

Romanian Ecocentrism and EU Legislation on Environmental Protection - A Criminal Law Perspective

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Romanian Act no. 101/2011: "on stranger tides"

- Act no. 101/2011 transposed into national legislation the [Environmental Crime Directive 2008/99/EC](#) ("ECD") on the protection of the environment through criminal law; the domestic law - intended to complete sector-specific environmental law and framework criminal legislation;
- I. **art. 3 ECD (offenses)** - (a) – (f) inappropriately transposed, mainly due to overlaps in national law:
 1. its counterpart - **art. 8 (2) Act no. 101**: the discharge, emission or introduction of a quantity of ionizing radiation into air, **water** or soil which is likely to cause death or serious injury to any person or substantial damage to the environment shall constitute an offense and shall be punishable by imprisonment of **1 to 5 years**;
 2. overlapping and conflicting criminal provisions – a similar offense, with the same latitudes of penalties - already provided by [Water Act no. 107/1996](#) (amended in 2016)– **art. 92**: (1) The evacuation, discharge or injection into the surface or ground waters, in the inland marine waters or in the territorial sea waters, of waste, residues or products of any kind, containing solid, liquid or gas substances, bacteria or microbes, that, by their concentrations and characteristics are liable to change the water characteristics and render it harmful to the health and bodily integrity of humans, animals' life and to the environment, to the agricultural or industrial production or to the fisheries, shall constitute an offense and shall be punishable by imprisonment of **1 to 5 years**;
 3. another similar offense - already set out by [GEO 195/2005](#) (Government Ordinance on the Protection of the Environment) - **art. 98 (4)**: The following acts shall constitute offences and shall be punishable by imprisonment of **1 to 5 years**, if they are likely to endanger the human, animal or vegetal life or health: a) causing, by lack of supervision of ionizing radiation, environment contamination, or exposure of the population to ionizing radiation, as well as the omission to promptly report the increase, above admitted limits, of environment contamination, the omission or inappropriate application of measures of intervention in case of nuclear accident ; b) discharging waste water or other waste, from ships or floating platforms, directly into natural waters, or intentionally causing pollution by evacuating or soaking into natural waters, either directly or from floating platforms, of dangerous substances or waste;

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II. art. 5 ECD (penalties) – incorrectly transposed;

- the sanctions for *actual damage* to health and the environment – less severe than sanctions for *abstract endangerment offenses* (i.e. merely creating a state of danger) for similar unlawful conducts;

e.g. **art. 4** of Act no. 101 (abstract endangerment offense): the breach of provisions on import-export of waste - punishable by imprisonment of **2 to 7 years**; **art. 8** (actual damage to life and health): serious environmental breaches are punishable by imprisonment of **1 to 5 years**;

- the principle of dissuasive sanctions – infringed;
- the principle of proportionate penalties is also disregarded – the offense of *water poisoning*, art. 356 **Romanian Criminal Code ("RCC")** – less severely punished;

e.g. **art. 356**: The act of poisoning water sources and water supply systems, by any means, if the water thus polluted becomes harmful to the health of people, animals or plants, shall be punishable by no less than **6 months** and no more than **3 years of imprisonment or by a fine**;

- in the larger frame of water pollution offenses, the RCC is the only law which sets out the alternative penalty of fine;

III. articles 6-7 ECD (liability of legal entities/penalties for legal persons) – not transposed at all

- theoretically, Act no. 101 provides no criminal liability for legal entities;
- practically, since it contains 2 Addendums (lists of statutes on the protection of environment) – indirectly entails criminal liability of legal entities; the Romanian legal system had acknowledged the criminal liability of legal entities before the ECD came into force, and no transposing measures were necessary (the RCC has provided for such liability as early as 2006);

NEG: caught in the Act

- the State specialized authorities responsible for environmental protection are mainly the following:
 - (I) the Ministry of Environment – core central authority;
 - (II) the National Agency for Environment Protection;
 - (III) the local environment protection agencies;
 - (IV) the National Environment Guard (“NEG”).

Powers of NEG (Government Decision no. 1005/2012):

- a specialized inspection body with the power to sanction, including imposing the stay/cessation of activity, in case of pollution and environment degrading or failure to meet the conditions imposed by sector-specific legislation;
- plays an active role in determining the damage caused by infringement of environment protection rules, and identifying the responsible party – applies sanctions for civil violations;
- *notifies criminal investigation authorities* in relation with offenses against the environment and closely cooperates with the latter;
- directly participates in actions to prevent and combat acts of criminal nature;

Act. no. 101 (art. 13) provides a *general legal obligation* (persons in the course of their duties) to report to authorities any criminal breaches of the environment.

