

OFFENCES BY WHICH THE LEGAL REGIME OF WASTES IS INJURED

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ABSTRACT:

THE PROPER MANAGEMENT OF WASTES PRESENTS A SPECIAL IMPORTANCE FOR THE MAINTENANCE OF THE ECOLOGICAL BALANCE AND BY DEFAULT, THE HEALTH OF THE POPULATION, THEREFORE, AS PER INTERNATIONAL CONVENTIONS AND DOCUMENTS OF THE EUROPEAN UNION, ROMANIA INCRIMINATED, BY ART. 63 FROM LAW NO. 211/2011, A LOT OF ACTS BY WHICH THE ESTABLISHED REGIME IN THIS FIELD IS BREACHED. ANALYSING THE LEGAL CONTENT OF THE RESPECTIVE OFFENCES, IT IS FOUND THAT SOME DIFFICULTIES MIGHT EXIST IN WHAT REGARDS TO THEIR APPLIANCE IN CONCRETE CASES, THEREFORE IMPOSING SUCH A PROFOUND ANALYSIS IN REGARD TO THEIR WAY OF INTERPRETATION AND ALSO PROPOSALS OF FRENETIC LAW.

KEY WORDS: ENVIRONMENT, WASTES, LEGAL REGIME, OFFENCES.

INTRODUCTION

The continuous development of the consumption society brought, among its benefits in the sphere of material wellness, multiple problems, by which the multiplication of wastes also derive from, with negative effects over the environment and by default, over the conditions of life, due to the permanent development of all economic and social activities generated.

The pollution by wastes is practically inevitable, considering the fact that every activity generates unusable rests, in many situations harmful to health and their quantity is permanently amplified by the cause of increasing the needs of the society³.

In the past waste management did not represent a priority, nevertheless in present, according to the environmental legislation, waste producers, and also specialized companies in the value or removal of these wastes are obligated to insure their hosting rationally, without negative effects ecologically. Thus, the necessity of environmental protection, and especially the intuition of some rentable businesses, generated the apparition of numerous waste management companies and a

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³ Mircea Duțu, *Dreptul mediului*, (Bucharest, C.H. Beck Press, 2007), 430.

market in which they cease to be unusable products, becoming the object of commercial transactions⁴.

Nowadays, in Romania the legal regime of wastes is ruled by the Law no. 211/2011⁵, republished, with amendments brought by the Law no. 187/2012⁶ for the application of the Law no. 286/2009 regarding the penal code, regulatory provisions regarding wastes also being embedded in other normative documents, as the Governmental Emergency Ordinance no. 195/22 December 2005, with further completions and amendments, or in some laws which different activity fields are ruled.

The Law no. 211/2011 – which transposes in the national legislation the Directive 2008/98/CE⁷ of the European Parliament and Council from 19 November 2008 regarding wastes and of abrogation of certain directives – establishes the necessary measures for the environmental protection and the health of the population, by preventing or reducing the adverse effects determined by the generation and management of wastes and also by reducing the general effects of using resources and increasing their efficiency in use.

The article 20 from the Law no. 211/2011 states that: waste management by companies from our country need to be achieved without endangering the human health and without damaging the environment, especially by: generating air, water, ground, fauna or flora risks; increase of discomfort due to the noise or smell; affecting the scenery or special interest areas⁸.

Violating certain regulations from this law, achieves the content of contraventions foreseen at art. 61 or of the offences shown at art. 63 from the same law⁹.

Apart from the contraventions, of which content can be easily identified by the references done at the texts from the law which foresee the obligations of which failing to respect, are sanctioned, in the case of offences, such references are not done, and the formulation of some incriminations is to general and short, without clear references concerning the material objective or the material element, etc., therefore the exact sphere of their contents being hard to establish, reported to the acts committed in reality.

⁴ Jose Juste Ruiz, *Derecho internacional del medio ambiente*, (Madrid, Mc Graw-Hil, 1999), 308.

⁵ Law no. 211/2011 regarding the regime of wastes was published in the Official Gazette of Romania, first part, no. 837 from 25 November 2011 and republished in the Official Gazette of Romania, first part, no. 220 from 28 March 2014, under art. 248 from the Law no. 187/2012 for the appliance of the Law no. 286/2009 regarding the penal code.

