The Commune de Mesquer case

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This article examines the very important preliminary ruling by the CJEU in Commune de Mesquer v Total France and Total International Limited.1 The case deals with the interplay of public international law and European law, and is of great importance in that the Court decided that oil spilt from tankers becomes waste under the Waste Directive and also that no law (whether national or international) should stand in the way of EU law.

Introduction

This preliminary ruling or judgment delivered by the Court of Justice of the European Union (CJEU) in Commune de Mesquer v Total France and Total International Limited is fascinating because it deals with the complicated and complex interplay of public international law (and, in particular, international maritime law) with European Union (EU) law. It is not the only case to address the issue2 but it is, in many ways, one of the most significant from the perspective of those interested in international maritime law. In particular, it is important because it:

(a) addresses the interplay between, on the one hand, the Liability and Fund Conventions with, on the other hand, various EU measures
(b) decided that heavy fuel oil which is spilt accidentally at sea is ‘waste’ for the purposes of the Waste Directive and

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* This article is based on a paper delivered at the Comité Maritime International’s Dublin Symposium (30 September 2013). Comments to vpower@algoodbody.com.
2 Examples include cases such as Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008] ECR I-6351; Case C-459/03 Commission v Ireland (Mox Plant) [2006] ECR I-4635; Case C-308/06 International Association of Independent Tanker Owners (Intertanko) v Secretary of State for Transport [2008] ECR I-4057; and Cases 21-24/72 International Fruit Company and Others [1972] ECR 1219.
(c) decided that, in certain circumstances, the supplier or seller of the oil and those who chartered the ship could be held liable for the clean-up costs for the spilt oil in a way which circumvents the Conventions.

With regard to the interplay between the Conventions and EU law, it is worth noting that the Liability Convention imposes strict liability on shipowners for damage caused by oil spills but this liability is subject to a tonnage limit and no claim lies against the ship’s charterer or operator unless the damage resulted from an intentional or reckless act or omission. In that context, the availability of another route of redress such as the EU’s Waste Directive could present opportunities for those affected by pollution but problems for those who were involved in pollution. The Commune de Mesquer was the very case to decide whether that alternative route was available.

Cross-border maritime pollution incidents are not unusual; examples include the Nestucca in 1988 involving Canada and the United States of America. Almost invariably, there is a multi-dimensional element to these cases because of different states of registration and the location of the incident (eg the British tanker Kurdistan breaking in two off the coast of Nova Scotia in Canada in 1979). What makes this case different from other international pollution incidents is the interplay between at least three legal regimes: the public international law regime (dealing with the conventions); the law of the coastal state; and, this is the important element in this case, the law of the EU. (There could be other legal dimensions as well in this multidimensional chess game involving the law of the flag state of the vessel, the law of the forum and so on.)

Before considering the case further, it is useful to pause to understand how the CJEU became involved in the matter in deciding whether spilt oil constituted waste for the purposes of the Waste Directive. There was litigation in a French court between the Commune de Mesquer and two Total oil companies. The French court needed to obtain the CJEU’s advice or opinion (a so-called preliminary ruling) on issues of EU law. The French court therefore referred the matter to the CJEU. The CJEU then delivered a preliminary ruling answering the questions posed by the French court but how the case will be decided is ultimately for the national court. However, the Member State court must comply with EU law and abide by the answers it receives from the CJEU. This article considers that preliminary ruling.

**Facts**

The factual background to the case is straightforward. The case concerned the ill-fated 1975 Japanese-built Maltese-registered oil tanker Erika and her sinking in 1999. It led to France’s worst oil disaster ever because much of the 31,000 tons of heavy fuel oil spilled into the sea and washed up on 400 kilometres of the French coastline requiring an enormous clean up and even a secondary clean up in 2000 and 2001. While it is estimated that about two-thirds of the 31,000 tonnes were spilled into the sea, some 250,000 tonnes of waste oil was collected. It is ironic but marginally helpful that the Erika was such a small vessel. Indeed, her small size meant that the funding available under the international conventions regime was limited to 135 million special drawing rights (SDRs, approximately US$200 million) but the 7000 or so claims following the incident amounted to three times that amount. Hence, there was a need to find an alternative route over and above the conventions regime.

The oil was being carried on board the vessel for Total. In the context of this case, Total comprised two companies: Total Raffinage Distribution (later called Total France) and Total International Limited. For the purposes of the Waste Directive, the former was the ‘producer’ of the waste, while the latter was the seller and carrier and therefore was the ‘holder’ of the waste.

The customer for the oil was ENEL, which is the main Italian electricity company. ENEL needed heavy fuel oil transported to Italy to be used in one of its power stations there. ENEL concluded a contract with Total International Limited for the delivery of the heavy fuel oil.
In order to fulfil the contract, Total Raffinage Distribution (now Total France SA) sold the oil to Total International Limited.

Total International Limited then chartered the *Erika* to transport the oil from Dunkirk in France to the port of Milazzo in Sicily in Italy. She set sail on 8 December 1999, and four days later she met her end.

**The incident at issue**

On 11–12 December 1999, the *Erika* sank off the Brittany coast – specifically, the vessel sank about 35 nautical miles south west of the Pointe de Penmarc’h in Finistère in France. She sank inside France’s exclusive economic zone (EEZ).

A very large proportion of the *Erika’s* cargo and oil from her bunkers spilled into the sea and caused pollution on the French coastline. The oil spill affected the coastline of Commune de Mesquer in France particularly badly. The Commune spent enormous amounts of money on the clean up operation.

