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Review article

THE 'POLLUTER PAYS' PRINCIPLE: THE CROATIAN EXPERIENCE

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ABSTRACT

The 'polluter pays' principle (PPP) is one of the four tenets of the European Union's (EU) environmental policy. Where the PPP is successfully applied, the polluter bears the cost of pollution, including the cost of prevention, control, and removal of pollution, as well as the cost it causes for the society and the respective population. The PPP is to discourage polluters from environmental pollution by holding them liable for the pollution by means of having the polluters, and not the taxpayers, bear the remediation cost.

This paper juxtaposes the application of the PPP in the case law of the Court of Justice of the European Union and Croatian jurisprudence. Following an overview of the PPP in EU law, the paper briefly reviews two CJEU cases (Van de Walle and Erika) that concern the question of whether liability for incidental pollution is attachable to both the manufacturer of dangerous material and the polluter. Next, the paper examines the application of the PPP in the Croatian judiciary, where – contrary to the EU environmental policy – the remediation cost being borne by the taxpayers is seemingly the norm (especially where the polluter cannot bear the remediation cost due to insolvency).

Keywords: *European Union, environment protection, liability in damage, polluter pays principle*

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1. INTRODUCTION: THE 'POLLUTER PAYS' PRINCIPLE IN EUROPEAN UNION LAW

Within the European Union's (EU) legislative framework, environmental protection is regulated by directives and regulations (the former of which allow more flexibility to the EU Member States).[1] While the EU environmental legislation does not provide for any citizen rights, it does impose obligations on both natural and legal persons and restrictions on environmentally hazardous activities.[2] The EU environmental policy is laid down in Article 191(2) Treaty of the Functioning of the European Union (TFEU). The 'polluter pays' principle (PPP), one of its four tenets, means attaching financial liability for environmental damage to those who caused it.[3]

Of the number of EU directives that embed the PPP, this paper highlights the Environmental Liability Directive (ELD).[4] The ELD deals with "pure ecological damage" and it is based on the powers and duties of public authorities ("administrative approach") that are distinct from civil liability for damages.[5] Under the ELD, "environmental damage" is damage to protected species and natural habitats, water, and land. The operators[6] of dangerous (occupational) activities, as listed under Annex III of the ELD, are subject to strict environmental liability.[7] (Strict liability does not require proof of negligence or violation of regulatory requirements.) To all other operators, a fault-based standard is applied for biodiversity damage they cause.[8] Where applied, the PPP should ensure that polluters

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1 More on the effect of directives see Rodin, S.; Ćapeta, T., *Učinci direktiva Europske unije u nacionalnom pravu,* in: Rodin, S.; Ćapeta, T. (eds.). Znanje, Zagreb, 2008

2 Ofak, L., *Utjecaj pristupanja Hrvatske Europskoj uniji na upravnopravnu zaštitu okoliša*, in: Barbić, J. (ed.), Upravnopravna zaštita okoliša, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2015, p. 123

3 OECD: Liability for environmental damage in Eastern Europe, CAUCASUS and Central Asia (EECCA): implementation of good international practices, 2012, p. 11

4 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage OJ L 143 from 30 Apr 2004. The European Commission (EC) supplemented Directive 2004/35/EC in March 2021 with Guidelines for a common understanding of the term 'environmental damage' as defined in Article 2 of Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage (2021/C 118/01)

5 See: European Commission, *Environmental Liability*, [https://ec.europa.eu/environment/legal/liability/], Accessed 9 April 2022

6 Per Art. 2(6) of Directive 2004/35/EC, "operator" *means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorization for such an activity or the person registering or notifying such an activity.*

7 *Ibid.,* n. 5

8 OECD: Liability for environmental damage in Eastern Europe, CAUCASUS and Central Asia (EECCA): implementation of good international practices, 2012, p. 14

bear the cost of pollution, including the cost of pollution prevention, control, and removal, as well as the cost it causes for the society and the respective population. Polluters are thus incentivized to avoid environmental damage and held liable for the pollution that they cause. Moreover, under the PPP, it is the polluter, and not the taxpayer, who covers the cost of remediation.[9]

