

Polluter Pays Principle – fitness check of its application to the environment- submission from the European Environmental Bureau

August 2023

The EEB is the largest network of environmental citizens organisations in Europe. It currently consists of over 180 member organisations in 40 countries, including a growing number of networks, and representing some 30 million individual members and supporters.

The Polluter Pays Principle (PPP), while recognised as a key principle underlying EU Environmental policy, has not been well adhered and implemented (European Court of Auditors¹, IEEP²). We agree with the European Commission that a fitness check on whether the PPP has been effective in the various environmental policies and legal texts at the EU and national level is necessary and we stress that substantial regulatory action will be needed to timely address all the identified gaps.

The PPP in its implementation should ensure the full internalisation of negative environmental and social externalities. Contrary to what some special interests would like to reduce it to, the principle is not *merely* about making the polluter pay off a right to pollute, as that would create a perverse incentive. It is explicitly about preventing pollution, according to the OECD. To be precise, it is about **getting the polluter to monitor, reduce, remediate and prevent pollution, and to provide legal recourse for justice, enforcement and compensation for environmental and health damage**. The Polluter Pays Principle and the precautionary principle are two sides of the same coin.

At present, however, the implementation of PPP is restricted to limited taxation and failing market-based internalisation instruments (almost exclusively targeting energy and transport, while overlooking other sources of pollution and resource use). It does not currently provide any recourse to monitoring, enforcement or compensation for environmental, health and climate damage, and is not fit for purpose in most environmental and climate policies. When implemented in such selective way, it creates more harm than good, as it becomes the oil that lubricates the unsustainable growth of too harmful industries. At present, the most harmful industries have been able to turn the PPP into a “pay to pollute” scheme and the payment, a mere cost of doing business. Therefore, the EEB believes that there is a broad agreement that the current PPP does not work and needs to change.

We have classified our opinion into four categories, Environmental effectiveness, Economic effectiveness, Just transition and Justice, compensation and burden of proof.

Environmental Effectiveness

Air pollution

In 2021, the EEA³ estimated the societal cost of air pollution to be at least [€ 277 billion](#) up to € 433 billion. However, studies have shown that taxes on pollution cover far less (44% in the case of air

¹ ECA, 2021: <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=58811>

² IEEP, 2021: <https://ieep.eu/publications/how-can-taxes-and-other-economic-instruments-help-to-make-polluters-pay>

³ <https://www.eea.europa.eu/publications/counting-the-costs-of-industrial-pollution>

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pollution and GHGs, according to one estimate⁴ than the cost of the damage caused. The research also clearly identified that the households have by far the highest internalisation rate among the economic sectors, with agriculture and energy sectors at the opposite end of the spectrum. At the EU level, total environment related tax revenue⁵ amounted to 2.2% of the EU GDP, while the costs of air pollution and GHG alone are at about 5 % of the EU GDP. Importantly, a more efficient application of a polluter pays principle was also flagged as a possible policy option in a crowdsourcing activity in five European countries through the CODE⁶ project.

EU Industrial Emissions Directive

While the Industrial Emissions Directive (IED) sets emission limits for more than fifty thousand industrial installations through a permit system, the polluting companies often do not pay a fair share for their activities. The ongoing revision⁷ the IED could not only ensure that stricter rules are in place, but importantly, open an opportunity to claim compensation rights for affected people. The compensation could be claimed in case the industry exceeds the legal pollution limits and the public authorities fail to take efficient action - paving the way towards more stringent application of the pollution pays principle and indirectly ensuring better compliance with the rules.

EU Ambient Air Quality Directive

With the ongoing revision⁸ of the Ambient Air Quality Directive (AAQD), both the Commission⁹ and the ENVI Committee¹⁰ texts include provisions on individuals' right for compensation. Unlike in the case of the IED, the compensation right is directed against the competent authorities in case of air quality limits violations.

The explicit acknowledgment of the compensation rights is thus complementary to the typical application of the polluter pays principle focusing on a responsibility of the polluting industry. The successful implementation of individuals' right to compensation in the framework of the AAQD would be a welcome step forward - European citizens should be able to hold the authorities accountable in case they do not ensure legal air quality levels through relevant policies.

Water pollution

Studies¹¹ have estimated the damage to ecosystems and human health from water pollution from Nitrogen and Phosphorous alone is estimated to be € 22 billion while the costs paid by polluters is about € 900 million as derived from revenues on account of poor water quality. The estimates of the damage cost of other water pollutants, like pharmaceuticals, microplastics¹², PFA's¹³ and mercury run into hundreds of billions of euros.

⁴ [Green taxation and other economic instruments](#), 2021.

