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The polluter must pay

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The principle stated in the title of this article was adopted for the first time at the international level in 1972, by the Organization for Economic Cooperation and Development (OECD). Basically, it postulates that those responsible for pollution must pay the cost of the measures needed to prevent or reduce such pollution in order to comply with regulations and measures on environmental quality.

The basis of this principle is that the utilization of common goods as goods that are totally free, both in the sense of the way they can be used and the absence of any charges for their use or exploitation, has led to growing deterioration in the quality of the environment.

The aim is not to unmask the guilty or to become involved in the area of obligations to pay compensation. What is sought is simply to ensure that the internal costs of production activities or processes incorporate the costs which are currently external to them but which give rise to social diseconomies: in other words, the aim is to incorporate the negative environmental externalities.

This article establishes various criteria for imputing environmental costs and reviews some instruments for the application of the principle. It also analyses special situations where the immediate application of highly restrictive regulations could cause serious economic upsets, recommending in these cases a more gradual approach and the provision of assistance. It ends with an examination of the shortcomings of the principle, especially with regard to activities having extreme environmental consequences.

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I

The origin and basis of the principle that the polluter must pay

1. *The abuse of common goods*

The emergence of the principle that the polluter must pay has much to do with what the biologist Garret Hardin called the tragedy of common goods (Edmunds and Letey, 1975, p.112). For these purposes, common goods are taken to mean those elements in the environment which do not belong to anybody and can hence be used by everyone without anyone being able to claim exclusive rights over them. Examples of this are the atmosphere and the high seas and the corresponding sea bed, with all their hydrobiological and mineral resources. Most legislation recognizes the existence of this type of goods. Thus, for example, the Chilean Civil Code, adopted in 1885, speaks of "the things which nature has made common to all men, such as the high seas", adding that such things "cannot be the subject of private domain" and that "no nation, corporation or individual has the right to appropriate them" (article 585).

In view of their common status, these goods are free from the point of view of their unrestricted use and the absence of any costs for such use, which means that anyone can use them or take advantage of them without having to pay any other person or seek permission for this. This was always the practice, until, as from the end of the last century, after the Industrial Revolution, the unrestricted and ever-increasing exploitation of these goods, on the one hand, and their increasing use as a sump for an ever-increasing volume of all kinds of wastes and refuse, on the other, began to highlight their finite nature and their vulnerability to human action and sounded a warning note on the risk that the continuation of this type of behaviour could lead to irreversible damage to them, or at least damage that would take a very long time and enormous resources to correct, with the whole human race having to suffer the consequences.

It was obvious that the ruin of these goods would cause severe prejudice to all. In accordance with the logic of private gain, however, the results of the benefit/prejudice equation continued to be

favourable to those using or exploiting these goods beyond the threshold of their tolerance to human intervention, since the damage caused would be divided among everyone, whereas the benefits obtained from their exploitation would be for the exclusive enjoyment of their users or exploiters. In other words, in the final analysis the gains outweighed the losses. At the same time, it was argued, there was always the risk that the benefits foregone because of the reduction of pressure on these goods could mean that other, less scrupulous, agents would make still bigger gains at the expense of this lower pressure, since these goods would be available to them in larger quantities or in a qualitatively better state. Consequently, if the activities foregone by some were carried out by others on even more profitable terms, then what point was there in foregoing the maximum gain that could be obtained from common goods, if everyone had an equal right to use them and derive free benefit from them?

It will be gathered from this summary of the arguments put forward that the cause of the spoliation and degradation of common goods has lain more in their gratuitous nature than in their common status, since even if they continued to be of a common nature, if they had been given a price that had to be reflected as a cost in the profit and loss accounts or balance sheets of corporations, then even in a context of the most selfish utilitarianism the benefit/prejudice equation would have discouraged the overuse and overexploitation that they have been subjected to. It would be an oversimplification, however, to reduce the problem of common goods to a mere question of greater or lesser economic costs or benefits, even if this were done with the aim of helping to find solutions. Any integral statement of the issue must necessarily take account of its social repercussions and, in particular, the serious distortions which it creates in the area of distributive justice, since the truth is that an overwhelmingly large proportion of the people who suffer the consequences of the deterioration or degradation of common goods have not played any part whatever in causing those effects, nor do they receive any form of compensation or indemnity for the damage or hardships suffered.

