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Briefing for the European Commission: the Polluter Pays Principle in the just transition process – diagnosis and recommendations¹

Overview

The Polluter Pays Principle (PPP) is one of the biggest concerns in the implementation of just transition support, due to the complexity of the issue and the danger of misusing public funds. Attempts are being made to push financial responsibility for land restoration away from the companies that have profited from mining and fossil fuel-fired energy production and into the Just Transition Fund (JTF) and other related funds. This needs to be addressed as soon as possible, as not only should the JTF not bail polluters out of their responsibilities, but it should also be focused on answering other social priorities linked to the phase-out of carbon-intensive industries.

A recent report of the European Court of Auditors,² the guardian of the EU budget, highlights that despite the Polluter Pays Principle being one of the key principles underlying the European Union's environmental policy, the EU budget is sometimes used to fund clean-up actions that, under the Polluter Pays Principle, should have been borne by polluters.

A stricter application of the PPP is needed, meaning that polluters should bear the costs of their pollution, **including the cost of measures taken to prevent, control and remedy pollution, as well as the costs the polluters impose on society.** By applying the principle, polluters are incentivised to avoid environmental damage and are held responsible for the pollution that they have caused. **It is also the polluter, and not the taxpayer, who should cover the cost of remediation.**

However, confusion in terms of PPP application within the just transition process will undermine the transition. This is a major concern for many

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² European Court of Auditors, [Special Report 12/2021: The Polluter Pays Principle: Inconsistent application across EU environmental policies and actions](#), 5 July 2021.

stakeholders on the ground, such as the local authorities in coal regions, worried about the lack of suitable land restoration conducted in former mining areas. This apprehension also results from fears that polluting companies will find ways to avoid covering the environmental costs of the resource exploitation they benefited from. **The Just Transition Fund and other related mechanisms should only be seen as a form of complementary funds** to supplement obligatory restoration and rehabilitation processes, which should be covered financially by polluting entities in accordance with the Polluter Pays Principle. **Although the JTF is a good resource for preparing and implementing repurposing projects**, which the local communities are counting on, there need to be clear-cut rules to avoid any misappropriation of the available funds.

We are putting forward a diagnosis of the situation based on our analyses of the Territorial Just Transition Plans (TJTJs) in various CEE countries, prepared by Bankwatch and WWF national campaigners, various NGOs working on the ground throughout the coal regions, and also through the application of the WWF TJTJ scorecards. This is followed by recommendations concerning the Polluter Pays Principle in the just transition process.

In a separate document prepared by the European Environmental Bureau, we propose a more concrete checklist that would enable ensuring PPP-compatible Territorial Just Transition Plans, which we strongly recommend applying to the just transition process.

1. Diagnosis

A. Identified problems in the Territorial Just Transition Plans (TJTJs)

Examples

Many of the already submitted TJTJs contain attempts at pushing financial responsibility for land restoration and rehabilitation away from the companies that have profited from mining. The Hunedoara region in **Romania**; the Western Małopolskie, Łódzkie, Upper Silesia and Eastern Wielkopolska regions, as well as the Wałbrzych sub-region in **Poland**; the **Latvian** just transition region; and the Ida-Virumaa region in **Estonia** have all been assessed by the WWF TJTJ scorecard tool as at risk for directly contravening the Polluter Pays Principle by not identifying the entities responsible for existing environmental damage. **Slovenia's** action plan is another example of such an issue.

In the two **Hungarian** counties (Heves and BAZ) of the Mátra Power Plant region, the repurposing of lignite mining areas is also an important part of the TJTJs. **Out of a total JTF budget of about EUR 300 million in Hungary, about EUR 43 million** would be allocated for alternative reclamation. However, the TJTJs do not include and do not expect any kind of Polluter Pays Principle-based assessment. In fact, the Polluter Pays Principle is not even mentioned in the text of the TJTJs. It should simultaneously be noted **that if this amount were to be spent in full respect of the Polluter Pays Principle**, specifically on repurposing preparation and implementation for the benefit of local communities, it would provide high added value to the just transition of the region.

