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Nicolas de Sadeleer

The canalization of strict liability and the polluter-pays principle

Introduction

If the polluter pays principle is not applied to cover the costs of restoration of environmental damage, either the environment remains un-restored or the State, and ultimately the taxpayer, has to pay for it.[1] Therefore, the aim of this environmental principle is making the polluter liable for the damage he has caused. If polluters need to pay for damage caused, they will cut back pollution up to the point where the marginal cost of abatement exceeds the compensation avoided. Thus, environmental liability results in prevention of damage and in internalization of environmental costs.[2]

Strict liability has both advantages and disadvantages: on one hand, it presents the advantage that the victim may act against a single person who is easily identifiable without having to prove a fault or an ommission; on the other hand, it could be disadvantageous for the victim in cases where the designated operator is insolvent.[3] This raises the question as to the identification of the liable party.

[1] See N de Sadeleer, *Environmental Principles: from Political Slogans to Legal Rules*, 2nd ed. (Oxford, Oxford University Press) 32–83.

[2] The Rio Declaration treats the question of liability in a separate principle from the PPP.

[3] Strict liability does not amount to absolute liability. In effect, under strict liability regime

It goes without saying that the 'polluter' should be the person who causes pollution. However, the task to determine the person liable for that damage may prove highly complex, given the multiplication of potentially liable parties. For instance, in the case of a contaminated site, it is not always easy to identify who has actually caused pollution. The operator of the installation or his representatives, the manufacturer of the defective product, the owner of the property may be liable for pollution. Is it the person who possesses technical knowledge, or resources, or operational control of the activity at the time when the damage occurs? This question becomes even more complex in the case of diffuse pollution, where multiple causes produce single effects and a single cause produces multiple effects.

Such snags can be avoided only by canalizing liability. The canalization mechanism is linked to the establishment of strict liability regimes. It also provides certainty as to how liability will be assigned. Canalizing liability on the producer or the operator also encourages the latter to improve safety measures or to choose more reliable operating systems. Canalization of liability therefore responds to the redistributive and preventive functions of the polluter pays principle.

Like Directive 85/374/EEC concerning liability for defective products, which considers the producer liable,[4] several international[5] and national environmental liability regimes stress that the person who has the greatest degree of control over the source of the pollution should be liable. Those regimes usually tend to canalize liability towards the operator of the dangerous activity: the operator of the nuclear installation, or the owner of the ship since in principle he has both knowledge of and control over its installation. What is more, the strict liability envisioned by the International Law

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exonerating justifications (Act of God, fortuitous event, *force majeure,* etc.) act as limitations which may exonerate the polluter from liability.

[4] Art 1 of Directive 85/374/EEC concerning liability for defective products traces liability for damage caused by a product back to its producer, as well as its importer and, under certain circumstances, their suppliers.

[5] According to Art II of the 1969 Brussels Convention on Civil Liability for Oil Pollution Damage, the liable party is the owner of the ship. According to Art s 6(1) and 7 of the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (not in force), the liable party is the operator in respect of a dangerous activity. In the area of accidental pollution arising from dangerous installations the OECD designates the operator as the polluter. Under the 2000 Basel Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (not in force) the person notifying the transfer and the disposer taking possession of the hazardous wastes is liable for damage. The 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy and the Brussels Supplementary Convention provide for three tiers of liability: the operator of the nuclear plant tier, the installation state tier, and the international tier.

Commission in the case of transboundary harm arising out of hazardous activities primarily attaches to the operator of a hazardous activity.[6]

This article addresses the issue of the canalisation of the polluter's liability under the Waste Framework directive and the environmental liability directive. The focus is on the way in which the Court of justice of the EU (hereafter the CJEU) has been adjudicating this issue.