The Commune then sued Total in the French courts, seeking compensation for the damage caused by the waste spread on the territory of that municipality following the sinking. The case was lost by the Commune in several French courts but ultimately reached the cour de cassation, which referred three questions to the CJEU.

**Essence of the CJEU proceedings**


**French court proceedings**

On 9 June 2000, the Commune instituted proceedings against the Total companies on the basis of their alleged responsibility for the pollution. By these proceedings, the Commune sought to recover its costs.

The Commune instituted these proceedings in the Tribunal de Commerce de Saint-Nazaire (ie the Commercial Court in Saint-Nazaire). It relied on French Law No 75-633. The Commune claimed that the Total companies should be liable for the consequences of the damage caused by the waste spread on the territory of the municipality and be ordered jointly and severally to pay the costs incurred by the municipality for cleaning and anti-pollution measures. The claim was not an enormous one – it was for €69,232.42 – but a claim for less than €70,000 has produced an extremely important precedent in EU and international maritime law.

The Commune lost its claim before the Tribunal de Commerce. The Commune then appealed to the Cour d’appel de Rennes (ie the Rennes Court of Appeal). On 13 February 2002, the Cour d’appel de Rennes confirmed the decision at first instance (namely, the decision of the Tribunal de Commerce). The Cour d’appel was of the view that the heavy fuel oil did not constitute waste in this case but was a combustible material for energy production manufactured for a specific use. The Cour d’appel did accept that the heavy fuel oil did spill into the water and was therefore mixed with water and sand but the court nonetheless believed that there was no basis under which Total could be held liable since it could not be regarded as the ‘producer’ or ‘holder’ of the ‘waste’.  

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6 Judgment para 27.
The Commune appealed to the cour de cassation – France’s final court of appeal. The net issue before the French court, the cour de cassation, was whether Total could be held liable for pollution damage under the Waste Framework Directive (Directive 75/442/EEC on Waste) and the French court believed that it needed the assistance of the CJEU under the preliminary reference regime because the case ‘raised a serious problem of interpretation of Directive 75/442’.

Reference from the cour de cassation in France to the CJEU

On 28 March 2007, the cour de cassation therefore decided to refer three questions to the CJEU for its advice. The CJEU summarised the three questions as follows:

1. Can heavy fuel oil, as the product of a refining process, meeting the user’s specifications and intended by the producer to be sold as a combustible fuel, and referred to in [Directive 68/414] be treated as waste within the meaning of Article 1 of [Directive 75/442] as ... codified by [Directive 2006/12]?

2. Does a cargo of heavy fuel oil, transported by a ship and accidentally spilled into the sea, constitute – either in itself or on account of being mixed with water and sediment – waste falling within category Q4 in Annex I to [Directive 2006/12]?

3. If the first question is answered in the negative and the second in the affirmative, can the producer of the heavy fuel oil (Total Raffinage [the distribution company]) and/or the seller and carrier (Total International Ltd) be regarded as the producer and/or holder of waste within the meaning of Article 1(b) and (c) of [Directive 2006/12] and for the purposes of applying Article 15 of that directive, even though at the time of the accident which transformed it into waste the product was being transported by a third party?

It is worth recalling that under the preliminary reference regime, the CJEU does not decide the case for the referring court. Instead, the CJEU answers the somewhat abstract questions posed by the referring court and then the latter decides the matter with the benefit of the answers given by the CJEU. It is for that reason that the judgment by the CJEU is sometimes referred to, in these circumstances, as preliminary.

Before the CJEU could even consider answering the three questions, it faced a claim of inadmissibility by Total. Total claimed that the CJEU should not entertain the reference for the preliminary ruling because the Commune had already been compensated from the International Oil Pollution Compensation Fund and therefore it had no legal interest in bringing proceedings. Total argued that the reference was therefore hypothetical or moot and thus should not be entertained. The CJEU rejected this inadmissibility argument without too much concern:

30 It is settled case law that questions on the interpretation of Community [or EU] law referred by a national court, in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, Joined Cases C–222/05 to C–225/05 Van der Weerd and Others [2007] ECR I–4233, paragraph 22 and the case law cited).

7 OJ 1975 L194/39 (as amended).
8 Treaty on the Functioning of the European Union art 267.
9 Judgment para 28.
10 ibid paras 29–34.
11 ibid para 25.
Moreover, according to settled case law, it is for the national court hearing a dispute to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Joined Cases C-393/04 and C-415/05 Air Liquide Industries Belgium [2006] ECR I-5293, paragraph 24 and the case law cited).

It may be seen from the documents in the case that the Commune de Mesquer has indeed received payments from the Fund, made following the claim for compensation it brought against inter alia the owner of the Erika and the Fund. Those payments were the subject of settlements by which the municipality expressly agreed not to bring any actions or proceedings, on pain of having to repay the sums paid.

It is apparent that the Cour de cassation had that information before it, but none the less did not consider that the dispute in the main proceedings had ceased or that the Commune de Mesquer had lost its legal interest in bringing proceedings, and did not decide not to refer its questions to the Court for a preliminary ruling.

In those circumstances the questions put by the Cour de cassation must be answered. Having established admissibility, the CJEU then had to consider the legal background before considering the three questions.

Legal background

In the typical CJEU case, the Court has to consider EU law and possibly Member State law but the CJEU had to deal in this case with EU law, Member State law and public international law.