Likewise, in the Western Małopolska region of **Poland**, the revitalisation of former mining sites is planned, with large utilities (i.e., Orlen, Tauron) as identified beneficiaries without a clear indication of an evaluation of the Polluter Pays Principle. Similarly, in Eastern Wielkopolska, the TJTJ mentions providing funds for the restoration process and various projects at former mining sites belonging to the ZE PAK group.

Information has also been made public that various mining-related companies have been rebudgeting their restoration funds to cover growing current expenses as a result of higher EU ETS costs.

More such specific examples can be found in the various TJTPs from all the CEE countries, which **indicates that this is an issue that must be dealt with quickly and comprehensively due to the widespread character of the problem and its complexity.**

Identified issues in the TJTPs related to the PPP

The plans do not include sufficient safeguards, as **they recommend using JTF resources to pay for land restoration without any analysis – or commitment to undertake such an analysis** – of the possibility, applicability and extent of the Polluter Pays Principle. There is a lack of clear rules and tools for how to do these necessary steps for limiting exploitation of the public funds offered within the JTF mechanism. This issue should be seen as a potential risk that could also apply to other available funds within the upcoming years, such as the Modernisation Fund or the Recovery and Resilience Facility.

For many municipalities, the current availability of JTF and structural funds is insufficient to tackle pollution and legacy problems from mining and related activities, which constitutes a barrier to just transition. Using these funds as a first resort would also contravene the Polluter Pays Principle. **There is a need for technical assistance and legal guidance for municipalities to ensure that the polluters pay wherever and whenever they should do so.** They also require expert support in planning repurposing projects (such as repurposing databases and evaluation matrixes) for their respective regions while making sure the Polluter Pays Principle is fully respected by the previous landowners.

Additionally, the plans frequently do not identify responsible polluters, as they lack a clear diagnosis of the situation that would take into account this aspect. A related issue results from situations in which the polluting entity no longer exists or is not solvent (such as in former Soviet states, e.g. **Estonia**, where Soviet Union institutions were responsible, referred to as ‘legacy pollution’) or is difficult to track or identify. In such cases, there is a need for restoration and rehabilitation processes to be introduced, but there are no clear guidelines within the JT mechanism concerning the extent to which it should be done by entities that have ‘inherited’ the responsibility. In terms of the just transition process, there is a lack of clear guidelines concerning whether such costs can be included as part of those eligible for financing from the JTF.

In turn, examples of open or undefined lists of large enterprises to receive JTF support for restoration measures are common, and it is also frequent for the plans to mention the transition to gas in various power plants (in itself an issue as a switch to another fossil fuel, which should not be covered by the JTF or any other EU funds)³ without diagnosing whether this will side-line the Polluter Pays Principle. As an example, it is worth mentioning the case of **Hungary**, where a 500 MW combined cycle gas turbine (CCGT) power plant is planned for the Mátra power plant.⁴ Will the costs resulting from the Polluter Pays Principle for damage caused by the coal-fired energy plant and related activities be covered in such a case, and by whom, if the power plant plans to switch to natural gas, causing new environmental damage? How will this be assessed?

³ There are plans to build this power plant using EU funds. Such a dual funding strategy, wherein certain EU funds explicitly ban investments in fossil fuel energy projects while other EU funds provide such support, should not be allowed.

⁴ Mátra Energia, [Our vision](#), *Mátra Energia*, accessed 7 October 2021.

A somewhat similar issue can be identified in reference to solar or wind power plants built on former mining sites. **It is difficult to draw a clear line between reclaiming and landscaping before the new solar and wind utilities are actually introduced**, but the just transition process should require detailed assessments of the expected extent of restoration work that should be covered by the polluting entity before any funds are given for new projects.

2. Recommendations

The Polluter Pays Principle is already present in the text of the Regulation; thus, the below recommendations primarily indicate the need for its enforcement in the just transition process.

