

## Analysis

# Liability for Oil Pollution Damage versus Liability for Waste Management: The Polluter Pays Principle at the Rescue of the Victims

Case C-188/07, *Commune de Mesquer v Total France*  
SA [2008] 3 CMLR 16, [2009] Env LR 9

Nicolas de Sadeleer\*

### Abstract

This landmark European Court of Justice (ECJ) judgment on one hand, provides clarifications as to the scope of the EC definition of waste with respect to transported heavy fuel oil that was accidentally discarded by a tanker during a storm and, on the other, adjudicates that the cleaning up of heavy fuel oil can be imposed on the companies who created the waste, notably in their capacity as former holder or producer of the product from which the waste came.

Keywords: Waste management, concept of waste, 'Polluter pays' principle, holder, previous holders, producer, hydrocarbons and heavy fuel oil, shipwreck, International Convention on Civil Liability for Oil Pollution Damage, International Oil Pollution Compensation Fund

\*Professor of EU law, FUSL, Brussels, Guest Professor, UCL and Paris II Panthéon-Assas (desadeleer@fusl.ac.be). This analysis has been written in regard to a project on Europeanization of Law financed by the Académie de Louvain. The author would like to thank Mr Peter Craddock for his help.

## 1. Background

The shipwreck, on 12 December 1999, of the Erika oil tanker on the coast of the Finistère greatly moved the French population, on the one hand because of the considerable damage caused to the coastline, and on the other hand because of the creation of brass plate companies to disperse the liability of the oil industry.

To briefly restate the facts, the Italian energy company ENEL had signed an agreement with Total International Ltd whereby the latter would provide ENEL with heavy fuel oil to be transported from Dunkirk to Italy. The fuel was intended to be used as fuel for electricity production. For the purpose of carrying out the agreement, TOTAL FRANCE had sold this combustible substance to Total International Ltd, a company that had chartered the Erika oil tanker. Over 25 years of age, flying the Maltese flag, manned by an inexperienced crew, having changed name and hands seven times, known to have suffered damage several times previously, the Erika would later break in two during a storm. The 10,000 tonnes of fuel spread during the shipwreck would lead to unprecedented pollution of the French Atlantic coastline and kill thousands of seabirds wintering along the coast. On 16 January 2008, the Tribunal de Grande Instance of Paris found guilty both the owner and manager of the ship, as well as the ship-classification company, which had certified the Erika as seaworthy and the TOTAL Fr. S.A., the last mentioned because, in the framework of the vetting process, it had given the green light to a vessel, though it could not have been unaware of its risks, and violated Law n 83/583 of 5 July 1983 on the offence of pollution.<sup>1</sup> In addition to these criminal offences, the prosecuted were also sentenced to remedy the damage caused to the reputation and brand of many public undertakings and to indemnify a bird protection Non Governmental Organisation (NGO) for the damage caused to birds.<sup>2</sup>

Consequently to this disaster, the Commune de Mesquer (municipality of Mesquer) brought proceedings against the TOTAL FRANCE S.A and Total International Ltd companies (hereinafter the TOTAL companies) for the reimbursement of costs undertaken for cleaning and decontamination operations on its coastline. The matter was submitted to the French Cour de cassation, which made a preliminary reference to the European Court of Justice (ECJ). On the grounds that the oil accidentally spilled on the beaches was waste within the meaning of the EC Waste Framework Directive, the Mesquer municipality argued that the TOTAL companies should bear the cost

1 The respective penalties were fines of 75,000 euro for both the ship manager and ship owner, and fines of 350,000 euro for Rina Cie (the ship classification company) and TOTAL.

2 See further D Papadopoulou, 'The role of French environmental associations in civil liability for environmental harm: courtesy of Erika' (2009) 21 JEL 87.

of the waste disposal, in their capacity as 'previous holders' of the waste or 'producer of the product from which the waste came'. Given that European Union (EU) secondary law was less favourable to them than the applicable international rules regarding compensation for damage caused by pollution and hydrocarbons, the TOTAL companies considered on the contrary that they were not liable for waste disposal costs on the grounds notably that the fuel oil which was accidentally spilled could not be treated as waste.

