

Questionnaire EUFJE annual conference 24-25 October 2022 - Climate law and litigation

Climate change litigation (or ‘Climate litigation’) is on the rise, both within the jurisdictions of EU member state countries and around the world. Climate litigation is a complex phenomenon that has been brought on many grounds, and courts play an important role in how the law can respond to climate change.

The purpose of this survey is to understand what developments are occurring in climate litigation at the EU Member State/European level, and how national courts are responding to these cases.

I. Qualitative questions

In this series of videos filmed for COP26, seven judges reflected on how the courts have addressed climate change, from both local and global perspectives.

We would appreciate if you could answer the following **questions**, providing your views on the overall opportunities and challenges regarding climate litigation in your country.

How has judicial decision-making on climate change issues evolved in your country over the last decade?

In Romania, all EU directives regarding environmental protection have been implemented. Although Romanian legislation properly reflects EU environmental requirements, putting them into practice is a challenge in many of important areas, mainly due to a lack of adequate planning, coordination and funding.

In 2017, Romania ratified the Paris Agreement (2015) on climate change, by which it was agreed to keep the increase in the average global temperature well below 2°C above pre-industrial levels and to continue efforts to limit it to 1.5°C.

Some progress has been made in recent years, but there are still problems in the country - from illegal deforestation to air pollution, from waste management to water quality.

Romania faces problems in areas such widespread illegal deforestation, water and air pollution, ineffective waste management, ineffective nature protection, and the numbers of cases of infringement proceedings are increasing.

From a case law perspective, throughout time, a series of difficulties has been identified in approving the requests for ecological damages. According to the common law rules, in order to incur tort liability, the damage must be certain, personal, direct and to consist in a harm of a legitimate right or interest of a person.

But in many cases, ecological damage is:

- uncertain (both from the point of view of its production probability to occur, as well as the possibility of its money evaluation);
- has a diffuse character (it materializes over a long periods of time, and the authors of the pollution can be numerous and difficult to be identified);

- involves a significant number of victims and vast geographical areas;
 - can affect items that are not in a person's possession (such as res communis and res nullius)
- does not affect a subjective right or interest that can be easily invoked by individuals in court.

For this reason, the classic liability legal regime has prove to be unsuitable and unproper for recovering the ecological damages.

On the other hand, Romania has implemented the 2004/35/CE Directive on environmental liability with regard to the prevention and remedying of environmental damage.

In recent years, there has been an increase of claims for ecological damages based on this specific national legislation. The plaintiffs relied on ecological expertise as evidence, and many of the claims were approved, revealing a significant damage to the environment.

From criminal perspective, there are more cases than in the past, that ending up with convictions for damages to the environment (imprisonment or fines for poaching, crimes against forestry rules, violation of protected natural areas, illegal dumping of waste, etc.).

Before which type of courts is this type of litigation brought and by which type of plaintiffs?

Local courts: - complaints against environmental sanctions and measures adopted by the authorities (the plaintiff is the sanctioned natural or legal person)

- environmental crimes, such as: capturing or killing wildlife species; pollution, through release in the atmosphere or in the ground, of waste or dangerous substances; unauthorized deforestation, illegal timber trade, etc.

- claims for damages (plaintiffs are persons injured by a harmful action on the environment, natural or legal person, NGOs, environmental associations etc)

Administrative courts: - judicial censureship of administrative acts that violate environmental legislation (such as public procurement, construction authorization, hunting derogation etc);

- actions against preventive or remedial decisions issued by the environmental authority in the event of imminent occurrence of environmental damage.

What are the opportunities to this type of litigation in your country?

The opportunity to: - obtain injunction measures in case of an iminent prejudice of the environment;

- obtain damages repair;
- obtain dissuasive punishments (fines, imprisonment) against those who commit environmental crimes;
- moderate quantum of litigation taxes.

What are the challenges to this type of litigation in your country?