⁶ Published in the Official Gazette of Romania, 1st part, no. 757 from 12 November 2012.

⁷ Published in the official journal of the European Union (JOUE) series L no. 312 from 22 November 2008.

⁸ According to the principle „the polluter pays“, the waste management costs are beard by their producer or, by case, by their actual holder or pervious of wastes (art. 21 from the Law no. 211/2011).

⁹ According to the art. 63 p. 1 from the Law no. 211/2011 „(1) Their constituted offences and are punishable with imprisonment from 6 months to 5 years or fine for the following acts: a) importation of installs, machinery, equipment, apparatus, substances and worn and used products, from the category of wastes prohibited at importation; b) disrespect or failing to take the obligatory measures for the development of collecting, treating, transportation, valuing and elimination activities concerning dangerous wastes; c) commercializing, abandoning and/or failing to secure the waste loads during or on the duration of transiting the Romanian territory; d) refusal to return in the country of origin the respective wastes introduced into the country in other purposes than the one of eliminating and for which the measure of return was disposed by the competent authority; e) introducing into the country wastes with the purpose of removal and/or not using them in the purpose from which they were introduced; f) acceptance by the warehouse/incinerating operators, in order to eliminate, the wastes, illegally introduced into the country and/or wastes introduced into the country for other purposes than the one of elimination and for which they were introduced”.

THE ANALYSIS OF THE LEGAL CONTENT OF INCRIMINATIONS COMPRISING THE ACTS BY WHICH THE LEGAL REGIME OF WASTES IS VIOLATED

• A general observation consists in the fact that, in the situation of some offences from art. 3 from the Law no. 211/2011, for the „completion” of the legal content, so that a correct legal framework of the acts committed in reality to be achieved, the regulations from the Law no. 211/2011 and the appendixes, are not sufficient, but also other regulatory documents are also necessary to be consulted, and which identification is very difficult, since the text of the offences does not refer to them, therefore in practice, is more likely that numerous acts regarding the incorrect management of wastes will stay outside the penal illicitness, although in reality they would have a criminal character.

Another especially important aspect which needs attention is the fact that the sphere of acts which are categorized in these incriminations, it is limited by art. 2 from the law, in the meaning that, if the incriminating activity is performed over some wastes which are foreseen in this text (as in: „gaseous tributaries released into the atmosphere”, „radioactive wastes”, „triggered explosives”, „used waters” a. s. o.) do not achieve the content of the analysed offences.

A last specification, with a general character, consists in the fact that the Law no. 211/2011 cannot be considered than that of having a *general character* towards other regulatory documents which might incriminate similar acts, regarding the wastes produced in certain activity fields, these being applied with priority, towards the ”general” ones.

There are also, regulations which are considered to have a general character towards the ones comprised in the Law no. 211/2011, and as certain incriminations comprised refer to acts somewhat similar, the problem of establishing the applied texts to certain concrete acts is posed.

Therefore, for example, by *Law 101/2011 for the prevention and sanctioning of certain actions regarding the environmental degradation*¹⁰, which also establishes measures of penal nature in order to insure an efficient protection of the environment, and some actions regarding the incorrect waste management, with negative impact over the ecologic balance, are incriminating. Therefore, according to art. 3 from this law, actions regarding the collection, transportation, valuing or eliminating wastes, are punishable with imprisonment from 6 months to 3 years, including the supervision of these actions and further maintenance of the eliminating spaces and also the actions performed by brokers in the process of waste management, with the disrespect of the legal provisions in the field, if they can cause the severe injury or death of a person or a significant damage brought to the environment.

Likewise, in accordance with the art. 4 from the law, is punishable with imprisonment from 2 to 7 years, actions regarding the importation or exportation of wastes violating the legal provisions in the field, in the case in which this activity enters in the field of appliance fo the art. 2 pct. 35 from the Regulation (CE) no. 1.013/2006 of the European Parliament and Council from

¹⁰ Published in the Official Gazette of Romania, 1st part, no. 449 from 28 July 2011. Republished under art. 248 from the Law no. 187/2012 on the appliance of the Law no. 286/2009 regarding the penal code, in the Official Gazette of Romania, 1st part, no. 757 from 12 November 2012. Republished in the Official Gazette of Romania, 1st part, no. 223 from 28 March 2014.

