

THE PRINCIPLE OF PRECAUTION IN THE AREA OF THE ELECTROMAGNETIC POLLUTION

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Abstract

Currently, it is an uncontested reality the fact that the electromagnetic pollution is part of every individual's life. The so-called electro smog represents a controversial subject under the aspect of the effects generated against human health; the studies conducted being controversial as well. In this context, of the scientific uncertainty, a important role is occupied by the law which must face these new challenges. Thus, the current article debates the principle of precaution and its application in this area.

Key words: *electromagnetic pollution, preventive liability, principle of precaution, jurisprudence.*

Introduction

The Smartphone, microwaves, wireless systems, radio, TV etc. are part of our lives, being considered as indispensable. But, all this scientific and technological evolution of mankind, focused on the growth of individual and social comfort is accompanied also by the negative effects on human health and the environment.

Though the negative effects of the electromagnetic fields have been denied or initially ignored, lately it is being noticed an intensification of the steps for the recognition of the existence of certain risks for human health and/or environment.

B. Blake Levitt, in one of his papers dedicated to the study of electromagnetic pollution, stated that "Modern society finds itself in the middle of a giant global experiment developed through a new form of energetic pollution, so-called electro smog or electric pollution (...) The electro smog affects the DNA of all living beings and may have a negative effect also against the Earth's atmosphere. Most likely, electronic smog will prove to be the greatest challenge of the century for the environment" [1].

In a relative recent study, Barry Trower (The Cooking of Humanity, 2005) draw attention that the “uncontrolled expansion of the mobile phones systems is the most serious genocide that this planet has ever known” [2].

Under the context in which the current studies claim that the exposure to electromagnetic fields is harmful for human health and environment, though it is not clear the how and to what extent these negative consequences occur, the law has the duty to interfere. In this meaning, it has been stated that “The legal reaction, in these cases, should be urgent, firm and appropriate (...) There are already foreseen significant developments in the area of human rights through (...) the configuration of a protective law against the exposure to electromagnetic fields, shaping the significations of the right to health and other rights to a healthy and ecologically balanced environment. The central position is taken by the institutionalization and proper regulation of the application of the principle of precaution to the risks inherent to the exposure to electromagnetic waves generated by wireless communications” [3].

1. *About the principle of precaution*

The principle of precaution emerged from the need to impose new behavior, both individually, as well as collective in front of the modern threats against environment. Though, initially stated only theoretically and considered more as a legal fiction, currently it is considered that the principle of precaution [4] has invaded the legal and social areas, by entering both the international law, as well as the communitarian one and in the national legislation of different states.

The principle has been stated for the first time in 1974 by the German legislation, on the occasion of the steps taken to reduce air pollution. Subsequently, it has been internationally stated by the Organization for Economic Co-operation and Development in 1987 and during the second International Conference on the protection of Northern Sea held in London in the same year. Its statement with international feature has been achieved by the Declaration of the Conference on Environment held in Rio de Janeiro on 1992, in its Principle 15 stating that “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.

At the level of the primary legislation of the European Union, the principle of precaution has been initially stated by the Maastricht Treaty in 1992, currently being stated by Art 191 Para 2 of the Treaty on the Functioning of the European Union (TFEU) according to which “Union policy on the environment shall aim at a high level of protection ... based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay”.

In the national law, the precautionary principle in taking the decision is stated by Art 3 Let b) of the G.E.O No 195/2005 on environmental protection together with the principle of integrating the environmental requirements in all the other sectorial policies; the principle of preventive actions; the principle of pollutant containment at source; the principle “polluter pays”; the principle of preserving the bio-diversity and ecosystems specific to the natural bio-geographic framework.

From the interpretation of the above mentioned provisions, it results that the precautionary principle is interdependent with the principle of preventing the ecological risks and damages, without reducing to it because the prevention refers to a certainty about a phenomenon, about the consequences of an action or inaction, while the precaution refers to uncertainty, ignorance or insufficient knowledge of the effects of certain phenomena, processes, activities.

Therefore, the precaution also refers to the prevention of a possible danger for the environment and advises in taking the decisions with maximum care and diligence to avoid the pollution, this is why it has been established that, from a temporal perspective, “first we are talking about precaution, then about prevention and finally, when the precaution and prevention measures prove to be insufficient and the pollution occurred, we are talking about the polluter pays” [5].

In literature, the principle has been defined as being “the attitude which every person should adopt regarding an activity which can reasonably be supposed to generate a danger for the health of current or future generations or for the environment [6].

Starting from this definition, it has been shown that the principle of precaution must represent “a guide both for the state’s activity in general, either legislative, administrative or jurisdictional, as well as for the private activities” [7].