OUR GENERAL RECOMMENDATIONS

- While welcoming the clarifications provided by the Commission concerning the implementation of the TJTPs, a similar clarification document should be drafted to rightly enforce the PPP.
- **Such a document should insist on the fact that the TJTPs shall respect the PPP** through the introduction of a mandatory check aimed at assessing which are the private entities liable for remediating environmental damages.
- It could take the form of a practical checklist that shall be assessed before approving the TJTP (see Annex I). In particular, it should:
 - identify responsible polluters;
 - provide information about the obligations already set out for polluters in relevant documents at the national level (e.g. appropriate approved recultivation and landscape plans);
 - assess the extent of financial liabilities shouldered by the polluter according to relevant EU and national regulations;
 - provide information on the adherence of enterprises involved in the just transition process to the PPP, if they are to in any way be recipients of aid; and
 - create opportunities for alternative landscaping and repurposing.
- In addition, we consider that it would be helpful for all those dealing with this issue if regional diagnoses were prepared by the European Commission concerning the pollution from carbon-intensive industries and the responsibilities that should be borne by polluting entities.
- Technical assistance and legal guidance should be provided for municipalities, regions and national governments involved in the JT process to ensure that the Polluter Pays Principle is upheld.
- Technical assistance should be provided for local and regional authorities on how they can work with existing landowners (e.g. polluters) and how they can plan and implement repurposing projects with maximum respect for the PPP.
- The Just Transition mechanism must be supplied with appropriate safeguards to protect against misappropriation of public money in these regards.

- Wherever new projects creating a lock-in to fossil fuels are envisaged (e.g. mining, coal, oil or gas exploitation), the Commission **should not approve the plans by default**. Similarly, to increase ambition, the Commission should expedite approval of TJTPs that foresee investments in sustainable, renewable and diversified energy projects.
- We recommend that the Commission **set out COM implementing rules/binding eligibility criteria**, to be mirrored in the CEEAG, on how to enforce the Polluter Pays Principle and the ‘best value in the common interest for money’ principle. This is needed now; therefore, it should come before any review of the Environmental Liability Directive (ELD). This is crucial to ensure the best value of public funds used in the common interest.
- In general, **we strongly recommend a speedy revision of the ELD** to ensure proper enforcement of the Polluter Pays Principle in future.

ANNEX: CHECKLIST TO ASSESS THE ADHERENCE OF A PROJECT TO THE PPP

When assessing adherence to the Polluter Pays Principle, the Commission should assess the following points, developed into a separate checklist:

PART 1: Project-specific exclusion criteria (negative)

Answer ‘no’ to all questions to go to the Part 2 of the assessment.

1. Is the project related to ‘perpetual obligations’ or to costs that the operator should have covered after the foreseen end of the activity?

The projects included in the TJTPs shall not cover remediation costs that operators would have covered in any case after the foreseen end of operations. In such cases, operators must pay for remediating environmental damages. For instance, when it comes to mines, a technical operating plan must have been prepared which includes the approved landscape or recultivation plan. ‘Perpetual obligations’ as defined by RAG-Stiftung⁵ include the following:

- Treatment of pit water in the underground sites of former mines. Pumping the pit water that has accumulated in the coal mines underground upwards.
- Pumping away surface water to decrease the risk of the surface subsiding.
- Purifying and monitoring the groundwater in former mining sites, including purification of contaminated water on some sites of former related operations of the coal mining industry, in particular former coking plants.
- Ensuring the geological stability of the area.

Other obligations must be covered by the polluter, such as:

- The management of methane leaks from closed mines.
 - Refurbishment of private properties.
 - Dismantlement of installations and disposal of waste, including hazardous substances.
2. Is the project related to covering other residual costs resulting from administrative, legal or tax provisions; underground safety work resulting from the closure of coal, peat and oil shale activities; or mining damage, provided that it has been caused by the coal, peat and oil shale activities which have been closed or which are being closed?
 3. Is the project or part of the project covered by State aid under ‘Exceptional costs related to coal mine closure’, as per Annex of Council Decision of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines (2010/787/EU)?