14 June 2006 regarding the wastes transfers¹¹, no matter if the transportation is done by one or more operations¹².

Comparing these provisions with the ones comprised at the art. 63 from the Law no. 211/2011, it is found that certain incriminations are overlapped, in a somewhat measure, and the limits of punishment are not correlated with the abstract social danger, specific to each offence, which might impose a revision of all the regulations regarding the sanction of actions by which the regime regarding waste management is breached, so that the incriminations be clear, complete and eliminate the texts competition, which can create difficulties in their interpretation and appliance. Likewise, the limits of the punishments might impose to be reviewed, so that, each, will be able to express the social danger from the category of incriminating actions.

• Analysing each incrimination, we find that, except the first two, the others do not raise other special issues (than the ones „generated”, above presented) regarding their interpretation and appliance in practice, to concrete cases of violating the regime of wastes.

a) The legal content of the offence foreseen at art. 63 letter ”a” from the Law no. 211/2011 is clearly under the aspect of the material element, nevertheless for the practitioners it will be hard to identify all the types of wastes „prohibited to importation”, considering that only those can constitute the *material objective* of the incriminating action.

Law no. 211/2011 does not comprise any provision in this way, and the interdictions to importations might exist in numerous normative documents (unstated in the legal content of the offence or in the contents of this law), in accordance with each activity field regulated, so that, by failing to identify one or more such regulations, for some actions, the judicial organisms cannot be referred.

b) At the second incrimination, firstly, the *material objective* needs to be correctly established, respectively those *dangerous wastes*, whereas the activity of improper management is referred.

The list of wastes, including the dangerous ones, is established by the European Commission, being then taken by the national legislation by governmental decision¹³ (art. 7 from the Law no. 211/2011), nevertheless in some cases the performance of tests and analysis is imposed in order to determine them¹⁴, considering the properties shown in the appendix no. 4 from the law, which make them dangerous (as in: explosive, oxidizing, very flammable, irritant, toxic, harmful, cancerous a. s. o.).

The second issue of interpretation of the respective text constitutes the difficulty of establishing what are the „*obligatory measures*” of which „*failure to take*” or „*disrespect*” – in the management activities („*collecting, treatment, transportation, valuing and removal of dangerous wastes*”) – perform the material objective of the offence. The incriminating text does not show where these ”obligatory measures” are foreseen, therefore, in an hypothesis, their identification might be tried in the contents of the Law no. 211/2011, and in another „the search” might extend

¹¹ Published in the official journal of the European Union, series L, no. 190 from 12 July 2006, with further amendments.

¹² The incriminating actions by which the two texts are sanctioned and when committed by guilt, nevertheless the limits of punishment shown are reduced to half; in the case of action from guilt foreseen at art. 4 can be applied and amended (art. 9 from Law no. 101/2011).

¹³ See The Governmental Decision no. 856/2002 regarding the evidence of waste management and for the approval of the list comprising the wastes, including the dangerous ones, published in the Official Gazette of Romania, 1st part, no. 659 from 5 September 2002, with further completions, This list is mandatory in order to determine if a waste needs to be considered dangerous.

¹⁴ See art. 8-11 from the Law no. 211/2011.

in all the normative documents regarding wastes (to environment, in general), which might be extremely difficult and with approximate results, from the point of view of the legal sciences rigor, whereas not any disrespect of any obligation, no matter how minor, might realize the content of the offence.

Moreover, the formulation which is too general: „the disrespect of the obligatory measures” – does not allow the determination strictly neither for the specific obligations (of which violation might realize the material element of the offence), comprised even and not only in the Law no. 211/2011, under the conditions in which the lawmaker has not indicated expressly the texts in which these obligatory measures are foreseen (like contraventions). Moreover, we find that the violation of the most important obligations in sanctioned contraveniently, with such obligatory measures being too few (foreseen by law), of which violation presents, mainly, a reduced danger, incompatible with the one specific to offences.

Towards the ones shown, we appreciate that the lawmaker should have determined, clearly, which are the obligatory measures, regarding dangerous wastes management, of which disrespecting leads to the achievement of the material element of the offence.