2. *The application of the precautionary principle in electromagnetic pollution. Fragments of national legislation in this area.*

For the practical application of the precautionary principle are considered as important documents the Communication of the European Commission of 2000 and the Resolution on the precautionary principle adopted by the European Council in Nice 2001, recommending the Member States to apply it.

According to the Communication of the European Commission in 2000, “the precautionary principle may only be invoked in the event of a potential risk, identified by an evaluation of the scientific data available, and this evaluation does not allow the complete identification of the risk”.

Also, the Commission has stressed that [8] the application of the precautionary principle may only be invoked when the three preliminary conditions are met: identification of potentially adverse effects; evaluation of the scientific data available; the extent of scientific uncertainty. In addition, the general principles of risk management remain applicable when the precautionary principle is invoked, namely: proportionality between the measures taken and the chosen level of protection; non-discrimination in application of the measures; consistency of the measures with similar measures already taken in similar situations or using similar approaches; examination of the benefits and costs of action or lack of action; review of the measures in the light of scientific developments.

Even if Romania does not have a well-shaped jurisprudence in this area [9], still there are judicial decisions which may be considered as starting points, such as the Decision No 8164/24 June 2009, adopted in the case file no 17703/299/2008, by the Bucharest District 1 Court.

Thus, the object of the case file was represented by the obligation of to do, namely the plaintiff requested the compelling of the defendant to demolish and remove the GSM antennas installed on the terrace of the apartment block in which he lives under the sanction of comminatory damages of 1500 RON/day of delay. Also, the plaintiff requested his authorization for the demolish of the antennas, on the expense of the defendant. In fact, the plaintiff proved that he is the owner of the flat no (...) located in Bucharest, and on the terrace of the apartment block, above his place, there are installed the GSM antennas owned by the defendant.

As response, the defendant requested the dismissal of the action, by proving that he had all the necessary approvals to install that antenna, including the authorization to build, the equipment being installed on the common side of the block. Moreover, the intensity of the electromagnetic field does not overcome the limitation stated by the Order of the Ministry of Public Health No 1193/2006.

Of the Court's assessment it results that "there are controversy studies related to the damaging effects on health for the long exposure to electromagnetic fields generated by these antennas. So that, if on the one hand, certain scientific personalities, in a study conducted by the Association for Consumers Rights, claim that a long exposure could generate damaging effects against the human body, and on the other hand, the public institutions – National Institute for Public Health Bucharest, the Ministry of Communication – claim that there are no scientific proof confirming the negative effects on health (...)"[10]. The court also stated that "it results from the writings submitted by the defendant, that mobile phone interfere with certain medical devices – pacemakers, defibrillator, hearing devices – and as mobile phone transmit an RF signal (radio frequency) of small range, unlike GSM antennas, it results that the antennas may interfere with these devices" and that "it is well known the fact that the human body has its own electromagnetic field, so that it is possible the interference with the one generated by the antennas (...), but the extent to which it could cause cellular damages it very controversial, given the current limitations for the scientific knowledge or international economic interests (...)" [11].

Thus, the court also emphasized that "the right to life and physical integrity, namely health, guaranteed by Art 2 of the Convention on Human Rights, ratified by Romania by Law No 30/18 May 1947 and stated by Art 22 and 34 of the Constitution, also refers to the elimination from the biological environment of individuals of any potential risk for his health and well-being" [12] and that "for as long as it has not been established, with a certain degree of certainty, that the GSM antennas have no dangerous effect against the life and health of a person living permanently around these devices, the plaintiff must enjoy the principle of precaution, stated by Art 174 of the Treaty on the European Community (former Art 130R of the Maastricht Treaty), which could translate by the fact that, in the absence of specific data regarding the long-term consequences for the

exposure to electromagnetic fields, the authorities shall have to protect the individual against possible risks” [13].

Therefore, given all these arguments, the court “shall admit the action, by compelling the defendant to dismantle and to remove the GSM antenna installed on the terrace of the building (...) within 2 months from the remaining as definitive of the decision under the sanction of paying comminatory damages of up to 1000 RON for every day of delay” [14].

This decision is important by the fact that it is based upon a preventive liability allowing the coverage of a potential damage derived from an action whose consequences cannot be fully known at a certain moment, given the limits of human knowledge.

Thus, its main merits [15] refer to the interpretation and application of the principle of precaution and the shaping of the specificities for a new form of liability – the ecological one.

