000 tones of oil of its reservoir leaked. The pollution resulted was an ecological and economic disaster: more than 61,400 water birds killed, 450 km of coastline affected by pollution, over 200,000 tones of oil waste collected[16].

What is important is the fact that before drafting the White Paper, from 1995 - 1997, a series of studies[17] were commissioned by the Commission in order to help prepare the White Paper on environmental liability. The summaries of these studies appear in the annexes to the White Paper.

The first study, published on December 31st, 1995, *"Study of civil liability systems for remedying environmental damage"*[18], examines the legal system of liability on remedying the environmental damage from 19 different countries[19]. Initially, the analysis should have included only the civil liability system, however for a thoroughgoing study and a general overview, both the civil and the criminal liability were taken into consideration.

The second study, *"Liability for damage to natural resources"*[20] was published on September 17, 1997, as the result of a brief research on liability for damage caused to natural resources. The aim of this study was to analyze and identify possible solutions to various problems that may arise in the damage recovery of natural resources (damage assessment, natural resources covered by the law in force). The study began in July 1997 and ended in September 1997.

"Liability for contaminated sites"[21] is the third study, published on September 26, 1997, stating the importance of a liability regime for damage caused through soil pollution, necessary to ensure the application of the precautionary principle, the prevention principle and "the polluter pays" principle, since pollution is a serious problem of the modern society, most European countries, especially the industrialized ones facing this problem.

Thus, after the European Commission decided to prepare the White Paper on liability for environmental damage, the position of Member States was swift: the attitude of Austria, Belgium, Finland, Greece, Luxembourg, Netherlands, Portugal and Sweden was favorable for the action in the field of liability for environmental damage, and several Member States said they expected legislative proposals of the European Commission before starting the process of national regulation in this area. The comments of Member States regarded the inclusion in the project of the environmental damage caused by the deliberate release and introduction on the market of genetically modified organisms[22].

After consulting several independent experts, national experts from Member States, but also all interested parties, on February 9, 2000, the Commission drew up and released the White Paper[23] on liability for environmental damage, which was a step forward in creating a systemic, uniform and consistent regulation for environmental damage, at the level of the European Community[24] and which considered that "the environmental liability aims at determining a person who has caused damage to the environment (the polluter) to pay some money to remedy the damage caused", reflecting in this way the content of "the polluter pays" principle[25].

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[16] Serban-Alexandru Stanescu, *op. cit.*, p. 40, see also http://www.euractiv.ro/uniunea-europeana/articles%7CdisplayArticle/articleID_9305/Politici-de-mediu.html

[17] http://ec.europa.eu/environment/legal/liability/background.htm

[18] Translated from English: "The study of civil liability systems for remedying environmental damage".

[19] The United States of America, Denmark, Finland, France, Germany, Italy, Netherlands, Spain, Sweden, England, Austria, Belgium, Greece, Iceland, Ireland, Luxembourg, Norway, Portugal and Switzerland.

[20] Translated from English: "Liability for damage to natural resources"

[21] Translated from English: "Liability for Contaminated Sites"

[22] Simona-Maya Teodoroiu, *op. cit.*, p. 231.

[23] COM (2000) 66 final.

[24] Simona-Maya Teodoroiu, *op. cit.*, p. 232.

[25] Cristian Mares, "Răspunderea comunitară pentru daunele aduse mediului reglementată de Directiva 2004/35/CE", *Annals of the Faculty of Juridical Sciences, Wallachia University of Targoviste*, 1 (2009): 121.

The White Paper concludes that the most appropriate option is a Framework Directive on liability for damage caused by dangerous activities, regulated by the European Commission, meant to cover the traditional damage, as well as the environmental damage and the fault-based liability for environmental damage caused by activities that are not dangerous.