Regrettably, in practice, the costs of remediation are regularly absorbed by taxpayers. EU Member States are obligated to take all necessary measures to apply the PPP. Per Ofak, the largest percentage of actions taken by the European Commission (EC) against Member States for violation of EU law concern EU environmental law infringement.[10] Per the EC's 2016 REFIT Evaluation of the Environmental Liability Directive,[11] the ELD has remained relevant, and Member States have made progress in achieving its objectives. However, it also established that certain issues, either from a policy design or implementation standpoint, hindered the efficiency and effectiveness of the environmental liability regime. These issues included (1) the lack of structurable data on ELD implementation, (2) poor stakeholder awareness of the regime, (3) unclear key concepts and definitions, (4) scope limitations due to exceptions and defenses, and (5) absence of financial security in cases of insolvency.[12] To address these issues, the EC developed the Multi-Annual ELD Work Programme (MAWP) for 2017-2020[13] and for 2021-2024.[14] The said issues are intertwined with the ELD adoption process and content. Per Pozzo, as a result of compromise with Member States, the wording of the ELD is "diplomatic". The generic terminology and the not-overly-technical legal terms create a wide margin of discretion in the implementation and application of the ELD. On the flip side, this compromises the goal of the ELD: harmonization of the environmental damage liability. Already in Article 2 of the ELD, the extremely narrow definition of the damage under seems problematic.[15] Overall,

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9 See: European Court of Auditors: Special Report 12/2021: The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions, p. 4, [https://www.eca.europa.eu/hr/Pages/DocItem.aspx?did=58811], Accessed 9 April 2022

10 Ofak, L., *op. cit.,* note 2, p. 117

11 European Commission: *Evaluation of the Environmental Liability Directive*, Brussels, 14 April 2016, SWD (2016) 121 final

12 European court of Auditors: Special Report 12/2021: The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions, pp. 24-25, Available at: [https://www.eca.europa.eu/hr/Pages/DocItem.aspx?did=58811], Accessed 9 April 2022

13 Multi-Annual Eld Work Programme (Mawp) for the Period 2017-2020, [https://ec.europa.eu/environment/legal/liability/pdf/MAWP_2017_2020.pdf], Accessed 9 April 2022

14 Multi-Annual Eld Rolling Work Programme (Marwp) for the Period 2021-2024, [https://ec.europa.eu/info/sites/default/files/eld_mawp-approved.pdf], Accessed 9 April 2022

15 Cassota, S., *Environmental Damage Liability Problems in a Multilevel Context: The Case of the Environmental Liability Directive*, Alphen an den Rijn: Kluwer Law International, 2012, p. XIV

the concept of environmental liability the ELD introduced is patently narrow and has a limited effect. Still, Member States may build upon the minimum liability introduced by the ELD, i.e., mandate a higher level of environmental protection at national level.[16]

Per the European Court of Auditors (ECA),[17] the use of public funding to remediate pollution is justifiable and necessary only in cases of orphan pollution, i.e., when the entity responsible could not be identified or made liable (due to, e.g., insolvency).[18] According to the 2021 ECA Report, there are four orphan pollution remediation projects, worth 33 million EUR (which were brought about by an insolvent polluter).[19] The ECA recommended to the EC to (1) assess the scope for strengthening the integration of the PPP into environmental legislation, (2) consider reinforcing the application of the ELD, and (3) protect EU funds from being used to finance projects that should be funded by the polluter.[20]

2. THE 'POLLUTER PAYS' PRINCIPLE IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

Offering a sound understanding of the PPP is CJEU case law,[21] primarily in *Van de Walle*[22] and *Erika*.[23] In 1999 the oil tanker *Erika*, chartered by Total International Ltd, sank south-west of the Pointe de Penmarc'h (Finistère, France), spilling part of her cargo and oil at sea and causing pollution. The oil was being delivered to ENEL under a contract with Total and intended to be used as fuel for electricity production. To carry out the contract, Total Raffinage Distribution, sold the oil to Total International Ltd, which chartered the vessel Erika to carry it from France to Italy. In 2000, the Commune de Mesquer, a French municipality, brought

16 Hinteregger, M. (ed.), *Environmental liability and ecological damage in European law*, Cambridge University Press, Cambridge, 2008, p. 639

17 The European Court of Auditors contributes to improving EU financial management and acts as the independent guardian of the financial interests of the citizens of the Union. See more: [https://www.europarl.europa.eu/factsheets/en/sheet/14/the-court-of-auditors]

18 Report, *op. cit.*, n. 12, p. 36

19 *Ibid.,* p. 32

20 European Court of Auditors: *The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions*, 2021, p. 5, [https://www.eca.europa.eu/Lists/ECADocuments/SR21_12/SR_polluter_pays_principle_EN.pdf], Accessed 22 April 2022

