

Waste Producers' Duty of Care under European Community Law

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Abstract

In a little-noticed case in 2008, the European Court of Justice held that waste producers have a duty to take reasonable precautions to assure proper disposal of their waste under the Waste Framework Directive. The Court, in effect, invalidated the laws of 15 Member States that purport to allow transfer of liability to third-party waste vendors. The same “polluter pays” language as to waste producers was re-enacted in the revised Directive and should be reflected in the latest transposition of the Directive in 2010 to meet the Court's ruling on what is mandatory community law.

Keywords

waste producer liability, duty of care

1 Introduction

While the Environmental Liability Directive gained an enormous amount of public attention in Europe, an expansive interpretation of waste producers' obligations under the Waste Framework Directive by the European Court of Justice has largely gone unnoticed. See [Commune de Mesquer v Total France SA](#), ([link](#)) European Court of Justice (Case No. 188/07). The “polluter pays principal” has frequently been the basis for regulatory measures adopted by the European Parliament, but rarely has it been broadly interpreted to impose liability for third-party damages and clean-up costs. The [Total France](#) decision imposes a broad duty of care on waste producers that has survived in the revised Directive and supersedes the enacted statutes of fifteen Member States that have allowed some form of transfer of liability under waste management contracts. While the revised Waste Framework Directive apparently alters this equation for producers of products, *the same ECJ logic will apply to waste producers*, who remain under the “polluter pays” language in the new article 14. Although generally not recognized, the ECJ has created a minimum mandatory standard of waste producer liability in the

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EU that requires waste producers exercise reasonable care to prevent subsequent problems with wastes handled by third-parties.

2 Total France Decision

One of the earliest EC environmental directives was the Waste Framework Directive in 1975. See 75/442/EEC ([as amended](#)) (now revised [2008/98/EC](#)). The Waste Framework Directive contained Article 15 on liability for waste disposal:

'In accordance with the "polluter pays" principle,² 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.³

Member States were given wide latitude by the European Commission in their transposition of this Directive in the very early years of EU environmental law. Most Member States took up a rule that allowed the waste producer to transfer liability along with the waste to a third-party, often with caveats that that party be licensed and/or that the waste be properly described.⁴ See Mott, European Environmental Law, TMC Asser Institute, the Hague (2007) ["State of the Law in Europe on Generator Liability: Waste Ste-](#)

² The "polluter pays" principle is well-established in EU law from Article 174(2) of the European treaty. "In simple terms, this is the principle that the cost of measures to deal with pollution should be borne by the polluter who causes the pollution." Jans, EUROPEAN ENVIRONMENTAL LAW 3rd Edition (2008), p. 43.

³ This has been amended in the revised Framework Directive approved in June 2008. Article 14 modified the language as follows: "1. *In accordance with the polluter-pays principle, the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders. 2. Member States may decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came and that the distributors of such product may share these costs.*" The obligatory liable parties seem to be limited now to the waste producer and subsequent holders, while product producers can be held responsible at the Member States' option. However, the entire analysis of how the "polluter pays" principle can reach a waste producer not in actual possession of the waste still is relevant. See further discussion herein.

⁴ The Revised Waste Framework Directive must be transposed by 2010. It may trigger a fundamental re-evaluation of the older laws. "When the waste is transferred from the original producer or holder to one of the natural or legal persons referred to in paragraph 1 for preliminary treatment, the responsibility for carrying out a complete recovery or disposal operation shall not be discharged as a general rule. Without prejudice to Regulation (EC) No 1013/2006, Member States may specify the conditions of responsibility and decide in which cases the original producer is to retain responsibility for the whole treatment chain or in which cases the responsibility of the producer and the holder can be shared or delegated among the actors of the treatment chain." Article 15(2) [2008/98/EC](#).

[wardship in a Complex System.](#)” In a Danish case, where their legislation followed this approach, the courts ruled that it only transferred liability of the third-party acted within the scope of the license for handling the waste.⁵ Other Member States required that the waste producer exercise a degree of care in selection of the third-party contractor. Some have strict liability under national law. Most seem to clearly take the view that they had discretion to provide for the transfer of liability under some defined conditions.⁶ Against this context, the European Court of Justice had the occasion to interpret when a producer of a product could be considered a “waste holder” and under what circumstances could the liability of the holder be transferred to third-parties.

The ECJ describes the basic facts of the case: “*On 12 December 1999 the oil tanker Erika, flying the Maltese flag and chartered by Total International Ltd, sank about 35 nautical miles south-west of the Pointe de Penmarc’h (Finistère, France), spilling part of her cargo and oil from her bunkers at sea and causing pollution of the Atlantic coast of France.*” Judgment of the Court, [Commune de Mesquer v Total France SA](#), ([link](#)) (ECJ Case No. 188/07). The supplier of the oil was Total France: “*Total France SA, sold the heavy fuel oil to Total International Ltd, which chartered the vessel Erika to carry it from Dunkirk (France) to Milazzo (Italy).*” *Id.* The local town where the spill occurred sued the French companies involved in the transaction and spill.