Thus, on February 21st, 2002, based on the White Paper, the European Parliament and the Council adopted a proposed directive[26] on environmental liability, and two years later the Directive 2004/35/EC of the European Parliament and Council on environmental liability with regard to preventing and remedying environmental damage was adopted. The directive is destined to all Member States, and the deadline for transposing it into the national law is April 30, 2007[27].

• Directive 2004/35/EC[28] on environmental liability concerning the prevention and remedying of environmental damage

The European legislation realized in 2004 one of the historical challenges of EU environmental legislation. The Community law has had long before the intention to regulate the legal regime of environmental damage, facing though many obstacles: the technical complexity of this task, the opposition of states and sectors affected by the system, including ideological factors and the supremacy of the precautionary principle in the area of environmental law[29].

The regime proposed considers that the environmental liability is based on the "polluter pays" principle, but also on principles 13[30] and 16[31] of the Rio Declaration (1992) on Environment and Development which established, on one hand that subjects who pollute, should in principle bear the cost of pollution, and on the other hand, imposed an obligation on states, to develop the national law regarding liability for environmental damage and compensation for victims of pollution and environmental degradation[32].

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[26] O.J no. C 151 E, June 25, 2002

[27] Milena Tomescu, Serban-Alexandru Stanescu, *op. cit*., 50.

[28] Directive 2004/35/EC of the European Parliament and the Council, of April 21st, 2004 on environmental liability to prevent and remedy environmental damage, O.J no. L 143/56 of April 30, 2004. The Directive was amended by Directive 2006/21/EC of the European Parliament and the Council, of March 15, 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC, O.J no. L102/15 of November 4, 2006 and Directive 2009/31/EC of the European Parliament and the Council, of April 23, 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, as well as Directives 2000 / 60/CE, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and the Commission Regulation (EC) no. 1013/2006 of the European Parliament and Council, O.J no. L 140/114, of June 5, 2009.

[29] Jesús Jordano Fraga, "La responsabilidad por daños ambientales en el Derecho de La Unión Europea: Análisis de la Directiva 2004/35, de 21 abril, sobre Responsabilidad medioambiental", *Revista Electrónica de Derecho Ambiental "Medio Ambiente & Derecho"* 12-13 (2005), http://huespedes.cica.es/aliens/gimadus/

[30] Principle 13 of the Rio Declaration: "States should draw up national laws on liability and compensation for victims of pollution and other damage to the environment. Also, States should cooperate with greater timeliness and determination to develop further international laws regarding liability and compensation for adverse effects caused by damage to the environment, through activities found in their jurisdiction or under their control, in areas outside the national jurisdiction".

[31] Principle 16 of the Rio Declaration: " The national authorities should make efforts to promote the internalization of environmental costs, and use economic instruments, taking into account the approach according to which, in principle, the polluter should bear the cost of pollution, with due concern for the public interest, and without distorting the trade and the international investments".

[32] Mario Peña Chacón, "La nueva directiva sobre responsabilidad ambiental en relación con la prevención y reparación de los daños ambientales y su relación con los regimenes latinoamericanos de responsabilidad ambiental", *Revista Electrónica de Derecho Ambiental "Medio Ambiente & Derecho"* 12-13 (2005), http://huespedes.cica.es/aliens/gimadus/

According to authors specialized on the matter[33], the Directive is the result of 15 years of attempts to change and adapt the liability regime to the specificity of environmental damage and to exploit developments in this context, especially in the prevention and remedying area; it is an attempt of "green revolution" of the tort liability system. By this normative act, the European Community has known for the first time in its history, a regulation dealing, in a horizontal and systemic manner, the problem of preventing and remedying the environmental damage.

The Directive succeeds to establish reference points for the harmonization of the national legislation on measures for preventing and remedying environmental damage at EU level, ensuring a minimum level of legal and administrative rules, on the matter.

It should be noted that Directive 2004/35/EC does not establish a civil liability regime, but rather a regime of responsibility of public character, a specific responsibility, mainly of administrative nature, which involves important procedural differences from the classical civil liability[34].