1. Canalizing the liability under the Waste Framework Directive

Can oil-contaminated soil be qualified as waste when it has been excavated and is awaiting recovery? What happens if the contaminated soil has not yet been excavated and treated? These questions have plagued the doctrine for years. Despite the fact that almost 2.5 million sites are deemed to be contaminated by pollutants, the EU lawmaker did not succeed to adopt any harmonisation measures to deal with this issue. The question arose whether unexcavated contaminated soils fall within the scope of EU waste management measures.

Since the nineties, several Member States had adopted specific regulatory regimes with a view to cleaning up their contaminated soils. Against this background, domestic case law has highlighted a problem of compatibility between this new regulatory approach and waste management. For instance, the French Council of State ruled that unexcavated soil polluted by hydrocarbons had to be qualified as waste when the substances could not be separated from the soil and managed other than through a decontamination operation[7].

In as much as waste law has been subject to harmonization since the middle of the 70s, State authorities argued that contaminated soils were deemed to be waste within the meaning of the EU waste legislation.

In *van de Walle* and *Mesquer*, the CJEU applied the polluter pays principle in these two waste liability cases relating to the clean-up of sites polluted by hydrocarbons. It ought to be remembered that in the case of a contaminated site, it is not always easy to identify who has actually caused pollution. The person in charge of the installation, the manufacturer of the defective plant,

[6] See ILC's Principles on Allocation of Loss, Principle 4(2). This principle aims to ensure that victims suffering harm as a result of an incident involving a hazardous activity obtain prompt and adequate compensation.

[7] C.E.fr., 18 juillet 2011, n° 339.452.

the owner of the property and the licence-holder or his representatives may be liable for pollution.

The CJEU was asked to decide whether the producers of oil products from which the waste came might be held liable for the costs of cleaning up the environmental damages resulting from accidental oil spills. In particular, the CJEU was called on, with respect to the financial burden of the waste disposal costs, to determine the scope of Article 15 of the former Waste Framework Directive 75/442/EC (hereafter WFD) that provided that, in accordance with the 'polluter pays' principle, 'the holder' of the waste (first indent) or 'the previous holders or the producer of the product from which the waste came' (second indent) must bear the costs of disposing the waste. It should be pointed out that under the former WFD the concept of 'holder' (first indent) embraced both 'the producer of waste' and 'the natural or legal person who is in possession of it'.

These two judgments enhance the enforceability of the principle when it has been fleshed out into specific EU obligations.

In *van de Walle*, the CJEU was asked to decide whether the WFD's obligations were applicable to a petroleum company which produces hydrocarbons and sells them to a manager operating one of its service stations under a contract of independent management excluding any relationship of subordination to the company.[8] In order to answer the question whether Texaco could be deemed holder of the waste, the CJEU emphasised the need to interpret Article 15 of the Directive in the light of the polluter pays principle.

At the outset, the Court stressed that the WFD draws a dividing line between, on one hand, 'practical recovery or disposal operations, which it makes the responsibility of any 'holder of waste', whether producer or possessor', and on the other hand, 'the financial burden of those operations, which, in accordance with the principle of polluter pays, it imposes on the persons who cause the waste, whether they are holders or former holders of the waste or even producers of the product from which the waste came.'[9]

As a matter of principle, the financial burden must be borne by the service station's manager 'who, for the purpose of his operations, had them in stock when they became waste and who may therefore be considered to be the person who 'produced' them within the meaning of Article 1(b) of Directive'.[10] Nevertheless, an oil company selling hydrocarbons to the manager

[8] Case C-1/03 *van de Walle* [2004] ECR I- 7613. See casenotes by N. de Sadeleer (2008)3 *CMLR* 16; McIntyre (2005)17 *JEL* 109.
[9] Case C-1/03, para. 58.
[10] Case C-1/03, para. 59.

of a petrol station can, in certain circumstances, be considered the holder of the land contaminated by hydrocarbons that accidentally leak from the station's storage tanks, even where the petrol company does not own or 'hold' them.[11] In other words, the 'polluter' should be the person who causes waste and thereby pollution. The CJEU left to the national court to determine whether the poor condition of the service station's storage facilities and the leak of hydrocarbons could be attributed to a disregard of contractual obligations by the petroleum undertaking which supplies that service station. The channelling of liability is thus foreclosed if the producer of the products from which the waste came can prove that it has acted in accordance with its contractual obligations.