⁵ https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Environmental_tax_statistics

⁶ <https://codecidingeurope.eu/>

⁷ https://environment.ec.europa.eu/publications/proposal-revision-industrial-emissions-directive_en

⁸ https://environment.ec.europa.eu/publications/revision-eu-ambient-air-quality-legislation_en

⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A542%3AFIN>

¹⁰ https://www.europarl.europa.eu/doceo/document/A-9-2023-0233_EN.pdf

¹¹ Same as reference no. 4

¹² <https://media.wwf.no/assets/attachments/Plastics-the-cost-to-society-the-environment-and-the-economy-WWF-report.pdf>

¹³ <http://norden.diva-portal.org/smash/record.jsf?pid=diva2%3A1295959&dswid=7514>

The ecological and chemical status of water bodies reported don't reflect the localised pollution leading to a situation that unless a water body is reduced in its status, the pollution caused does not trigger a liability under the Environmental Liability Directive (ELD).

Lack of implementation of the economic instruments of the Water Framework Directive

Despite the possibility to recover the environmental and resource costs of water services under the Water Framework Directive (WFD) using articles 5 (economic analysis) and 9 (cost recovery), this has been largely restricted to residential water services while water tariffs to industry and agriculture sectors have been very low or free of cost¹⁴.

The staff working document ¹⁵of the European commission's overview of the river basin management plans concluded that "progress on the implementation of the principle of cost recovery and the use of economic instruments has been limited, which limits the potential of promoting efficient water management".

The EEB did a focus study on mapping the hidden water subsidies in the coal sector, Mind the Gap¹⁶, which shows that the water intensive and polluting coal industry pays nothing or very little for their water use. If the true cost of water resources and pollution could be included in the price of water and the polluter made to pay, the dissuading costs and the revenue could both act as a tool to prevent environmental damage from pollution (e.g. poor quantitative status of groundwater bodies).

The 2019 Fitness check of the WFD¹⁷ concluded that the Directive is fit for purpose but also pointed out that "The fact that the WFD's objectives have not been reached fully yet is largely due to insufficient funding, slow implementation and insufficient integration of environmental objectives in sectoral policies, and not due to a deficiency in the legislation." The subsidised water costs for the coal industry contributes to the insufficient funding of the measures needed to bring water bodies to good status while also discouraging polluters and intensive water users to prevent pollution or use water more efficiently.

Apart from coal industry, agriculture sector, responsible for 24% of the water use in Europe has lower prices as compared to other users of water in many member states and benefits from exemptions (from water abstraction authorisations). The 2021 report¹⁸ from the European court of auditors recommends that water pricing levels and exemptions from the requirement of water abstraction permits for agriculture should be justified, to ensure that the objectives of WFD are achieved.

Europe is already experiencing the effects of climate change and our water resources are the medium through which most of the impacts will be seen. Water use policies will have to adapt to climate impacts and adopt long term measures to tackle adequate water for nature, people and farming while preserving water quality and quantity. Agriculture subsidies should encourage efficient water use and

¹⁴ <https://eeb.org/wp-content/uploads/2020/12/Report-Mind-the-gap.pdf>

¹⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=SWD:2019:30:FIN&qid=1551267381862&from=EN>

¹⁶ Same as reference no. 14

¹⁷ https://commission.europa.eu/publications/fitness-check-water-framework-directive-and-floods-directive_en

¹⁸ https://www.eca.europa.eu/Lists/ECADocuments/SR21_20/SR_CAP-and-water_EN.pdf

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discourage water pollution and should switch¹⁹ to nature friendly, sustainable practices aiding the restoration of water bodies as well as nature.

Diffuse pollution

The use of synthetic inputs in agriculture is a key factor contributing to diffuse pollution of air, soil and water. Intensive livestock rearing is hardly regulated today other than ultra-large-scale pig and poultry farms under the IED. The prescribed emission limits on these large-scale farms are so lax that intensive pig and poultry rearing farms have been able to continue with 'business-as-usual'. The Commission proposal for the review of the IED included all large-scale farms into the directive; however, this proposed scope has been strongly reduced in the Council²⁰ and Parliament²¹. The long-overdue inclusion of cattle is still at risk, aquaculture is excluded, and the permitting regime for the remaining activities heavily watered down to today's standards²².

The discharges from wastewater treatment plants still represent a main reason for surface water bodies to fail good chemical status and were reported to contaminate over 13000 water bodies with polyaromatic hydrocarbons (PAHs), mercury, cadmium, lead and nickel. With a lack of effective pollution control at source and weak extended polluter responsibility²³ regimes the urban wastewater treatment plants directive has no provision for ensuring the polluter shares the cost of many recalcitrant pollutants.

Chemicals

The Polluter Pays Principle is included in the EU REACH legislation (article 1.3), compensation and liability are also clearly expressed on other articles of the legislation (article 77 and 78), however its implementation has been weak in ensuring companies are held accountable for their pollution or to ensure authorities have sufficient resources to monitor pollution so that the society is protected from potential harm caused by the use of hazardous chemicals.

For example, the project for monitoring internal pollution of Europeans, HBM4EU²⁴, received € 74 million public funding under Horizon 2020 (European Commission). Its successor project PARC²⁵ will receive € 400 million from public funding (European Commission and Member States). The EEB believes that the burden of monitoring pollution should be on the polluters profiting from the chemicals that cause pollution, rather than public finances funded by the society which suffers from the negative impacts of pollution.