In this respect, the Directive establishes a two-step procedure for resolving the claims of environmental damage and those on the imminent threat of such damage[35].

Thus, under Article 12, first of all, the request, accompanied by relevant information and data on the environmental damage, must be addressed to the competent authority[36], asking it to take the appropriate measures established by the Directive. If the request for action and the accompanying observations indicate, in a plausible manner, the existence of environmental damage, the competent authority shall examine these comments and the request for action. In such cases, the competent authority gives the operator the opportunity to express his opinion on the request for action and on the accompanying observations. The Directive requires the competent authority to inform the applicant as soon as possible and in accordance with the relevant provisions of the national law, of its decision to accept or reject the request and the grounds on which it is based; Member States have, though, the possibility to decide that these requirements do not apply to an imminent threat of damage.

Article 13 of the Directive presents the second stage of processing requests, namely, the review procedures. Thus, decisions, documents or the refusal to act of the competent authority may be challenged before a court or other public body which is independent and impartial.

With regard to the active capacity to pursue proceedings, three alternatives are provided, and each Member State must implement the alternative corresponding to its legal system:

- persons affected or potentially affected by damage;
- persons who have a sufficient interest in taking a decision on the damage;
- persons claiming a right violation.

The Directive establishes that preventing and remedying the environmental damage must be implemented in accordance with "the polluter pays" principle and with the sustainability principle. Thus, the fundamental principle of the directive should be that the operator whose activity has caused environmental damage or imminent threat of such damage should be held financially liable, in order to determine operators to adopt measures and develop practices to reduce the risks of environmental damage so as to reduce exposure to implicit financial risks.

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[33] Mircea Dutu, "Prevenirea i repararea pagubelor de mediu potrivit Ordonan ei de urgen ă a Guvernului nr. 68/2007", *Law Review* 11 (2007): 10.

[34] Berthy van den Beoek, "Environmental Liability and Nature Protection Areas. Will the EU Environmental Liability Directive actually lead to the restoration of damaged natural resources?", *Utrecht Law Review*, Volume 5, 1 (2009): 117; Mircea Dutu, *Tratat ...*, 492

[35] Monica - Elena Otel, *Răspunderea interna ională în domeniul mediului,*, (Bucharest, Legal Universe Publishing House, 2009), 304.

[36] Article 11, paragraph (1): Member States designate the competent authority or authorities responsible for fulfilling obligations under this Directive.

The content of the directive provides in Article 1, the goal of its adoption, namely, establishing a liability framework for environmental damage based on the "polluter pays" principle, in order to prevent and remedy environmental damage, and in Article 2, it defines the concepts that it uses.

Article 3 of the Directive regulates its scope, creating two forms of liability, namely[37]:

First, an objective liability for dangerous or potentially dangerous occupational activities listed in Annex III, which allows covering the environmental damage, and secondly, a subjective liability (based on fault) for professional activities not listed in Annex III, allowing liability to cover only damage to species or habitats protected in the community law.

With regard to dangerous or potentially dangerous occupational activities listed in Annex III, it must be mentioned that Directive 2004/35/EC has so far incurred *two amendments*, made, on one hand, by Directive 2006/21/EC[38] of the European Parliament and the Council of March 15, 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC, and on the other hand, Directive 2009/31/EC[39] of the European Parliament and Council of April 23, 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Commission Regulation (EC) no. 1013/2006 of the European Parliament and Council.