Oil spills at sea raise interesting liability issues. In *Mesquer*, in adjudicating the issue of whether French oil companies could be charged for the cleaning up of heavy fuel that was accidentally discarded by a tanker operated by a Maltese company, the CJEU has ensured a correct application of the 'polluter pays' principle, which may not be emasculated by limitation or exemption systems resulting from international agreements to which the EU is not party.[12]

What deserves attention here is that the international agreements applicable to the compensation for damage caused by the discharge of hydrocarbons are, at first glance, far more favourable to oil companies than to victims. This is because, on the one hand, they channel liability to the oil tanker owner,[13] which has the effect of paralysing any compensation claims for third parties where the owner is insolvent. On the other hand, even if this limitation of liability is countered by the intervention of a compensation fund such as FIPOL, this intervention remains limited.[14] The limitation can as such result in neither the ship-owner nor FIPOL bearing any part of the costs of waste disposal resulting from damage due to pollution by hydrocarbons at sea. This leads to the financial burden being placed on the general public, which seems contrary to the logic of the polluter pays principle. In sharp contrast to these international agreements, the WFD obligation regarding waste disposal costs was not subject to any limitation.

[11] Case C-1/03, para. 60.

[12] Case C-188/07 *Mesquer* [2009] ECR I-4501. See casenote by N. de Sadeleer (2009)21: 2 *JEL* 299.

[13] International Convention on Civil Liability for Oil Pollution Damage, Art. III. In channelling the liability exclusively to the owner of the oil tanker, the Convention insulates the seller-charterer from civil liability.

[14] International Oil Pollution Compensation Fund.

Both Advocate general Kokott and the CJEU reached the conclusion that, even if it was in principle the ship-owner who held the waste[15], the producer of heavy fuel oil as well as the seller and the oil tanker charterer could be held liable for waste disposal costs, on the grounds that they could be deemed to have contributed in some way to the causal chain which lead to the shipwreck at the origin of the accidental spillage.[16] Indeed, that financial obligation is thus imposed on the 'previous holders' or the 'producer of the product from which the waste came' 'because of their contribution to the creation of the waste and, in certain cases, to the consequent risk of pollution'.[17] As a result, the liability for damage caused by waste disposal cannot only be channelled to the sole owner of the vessel, who generally speaking is more often insolvent than the companies chartering said ship. On the contrary, it will be possible in accordance with the polluter pays principle to regard the seller-charterer as a previous holder of the waste.[18] That said, the producer may only be made liable, in accordance with the polluter pays principle, insofar as the latter has 'contributed by his conduct to the risk that the pollution caused by the shipwreck will occur'.[19]

In shifting the channelling of the liability, the CJEU was nonetheless facing opposing norms with, on the one hand, international agreements limiting the liability of oil companies and, on the other hand, Article 15 of the former Waste Framework Directive, which does not provide for any limitation on the liability of the waste holder.[20] The Court considered that Article 15 WFD did not prohibit Member States, in accordance with the two international agreements, from laying down limitations and exemptions of liability in favour of the ship-owner or of the charterer.[21] There was therefore no incompatibility between EU law and international law.

However, taking into account that the cost of disposal of the waste may not be borne by FIPOL, or cannot be borne because the ceiling for compen-

[15] Case C-188/07, para. 74.

[16] Opinion AG Kokott in Case C-188/07, para. 147; Case C-188/07 *Mesquer*, para. 78.

[17] Case C-188/07, para. 77.

[18] Case C-188/07, para. 78.

