

Challenges Brought by Climate Change in the Field of Administrative Law

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Abstract

The paper wishes to analyze the challenges that the interdisciplinary approach on climate change and ancillary obligations will bring in the field of administrative law, by analyzing EU legislation in this respect. Climate change has become a rising global concern, significantly affecting administrative policies, regulations, and administrative processes. Considering these challenges, administrative law legislation and jurisprudence have evolved and adapted to address the new requirements. At the regulatory level, the impact of climate change on issues such as urban planning, protection of natural resources, project permitting, and environmental governance is taken into account. The article paves the way for solutions and suggestions for improving the legal and administrative framework to meet the challenges raised and highlights the importance of legal and administrative collaboration in developing the most appropriate policies and regulations.

Keywords: administrative law, climate policy, environmental regulation, pollution control, environmental reporting, sustainability.

JEL Classification: K23, K32, Q56, Q58

1. Introduction

Fifteen - twenty years ago, when addressing climate change², one would discuss mainly about atmospheric pollution and the ancillary legal provision. Although perceived already as a rather complex matter, the attention was centered towards the control and reduction of the main sources of atmospheric pollution³: various gases resulted from the combustion processes (such as carbon monoxide, carbon dioxide and oxides of nitrogen), sulfur dioxide, particles of lead and other heavy metals, PM10 (small airborne particulate matter), various complex pollutants resulting from the incomplete combustion of fuels, volatile organic compounds (VOCs), methane and chlorofluorocarbons (CFCs).

For this reason, after the issuance in 2007 by the Intergovernmental Panel on Climate Change of the Report on climate change⁴, regulation intended the limitation, at international level, of the six greenhouse gases viewed as responsible for the increase of global temperature, because it was considered that, due to their nature and diffusion, the limitation of atmospheric pollution would require a transnational approach. Thus, have been adopted the 1979 Geneva Convention on Long-Range Transboundary Air Pollution, the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1992 Framework Convention on Climate Change, the 1997 Kyoto Protocol.

The European Union had an important role⁵ in the negotiation of the abovementioned treaties and played an active role by the introduction of mandatory targets through regulations such as Regulation 2037/2000⁶, Directive 2003/87/EC⁷ and others. Also, some multisector initiatives lead to the implementation of new targets in the field of cogeneration⁸, promotion of renewable energy⁹,

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² J. Robinson, J. Barton, C. Dodwell, M. Heydon and L. Milton, *Climate Change Law: Emissions Trading in the EU and the UK*, London, 2007, p. 25.

³ Stuart Bell, Donald McGillivray, *Environmental Law*, Oxford University Press, New York, 2008, p. 510; Richard J. Lazarus, *The Making of Environmental Law*, The University of Chicago Press, London, 2023, p. 270.

⁴ The document is available online at <https://www.ipcc.ch/report/ar4/wg3/> (14.05.2023).

⁵ See Augustin Fuerea, *Manualul Uniunii Europene*, Ed. Universul Juridic, Bucharest, 2016, p. 217 et seq.

⁶ Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer (OJ L 244, 29.9.2000).

⁷ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003).

⁸ Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC (OJ L 52, 21.2.2004).

⁹ Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market (OJ L 283, 27.10.2001).

promotion of biofuels for transport¹⁰, energy performance of buildings¹¹, energy end-use efficiency¹².

All these initiatives were meant to encourage or to initiate the process towards a more sustainable economy, by establishing in most cases, specific targets for states or companies to comply with, but as any transition process, without major or fast transformations regarding ongoing activities.

However, following the 2015 Paris Agreement on Climate Change, we have seen a change of approach. The recent developments in the European Union's regulations show that, with regard to environmental protection and climate change, there is a clear transition from a contextual regulation limited to a specific protected area (i.e. water, soil, air etc.), industrial activity (mining, energy, transportation etc.) towards a multidisciplinary regulation, where environmental law norms and requirements become special regulation against which one needs to validate any existing or proposed activity and/or future development.

The end scope is positive, to enhance adaptation to climate change because, as seen in the last report of the IPCC¹³, the main barriers are, among others, limited resources, lack of involvement from the private sector and the public, insufficient financial mobilization, low environmental know-how, lack of political engagement, a limited sense of emergency.

We will analyze going forward some Romanian law provisions currently applicable, some recent regulations enacted by the European Union or due to be approved and some elements of uncertainty that they will bring, both on a local level and throughout Europe.