If we admit that the material element of the offence is done by ”failing to take or failing to respect the obligatory measures” regarding the activities of waste management foreseen in other normative documents, in a first version, only the regulations referred in the contents of the Law no. 211/2011 should have been considered. Thus, for example, at art. 26 p. 3 from the Law no. 211/2011 shows that the activity of transportation of dangerous wastes on the Romanian territory is ruled by the Governmental decision¹⁵. Likewise, in art. 28 p. 1 from the Law no. 211/2011¹⁶ shows that the holders of dangerous wastes are obligated to insure that on the duration of performing the operations involving collecting, transportation and storage, these materials should be wrapped and labelled in accordance with the provisions of the (CE) Regulation no. 1.272/2008 of the European Parliament and Council from 16 December 2008 regarding the classification, labelling and wrapping of substances and mixtures¹⁷.

In our country the legal regime of some category of dangerous wastes is nevertheless established by other normative documents which rule certain activity fields. Therefore, *wrapping and wrapped wastes management* is ruled by the Decision no. 621/2005¹⁸, which contains some regulations referring to the quality of wrappings, meant to insure the protection of health and the hygiene of wrapped products, transportation requirements, and also some specific regulations regarding dangerous wastes. Also, the Governmental Decision no. 11/2003¹⁹ establishes the legal regime of radioactive wastes²⁰, resulted from the specific cycle of nuclear fuel, and also from the

¹⁵ See Government Decision no. 1.061/2008 regarding the transportation of dangerous and non-dangerous wastes on the Romanian territory, published in the Official Gazette of Romania, 1st part, no. 672 from 30 September 2008.

¹⁶ The transfer of dangerous wastes on the national territory needs to be followed by an identification document foreseen in the appendix IB at the (CE) Regulation no. 1.013/2006, with further completions and amendments (art. 28 p. 2 from the Law no. 211/2011).

¹⁷ Also the provisions of the Governmental Decision no. 1.408/2008 regarding the classification, wrapping and labelling of dangerous substances and of the Governmental Decision no. 937/2010 regarding the classification, wrapping and labelling on market introduction of dangerous mixtures, are also considered.

¹⁸ Published in the Official Gazette of Romania no. 639 from 20 July 2005, modified by the Governmental Decision no. 1872/2006 and by Governmental Decision no. 247/2011.

¹⁹ Published in the Official Gazette of Romania no. 61 from 1 February 2003, Republished in the Official Gazette of Romania no. 289 from 2 May 2007 under the Governmental Ordinance no. 31/2006 approved by the Law no. 26/2007 and further modified by the Law 329/2009 and by the Law no. 378/2013.

²⁰ In the understanding of the law, the radioactive wastes are radioactive materials in gaseous, liquid or solid form, for which no other attribution is foreseen and have or are contaminated with radionuclides in concentration higher than

nuclear technologies and techniques appliances in industry, medicine, agriculture or in other fields of social and economic interest, including the ones resulted from the disassembly of nuclear and radiologic installs.

CONCLUSIONS. PROPOSALS OF *FERENDA LAW*

Taking into account the considerations and arguments exposed above, we appreciate that it would be necessary to make an inventory of the normative documents by which the incriminating actions which breaches the legal regime of wastes are done and for which the overlapping of the aspects of certain provisions are found and also for the ones regarding to the improper formulation of some incriminating texts, or the ones of establishing certain limits of uncorrelated punishments with the social danger of the actions, especially by comparison with the ones afferent to some incriminations of the same nature.

As per resulted findings from this study, we propose *de lege ferenda*, removing the completion of texts, so that a certain category of actions to be incriminated in a single normative document. Likewise, the legal content of the offences needs to be formulated in such a way to comprise all the necessary elements for a correct framework of actions committed in reality, by violation of the legal regime of wastes.

Last but not least, even the necessity of the existence of the "general" incriminations themselves from the art. 63 from the Law no. 211/2011 may be brought into the discussion, considering that specific incriminations for normative violations regarding waste management in every field of activity may be sufficient and ruled in the same normative document, which might ease the ever more accurate stipulation of the legal content of offences and a better interpretation of the incriminating texts, in accordance with the content of the other regulations comprised in the respective law.

the accepting limits. By radioactive waste, the used nuclear fuel is also understood and for which no other use is foreseen.

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