It may be added that the fate of common goods has also been shared by certain publicly used national goods which can be freely used by all the

inhabitants of the country in question, for the same reasons and with similar consequences. This, too, has played a part in the origin and development of the principle that the polluter must pay.

2. *Negative environmental externalities*

Economic theory speaks of externalities or spillover effects when referring to certain interactions which may take place between the gains of one enterprise and the costs of another (Edmunds and Letey, 1975, p. 393). In general terms, it may be said that we are in the presence of an externality every time that the acts of one social agent give another a gain or benefit without obtaining any reward for this, or cause him damage or expense without giving any kind of compensation for this. In the first of these hypotheses, what is involved are positive externalities, while in the second they are negative externalities (Haveman (undated), p. 45).

Negative externalities are closely related with so-called "external costs" and generally arise as a result of the use of scarce resources over which no one can claim exclusive rights of ownership or use (Reynolds, 1976, p. 275). The use of elements of the environment which do not have any price assigned to them naturally represents a saving for those who make use of them. Since these components of the environment are not considered as economic goods and are hence outside the system of prices, any economic operator can use them or take advantage of them without thereby incurring any internal cost whatever.

From the moment when the use of these goods goes beyond the threshold of their deterioration or degradation, however, the saving enjoyed by those who use them becomes a diseconomy or external cost for those who are affected by their destruction or deterioration. The costs of restoring human health and well-being, rehabilitating components of the environment which have undergone quantitative or qualitative degradation, or restoring the functional equilibrium of the ecological systems to which they belong are examples of this type of costs.

When responsibility for this damage is not shouldered or paid for by those who caused it or contributed to it, this gives rise to a negative environmental externality. As society as a whole cannot

merely turn a blind eye to this damage and must consequently assume responsibility for its repair, the resulting external costs become "social costs". In other words, because of the fact that the internal costs of the users or exploiters of environmental elements have not been real, there has been a transfer of the greater costs to society as a whole, in a general and indiscriminate way, in the form of hidden costs, which means that the gains of a few have been obtained at the cost of an indirect social subsidy.

In order to reverse or put a halt to this situation, which is at variance with the principles of distributive justice, various solutions have been proposed, all aimed at obtaining what has been called the "internalization of externalities", that is to say, ensuring that the external costs involved in the prevention and combating of the deterioration of environmental elements of a common nature are assumed and accounted for as internal costs by those who bring about or contribute to such degradation. In so far as this direct and personalized imputation of the external costs makes it more profitable not to damage the environment, it also seeks to relieve the pressure on these environmental elements by reorienting it towards other goods or towards the development and application of less damaging technologies which will lead to a more reasonable and equitable allocation and use of these elements.

In the sphere of production, it will always be more than likely that those whose internal production costs are increased by the external costs that they have to incorporate in them will seek ways of passing on the higher costs to the purchasers of their products or the users of the services they provide, thereby causing the latter to bear their burden in the final analysis. Aside from the fact that this does not seem to be at variance with considerations of justice, especially when goods with elastic demand are involved, it is also possible that the progressive and compulsory addition of external costs will lead to such increases in internal production costs that it will not be possible to continue to transfer them to prices for reasons of competitiveness. Thus, the producer enterprise will have to begin to pay such costs out of its own profits, in order not to run the risk of not being able to continue selling its products or services on the market.

3. Competitive disadvantages

It may happen that an enterprise reaches the point where it cannot continue adding the greater domestic costs with which it is faced to the price of the products or services it offers or paying them out of its operating profits, in which case it will find itself pushed out of the market. Extreme situations of this kind may be considered socially beneficial when viewed in relation to the objectives of the process of internalization of negative environmental externalities. There is a danger, however, that the excessively rigid application of the measures adopted may bring with it competitive disadvantages which are neither justifiable nor desirable in the light of the general interest. This could happen, for example, if the use of particular technologies which do not damage the environment is made obligatory without providing for differentiated deadlines for their adoption, depending on whether the plants involved are existing factories which are already operating, or new plants that it is planned to install. It is obvious that new plants can incorporate these technologies into their production processes without having to make the structural and operational changes involved for existing plants, which would require correspondingly greater amounts of time and money.

