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PROPOSALS FOR THE AMENDMENT OF THE NEW CIVIL CODE ARISING OUT OF THE FAILURE TO MEET THE REQUIREMENTS OF ENVIRONMENTAL PROTECTION

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Abstract

Appeared with the declared intention to "meet the requirements of a dynamic present", by: "the newly promoted solutions, the revision of some classical institutions or emphasis on certain internationally recognized principles, not implemented in the Romanian space yet", the new Civil Code does not seem to integrate the environmental and related issues in the dynamics of the present. Moreover, except for some modest norms – such as art. 539 par. 2 which includes in the category of movables "the electromagnetic waves or those assimilated to them, as well as the energy of any kind" and art. 603 which provides the obligation of the owner to "observe the tasks concerning the protection of the environment and the action of ensuring good neighbourhood" – nothing entitles us to assert that the new Civil Code "makes valuable use of provisions of European law instruments". It is known that the basic treaties of the European Union – the Treaty on European Union and the Treaty on the Functioning of the European Union – in numerous articles, establish the sustainable development of Europe and of the planet, the promotion of solidarity between generations and a high level of protection and enhancement of the quality of the environment as primary objectives of the European Union. This is the reason why art. 11 TFEU imposes that "environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities".

Keywords: *basic treaties of the European Union, protection of the environment, sustainable development of Europe and of the planet.*

Introduction

Section 1. The Civil Code and the protection of the environment

Subsection 1.1 Art. 539 of the Civil Code (Movables)

(1) "The things which are not immovable by law are movable. (2) Electromagnetic waves or whatever is assimilated to them, as well as any kind of energy, lawfully generated, captured and transmitted by any person and for his own benefit, regardless of the movable or immovable nature of their source, are also movables". The text raises some comments. First, one should notice the negative form of the sentence defining movables, which is not the most appropriate one for a legal norm[1]. Instead of providing that movables are not immovables, it would have been more accurate to indicate what characterizes this category of property[2]; the

[1] Neculaescu S, *Răspunderea civilă delictuală în Noul Cod Civil – Privire critică* -, "Dreptul" Review, no. 4/2010, p. 55.
[2] Popa C., *Teoria definiţiei,* "Academiei" Publishing House, Bucharest, 1972. So that a definition will be functional, it must meet the following requirements: to be characteristic; not to be circular, a word is not defined by itself; to be clear and precise; to be logically affirmative; not to contain contradictions.

very definition of movables, by excluding the things "which are immovable by law" from the category of property, is not a good choice. Secondly, although there is no definition of movables, par. 2 provides that "... are also movables" and, consequently, we do not know what movables are in general, but we find out that, undoubtedly, this category "also" contains the items of property expressly enumerated in par. 2, "electromagnetic waves or whatever is assimilated to them, as well as any kind of energy, lawfully generated, captured and transmitted by any person and for his own benefit...". As for the enumeration "generated, captured and transmitted", referring to "any kind" of energy, we may notice that it does not comply with the stages provided by Law no. 13/2007 on electricity[3]. "Establishing the legal framework for the electricity sector activities … for the effective use of primary energy resources in terms of accessibility, availability, affordability and compliance with the safety, quality and environmental protection norms"[4], Law no. 13/2007 provides in art. 13 par. (2) that "The generation, transmission, system service, distribution and supply of electricity, as well as the activities of the electricity market operator and supply of system technology services take place on the basis of licenses granted under this law". And in art. 27 it is specified that: (1) "The participants in the electricity market and associated operational structures are: producer[5], transmission system operator[6], market operator[7], distribution operator[8], supplier[9], eligible and captive consumer[10]". By systematically interpreting the texts

[3] Official Gazette no. 51, 23/01/2007. Of the amendments and completions to the law, we mention: G.E.O. no.33 of 4 May 2007; G.E.O. no. 172/2008 for the amendment and completion of the Law on electricity no.13/2007. Law no.123/2012 on electricity and gas establishes now the legal framework for the electricity sector activities... for the effective use of primary energy resources in terms of accessibility, availability and affordability and compliance with the safety, quality and environmental protection norms. Law no.123/2012 provides in art. 8(2) that "The generation, transmission, system service, distribution and supply of electricity, as well as the activities involved by the administration of centralized electricity markets take place on the basis of licenses granted under this law". In art. 21(2) it is specified: (1) "The participants in the electricity market and associated operational structures are: producer, transmission system operator, market operator, distribution operator, supplier and client". (Official Gazette no. 485, 16/7/2012).

