The Polluter-pays Principle in EU Law – Bold Case Law and Poor Harmonisation

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More than thirty-five years have passed since Recommendation 75/436/Euratom, ECSC, EEC of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters was adopted by the Commission, a soft law instrument that has been clarifying the ways in which the polluter-pays principle should be applied in the EU. Unfortunately, in spite of all efforts, environmental externalities are not yet fully integrated into prices of goods and services. Throughout his academic career, Hans Christian Bugge has been shedding light on the scope of this principle.[1] In this chapter, I wish to express my gratitude to Hans Christian Bugge's significant academic work regarding this principle as well to the support he offered me during my stay in Oslo as a Marie Curie Chair holder.

1 Genesis

Given a name that is almost a slogan and the seeming clarity of its underlying logic, the polluter-pays principle easily wins approval. Its main function is to internalize the social costs borne by the public authorities for pollution prevention and control. Accordingly, the principle serves as an economic rule according to which a portion of the profits accruing to polluters as the result of their activities must be returned to the public authorities responsible for inspecting, monitoring and controlling the pollution these activities produce. As it attaches a price to the right to pollute, the redistributive function has nevertheless attracted criticisms that are not entirely unfounded. Consequently, it is seen as accepting environmental degradation as inevitable, provided that the polluter pays: «I pay, therefore I pollute». For the polluting firm, however, a charge merely represents a supplementary tax. The result is to perpetuate pollution as long as charges cover the costs of the regulatory tasks relating to pollution control and abatement. Moreover, the purely distributive function may be subject to an even more fundamental criticism. To speak of a polluter is to evoke ecological damage, which in

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1 H.C. Bugge, *Forurensningsansvaret* (Oslo: Tano Aschehoug, 1999).

turn means that such damage has already taken place – that is, prevention is no longer of any use.

Of course, such criticisms must be nuanced.

First, polluter-pays and preventive principles would constitute two complementary aspects of a single reality. Put at the service of prevention, the polluter-pays principle should no longer be interpreted as allowing a polluter who pays to continue polluting with impunity. The true aim of the principle would henceforth be to institute a policy of pollution abatement by encouraging polluters to reduce their emissions instead of being content to pay charges. Indeed, the principle aims at correcting market failure: the costs of pollution should be reflected in the price of services and products and be borne by the polluters and not the society at large. Moreover, this would create an incentive for producers to place on the market environmentally friendly products.

Second, whatever the importance or quality of preventive or redistributive measures, the risk of environmental degradation remains. Indeed, setting emission thresholds or establishing funds necessarily leads to degradation of water, soil and air. One should therefore consider that civil liability could provide fertile ground for adding a new dimension to the principle: a curative function. If civil liability guarantees a form of redistribution *ex post*, it differs from the classical distributive function in that it is more individual than collective in character.

2 Recognition within EU law

The polluter-pays principle has gradually commanded recognition as one of the pillars of the EU's environment policy. It has successively been invoked to address distortion of competition, to prevent chronic pollution, and, finally, to justify the adoption of fiscal measures or strict liability regimes. The procedures for applying the principle were specified in Recommendation 75/436/Euratom, ECSC, EEC of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters, which broadly takes up the rules elaborated by the OECD. Subsequent to the Recommendation of 3 March 1975, the polluter-pays principle recurred in all subsequent Environmental Action Programmes and in the EC Guidelines relating to state aids for the protection of the environment.[2]

2 Information from the EC Commission: EC Guidelines 94/C 72/03 on State Aid for Environmental Protection, replaced by EC Guidelines 2001/C 37/03 on State Aid for Protection of the Environment.