Public international law background

There are two conventions which are relevant to the case:

- The International Convention on Civil Liability for Oil Pollution damage adopted at Brussels on 29 November 1969, as amended by the Protocol signed in London on 27 November 1992 (the Liability Convention) OJ 2004 L78/32

The Liability Convention

The Liability Convention governs the liability of shipowners for damage caused by the spillage of oil from oil tankers. It embodies the principle of strict liability but is limited to an amount calculated by reference to the tonnage of the ship and establishes a system of compulsory liability insurance.

Under Article II(a) the Convention applies to pollution damage caused in the territory, including the territorial sea, of a Contracting State, and in the exclusive economic zone of a Contracting State established in accordance with international law or, as the case may be, in an area beyond and adjacent to the territorial sea of that state determined by that state in accordance with maritime law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.

Under Article III(4) ‘no claim for compensation for pollution damage under this Convention or otherwise may be made against … any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship … unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result’. In the context of this case, that is an important provision because if Total was not guilty of conduct under the last limb of Article III(4) then it would have had no liability to the Commune – the question was therefore could Total (as charterer) be liable under the EU’s Waste Directive.
The Fund Convention

The Fund Convention ‘complements'\textsuperscript{12} the Liability Convention by establishing a system for compensating victims. The CJEU recalled\textsuperscript{13} that the International Oil Pollution Compensation Fund (the Fund), which is financed by contributions from the oil industry, can cover up to 135 million SDRs for an incident before 2003. Under Article 4 of the Fund Convention, victims may bring claims for compensation before the courts of the Contracting State where the damage has been caused, in particular where the Liability Convention does not provide for any liability for the damage in question or where the shipowner is insolvent or released from liability under that Convention. The Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992,\textsuperscript{14} establishes an international supplementary fund for compensation for oil pollution damage, to be named the International Oil Pollution Compensation Supplementary Fund 2003, which together with the Fund makes it possible to cover up to 750 million units of account in respect of any one incident after 1 November 2003.

EU law background

When one examines the judgment, it would appear that the EU law background to the case seems more complicated than it is in reality. This is because there are several directives at play and then there are several provisions within some of those directives at issue.


Directive 75/442 is the main directive at issue. This is the Waste Directive. The objective of Directive 75/442 is set out in the recitals to the directive and the third recital provides that the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste.

Article 1 of the Waste Directive (Directive 75/442) provides:

For the purposes of this Directive:

(a) ‘waste’ shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

(b) ‘producer’ shall mean 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;

(c) ‘holder’ shall mean the producer of the waste or the natural or legal person who is in possession of it;

(e) ‘disposal’ shall mean any of the operations provided for in Annex II, A;

(f) ‘recovery’ shall mean any of the operations provided for in Annex II, B;

(g) ‘collection’ shall mean the gathering, sorting and/or mixing of waste for the purpose of transport.

It is notable that the word ‘discard’ is used in Article 1. This word will be very significant in the ruling.

\textsuperscript{12} ibid para 6.
\textsuperscript{13} ibid paras 7–8.
\textsuperscript{14} OJ 2004 L78/24.
Article 8 of the Waste Directive (Directive 75/442) provides:

Member States shall take the necessary measures to ensure that any holder of waste:
− has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or B, or
− recovers or disposes of it himself in accordance with the provisions of this Directive.

Article 15 of the Waste Directive (Directive 75/442) embodies the polluter pays principle. It would become the heart of the Commune de Mesquer’s case against Total. Article 15 provides:

In accordance with the ‘polluter pays’ principle, the cost of disposing of waste must be borne by:
− the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9,
and/or
− the previous holders or the producer of the product from which the waste came.

This latter limb – the previous holders or producers of the product from which the waste came – would prove again a central part of the case.

Categories Q4, Q11, Q13 and Q16 in Annex I to Directive 75/442, ‘Categories of waste’, read as follows:

Q4 Materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap …
Q11 Residues from raw materials extraction and processing (e.g. mining residues oil field slops, etc.) …
Q13 Any materials, substances or products whose use has been banned by law …
Q16 Any materials, substances or products which are not contained in the above categories.

Annex II A to the Directive, ‘Disposal operations’, is intended to list disposal operations such as they occur in practice, while Annex II B, ‘Recovery operations’, is intended to list recovery operations in the same way.

Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste,15 which drew up a codification of Directive 75/442 in order to clarify matters, repeats the above provisions in Articles 1 and 15 and Annexes I, IIA and IIB. Directive 2006/12 was not adopted until after the events that are the subject of the main proceedings so that it does not affect those proceedings.


Recital 10 in the preamble to Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remediating of environmental damage18 reads as follows:

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16 OJ English Special Edition 1968(II)/586.
17 OJ 1998 L358/100.
18 OJ 2004 L143/56.
Express account should be taken of the Euratom Treaty and relevant international conventions and of Community legislation regulating more comprehensively and more stringently the operation of any of the activities falling under the scope of this Directive. …

Article 4(2) of Directive 2004/35 provides:

This Directive shall not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in Annex IV, including any future amendments thereof, which is in force in the Member State concerned.

Annex IV to Directive 2004/35 reads as follows:

International conventions referred to in Article 4(2):
(a) the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage;
(b) the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
…

Fund Decision: Decision 2004/246/EC

On 2 March 2004, the Council adopted Decision 2004/246/EC authorising the Member States to sign, ratify or accede to, in the interest of the European Community, the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992, and authorising Austria and Luxembourg, in the interest of the European Community, to accede to the underlying instruments.19

Recital 4 in the preamble to Decision 2004/246 reads as follows:

Pursuant to the Supplementary Fund Protocol, only sovereign States may be party to it; it is not therefore possible for the Community to ratify or accede to the Protocol, nor is there a prospect that it will be able to do so in the near future.