[4] Art.1 The scope of regulation.

[5] Art.3 (46) *The meaning of some terms and expressions: electricity producer,* natural or legal person, license holders, whose specific activity is to generate electricity, including cogeneration.

[6] Art.3 (35) *transmission system operator,* natural or legal person which detains, with any title, an electrical power transmission network and holds a transmission license, entrusted with operations, maintenance and, if necessary, development of the transmission network within a certain area and, where applicable, interconnection with other electro-energetic systems, as well as the assurance of long-term capacity of the system to cover reasonable requests for the transmission of electricity.

[7] Art.3 (33) *operator of the centralized electricity market* the economic operator holding a license and ensuring the organisation and administration of a centralized electricity market.

[8] Art.3 (34) *distribution operator* natural or legal person which detains, with any title, a distribution network and holds a distribution license by which it is entrusted with operations, maintenance and, if necessary, development of the distribution network within a certain area and, where applicable, interconnection with other systems, as well as the assurance of long-term capacity of the system to cover reasonable requests for the distribution of electricity.

[9] Art.3 (23) *electricity supply,* the activity of electricity trading towards clients; (24) *supplier,* legal person holding a supply license; (25) *supplier of last resort,* supplier appointed by the competent authority to provide supply services under specifically regulated conditions; (26) *default supplier,* supplier appointed by the competent authority, which also detains the distribution license, as well as a concession contract for the exclusive supply of distribution services within a certain area or the successor of the legal entity carrying out both its distribution activity and supply activity at the time of the entry into force of this law.

[10] Art.3 (8) *client,* natural or legal person that is buying electricity; (9) *wholesale client,* any authorised natural or legal person buying electricity for the purpose of reselling it on the internal or external electricity market; (10) *eligible client*, any natural or legal person free to buy electricity from the supplier, in accordance with their own choice; (11) *final client,* any natural or legal person buying electricity for their own use; (12) *non-domestic client,* any natural or legal person buying electricity which is not for their own domestic use, this category also including producers and wholesale clients; (14) *captive consumer,* electricity consumer which, for technical, economic or regulation reasons, cannot choose the supplier, as well as the eligible consumer which does not

under discussion, we cannot but guess the legislature's intention to limit to "the generation, caption and transmission" of electricity and the reason underlying the choice of the expression "any person", as long as we can see that not any person, but well individualized persons from the standpoint of name, powers, duties..., deal with electricity issues. It is possible that the reason behind the expression "any person" may be to emphasize the fact that the person who "generated, captured, transmitted", "any kind of energy" is not important as long as it was "for his own benefit"; and since there is a gain - out of this "benefit"- for the person involved, it results not only that the specificity of the property mentioned in art. 539(2) is given by this gain, but also that this rule actually addresses a particular category of persons, those participating in the electricity market. Since this is the logical conclusion, we wonder why art. 539 occurs in a section entitled "On the distinction of property", at the beginning of a chapter called "On property in general"[11].

The merit of this paper, under environmental law, resides in the inclusion of "*electromagnetic waves or whatever is assimilated to them"* in the category of movables. Independently, art. 539 of the Civil Code is just a segment of an incomplete legal framework leading to uncertain judgments, full of unavoidable errors caused by the fact that in such a sensitive domain, i.e. the environment, there are still solutions which do not comply with the spirit of the law. A first reason in this sense is that electromagnetic pollution does not benefit from coherent regulations. Thus, the framework law, G.E.O. no. 195/2005 on the protection of the environment, with regard to electromagnetic radiation, adopts a different position, not offering a special chapter as happens with other pollutants (e.g. dangerous substances and preparations, Chapter II, waste, Chapter IV, fertilizers and plant protection products, Chapter V, genetically modified organisms, Chapter VI, ionizing radiation, Chapter VII, etc). It nevertheless mentions electromagnetic radiation as a polluter in art. 2(50), providing that a *pollutant* is "any substance, in solid, liquid, gaseous form, or in the form of vapour or energy, *electromagnetic*, ionizing, thermal, phonic radiation or vibrations, which, introduced in the environment, modifies the balance of its components and of the living bodies and causes damage to material goods". Since G.E.O. no. 195/2005 recognizes electromagnetic radiation as a pollutant and, consequently, its ability to cause damage to people, it results that a series of texts, including some in the framework law, should be modified. Thus, ***de lege ferenda****:* a) art. 2(38) referring to *information on the environment* which must be made available to the public, must concern, in par. (b), *factors*: besides substances, energy, noise and electromagnetic radiation[12] and together with art. 2(38), it is necessary to modify the relevant legislation in the field, namely the legislation on environmental information; b) *"action plans", integrated environmental authorisation"...* must also concern electromagnetic radiation; c) the central public authority for health should monitor *the health of the population* in relation to this risk factor and should develop research in this field; d) the central public authority for *education and research* (individually or in cooperation with the central public authority for health) should increase research in order to *eliminate any uncertainty regarding the harmful effects* of electromagnetic radiation and to take appropriate measures; e) the authorities within *local public administration* which also have the power to supervise