21 For a comprehensive analysis of the two cases see: Bleeker, A., *Does the Polluter Pay? The Polluter-Pays Principle in the Case Law of the European Court of Justice,* European Energy and Environmental Law Review, Vol. 18, No. 6, 2009, pp. 289 – 306

22 See: Case C-1/03 Van de Walle and Others, ECLI:EU:C:2004:490

23 See: Case C-188/07 *Commune de Mesquer v Total France SA and Total International Ltd.*, ECLI:EU:C:2008:359

action against the Total companies in the Commercial Court in Saint-Nazaire, seeking inter alia a ruling that the companies be held liable for the consequences of the damage caused by the waste spread on the territory of the municipality and be ordered to pay the costs of cleaning and anti-pollution measures borne by the municipality. The action was unsuccessful, and the municipality appealed to the Court of Appeal in Rennes. In 2002, the said court confirmed the decision at first instance, taking the view that the oil did not constitute waste but was a combustible material for energy production manufactured for a specific use. Further, the court accepted that the oil spilled and mixed with water and sand formed waste, but nevertheless took the view that there was no legislation under which the Total companies could be held liable, since they were not formally producers or holders of said waste. The municipality appealed to the Court of Cassation. Since it considered that the case raised a serious problem of interpretation of Directive 75/442, the Court of Cassation decided to stay the proceedings and refer the questions to the CJEU for a preliminary ruling.[24]

Van de Walle and *Erika* are particularly significant for addressing the question of liability of the producer of the product from which the waste came in the event of an incidental environmental damage or disaster. In *Van de Walle*, the earlier of the two, the CJEU reasoned that causal relation or negligence was necessary for establishing liability of the producer. In *Erika*, the CJEU introduced a risk liability standard under which, in accordance with the PPP, such producers can be liable for remediation where they directly contributed to the risk of pollution. In other words, under the CJEU's most recent interpretation of the PPP, polluters can be attached with financial liability for pollution damage, but only in proportion to their contribution to the creation of that pollution.[25]

3. THE 'POLLUTER PAYS' PRINCIPLE IN THE CROATIAN JURISPRUDENCE

In Croatia, environmental protection is primarily regulated by the Environmental Protection Act (EPA),[26] through which the ELD was incorporated into Croatian national law. Based on the EPA, Croatia introduced the national Regulation on Environmental Damages Liability.[27] The EPA regulates the remediation of envi-

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24 *Ibid*. The relevant facts of the case are cited from the judgment, par. 24-28

25 Bleeker, A., *op. cit.,* n. 21, p. 289

26 Law on environment protection (Zakon o zaštiti okoliša), Official Gazette No. 80/13, 153/13, 78/15, 12/18, 118/18

27 Regulation on liability for environmental damage (Uredba o odgovornosti za štetu u okolišu), Official Gazette No. 31/2017

ronmental damage based on the PPP. Per Article 16 EPA, the polluter bears the cost of pollution, including the cost of environmental damage assessment, as well as the cost of assessment of the necessary pollution remediation measures. The EPA defines the *polluter* as any natural and legal person whose indirect or direct action or inaction causes environmental damage (Article 4(1) and (33) EPA). Within the meaning of the EPA, the polluter is also an operator who, in compliance with dedicated legislation, carries out or controls an activity that caused an environmental damage.[28]

Per Josipović, the liability of the polluter/operator for environmental damage should be distinguished from the liability for the damage caused to natural and legal persons as a consequence of the damages to the environment. Of the two liability categories, the former is established in administrative proceedings under the EPA as public law protection; liability to natural and legal persons is established under the Civil Obligations Act (COA) rules on tort.[29] In Croatia, protection provided for under public law is established under the EPA in administrative proceedings, and under the Criminal Act (CA) in criminal proceedings. Chapter XX of the CA defines criminal acts against the environment. These criminal acts were introduced as part of the implementation of Directive 2008/99 on the protection of the environment through criminal law.[30] Characteristic for these criminal acts is that they cause significant damage or danger to the environment and human health.[31]