Articles 1(1) and 4 of Decision 2004/246 read as follows:

Article 1
1. The Member States are hereby authorised to sign, ratify or accede to, in the interest of the European Community, the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, (the Supplementary Fund Protocol) subject to the conditions set out in the following Articles.
…

Article 4
4. Member States shall, at the earliest opportunity, use their best endeavours to ensure that the Supplementary Fund Protocol, and the underlying instruments, are amended in order to allow the Community to become a Contracting Party to them.

Member State law/national law

The CJEU recalled the relevant provisions of French national law in a single paragraph:

23 Article 2 of Loi n° 75-633 relative à l’élimination des déchets et à la récupération des matériaux (Law No 75-633 on the disposal of waste and the recovery of materials) of 15 July 1975 (JORF (16 July 1975) at 7279), now Article L 5412 of the Code de l’environnement (Code of the Environment), provides:

19 OJ 2004 L78/22.
Any person who produces or holds waste under conditions likely to produce harmful effects on soils, flora and fauna, to damage sites or landscapes, to pollute the air or water, to cause noise and odours and, in general, to harm human health or the environment, is obliged to dispose of it or have it disposed of in accordance with the provisions of this Chapter, under the conditions required to avoid the above effects. The disposal of waste includes the operations of collection, transport, storage, sorting and treatment required for the recovery of reusable elements and materials or energy, and for the deposit or discharge into the natural environment of all other products under the conditions required to avoid the harmful effects mentioned in the previous paragraph.

Relationship between EU and public international law

There have been several CJEU cases dealing with the issue of the relationship between the international law of the sea and EU law. Among these cases are the Mox Plant\(^{20}\) and the Intertanko\(^{21}\) cases. This case clarifies the matter further.

**Judgment by the CJEU**

The preliminary ruling (or, in practical terms, judgment) of the CJEU was delivered by a Grand Chamber of the CJEU. The fact that it was a Grand Chamber reflects the importance of the case.\(^{22}\)

First question: is heavy fuel oil sold as a combustible fuel 'waste' within the meaning of Article 1(a) of Directive 75/442?

The first question seems a relatively simple one. The cour de cassation asked whether heavy fuel oil sold as a combustible fuel may be classified as waste within the meaning of Article 1(a) of Directive 75/442.\(^{23}\)

The answer seems simple but, when money is at stake, everyone can take a different view! Not surprisingly, the Total companies urged the CJEU to take the negative view (namely, that such heavy fuel oil was not waste and therefore outside the directive) and the Commune argued the opposite (namely, that it was waste and within the scope of the directive). The Commune argued that heavy fuel oil was not only waste but was also within the category of dangerous and illegal products. However, all the Member States which had submitted observations to the CJEU and the Commission took the view that the question should be answered in the negative. How was the CJEU going to address the issue?

The CJEU recalled that under Article 1(a) of Directive 75/442 any substance or object in the categories set out in Annex I to the directive which the holder discards or intends or is required to discard is to be regarded as waste.\(^{24}\)

So, the issue turned on the meaning of the term ‘discard’. The CJEU proceeded on the following lines:

38 Thus, in the context of that directive, the scope of the term ‘waste’ turns on the meaning of the term ‘discard’ (Case C–129/96 Inter-Environnement Wallonie [1997] ECR I–7411,


\(^{21}\) Case C–308/06 The Queen on the application of: International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport [2008] ECR I–04057.

\(^{22}\) There was an opinion by Advocate General Kokott but this article is concentrating on the ruling by the CJEU itself. Suffice it to say that the CJEU very largely followed the opinion of the very experienced and expert Advocate General Kokott.

\(^{23}\) Judgment para 35.

\(^{24}\) ibid 37.
paragraph 26), and consequently, in accordance with the Court’s case law, those terms must be interpreted in the light of the aim of the directive (Joined Cases C-418/97 and C-419/97 ARCO Chemie Nederland and Others [2000] ECR I-4475, paragraph 37), which, in the words of the third recital in the preamble to the directive, consists in the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste, having regard to Article 174(2) EC, which provides that Community policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken (see Case C-457/02 Niselli [2004] ECR I-10853, paragraph 33).

39 The Court has also held that, in view of the aim pursued by Directive 75/442, the concept of waste cannot be interpreted restrictively (see ARCO Chemie Nederland, paragraph 40).

40 That concept can cover all objects and substances discarded by their owner, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or reuse (see, in particular, Case C-9/00 Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus [2002] ECR I-3533, paragraph 29 and the case law cited).

41 In this respect, certain circumstances may constitute evidence that a substance or object has been discarded or of an intention or requirement to discard it within the meaning of Article 1(a) of Directive 75/442. That will be the case in particular where the substance used is a production residue, that is to say, a product not sought as such (ARCO Chemie Nederland, paragraphs 83 and 84). The Court has thus said that leftover stone from extraction processes of a granite quarry which is not the product primarily sought by the operator in principle constitutes waste (Palin Granit, paragraphs 32 and 33).

42 However, goods, materials or raw materials resulting from a manufacturing or extraction process which is not primarily intended to produce that item may constitute not a residue but a by-product which the undertaking does not wish to discard but intends to exploit or market on economically advantageous terms in a subsequent process without prior processing (see Palin Granit, paragraph 34, and order in Case C-235/02 Saetti and Frediani [2004] ECR I-1005, paragraph 35).