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exercise the right to choose its supplier; (15) *domestic consumer,* consumer which buys electricity for his own use of the household, excluding electricity consumption for commercial or professional activities; (16) *electricity consumer,* final client, natural or legal person, buying electricity for their own use; (17) *eligible electricity consumer,* electricity consumer which may choose its supplier and contract the necessary energy directly with it, having access to transmission and/or distribution networks.

[11] Section 1. On the distinction of property, Chapter I. On property in general, Title I. Property and real rights in general, Book III On goods.

[12] At present, the text appears as follows: "*information on the environment,* any information in written, visual, audio, electronic form or in any other material form on: a)...; b) factors such as substances, energy, noise, radiations or waste, including radioactive waste, emissions, discharges and other releases into the environment which affect or may affect the environmental elements referred to in a)".

subordinate *economic operators* for the prevention of accidental release of *pollutants*...[13] must take into account those whose activity generates *electromagnetic radiation*; f) the *National Authority for Consumer Protection* should have powers in this matter as well (not only in the field of genetically modified organisms[14]), and on the basis of data provided by the Authorities for health and research, they should take measures for consumer information with regard to mobile phones, video-terminals, GSM etc. A second reason for which electromagnetic radiation remains a problem is the absence of special environmental courts which should adjudicate only environmental issues. An environmental court would imply, in particular, the existence of: specialized police officers; motivated magistrates specialized in environmental issues; the will of judicial institutions, especially of the public ministry, to integrate the fight against environmental crimes among the high priority objectives; some experts not only specialized, but also possessing the equipment for various measurements. For the above-mentioned reasons, we propose ***de lege ferenda***, the amendment of the Code of Civil Procedure, in the sense of establishing environmental courts.

Art. 539 of the Civil Code do not reveal its importance individually, but by relating to art. 1349 of the Civil Code which provides: *(1) Everyone has the duty to observe conduct rules imposed by the local law or custom and not prejudice, by his acts or failure to act, the legitimate rights or interests of others. (2) The mentally competent person who fails to perform this duty shall be liable for all the damage caused, having the duty to fully remedy it. (3) In cases expressly provided by law, a person has the duty to remedy the damage caused by another person's action, by the things or animals in his custody, as well as the ruin of a building. (4) The liability for the damage caused by defective products shall be established by a special law.*

Getting over the flagrant violation of the norm according to which: "in the normative language the same notions shall be expressed only by the same terms"[15], and we can see that for the same notion of property, there are several terms, even in art. 1349 of the Civil Code, par. (3) mentions …the damage caused…by the things … in his custody, and par. (4) provides that: "*The liability for the damage caused by defective products shall be established by a special law",* and getting over the fact that we do not understand the distinction between "goods", "things" and "products", art. 539 of the Civil Code is important by these two articles whose systematic interpretation results in the fact that one must be liable for *"the damage caused"..."by electromagnetic waves or whatever is assimilated to them, as well as any kind of energy",* and liability may be imposed on *"any person"* who used it "*for his own benefit",* by *"generating, capturing and transmitting",* this kind of *"things", "regardless of the movable or immovable nature of their source".*