- the frequent changes in environmental legislation;
- decisions of the Constitutional Court that decriminalize certain offences or felonies, declaring them of unconstitutional nature;
- lack of a well set jurisprudence;
- different views on the interpretation of legislation, due to ambiguity of the legal terminology which prevents the offenders to foresee, in a reasonable way, that their behavior does not comply with the environment legislation;
- difficulties in gathering evidence;
 - disrupt criminal networks involved in all forms of environmental crime, especially on waste and wildlife trafficking;
- following the online illegal trade of wildlife or timber;
- issues regarding the integrity of public local authorities members.

What is the average length of proceedings (including on appeal and cassation)?

The length of proceeding depend on the nature and complexity of the case, on the difficulty of the evidences (technical expertize). But the average length, including on appeal and cassation is between 2 and 3 years.

Which type of remedies are being ordered by the courts? What are the arguments for not ordering such remedies?

In an environmental case, the court could order the following measures:

- retaining the wood material resulting from a forestry crime;
- supporting the cost of repairing the damage and remove the consequences caused by it, restoring the conditions before the damage occurred, according to the "polluter pays" principle;
- repairing the damages caused to the waters or protected species or natural habitats, carried out by returning them to their initial state, through a primary, complementary and compensatory repair;
- cleaning of the land and elimination of waste stored in areas other than those authorized;
- seizing the vehicles used to unload/abandon waste in unauthorized areas;
- suspending the activity of a legal entity or withdrawing operating permits.

One of the most frequent arguments for not ordering such remedies is the lack of sufficient proof, that do not meet the minimal standard of proof for an action to be approved.

Do the courts have powers to ensure and follow-up the enforcement of judgements in climate cases? Are there specific difficulties in this regard?

The enforcement of criminal decisions is carried out by the enforcement court under conditions of legality and effectiveness.

On the day the decision is pronounced, an extract of the decision containing all the data necessary for enforcement is send to the authorities.

The criminal court orders the enforcement and imposes all necessary measures to fulfill

the execution order.

The judge delegated with the enforcement, has the opportunity to clarify the situations related to uncertainties or obstacles to the execution.

The court must adopt all the necessary measures to enforce the criminal decision.

The sentences (decisions) pronounced by the administrative court are binding and put into practice voluntarily or by a civil enforcement agent.

In case of ordering a measure that implies for an authority to issue an act or to do a certain action, the administrative court can order the payment of a daily amount penalty until the obligation is fulfilled.

The difficulties:

- to restore the initial state of a land affected by ecological damage (especially soil or water pollution);
- to enforce a fine penalty when the offender has no incomes;
- to actually find the guilty persons that are responsible for the pollution acts.

What are the most useful norms, legal principles or practices available to judges to ensure effective climate action by governments and businesses?

- proposal of normative acts and amendments to the projects of normative acts in the field of environmental protection;
- opportunity of administrative court to cancel normative administrative acts that violate environmental legislation;
- opportunity of administrative court to approve an enforcement petition or to order the obligation to replace the failure to act;
- cancellation of authorizations or approvals of companies that operate in the field of the environment and do not respect their obligations

II. Case identification and data collection

There are two connected databases tracking climate litigation across the world:

Climate Change Laws of the World maintained by the Grantham Research Institute at the London School of Economics - covers national-level climate legislation and policies globally, and climate litigation outside the US; and

Climate Change Litigation, maintained by the Sabin Center at Columbia University -contains climate litigation in the US and outside the US.

In this survey, we would appreciate if you could *please identify climate litigation cases from your country that might be currently missing from these databases.*

To fall within the scope of the databases, cases must satisfy two key criteria:

- (i) Cases must generally be brought before judicial bodies (though in some exemplary instances matters brought before administrative or investigatory bodies are also included)
- (ii) Climate change law, policy, or science must be a material issue of law or fact in the case. Cases that make only a passing reference to climate change, but do not address climate-relevant laws, policies, or actions in a meaningful way are not included.