In the REACH context, one of the reasons for this lack of application could be explained to the fact that legislation often focuses on linking a certain substance to a certain company or a person, which is almost impossible due to the lack of information about the substance/chemical. As a result, it is difficult

¹⁹ <https://meta.eeb.org/2023/06/13/europes-water-crisis-demands-a-fundamental-change-in-food-production/>

²⁰ <https://europa.eu/l6Pbwfj>

²¹ <https://www.europarl.europa.eu/news/en/press-room/20230522IPR91622/pollution-meps-support-strict-rules-to-reduce-industrial-emissions>

²² <https://eipie.eu/wp-content/uploads/2022/11/2022-11-30-Intensive-livestock-IED-briefing.pdf>

²³ <https://eeb.org/wp-content/uploads/2021/07/EEB-position-for-a-revised-UWWTD.pdf>

²⁴ <https://www.hbm4eu.eu/>

²⁵ <https://www.eu-parc.eu/>

to trace the source of the chemicals, making it challenging to hold companies accountable under the principle of "duty of care" and "extended producer liability". Another issue is that REACH relies on information and data given by companies to place chemicals on the market, but often these data are proven to be insufficient or non-compliant and companies don't pay for the damages caused by the products which are later recognized as harmful to the environment and/ or human health. We call this practice "no data no problem" which is very detrimental for the environment and benefits the misleading practice of putting a product in the market without insufficient, inadequate or unreliable data, even though many companies already know that their chemicals are highly polluting.

Enforcement under REACH legislation is still very weak, with high levels²⁶ of non-compliance (an average of two thirds of data is estimated to be non-compliant since the enforcement of REACH and over 90% in the last few years) contributing to a scenario of massive chemical pollution without accountability. For example, studies show that chemical pollution has crossed²⁷ the "planetary boundary", pushing the earth outside of its stable environment and putting humanity at risk. But, in the current legislation, the enforcement in case of non-compliance is left completely to the choice of each member state and is not harmonised. The most used sanction for non-compliance in REACH is verbal or written advice, which contributes to systemic lack of incentives for companies to comply, as acknowledged by the European Ombudsman²⁸. This lack of incentives and penalties for non-compliance triggers high levels of non-compliance over time and leads to the inefficient application of the polluter pays principle.

To address the current situation, the polluter pays principle should be better integrated²⁹ into the reform of REACH legislation on all levels to implement, monitor and enforce REACH: from the moment a company asks for a market authorisation, monitoring environmental and human internal pollution, completeness and compliance assessments, hazard evaluation, up to the enforcement level.

The reform of REACH can also introduce additional fees for using and introducing hazardous substances on the market as well submission of non-compliant chemical safety information dossiers. The revenue from these fees could be used to cover costs related to enforcement, pollution prevention, (human and environmental) monitoring and remediation of pollution as well as establishing and funding an EU-wide substitution and green innovation centre that supports industry, particularly SMEs, in reducing the use and manufacture of toxic chemicals.

Some measures that could be applied as part of the revision of REACH are:

- Revision of fees and charges. The registration fees and charges for services provided by ECHA should take account of the work to be carried out by the authorities. A review of the fees and charges is needed to correct for actual costs.
- Introduction of an obligation for companies to bear the costs incurred by ECHA for reviewing non-compliant dossiers. ECHA figures show that 80% of dossiers are compliant only after the Agency has performed the compliance check, meaning that registrants wait for ECHA to do the job for them since there has been no consequences to them for submitting non-compliant dossiers in the first place. Together with reviewing the provision for completeness check and strengthening ECHA's

²⁶ https://ec.europa.eu/environment/chemicals/reach/pdf/report_reach_penalties.pdf

²⁷ <https://www.stockholmresilience.org/research/research-news/2022-01-18-safe-planetary-boundary-for-pollutants-including-plastics-exceeded-say-researchers.html>

²⁸ <https://www.ombudsman.europa.eu/en/decision/en/81645>

²⁹ <https://eeb.org/wp-content/uploads/2022/05/NGO-key-demands-to-improve-REACH-April-2022.pdf>

capacity to revoke registration numbers, companies should pay for the resources invested by ECHA to perform the compliance checks, when they are found non-compliant.

Within the context of chemicals and implementation of PPP, another dimension is worth highlighting. Legacy chemicals- which are products or ingredients of products that were placed in the market during a time when it was not considered hazardous but later classified as hazardous – lead to contamination that cannot be fully traced. The cost of such contamination is usually never re-attributed to the producer. While we don't expect any law to be enforced in a retroactive manner, it's important to ensure full traceability of the chemical product so that legacy pollution can be mitigated (e.g through removal of the contaminated parts at end-of-life stage). The PPP should be applied to incentivise (if not required by law) the full disclosure of chemicals used in any products entering the EU market and those not complying with a full disclosure should pay the societal costs of the legacy. A full disclosure and traceability of chemicals in products should also ensure the ability to safely remove the problematic ones and avoid their re-introduction in the economy. This also helps to avoid discarding a whole product because no one knows where hazardous chemicals are embedded, thus wasting reuse and recycling opportunities.