2. Overview of current Romanian legislation

In Romania, the main legislative act in the field of environment protection is GEO 195/2005¹⁴. It regulates under art. 2 what are the acts deemed as regulatory acts in the field of environmental law, the scope of the environmental permits and the conditions an entity has to meet in order to obtain it and begin/continue to pursue its economic activity. It traditionally makes a difference between the environmental permit and the integrated environmental permit, depending on the impact an economic activity has on the environment.

Furthermore, aligned with current EU legislation, there are clear definitions for what are the "*best available technique*", i.e. the most advanced and efficient developed stage registered in the development of an activity and its exploitation methodologies, which demonstrate the practical possibility to become a reference for the establishment of emission limits with the purpose to prevent pollution and if this is not possible, to generally reduce the emissions and impact on the environment as a whole.

We already also have the notion of an "*environmental audit*", which is defined as a managerial instruments for periodical, systematic, documented and objective evaluation of an organization's performance, of its management system and the processes which are established to protect the environment, in order: a) to facilitate the control of the management of activities with potential impact on the environment; and b) to evaluate the observance of environmental policy, including the observance of the organization's environmental objectives and targets.

Romanian environmental protection legislation is consistent in terms of defining what are competent environmental protection bodies, their competencies, the manner in which they cooperate with other centralized or local bodies, the current reporting mechanisms to the EU on various topics. For example, as per GEO 92/2021¹⁵ all companies that are authorized to perform their activities based on an environmental permit must elaborate a plan for the prevention and limitation of waste generated

¹⁰ Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport (OJ L 123, 17.5.2003).

¹¹ Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings (OJ L 1, 4.1.2003).

¹² Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services (OJ L 114, 27.4.2006).

¹³ The document is available online at https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf (14.05.2023).

¹⁴ Government Emergency Ordinance no. 195/2005 regarding environmental protection (OG Part 1, no. 1196 of 20 December 2005).

¹⁵ Government Emergency Ordinance no. 92/2021 on the regime of waste (OG Part 1 no. 820 of 26 August 2021).

by its own activity or, as the case may be, from any produced good, which they must subsequently implement throughout the year, to publish it on its internet page and to submit it annually by 31 May of the next year, together with the recorded progress. Romanian competent bodies send annually to the European Commission information on types and quantities of generated waste, as well as the measures taken for the reduction of waste, reuse and recycle.

Traditionally, environmental liability is understood as a consequence of breaching the applicable legal norms, as a general matter and of the environmental obligations set out in the individual administrative act which allows for the performance of a certain activity, in particular¹⁶. Liability is either administrative, civil and/ or criminal in consideration of the breach and the resulted damage. GEO 68/2007¹⁷ sets out, as a general norm, what are the criteria based on which competent environmental bodies require actions for the prevention and remediation of the environment. Also, because environmental protection is an objective of major public interest, the doctrine¹⁸ has been consistent in the interpretation that evaluation of an environmental damage is made unilaterally by public environmental protection bodies.

With regard to the access to justice in environmental related matters, it's an established principle that the Romanian state recognizes the right of any person to a clean and balanced environment and for this reason recognizes the right to address directly or through environmental protection associations the administrative and/or judicial bodies on environmental matters, irrespective of whether a damage has occurred.

With regard to the persons that can initiate proceedings in relation to the control of legality of administrative acts¹⁹ and the grounds thereof, however, the High Court of Cassation and Justice clarified the limits of such address. In Decision no. 8 dated 2 March 2020 issued by the High Court of Cassation and Justice²⁰, the Court established for the settlement of the extraordinary appeal in the interest of the law decided that invoking the legitimate public interest must be subsidiary to the invocation of a private legitimate interest, the latter resulting from the direct connection between the administrative act subject to a legality control and the direct scope and objectives of the non-governmental organization²¹. Otherwise, it would seem that the legislator conferred NGOs higher prerogatives than the Prosecutors' Office in relation to the challenge of an administrative act, which is not the case. NGOs may challenge both individual administrative acts and normative administrative acts within the powers granted by the law to subjective challenges.

3. Corporate Responsibility Reporting Directive (CSRD)

On 5 January 2023, the Corporate Sustainability Reporting Directing (CSRD)²² entered into force. This new regulation is meant to improve the rules on corporate, social factors and environmental information that companies have to report. Listed companies, large companies, as well as listed SMEs, will be obliged to report on sustainability.