***Subsection* 2. Art. 630 of the Civil Code (Overcoming normal neighbourhood inconveniences)**

[13] Art.90 (h), G.E.O. no.195/2005.
[14] Art.92 (a, b, c) G.E.O. no.195/2005.
[15] Art.37 of Law no. 24/2000 on the legislative technique norms for the elaboration of normative acts, republished on the grounds of art. II of Law no. 60/2010 for the adoption of G.E.O. no. 61/2009 for the amendment and completion of Law no. 24/2000 (Official Gazette no. 215, 6/04/2010). Law no. 24/2000 on the legislative technique norms for the elaboration of normative acts (republished in the Official Gazette no. 777, 25/082004); Law no. 49/2007 for the amendment and completion of Law no. 24/2000 on the legislative technique norms for the elaboration of normative acts (Official Gazette no.194, 21/03/2007); Law no. 173/2007 for completing art. 53 of Law no. 24/2000 on the legislative technique norms for the elaboration of normative acts (Official Gazette no.406, 18/06/2007); Law no. 194/2007 for the amendment and completion of Law no. 24/2000 on the legislative technique norms for the elaboration of normative acts (Official Gazette no.453, 4/07/2007); G.E.O. no.61/2009 for the amendment and completion of Law no. /2000 on the legislative technique norms for the elaboration of normative acts (Official Gazette no. 390, 9/06/2009). Republished in the Official Gazette no. 260, 21/04/2010.

(1) "If the owner causes, by exercising his right, inconveniences which exceed the limits of normal neighbourhood relations, the court may, on equity grounds, order him to pay compensatory damages to the injured person, as well as reinstatement whenever possible.

(2) Should the injury be minor in relation to the necessity or utility of carrying out the harmful activity by the owner, the court may approve the performance of that activity. The injured person shall be entitled to compensation. (3) If the injury is imminent or very likely to occur, the court may approve, by a court order, the necessary measures for preventing the damage". Obviously, this article is a continuation of the previous one; therefore in case *he fails to observe the duties regarding environmental protection and good vicinity,* the owner is subject to art. 630 of the Civil Code. By systematically interpreting art. 630 and art. 1353 of the Civil Code, which provides: *"The person who causes an injury by the very exercise of his rights shall not have the duty to remedy it, except where the right is exercised abusively"* and art. 1381 of the Civil Code which provides: (1) *"Any injury shall entitle to remedy",* it results that art. 630 of the Civil Code does not set a judicial limit[16], if we take into account the fact that art. 630 of the Civil Code is the single article of Section 3 *Judicial limits,* in Chapter II *The juridical limits of the right to private property* (Title II. Private property, Book III. On goods), but a special case of liability. Consecrating the moral imperative *Neminem laedere qui suo iure utitur,* attributed to Ulpian, art. 1353 of the Civil Code materializes the principle of the abuse of right regulated in art. 15 of the Civil Code. *"No other right shall be exercised for the purpose of injuring or prejudicing another or in an excessive and unreasonable manner, contrary to good faith"*[17]. With no intention to bring details, we can only notice the negative form of the sentence which defines the abuse of right[18], which is not the most appropriate for normative expressions; thus, instead of disposing how *a right shall not be exercised,* it would be better to read about how rights shall be exercised and what characterizes the abuse of right. There might be an objection in the sense that art. 15 of the Civil Code is the natural consequence of art. 14 of the Civil Code (Good faith) (1) *Every natural or legal person must exercise their rights and perform their civil obligations in good faith, in accordance with public order and mores* and is closely related to art. 1349 of the Civil Code (Liability in tort) (1) *Everyone has the duty to observe conduct rules imposed by the local law or custom and not prejudice, by his acts or failure to act, the legitimate rights or interests of others,* and therefore it results that rights must be exercised *in good faith, in accordance with public order and mores,* so that by his *acts or failure to act, any person shall not prejudice the legitimate rights or interests of others.* Likewise, it results that the specific feature of the abuse of right consists in the exercise of any right, *contrary to good-faith, for the purpose of injuring or prejudicing another or in an excessive and unreasonable manner.* Since this possible objection does not substitute coherent norms, we consider that all these should be taken into account in a necessary prospective revision of the texts we made comments upon. On the other hand, we do not understand the difference between *"to injure"* and *"to prejudice"* as long as injury involves prejudice. Consequently, art. 630 of the Civil Code outlines a case of abuse of right, which entails the liability of the owner who *"failing to observe the duties regarding environmental protection and good vicinity"* (art. 603 of the Civil Code), *"causes, by exercising his right, inconveniences which exceed the limits of normal neighbourhood relations"* (art. 630 of the Civil Code). This is the reason for which *"the court may... order him to pay damages to the injured person, as well as reinstatement whenever possible"* (art. 630 of the Civil Code).

