PRESENTATION Judge F. Nési

Judgments of the 3rd civil chamber of the Cour de cassation Commune de Mesquer
“Erika” case

On December 12, 1999, the oil tanker Erika, chartered by the company Total International Ldt to transport 30,000 tonnes of heavy fuel oil, sank, dumping part of its cargo at sea, causing pollution of the French Atlantic coast.

One of the affected municipalities, the municipality of Mesquer, sued the company Total France, producer of fuel oil, the company Total International Ldt, seller of fuel oil, and charterer of the ship, to obtain reimbursement of the expenses incurred for cleaning and depollution, on the basis of the law transposing Directive 75/442 of 15 July 1975 on waste.

The first instance and appelate courts having rejected the request, the Court of Cassation, seized of an appeal from the Municipality, and considering that the Court of Appeal had too narrow an interpretation of the concepts of producer and holder of the waste , asked the Court of Justice of the European Communities, by a judgment of March 28, 2007, appeal n ° 04-12.315, the following questions:

« 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?’

By judgment of June 24, 2008 C-188/07 the CJEU:

1 °) answered the first and second questions that heavy fuel oil is not by itself waste within the meaning of the European directive of July 15, 1975, but becomes so when following a shipwreck, it was accidentally spilled at sea.
2 °) answered the third question, concerning the identification of the persons liable for compensation, in the following terms:

- according to the obligations of the directive, arising from the polluter pays principle: the cost of waste disposal must be borne by the previous holders or by the producer of the product generating the waste (§ 69);

- if the owner of the ship carrying the fuel oil, which was in his possession before it became waste due to the sinking, can therefore be considered to have produced this waste within the meaning of Article 1 (b) of the Directive 75/442 and thus be qualified as a 'holder' within the meaning of Article 1 (c) of that directive, that directive did not exclude that, in certain cases, the cost of the disposal of waste is the responsibility of one or more previous holders (§ 74 and 75);

- Article 15 of Directive 75/442 provides that certain categories of persons, in this case the “previous holders” or the “producer of the generating product”, may, in accordance with the polluter pays principle, be required to bear the cost of waste disposal. Thus, this financial obligation falls on them because of their contribution to the generation of said waste and, where applicable, to the resulting risk of pollution (§ 77);

- for the application of this Article 15 to the accidental spill of oil at sea causing pollution of the coasts of a Member State:

->the seller of these hydrocarbons and the charterer of the vessel transporting them can be considered to be the producer of the said waste, within the meaning of Article 1 (b) of Directive 75/442, as amended by Decision 96/350, and , in doing so, as a “previous holder” for the purposes of applying Article 15, second indent, first part, of that directive (relating to the assumption of the cost of waste disposal) if the national court, in view of the elements that only he is able to assess, comes to the conclusion that this seller-charterer contributed to the risk of the occurrence of pollution caused by this shipwreck, in particular if he refrained from taking the measures aimed at preventing such an event such as those concerning the choice of ship (§ 78);

-> if the national law of a Member State, including that resulting from international conventions (compensation ceiling, limitation and / or exemption from liability), prevents these costs from being borne by the shipowner and / or the charterer of the latter, even though they are to be considered as "holders" within the meaning of Article 1 (c) of Directive 75/442, such national law must then allow, in order to ensure compliance with Article 15 of that directive, that those costs are borne by the producer of the product generating the waste thus spilled. However, in accordance with the polluter pays principle, such a producer can only be required to bear these costs if, through his activity, he has contributed to the risk of the occurrence of the pollution caused by the sinking of the ship (§ 89).

The ECJ also recalled an essential rule for the application of Community law:
- the obligation for 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. This obligation to take any general or specific measures is imposed on all the authorities of the Member States, including, within the framework of their powers, the judicial authorities (see judgments of 13 November 1990, Marleasing, C-106/89, Rec. . p. I - 4135, point 8, and Inter-Environnement Wallonie, cited above, point 40) (§ 83)

- By applying national law, whether it concerns provisions prior or subsequent to the directive or provisions resulting from international conventions to which the Member State has subscribed, the national court called upon to interpret it is required to do so as much as

possible in the light of the text and the purpose of the directive in order to achieve the result sought by it and thus comply with the third paragraph of Article 249 EC (see, to that effect, the Marleasing judgment, cited above, point 8) (§ 84)

Decision part of the ECJ judgment:

1. 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 Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Commission Decision 96/350/EC of 24 May 1996, where it is exploited or marketed on economically advantageous terms and is capable of actually being used as a fuel without requiring prior processing.

2. 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, as amended by Decision 96/350, where they are no longer capable of being exploited or marketed without prior processing.

3. For the purposes of applying Article 15 of Directive 75/442, as amended by Decision 96/350, 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, as amended by Decision 96/350, 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 International Oil Pollution Compensation 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, as amended by Decision 96/350, 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.

We can therefore consider that the Court of Justice answered fully and precisely to the questions referred for a preliminary ruling, and even beyond since it very clearly recalled, in response to the objection of the Total companies, which considered that they had satisfied their polluter payer obligation by applying international conventions, and in particular the IOPC Fund convention, the obligations incumbent on the national judge in application of the Union Treaty.

Applying exactly the rules laid down by the CJEU, the 3rd civil chamber of the Court of Cassation, by judgment of September 17, 2008, appeal n ° 04-12.315, Bull. 2008, III, n ° 206, quashed, in the light of article L.541-2 of the environment code (resulting from the transposition of directive 75/442), interpreted in the light of the objectives assigned to the Member States by the said directive, the judgment of the Rennes Court of Appeal which had rejected the request for condemnation of the companies Total seller-charterer and refining distribution on the grounds that they could not be considered as producers or holders of the waste found on the beaches after the sinking of the Erika, "when in reality they had produced an oil product that had become waste due to the mere fact of the transport".

Response of the Court of Cassation: "by ruling thus, while the seller of the hydrocarbons and charterer of the vessel transporting them can be considered as the previous holder of the waste if it is established that he contributed to the risk of the occurrence of the pollution caused by the shipwreck and that the producer of the product generating the waste may be required to bear the costs associated with the disposal of the waste, if, through his activity, he contributed to the risk of the occurrence of pollution caused by the shipwreck, the Court of Appeal, which found that the company Total raffinage distribution had produced the heavy fuel oil and that the company Total international Ldt had acquired it then sold it to the company Enel and chartered the ship Erika to transport it, did not draw the legal consequences of its own findings and violated the aforementioned text (L. 541-2 environmental code).

It was therefore up to the referral court of appeal (Bordeaux) to determine whether the two Total companies involved in the operation had contributed to the risk of pollution caused by the wreck.

But the referral court of appeal has not ruled to date, probably because other procedures tending to the same ends (in particular a criminal procedure which recognized the responsibility of Total) finally gave satisfaction to the municipality of Mesquer.

Regarding the subject of our conference, we can retain:
- a complete and precise answer from the CJEU to the question asked;
- an application of the national text resulting from the transposition of the directive in accordance with the interpretation given by the CJEU.
- referral to the national court for the decisive elements of the solution of the dispute, falling within its sovereign power (contribution of Total companies to the risk of pollution).