Exemptions preventing the implementation of polluter pays principle

Many EU directives contain exemptions or derogations that prevent the full internalisation of negative environmental externalities. Article 8(4) of the ELD exempts the polluter from most of the damages caused to the environment if the pollution is permitted through an operating permit. Article 15(4) of the IED provides a cost benefit assessment for derogating from stricter emission limits. Article 4 of the WFD exempts the water bodies from achieving good status and to extend the good status date even beyond 2027. The misuse³⁰ of WFD exemptions have led to the situation that two thirds of Europe's surface water bodies and one quarter of groundwater bodies are not in good status.

The current authorisation system under the REACH legislation authorises just a small fraction of all the chemicals which are sold in the market. The system allows polluters to continue commercialising bulk of these chemicals with ease, despite having clear indications of their potential hazards, often with limited available data. As a result, chemicals that are not subjected to REACH procedures are being marketed without sufficient information, and often are found to be dangerous, much later. This situation allows polluters to evade financial responsibilities while profiting from their actions.

Another issue with the REACH legislation is the exemption related to tonnage. According to REACH, substances manufactured or imported in quantities less than one tonne per year are not required to be registered. Consequently, these manufacturers are exempt from the costs associated with providing data. However, this exemption does not imply that these chemicals are safe for the environment.

³⁰ When the exception becomes the rule, 2022. https://eeb.org/wp-content/uploads/2022/11/Water-briefing_formatted_PC.pdf

Economic Efficiency

Extended Producer Responsibility (EPR) and circular economy

EPR is a policy instrument, which applies the polluter pays principle by placing the responsibility of a product's entire life cycle – from designing environment friendly and low-impact products to managing their end-of-life – onto the producers. However, an assessment³¹ of current EPR practices for the product streams of packaging, WEEE, batteries and textiles show that EPR and ecomodulation of fees (i.e. charging differentiated fees based on criteria which support design changes towards improved products' sustainability) are currently focused almost exclusively on waste management (collection and recycling), instead of driving waste prevention (by promoting reusability, durability, reparability). Further, EPR fees and hence ecomodulation does not consider the full social and environmental costs associated with the products, thus failing to adequately implement the polluter pays principles for these products streams.

These issues stem from the current cost coverage of EPR systems which is based on the limited concept of “necessary costs” to deliver the expected service of meeting the regulatory collection and recycling obligations (disciplined in art. 8 and 8a of the Waste Framework Directive) and seeks to minimize the costs (by essentially only including the costs incurred to improve recycling and collection). In the pursuit of cost minimization, the EPR fee potentially becomes too low to effectively implement the PPP principle and encourage producers to design products, which have high environmental performance regarding waste prevention and reusability. A systemic revision of the EPR regime currently set in the Waste Framework Directive is therefore a precondition to unlock the full potential of Extended Producer Responsibility in applying the Polluter Pays Principle. This should include a revision of the EPR cost coverage, overall size of the fees, use of the revenues, governance of the Producer Responsibility Organisations, and be accompanied by ambitious regulatory targets focusing on waste prevention and reduction of pollution along the whole life cycle.

Also, as second-hand products are exported from the EU to third countries for reuse, the associated EPR fees paid by producers to support waste management costs too often fail to follow these products and are retained in the exporting countries (notably for used electronics, vehicles and textiles). This deprives importing countries of the adequate financial support to manage the products once they inevitably reach their end of life and need to be collected, disassembled, repaired, decontaminated, recycled or finally disposed of. Recent research³² on the exports of used electronics and vehicles from the EU to Africa estimated that every year African economies miss out on € 340 – 380 million in EPR fees associated with second-hand electronics, and on € 294.6 – 409.4 million in EPR fees for second-hand vehicles).

The untapped potential of environmental taxation

Despite its clear potential to apply the polluter pays principle while raising revenues to create fiscal space for green investment and broader tax shifts (e.g. from labour to resource-use and pollution),

³¹<https://eeb.org/wp-content/uploads/2022/01/Extended-Producer-Responsibility-and-ecomodulation-of-fees-web.pdf>

³²<https://eeb.org/library/items-shipped-for-reuse-and-extended-producer-responsibility-fees-a-case-for-extending-eu-epr-fees-to-cover-end-of-life-activities-of-products-shipped-outside-the-eu/>

environmental taxation remains a largely unexploited, as concrete green fiscal action is still very limited and uncoordinated across the EU.

Currently, less than 6% of all the taxes collected yearly by Member States come from environmental taxes (covering all uses of natural resources, pollution and GHGs emissions). Of all environmental taxes, more than three quarters are taxes on energy, while less than 4% are taxes on pollution or the use of resources. The limited taxation of resource consumption is a missed opportunity given that approximately half³³ of global Greenhouse gas emissions and more than 90% of biodiversity loss and water stress are associated with resource extraction, production and consumption. Moreover, in the EU, revenues from environmental taxes as percentage of GDP have stagnated³⁴ over the last ten years and have been on a downward trend as a percentage of total government revenues. Moreover, they also declined in absolute terms in 2020 (- 9.1 % compared with 2019.)