43 There is no reason to apply the provisions of Directive 75/442 to goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products (see Palin Granit, paragraph 35, and order in Saetti and Frediani, paragraph 35).

44 However, having regard to the obligation to interpret the concept of waste widely in order to limit its inherent nuisance and harmful effects, the reasoning concerning by-products should be confined to situations in which the reuse of goods, materials or raw materials is not a mere possibility but a certainty, without prior processing and as an integral part of the production process (Palin Granit, paragraph 36, and order in Saetti and Frediani, paragraph 36).

45 In addition to the criterion of whether a substance constitutes a production residue, a second relevant criterion for determining whether or not the substance is waste within the meaning of Directive 75/442 is thus the degree of likelihood that the substance will be reused without prior processing. If, in addition to the mere possibility of reusing the substance, there is also an economic advantage to the holder in so doing, the likelihood of such reuse is high. In that case, the substance in question can no longer be considered a substance which its holder seeks to ‘discard’ and must be regarded as a genuine product (see Palin Granit, paragraph 37).

46 In the case at issue in the main proceedings, it appears that the substance in question is obtained as a result of the process of refining oil.

47 However, this residual substance is capable of being exploited commercially on economically advantageous terms, as is confirmed by the fact that it was the subject of a commercial transaction and meets the buyer’s specifications, as the referring court points out.
The CJEU thereby had regard to the purposive interpretation of the directive, the notion that the concept of waste cannot be construed restrictively and indeed the concept of waste should be construed widely in order to limit its inherent nuisance and harmful effects, the concept that waste could include something of value and that it was a question of fact as to whether the item was a by-product which would not be used again or something which could be exploited or marketed ‘on economically advantageous terms in a subsequent process without prior processing’. However, the CJEU emphasised ‘the degree of likelihood that the substance will be reused without prior processing. If, in addition to the mere possibility of reusing the substance, there is also an economic advantage to the holder in so doing, the likelihood of such reuse is high. In that case, the substance in question can no longer be considered a substance which its holder seeks to “discard” and must be regarded as a genuine product’.

It followed therefore that the CJEU answered the cour de cassation’s first question in the negative:

48 The answer to the first question must therefore be that a substance such as that at issue in the main proceedings, namely heavy fuel oil sold as a combustible fuel, does not constitute waste within the meaning of Directive 75/442, where it is exploited or marketed on economically advantageous terms and is capable of actually being used as a fuel without requiring prior processing.

In other words, where the oil had not been discarded but was actually being transported to be delivered to a customer then it was not waste.

The Schedule to the Waste Directive contained a category which included ‘materials spilled, lost or having undergone other mishap, including any materials equipment etc contaminated as a result of such a mishap’. However, as the CJEU said, this did not mean that the substance was waste; it was necessary to establish that the holder of the waste had intended to ‘discard’ the substance. The heavy duty oil on board the Erika was a by-product of the oil-refining process. In earlier judgments, the CJEU had held that by-products or residues could constitute waste if the holder intended to discard the substance. This was so even if the substance had economic value. In this case, the CJEU held that once the oil had spilled into the sea, there was little technical or economic possibility that it could be reused and therefore it was waste as it had been ‘discarded’.

Second question: is heavy fuel oil that is accidentally spilled into the sea following a shipwreck waste within the meaning of category Q4 in Annex I to Directive 75/442?

The second question from the cour de cassation to the CJEU concerned whether ‘heavy fuel oil that is accidentally spilled into the sea following a shipwreck must in such circumstances be classified as waste within the meaning of category Q4 in Annex I to Directive 75/442’.

Submissions to the CJEU

There had been some division with regard to the first question: the Commune on one side (saying pure heavy fuel oil was waste and worse) while Total, the Commission and the Member States, on the other hand, were saying it was not waste. However, there were more
complicated and complex divisions opened up by the second question. It is easier to understand those divisions by examining the issue in tabular form:

<table>
<thead>
<tr>
<th>Party</th>
<th>Argument</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>The products spilled at sea should be classified not as waste within the meaning of Directive 75/442 but as heavy hydrocarbons within the meaning of the Liability Convention and the Fund Convention.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Accepted that such hydrocarbons may be classified as waste within the meaning of the directive but considers it preferable for the accidental spillage of hydrocarbons at sea to be covered exclusively by the Liability Convention and the Fund Convention so that Directive 75/442 does not apply in such circumstances.</td>
</tr>
</tbody>
</table>

How did the CJEU deal with these arguments?

The CJEU began by saying that the lists in Directive 75/442 amounted to guidance and that one should look primarily at the holder’s actions and the meaning of the term ‘discard’:

53 It should be noted, to begin with, that Annex I to Directive 75/442 provides lists of substances and objects that may be classified as waste. However, the lists are only intended as guidance, and the classification of waste is to be inferred primarily from the holder’s actions and the meaning of the term ‘discard’ (see Case C–1/03 Van de Walle and Others [2004] ECR I–7613, paragraph 42). 35

The CJEU then stated:

54 The fact that Annex I to Directive 75/442, entitled ‘Categories of waste’, refers in point Q4 to ‘Materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap’ thus merely indicates that such materials may fall within the scope of waste. It cannot therefore suffice to classify as waste hydrocarbons which are accidentally spilled at sea and cause pollution of the territorial waters and then the coastline of a Member State (see, to that effect, Van de Walle, paragraph 43).