In this respect, the two directives bring changes to the list with dangerous occupations, in Annex III, by the insertion of two activities, as it follows:

- Directive 2006/21/EC introduces the activity of *managing the extractive waste ;*
- Directive 2009/31/EC introduces the activity of *operating sites for geological storage of carbon dioxide.*

Regarding the transposition of the two Directives, Directive 2006/21/EC had as transposing deadline, the date of May 1st, 2008. So far, only two Member States have not implemented national measures, namely Estonia and France. Romania's transposition measures are included in the Government Decision no. 856/2008[40] on the management of waste from extractive industries and the Government Emergency Ordinance no. 15/2009[41] amending and supplementing Government Emergency Ordinance no. 68 / 2007 on environmental liability with regard to preventing and remedying environmental damage. Directive 2009/31/EC requires as implementation deadline, the date of June 25, 2011, but Member States must make sure that the following storage sites covered by the directive are operated in accordance with its requirements until June 25, 2012:

- storage sites used in accordance with the law in force, on June 25, 2009
- authorized storage sites in accordance with such legislation before June 25, 2009, provided that the sites should not be used for more than a year after that date .

So far, only three Member States have transposed the Directive 2009/31/EC into their national legislation, namely, Belgium, Lithuania and Austria. Until today, Romania has not yet implemented the directive.

In Article 4 of Directive 2004/35/EC, we find exceptions that are excluded from its scope, especially those for which, liability is involved under the international instruments listed in Annexes IV and V, as it follows:

- November 27, 1992, the International Convention on civil liability for oil pollution damage;
- November 27, 1992, the International Convention on establishing an international fund for compensation, for oil pollution damage;
- March 23, 2001, the International Convention on civil liability for bunker oil pollution damage;

[37] Milena Tomescu, Serban-Alexandru Stanescu, *op. cit*., 52.
[38] O.J no. L102/15 of April 11, 2006.
[39] O.J no. L 140/114 of June 5, 2009.
[40] Official Gazette. no. 624 of August 27, 2008.
[41] Official Gazette. no. 149 of March 10, 2009.

- May 3, 1996, the International Convention on liability and compensation for damages related to the transport by sea of dangerous and noxious substances;

- October 10, 1989, the Convention on civil liability for damage caused during transport by road, rail and inland waterway of dangerous goods;

- July 29, 1960, the Paris Convention on civil liability in the field of nuclear energy and the Brussels Supplementary Convention of January 31st, 1963;

- May 21st, 1963, Vienna Convention on civil liability for nuclear damage;

- September 12, 1997, the Convention for additional compensation for nuclear damage;

- September 21st, 1988, the Joint Protocol on the implementation of the Vienna Convention and Paris Convention;

- December 17, 1971 the Brussels Convention on civil liability in maritime transport of nuclear material.

Also, the Directive does not apply to activities that have as main purpose the national defense or the international security, or to activities conducted to protect from natural disasters.

Regarding the preventive measures, under Article 5, if an environmental damage has not yet occurred, but there is an imminent threat of such damage, the operator must take the necessary preventive measures, and the Member States must foresee any situation where an imminent threat of environmental damage is not eliminated despite preventive measures taken by the operator, in order for the operator to inform, as soon as possible, the competent authority on all relevant aspects of the situation.

Article 6 refers to the act of repair, so that in case of environmental damage, the operator must inform without delay the competent authority on all relevant aspects of the situation and take all practical measures to control, limit, eliminate or manage immediately, the relevant contaminants and / or any other damage factors in order to limit or prevent further environmental damage and harm to human health or further deterioration of services.

Regarding the application in time, the Directive does not apply in three cases expressly stipulated in the Article:

- damage caused by an emission, event or incident that occurred before April 30, 2007;

- damage caused by an emission, event or incident that occurred after April 30, 2007, in case it resulted from a specific activity that occurred and ended before that date;

- damage, if thirty years have passed from the emission, event or incident that caused it.

Regarding the implementation, Member States must implement, under Article 19, laws, regulations and administrative provisions necessary to comply with the directive, until April 30, 2007, while having the obligation to immediately inform the Commission thereof.

Regarding the transposition of Directive 2004/35/EC, there were a number of decisions of the European Court of Justice for infringement of obligations, by Member States.