As confirmed also by the Commission study "Green taxation and other economic instruments³⁵" (2021), figures show clearly that in EU the polluter pays principle is not being fully applied across all pollutants, in all Member States and across all sectors of the economy. A decisive expansion of environmental taxation and other economic instruments at EU and national level is therefore urgently needed to enable a more effective implementation of this principle.

Fiscal instruments and other forms of price-based measures can also play a key role to improve the circularity of the European economy and reduce resource consumption to bring it in line with planetary boundaries (see EEB study on Circular Taxation³⁶, 2022). The EU could, for example, play a key role in setting harmonised minimum tax rates for a broader range of resource uses beyond energy products, issue recommendations on the use of revenues from new circular taxes to lower labour taxes as well as further develop existing circular economic instruments (e.g. EU own-resource on non-recycled plastic packaging waste). A number of member states have started taking steps towards the use of fiscal instruments to stimulate waste prevention, reuse, recycling and material efficiency. However, while the role of fiscal and economic instruments to stimulate circularity has been on the EU agenda for some time, including the recent commitment in the new Circular Economy Action Plan, a systematic approach to the subject across Europe is still missing.

The general failure of proper external cost internalisation

The internalisation of negative environmental externalities is one of the working principles behind fixing a cost for the pollution in the environment. In an ideal implementation of the PPP, a full internalisation of externalities along with the goal to prevent pollution should drive the polluter towards adopting a least polluting path for any industrial activity.

We provide four illustrations where the internalisation of pollution is failing, by using lower valuation methods in cost benefit analyses in the IED, by depending on market to identify the right price on pollution while skewing the prices with free allocations in the EU Emission Trading System, by promoting a 'pay and pollute' policy in sectors (air travel) that need to reduce pollution to limit runaway

³³ <https://wedocs.unep.org/handle/20.500.11822/31715;jsessionid=6767956A282290CDF0B6BD5B7F32E5BD>

³⁴ https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:ETE21L-F01-Environmental_tax_revenue_by_type_and_total_environmental_taxes_2020.png

³⁵ [Green taxation and other economic instruments](#), 2021. Same as reference no. 4

³⁶ <https://eeb.org/wp-content/uploads/2022/11/Circular-Taxation-study-EEB-Final-Report.pdf>

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climate change and a prolonged policy to continue harmful subsidies in the Common Agricultural Policy (CAP).

Illustration 1: Use of low-cost valuation methods while determining the costs and benefits.

The assessment to test viability of Best Available Techniques (BAT) depends upon the cost benefit analysis to judge proportionality of benefits (to public) versus costs to the operator, while deciding on the need for higher pollution abatement. Under article 15(4) of the IED, CBA is used to derogate from stricter emission limits which were formulated after considering the economic and technical viability (BAT) of the pollution abatement technologies. The analysis should be based on well-established data and any assumptions should be as transparent and as objective as possible. The costs (of pollution abatement) used for assessing the disproportionality in the CBA should be provided by third parties in official quotes and shared by the operator of the installation.

The EEA publishes results for health cost from air pollution by using two cost valuation methods³⁷ - the Value of Life Year Lost (VOLY) or the Value of Statistical Life (VSL). Using one or the other yields a factor 3 difference (at least).

The VOLY method disregards the impact on elderly people, and their lesser 'willingness to pay' for good health is reflected as lower benefit from pollution impacts which is considered as a reason for lower pollution abatement investments. For the VSL method (also based on willingness to pay) the externalised costs do not discriminate against elderly people. It is a politically relevant decision as to which method to use (or not to use) for accounting the negative externalities of pollution - the damages to society from the polluting activity and the compensation paid to reflect the real cost of those damages.

The OECD³⁸ already suggested the EU to adapt its method to VSL and rather align the price level to what is applied by the US EPA (\$7.15 million /statistical life). Applying this method would give a more honest and clearer picture of the scale of the bill the polluter should be accountable for. The VOLY approach is often used by companies and even listed in the guidelines published³⁹ by member states to justify the derogations⁴⁰ from complying with the emission limits under the IED.

However, the directive (IED) does not enforce the use of higher cost valuation methods (VSL) despite recommendations from the OECD leading to widespread adoption of lower pollution abatement techniques across the EU.

Illustration 2: EU ETS – persistence of free allocations and inadequate carbon prices.