[16] Or just a judicial limit.
[17] Neculaescu S, *Răspunderea civilă delictuală în Noul Cod Civil – Privire critică* -, "Dreptul" Review, no. 4/2010, p. 56.
[18] Neculaescu S, *Răspunderea civilă delictuală în Noul Cod Civil – Privire critică* -, "Dreptul" Review, no. 4/2010.

Par. (2) under art. 630 of the Civil Code provides: *"Should the injury be minor in relation to the necessity or utility of carrying out the harmful activity by the owner, the court may approve the performance of that activity. The injured person shall be entitled to compensation".* The situation is paradoxical, in the sense that the owner, compelled by the Constitution and the Civil Code *to observe the duties regarding environmental protection and good vicinity* and not *exceed the limits of normal neighbourhood relations,* is exempted from performing these obligations if he pays compensatory damages and puts the prejudiced person back to his original position, as happens in the classical case of liability in tort[19]. The paradox also consists in the fact that by corroborating art. 602 of the Civil Code (which provides: *(1) The law may limit the exercise of the right of property either for public or private interest. (2) The legal limits for private interest may be modified or temporality terminated by the mutual agreement of the parties. For enforceability against third parties it is necessary to fulfil publicity formalities as provided by law."*) with art. 603 of the Civil Code (which provides: *"The right of property compels to the observance of the duties regarding environmental protection and good vicinity, as well as the observance of other duties which, in accordance with the law or custom, lie with the owner"*) it results that legal limits for public interest, as happens with *the duties regarding environmental protection and good vicinity,* cannot be modified or temporarily terminated by the mutual agreement of the parties. We understand that the court may *modify or temporarily terminate the legal limits for public interest* so that the one who will have to suffer the *exceeding of normal neighbourhood inconveniences* throughout *the performance of the harmful activity* is the innocent owner because the court will hold, according to unknown criteria, that *the injury would be minor in relation to the necessity or utility of carrying out the harmful activity* and therefore it *may approve the performance of that activity.* Maybe the explanation for such an anomaly is the economic interest which prevails, especially when we deal with "the vicinity of a plant, railway, a pig or chicken farm, dairy, slaughterhouse, a transport company, a mall, a touristic complex, a quarry, a site, a mine, a sawmill, high voltage power lines, GSM antennas, billboards..."[20], numerous workers benefiting from these activities – therefore part of the prejudice which can consist in the diminution of the building value[21] as a consequence of abnormal neighbourhood disturbance, will be covered by the owner as a victim.

On the other hand, although we know the adage *ubi lex non distinguit, nec nos distinguere debemus,* we consider that it would have been interesting for the legislature to distinguish between the situation of the owner as a natural person and the owner as a legal person. The distinction is important if we take into account the exceeding of normal neighbourhood relations by different activities generating noise, visual, olfactive pollution. If in the former case, the court might consider the repeated use of a grill (for instance)[22], by the owner, in the yard of his house, as an action generating a minor prejudice, it is totally different when a person lives near a pig or chicken farm, dairy, slaughterhouse, a transport

[19] *Section 6 Remedy for the prejudice in the case of liability in tort* Art. 1381 – (1) Any prejudice entitles to remedy. (The object of the remedy), Art. 1385 – (1) The prejudice shall be remedied in full, unless otherwise provided by law. (3) The compensation shall cover the loss suffered by the prejudiced person, the gain that he could have obtained under normal circumstances and of which he has been deprived, as well as the expenses that he covered in order to avoid or limit the prejudice. (The scope of the remedy), Art. 1386 – (1) The remedy of the prejudice shall be in kind, by reinstatement, and if it is not possible or if the victim is not interested in a remedy in kind, by compensatory damages, established by mutual agreement of the parties or, in the absence of it, by judgment of the court. (The forms of the remedy).

[20] Ungureanu O, Munteanu C, *Propunere de lege ferenda privind reglementarea inconvenientelor anormale de vecinatate*, "Revista Română de Drept Privat" Review, no. 4/2007, p. 187.

[21] *Idem.*

[22] Which was perceived by a vegetarian neighbour as embarrassing.

company, a quarry, a site, a mine, a sawmill[23] …In such cases we do not know by what kind of algorithm of thought one might reach the conclusion that the prejudice is minor. Whether the prejudice is minor or major, when it is the result of pollution, it compels the polluter to pay damages, not *on equity grounds,* but because G.E.O. no.195/2005 establishes objective liability.