Pursuant to Article 191(2) TFEU, «Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on … the polluter should pay». Even though there are various definitions of the polluter-pays principle in international environmental law, it has not been defined by the treaty framers. Broadly speaking, the lack of definition could be justified on the grounds that the implementation of this principle across a wide range of policies is rather contextual. The use of the indicative in paragraph 2 of Article 192 rather than the conditional confirms that such principles are binding: «Union policy on the environment … shall be based on …». In contrast to other rules of indeterminate content, the polluter-pays principle set out in the Article 191(2) TFEU is thus mandatory.[3]As a result, EU institutions have to abide by this principle. In other words, EU measures not complying with these principles are likely to be subject to judicial review, though courts leave to the institutions a rather broad margin for discretion, provided a number of formal conditions are met. In addition, as discussed below, Member States are obliged to apply these principles when carrying out action in the environment field that has been harmonized by secondary EU law.[4] However, in areas that have not been harmonized, given that the polluter-pays principle is addressed to EU institutions, it cannot constrain national authorities and is accordingly devoid of direct effect. As a result, Member State actions may not, in principle, be reviewed on the basis of this treaty principle.[5]

Despite the recognition of the principle under Article 192(2) TFEU, the TFEU in making public funds available for environmental protection departs from the logic of the internalisation of the externalities. First, the Cohesion Fund established under Article 177 TFEU co-finances environmental projects in the poorer Member States. Second, Article 192(5) TFEU provides for national public intervention in the form of temporary financial support where an act adopted under Article 192(1) TFEU involves costs deemed to be disproportionate.

The polluter-pays principle also appeared in secondary EC legislation throughout the 1970s and was expressly taken up in several waste management directives.[6]

3 G. Winter, «The legal nature of environmental principles in international, EC and German law», in Macrory, R. (ed.) *Principles of European Environmental Law* (Groeningen: Europa Law Publishing, 2004), 19–22 and following.

4 Case C-127/02 *Waddenzee* [2005] ECR I-6515, para. 44.

5 Case C-378/08, *Agusta* [2010], para. 46.

6 Several waste management directives recall that the principle must be respected when setting out economic instruments (Directive 75/439/EEC on the disposal of waste oils, Directive 94/62/EC on packaging and packaging waste).

In condemning a prohibition on the export of waste oils outside of France as incompatible with Article 34 TFEU, the ECJ rejected the economic argument invoked by the French authorities that an export ban was needed to avoid bankrupting recycling firms, since under the EC Waste Oils Directive, Member States «may, without placing restrictions on exports, grant to such undertakings 'indemnities' financed in accordance with the principle of 'polluter-pays'.»[7] However, EU directives dealing with atmospheric pollution, water protection, nature protection and noise do not expressly refer to the principle. Indeed, the Habitat Directive recognises that «the polluter-pays principle can have only limited application in the special case of nature conservation».[8]

We must now consider whether this principle is really capable of bringing about changes to two redistributive legal instruments: taxation (instrument of prevention *ex ante*) and civil liability (instrument of remediation *ex post*).

3 *Ex ante* application of the principle: environmental charges

3.1 introductory comments

The main function of the polluter-pays principle is to internalise the social costs borne by the public authorities for pollution prevention and control.[9] At this stage, the principle serves as an economic rule according to which a portion of the profits accruing to polluters as the result of their activities must be returned to the public authorities responsible for inspecting, monitoring and controlling the pollution these activities produce. It is generally recognised that the polluter-pays principle implies setting up a system of charges by which polluters help finance public policy to protect the environment.[10]

In obliging Member States to implement this environmental principle when carrying out pricing policy, several EU directives embrace this redistributive func-

7 Case C-172/82, *Inter-Huiles* [1983] ECR 555, para. 18.

8 Eleventh recital of the Preamble of the Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1996] L 206/1.

9 N. de Sadeleer, *Environmental Principles: from Political Slogans to Legal Rules* (Oxford: Oxford University Press, 2005), 35.

10 According to the terms of the 1975 Council Recommendation regarding cost allocation and action by public authorities on environmental matters, this is in fact the most appropriate instrument for carrying out the polluter-pays principle. The Commission Communication of 26 March 1997 on taxes, fees and environmental charges in the Single Market considers that «such levies could constitute an adequate means for implementing the polluter-pays principle, by including environmental costs in the price of goods and services» (COM(97) 9 final).

tion. Article 10 of Directive 1999/31/EC on the landfill of waste has given concrete expression to the principle by requiring that the cost of waste disposal include all operational costs, including financial guarantees and restoration of the site once it ceases to be used for disposal. By the same token, Article 9 of Directive 2000/60/EC establishing a framework for Community action in the field of water policy has also given concrete expression to the principle, by requiring that «Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs». In addition, Member States are required to ensure by 2010 that water-pricing policies provide adequate incentives for the efficient use of water resources, thereby contributing to the environmental objectives of this Directive.