[19] Case C-188/07, para. 82. The criterion of 'contribution to the risk that the pollution might occur' is somewhat lower than the threshold to be met in *van de Walle*, the direct causal link or the negligent behaviour of the operator'.

[20] However, by not concluding these international instruments, the EU was not bound by obligations thereof, whereas the majority of Member States, including France, were parties to them. See para. 85.

[21] Case C-188/07 *Mesquer*, para. 81. The fact that these limitations and exemptions stemming from international law would have the effect of passing on to the general public a substantial part of the environmental liability was, according to AG Kokott, in accordance with the 'polluter pays' principle (Opinion, para. 142).

sation for that accident has been reached, or 'that, in accordance with the limitations and/or exemptions of liability laid down, the national law of a Member State, …, prevents that cost from being borne by the ship-owner and/or the charterer' the Court reached the conclusion that such a national law will have to be interpreted in such a way as to ensure that the full costs are borne by the producer.[22]

Practically speaking, if the damage caused by the oil spill exceeds the ceiling for compensation provided for under the international regime, the Member State is called on to give precedence to the EU waste liability scheme interpreted in the light of the polluter pays principle as to make sure that the costs are borne by the producer of the oil from which the waste came. As a result, Member States cannot limit the scope of their EU secondary law obligations interpreted in the light of the polluter pays principle, even though they will have to disregard their international obligations. In short, EU waste law and hence the polluter pays principle takes precedence over international law.

In reaction to the willingness of the CJEU to channel the liability towards the oil producers provided that their conduct has given rise to the waste has been somewhat softened under the new WFD of 2008.[23] Anyway, Member States may still under the new regime channel liability along the production chain of waste.

Since 2008, Member States have the possibility, by virtue of WFD 2008/98/EC, to exclude from the scope of the waste policy the two following cases:

- "land (in situ) including unexcavated contaminated soil and buildings permanently connected with land" (Article 2(1) b)).
- "uncontaminated soil and other naturally occurring material excavated in the course of construction activities where it is certain that the material will be used for the purposes of construction in its natural state on the site from which it was excavated" (Article 2(1) c)).

[22] Case C-188/07 *Mesquer*, para. 82. In so doing, the Court of justice departed somewhat abruptly from the Opinion of AG Kokott in considering that a correct transposition of Article 15 of the directive implied that national law must ensure that further costs 'be borne by the producer of the product from which the waste thus spread came'.

[23] Under Article 14 (1) of the new WFD 2008/98/EC, 'in accordance with the polluter-pays principle, the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders' and not any more by 'the previous holders or the producer of the product from which the waste came'. However, pursuant to the second paragraph of that article, 'Member States may decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came and that the distributors of such product may share these costs'.

With respect to the first exclusion (Article 2(1) b)), one has to bear in mind that as soon as contaminated soils are excavated, they fall within the scope of waste law. Soil decontamination is a waste management operation, whether the soil is disposed of or recovered. However, as long as it is not excavated, soil, regardless of whether it is contaminated or not, does not fall within the scope of waste law, unless Member States decide, in accordance with Article 113 TFEU, to dispense with this exception.

The second exclusion (Article 2(1)(c)) is restrictive, in that authorities must ensure that 'the material will be used for the purposes of construction in its natural state on the site from which it was excavated'. By way of illustration, if, in the development of an industrial estate, soil is excavated from certain plots of land in order to fill in other parts of the site, this would not be covered by waste law. However, if the excavated soil is reused elsewhere, economic operators will not be able to invoke this exception. They are discarding waste. Finally, if the excavated soil intended for *in situ* reuse is mixed with other materials, the exception does not apply. For instance, the *Cour administrative d'appel de Marseille* ruled that asbestos rocks excavated during earthworks constituted movable property and, therefore, waste within the meaning of Article L 541-1 of the French Environmental Code as these rocks were to be abandoned by their holders.[24] They cannot be considered as residues of a production, transformation or use process. The following table provides a better picture of these different regimes.