In examining these first two preliminary questions, the ECJ, sitting as a Grand Chamber, had to establish whether the transported fuel and the spilled residues were covered by the definition of waste in Framework Directive 75/442 which, when the ECJ handed down its judgment, had been codified in Directive 2006/12.<sup>3</sup> The answer to give to the third and last question was far more delicate, in that the Cour de cassation asked the ECJ whether the TOTAL companies could be regarded as the 'producer and/or holder' of waste, even if the discharged substance had been transported by a third party. The answer to this last question presented a risk of conflict between EC obligations of the French State and its international obligations resulting on the one hand from the Brussels Convention of 29 November 1969 on civil liability for oil pollution damage, and on the other hand from the Brussels Convention of 18 December 1971 on the establishment of an international fund for compensation for oil pollution damage (hereinafter the 'Fund Convention').

## 2. The scope of the definition of waste

According to Article 1(a) of the framework directive, any substance or object in the categories set out in Annex I is to be considered as waste, provided that 'the holder discards or intends or is required to discard'. Repeated three times, the verb 'to discard' occupies a central place in this definition.<sup>4</sup> In other words, the scope of the applicability of the concept of waste and, by extension, of both EC and national rules, depends upon the meaning given to this term. However, EC law has avoided specifying what precisely is meant by this term. Moreover, various general questions arise in connection with the scope of the meaning of the verb 'to discard' independently of the particular language version of the Directive.<sup>5</sup>

3 Directive 2006/12/CE of 5 April 2006 on waste, OJ L 114, 27.4.2006, p 9. That directive is repealed by Directive 2008/98/EC of 19 November 2008, OJ 312, 22. 11.2008, p 3.

4 Case C-129/96, *Inter-Environnement Wallonie ASBL & Région wallonne* (1997) ECR I-7411, para 26; Joined Cases C-418/97 and C-419/97, *ARCO Chemie* (2000) ECR I-4475, para 36.

5 The equivalent French term is 'éliminer', in German 'sich entledigen', in Italian 'disfarsi' and in Dutch 'zich ontdoen'.

Although it has not managed to develop an exhaustive definition of waste,<sup>6</sup> the ECJ has nevertheless set out in a line of cases several criteria that can be applied by administrative authorities in order to determine whether a substance or object falls under the EC definition of waste:

- (i) The concept of waste should be interpreted broadly on the basis of the objectives pursued by Community legislation, the need to render the Directive efficacious and general principles of environmental law;
- (ii) The concept of waste can only be understood in conjunction with that of discarding;<sup>7</sup>
- (iii) The application of the concept of discarding implies that all the 'circumstances' indicating whether the holder has the intention or obligation to discard be taken into consideration.<sup>8</sup>

The existence of waste for the purposes of the framework directive must, in fact, be verified in the light of all the relevant circumstances; in other words, in the light of a number of factors. In this respect, the ECJ has provided a cluster of elements enabling national authorities to reach this conclusion.<sup>9</sup> However, no *a priori* preference can be given to any one criterion over another, but rather the criteria must be applied on a case-by-case basis in the light of the particular circumstances.

The absence of an economic benefit can constitute a salient criterion.<sup>10</sup> This is particularly important where the holder of waste tries to get rid of the substance because it no longer has any economic value. In order to do this, the holder may have to pay a specialist company to take care of collection, transportation and the final treatment of the waste. Besides, the impossibility of using the substance in its current state in another production process or for other commercial ends is another relevant criterion.

Agreeing with the Opinion of the Advocate General Kokott, the ECJ considered, in answering the first question, that the transported heavy fuel oil was a petroleum product and not waste, as on the one hand, it was marketed on economically advantageous terms, and on the other hand, it did not require

6 In his opinion in the *ARCO Chemie* (n 4), Advocate General Alber stated that 'the definition of the term "waste" . . . is too vague to provide a generally valid, comprehensive definition of waste' (para 109). The ECJ has itself never given a complete definition of the concept.

7 Case C-129/96, *Inter-Environnement Wallonie* (n 4), para 26; Joined Cases C-418/97 and C-419/97, *ARCO Chemie* (n 4), para 36.