Therefore the CJEU had to consider, in the light of the circumstances, ‘whether such an accidental spillage of hydrocarbons is an act by which the holder discards them within the meaning of Article 1(a) of Directive 75/442’36 and, in that context, cited paragraph 44 of Van de Walle.

The CJEU then turned to the essence of the issue and came to a conclusion on the second question:

56 Where the substance or object in question is a production residue, that is to say, a product which is not itself wanted for subsequent use and which the holder cannot reuse on economically advantageous terms without prior processing, it must be regarded as a burden which the holder ‘discards’ (see Palin Granit, paragraphs 32 to 37, and Van de Walle, paragraph 46).

57 In the case of hydrocarbons which are accidentally spilled and cause soil and groundwater contamination, the Court has held that they do not constitute a product which can be reused without prior processing (see Van de Walle, paragraph 47).

33 ibid 52.
34 ibid 52.
35 Van de Walle and Others was a controversial decision to the effect that oil which had leaked from a filling station into the ground amounted to waste.
36 Judgment para 55.
The same conclusion must be reached in the case of hydrocarbons which are accidentally spilled at sea and cause pollution of the territorial waters and then the coastline of a Member State.

It is common ground that the exploiting or marketing of such hydrocarbons, spread or forming an emulsion in the water or agglomerated with sediment, is very uncertain or even hypothetical. It is also agreed that, even assuming that it is technically possible, such exploiting or marketing would in any event imply prior processing operations which, far from being economically advantageous for the holder of the substance, would in fact be a significant financial burden. It follows that such hydrocarbons accidentally spilled at sea are to be regarded as substances which the holder did not intend to produce and which he ‘discards’, albeit involuntarily, while they are being transported, so that they must be classified as waste within the meaning of Directive 75/442 (see, to that effect, Van de Walle, paragraphs 47 and 50).

Moreover, the applicability of that directive is not called into question by the fact that the accidental spillage of hydrocarbons took place not on the land territory of a Member State but in its exclusive economic zone.

This is significant because the CJEU decided that because the spillage occurred within the Exclusive Economic Zone (EEZ) of a Member State then the Waste Directive was applicable. Even if the spillage had occurred outside the EEZ then it would still be subject to the Waste Directive because the oil had washed up onto a Member State’s territory.

Without there being any need to rule on the applicability of the directive at the place where the ship sank, it suffices to observe that the hydrocarbons thus accidentally spilled drifted along the coast until they were washed up on it, so being discharged on the Member State’s land territory.

It follows that, in the circumstances of the sinking of an oil tanker such as those at issue in the main proceedings, Directive 75/442 applies ratione loci.

Consequently, the answer to the second question must be that hydrocarbons accidentally spilled at sea following a shipwreck, mixed with water and sediment and drifting along the coast of a Member State until being washed up on that coast, constitute waste within the meaning of Article 1(a) of Directive 75/442, where they are no longer capable of being exploited or marketed without prior processing.

In essence, the CJEU held that hydrocarbons accidentally spilled at sea following a shipwreck, mixed with water and sediment and drifting along the coast of a Member State until being washed up on that coast, constitute waste within the meaning of Article 1(a) of Directive 75/442, where they are no longer capable of being exploited or marketed without prior processing.

Third question: whether, in the case of a sinking of an oil tanker, the producer of the oil spilled at sea and/or the seller of the oil and charterer of the ship may be required to pay for the disposing of the waste generated even though the substance was being transported by a third party?

The third question from the cour de cassation to the CJEU concerned whether in the event of the sinking of an oil tanker, the producer of the heavy fuel oil spilled at sea and/or the seller of the fuel and charterer of the ship carrying the fuel may be required to bear the cost of disposing of the waste generated, even though the substance spilled at sea was transported by a third party, in this case a carrier by sea.

Observations submitted to the CJEU

Just as there had been some division in regard to the first and second questions, there was further division on the third question. Once again, it is easier to understand those divisions by examining the issue in tabular form:
### Findings of the Court on the third question

Initially, the CJEU recalled:

69 In circumstances such as those of the main proceedings, having regard to the aim of Directive 75/442 as stated in the third recital in the preamble to the directive, the second indent of Article 15 of the directive provides that, in accordance with the ‘polluter pays’ principle, the cost of disposing of the waste is to be borne by the previous holders or the producer of the product from which the waste came.

70 Under Article 8 of Directive 75/442, any ‘holder of waste’ is obliged to have it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or B to the directive, or to recover or dispose of it himself in accordance with the provisions of the directive (Case C–494/01 Commission v Ireland [2005] ECR I–3331, paragraph 179).

71 It follows from those provisions that Directive 75/442 distinguishes the actual recovery or disposal operations, which it makes the responsibility of any ‘holder of waste’, whether producer or possessor, from the financial burden of those operations, which, in accordance with the ‘polluter pays’ principle, it imposes on the persons who cause the waste, whether they are holders or former holders of the waste or even producers of the product from which the waste came (Van de Walle, paragraph 58).