Likewise, competitive disadvantages may arise in international trade when the export sectors of a given country have to comply with environmental quality requirements which are significantly greater than those affecting the export sectors of other countries and, in contrast with the latter, their production costs fully or largely reflect their real costs and do not enjoy similar amounts of indirect social subsidies generated by the existence of non-internalized social costs.

The foregoing has given rise to the view that, as a general rule, any kind of aid or social subsidy which makes it less onerous for the productive sectors to absorb the social diseconomies they cause represents a distortion of the conditions of production and consumption and a corresponding distortion of competition, which may have a negative effect on trade transactions and the location of investments. This is why such aid, except in a few special cases, tends to be considered as undesirable and principles such as the idea that the polluter must pay have been developed and applied.

II

Concepts and instruments for the application of the principle

1. The concepts

The principle that the polluter must pay was adopted for the first time at the international level on 26 May 1972, when the Council of the Organization for Economic Cooperation and Development adopted a recommendation on guidelines on international economic aspects of environmental policies (OECD, 1983a, pp. 173-174, and Kiss, 1983, p. 74). Two years later, on 14 November 1974, the OECD Council adopted a further recommendation, on the implementation of the principle that the polluter must pay, in which it clarified some aspects concerning the limitation of the exceptions that could be applied to this principle (OECD, 1983b, p. 174). It was within the European Communities, however, that the principle was defined most clearly and its concrete implications were spelled out.

For the Council of the European Communities, the principle that the polluter must pay means that all physical or legal persons under public or private law who are responsible for pollution must pay the cost of the measures needed to prevent such pollution or to reduce it to comply with the corresponding regulations and measures designed to attain the relevant quality objectives, or, where such objectives do not exist, to comply with the relevant regulations and measures laid down by the public authorities. The Council goes on to say that environmental protection should therefore, in principle, not be secured through policies based on the granting of assistance which, in fact, make society as a whole responsible for the cost of the fight against pollution.¹

Consequently, the principle does not refer to the responsibility which polluters may have for the damage caused by their pollution. It does not propose that those who cause damage by pollution must assume responsibility for this, thereby making it something like an environmental version of the

the idea of "an eye for an eye and a tooth for a tooth". The obligation to make compensation for damage caused by pollution exists, of course, but it is not based on this principle but on the general rules of the law of torts. There is therefore nothing standing in the way of the simultaneous application of the principle that the polluter must pay and of the rules on civil liability for damage caused to third persons, although it could happen that, even if this principle were adopted, there might be no legal grounds (because of non-fulfillment of the necessary legal requirements) for obtaining monetary compensation for the damage caused by pollution, or on the contrary, if it were legally possible to demand compensation for this damage, there might be no legal means of effectively applying the consequences of the principle, because it was not embodied in the legislation itself.

It is worth clarifying this point in some detail, since there must be many who will assume that the principle that the polluter must pay is fully settled by making the polluter responsible for the damaging consequences of his acts. Those who interpret the principle in this way usually view the responsibility of the polluter for the payment of compensation as being essentially an objective or constructive liability which does not depend on the legal culpability of the agent causing the damage but on the mere fact that he has carried out an act giving rise to the probability of damage, that is to say, he has taken a risk. Maintaining that the polluter must pay, then, would in conceptual terms be the same as saying that every person who causes damage to another as a result of having given rise to a polluting effect is obliged to pay compensation for the damage done, irrespective of whether he acted with malicious intent or committed a fault or whether he exercised all due care and caution.

Those who attribute this scope to the principle are often the same ones who see in it a kind of license to pollute. Such a license could indeed be considered implicit in the postulation itself, since if the principle does not outlaw pollution but merely makes the polluter responsible for paying compensation for the damage caused by his acts, this would mean that anyone who was willing to pay

¹See the Council recommendation of 3 March 1974 on the imputation of costs and the intervention of the public authorities in environmental matters, in EEC (1988), vol. I, p. 7.

could pollute. In our opinion, a contributory factor in this mistaken interpretation is the fact of speaking of the "principle of the originator" or the "principle of the responsibility of the causal agent" when referring to the principle that the polluter must pay. In the view of a distinguished legal expert, this confusion of ideas is due to the fact that more publicity has been given to the name of the principle than to its content (Brafies, 1987, p. 157).