The French courts rejected the town's claim, finding “*that the heavy fuel oil did not in this case constitute waste but was a combustible material for energy production manufactured for a specific use.*” *Id.* It further “*accepted that the heavy fuel oil thus spilled and mixed with water and sand formed waste, but nevertheless considered that there was no provision under which the Total companies could be held liable, since they could not be regarded as producers or holders of that waste.*” *Id.* The final French court in-

⁵ “A producer of hazardous waste may be held liable for unauthorised disposal of waste by a transporter to whom the producer passed on the waste. A company, Horn Belysning, was convinced by a waste transporter that it had an arrangement with a licensed waste undertaker. The transporter dumped the waste illegally and was prosecuted. The court found Horn Belysning liable for clean-up costs and disposal expenses holding that it had the power to ensure the waste reached an authorised undertaker and could not escape liability by using a waste transporter (re. Horn Belysning, unpublished, Western High Court, 6 division 10th June 1993)(*emphasis added*).” McKenna & Co. (now Cameron McKenna), [Study of Civil Liability Systems for Remedying Environmental Damage, FINAL REPORT](#) to the European Commission (December 1995) discussing [In re Horn Belysning](#) (unpubl. Western High Court, 6 Division, June 10, 1993). See Larsson, [The Law of Environmental Damage: Liability and Reparation](#) (Martinus Nijhoff Publishers 1999) p. 328.

⁶ Such national laws cannot act to undermine EU schemes that retain waste producer liability in certain incidences, such as the Environmental Liability Directive and the IPPC Directive, which have both been used for this purpose.

volved (the Court of Cassation) stayed the matter and requested an interpretation of the Waste Framework Directive from the European Court of Justice.

After wrestling with the issue of liability limits under the international oil spill convention, the ECJ identified three issues in the case that arose under community law:

“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 [distribution]) 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?” Supra, para. 28.⁷

On the first question, whether the oil was a waste (before it leaked), the court concluded: *“...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.”* Id.⁸

⁷ American lawyers will be interested in the Court’s handling of the issue of mootness, which is very different from U.S. jurisprudence: “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.” Supra, para. 32-34.

⁸ One troubling part of the ECJ’s traditional analysis of what is a waste is illogical, i.e. whether it needs to be processed further. All raw materials need to be processed further and are never in real terms considered “wastes.” The sole issue in this context is whether there is “an intent to discard.” The economics of further processing is only relevant as indicia of intent.

On the second question, “*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,*” the ECJ followed its precedent which really left little doubt as to the answer. Rejecting the UK argument that heavy oil spilled at sea was “*covered exclusively by the Liability Convention and the Fund Convention, so that Directive 75/442 does not apply in such circumstances.*” and noting that the oil washed ashore on a Member State's territory,⁹ the Court reiterated that the spilled oil was “waste,” citing Case C-1/03 *Van de Walle and Others* [2004] ECR I-7613, paragraph 47.¹⁰

The third question is the critical one in the case: “*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 thus generated, even though the substance spilled at sea was transported by a third party.*” *Id.* (emphasis added).

At the outset, we should note that French law already covered the “producer of waste” given to third parties. The 1975 French statute involved in *Total France* had been considered adequate to create strict liability for “waste producers”: “[T]he 1975 waste law ... allows waste producers to be held liable if they have consigned waste to a disposer improperly.” Clarke, “Update Comparative Legal Study,” European Commission Study on

⁹ “...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-0000, 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 L 179, 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. 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.” *Supra*, para. 85-86. For a discussion of the implications for international oil spill law, see Norton Rose analysis. [\[link\]](#)

¹⁰ Again, whether it could be further processed seems irrelevant, especially since it was discarded and the definition in the Directive provides that a waste is “*any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.*” Waste Framework Directive 2006/12/EC, Article 1(1)(a). Its economic value through additional processing is only relevant as evidence of intent to discard and becomes irrelevant if it is, in fact, discarded.

Environmental Liability (2001). So the issue before the ECJ upon which the Court of Cassation requested an opinion was whether and when the EU Directive required that the **producer of a product** that became a waste was liable.

“Under Law 76/663, the operator (exploitant) and, to a lesser extent, the “détenteur” of the listed site are likely to be liable, while under Law 75/633 the producer and the “détenteur” of waste are most likely to incur liability. “Détenteur” has a broad definition and it can mean the owner, the occupier, the receiver in bankruptcy or, in the case of waste, it can be any intermediary...”¹¹

Total argued to the court that *“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.”* *Id.* (emphasis added). The European Commission and some of the national governments briefing the case argued:

“...that 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. The Commission adds, 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. He is none the less 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’.”