Nevertheless, we can observe the existence of certain gaps, namely the fact that the court refers only to the normative act of the European Union stating the precautionary principle, without mentioning that this principle is also found in the entire national legislation. Also, there are mentions about the violation of the right to life and physical integrity and of the right to health, omitting the fundamental right to a healthy environment guaranteed by Art 35 of the Romanian Constitution.

Conclusions

In the virtue of the right to life, physical integrity, right to health, right to a healthy environment and in close correlation with the principle of durable development, the principle of precaution and prevention, having as common point the electromagnetic pollution, a timid jurisprudence in this area starts to be formed in our country.

Even if the principle of precaution enjoys a legal regulation both internationally, communitarian and nationally, unfortunately it is ascertained a reluctance of law practitioners in its consideration as base of the preventive civil liability. We consider that in the near future, given the more and more polluted environment in which we live, as well as the permanent development of new technologies, the preventive liability shall represent a branch of the civil liability, being able to face these new realities.

References

- [1] Blake Levitt, B. (2007). *Electromagnetic Fields. A Consumer's Guide to the Issues and How to Protect Ourselves*, iUniverse Publ.-house, Inc., p. XVIII.
- [2] Trower Barrie (2015). *The Cooking of Humanity* apud Duțu, Mircea. „Poluarea electromagnetică, o formă de ecocid? Considerații asupra necesității consacrării unei noi crime împotriva umanității”, (<https://juridice.ro/essentials/1133/poluarea-electromagnetica-o-forma-de-ecocid-consideratii-asupra-necesitatii-consacrarii-unei-noi-crime-impotriva-umanitatii>)
- [3] Duțu, Mircea, „Poluarea electromagnetică, o formă de ecocid? Considerații asupra necesității consacrării unei noi crime împotriva umanității” (<https://juridice.ro/essentials/1133/poluarea-electromagnetica-o-forma-de-ecocid-consideratii-asupra-necesitatii-consacrarii-unei-noi-crime-impotriva-umanitatii>).
- [4] Anghel, D. (2010). *Răspunderea juridică privitoare la protecția mediului. Privire specială asupra răspunderii civile*. Bucharest: Universul Juridic Publ.-house, p. 81.
- [5] Dușcă, A. I. (2014). *La responsabilité préventive, essence de la responsabilité écologique*. Les Éditions Universitaires Européennes, Saarbrücken, Germany, p. 48.
- [6] Telegă, C. (2004). „Principiul precauției și viitorul răspunderii civile”, in *Revista română de dreptul mediului* nr. 1(3), p. 40.
- [7] On, Alexandru Daniel (2012). „Un concept nou: răspunderea civilă preventivă”, in *Dreptul* nr. 5, pp. 111-125; On, Alexandru Daniel (2012). „Legislație și jurisprudență privind răspunderea civilă preventivă”, in *Dreptul* nr. 6, pp. 123-139.
- [8] Communication (COM(2000) 1final) on the precautionary principle on 2 February 2000 (<http://eur-lex.europa.eu/>).
- [9] In the same regard, see: Duțu, Mircea (2017). „Probleme juridice privind contenciosul legat de riscul sanitar și de mediu al câmpurilor electromagnetice și de implantarea /demonțarea antenelor de telefonie mobilă GSM”, in *Pandectele Române*, No 5, p. 27; Marcusohn, V. „Despre (in)oportunitatea menținerii posibilității de expunere a populației la câmpuri electromagnetice generate de echipamente radio și echipamente terminale de comunicații” (<https://www.juridice.ro/452859/despre-inoportunitatea-mentinerii-posibilitatii-de-expunere-a-populatiei-la-campuri-electromagnetice-generate-de-echipamente-radio-si-echipamente-terminale-de-comunicatii.html>).
- [10] Court Decision No 8164/24 June 2009, ordered in the case file No 17703/299/2008, Bucharest District 1 Court.
- [11] Court Decision No 8164/24 June 2009, ordered in the case file No 17703/299/2008, Bucharest District 1 Court.
- [12] Court Decision No 8164/24 June 2009, ordered in the case file No 17703/299/2008, Bucharest District 1 Court.
- [13] Court Decision No 8164/24 June 2009, ordered in the case file No 17703/299/2008, Bucharest District 1 Court.
- [14] Court Decision No 8164/24 June 2009, ordered in the case file No 17703/299/2008, Bucharest District 1 Court.
- [15] For a more detailed presentation of the pros and cons of the decision, see also: Dușcă, A. (2011). „Răspunderea preventivă – formă a răspunderii ecologice (Bucharest District 1 Court), Bucharest, Court Decision No. 8164/24 June 2009”, in *Pandectele Române*, No 4, Wolters Kluwer Publ.-house, Bucharest, pp. 216-222.