The EU Emission Trading System (ETS) is often claimed by its supporters as an implementation of the polluter pays principle, but it is at best an incomplete implementation. The existence of free allocations of ETS allowances (EUAs, each of which represents a permit to be surrendered for each tonne of CO₂ emitted) reflects the fact that polluters do not pay for the climate damage caused. In 2021, CO₂ polluters

³⁷ https://www.eea.europa.eu/publications/costs-of-air-pollution-2008-2012/at_download/file

³⁸ <http://www.oecd.org/environment/mortalityriskvaluationinenvironmenthealthandtransportpolicies.htm>

³⁹ http://www.ekoportal.gov.pl/fileadmin/Ekoportal/Pozwolonia_zintegrowane/poradniki_branzowe/Podrecznik_dotyczacy_udzielania_odstepstw_-_Konkluzje_BAT_dla_LCP.pdf

⁴⁰ http://www.ekoportal.gov.pl/fileadmin/Ekoportal/Pozwolonia_zintegrowane/poradniki_branzowe/Zalacznik_1.B_do_podrecznika_dotyczacego_odstepstw_BAT_LCP_01.2018.xlsb

under the EU ETS incurred costs of around € 25 billion⁴¹ to buy EUAs, while the revenue foregone due to free allocations amounted to € 29 billion. Of the revenue raised, 28 % was not spent on climate action.

The cost of an EUA has largely remained below the 100 ⁴²€ / tonne threshold since the introduction of the EU ETS. This is in stark contrast to the shadow cost of carbon estimated by the European Investment Bank (EIB)⁴³, which is defined as the cost of carbon required to drive the economy towards the 1.5 °C target. This estimate projects a cost of 240€/t CO₂ in 2030, rising to 800 €/t CO₂ in 2050. The EIB results can be directly compared with the 1.5 °C low OS (low overshoot) scenario of the IPCC's assessment of the cost of carbon in its report 'Migration pathways compatible with 1.5°C in the context of sustainable development'⁴⁴, 2018. Similar estimates⁴⁵ of the cost of carbon produced by DG MOVE which determines the lowest cost option required for 1.5 °C or 2 °C degrees warming (450 ppm of CO₂). The central estimate of this is at 100 €/t CO₂ for short and medium term (2030) and 269€/t CO₂ for the long run. This shows a major gap between what the polluter actually pays and the real cost of pollution. More information has been provided by the EEB in the context of the review of the General Block Exemption Regulation (GBER) in 2021⁴⁶, which includes an exemption for the internalisation of external costs).

Illustration 3. Air travel- a case in point for pay and pollute policy.

One example of where the polluter does not pay at all is the emissions from air travel (free ETS allocations continue till 2026). At present, 1% of all people who travel via air are responsible for 50% of all aircraft carbon emissions. Frequent flyers even get rewards. This is not just paying to have the right to pollute, this is being paid if you pollute more.

The publication "Scientists warning on affluence⁴⁷" in Nature states that the absolutely necessary transition to reduce alarming trends of environmental degradation can only be effective if far-reaching lifestyle changes are enforced on a specific segment of the world's population – the one that is by far the most disproportionately impactful. In the case of air travel, this would mean the opposite of a frequent flyer card: a carbon credit card that prevents anyone from overshooting a fair carbon budget for flights. The discussion should then be about how tradeable these carbon credits should be and what could be the total cap of carbon credits and how fast it should decline.

This would be a good example of an effective use of both the PPP and the precautionary principle, considering that we have a limited carbon budget, in line with climate agreements, but is depleting fast with aviation sector taking an ever-larger share of it. As the EEB unpacked in a policy paper on energy justice⁴⁸, the issues of extreme affluence and carbon inequality within Europe need to be addressed urgently. Excesses need to be capped and clipped through strong interventions that fall beyond the scope of what markets are designed to do: allow the richest to simply pay to pollute.

⁴¹ <https://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/Klima/WWF-Report-ETS-Revenues-2022.pdf>

⁴² <https://tradingeconomics.com/commodity/carbon>

⁴³ https://www.eib.org/attachments/thematic/eib_group_climate_bank_roadmap_en.pdf, page 47.

⁴⁴ https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Chapter_2_LR.pdf

⁴⁵ <https://op.europa.eu/o/opportal-service/download-handler?identifier=9781f65f-8448-11ea-bf12-01aa75ed71a1&format=pdf&language=en&productionSystem=cellar&part=>

⁴⁶ <https://eeb.org/library/eebs-comments-and-amendments-to-the-general-block-exemption-regulation-gber-consultation/>

⁴⁷ <https://www.nature.com/articles/s41467-020-16941-y>

⁴⁸ <https://eeb.org/wp-content/uploads/2022/11/Why-Energy-Justice-EEB-Reflection-Paper-1.pdf>

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Illustration 4: Agriculture – continuation of harmful subsidies and free pass to pollute.

In 2021, the European Court of Auditors (ECA) concluded⁴⁹ that EU policies were failing to curb GHG emissions from the agriculture sector and that the PPP was insufficiently applied in this sector. Despite €100bn labelled as “climate spending”, the auditors pointed to the stagnation of agricultural GHG emissions in the EU. Another ECA report⁵⁰ that year warned that Common Agricultural Policy (CAP) subsidies were often doing more harm than good with regards to sustainable water use. The EEB, alongside many NGOs and scientists has been calling for a deep reform of the CAP for many years, including as a key priority, a phase out of harmful subsidies.