In its correct interpretation, the principle does not seek to determine the guilty parties nor to enter into the field of their obligation to pay compensation. What it does seek to ensure is that the costs involved in the prevention and combating of pollution should be assumed and paid by those causing the pollution, and not by the community as a whole. When the principle states that the polluter must pay, it is referring to these costs and no others. It is referring, in other words, to the social diseconomies or external costs already mentioned and is stating that these costs must be incorporated in the internal costs of the activities or production processes which cause the pollution, so that these internal costs will reflect the real costs and not falsified or fictitious ones. The principle that the polluter must pay consists then, in the final analysis, of the duty to internalize the negative environmental externalities. This gives the principle a fundamentally economic rather than legal character, although if it is to be operational it must be explicitly or implicitly included in the domestic legislation of the countries or in international treaties (Kiss, 1983, p. 77).

Behind the principle lies the conviction that, if polluters are obliged to assume the costs of the externalities they cause, they will be indirectly pressured to reduce the polluting effects of their activities by, for example, using raw materials or technologies which cause less environmental pollution. Another underlying consideration is the determination to put an end to the distributive distortions implicit in a state of affairs where the gain of a few is obtained at the cost of the sacrifice and suffering of many.

2. Criteria for the imputation of costs

The way in which the principle is defined by the Council of the European Communities in its recommendation of 3 March 1974 leaves no doubt that those responsible for paying for pollution are

those who are responsible for causing it. The recommendation defines those responsible as those who directly or indirectly pollute the environment or create conditions conducive to such deterioration, noting in a footnote that the notion of "those responsible for pollution" does not affect the provisions regarding civil liability.²

At first sight it might appear that the definition of the expression "responsible for pollution", far from clearly defining its scope, on the contrary gives it an even broader extension than might be gathered from the literal meaning of the words, for the inclusion in it of a reference not only to those who "indirectly" pollute the environment (which is already going quite a long way) but also "those who create conditions conducive to such deterioration" means taking its scope to extremes where it might reasonably be asked who could possibly be outside the scope of its application. As we shall see later, however, it is fundamentally an operational definition which is directly related with the extremely broad criteria of the Council of the European Communities with regard to the imputation of costs. At the same time, the footnote mentioned above has the virtue of leaving no doubt that the principle in question has nothing to do with the problem of compensation for the damage caused by pollution to third parties.

The question of the imputation of costs is a complex one, but it is particularly important because it goes to the root of the principle: that is to say, the internalization of externalities. The first problem that arises is the identification of those responsible for the pollution, without which the imputation of the costs becomes an impossibility or else there is a risk of reaching arbitrary decisions. The biggest difficulties in this respect arise in relation with the forms of pollution termed "accumulative" and "chain pollution". Pollution is called accumulative when it is the result of various simultaneous causes, as occurs, for example, when the atmosphere over a city is simultaneously polluted by emissions from industrial boilers and furnaces, vehicle engines, and house chimneys. It is called "chain pollution" when it is the result of a chain of acts—not necessarily polluting when considered separately—which ultimately lead to a polluting ef-

² See the recommendation of the Council already referred to, in EEC (1988), p. 7, annex, section 3 and footnote on page 2.

fect: this occurs, for example, with the pollution caused by the exhaust gases of motor vehicles, where those involved as agents are not only the users of the vehicles but also their manufacturers and the producers of the fuel they run on.