European Court of Human Rights case-law

- prior to the enactment of Act no. 101, ECtHR condemned Romania for the authorities' failure to take appropriate steps to avoid and remedy environmental pollution associated with corporate offenders
- ❖ ECHR: case of *Tătar vs. Romania* (27.01.2009)
- the applicants lived in Baia Mare (Romania). The company Transgold SA obtained a license in 1998 to exploit the Baia Mare gold mine. The company's extraction process involved the use of sodium cyanide. Part of its activity was located in the vicinity of the applicants' home. On 30 January 2000 an environment accident occurred at the site. A United Nations study reported that a dam had breached, releasing about 100,000 m³ of cyanide-contaminated tailings water (mine dumps) into the environment. The report stated that the company had not halted its operations. After the accident, the father applicant filed various complaints concerning the risk incurred by him and his family as a result of the use of sodium cyanide by the company in its extraction process. The Ministry of the Environment informed him that the company's activities did not constitute a public health hazard and that the same extraction technology was used in other countries. Romanian courts closed criminal proceedings concerning the accident of 30 January 2000 on the ground that the alleged facts did not constitute offences. No judicial order or decision concerning the other complaints has been issued to date.
- **the ECtHR: violation of art. 8 ECHR** - the Romanian authorities had failed in their duty to assess, to a satisfactory degree, the risks that the company's activity might entail, and to take suitable measures in order to protect the rights of those concerned to respect for their private lives and homes, within the meaning of Article 8, and more generally their right to enjoy a healthy and protected environment.

ECtHR/National case-law

❖ ECHR: case of *Bacilă vs. Romania* (30.03.2010)

- in this case, the applicant complained about the emissions of a lead and zinc plant in the small industrial town of Copșa Mică. Analyses carried out by public and private bodies established that the heavy metals could be found in the town's **waterways**, in the air, in the soil and in vegetation, at levels of up to 20 times the maximum permitted. The rate of illness, particularly respiratory conditions, was 7 times higher in Copșa Mică than in the rest of the country. The ECtHR found that Romanian authorities had failed to strike a fair balance between the public interest in maintaining the economic activity of the biggest employer in town (Sometra company, a lead and zinc producing plant) and the applicant's effective enjoyment of the right to respect for her home and for her private and family life.
- **the ECtHR: a breach of art. 8 ECHR**, as the applicant showed a causal link between the plant pollution (by emitting noxious emissions) and her health deterioration (lead poisoning);

❖ National case-law

- in May 2012, the pipelines of a Romanian oil company (OMV Petrom) broke because of old age and corrosion, resulting in accidental pollution. Over 700 liters of crude oil spilled into several rivers feeding the Danube as well as the wetlands and adjoining areas. The authorities enforced the **max. administrative fine of 100.000 lei** (about EUR 22,000) and ordered restoration of the harm within a three-day term;
- **one case of criminal conviction** (2011) for the offense set out by art. 3 Act no. 101/2011: 4 years of imprisonment (the collection, transport, recovery or disposal of waste which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, or to animals or plants);

Infringement proceedings against Romania

❖ Late transposition of Directive 2012/33/EU

- 2 years after the transposition deadline – Romania had not transposed into national legislation the [Sulphur Directive 2012/33/EU \(the "SD"\)](#)
- under the Lisbon Treaty, if Member States fail to transpose EU legislation into national law within the required deadline, the Commission may ask the ECJ to impose financial sanctions;
- the Commission asked ECJ to impose a proposed daily fine of EUR 38,042.6, which would be paid from the date of the Court ruling until Romania fully transposes the obligations of the Directive;
- sulphur dioxide is a pollutant mainly emitted by ships; as well as harming human health, the gas damages the environment and contributes to acid rain;
- without the SD, emissions from shipping would soon surpass combined emissions from all land-based sources;
- Romania finally transposed the SD by Government Decision no. 346/11.05.2016 ("the GD no. 346"), in force since 13th May 2016;
- it provides only for civil sanctions for environmental breaches, no criminal sanctions;

❖ Failure to transpose Directive 2006/21/EC (management of waste from extractive industries)

- case C-104/15 (21.07.2016) concerns the Boşneag pond, a 102-hectare tailing pond that holds waste extracted from copper and zinc mines in Moldova Nouă, Romania, and is in a state of almost complete abandonment; the pond is a major source of pollution, spreading toxic dust that poses significant risks for human health and the environment;
 - the Commission opened [infringement proceedings](#) against Romania on this matter with a letter of formal notice in October 2012, followed by a reasoned opinion in February 2014;
 - on 21 July 2016, the ECJ ruled: by failing to adopt appropriate measures to prevent dust rising from the Boşneag pond, Romania has failed to fulfill its obligations under Article 4 and Article 13(2) of Directive 2006/21/EC; Romania has agreed to finish pond decontamination by half of 2018;

Bitter conclusion(s)

Partially non-compliant transposition of the ECD – resulted from:

- Act no. 101/2011 did not aim at amending or correcting pre-existing environment protection legislation;
- the transposition law does not provide for offences in the situation where the potentially dangerous outcome consisting in death or injury to a person or a substantial damage to the environment has **effectively occurred**;
e.g. the expression used in the content of offenses is "**likely to cause...** death or serious bodily injury..."
- in such a case, the general provisions in the RCC regulating offences against life, health, and bodily integrity or property/assets should apply accordingly, as **concurrent offences**;
- several offences that ultimately describe the same behavior and that are subject to different criminal sanctions coexist in full force and effect in the Romanian criminal system;
- the applicable fines *are not dissuasive* ; ecologic crime = 4th place of profit-generating offenses (after drug-trafficking, forgery and trafficking in human beings);
- the current status of the transposing legislation = excessive criminalization → *unpredictability*, in the sense of art. 7 ECHR;
- due to its inconsistencies, Act no. 101 opposes the philosophy of *ecocentrism*, an ecological approach, used to denote a nature-centered system of values;

THANK YOU
FOR YOUR ATTENTION!