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**Party** | **Argument**
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Commune de Mesquer | For the purposes of the application of Article 15 of Directive 75/442, the producer of the heavy fuel oil and the seller of that fuel oil and charterer of the ship carrying it must be regarded as producers and holders, within the meaning of Article 1(b) and (c) of that directive, of the waste resulting from the spillage into the sea of that substance.\(^{37}\)
Total | In the circumstances of the case, Article 15 of Directive 75/442 does not apply to the producer of the heavy fuel oil or to the seller of the oil and charterer of the ship carrying that substance, in that, at the time of the accident which converted the substance into waste, it was being carried by a third party.\(^{38}\) Furthermore, that provision also does not apply to the producer of the heavy fuel oil simply because it produced the product from which the waste came.\(^{39}\)
France | The producer of the heavy fuel oil and/or the seller of the oil and charterer of the ship carrying that substance may be regarded as producers and/or holders of the waste resulting from the spillage at sea of that substance only if the shipwreck that converted the cargo of heavy fuel oil into waste was attributable to various actions capable of making them liable.\(^{40}\)
Italy | The Commission added, however, that the producer of a product such as heavy fuel oil may not, merely because of that activity, be regarded as a ‘producer’ and/or ‘holder’ within the meaning of Article 1(b) and (c) of Directive 75/442 of the waste generated by that product on the occasion of an accident during transport. Such a person is nonetheless obliged under the second indent of Article 15 of that directive to bear the cost of disposing of the waste, in his capacity as ‘producer of the product from which the waste came’.\(^{41}\)
Commission | The application of Directive 75/442 is excluded because the Liability Convention applies.\(^{42}\)
Belgium | The CJEU should not answer this question, in that the case at issue in the main proceedings relates to issues of liability for the spillage of heavy fuel oil at sea.\(^{43}\)
United Kingdom |
The application of the ‘polluter pays’ principle within the meaning of the second sentence of the first subparagraph of Article 174(2) EC and Article 15 of Directive 75/442 would be frustrated if such persons involved in causing waste escaped their financial obligations as provided for by that directive, even though the origin of the hydrocarbons which were spilled at sea, albeit unintentionally, and caused pollution of the coastal territory of a Member State was clearly established.

As the oil constituted waste for the purposes of the Waste Directive, the CJEU then considered the issue of the apportionment of liability. The CJEU noted that as Article 15 of the Waste Directive provides that having regard to the ‘polluter pays’ principle, the costs of the disposal of waste must be borne by the waste holder who has waste handled by a waste collector or a waste undertaking, and/or the previous holder or producer of the product from which the waste came.

**Consideration by the CJEU of the terms ‘holder’ and ‘previous holders’**

The CJEU spent time on the meaning of the terms ‘holder’ and ‘previous holders’:

73 The Court has held, in the case of hydrocarbons spilled by accident as the result of a leak from a service station’s storage facilities which had been bought by that service station to meet its operating needs, that those hydrocarbons were in fact in the possession of the service station’s manager. The Court thus found that, in that context, the person who, for the purpose of his activity, had the hydrocarbons in stock when they became waste could be regarded as the person who ‘produced’ them within the meaning of Article 1(b) of Directive 75/442. Since he is at once the possessor and the producer of that waste, such a service station manager must be regarded as its holder within the meaning of Article 1(c) of that directive (see, to that effect, Van de Walle, paragraph 59).

74 In the same way, in the case of hydrocarbons spilled by accident at sea, it must be held that the owner of the ship carrying those hydrocarbons is in fact in possession of them immediately before they become waste. In those circumstances, the shipowner may thus be regarded as having produced that waste within the meaning of Article 1(b) of Directive 75/442, and on that basis be categorised as a ‘holder’ within the meaning of Article 1(c) of that directive.

75 However, that directive does not rule out the possibility that, in certain cases, the cost of disposing of waste is to be borne by one or more previous holders (Van de Walle, paragraph 57).

**Determination of who is liable to bear the costs of disposing of the waste**

The CJEU then continued:

76 The question which arises is whether the person who sold the goods to the final consignee and for that purpose chartered the ship which sank may also be regarded as a ‘holder’, a ‘previous’ one, of the waste thus spilled. The referring court is also uncertain whether the producer of the product from which the waste came may also be responsible for bearing the cost of disposing of the waste thus produced.

77 On this point, Article 15 of Directive 75/442 provides that certain categories of persons, in this case the ‘previous holders’ or the ‘producer of the product from which the waste came’, may, in accordance with the ‘polluter pays’ principle, be responsible for bearing the cost of disposing of waste. That financial obligation is thus imposed on them because of their contribution to the creation of the waste and, in certain cases, to the consequent risk of pollution.

78 In the case of hydrocarbons accidentally spilled at sea following the sinking of an oil tanker, the national court may therefore consider that the seller of the hydrocarbons and charterer of the ship carrying them has ‘produced’ waste, if that court, in the light of the elements which it alone is in a position to assess, reaches the conclusion that that seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in
particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship. In such circumstances, it will be possible to regard the seller-charterer as a previous holder of the waste for the purposes of applying the first part of the second indent of Article 15 of Directive 75/442.

79 As noted in paragraph 69 above, in circumstances such as those of the main proceedings, the second indent of Article 15 of Directive 75/442 provides, by using the conjunction ‘or’, that the cost of disposing of the waste is to be borne either by the ‘previous holders’ or by the ‘producer of the product from which’ the waste in question came.

80 In this regard, in accordance with Article 249 EC, while the Member States as the addressees of Directive 75/442 have the choice of form and methods, they are bound as to the result to be achieved in terms of financial liability for the cost of disposing of waste. They are therefore obliged to ensure that their national law allows that cost to be allocated either to the previous holders or to the producer of the product from which the waste came.