Application of the PPP by administrative courts and bodies in Croatia is by and large problematic, chiefly due to the polluters' frequent inability to remediate due to their over-indebtedness or insolvency – a fact that has been discussed widely in Croatian legal literature.[32] As legal scholars and CJEU case law interpret it, in the case of insolvency, legal persons responsible for a pollution (or their legal successor(s)) remain liable both for the environmental damage they caused and the remediation, regardless of whether they caused it directly or indirectly.[33] The view that such remediation ought to be funded with public money should be fully

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28 Josipović, T., *Građanskopravna zaštita od štetnih emisija*, in: Barbić, J. (ed.), Građanskopravna zaštita okoliša, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2017, p. 73

29 *Ibid.* p. 74

30 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law OJ L 328, 6 December 2008, pp. 28–37

31 See more: Maršavelski, A., *Odgovornost pravnih osoba za kaznena djela protiv okoliša: teorijsko utemeljenje u odgovarajućoj regulaciji*, in: Barbić, J. (ed.), Hrvatska akademija znanosti i umjetnosti, Zagreb, 2017. pp. 46-49; See also: Pujo Tadić, M., *Odgovornost za »Kaznena djela protiv okoliša« u Republici Hrvatskoj*, Informator No. 6255 of 15 Februar 2014

32 See: Bodul, D.; Vuković, A., *Položaj ekoloških tražbina u hrvatskom stečajnom pravu - norma, dileme i pravci promjena*, Ius info, Accessed 27 September 2016

33 *Ibid.*

abandoned. Otherwise, it would translate to having transferred the liability for the damage from the polluter (who is profiting from incautious, but profitable operations that caused the damage) onto the state, i.e., the taxpayer. That this principle is upheld by the Croatian legislator is clear from Article 16(1) and (2) EPA: the polluter is the bearer of the remediation cost (the scope of which is clearly delineated) and not the damage caused to the environment.

The Croatian judiciary takes the same position. In one such case, which involved an accidental oil spill from a tanker and the resulting environmental damage, competent authorities were notified, and the clean-up (remediation) provided by the injured party, of which a remediation log was kept. Once remediation was completed, the injured party invoiced the remediation cost to the polluter. The polluter contested the remediation in terms of title, volume, and cost thereof. The court viewed the injured party as a hazardous waste management company that is obligated to act urgently. Remediation was inspected by the Croatian Ministry of Environmental Protection, Physical Planning and Construction between 12 and 13 January 2007. The injured party invoiced the remediation in accordance with the valid tariffs. The polluter's request for an expertise was denied. The courts found that under Article 16 EPA, the remediation cost should be borne by the polluter. The polluter was ordered to recover the remediation cost to the injured party.[34] In a similar vein, from the wording of the Croatian Water Act[35] (WA), it cannot be concluded that the polluter should bear the costs of the pollution of the water, but rather, far more specifically, as provided under Article 73(1) WA, that he should bear the remediation cost under Article 70(3) WA in conjunction with Article 59 WA.

In Croatia, state-owned companies are responsible for public goods under special acts. This follows the ELD in prescribing that competent authorities be in charge of specific tasks entailing appropriate administrative discretion, namely the duty to assess the damage and determine the necessary remedial measures. However, this should not imply that they are proprietors of those goods or that the damage was inflicted directly to their property. Under the ELD, the liability for damage caused to protected species and natural habitats, water, and soil is based on the public approach: the injured party is no one natural or legal person, but rather the society as a whole given the public and universal nature of damages caused to natural resources. In Croatia, in such cases, actions are ordinarily brought by public authorities to ensure remediation. This is at a remove from civil liability cases, which aim at compensation. Environmental protection authorities must ensure that responsible entities and a causal link be established, and a remediation plan and preventive and

[34] Supreme Court of the Republic of Croatia (VSRH) Revt 153/2013-2

[35] Water Law (Zakon o vodama), Official Gazette No. 66/2019

corrective measures adopted. In this regard, public authorities' actions are confined to administrative proceedings. However, it is in administrative proceedings that orders to remediate are brought (including the manner of cost bearing).

The sole claim grounded in the liability of the polluter is that for remediation cost recovery, submitted by the remediation company. Relevant literature clearly distinguishes between the position and the role of the national authorities in regard to remediation and compensation claims, which can be brought only where the same authorities had the remediation carried out in place of the polluter.[36] Obviously, if the polluter is established and made part of the remediation, he bears the remediation cost. This is in full agreement with the PPP, as well as the position that there is no grounds for transferring the polluter's liability to a third person (which would be the case were the national authority found directly liable to the remediation company and to subsequently require cost recovery from the polluter). In support of this is the exceptional case where the competent authority bears the cost only if the polluter cannot be identified or held liable (arg. *ex* Article 6 para 3 Directive 2004/35).