The recommendation by the Council of the European Communities lays down that in these cases the costs must be imputed at the point in the chain or the accumulation process which offers the best solution from both the administrative and economic points of view. Thus, for example, in the case of chain pollution the costs must be imputed at the point where there is the smallest number of economic operators and the control of their activities is easiest, or at the point where the imputation of the costs can contribute most effectively to the improvement of environmental conditions, while at the same time avoiding distortions of competition.³ A noted Latin American expert on environmental law has put forward the opinion that when these directives are applied to the case of the pollution caused by the exhaust gases of motor vehicles, the correct point for the imputation of the costs would be first of all at the level of the vehicle manufacturers, and next at the level of the fuel producers (Cano, 1983, p. 16). Neither of these economic operators can be accused of being directly responsible for causing the pollution, and indeed in the Latin American case it is very likely that the vehicles or fuels were produced outside the region. When the above-mentioned definition of those responsible for pollution is applied, however, those operators can be considered as being responsible because they indirectly caused deterioration of the environment or, at the very least, created conditions conducive to such deterioration.

Quite apart from the difficulties which may arise in determining to which operators the costs should be imputed, the essence of the principle is that the imputation should be carried out in such a way and on such terms that it represents a real and effective increase in their internal costs for those responsible for the pollution, while for the community as a whole it represents a corresponding real and effective reduction in their external costs connected with pollution. If this is accompanied by open or concealed allowances, exemptions, privi-

leges or special aid of any type provided by the public authorities for the benefit of those responsible for pollution in order to reduce the severity of the higher costs involved by imputation of the costs, however, the internalization of the externalities will be distorted, as will the application of the principle itself. We shall return to this point in connection with the question of exceptions or pseudo-exceptions to the terms of application of the principle.

3. Instruments for the application of the principle

a) Regulations

The main instruments available to the public authorities for implementing the principle that the polluter must pay are regulations and special charges.

Within regulations –also known as standards– a distinction may be drawn between environmental quality standards, product standards and process standards.

For this purpose, environmental quality standards are taken to mean those which lay down the maximum levels of pollution or environmental disturbance which are allowable within a given environment or part of an environment. Product standards, for their part, may have various aims, such as fixing the maximum permissible levels of contamination in the composition of a product; laying down the necessary properties or characteristics of its manufacture; determining its methods of use, and laying down specifications on testing methods, packaging, and the marking and labelling of products, the term “product” being understood for all these purposes in its broadest sense.

Process standards refer in particular to fixed installations and comprise the subdivisions termed emission standards, which lay down the maximum permissible levels of emissions or polluting discharges; construction standards, which lay down the specifications that must be complied with in the design and construction of plants in order to protect the environment; and operational standards, which lay down for the same purpose the conditions which the production or manufacturing processes must comply with. These operating standards, like the product standards concerning

³See the recommendation by the Council already referred to, in EEC (1988), p. 7, annex, section 3, and footnote on page 2. See also Cano (1978), pp. 136-137.

the forms of use of a particular thing, element or substance, may also be covered by what are known as codes of practice.⁴

The fact of having to comply with a standard involves special costs. For example, in the case of a product standard which lays down maximum limits for the pollutants which can be present in a particular substance, those who produce it will be obliged to take measures to ensure that the amount of pollutants does not exceed the stipulated limit, and if they do not do so they will run the risk of being punished; these measures consequently involve a cost which they would not have had to incur if the standard had not been adopted. Once an emission standard has been imposed, it will probably be necessary to make changes in the production technologies or the processes of purification or neutralization of effluents in order to ensure that the pollutants emitted do not exceed the maximum permissible levels, with everything that this involves in terms of non-budgeted investments. Before the adoption of these standards or any of the other measures in question (with the sole exception of the standards on environmental quality), the costs of forestalling and combatting the adverse effects stemming from the use or consumption of impure materials or the unrestricted emission of polluting effluents, to continue with the examples proposed earlier, were borne by the community as a whole in the form of external costs.

Once standards have been adopted, this situation is reversed, leading to the imputation of these external costs to the internal production costs of those who had been making a profit at the expense of a social diseconomy. This imputation does not pretend to be numerically exact. Indeed, there is no great interest in knowing the total amount of the costs which society was assuming. The term "imputation" is used in a figurative sense, signifying only that what previously gave rise to a given external cost will now be assumed and accounted for as a given internal cost, so that there will be internalization of a negative environmental externality and the principle that the polluter must pay will consequently have been put into effect.