⁵ RAG-Stiftung, [Foundation](#), RAG-Stiftung, accessed 7 October 2021.

4. Is the project related to costs resulting from non-compliance with either EU or national environmental law?
5. Is the project related to costs deriving from legal obligations, either at the EU or national level?

PART 2: Member State and beneficiary-specific criteria (positive)

Answer ‘yes’ to all questions to be sure that the project can be funded.

6. Has the Member State applied art. 14 of the Environmental Liability Directive (ELD)? Has the operator put in place financial liability schemes aimed at covering remediation costs?

The ELD ‘encourages’ the development of financial security instruments by the beneficiaries (art. 14) with the aim of enabling them to use financial guarantees to cover their responsibilities. Unfortunately, as reported by the European Court of Auditors, only five Member States (CZ, ES, IE, PT and SK) foresee the use of mandatory financial security schemes, two (IT and PL) only for specific activities, and 20 have no mandatory financial security tools in place.

7. Has the Member State taken all the possible legal ways to identify the polluter and make it accountable?

The Member State must demonstrate that all legal steps have been taken to make the polluter bear the costs, including legal actions. Where the activity involves the use of and contamination by hazardous substances, it is usually possible to trace back to the provider of those chemicals (e.g. supply contracts, REACH registration dossiers) and make them contribute to remediation costs, based on the ‘duty of care’ and ‘extended producer liability’ principle.

Where the beneficiary liable under the applicable law is not identified or cannot be made to bear the costs, public funds may be granted to cover all the exceptional environmental costs, provided that the Member State has demonstrated that all reasonable efforts have been taken to identify the liable entity, including the identification of ‘legal successors’, ‘subsidiary companies’ or ‘mother companies’.

8. Has the Commission checked that either the Member State or the polluter have not set schemes aimed at not paying environmental and social costs and instead shifting them to the public purse? (e.g. ‘bad banks’ or ‘planned bankruptcies’).
9. Has the Member State correctly applied the internalisation of external costs to the project beneficiary, and have these costs been subtracted from the proposed aid scheme?

Where the beneficiary operates other activities in the EU subject to the JTF, the assessment must be made at the mother-company level, not limited to the TJTP scope. The assessment must include:

- Whether **the Member State has enforced the most advanced pollution control measures (BAT)⁶ adopted under the Industrial Emissions Directive** that, by

⁶ European Environment Agency, [Best available techniques \(BAT\) conclusions for large combustion plants](#), August 2017.

definition, have been considered economically viable by the industry in the Sevilla process.⁷

- Whether **negative externalities have been internalised by operators**. Negative externalities exist when pollution or negative environmental health impacts are not adequately priced and the polluter does not pay in full the real cost to the economy. The beneficiary of JT funds must therefore provide evidence that the following internalisation of negative externalities is occurring prior to relying on Just Transition resources. The beneficiary must demonstrate the following internalisation of external costs:
 - **Where impacts on water:** Any mining site rehabilitation should be assessed and have a clear obligation to improve the environmental status of the affected water body according to the Water Framework Directive's main goal. In addition, the cost-recovery principle enshrined in the Water Framework Directive should be enforced. This shall notably cover indirect costs of water supply such as compliance with relevant drinking water standards affected by the continuation of the activity in question. In relation to water abstraction for industrial use, such as cooling, mine drainage, air pollution abatement controls, the minimal fee to be applied shall be EUR 0.11/m³ of water abstracted, unless a higher fee is applied for the same water body by another Member State; in that case, the higher fee applies for the purpose of the calculation. The fee shall reflect the external damage cost paid by its use and should in no way be less than competing energy providers like hydropower. Where the origin of the water source / body is the same, the fee shall be at least the same level than applied in another country for a user of that same water source / body;
 - **Where air emissions:** the value of statistical life (VSL) air cost valuation method, adapted to OECD price levels;
 - **Where residual GHG emissions:** a minimal carbon price debt of EUR 105/tCO₂eq is assumed up to 2030, rising to EUR 199/tCO₂eq by 2040⁸;
 - **Damage costs to habitats, soil fertility and crop fertility** surrounding the site;
 - **Other remediation costs and liabilities** due to the operation of the activity that are of a global nature, such as sedimentation of mercury to EU surface waters; achievement and liability costs to Member States with Environmental Quality Standards;