8 Joined Cases C-418/97 and C-419/97, *Arco Chemie* (n 4), paras 73, 88 and 97; C-9/00, *Palin Granit Oy* (2002) ECR I-3533, para 24.

9 On these elements, see N de Sadeleer, 'Waste, Products and By-products' (2005) 1 JEEPL 46; Nicholas de Sadeleer, 'EC Waste Law or How to Juggle with Legal Concepts. Drawing the Line between Waste, Residues, Secondary Materials, By-products, Disposal and Recovery Operations' (2005) 2 JEEPL 458.

10 Joined cases C-304/94, C-330/94, C-342/94 and C-224/95, *Tombesi* (1997) ECR I-3561, paras 47, 48 and 52.

any processing prior to its use.<sup>11</sup> Given that the residual substance is capable of being exploited commercially on economically advantageous terms, it does not constitute waste within the meaning of the Waste Framework Directive.<sup>12</sup>

However, the ECJ considered, in answering the second question, that given the circumstances of the shipwreck, the hydrocarbons accidentally spilled, mixed with sediment in the shape of pies, could not be treated as a reusable product. Being substances which the holder did not intend to produce and which he had discarded, albeit involuntarily, while they were being transported at sea, they had to qualify as waste.<sup>13</sup> In particular, the ECJ stressed that the substances cannot be reused on economically advantageous terms without prior processing.<sup>14</sup> On this matter, the ECJ follows the logic developed in the *Van de Walle* case (case C-1/03) on the application of waste law to soil contaminated by hydrocarbons, a case which had at the time spurred many controversies.<sup>15</sup>

### 3. The producer of the oil deemed to be the holder of the waste

Since the Waste Framework Directive was applicable to hydrocarbons mixed with water and sediment washed on to beaches, the further question was whether the disposal of these substances could be imposed on the persons who created the waste, notably in their capacity as former holder or producer of the product from which the waste came (in this case, the TOTAL companies). Concerning the financial burden of the waste disposal costs, Article 15 of the Waste Framework Directive provides that, in accordance with the 'polluter pays' principle, 'the holder' of the waste (first indent) or 'the previous holders or the producer of the product from which the waste came' (second indent) must bear the cost of disposing the waste.

11 Case C-188/07, para 48.

12 Paras 47 and 48.

13 Para 63.

14 Para 56.

15 Case C-1/03, *Van der Walle and ors v Région de Bruxelles-Capitale* [2005] Env LR 24. See our comments in (2006) 43 CMLRev 207–23 and also the analysis by McIntyre, (2005) 17 JEL 109. Having to answer the questions asked by the French court, the Court did not have to examine the acts intended as a follow-up to the *Van de Walle* case by the EC lawmaker. Indeed, on 17 June 2008, thus one week before the judgment was pronounced, the European Parliament adopted in second reading the new framework directive on waste. Attention should be drawn to the fact that 'land (in situ) including unexcavated contaminated soil and buildings permanently connected with land' are excluded from the scope of ambit of the directive (art 2, para 1(a)). The new directive 2008/98/EC was enacted on 19 November 2008 (OJ, L 312, 22 November 2008, p 3). This exclusion does not put into question the lessons to be drawn from the case at hand, given that the soils of the French polluted beaches are not falling within the scope of that exemption.

Article 1(b) of the Waste Framework Directive defines the producer as ‘anyone whose activities produce waste (“original producer”) and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste’. However, possession is neither defined in the framework directive nor in EC law in general. The received view on this is that possession entails simply effective control and does not presuppose any proprietary or other legal rights in the object.<sup>16</sup>

As far as the scope of these two terms is concerned, the concept of ‘holder’ appears to be much broader than that of ‘owner’ because it covers all persons likely to get rid of waste. Similarly, the central importance of the concept of holder is testament to the autonomy of the definition of waste from the concept of abandonment for the purposes of private law, which presupposes full proprietary rights over an object. Accordingly, on the basis of this provision, the ECJ has taken the view that an oil company selling hydrocarbons to the manager of a petrol station can, in certain circumstances, be considered the holder of the land contaminated by hydrocarbons that accidentally leak from the station’s storage tanks, even where the petrol company does not own them.<sup>17</sup>