¹¹ McKenna & Co. (now Cameron McKenna), [Study of Civil Liability Systems for Remedying Environmental Damage, FINAL REPORT](#) to the European Commission (December 1995), p. 191: *“Article 11 of Law 75/633 on waste provides that any person who disposes of or causes to be disposed of certain categories of waste and all operators of listed waste disposal installations can be held jointly liable for damage caused by the waste. This therefore imposes liability across the chain of waste disposal from the producer to the disposer.”* As early as 1995, the McKenna study for the European Commission noted that: *“...this [French] case law tends to show an evolution towards a strict liability regime applicable to the [waste] producer. This case law ...[has been] criticised on the basis that it applied the “deep pocket” principle.”* *Id.* Nevertheless, the trend has continued and there is little doubt today that the French waste law covers waste producers. See Frédéric Bourgoin, “Soil Protection in French Environmental Law,” [Journal for European Environmental & Planning Law](#) (2006) ([link](#)).

The court dealt with the argument by starting with a reminder that in Van Der Walle it had already found that a “waste holder” could be a party not in actual possession of the waste.

“It follows from those provisions [Article 15 cited above] 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)...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, ” id. para. 72 (emphasis added).

The Court cites Article 15 which specifically includes “*the producer of the product from which the waste came.*” Applying the “polluter pays” principle that is specifically incorporated into the Directive, the Court focuses the inquiry on whether the producer of the product in effect was a “polluter”¹².

“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.” Id. para. 77.

The opinion then describes the test for when a producer of the product might be considered by the trial court to be a contributing cause of the waste' release:

“...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 conclu-

¹² Of course, this does not mean that other parties more directly involved in the spill are excluded from joint liability: “...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 ship owner 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.” Judgment, supra, para. 74.

sion 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.” Id. Para. 78 (emphasis added).

Significantly, the ECJ found that this interpretation of Article 15 of the Waste Framework Directive is binding on Member States:

“...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.” Id. para. 80 (emphasis added).

Does this mean that Member State's can provide for liability only to the intermediaries and let the producer of the product that become waste walk? The ECJ says no:

“...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. 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.” Id. para. 82 (emphasis added).¹³ (emphasis added).

¹³ This is an area where the ECJ asserts the primacy of community law over national discretion: *“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).” Id. para. 83 (emphasis added).*

While commentary on the Total France case has been robust as to the international oil spill implications, few observers have noted that this logic under the Waste Directive is applicable to all waste producers within the Directive's broad scope. Accordingly, a waste producer may be held liable if the national law elects to make him a primarily liable party or if the third-parties lack the means to pay the damages or cleanup where the producer "contributed to the risk that the pollution caused by the ...[release into the environment] would occur, in particular if he failed to take measures to prevent such an incident..." Id. para. 89. Member States do not have the option to narrow this liability if participation by the waste producer is financially necessary:

"...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..." Id. para. 89 (emphasis added)(only product producers were removed by the WFD Revision)

3 Analysis

The ruling of the European Court of Justice in Total France has generally been unappreciated in Europe. Commentary in the *European Law Reporter* was one of the few sources to pick up the implications: "...how will one be able to prove that a producer contributed to the supervening risk of pollution if he ... does not have any method of controlling the substances which he produced?" 12 *ELR* 2008 at 409. The flip side is how does the enforcer prove that the producer contributed to the risk?

The underlying issue is what standard of care will apply to producers of products and raw materials which may become improperly discarded wastes through the actions of third-parties. The ECJ suggested in its opinion that the oil company should have inspected the ship involved and that this would have prevented the incident. Even if it did not prevent the accident, i.e. the defective condition was latent or not readily ascertained, would an inspection have been sufficient? Since the standard used by the Court is fault, albeit one of omission, it can be argued that reasonable care would be sufficient. Support for this view comes from the "polluter pays" precedent before the ECJ. Earlier decisions have indicated that a legal measure must avoid putting burdens on persons and undertakings for the elimination of pollution to which they have not contributed. Case C-293/97 *Standley* [1999] ECR I-2603.

Some reasonable precautions could include site inspections, inventory control, explicit safety instructions, and contract provisions regarding proper handling. Two examples may illustrate measures that will likely create good defenses for producers. The first is the European Chemical Industry Council "Responsible Care" program which provides safety procedures, labeling, and actual site inspections to third-party handlers of products and materials. An example illustrates the level of detail involved [\[link\]](#). Specially-trained auditors conduct reviews of transportation facilities for the industry participants. The second is CHWMEG, which provides a similar service for members, by reviewing third-party recycling, recovery and disposal contractors and facilities. CHWMEG membership extends internationally and across industry sectors, including chemical, oil, electronics, pharmaceutical, aerospace, and other businesses. CHWMEG would be relevant, for example, to producers of electronic and electrical equipment that is shipped for reuse, recovery or recycling. Cost-sharing of the reviews allows the facility reviews to be done for very moderate fees.