The purpose is to: (i) ensure that investors and other stakeholders have access to the information they require, in order to understand investment risks arising from climate change and other sustainability issues and to (ii) create a culture of transparency about the impact of companies

¹⁶ Brian Jones and Neil Parpworth, *Environmental Liabilities*, Shaw & Sons Limited, Crayford, 2004, p. 142 et seq.

¹⁷ Government Emergency Ordinance no. 68/2007 on the environmental liability related to the prevention and mitigation of environmental damage (OG. Part 1 no. 446 of 29 June 2007).

¹⁸ Daniela Marinescu, *Tratat de dreptul mediului*, Ed. Universul Juridic, Bucharest, 2010, p. 75.

¹⁹ See regarding the persons who can have active procedural status in the administrative litigation Cătălin-Silviu Săraaru, *Drept administrativ. Probleme fundamentale ale dreptului public*, Ed. C.H. Beck, Bucharest, 2016, p. 445-463; Verginia Vedinaș, *Drept administrativ*, Ed. Universul Juridic, Bucharest, 2022, p. 321.

²⁰ Decision of the High Court of Cassation and Justice of Romania no. 8 of March 2, 2020, <https://www.iccj.ro/2020/03/02/decizia-nr-8-din-2-martie-2020/> (14.05.2023).

²¹ For a comment on this decision see Cătălin-Silviu Săraaru, *Tratat de contencios administrativ*, Ed. Universul Juridic, Bucharest, 2022, p. 234, 235.

²² Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (OJ L 322, 16.12.2022).

on people and the environment. Additionally, reporting costs are supposed to be reduced medium to long term, by harmonizing the information to be provided.

The first companies will have to apply the new rules during the 2024 financial year, for reports published in 2025. Companies in scope are required to include sustainability information in their management report, subject to the mandatory limited assurance performed by an external assurance provider. Multinational companies may need to comply with multiple applicable reporting frameworks and understand differences in data requirements. An additional challenge shall be to obtain correct information on contractual relationships from entities within the supply chain.

Companies will have to report according to European Sustainability Reporting Standards (ESRS). The draft standards are developed by the EFRAG, (which was known before as the European Financial Reporting Advisory Group), an independent body bringing together various different stakeholders. The Commission should adopt the first set of standards by mid-2023, based on the draft standards published by EFRAG in November 2022.

CSRD also requires companies to perform an audit of the sustainability information they report. In this respect, there are a series of relevant aspects which have not been yet clarified:

i) Targets: in addition to disclosing information on various policies and initiatives, CSRD will require companies to set targets, select a baseline and report progress towards these targets.

ii) Quantity and methodology of information gathering and disclosure: information to be disclosed should contain forward-looking and retrospective information, while extending the scope with reference to the whole supply chain.

iii) Link with the EU Taxonomy: The ESRS includes the requirement to report in line with information set out by the Eu Taxonomy.

iv) Reporting in the management report: Mandatory disclosure of sustainability information in the management report will require reshaping the existing report structure to accommodate new and different types of information (by significant amendment of national corporate legislations in this respect).

4. EU Taxonomy

In order to meet the EU's climate and energy targets for 2030 and reach the objectives of the European green objectives, it was considered that investments should be directed towards sustainable projects and activities. The EU Taxonomy is a green classification system that aims to translate the EU's climate and environmental objectives into criteria for specific economic activities for investment purposes.

Its initiators view it as a transparency tool that will introduce mandatory disclosure obligations on some companies and investors, requiring them to disclose their share of Taxonomy-aligned activities. This disclosure of the proportion of Taxonomy-aligned activities will allow the comparison of companies and investment portfolios and can guide market participants in their investment decisions. If they wish, companies can reliably use the EU Taxonomy to plan their climate and environmental transition and raise finance for this transition, while financial companies can use the EU Taxonomy to design credible green financial products.

At the first glance, the EU Taxonomy is not a mandatory list of economic activities for investors to invest in, nor does it set mandatory requirements on environmental performance for companies or for financial products. Investors appear free to choose what to invest in, although it is expected that over time it will be an enabler of change and encourage a transition towards sustainability.

Economic activities that are not recognized by the EU Taxonomy delegated acts as substantially contributing to one of the EU's climate and environmental objectives are not necessarily environmentally harmful or unsustainable. And delegated acts shall be periodically supplemented and amended, not being clear at this moment what are all the activities that can make a substantial contribution to the environmental objectives.