⁷ European Industrial Production Information Exchange, [The Sevilla Process](#), accessed 7 October 2021.

⁸ Simone Schucht et al., [ETC/ATNI Report 04/2020: Costs of air pollution from European industrial facilities 2008–2017](#), *Eionet Portal*, 18 August 2021.

- The rehabilitation projects should be assessed against the Landscape Directive and Convention requirements;
- Any enterprise/entity appointed to implement rehabilitation projects should be assessed and provide evidence that they have the necessary expertise (record of fulfilled projects) and appropriate staff and equipment.

The Environmental Impact Assessment contains the necessary evidence as to the consideration of externalities at mother company level and is made publicly available for verification.

ORPHAN SITES

It might happen that there are ‘genuine’ orphan sites where the polluter cannot be identified or is not solvent and the public purse should step in to perform remediation works.

In such situations, a case-by-case assessment should weigh the benefits of using JTF funds in order to mitigate further environmental and human health damage (‘no action’ scenario) against the drawbacks of not having available the equivalent amount of funds for other projects able to satisfy the many objectives set out in Article 8(2) of the Regulation for a longer timescale.

For instance, future repurposing activities could include sites that serve recreational, tourist, mining heritage, green economy or aquaculture purposes; it should be possible to cover such ‘top-up repurposing’ support by the JTF. Some examples of non-energy conversion of brownfields have been mentioned in the EU toolkit.⁹

The possibility of conversion to a nature conservation area – promoting also nature-based carbon sinks – is very site-specific and dependent on local urban development policies. In already urbanised areas, a revitalisation to green recreational parks/areas is more likely to receive endorsement by the local communities.

It is worth mentioning that the provisions of the Industrial Emissions Directive (2010/75/EU) in regard to industrial sites require the removal of hazardous substances so as to prevent risks to soil and groundwater contamination (with the duty placed on the operators to bring the site back to its original state established in the baseline report, depending on the technical feasibility of such measures and as a minimum to ensure the site does not pose such a risk, depending on its current or approved future use).

As a minimum expectation, the site remediation obligations set forth for industrial activities shall also apply to mining activities (which may be considered as a ‘directly associated’ activity to combustion / steel production clearly covered by the IED), with decontamination and restoration to initial state obligation (compulsory reclamation activities), for which the companies/mother companies or its insurance companies shall bear the costs.

⁹ European Commission, [Technology options toolkit: Transforming industries in coal regions for a climate-neutral economy](#), European Commission, April 2021.

MITIGATING FUTURE RISKS

In order to mitigate future risks around the Polluter Pays Principle, TJTPs should adhere to the following principles, wherever new energy generation facilities and projects are included:

- Pollution prevention solutions beyond EU standards should be preferred over control/reduction measures;
- The Member State / beneficiary should provide evidence that the consideration of alternative approaches to just transition resources (such as pollution standards, emission limit values, national legislation, levies, charges or taxation systems) have been exhausted and that those alternative measures are not as effective in achieving the desired environmental outcome;
- The substitution of the equivalent energy supply of the displaced asset through imports of displaced energy from other countries (Energy Union) or through improved energy conservation measures (efficiency measures in housing, state investment in substitute heat alternatives which would enable to not rely on the displaced asset) has been taken into account; and
- Other potential effects of supporting a given activity on the environment, health, and competition have been considered.