Thus, art. 95 of the Government Emergency Ordinance no. 195/2005 provides: (1) "the liability for damage to the environment has an objective character, independently of guilt. In case of several authors, liability is joint responsibility; (2) Exceptionally, liability is subjective for the prejudice caused to protected species and to natural habitats, in accordance with express regulations; (3) The prevention and remedy of environmental damage are carried out in accordance with the provisions of the present emergency ordinance and express regulations. From this text, it results that the rule in environmental law is represented by objective liability, independently of guilt (and the exception is subjective liability) and joint liability (in case of plurality of authors). Objective liability and joint liability are the expression of the fundamental "polluter pays" principle[24] actually meeting the needs of the victim who, on the one hand does not have to prove the guilt of the doer and, on the other hand, in case of plurality of authors, has the possibility to claim full remedy of damage from any of them. As far as environmental law is concerned, the acts generating liability include both wrongful acts, causing damage to the environment and, at the same time, standing for violations of the legal norms, and legal acts which can constitute causes of damage to the environment. If in the case of wrongful acts the ground for liability is the guilt, in the case of legal acts, the ground for liability is the risk.

Considering these inadvertencies between art. 630 of the Civil Code and environmental law we think it would be useful to present some solutions of the foreign jurisprudence. Noises seem the most often invoked disturbance in litigations. Thus, in France, in 1844 the court held the liability of a factory owner who did not declare that the noise the factory would make would be permanent; the jurisprudence retains several ideas: a) the property right is limited by the legal and natural obligation of not causing any damage to the neighbouring property (an idea which might rely on the very definition of the right of property, a definition reminding the limits established by law); b) the abnormal character of neighbourhood disturbance also resides in the fact that "it exceeds the ordinary level and neighbourhood obligations"; c) the "excessive" character of the damage arises out of the fact that the normal neighbourhood inconveniences are exceeded. These issues are to be found as well in a decision from October 2007 which disposed the remedy of the prejudice caused to the victims by a municipal polyvalent hall where noisy manifestations took place, even after midnight, and which, by the acoustic level, exceeded the normal neighbourhood disturbance[25], it was held that the local administration was liable without any guilt, liability arising out of the damage caused to third parties by the functioning or mere existence of a public service. Disturbance[26] generated by noises also led to the annulment, by an administrative tribunal, of a construction authorisation for erecting such a building where various activities were to be

[23] Ungureanu O., Munteanu C., *Propunere de lege ferenda privind reglementarea inconvenientelor anormale de vecinatate*, "Revista Română de Drept Privat" Review, no. 4/2007, p. 187.
[24] As provided by art. 3(e) of Government Emergency Ordinance no.195/2005.
[25] The decision is also important because it mentions the "valuable loss of this property" due to the noise which might be considered an apparent defect of the construction. Février.I.M, *Responsabilité administrative. Nouvelles condamnations de communes a raison des nuisances sonores provoquées par des manifestations culturelles*, in Environnement – Revue Mensuelle Lexisnexis Jurisclasseur – 1/ janvier, 2008, pp. 18-20.
[26] Gillig.D, *Une salle multi-activités est une occupation du sol susceptible de causer des effets genant pour le voisinage*, in Environnement Revue Mensuelle Lexisnexis Jurisclasseur no. 1 janvier, 2008, p. 35. With regard to the possible solutions in the case of administratively authorized *harmful* activities, see: Ph.Malaurie, L.Aynès, Ph.Stoffel-Munck, *Drept civil. Obligaţiile*, translated by Diana Dănişor, Wolters Kluwer, 2010, p. 66.

carried out – as a result, a future probable risk lay at the basis of a request for the annulment of the construction authorisation or, more precisely, the precautionary principle.