The Taxonomy Regulation²³ entered into force on 12 July 2020. It establishes six environmental objectives: (i) climate change mitigation, (ii) climate change adaptation, (iii) sustainable use and protection of water and marine resources, (iv) transition to a circular economy, (v) pollution prevention and control and (vi) the protection and restoration of biodiversity and ecosystems.

The Taxonomy Regulation sets out four conditions that an economic activity has to meet to be recognized as green or environmentally sustainable: (a) to make a substantial contribution to at least one environmental objective; (b) to do no significant harm to any other environmental objective; (c) to complying with minimum social safeguards and (d) to comply with the technical screening criteria set out by the Commission.

Subsequent delegated acts will establish clear criteria for activities to define what it means to make a substantial contribution and what it means to do no significant harm.

Also, the technical screening criteria are currently under development in delegated acts. For each analyzed economic activity, the technical screening criteria shall specify the environmental performance requirements that ensure the activity makes a substantial contribution to the environmental objective in question and does not significantly harm the other environmental objectives.

The technical screening criteria for ‘*substantial contribution*’ to an environmental objective is meant to determine that an economic activity has a substantial positive environmental impact or substantially reduces negative impacts on the environment. The technical screening criteria for ‘*do no significant harm*’ is meant to determine that the economic activity does not impede on the other environmental objectives from being reached.

The EU Taxonomy explicitly recognizes two specific types of activities that also make a substantial contribution. First, for the climate change mitigation objective, it recognizes ‘*transitional activities*’. These are activities for which low-carbon technical and economical alternatives are not yet available and that have greenhouse gas emission levels that correspond to the best performance in the sector or industry. There are two conditions: (i) they should not hamper the development and deployment of low-carbon alternatives and (ii) they should not lead to a lock-in of carbon-intensive assets, considering the economic lifetime of those assets.

The second specific type of activity recognized as making a substantial contribution is referred to as ‘*enabling activities*’. These are activities that directly enable a substantial contribution to an environmental objective, such as manufacturing of renewable energy technologies, installation of energy efficiency equipment in buildings etc.

The application has been delayed several times because delegated acts have not been yet all approved and therefore, it is hard to estimate the extent of conditions and applicability, in order to evaluate the impact on national legislation and the extent of legislative changes it will require.

5. Proposed Corporate Sustainability Due Diligence Directive (CSDDD)

The European Commission, via its proposed Corporate Sustainability Due Diligence Directive (CSDDD)²⁴, has put forward a legislative framework meant to oblige companies, including those in financial services, to demonstrate what action they are taking to protect the environment and human rights. When adopted, the CSDDD will introduce requirements for companies to (i) identify and prevent, (ii) bring to an end or (iii) mitigate the actual and potential impacts of their activities on the environment and on human rights abuses. Companies will thus be obliged to conduct due diligences not just on their activities, but also on the activities of their subsidiaries and other entities in their value chains with which they have direct and indirect established business relationships. They will need to develop and implement ‘prevention action plans’, obtain contractual assurances from their direct business partners that they will comply with the plans, and subsequently verify compliance.

²³ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088 (OJ L 198, 22.6.2020).

²⁴ The proposal is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071> (14.05.2023).

The European Commission adopted the proposal in February 2022 and, in November 2022, the European Council adopted its negotiating (general approach) on the Proposal. While there is commitment to introduce obligations on companies to undertake human rights and environmental due diligence, there are a number of significant points of discussion, in particular in relation to directors' duties and to whether the obligations should apply to financial institutions, which are delaying the adoption of the CSDDD. There are some important aspects currently under review.

(a) *Directors' duties.* The Council proposes the removal of provisions related to directors' duties, including the requirement to link directors' variable remuneration to the long-term interest and sustainability of the company, and the imposition of a duty on directors to establish and oversee the due diligence actions of their companies.

(b) *Civil liability.* The Council has sought to clarify the circumstances where a company could be held liable under the CSDDD, specifying that victims of human rights and/or environmental adverse impacts would be entitled to full compensation if certain conditions were met.

The European Parliament must now determine its initial negotiating position on the CSDDD, which is expected in the new few months. Then, the two will negotiate to arrive at a final and agreed text, after which Member States will have two years to transpose the CSDDD into their domestic legislation.