The most obvious examples of harmful subsidies in the CAP include

- Income-support payments for agricultural land on drained peatlands -which act as a direct incentive to maintain the harmful practice, as these subsidies would generally be lost if the right land management practices were put in place;
- Subsidies for the installation of new or expansion of old irrigation systems in areas where water bodies are in less than good status; and
- Subsidies per livestock unit or for the expansion of stables for intensively reared livestock– which are problematic anywhere but especially in areas of high livestock density and related nutrients pollution.

Furthermore, the agriculture sector has so far benefitted from “agricultural exceptionalism” in EU policy, leaving the sector largely insulated from efforts to prevent and address environmental impacts. Where legislation exists, it is weakly implemented and enforced, while other issues like methane emissions for example – remain largely unregulated. The costs of the resulting pollution and wider environmental damage are borne by society, while huge profits are made by upstream (e.g. fertilisers and pesticides producers) and downstream (meat processors) actors. One recent example is again the IED where the largest industrial agriculture factories will most likely be exempted from a proper permitting regime – implying a backtracking from today’s obligations for the most polluting pig and poultry factories.

For these reasons, the commitment by DG CLIMA⁵¹ in December 2021 to explore avenues for the implementation of the PPP was welcome. However, as explained earlier in this document, this must not become a narrow “pay to pollute” policy instrument. Rather it must include a comprehensive approach seeking first to reduce environmental harm through a holistic policy mix and secondly only to internalise remaining external costs, for example through a form of emissions pricing, while also including the urgent phase out of harmful subsidies.

Just Transition

Just Transition Fund and environmental rehabilitation costs

An analysis of the Just Transition Fund (JTF) plans indicates⁵² that hundreds of millions of euros are being approved for site rehabilitation which should have been the liability of the polluter. The plans do

⁴⁹ https://www.eca.europa.eu/Lists/ECADocuments/SR21_16/SR_CAP-and-Climate_EN.pdf

⁵⁰ https://www.eca.europa.eu/Lists/ECADocuments/SR21_20/SR_CAP-and-water_EN.pdf, same as reference 13

⁵¹ https://climate.ec.europa.eu/system/files/2021-12/com_2021_800_en_0.pdf

⁵² https://eeb.org/wp-content/uploads/2021/10/2021-10-07_PPP-in-the-just-transition-process-%E2%80%93-diagnosis-and-recommendations_final.pdf

not include sufficient safeguards, as they recommend using JTF resources to pay for land restoration without any analysis – or commitment to analysis – of the possibility, applicability and extent of PPP.

Environmental responsibilities and liabilities of operators are at risk of being paid by public finances as closure aid. A case in point is the lignite state aid⁵³ from Germany. More than half of the 1.75 billion Euro meant for the Lusatian coal mines are accounted for mine remediation, which should be paid by the mining company LEAG. The member states which are yet to announce a coal phase out date might potentially follow the same process as Germany and more public finances may be provided for managing the polluters private liabilities.

For more information, please refer to the Climate Action Network-Europe's position paper on the PPP in the just transition process⁵⁴

Impacts outside of the EU

The lacking implementation of the PPP has limited its potential positive benefits both in the EU and outside. Even worse, there are still many cases of complete incoherence between the EU's environmental commitments and its external trade policy (e.g. exports of chemicals banned for use in the EU) which impose a huge cost of pollution on other countries for the profits of our chemicals producers, without any application of the PPP. On the other hand, if the EU were to apply the PPP properly and coherently across its domestic industry, imports, and exports, while supporting SMEs in least-developed countries to reduce their pollution and comply with EU laws, the full application of the PPP would then have a very positive impact also on non-EU countries. Such positive impacts would include reduced costs to the economy for the health impacts of pollution and the modernisation of industries in our trading partners.

Justice, liability and burden of proof

The PPP is either not applied or poorly applied, resulting in taxpayers paying both directly and indirectly for the costs of pollution– including paying with their health. The financial contributions paid by polluters are either non-existent, too low, and do not allow real compensation to be set up for the impact of the activities and products. The financial contributions from polluters:

- largely cover the impact of the treatment of end-of-life products, which is a minor part of the pollution actually generated and are derisory compared to the real environmental cost;
- are far too low and easy to pay in comparison to the annual turnover of the companies, so they are not really encouraged to change their mode of production;
- extended producer responsibility practices fail to prevent pollution and fail to include dissuasive financial penalties or removing the most polluting product from the market.

EU environmental and climate policy must properly apply the PPP and reduce the high societal costs of pollution and environmental damage. It should guarantee the primacy of the prevention principle, and precautionary principle, even if the PPP often seems easier to implement. To prevent the PPP from becoming a 'pay to pollute' policy, it is essential that policies be more oriented towards pollution prevention.