As Advocate General Kokott explained in her opinion[37] on *Fipa Group and Others*,[38] the PPP largely coincides with the restrictions which the objectives of the ELD impose on the application of Article 16. Member States must not undermine the PPP by identifying responsible parties in addition to or in place of the polluter. Third persons may only be secondarily liable. Per Kokott, this is in line with the principle of preventive action (PPA): where polluters are aware of the risk of damage and their full liability therefor, they are to take the necessary damage prevention measures. In general, it is the polluters who are able to take the most effective measures.

In addition, under the PPA – akin to the 'rectification at source' principle (under which damage or pollution is to be dealt with where it occurs) – measures are to be taken on polluted sites to prevent further spread of the damage irrespective of any contributions by the owners to the causes. In certain circumstances, it may also be necessary for the owner to support these measures using his better knowledge of the site. Otherwise, it would clearly be more difficult, if not impossible, to prevent such spread. On the other hand, in general neither of these principles requires that these owners should themselves be called on to carry out remediation.[39]

In this sense, grounding any transfer of liability for the remediation cost onto the national authority or state-owned company in their supposed liability for the

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[36] See: Vizjak, S., *Odgovornost za štete u okolišu*, Hrvatska pravna revija, Vol. 47, 2012, pp. 47-50, p. 49

[37] Opinion of Advocate General Kokott in Case C- 534/ 13, ECLI:EU:C:2014:2393

[38] See case C-534/13 *Fipa Group Srl. and Others*, ECLI:EU:C:2015:140

[39] *Op. cit.*, n. 38

respective public good and, in turn, the necessary prevention or remediation measures, would be tantamount to imposing the cost obligation on the possessor, and thus in direct opposition EU law.

4. CONCLUDING REMARKS

The complexity of environmental protection requirements is evident from the modalities of their implementation, which in turn points to the need for providing criminal, civil and administrative protection. Although the focus here was on the realization of administrative protection in Croatia as provided under the ELD, the paper also confirmed the understanding across the relevant literature on the inseparability of civil and administrative path of statutory environmental protection. Namely, public interest, which is primarily protected in administrative proceedings, is also realized in civil proceedings seeing as how public interest protection relates to the realization of a civil law claim. Under the Croatian legislative framework, which reflects equally the position of EU legislation and the relevant CJEU interpretations, polluters are to bear the costs of the pollution they cause, in accordance with the PPP. This prevents the transferring of the remediation cost onto the taxpayers. Member States are obligated to take all necessary measures to implement the PPP. Under EU law, the term 'state' implies all national authorities, including national courts of all levels. In other words, national courts are obligated to apply the PPP, even in civil law litigation.

However, the Croatian judiciary is often faced with certain doubts regarding the interpretation of the liability of the polluter and the liability for the remediation cost. This is characteristic of cases where the state, through its bodies or state-owned companies, is involved in the implementation of remediation (either as the contracting authority, or the principal, or supervising body). As this paper has shown, regardless of the state bodies' involvement in the very remediation, the sole liability undoubtedly remains the polluter's. Otherwise, regardless of the cost being formally borne by the state, the actual burden would be transferred to the taxpayers (e.g., by raising the state-owned companies' service fees). Fortunately, as has been discussed in literature, the Waste Framework Directive[40] offers a clear distinction between the liability for "practical operations or the execution of the disposal itself" and for the "bearing of the cost of those operations".[41]

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[40] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312 of 22 Nov 2008

[41] Sadeleer, N., *The polluter pays principle in EU law. Bold case law and poor harmonization* in: Pro Natura Festskrift il C.H. Bugge. Universitetsforlaget, Oslo, 2012, pp. 405-419, p. 414

A different understanding of the PPP should not be acceptable even in Croatia, where – due to frequent cases of polluter insolvency – the remediation cost is regularly transferred onto state-owned companies or government agencies. Namely, even though the actual remediator has a well-founded claim for cost recovery from the polluter, the transfer of liability to third parties for realization purposes is plainly unjustifiable. Any other interpretation would create ample room for polluters to avoid bearing high remediation cost by feigning insolvency. Without a doubt, this would effect the exact opposite of the ELD's purpose, and allow that the liability for environmental damage be linked to the action or inaction of individual factors.

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