4 Impact of Revised Directive

While the Revised Directive removes product producers from the Total France rule, it does not affect waste producers.

"Member States may decide, in accordance with Article 8, that the responsibility for arranging waste management is to be borne partly or wholly by the producer of the product from which the waste came and that distributors of such product may share this responsibility." Article 15(3).

Additional disputes over the provisions in the revised Directive seem to be inevitable.

The question of the implications of Total Oil on waste producers looms large, since "waste producers" are singled out in the revised Directive. New Article 14 repeats the earlier language applied in Total Oil citing *"the original waste producer or .. "the current or previous waste holders"* under the polluter pays language. Using the ECJ's reasoning, then, a waste producer would not have to be in physical possession to be liable and failure to provide for this prospect would be an inadequate transposition of community law. The ECJ's rationale would require that a waste producer, who contributed to the risk of improper handling, remain liable even if not longer in physical possession. This is inconsistent with the existing transpositions of at least 15 of the 27 Member States (which allow transfer of liability).

Member States must now revisit these issues in a new transposition due by the end of 2010. The prospect of enlarged waste producer liability is heightened by the revised Waste Framework Directive, 2008/98/EC [\[link\]](#) which has still encourages the retention of waste producer liability: *"In accordance with the polluter-pays principle, the costs of*

waste management shall be borne by the original waste producer or by the current or previous waste holders.” Article 14(1). The revised Directive adds a preliminary finding that:

“The polluter-pays principle is a guiding principle at European and international levels. The waste producer and the waste holder should manage the waste in a way that guarantees a high level of protection of the environment and human health.” Directive 2008/98/EC, Clause 26.

It further provides an explicit duty on waste producers:

“Member States shall take the necessary measures to ensure that any original waste producer or other holder carries out the treatment of waste himself or has the treatment handled by a dealer or an establishment or undertaking which carries out waste treatment operations or arranged by a private or public waste collector in accordance with Articles 4 and 13 “

Using the polluter pays principle, the standard of care of a waste producer will inevitably be at least as great as the standard applied by the ECJ to the product producer. A “waste producer's” closer involvement with the material when it is already a waste and the foreseeability of improper disposal suggest an implicit standard of care be applied to reduce the subsequent risk. The assumption that a national law allowing liability transfer for the waste producer to occur along with physical transfer to a third-party contractor seems to be quite inconsistent with the Court's reasoning in Total France. The issue will undoubtedly be tested in Member State's national court systems in the coming years.

So the minimum European community legal standard for waste producers is implicitly the duty to take reasonable precautions in handling waste, a duty that cannot be completely delegated. In light of the ECJ construction of the same language that contained in new Article 14, it appears that Member States may not have complete discretion to provide for the complete transfer of liability to third-parties, as the waste producer arguably has a duty to take precautions as to third-party actions. This will also be construed along with new language in the Directive in Article 15(2):

“ When the waste is transferred from the original producer or holder to one of the natural or legal persons referred to in paragraph 1 for preliminary treatment, the responsibility for carrying out a complete recovery or disposal operation shall not be discharged as a general rule.” [2008/98/EC](#).

The Revised Waste Framework Directive, approved by the European Parliament just seven days before the ECJ decision in Total Oil, will cause these issues to be revisited in all Member States in 2010 as they grapple with the transposition. Given the history of

the European court's expansive reading of waste holder liability in Van der Walle and Total Oil there is clearly an element of legal risk to waste producers under the community-wide scheme. There are, of course, separate European predicates for waste producer liability under the IPPC Directive and Environmental Liability Directive as well as under national laws in each Member State.

The due care approach to waste producer liability, of course, differs fundamentally from the strict liability regime of the United States and some European jurisdictions. Frankly, a due care approach makes the review and audit of third-party waste and recycling contractors more cost-effective than a strict liability scheme. Under due care, the end disposal of waste can still be problematic, but a waste producer may escape liability by demonstrating due care. Under a strict liability scheme, the due care efforts must be effective to forestall the improper disposal or handling. Similarly, the European jurisdictions that have provided for transfer of liability to licensed third-parties have seen courts limit this defense to actions taken by the third-parties consistent with their license. In these circumstances, a review or audit of the third-party to assure that their actions in handling a producer's waste are within their permit conditions can be a very cost-effective defense to subsequent claims. Despite the legal complexities of European situation, there remains a very high value for "supply chain" audits in the area of waste. Collective, cost-sharing arrangements for such reviews provide a sensible way to handle an increasingly vexing set of problems.

5 Literature

European Union	2008	Revised Waste Framework Directive, 2008/98/EC
European Court of Justice	2008	Commune de Mesquer v Total France SA , (Case No. 188/07)[2008].
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