Polluter-pays-principle as a pillar under the Green Deal and the Environmental Liability Directive

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1. Environmental pollution as an externality

- Crucial points: if polluters not forced to pay for negative external effects, social costs created by pollution not incorporated in prices of products and services
- Externalisation of pollution is normal reaction of polluter
- Cost minimization = profit maximisation

2. Goal of environmental liability

- Internalisation of negative externality caused by pollution
- Prices to reflect social costs

3. Implications of the polluter-pays-principle

- The polluter should pay, but for what?
- Different interpretations among lawyers and economists
- Cost internalization (paying costs of prevention)
- Not necessarily compensate *ex post* environmental harm
- A negligence rule can equally provide incentives for optimal prevention, thus complying with PPP (economists)
- But *ex post* compensation only under SL, needed for PPP (lawyers)
- So: is PPP economic (cost internalization) principle or distributional?

4. Who is polluter?

- Ronald Coase: when harm caused by more than 1 party identifying 1 entity as polluter is problematic
- Langlet/Mahmoudi: "Is it, for example, the car driver, the car manufacturer, the producer or distributor of fuel, or perhaps all of them who are polluters in relation to car traffic environmental damage?"
- Ecological foot-printing: it is not the producer alone who causes pollution
- Important implication: operational costs can be passed on to consumers via price mechanism
- If, as a consequence, prices reflect social costs, brown products should be priced out of the market

5. Implications

- Economic rationale of eco-labelling + awarding price premium for green products
- Leads to product differentiation according to (green) preferences. Only works with government support to remedy greenwashing
- Economic basis for EPR
- And for supply chain control

6. Threats to the PPP in the ELD?

(in addition to the limited scope + many exclusions and exceptions…)

6.1 Limited liability of the corporation

- Potential result: insolvency
- Mandatory solvency guarantee lacking in ELD
- Leads to problems in practice (in cases where it matters!):
- Kolontar, Moerdijk, Ilva

6. Threats to the PPP in the ELD?

6.2 "Compliance with regulation"

- Increasing number of cases with large pollution-related health damage
- Often: compliance with regulation/permit
- Differences between MS
- Optional compliance with permit defense (Art. 8(4)(a))
- Potentially violating HR
- Umicore (Hoboken), Dupont/Chemours (Dordrecht), Tata Steel (Ijmuiden) and many more…?

7. Remedies

- For insolvency: flexible mandatory financial guarantees
- For "compliance with regulation": an autonomous liability regime generally and within the ELD