If there are any cases missing, please provide information following this general format:

I. Alianta pentru combaterea abuzurilor v. TM, UN, Asociatia DMPA (European Court of Justice – 2019)

Case number: *C-88/19 - strict protection of animal species provided for in the Habitats Directive 92/43/CEE*

Names of the plaintiffs and defendants, including the type:

Plaintiff: *Alianta pentru combaterea abuzurilor (environmental association)*

Defendants: *TM, UN, Asociatia DMPA (individuals and environmental association)*

Filing date: *February 2019*

Status: *decided*

Jurisdiction: *European Court of Justice*

Principal Laws: *Article 12(1) of Directive 92/43 on the conservation of natural habitats and of wild fauna and flora1('the Habitats Directive')*

Summary: *In 2016, employees of an animal protection association, accompanied by a veterinary surgeon, captured and relocated, without prior authorisation, a wolf which had been present on the property of a resident in a village situated between*

two major sites that are protected under the Habitats Directive. The relocation of the captured wolf to a nature reserve did not follow the plan and the wolf managed to escape into a nearby forest. A criminal complaint was filed in respect of offences associated with the unsafe capture and relocation of a wolf.

The Prosecutor's Office dismissed the complaint, finding that the conditions of the alleged crimes are not met, given that the wolf was not captured in its natural habitat, but inside a human settlement.

*The local court (Judecătoria Zărnești), in charge of the complaint against the prosecutor's solution, referred a preliminary question: "To what extent the deliberate capture or killing of wild animals of the species *canis lupus* may take place without a derogation based on Article 16 of the Habitats Directive, if these animals are caught in human settlements, or this derogation is mandatory for any wild specimen, whether it is in the wild or in certain local human places?"*

The European Court of Justice in its decision answered: "Article 12 (1) (a) of Council Directive 92/43 / EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 2013/17 / EU, of May 13, 2013, must be interpreted as meaning that the capture and transport of an animal protected under Annex IV of this directive, such as the wolf, on the outskirts of a human settlement or in such an area, are liable to fall under the prohibition established in this provision."

The interpretation that the protection provided for in Article 12(1)(a) of the Habitats Directive does not comprise any strict limits or borders is also of such a nature as to allow the objective pursued by that provision to be attained. It is in fact a matter of protecting the species concerned not only in certain places –which are defined restrictively –but also specimens of those species living "in nature" or in the wild which therefore play a part in natural ecosystems. In that connection, the Court noted, moreover, that in many regions of the European Union –such as that at issue in the present case –wolves live in areas occupied by humans, with the human impact on those spaces thus resulting in wolves partially adapting to those new conditions. Furthermore, the development of infrastructure, illegal logging, farming and certain industrial activities contribute to the pressure exerted on the wolf population and its habitat. Consequently, the Court held that the obligation strictly to protect protected animal species applies to the entire 'natural range' of those species, whether they are in their natural habitat, protected areas or in proximity to human settlements.

II. E... Local Court Hungary (Side A) v. H.F Romania (Side B)

Case number: european arrest warrant - judicial cooperation (85/N/ 03.06.2009 decision – Bacau Court of Appeal)

Names of the plaintiffs and defendants, including the type:

Plaintiff: *E...Local Court Hungary (judicial authority)*

Defendant: *H. F. Romania (individual)*

Filing Date: *January 2009*

Status : *decided*

Jurisdiction: *Bacau Court of Appeal*

Principal Laws: *art.1 of the Convention on International Trade in Wild Species of Fauna and Flora; Council of Europe Regulation no. 338/97 on the protection of wild fauna and flora species.*

Summary: *On January 27 2007, the requested person H.F. entered Hungary as a passenger in a personal car; in which was found, at a border control, a brown bear fur (ursus arctos) a protected species, under the Council of Europe Regulation no. 338/97 on the protection of wild fauna and flora species.*

The requested person H. F. is judged to be prosecuted by the Court of E. - Hungary, for committing the crime of "damage to nature", provided by art. 281 paragraph 1.c of the Hungarian Penal Code, which is punishable by up to 3 years in prison. The crime for which the requested person is tried is also provided for by the Romanian criminal law, and the punishment is also imprisonment.

In accordance with the provisions of art.1 of the Convention on International Trade in Wild Species of Fauna and Flora, by individual (in the sense of fauna or flora) is meant: any animal or plant, alive or dead, and in the case of an animal any part or any easily identifiable animal product. According to art.1 of the C.E. Regulation no. 338/1997 regarding the protection of species of wild fauna and flora by regulating trade with them, the object of this regulation consists in: "protecting species of wild fauna and flora and ensuring their conservation by controlling their trade, in accordance with the following articles of the regulation."