As regard taxation, the polluter-pays principle throws up more questions than it solves.[11]

3.2 who should pay pollution charges?

Identifying the person who must pay pollution charges has given rise to a great deal of controversy, since generally more than one identifiable individual contributes to pollution. May the authority charge each person who has contributed to the harm, no matter how small their share, on the grounds of equity? Or, for the sake of efficiency, is it preferable to charge the person who is best placed to pay? With respect to the scope of Article 10 of Directive 1999/31/EC on the landfill of waste, the Court held in *Pontina Ambiente* that all the operating costs of operating a landfill must be borne by the holders of the waste deposited in the site for disposal.[12] Although nothing precludes a Member State from introducing a levy on waste to be paid by the landfill operator, it can do so only on condition that the fiscal provision in question is accompanied by measures to ensure that the levy is actually reimbursed by the holders of the waste «within a short time so as not to impose excessive operating costs on the operator on account of late payment» by those holders, thereby undermining the «polluter pays»-principle.[13]

3.3 how much must the polluter be charged?

By the same token, determining the basis of a charge has also sparked off controversies. According to the principle of proportionality, polluters must pay in proportion

11 N. de Sadeleer, *Environmental Principles*, above, 44–49.
12 Case C-172/08, *Pontina Ambiente* [2010], para. 37.
13 Case C-172/08, para. 38.

to the damage they cause. As a result, activities that are the most harmful to the environment should pay the highest charges. *Standley* is a textbook example of the fact that the polluter-pays principle is the expression of a general principle of EU law, the principle of proportionality. With regard to charges related to the protection of waters against pollution caused by nitrates from agricultural sources, which were exclusively paid by farmers, the Court was asked to rule on whether the Nitrates Directive infringes the polluter-pays principle laid down in Treaty law, on the grounds that farmers were being singled out to bear the cost of reducing the concentration of nitrates in waters to below the threshold of 50 mg/l even though agriculture is acknowledged to be only one source of nitrates, while no financial demands were being made upon other sources. Referring to the polluter-pays principle, the ECJ judged that:

> [T]he (Nitrates) Directive does not mean that farmers must take on burdens for the elimination of pollution to which they have not contributed; … the Member States are to take account of the other sources of pollution when implementing the Directive and, having regard to the circumstances, are not to impose on farmers costs of eliminating pollution that are unnecessary. Viewed in that light, the polluter-pays principle reflects the principle of proportionality …[14]

According to this case law, Member States cannot impose on farmers costs of eliminating pollution that are 'unnecessary': they must also take into account other sources of pollution.[15] Following that reasoning, the costs charged to some categories of economic agents arising from the designation of a protected area should not be superior to the costs of the pollution generated by those agents.[16] It follows that where the polluter is an industrial plant located upstream, it would run contrary to the principle to charge exclusively the farmers downstream. This demonstrates clearly how a principle laid down in the TFEU may influence the interpretation of an act of secondary legislation and consequently determine national administrative practices.

However, applying proportionality to charges in a rigorous manner may prove a relatively complex operation owing to the multiple parameters which must be taken into account – among them, the nature of the nuisance, the hazards it pre-

14 Case C-293/97, *Standley* [1999] ECR I-2603, paras. 51–52.

15 Para 52.

16 According to the Opinion of Advocate General Ph. Léger, the directive had to be interpreted as requiring Member States to impose on farmers only the cost of pollution for which they were responsible, and he explicitly added «to the exclusion of any other cost» (Opinion of 8 October 1998, Case C-293/97 [1999] ECR I-2603, para 98).