***Subsection* 3. Art. 2518 of the Civil Code (The prescription period of 10 years. Cases)**

"The right of action shall be subject to a prescription limit of 10 years in the following cases: 1. Real rights which are not declared imprescriptible by law or are not subject to another limitation period; ... 3. the remedy of the damage to the surrounding environment". We are interested in the last point under art. 2518 of the Civil Code which establishes for the remedy of the damage to the environment a prescription period of 10 years. It is clear that the expression 'the surrounding environment' is a pleonasm which could have been easily avoided[27] as long as the legislation on the environment uses the term 'environment'[28]. Yet, it is not clear why the legislature preferred such a long prescription period for the remedy of the damage to the environment. In order to support this idea, i.e. that it would have been better to establish a shorter period, we have in view not only the much repeated educational function, mobilizing extinctive prescription, meant to stimulate the holders of subjective civil rights and to make valuable use of them, thus stimulating the dynamics of the civil circuit as well[29], but also aspects of environmental law. Thus, the Emergency Ordinance on environmental liability with regard to the prevention and remedy of damage to the environment, no. 68/200730 which establishes the regulatory framework for environmental liability, based on "the polluter pays" principle, for the purpose of preventing and remedying damage to the environment[31], is full of norms compelling to immediate action. For instance, art. 10 provides; (1) In case of imminent threat of damage to the environment, the operator[32] shall have the duty to immediately take the necessary preventive measures and, within 2 hours of becoming aware of the threat occurrence, notify the county agency for the protection of the environment and the county commission of the National Environmental Guard.... (3) The preventive measures referred to in par. (1) must be proportional with the imminent threat and lead to the avoidance of the damage, considering the precautionary principle in decision-making.... (4) Within 1 hour of the completion of preventive measures the operator shall inform the authorities provided in par. (1) on the measures taken to prevent damage and their efficiency. (5) If the imminent threat persists despite the preventive measures taken, the operator shall, within 6 hours after he noticed the inefficiency of the measures taken, inform the county agency for the protection of the environment and the county commission of the National Environmental Guard on: a) the measures taken to prevent damage; b) the evolution of the situation after taking the preventive measures; c) additional measures, if any, to be taken to prevent the worsening of the situation". Art. 13 is similar (disposing: "in the event of environmental damage, the operator shall, within 2 hours after the damage occurred, inform the county agency for the protection of the environment and the county commission of the National Environment Guard on: a) the identification data of the operator; b) the time and place of the damage to the

[27] Hristea.T, *Un pleonasm evitabil: "mediul înconjurător"*, "Revista Română de Dreptul Muncii" Review, no. 1/2003.

[28] G.E.O. no.195/2005 on environmental protection defines, in art. 2 (41) the environment as the totality of natural conditions and elements of Terra: air, water, soil, subsoil, characteristics of the landscape, all atmospheric strata, all organic and inorganic matter, as well as living beings, interacting natural systems, containing the previously mentioned elements, including certain material and spiritual values, life quality and conditions which may influence the welfare and health of humans.

[29] Chelaru E, *Drept civil. Partea generală*, "All Beck" Publishing House, Bucharest, p. 185.

[30] Official Gazette no. 446, 29/06/2007.

[31] Art. 1.

[32] Art. 2 (11) *operator*, any natural or legal person under public or private law which performs or controls a professional activity or, if the national legislation provides it, which was invested with decisive economic power on the technical functioning of such an activity, including the holder of a regulatory act for such an activity or the person which registers or notifies such an activity.

environment; c) the characteristics of the environmental damage; d) the causes generating the damage; e) the affected environmental elements; f) the measures implemented to prevent the expansion or worsening of the environmental damage; g) other information considered relevant by the operator") or art. 14 (which provides: The operator is required to: a) take immediate action to control, isolate, remove, or otherwise to manage the pollutants and/or any other contaminating factors in order to limit or prevent the expansion of the environmental damage and the adverse effects on human health or the worsening of service damage; b) take appropriate remedy measures in accordance with art. 17-19").

We may note, from the above-mentioned articles, that G.E.O. no.68/2007 provides extremely short time intervals, of hours or days, for taking necessary measures, either in case of imminent threat of environmental damage, or in case of actual environmental damage. But G.E.O. no. 68/2007 does not entitle natural or legal persons under private law to compensation as a consequence of environmental damage or imminent threat of such damage; the provisions under common law are applicable in such cases[33]. The explanation is that G.E.O. no. 68/2007 is applicable to: a) environmental damage caused by any type of professional activity referred to in Annex 3 and to any imminent threat of such damage caused by any of these activities; b) damage to protected species and natural habitats and to any imminent threat of such damage caused by any professional activity other than those referred to in Annex 3 whenever the operator acts intentionally or recklessly; environmental damage or an imminent threat of such damage caused by pollution of a diffuse character only when one can establish a causal link between the damage and the activities of individual operators"[34]. As a result, taking into account art. 2518(3) of the Civil Code and the articles previously discussed of G.E.O. no. 68/2007 we cannot understand what may explain this difference between the 10-year prescription limit for the remedy of environmental damage and the extremely short time intervals provided by G.E.O. no.68/2007 when the operator polluter has to take necessary measures, time limits which are more appropriate for environmental problems. It is also painful to find that under environmental law the odyssey of compensation lasts for years even in the case of well-known disasters such as the sinking of the Amoco Cadiz[35] or Erika[36] tankers. We consider that we have brought arguments to support the idea that the 10-year prescription term is not justifiable in case of damage caused by pollution of a diffuse character[37] and, so much the less, in case of instantaneous pollution.