By "specimen" is meant in accordance with art. 2 letter t of this regulation: "any animal or plant, alive or dead, of the species provided for in annexes A-D, or any part or product obtained from them...", and by " trade" means: "the introduction into the Community..., as well as the use, circulation within the Community, including within a member state, of specimens that fall under the provisions of this regulation.

Considering that the conditions for the execution of the European mandate were met, the requested person was arrested and delivered to the Hungarian Courts for the criminal trial.

III: *Gâjju si alti (Side A) v. Societatea Complexul Energetic Oltenia SA (Side B)*

Case number: *compensation for damages to the environment (7340/2021 26/11/2021 decision –Târgu Jiu Local Court)*

Names of the plaintiffs and defendants, including the type:

Plaintiff: *Gâjju și alții (individuals)*

Defendant: *Societatea Complexul Energetic Oltenia SA (energy services company)*

Filing Date: *November 2020*

Status : *decided - appeal pending*

Jurisdiction: *Târgu Jiu Local Court*

Principal Laws: *Emergency ordinance no. 195/2005 on environmental protection; Emergency ordinance no. 68/2007 regarding environmental liability who implement the 2004/35/CE Directive on environmental liability with regard to the prevention and remedying of environmental damage.*

Summary: *At a distance of approximately 2.5 km from the properties of the plaintiffs, there is deposit no. 2, belonging to Oltenia Energy Complex, where the waste is discharged*

From the conclusions of the experts it follows that, depending on the volume of dense sludge evacuated, work is periodically carried out to raise the storage dykes, which is carried out with slag and ash sludge mixed with gypsum. During the execution of such elevation works, in dry periods and with intensification of the wind, slag and ash may be scattered, similar episodes of pollution being detected and sanctioned by the Environmental Guard.

It was found that pollution affects these lands through the negative effects, namely fruit trees and vines. The effect of dust on plants is the embarrassment of their development, the reduction of production levels by increasing the frequency of falling flowers and young fruits. The components of the polluting factor negatively influence the qualities of the fruits and grapes, mainly the taste, establishing a percentage of 15% affecting the production level and a 20% decrease in the price of sale.

The court established that environmental protection is an obligation of all natural and legal persons, for which purpose they bear the cost of repairing the damage and remove the consequences produced by them, restoring the conditions prior to the production of the damage, according to the "polluter pays" principle.

The normative act (Emergency ordinance no. 195/2005 on environmental protection) defines damage as a quantifiable cost effect of damage to people's health, goods or the environment, caused by pollution, harmful activities or disasters, providing in art.95 that liability for damage to the environment is objective, independent of fault.

Regarding the right guaranteed by art. 8 paragraph 1 of the European Convention on Human Rights, and its jurisprudence, the ECtHR ruled that the obligation to take all the necessary measures to ensure the protection of the right to a healthy and protected environment is limited to the guarantee of the right to private and family life, provided by art. 8, and the respect of the right protected by the mentioned norm implies not only the negative obligation not to act in a way that would affect the right to private and family life, but also the positive obligation to respect and apply the legal regulations necessary for carrying out activities with an impact on the environment, in such a way as to ensure an effective protection of citizens.

In the case, it was proved cumulative fulfillment of the conditions for the tort civil liability, the defendant having the obligation to take measures in carrying out the activity, and prevention of the scattering in the atmosphere of slag and ash, a phenomenon that could be prevented, as it results both from the expert report, as well as from the report of National Environmental Guard- Gorj County Commissariat.

The movement of these products from the defendant's warehouse in the area of the claimant's household, violate the rules of objective law and caused damage to the subjective right of the plaintiffs, the right to a healthy environment being protected both by the Romanian Constitution and by European legislation.

Regarding the extent of the damage, the court considers that the compensation must be fair, rational and equitable, so as to effectively ensure a sufficient, but not exaggerated,

*compensation of the damage, the monetary compensation having the role of compensating the moral damage, the suffering felt by plaintiff, without, however, tending to turn into a means of enrichment and to divert this institution from its purpose.
The defendant was convicted to pay the plaintiffs material and moral damages for the environmental damages (approximately 5000 euros).*