What is really worth noting in respect of this mechanism is that the mere adoption of the stand-

ard means that the principle has already been put into effect. Society does not receive any payment. If third parties harmed by pollution do obtain some kind of compensation, this will be through the regular civil liability of the party responsible for the pollution, which is governed by criteria and subject to procedures totally divorced from the principle under consideration here. Nevertheless, the party responsible for the pollution has had to pay, since he has had to assume a cost which he had previously been able to avoid, while society has been freed from a cost which it had had to pay before the standard existed.

These redistributive effects are not achieved simply by adopting an environmental quality standard, since the mere adoption of the standard does not force anyone in particular to avoid exceeding the maximum permissible levels of environmental pollution or disturbance of the environment. It is another matter, however, if the public authorities take additional measures to reduce and keep down the concentrations of pollutants to levels defined as socially acceptable whenever the standards are infringed or in danger of being infringed. Such measures could consist of the imposition of supplementary or subsidiary standards of other kinds, the establishment of special charges, or other measures. Indeed, when the problem of environmental pollution is tackled in a serious and integral manner, the measures taken to reduce it are not usually limited to the isolated imposition of a certain type of regulation or standard, but involve the establishment of a whole interconnected system of different kinds of regulations which mutually strengthen and reinforce each other.

It must be borne in mind, however, that although the imposition of standards in itself implies the putting into effect of the principle that the polluter must pay, this principle will only really come into force if the internalization of the negative environmental externalities involved is carried out without any social counterparts in the form of subsidies, tax or accounting advantages, or other forms of aid given by the authorities to those responsible for pollution (Kiss, 1983).

b) *Special charges*

Special charges are the other most effective instrument that the authorities have at their disposal for applying the principle in question. They are fre-

⁴ See the recommendation of the Council of the European Communities of 3 March 1974 in EEC (1988), p. 7, annex, section 4, paragraph a.

quently also referred to as charges, taxes, rates or tariffs, although these words may not always be used as strict synonyms.

These charges provide for compulsory periodic payments, generally at a progressive rate, and they have two well-defined functions: to act as incentives for positive action and to act as a means of redistribution. Such charges fulfill their role of incentives for positive action to the extent that they induce those responsible for pollution to adopt of their own accord the measures needed to reduce or eliminate the pollution they cause, which will take place when the payment of these charges represents a greater economic sacrifice than that involved in the adoption of such measures. When this higher burden is imposed on them, it may be expected that those responsible for the pollution will consider it more profitable, and hence more attractive, to reduce the volume or toxicity of their polluting effluents in order to avoid having to pay the special charges or at least to be eligible for paying them at lower rates, rather than continuing the state of affairs which made them subject to their payment.

If, on the other hand, the amount of the special charge is less burdensome than the cost of taking such measures, then the polluters will prefer to pay the charge, which means that it will have failed in its purpose of acting as an incentive for positive action. Special charges also have a redistributive function, however, as they oblige those responsible for pollution to repay to society the expenses which it had to incur in order to tackle the damage caused to the environment by such pollution. For this purpose, it is necessary that the special charges should be fixed at such a level that, with regard to a particular region or a particular environmental quality objective, their total amount will correspond with the total collective expenditure that must be made in order to attain the proposed environmental objectives.⁵ Even when a special charge fails to fulfill its purpose of acting as an incentive, this is far from meaning that its adoption was totally worthless from the environmental point of view, since it still fulfills its redistributive function, which is its main aim.

In contrast with the position regarding standards, for the establishment of which it is not necessary to calculate the external costs being incurred by society, when fixing special charges it is necessary to make a prior economic estimate of the amounts involved, including the administrative costs directly connected with the execution of anti-pollution measures.

Once special charges have been established, their two functions act together to contribute to the objective of making those responsible for pollution –and not the community as a whole– assume and defray the costs of preventing and combating its adverse effects. Regardless of whether their aim is to give incentives or bring about redistribution, there is an internalization of external costs and, ultimately, application of the principle that the polluter must pay, but only on condition –it must be repeated– that there are no parallel social allowances which reduce or relieve, and therefore distort, the burden represented by the payment of such charges.