Conclusions

The new Civil Code, a normative reality as a consequence of its adoption by Law no. 287/2009, implements a deep reform of the Romanian legal system. A modern instrument for

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[33] Art. 3.

[34] Art. 3.

[35] Whose sinking caused 220, 000 tons of oil to spill near Brittany, destroying sea fauna, as well as sea-related industries. The accident occurred on17 March 1978, but due to bureaucratic games, the court decided only on 11 January 1988 that the Amoco company should pay 85.2 million $ in damages for this catastrophe". See: Ţurlea S., *S.O.S! natura în pericol,* "Politică" Publishing, Bucharest, 1989, p. 62.

[36] The sinking of the tanker Erika, which took place on12 December1999, spilling part of its cargo and content of the tanks, caused the pollution of the French Atlantic seaside, and the judgment of CJEC (Great Chamber) – in case C-188/07, a reference for a preliminary ruling from the Cour de cassation (France) on the basis of art. 234 EC, received by the Court on 3 April 2007, in Commune de Mesquer v. Total France SA, Total International Ltd – was delivered on 24 June 2008.

[37] G.E.O. no.195/2005, Art.2 (50) *pollutant* - any substance, in solid, liquid, gaseous form, or in the form of vapour or energy, electromagnetic, ionizing, thermal, phonic radiation or vibrations, which, introduced in the environment, modifies the balance of its components and of the living bodies and causes damage to material goods; par. 51 *pollution* - direct or indirect introduction of a polluter which can prejudice human health and/or environment quality, cause damage to material goods or cause degradation or prevention from environment use for recreational purposes or other legitimate purposes.

regulating the fundamentals of the individual and social existence, the new Civil Code makes valuable use of the experience of recent reforms in the field of civil law accomplished by other states, as well as the provisions of European and international law instruments. This is what is asserted in the motivation of Law 71/2011 for the enforcement of Law no. 287/2009 on the Civil Code, where it is also shown that: in order to meet the requirements of a dynamic present, of living and ever-changing realities, new solutions are being promoted, classical institutions are being revised, internationally recognized principles are being emphasized, principles which have not been implemented in the Romanian space yet. Although the declared intention is to "meet the requirements of a dynamic present", the new Civil Code does not seem to place the environment and related problems within the dynamics of the present. Therefore, except for modest norms - art. 539 par. 2 and art. 603 - nothing entitles us to state that the new Civil Code "makes valuable use of provisions of European law instruments", a reason for which this paper aims at highlighting aspects which must be regulated or which may be better regulated.

Bibliography

Neculaescu S, *Răspunderea civilă delictuală în Noul Cod Civil – Privire critică* -, "Dreptul" Review, no. 4/2010;

Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Drept civil. Obligaţiile*, translated by Diana Dănişor, Wolters Kluwer, 2010;

Février I. M, *Responsabilité administrative. Nouvelles condamnations de communes a raison des nuisances sonores provoquées par des manifestations culturelles*, in Environnement – Revue Mensuelle Lexisnexis Jurisclasseur – 1/ janvier, 2008;

Ungureanu O., Munteanu C., *Propunere de lege ferenda privind reglementarea inconvenientelor anormale de vecinatate*, "Revista Română de Drept Privat" Review, no. 4/2007;

Popa C., *Teoria definiţiei,* "Academiei" Publishing House, Bucharest, 1972;

Gillig D., *Une salle multi-activités est une occupation du sol susceptible de causer des effets genant pour le voisinage*, in Environnement Revue Mensuelle Lexisnexis Jurisclasseur no. 1 janvier, 2008;

Hristea T., *Un pleonasm evitabil: "mediul înconjurător"*, "Revista Română de Dreptul Muncii" Review, no. 1/2003;

Chelaru E., *Drept civil. Partea generală*, "All Beck" Publishing House, Bucharest;

Dogaru I., Cercel S., *Drept civil Partea generală*, "C.H. Beck" Publishing House, Bucharest.