Some EU countries have already taken unilateral action. In 2017, France introduced the French Corporate Duty of Vigilance Law²⁵, the first regulatory intervention of this kind. It establishes a legal obligation for parent companies to identify and prevent adverse human rights and environmental impacts resulting from their own activities, from activities of companies they control, and from activities of their subcontractors and suppliers, with whom they have an established commercial relationship. Interested parties can hold companies accountable, by requiring judicial authorities to order a company to establish, publish and implement a vigilance plan, or account for its absence. They can also make a company liability ask for compensation if the breach of the legal obligation has caused damages.

According to the German Supply Chain Due Diligence Act (LkSG)²⁶, companies are obliged to take measures to identify and prevent human rights and environmental risks and impacts in their business activities and supply chains. The German Act entered into force on 1 January 2023 for companies with more than 3,000 employees and it will enter into force on 1 January 2024 for those with more than 1,000 employees.

In the Netherlands, on 2 November 2022 several parties formally submitted an amended bill for the Responsible and Sustainable International Business Conduct Act. If passed, the bill would require large undertakings (as defined by the EU Accounting Directive) to implement due diligence processes to investigate, prevent, mitigate or terminate the potential and actual adverse impacts of their activities and those of their business relationships on human rights and the environment in countries outside the Netherlands.

It is expected that these obligations will be imposed through independent national legislation, as seen in France and Germany and through the national implementation of the CSDDD in due course. How this amalgamation of national and EU regulations will interact is currently unclear. Companies within the scope of various due diligence requirements will be required to develop systems and processes that ensure compliance with all requirements either national, either extraterritorial within or outside the EU. Even companies that are not required themselves to comply with European due diligence regulations, they may be part of the value chain of a company subject to those laws and as such, they are likely to be required to provide information and comply with certain standards in order that the other business can comply with its due diligence obligations. And this will increase the unclear extraterritorial application of such rules.

²⁵ Information is available here: <https://respect.international/loi-2017-399-du-27-mars-2017-relative-au-devoir-de-vigilance-des-societes-meres-et-des-entreprises-donneuses-dordre/> (14.05.2023).

²⁶ Information is available here: https://www.bafa.de/DE/Lieferketten/Multilinguales_Angebot/multilinguales_angebot_node.html (14.05.2023).

6. Conclusions. Future challenges

From the above presentation, it is rather clear that an important change will come regarding the manner in which the EU and Member States are looking at environmental requirements and obligations and especially, the objectives they seek. Because although we speak about reports, transparency towards interested parties/investors and transitions towards sustainable activities, we observe that in reality there are substantial obligations which shall be implemented and sanctioning methods directly or indirectly established.

Following the necessity to transpose the above-mentioned regulations and considering the existing institutions of Romanian law, we consider some legitimate questions in connection with their implementation:

- is the legislator going to supplement the current types of administrative acts in the field of environmental protection or shall allow a parallel reporting system, the first (the existing one) for the purpose of authorizing the activity of a company and the latter (described above) solely for the purpose of interested third-party information?

- are the competent environmental bodies going to analyze/evaluate themselves the reports made under CSRD, CSDDD and EU Taxonomy (please see the question above) and under which administrative procedure since financial statements are financial documents falling under the competence of the fiscal authorities? What would be the mechanism to partially evaluate an unilateral financial document submitted by a company, separating the other corporate, tax and employment law aspects? Taking into account the sanctions applied de facto by financial institutions and the other entities within the respective economic chain (i.e. the impossibility to finance, if required, the continuation of the activity and to continue the activity by the sale/acquisition of goods, rendering of services respectively etc.), shall we be in the presence of a competence delegation to the auditors of the respective reports and the financial institutions respectively?

- are the new environmental regulations going to supersede the rules set out by Law no. 31/1990 regarding the right/obligation of the management to maintain the confidentiality of certain affairs of a company (for example, to the extent it is a commercial secret, it provides a competitive advantage etc.)?

- given that financial statements are essentially sensitive corporate and financial documents, distributed on a need-to-know bases to shareholders, employees and competent authorities, how would the environmental statements, as audited by an authorized party, will be made available to interested parties? Will they be challenged and based on what grounds?

- considering the current US and EU trend on climate change litigation, shall we see a change in the practice of Romanian administrative and/or civil courts in terms of stakeholder litigation (by allowing NGOs to litigate against companies based on a legitimate public interest and not a legitimate private one)?

- considering the potential extraterritorial applicability of regulation for companies which have in their supply chain companies located outside of EU, what will be the procedure for settlement of disputes in this respect?

- given the complexity of environmental and climate change aspects, are specialized environmental/climate change courts law courts a requirement *de lege ferenda*?

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