Unexcavated contaminated soils	Optional exclusion
Excavated uncontaminated soils	Optional exclusion
Excavated contaminated soils	Waste management law applies

To conclude, by excluding contaminated land from the waste framework directive, the EU lawmaker wanted to water down the *Van de Walle* case law.

However, the national authorities are not obliged to exclude from the scope of their waste legislation contaminated soils. The ability of State authorities to maintain stricter regimes, pursuant to Article 193 TFEU, was confirmed by a judgment of 17 June 2015, handed down by the Belgian Court of Cassation in relation to Walloon legislation.[25] The Court ruled that the regional legislation was, as the parliamentary proceedings pointed out,

[24] Cour administrative d'appel de Marseille, 17 décembre 2009, *Association «U Levant » et Association «L'Erbaghju » c. Ministre de l'écologie,* 07MA00456, *R.J.E.,* 2010/4, p. 674.
[25] Article 4 (3) Walloon Waste Law of 27 June 1996.

only a partial transposition of Directive 2008/98/EC.[26] The legality of this choice was confirmed by the minimum harmonization of domestic waste legislation.

2. Canalizing the liability under the Environmental liability directive

This line of reasoning according to which environmental liability results in accordance with the principle of internalization of environmental costs found echo in the 2004/35/EC directive on environmental liability with regard to the prevention and remedying of environmental damage (hereafter ELD). Pursuant to Article 1, this directive is underpinned by the polluter pays principle.[27]

However, it must be noted that this directive does not establish a genuine liability regime given that, on one hand, compensation for private parties is expressly excluded[28] and, on the other, the directive straddles the divide between civil and administrative law. In *Agusta*, the CJEU held that a strict liability regime does not in itself run contrary to the polluter pays principle which applies to Directive 2004/35/EC.[29]

The polluter-pays principle cannot answer that question, though two approaches could be contemplated. Liability could be imposed either on the operator of the plant causing the damage (i) or, if the pollution does not originate from a specific operator, on the landowner or occupier of the land where the pollution occurred (ii).

(i) The operator

The primary importance afforded to the polluter pays principle in the ELD lies precisely in the fact that the Directive places operators and not the authorities under a duty both to prevent and to remedy environmental damage.[30] In *Agusta*, the CJEU held that a strict liability regime on opera-

[26] Cass. b., 17 juin 2015, n° P.14.1144.F/1.

[27] In addition, the preamble of that directive stresses that 'the prevention and remedying of environmental damage should be implemented through the furtherance of the "polluter-pays" principle' and that, according to this principle, the 'operator should bear the cost of the necessary preventive or remedial measures' (2nd and 18th recitals of the preamble).

[28] Articles 2(1) and 3.

[29] Case C-378/08, *Agusta* [2010], para. 70. See S. Casotta and C. Verdure, 'Recent Developments Regarding the EU Environmental Liability for Enterprises: Lessons Learned from Italy's Implementation of the "Raffinerie Mediterranee" Cases' (2012) *EEELR* 156–164.

[30] Cases C-379/08 and C-380/08 *ERG*, [2010] C:2010:126, para 75.

tors does not in itself run contrary to the polluter-pays principle.[31] Nonetheless, the Court expressed the view that in spite of the strict liability regime, operators are not required to bear the costs of remedial actions where they can prove that the environmental damage was caused by a third party and occurred despite the fact that appropriate safety measures were in place. In effect, 'it is not a consequence of the polluter-pays principle that operators must take on the burden of remedying pollution to which they have not contributed'.[32]

(ii) The landowner or occupier

For reasons of administrative expediency, the trend at national level has been towards requiring the owners rather than the former polluters to implement remedial measures and to bear the costs incurred. Indeed, in the absence of any 'polluter', the only person able to take remedial measures, apart from the public authorities, is the landowner or occupier.[33] However, innocent owners of a contaminated land are likely to invoke the polluter-pays principle as a shield against the remediation obligation imposed by the administration.