sents, the means available to remedy its harmful effects and the cost of meeting an environmental quality objective, including the administrative costs directly linked to carrying out anti-pollution measures. Put it simply, flexibility is needed in applying the principle. In this respect, *Futura Immobiliare* is illustrative of the ways in which the tax basis has to be calculated in accordance with the principle. The Court was asked to decide whether waste management charges could be calculated on the basis of the economic activity or the surface area of the undertaking instead of the amount of waste produced and collected. It held that the principle did not preclude the Member States from varying the contribution of each category of tax payers «in accordance with their respective capacities to produce urban waste».[17] Accordingly, some categories of undertakings (hotels) can be treated less favourably than households provided that this distinction «is based on objective criteria … such as their waste-production capacity or the nature of the waste produced».[18] As a result, national authorities are endowed with «broad discretion» when determining the manner in which an environmental charge must be calculated.[19]

Last, in applying charges which are distinctly higher than the costs they are intended to cover, national authorities may be tempted to penalise undesirable behaviour. Though these charges are incentive enough to oblige the consumers to change their behaviours, are they consistent with EU treaty law?

3.4 allocation of charge revenues

Allocating the revenue from charges also gives rise to a number of questions. The EU directives and recommendations do not indicate whether the sums collected should be set aside in a special fund for financing environmental policy or if they should be paid into the general State budget. The redistributive function generally assigned to charges argues in favour of the first option. Since a financial transfer from polluters to the public authorities is intended to spare the community from having to assume environmental liability, the proceeds of charges should primarily be allocated to the tasks of prevention, control, monitoring and clean-up carried out by public authorities. In the case where charge revenue exceeds total expenditure, Recommendation 75/432 says that «the surplus should preferably be used by each government for its

17 Case C-254/08, *Futura Immobiliare* [2009], para. 52.
18 Case C-254/08, para. 54.
19 Case C-254/08, para. 55.

national environmental policies.» Allocating charge revenues to a dedicated fund does not, however, conform to the principle of universality, according to which tax revenues should not be used for specific expenditure.

The question also arises whether the public authorities may assign part of the charges back to the polluters themselves. Recommendation 75/432 authorises such mechanisms under certain conditions. Strictly applied, financial intervention by Member States in support of certain private investments should not be considered contrary to the polluter-pays principle. Methods for Member State financing have, moreover, been specified in several European Commission Communications.

4 *Ex post* application of the principle: civil liability

4.1 introductory comments

More or less unnoticed, the polluter-pays principle has shifted from the public sphere to civil liability.[20] Indeed, there is an increasing tendency in international circles to ascribe a curative dimension to the polluter-pays principle.[21]

Accordingly, environmental liability has been considered as a way of implementing the polluter-pays principle.[22] If this principle were not to be applied to cover the costs of restoration of environmental damage, either the environment would remains unrestored 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 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. Nonetheless, a number of questions remain unanswered. Who is the liable party (the polluter)? Which damage or type of pollution should

20 As to the scope of that environmental principle, see N. de Sadeleer, *Environmental Principles: from Political Slogans to Legal Rules* (Oxford: Oxford University Press, 2005) 21–60; and «Polluter Pays, Precautionary Principles and Liability», in G. Betlem and E. Brans (eds.), *Environmental Liability in the EU* (Cambridge: Cameron & May, 2006), 89–102.

21 In a 1991 Recommendation on the Use of Economic Instruments in Environment Policy, the OECD Council admitted that a «sustainable and economically efficient development of environmental resources» required internalizing the costs of preventing and controlling pollution as well as of the damage itself (C(90) 177 (final), OECD, 1991). Similarly, the preamble to the 1993 Lugano Convention on civil liability for damage resulting from activities dangerous to the environment (not in force) «has regard to the desirability of providing for strict liability in this field, taking into account the «polluter-pays» principle».

22 COM(2000) 66 final, 9 February 2000.

he compensate? To which extent should he pay? We provide here a comprehensive analysis of three cases – *Agusta*, *van de Walle* and *Mesquer* – in which the Court has been asked to answer some of these questions.