The funds collected through the special charges must be applied to the financing of the environmental protection and rehabilitation measures carried out by the public authorities, especially in the area of environmental pollution. Under the terms of the recommendation of the Council of the European Communities, these funds can also be used to contribute to the financing of special installations effected by private polluters, but only when the latter, at the express request of the competent authorities, bring down their pollution to levels below those considered acceptable by those authorities, thereby rendering a special service to the community.⁶ Such contributions tend to offset the greater expenses incurred by those responsible for the pollution and thereby maintain their level of competitiveness in cases where otherwise their greater sacrifice for the benefit of the community would give competitive advantages to other firms who limit themselves to a minimum degree of compliance with the general rules imposed.

⁵See the recommendation adopted on 3 March 1974 by the Council of the European Communities, in EEC (1988), p. 8, annex, section 4, paragraph b). See also Cano (1983), pp. 16-17.

⁶See the recommendation by the Council of the European Communities in EEC (1988), p. 8, annex, section 4, paragraph b).

III

Exemptions from the principle

1. *Express exemptions*

Implementation of the principle has revealed that the immediate application of very restrictive standards or very burdensome charges may cause serious economic upsets which have the opposite effect to what was intended, so that instead of reducing the external social costs deriving from environmental pollution, they lead instead to new and perhaps even greater social costs under other headings. This situation forms the background to the recommendation made by the Council of the OECD on 14 November 1974 on the implementation of the principle that the polluter must pay. This recommendation begins by reasserting the principle that the public authorities must not provide assistance which helps polluters to get round the costs of pollution control through subsidies, tax advantages or other measures. It immediately goes on, however, to admit that exceptionally such aid may be justified, provided it is strictly limited and complies with the requirements of being selective, temporary, and not giving rise to distortions in international trade.⁷ In legal terminology, such exceptions to the general rule are known as defeasances.

The requirement that such assistance must be "selective" means, according to the recommendation by the OECD Council, that it must be restricted to those parts of the economy (such as industries, zones or plants) where serious difficulties could arise in the absence of aid from the public authorities. With regard to industrial activities, however, doubt has arisen as to whether the assistance must be limited to existing plants or can also apply to new plants.

According to the recommendation by the Council of the European Communities of 3 March 1974, such assistance can only benefit production plants which are already in operation and existing products, and it must be understood for these purposes that any extensions made to operating plants, if they result in an increase in their production ca-

capacity, must be considered as equivalent to new plants, so that they are not eligible to be subsidized.⁸

The recommendation by the OECD Council on the implementation of the principle, however, permits the aid to be extended to new plants provided that the difficulties they face are of an exceptional nature and that the terms governing the granting of the aid are even stricter than those applicable to existing plants.⁹ The reason for this distinction between plants already in operation and new plants is, of course, that the costs incurred by the latter in bringing their production processes in line with the new environmental regulations will normally be less than those of the former (Kiss, 1983).

Another requirement is that the aid should be "temporary". The recommendation by the OECD Council of 26 May 1972 on guidelines regarding the international economic aspects of environmental policies admits the possibility that the application of the principle that the polluter must pay may be subject to exceptions or special arrangements, particularly in periods of transition (OECD, 1983a, pp. 173-174). The same Council's recommendation of 14 November 1974, in contrast, is much stricter and states that the aid must be limited to well-defined transitional periods established in advance and in keeping with the specific economic and social problems associated with the implementation of the environmental programme of a country (OECD, 1983b).

The strictness of these conditions is in contrast with the recommendation by the Council of the European Communities of 3 March 1974, which merely recognizes the occasional need to give certain polluters a time limit for adapting their products or production methods to the new standards and/or to give them aid which is limited in time and may be of a decreasing nature.¹⁰ Although not

⁸ See the recommendation of the Council of the European Communities in EEC (1988), p. 9, section 6, paragraph a).

⁹ See the recommendation by the OECD Council on the implementation of the principle that the polluter must pay, section 3, in OECD (1983b).

¹⁰ See the recommendation by the Council, in EEC (1988), p. 9, annex, section 6, paragraph a).

⁷ See the relevant recommendation of the OECD Council, section 2, in OECD (1983b).

expressly stipulated, it may be gathered from the context of these recommendations that extraordinary temporary time limits for adapting to new environmental requirements may be granted only in the case of industrial plants which are already in operation.