A distinction should be drawn between three scenarios.

First of all, the owner or occupier of land is considered to be an operator for the purposes of Article 6 ELD. According to that provision, he may have a 'decisive economic power' over the activity that is operated by the holder of the environmental license. This imposition of liability is thus consistent with the ELD and the polluter-pays principle.

Secondly, the owners of the contaminated land on which the pollution occurred are liable for the costs of remedial action because the original polluter cannot be found. In *Raffinerie Mediterranee* and *Fipa Group,* the CJEU ruled that

> 'operators are not required to bear the costs of remedial actions where they can prove that the environmental damage was caused by a third party and occurred despite the fact that appropriate safety measures were in place, since it is not a consequence of the 'polluter pays' principle that operators must take on the burden of remedying pollution to which they have not contributed'.[34]

[31] Case C-378/08 *Agusta* [2010] C:2010:126, para 70.
[32] Art 11(2).
[33] A Waite, 'The Quest for Environmental Law Equilibrium', in G Betlmen and D Brans (eds), *Environmental Liability in the EU* (Cameron & May, 2006) 83.
[34] Case C-378/08, *Raffinerie Mediterranee* [2010] C:2010:126, para 67; Case C-534/13 *Fipa Group* (n 148), paras 57–58.

As a result, it cannot be automatically assumed that the operator using a contaminated site is responsible for having caused the pollution. Indeed, the polluter pays principle does not allow the lawmaker to impose liability on an operator that has not caused the environmental damage.

Thirdly, the owner or occupier of land may be held liable irrespective of any causal link. However, as they will be held liable solely by virtue of their ownership or occupancy rights over that land, this approach departs from the polluter pays principle.[35] Nonetheless, such an outcome can be permissible as the Member States may adopt stricter measures pursuant to Article 16 ELD.[36] The liability on the innocent owner must nevertheless be grounded on the presumption of causation related to plausible evidence.[37] The shifting of the obligation to carry out remedial action from the operator to the owner or occupier with a view to encouraging the later to endorse a more preventive approach is not inconsistent with EU law. What is more, this residual liability must be approved on the account that it is impossible to apply the polluter pays principle, because the polluter cannot be identified.[38]

Conclusion

More or less unnoticed, the polluter pays principle has shifted from the public sphere to civil liability. Lately, there is an increasing tendency in international circles to ascribe a curative dimension to the polluter-pays principle. If this principle were not to be applied to cover the costs of restoration of environmental damage, either the environment would remain un-restored or the State, and ultimately the taxpayer, would have to pay for it. Therefore, a first objective is making the polluter liable for the damage he has caused. If polluters need to pay for damage caused, they will reduce pollution up to the point where the marginal cost of abatement exceeds the compensation avoided. Thus, environmental liability results in prevention of damage and in internalization of environmental costs. Nonetheless, a number of questions remain unanswered. Who is the liable party (the polluter, the producer, the waste holder, the consumer, etc.)? We provide here a comprehensive analysis of several cases – *Agusta*, *Raffinerie Mediterranee, van de Walle*

[35] Opinion AG Kokott in Case C-378/08 *Raffinerie Mediterranee*, para 98.

[36] In accordance with Art 193 TFEU, Art 16 ELD allows the Member States to adopt more sringent provisions 'in relation to the prevention and remedying of environmental damage'. See Case C-129/16, *TTKft*, [2017] C:2017:547, paras 56–61.

[37] AG Kokott Opinion in Case C-534/13 *Fipa Group*, para 35.

[38] F Goisis and L Stefani, 'The Polluter-Pays Principle and Site Ownership: the European jurisprudential Developments and the Italian Experience' 13 (2016) JEEPL 235.

and *Mesquer* – in which the CJEU has ruled that canalizing the liability to certain operators is not inconsistent with the polluter pays principle.