4.2 environmental liability directive

This line of reasoning according to which environmental liability results in accordance with the principle in internalization of environmental costs found an echo in the 2004/35/EC directive on environmental liability with regard to the prevention and remedying of environmental damage. Pursuant to Article 1, this directive is underpinned by the «polluter-pays» principle.[23] 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,[24] and on the other, the directive straddles the divide between civil and administrative law.[25] In *Agusta*, the ECJ held that a strict liability regime does not in itself run contrary to the polluter-pays principle which applies to Directive 2004/35/EC.[26] Nonetheless, reasoning by analogy with *Standley,* the Court expressed the view that in spite of the strict liability regime, operators subject to the liability regime 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».[27] In other words, the strict liability regime does not preclude the demonstration of the link of causation.

4.3 waste framework directive

Besides, the ECJ has also been applying the principle in two waste liability cases. In both *van de Walle* and *Mesquer*, the Court has been asked to rule on whether the pro-

23 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).

24 Articles 2(1) and 3.

25 N. de Sadeleer, «La directive 2004/35/CE relative à la responsabilité environnementale : avancée ou recul pour le droit de l'environnement des Etats membres?» in B. Dubuisson et G. Viney (eds.), *Les responsabilités environnementales (*Brussels, Paris: Bruylant, L.G.D.J., 2005), 732.

26 Case C-378/08, *Agusta* [2010], para. 70.

27 Case C-378/08, para. 67.

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

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, the owner of the property and the licence-holder or his representatives, may be liable for pollution. This question becomes even more complex in the case of diffuse pollution, where multiple causes produce single effects and single causes produce multiple effects. In *van de Walle*, the Court was asked to decide whether the Waste Framework Directive'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.[28] It should be pointed out that under the former Waste Framework Directive the concept of «holder» embraced both «the producer of waste» and «the natural or legal person who is in possession of it». In order to answer the question whether Texaco could be deemed holder of the waste, the ECJ emphasised the importance of Article 15 of the directive, according to which in accordance with the polluter-pays principle, the operator must be the one who bears the cost of disposing of waste.

It follows that the directive 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.»[29]

As a matter of principle, it is 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».[30] Nevertheless, the Court took the view that an oil company selling hydrocarbons to the manager of a petrol station can, in certain circumstances, be

28 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. In reaction to this judgment, the EU lawmaker explicitly excluded land and unexcavated contaminated soil from the scope of the new Waste Framework Directive (Article (2)(1)(b) Directive 2008/98/EC).

29 Case C-1/03, para. 58.

30 Case C-1/03, para. 59.

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 them.[31] In other words, the «polluter» should be the person who causes waste and thereby pollution. The ECJ 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.

In *Mesquer*, in adjudicating the issue of whether oil companies could be charged for the cleaning up of heavy fuel that was accidentally discarded by a tanker, the ECJ has been ensuring 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.[32] 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,[33] which has the effect of paralysing any compensation claims for third parties. On the other hand, even if this limitation of liability is countered by the intervention of a compensation fund, this intervention remains limited.[34] The limitation can as such result in neither the shipowner nor the International Fund 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, with respect to the financial burden of the waste disposal costs, Article 15 of the former Waste Framework Directive 75/442/EC 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 cost of disposing the waste. In Mesquer, both Advocate General Kokott and the ECJ reached the conclusion that, even if it was in principle the shipowner who held the waste,[35] 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

31 Case C-1/03, para. 60.
32 Case C-188/07 *Mesquer* [2009] ECR I-4501. See casenote by N. de Sadeleer (2009)21/2 *JEL* 299.
33 International Convention on Civil Liability for Oil Pollution Damage.
34 International Oil Pollution Compensation Fund.
35 Case C-188/07, para. 74.

contributed in some way to the causal chain which led to the shipwreck at the origin of the accidental spillage.[36] 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»[37] 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.[38] 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».[39]

In shifting the channelling of the liability, the ECJ was nonetheless surrounded by 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.[40] The ECJ considered that Article 15 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.[41] There was therefore no incompatibility between EC law and international law. This critical paragraph of the judgment is worth quoting at length.