In accordance with the *Van de Walle* case-law, both Advocate General Kokott and the ECJ reached the conclusion that, even if it was in principle the ship owner who held the waste,<sup>18</sup> the producer of heavy fuel oil as well as the seller and the oil tanker charterer could be held liable for waste disposal costs, on the grounds that they could be deemed to have contributed in some way to the causal chain which lead to the shipwreck at the origin of the accidental spillage.<sup>19</sup> Indeed, that financial obligation is thus imposed on the ‘previous holders’ or the ‘producer of the product from which the waste came’ ‘because of their contribution to the creation of the waste and, in certain cases, to the consequent risk of pollution.’<sup>20</sup>

As a result, the liability for damage caused by waste disposal cannot only be channelled to the sole owner of the vessel, who generally speaking is more often insolvent than the companies chartering said ship. On the contrary, it will be possible to regard the seller–charterer as a previous holder of the waste.<sup>21</sup>

16 Advocate General Kokott’s Opinion in *van de Walle* (n 15), para 56.

17 *van de Walle* (n 15), paras 42–61.

18 Para 74 of the judgment.

19 Opinion, para 147; judgment, para 78. While the Advocate General extends the concept of holder both to the ‘producer’ (in this case, Total France) and to the ‘seller and carrier’ (Total France had sold the fuel, while Total International had chartered the ship), the ECJ does not examine, in para 78 of its judgment, the responsibility of the ‘producer’ (Total France here). In para 82 of the judgment, the Court considers, on the contrary, that the holder, in the meaning of art 15, is the ‘producer’.

20 Judgment, para 77.

21 Para 78.

#### 4. Conflict between EC and international liability regimes

The international rules applicable to the compensation for damage caused by the discharge of hydrocarbons were, at first glance, far more favourable to the TOTAL companies. This was because, on the one hand, they channel liability to the oil tanker owner, which has the effect of paralysing any compensation claims for third parties. On the other hand, even if this limitation of liability is countered by the intervention of a compensation fund (Fund Convention), this intervention remains limited. The limitation can as such result in neither the ship owner nor the International Fund bearing any part of the costs of waste disposal resulting from damage due to pollution by hydrocarbons at sea. This leads to the financial burden being placed on the general public, which seems contrary to the logic of the 'polluter pays' principle.

The ECJ was, therefore, surrounded by opposing norms with, on the one hand, international rules limiting the liability of oil companies and of the International Fund and, on the other hand, Article 15 of the Waste Framework Directive, which does not provide for any limitation on the liability of the waste holder. One should further add that the European Community, by not concluding these international instruments, is not bound by obligations thereof,<sup>22</sup> whereas the majority of Member States, including France, are parties to them.

First, the ECJ considers that Article 15 does not prohibit Member States, in accordance with the two international agreements, from laying down limitations and exemptions of liability in favour of the ship owner or of the charterer.<sup>23</sup> There would, therefore, be no incompatibility between EC law and international law.

The fact that these limitations and exemptions stemming from international law would have the effect of passing on to the general public a substantial part of the environmental liability was, according to Advocate General Kokott, in accordance with the 'polluter pays' principle, which, as one should recall, is also enshrined in Article 174(2) of the EC Treaty. Insofar as the Member States permit and control risk activities, the Advocate General deemed it 'justified to apportion to the general public a causal contribution for oil accidents and some of the risk'.<sup>24</sup> This solution was justified in light of the 'broad political consensus for liability for oil pollution damage' to be regulated by specific international agreements, a consensus which is confirmed by the fact that a majority of Member States had ratified the two aforementioned

22 Para 85.

23 Opinion, para 135; judgment, para 81.

24 Opinion, para 142.

international agreements.<sup>25</sup> Furthermore, the EC had to take this political goal into account, under an obligation of cooperation resulting from Article 235(3) of the United Nations Convention on the Law of the Sea, an agreement to which the Community is party.<sup>26</sup>

Such reasoning was at the very least unfavourable to the interests of the Mesquer municipality, whose damage had only been partially compensated by the International Fund for Compensation for Oil Pollution Damage.