In the context of accession to the European Communities, Member States have undertaken the obligation to integrate rules of the Community law in their own legal system. In this regard, each Member State must take measures to make sure that the Community rule can be applied in the internal law[42], to ensure the compliance of internal rules with Community rules and also to correctly apply the Community rule[43].

[42] Depending on the Community act in question, a Member State must go through several stages. For example, in the case of the directive, as known, it is necessary to transpose it into national law first, and then take steps to implement it, if necessary. In the case of regulations, they have direct applicability, and there is no need for transposition, however there are situations when adopting some internal measures to ensure its applicability becomes necessary.

[43] Monica - Elena Otel, „Procedura acțiunii pentru constatarea neîndeplinirii de către statele membre a obligațiilor de decurg din Tratatul CE și dreptul comunitar al mediului", *Revista română de Drept Comunitar*, 2 (2006): 55.

Since Member States have willingly assumed these obligations, it is natural for them to be fulfilled; otherwise, the Community treaties establish *a procedure by which they are being held responsible, namely, the infringement by Member States of their obligations, under the Community law*[44], procedure which is specific to the Community law[45].

As "guardian of treaties", the European Commission shall ensure the correct implementation of Community law in Member States, and it may even bring to Court an action against a Member State when it considers that that State has failed to fulfill its obligations, under the treaties[46].

This action of finding the infringement constitutes, under the doctrine[47], the control instrument specific to the Commission, within its powers in relation to Member States, as the expression of the existing dualism between Member States and Community institutions. By this mechanism of action for finding infringements of treaties, the Commission shall make sure that Member States do not exercise powers that they have voluntarily renounced at, in favor of the Communities.

The infringement of obligations, as we shall see in the next chapter, can be the result of a positive action, of the inappropriate application of Community regulations, as well as the consequence of a negative action, namely, the omission of notification of national regulations transposing and implementing directives, or the noncompliance of the national law with requirements of the Community rules.

We believe[48] that it is very important that this action provides also a preliminary *non-contentious procedure* of resolving "disputes" between the Commission and Member States, on the application of the Community law, allowing in this way to amicably resolve the dispute.

This preliminary procedure is a mutual change of views between the future plaintiff and the future defendant, more specifically, it sets some deadlines for resolving the situation inconsistent with the Community law; also relevant is that, during the preliminary procedure, the scope of the future action brought before the Court of Justice[49] is established.

With regard to the procedure purpose, the Court itself has stated repeatedly that it is "to give the possibility to the Member State, on the one hand to remedy, correct or rectify its position towards the issue brought before the Court and, secondly, to present its defense against complaints of the Commission"[50].

Any natural or legal person, including any other Member State has the possibility to notify the Commission. Other sources of information for the Commission are: Member States reports on the state of transposition of EU directives, the press, MEPs or civil society organizations. The active capacity to pursue the proceedings and the interest of the Commission do not have to be proved; in this respect, the Court has stated on several occasions that "in exercising powers it has, based on art. 211 and 226 of the EC, the Commission must not prove a legal interest since, in the

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[44] In English for this procedure, the term *"infringement"* is being used, and in French, *"en manquement"*.

[45] The legal basis for infringement by Member States, under the Community law, is found in Art. 226 of the Treaty establishing the European Community

[46] Andrada Trusca, "Procedura acţiunii pentru constatarea neîndeplinirii de către statele membre a obligaţiilor ce le revin conform dreptului comunitar. Privire specială asupra dreptului mediului", *Revista Transilvană de Ştiinţe Administrative*, 2 (24) (2009): 148.

[47] Gyula Fabian, *Drept instituţional comunitar*, Third edition revised and enlarged, with reference to the Treaty of Lisbon, (Cluj-Napoca, Legal Sphere Publishing House, 2008), 359.

[48] Andrada Trusca, *op. cit.*, 149.

[49] Gyula Fabian, *op. cit*., 362.