81 As the Advocate General observes in point 135 of her Opinion, Article 15 of Directive 75/442 does not preclude the Member States from laying down, pursuant to their relevant international commitments such as the Liability Convention and the Fund Convention, that the shipowner and the charterer can be liable for the damage caused by the discharge of hydrocarbons at sea only up to maximum amounts depending on the tonnage of the vessel and/or in particular circumstances linked to their negligent conduct. That provision also does not preclude a compensation fund such as the Fund with resources limited to a maximum amount for each accident from assuming liability, pursuant to those international commitments, in place of the ‘holders’ within the meaning of Article 1(c) of Directive 75/442, for the cost of disposal of the waste resulting from hydrocarbons accidentally spilled at sea.

82 However, 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 shipowner 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. In accordance with the ‘polluter pays’ principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur.

As the CJEU observed that ‘a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck would occur,’ the CJEU basically held that there would be a requirement that a degree of ‘negligence’ is required before imposing liability in these circumstances:

83 The obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 249 EC and by the directive itself. That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts (see Case C–106/89 Marleasing [1990] ECR I–4135, paragraph 8, and Inter-Environnement Wallonie, paragraph 40).

84 It follows that, in applying national law, whether the provisions in question were adopted before or after the directive or derive from international agreements entered into by the Member State, the national court called on to interpret that law is required to do so, as far as possible, in the light of the wording and the purpose of the directive, in order to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 249 EC (see, to that effect, Marleasing, paragraph 8).
Moreover, contrary to the arguments put forward by the Total companies at the hearing, the Community is not bound by the Liability Convention or the Fund Convention. In the first place, the Community has not acceded to those international instruments and, in the second place, it cannot be regarded as having taken the place of its Member States, if only because not all of them are parties to those conventions (see, by analogy, Case C-379/92 Peralta [1994] ECR I-3453, paragraph 16, and Case C-308/06 Intertanko and Others [2008] ECR I-4057 paragraph 47), or as being indirectly bound by those conventions as a result of Article 235 of the United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, which entered into force on 16 November 1994 and was approved by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L179 p 1) paragraph 3 of which confines itself, as the French Government pointed out at the hearing, to establishing a general obligation of cooperation between the parties to the convention.

The CJEU thus held, at paragraph 85 of the ruling, that the EU cannot succeed the Member States as party to an international agreement where not all the EU Member States are parties to the agreement. Put another way, the EU was not a party to the conventions nor were all its Member States; accordingly, it was not bound by these treaties:

Furthermore, as regards Decision 2004/246 authorising the Member States to sign, ratify or accede to, in the interest of the Community, the Protocol of 2003 to the Fund Convention, it suffices to state that that decision and the Protocol of 1993 cannot apply to the facts at issue in the main proceedings.

It is true that Directive 2004/35 expressly provides in Article 4(2) that it is not to apply to an incident or activity in respect of which liability or compensation falls within the scope of any of the international conventions listed in Annex IV, which mentions the Liability Convention and the Fund Convention. The Community legislature, as stated in recital 10 in the preamble to that directive, found it necessary to take express account of the relevant international conventions regulating more comprehensively and more stringently the operation of any of the activities within the scope of that directive.

However, Directive 75/442 does not contain a similar provision, even in the codified version resulting from Directive 2006/12.

The CJEU thus answered the third question as follows:

In the light of the above considerations, the answer to the third question must be that, for the purposes of applying Article 15 of Directive 75/442 to the accidental spillage of hydrocarbons at sea causing pollution of the coastline of a Member State:

- the national court may regard the seller of those hydrocarbons and charterer of the ship carrying them as a producer of that waste within the meaning of Article 1(b) of Directive 75/442, and thereby as a ‘previous holder’ for the purposes of applying the first part of the second indent of Article 15 of that directive, if that court, in the light of the elements which it alone is in a position to assess, reaches the conclusion that that seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship;

- if it happens that the cost of disposing of the waste produced by an accidental spillage of hydrocarbons at sea is not borne by the 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 shipowner 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. In accordance with the ‘polluter pays’ principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur.
Conclusions

Ultimately, however complicated the preliminary ruling by the CJEU would appear, it is nothing compared with the ultimate process in France. The cour de cassation gave a judgment in 2012. The judgment was, in the finest French tradition, just one sentence long. However, that sentence was 330 pages long! The cour de cassation found that Total was, no pun intended and with a little poetic licence, totally liable.

The Commune de Mesquer reasoning has been followed by the CJEU ever since. For example, Advocate General Kokott followed the approach on 13 December 2012 in Case C-358/11 Lapin elinkeino-, liikenne- ja ympäristökeskuksen liikenne ja infrastruktuuri –vastuualue. Equally, Advocate General Jääskinen followed the same approach on 18 June 2013 in Joined Cases C-241/12 and C-242/12 Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV. Moreover, the CJEU followed the approach on 28 February 2012 in Inter-Environnement Wallonie ASBL, Terre Wallonne ASBL v Région Wallonne. Equally, the reasoning has been followed in Member State courts as well in a non-maritime context.

The case is extremely important because it not only decides that oil spilt from tankers becomes waste; it thereby gives the opportunity for third parties to claim compensation under the Waste Directive over and above any compensation which they could obtain under public international law. However, the case probably has a greater significance: it demonstrates how the CJEU will almost always ensure that no law (whether national or international) will stand in the way of EU law. And, in that regard, the result was perhaps not surprising: the CJEU has since the outset insisted that EU law is a special legal regime and has fought valiantly to ensure the supremacy of EU law over Member State law and that Member States or public international law do nothing to undermine EU law; this case is another example, but in a new field, of that intention and commitment by the EU’s highest court.

44 Case C-43/11.