⁵³ https://ec.europa.eu/commission/presscorner/detail/de/ip_21_972

⁵⁴ https://caneurope.org/brief_ec_polluter_pays_jt_diagnosis-and-recommendations/

Therefore, it is crucial to read any enforcement provisions, including private enforcement provisions, in conjunction with the polluter pays principle and the prevention principle: Effective enforcement tools such as effective remedies before courts (effective access to justice), effective penalties and effective compensation rights in case of damages against the polluter are essential to set the right incentives to comply with the law right from the beginning. The Environmental Implementation Review of 2022 shows that just “fully implementing EU environmental laws could save the EU economy around € 55 billion every year in health costs and direct costs to the environment.”⁵⁵ However, there is a risk of not addressing it in EU law sufficiently, as illustrated by the following three examples:

EU Industrial Emissions Directive (IED)

The European Commission finally acknowledges the need for an effective compensation right in environmental legislation, including IED, (only) for individuals suffering from health damages in case of unlawful pollution. It also suggests including an alleviation of the burden of proof when it comes to the causality link between the health damage and the IED violation. The Commission states clearly that this is needed because, given today's burden of proof rules, “in the majority of cases, victims of violations of (the IED) do not have an effective way to obtain compensation for the harm caused by such violations.”⁵⁶ However, the European Parliament opposed⁵⁷ this alleviation of the burden of proof. Additionally, while the Parliament kept penalties for breaches of the directive, it lowered the reference for penalties to the turnover of the operator concerned. This is another example of how the polluter is barely held accountable and how victims of pollution and the larger society bear the cost of pollution.

EU Corporate Sustainability Due Diligence Directive (CSDDD)

The scope of the draft CSDDD⁵⁸ is far too narrow, as it does not cover all EU corporations nor the climate impacts of their full value chains, resulting in a failure to implement the PPP. The CSDDD also does not adequately address barriers to justice faced by claimants in business-related environmental cases, which should be remedied by applying the concept of the alleviation of the burden of proof.

EU Environmental Liability Directive (ELD)

The ELD, as the legislative instrument dedicated to implement the polluter pays principle, fails in its implementation because it fails to provide strong incentives to prevent such damage from occurring in the first place. The current text of the ELD creates damage thresholds that are excessively high and unclear - like the use of term “significant adverse effects” - this must be changed. Furthermore, the problematic ‘permit defense’ (article 8.4) in this directive allows Member States to exempt the polluter from liability by exempting the pollution caused under a permit, which is the large part of the pollution, and transfers the cost of this damage to the bearer, taxpayers and wider society. In this sense, the ELD is not in line with the objectives of the Zero Pollution Action Plan which requires a better implementation of the PPP. The ELD should also recommend mandatory financial guarantees (article 14) to reduce the vulnerability of an operator's insolvency and to prevent parent companies from escaping liability.

Another deep procedural legal problem with the ELD, is the tremendous burden of financial and other resources required to remediate or restore the environmental or biodiversity damage caused by any

⁵⁵ https://environment.ec.europa.eu/law-and-governance/environmental-implementation-review_en.

⁵⁶ See Recital 33 IED proposal, COM(2022) 156 final/3, https://eur-lex.europa.eu/resource.html?uri=cellar:32d55555-c550-11ec-b6f4-01aa75ed71a1.0001.03/DOC_1&format=PDF.

⁵⁷ See [P9_TA\(2023\)0259](#) in particular amendments to Article 79a and Recital 33.

⁵⁸ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, [COM\(2022\) 71 final](#)

environmental damage. To address this issue, a revision of the Directive should impose strict liability for all environmental damage and biodiversity damage caused by any occupational activity (by abolishing Annex III). This is needed for the ELD to be fit for purpose and keep up with the pervasive and prevalent reality of environmental destruction; along with a liability regime which should be extended to include public authorities, as well as parental and supply chain liability for damage caused to human health and the environment, so as to also include subsidiaries active outside the EU and the environmental damage they may cause.

The ELD also transfers the burden of proof on the shoulders of the national environmental authorities, instead of being shifted to the side of the responsible operators. This, in conjunction with the large financial resources needed to remediate environment damages leads to the poor implementation of the ELD and hence the PPP.

For more information on how the ELD does not properly implement the Polluter Pays Principle, please see this 2022 EEB Position paper on the Environmental Liability Directive⁵⁹.

Legacy chemicals

As illustrated earlier (in chemicals section) many legacy chemicals are in the market without information on their full traceability and with many cases of newer chemicals where manufacturers don't disclose such information, it's even more difficult to hold any polluter responsible for the cost of investigation and remediation apart from environmental and health damages. Adopting a legal process to alleviate the burden of proof and making information disclosure mandatory could help in avoiding the cost of investigation and can reduce the eventual cost of remediation.

Conclusion

The above examples are not exhaustive. We would like to see this fitness check as the first step in developing recommendations and measures for a better implementation of polluter pays principle in the environmental acquis of the EU, and we hope further steps will be swiftly initiated by the Commission to review the legislations which apply/should apply the PPP, following the completion of this fitness check. A mere recommendation is not enough to address the issues with the implementation of the PPP highlighted by the devastating report by the ECA (2021) - clear legislative action is needed.

A proper implementation of the PPP in EU and national policies is crucial to support the full achievement of the European Green Deal, the EU's climate targets, and their associated Union policies.

⁵⁹ <https://eeb.org/wp-content/uploads/2022/09/ELD-Position-Paper-FINAL.pdf>