However, the ECJ departed somewhat abruptly from the Opinion of the Advocate General in considering that a correct transposition of Article 15 of the directive implied that national law must ensure that further costs 'be borne by the producer of the product from which the waste thus spread came'.<sup>27</sup> This critical paragraph of the judgment is worth quoting at length.

(...) if it happens that the cost of disposal of the waste produced by an accidental spillage of hydrocarbons at sea is not borne by that fund, or cannot be borne because the ceiling for compensation for that accident has been reached, and that, in accordance with the limitations and/or exemptions of liability laid down, the national law of a Member State, including the law derived from international agreements, prevents that cost from being borne by the ship-owner and/or the charterer, even though they are to be regarded as 'holders' within the meaning of Article 1(c) of Directive 75/442, such a national law will then, in order to ensure that Article 15 of that directive is correctly transposed, have to make provision for that cost to be borne by the producer of the product from which the waste thus spread came.<sup>28</sup>

That said, the producer may only be made liable, in accordance with the 'polluter pays' principle, insofar as the latter has 'contributed by his conduct to the risk that the pollution caused by the shipwreck will occur'. Moreover, in accordance with the consistent interpretation doctrine,<sup>29</sup> the national courts are called on to interpret French law in accordance with EC law.<sup>30</sup>

25 Opinion, paras 99 and 100.

26 Opinion, para 102.

27 In para 82 of the judgment, the Court considers that the holder, in the meaning of art 15, is the 'producer', whereas in para 78, it considers that it designates the 'seller-charterer' of the hydrocarbons.

28 Judgment, para 82.

29 Case C-106/89 *Marleasing* [1990] ECR I-4135, para 8, and Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, para 40.

30 Judgment, paras 83 and 84.



## 5. Conclusion

Favourable to the interests of victims, the annotated case ensures a correct application of the 'polluter pays' principle,<sup>31</sup> which may not be emasculated by limitation or exemption systems resulting from international agreements to which the Community is not party. The chain liability provided for by secondary law is thus supplementary to the Fund system. Victims of ecological damage may, therefore, be compensated on both international and EC law grounds.

The reasoning is convincing and sound: an obligation of international treaty law which has not been integrated in the EC legal order may not prohibit a rule of secondary law from having its full effects in the light of the guiding principle of the policy to which the directive relates. The EC legal order retains its full autonomy.<sup>32</sup> The solution would have been different if the Community had been party to the Brussels Conventions.<sup>33</sup> Moreover, an application of environmental rules on waste management and strict liability regimes to damage caused by oil tanker discharges is probably the best answer to give to a truly troubling phenomenon, which consists in limiting charterers' risks by the formation of companies. Indeed, according to the 'one ship, one company' formula, one creates as many companies as there are ships owned by the charterer. It is in a way, a victory for victims of ecological disasters over vessels flying a flag of convenience and over other companies of dubious classification. One should keep in mind that the Maltese company, owner of the Erika, was controlled by two Liberian companies whose shareholder was a Napolitan ship manager. The technical operation of the ship had been entrusted to an Italian company. After having been repaired in Montenegro, the Erika had benefited from a class certificate issued by an Italian company. It was manned by a crew of officers and sailors recruited by an Indian agency. The vessel had been chartered by a Bahamas company, acting through the intermediary of a Swiss company, to ensure the transport of the heavy fuel oil.

31 As to the scope of that environmental principle, see N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP, Oxford 2005) 21–60; and 'Polluter Pays, Precautionary Principles and Liability' in G Betlem and E Brans (eds), *Environmental Liability in the EU* (Cameron & May, Cambridge 2006) 89–102.

32 Again affirmed by the ECJ in its judgment of 3 September 2008, *Kali et al.*, joined Cases C-402/05 P and C-415/05 P [2008] 3 CMLR 41, paras 299 and 300.

33 The Court has considered that the fact that the Community was not bound by the MARPOL agreement did not enable it from controlling the legality of a directive that contained obligations provided for by the agreement (Case C-308/06 *Intertanko* [2008] 3 CMLR 9, para 50).