[50] See ECJ Decision of January 31st, 1984, Case 74/82, *Commission v. Ireland*, ECR European Court of Justice in 1984, p. 00317; ECJ Decision of February 2nd, 1988, Case 293/85, *Commission v. Belgium*, ECR European Court of Justice in 1988, p. 00305; ECJ Decision of May 10, 2001, Case C-152/98, *Commission v. Netherlands*, ECR European Court Justice, 2001 p. I-03463. http://eur-lex.europa.eu/

general interest of the Community, its function is to make sure that treaty provisions are being applied by Member States and to observe the existence of any infringement of obligations deriving thereof, in order to stop this infringement"[51].

The importance of this preliminary procedure lies equally in the fact that it is confidential, leading to the facilitation of the amicable settlement, 90% of the nearly 200 cases per year being resolved amicably, even before notifying the Court[52].

Therefore, taking into account the above, we shall try to define the infringement by Member States, of their obligations under the Community law, as a legal tool at the disposal of some determined subjects of law, ensuring the compliance by Member States with the Community law, and punishing conducts inconsistent with its rules.

Thus, in 2008, the European Court of Justice pronounced two decisions for infringement by a Member State, for not adopting, within the prescribed period, the provisions necessary to comply with Directive 2004/35/EC, ECJ Decision, dated December 11, 2008[53] in Case C-330/08 *Commission v. France* and ECJ Decision, dated December 22, 2008[54] in Case C-328/08 *Commission v Finland.*

In 2009, Court's decisions for infringement targeted five Member States, namely, ECJ Decision of March 12, 2009[55] in Case C-402/08, *Commission v. Slovenia*, ECJ Decision of March 24, 2009[56] in Case C-331/08, *Commission v. Luxembourg*, ECJ Decision dated May 19, 2009[57] in Case C-368/08, *Commission v. Greece*, ECJ Decision dated June 18, 2009 in Case C-417/08, *Commission v. United Kingdom* and ECJ Decision dated June 18, 2009 in Case C-422/08, *Commission v. Austria.*

Conclusions

Romania's accession to the European Union, on January 1st, 2007 imposed the transposition into the national law, of the Council and European Parliament Directive no. 2004/35/EC on environmental liability with regard to environmental damage, seeking a common framework for preventing and remedying environmental damage, at a reasonable cost to society. This was realized by Government Emergency Ordinance no. 68/2007[58] with the same title, promoting thus in the internal law, a special, innovative regime of prevention and repair of environmental damage, of a different nature from the classical liability systems, in which prevention is the priority; however, in case of damage, the priority is to repair it, which is why some financial guarantees[59] are being established.

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[51] See ECJ Decision of April 4, 1974, Case 167/73, *Commission v. France*, ECR European Court of Justice, 1974 p. 00359; ECJ Decision of August 11, 1995, Case C-431 / 92, *Commission v. Germany*, ECR European Court of Justice in 1995, p. I-02189; ECJ Decision of November 9, 1999, Case C-365/97, *Commission v. Italy*, ECR European Court of Justice, 1999, p. I-07773; ECJ Decision of January 1st, 2001, Case C-333/99, *Commission v. France*, ECR the European Court of Justice in 2001, p. I-01025, http:// / eur-lex.europa.eu /

[52] Augustin Fuerea, *Manualul Uniunii Europene*, Third Edition, revised and enlarged, (Bucharest, Legal Universe Publishing House, 2006), 267.

[53] ECR European Court of Justice in 2008, Page I-00191.

[54] ECR European Court of Justice in 2008, Page I-00200.

[55] ECR European Court of Justice in 2008, Page I-00034.

[56] ECR European Court of Justice in 2008, Page I-00045.

[57] ECR European Court of Justice in 2008, Page I-00089.

[58] Published in the Official Gazette, no. 446 of June 29, 2007, approved by Law no. 19/2008, as amended by Government Emergency Ordinance no. 15/2009, published in the Official Gazette no. 149 of March 10, 2009

[59] Mircea Dutu, *Prevenirea*….., 9.

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