> … [I]f it happens that the cost of disposal of the waste produced by an accidental spillage of hydrocarbons at sea is not borne by that fund, or cannot be borne because the ceiling for compensation for that accident has been reached, and that,

36 Opinion, para. 147; judgment, para. 78.

37 Case C-188/07, para. 77.

38 Case C-188/07, para. 78.

39 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».

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

41 Case C-188/07, 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 Advocate General Kokott, in accordance with the «polluter-pays» principle (Opinion, para. 142).

> in accordance with the limitations and/or exemptions of liability laid down, the national law of a Member State, including the law derived from international agreements, prevents that cost from being borne by the ship-owner and/or the charterer, even though they are to be regarded as «holders» within the meaning of Article 1(c) of Directive 75/442, such a national law will then, in order to ensure that Article 15 of that directive is correctly transposed, have to make provision for that cost to be borne by the producer of the product from which the waste thus spread came.[42]

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 environmental principles, even though they will have to disregard their international obligations.

The willingness of the Court in these two cases to channel the liability towards the oil producers provided that their conduct has given rise to the waste must be approved for the following reasons. First, for reasons of economic efficiency and administrative simplicity, the law need not necessarily adhere to reality, and it is sometimes preferable to apply the qualification of polluter or waste holder to a single person rather than a number of people.[43] For instance, Recommendation 75/436 regarding cost allocation and action by public authorities on environmental matters provides that the costs of pollution could be charged «at the point at which the number of economic operators is least and control is easiest …». Consequently, the polluter may be the agent who plays a determining role in producing the pollution rather than the person actually causing the pollution (for example, the producer of

42 Case C-188/07, para. 82. In so doing, the ECJ departed somewhat abruptly from the Opinion of the Advocate General 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».

43 N. de Sadeleer, *Environmental Principles* (cited supra note 9), 41–42.

pesticides rather than the farm worker).[44] Second, in shifting the channelling of the liability towards the most solvent party – the oil producing company or the seller-charterer – the Court ensures that the cleanup of the oil spills would take place. Third, given that the liability is not channelled towards the least solvent party – the holder of the waste – all the parties involved in the chain of operations are enticed to monitor closely their respective activities.

5 Concluding observations

Given a name that is almost a slogan and the seeming clarity of its underlying logic, the polluter-pays principle easily wins approval. It has an important role to play in furthering environment law at the international, EC and national levels. The principle answers to an economic logic, and its success in the field of environmental taxation is thus in any case assured.

Nonetheless, a basic ambiguity remains inherent in the polluter-pays principle. On the one hand, it appears essential for the implementation of a preventive environmental protection policy, by making it possible to obtain the funds needed to carry out that policy and, where necessary, modifying the behaviour of those being administered. It can even require polluters to fully compensate public authorities for damages they may have caused. On the other hand, the principle contains neo-liberal overtones that appear to countenance the idea that the right to pollute can be purchased for the monetary equivalent of the environmental cost sustained.

In addition, the principle's outlines remain singularly difficult to trace at the legal level, despite the simplicity of its message. The more one attempts to refine its definition, the more elusive the principle becomes. The polluter cannot be pinpointed, because any act of pollution is the result of the act of production – the creator of added value – as well as of final consumption. And the principle slips even further from our grasp as pollution becomes increasingly diffuse and historic in nature, rather than clearly identifiable and contemporaneous with the damage produced.

Nevertheless, the principle's vagueness, which is considerable in relation to environmental taxation and even more so in relation to civil liability, should not lead us

44 The fact that the hydrocarbons were accidentally spilled does not preclude that there is no obligation to decontaminate the land in the light of the polluter-pays principle. Indeed, the OECD Recommendation of 5 July 1989 on the Application of the Polluter-Pays Principle to Accidental Pollution confirms the intention to apply the principle to accidental as well as chronic pollution and to thereby require potential polluters to contribute financially to preventive measures adopted by public authorities.

to condemn it. Rather, it is up to legal doctrine to progressively decipher new case law developments with the aim of adding the finishing touches that will clarify the definition and scope of the principle, as well as to propose changes to the traditional positive solutions in its light.