Lastly, the recommendations of the OECD Council indicate that assistance granted by the public authorities must not give rise to significant distortions in international trade or investments. What should be understood by "significant" distortions is a question on which there are no specific Community directions regarding their size and evaluation.

It is worth mentioning that behind these prohibitions and restrictions on the aid which the public authorities can give to those responsible for pollution are the provisions of Article 92 of the Rome Treaty of 25 March 1957 which gave birth to the European Economic Community (EEC). According to this Treaty, all forms of aid granted by States or by means of State resources which distort or threaten to distort competition by favouring particular enterprises or products are incompatible with the Common Market, in so far as they affect trade among member States. The same provision, however, states that aid designed to promote the economic development of regions where the standard of living is abnormally low may be considered as compatible with the Common Market, as also are measures which seek to correct a serious disturbance in the economy of a member State. This has been interpreted as support for exceptions to the general rule which the OECD Council and the Council of the European Communities have gone to some

lengths to specify (Biblioteca Política Taurus, 1960, pp. 173-174).

2. *Quasi-exemptions*

We give the title of quasi-exemptions to the types of aid which the recommendation of 3 March 1974 of the Council of the European Communities does not consider to be contrary to the principle that the polluter must pay, in order to distinguish them from the types of aid which that same recommendation terms "exceptions" to the application of the principle and which we have dealt with under the title "express exemptions".

Firstly, aid which is not considered contrary to the principle includes possible financial aid granted to local communities in order to build and manage public environmental protection installations whose costs cannot be covered immediately and in full with the proceeds of the special charges paid by the polluters who use such installations. If these are plants for the treatment of effluents other than household wastes, however, it is laid down that the services provided must be charged for in a manner which reflects the real costs of the treatment processes.

Other forms of aid not considered contrary to the principle are types of financial assistance designed to offset the particularly heavy charges imposed on certain parties responsible for a certain type of pollution, in order to achieve an exceptionally high level of environmental purity.

Other forms of aid which belong to this category include contributions made in order to promote the execution of research on the development of less polluting production technologies or the manufacture of less polluting products.¹¹

IV

Shortcomings of the principle

It cannot be pretended that the application of the principle that the polluter must pay offers an integral solution for the problem of environmental pollution, since this involves much more than a mere redistribution of costs. That the cost of the measures against pollution should be borne by

those who cause it and not those who suffer from it, without having helped to produce it, is a requirement of distributive justice which is beyond discus-

¹¹See the recommendation of the Council of the European Communities of 3 March 1974, in EEC (1988), p. 9, annex, section 7.

sion. There are types of pollution, however, which simply should not be allowed to take place, either because they create living conditions which are highly dangerous for human life or health or for the functional stability of the ecological cycles, processes and balances which are the basis of life, or because they give rise to irreversible damage.

In a situation of loss of human life, the extinction of species or other similar extreme consequences, there is no longer any sense in even talking about the internalization of externalities, since what might in other circumstances be termed an externality or external cost constitutes, in plain words, a totally irrational practice and act of external destruction which cannot be assessed in monetary terms and must be dealt with once and for all. The principle therefore only extends to the limit of what can be internalized. Beyond that limit what is involved is not a question of distorted costs but rather a problem of distortion of the whole idea of the right to life, since he who gradually takes away the life of another person by a succession of acts with lethal effect, as occurs in the case of certain types of pollution, is just as guilty of homicide as

he who takes away the life of another person through an act of violence.

In such cases, the function of incentivization which the principle seeks to carry out must give way to a function of radical dissuasion, and its function of redistributing economic burdens must give way to a function of assigning responsibilities. This involves, on the one hand, the characterization of "crimes against the environment" subject to severe penalties, and on the other, the establishment of a system of civil liability for damage to the environment which gives the victims of pollution the certainty of being able to obtain full and timely redress for all damage done to them.

This does not mean belittling the validity of the principle that the polluter must pay nor falling into the frequent confusion between its scope and that of the conventional system of civil liability. It merely seeks to emphasize that the adoption of the principle alone is not sufficient to serve as a social response to the problem of environmental pollution and must therefore be supplemented with other measures of both a criminal and civil nature.

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