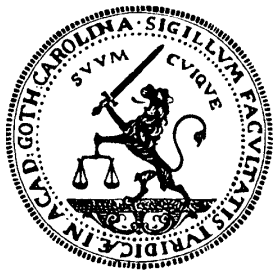

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The Polluter Pays Principle in the European Waste Framework Directive

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Contents

Summary

The polluter pays principle is an economic principle through which external costs can be internalised. The principle is thus a way of allocating costs for pollution. The principle can also be described using a fairness argument, where it would seem fair that the polluter pays the costs for the pollution which he has contributed to. It has been extensively used in international law, and has been rewarded the status as one of the guiding environmental principles in European Union law. However, it is evident that the polluter pays principle contains ambiguities which have not been resolved at the international level. The principle does not answer the question of who shall be seen as polluter, when the pollution has occurred or which costs shall be covered.

The polluter pays principle has been a part of European waste legislation since 1975. The main piece of legislation in EU waste law is the waste framework directive. The principle allocates liability for costs for waste disposal or waste management to the final holder of the waste, or the previous holders of the waste. The polluter pays principle under the EU waste law also provides for liability to be channelled to the producer of the product or the distributors or holders of this product. It can be said that the pollution under EU waste legislation occurs when the waste has been created. The European concept of waste has been interpreted numerous times by the Court of Justice. The concept must be interpreted broadly in order to uphold environmental protection, and the concept of waste turns on whether something has been discarded. When something has been referred to recovery or disposal operations, there exists a presumption that it has become waste, but factors such as the impression of the general public or the economic interest for the holder will also be necessary to consider.

In most cases the polluter will be the final holder of the waste. There exists a possibility to channel liability to other actors within the polluter pays principle. This channelling does, according to the Court of Justice, require contribution to the risk of the pollution occurring to occur. The Court of Justice thus makes a proportional interpretation of the polluter pays principle where the polluter can only be held liable to pay to what he contributed.

It has been held by the Court of Justice that the polluter pays principle encompasses ex ante as well as ex post applications. The polluter pays principle can thus serve as justification for a tax for waste management. The polluter pays principle might also be applicable to costs for monitoring.

The polluter pays principle thus contains a wide discretionary ambit. The application of the principle might lead to different results in different member states. However, it must be kept in mind that the principle might be the best possible way of dealing with this form of pollution at the moment.

Sammanfattning

Förorenaren betalar är en ekonomisk princip som internaliserar externa kostnader. Principen är således en metod genom vilken kostnader för förorening kan bli fördelade. Principen kan också beskrivas genom att använda ett rättviseargument, eftersom det kan anses rättvist att förorenaren ska betala för den förorening som han bidragit till. Förorenaren betalar har använts i internationell rätt och anses vara en vägledande princip inom EU:s miljörätt. Det är dock uppenbart att principen om att förorenaren skall betala innehåller flera oklarheter. Det är svårt att säga vem förorenaren är, när förorening skall anses ha skett samt vilka kostnader som skall täckas av principen.

Principen har varit en del av EU:s avfallslagstiftning sedan 1975. Det främsta lagverket inom avfallslagstiftningen är ramdirektivet för avfall. Förorenaren betalar fördelar i ramdirektivet ansvar för kostnader för bortskaffande av avfall och avfallshantering. De aktörer som berörs av principen är den slutgiltiga innehavaren av avfallet eller tidigare innehavare. Principen innebär också att ansvar kan läggas på producenten av den produkt som blivit avfall, eller distributörerna eller innehavarna av produkten. I europeisk avfallslagstiftning anses förorenaren betalar träda in när avfall har skapats. Avfallsbegreppet har tolkats av Europeiska unionens domstol, som har sagt att begreppet måste anses vara brett, för att ett skydd för miljön skall kunna upprätthållas. Det relevanta i avfallsbegreppet är huruvida innehavaren av produkten anses ha gjort sig av med den. Om något överförs till bortskaffande- eller återvinningsprocedurer föreligger det en presumtion för att det blivit avfall, men även faktorer som det ekonomiska intresset för innehavaren eller allmänhetens uppfattning kan vara avgörande.

I de flesta fall kommer den slutgiltiga innehavaren anses vara förorenaren. Det finns en möjlighet att överföra ansvar till de andra aktörerna som berörs av förorenaren betalar, men då krävs det att dessa har bidragit till risken att föroreningen skall inträffa enligt Europeiska unionens domstol. Domstol gör alltså en proportionalitetsbedömning av förorenaren betalar, där förorenaren endast måste betala för det han bidragit till.

Förorenaren betalar omfattar tillämpningar såväl ex ante som ex post. Principen kan alltså fungera som ett rättfärdigande för skatter för avfallshanteringar. Det finns också en möjlighet att principen kan vara tillämplig på kostnader för övervakning.

Principen om att förorenaren skall betala innehåller således ett vitt skön. Tillämpningen av den kan leda till olika resultat i olika medlemsländer på grund av orsakerna gällande dess tolkning. Det är dock viktigt att komma ihåg att förorenaren betalar för tillfället kanske är det bästa möjliga sättet att hantera avfallsföroreningar.

Abbreviations

AG	Advocate General
EAP	Community Environment Action Programme
EC	European Community
EU	European Union
TFEU	The Treaty of the Functioning of the European Union

1 Introduction

1.1 Background

Since the creation of the European Union, the European legislator has often taken recourse to principles when regulating new areas of law. In European environmental law, the legislator talks about the principle of prevention, the polluter pays principle and the principle of rectification at source, among others. Legislation by principles can function as a tool of harmonisation when the consensus regarding the application of law is low. Principles are also useful as their often wide discretion allow for different cases to be covered by the same principle, and for them to be interpreted in different ways.

However, legislation must also be enforceable in order for it to be effective. European legislation must be uniform enough to be applied with the same effect in the member states of the Union, while at the same time not regulating details that the member states are better equipped at dealing with. The use of principles in legislation can forward this uniformity, but it can also lead to confusion, as a too wide discretionary ambit might lead to contradictory interpretations of the principle. A principle that seems clear to its wording might contain ambiguities which lead to disparate interpretations. The environmental principles, such as the polluter pays principle, appear in a number of different places ranging from soft law to legislation and jurisprudence, and have been interpreted differently in each of these, causing uncertainty regarding how they are to be interpreted.[1] The focus of this thesis will be the ambiguities and difficulties in applying the polluter pays principle to EU waste law.

The origin of the EU waste management legislation dates back to the 1970s, and the legislation conjoins the dual objectives of maintaining the internal market while upholding an environmental protection. Waste has been a problem within the union, as the amount and toxicity of waste created lead to adverse effects on the environment. According to the European Commission the Union yearly produces 6 tonnes of waste per person, or in total, 3 billion tonnes of waste, of which by estimate 90 million tonnes is considered hazardous.[2] To uphold any environmental protection in the union, the prevention and control of waste is thus a key question. The legislation explicitly refers to the polluter pays principle as a tool for allocating the costs for waste disposal or waste management. It could thus be said that the polluter pays principle functions as a liability rule. The legislation provides little guidance on the interpretation of this text. During

[1] De Sadeleer, N., *Environmental Principles, From Political Slogans to Legal Rules*, Oxford University Press 2002, pp. 2-3.
[2] European Commission website, http://ec.europa.eu/environment/waste/index.htm, as accessed 2010-06-01.

recent years, the question of the polluter pays principle within the waste management legislation has been much debated by legal commentaries, and it has also been the subject of three very interesting cases in the Court of Justice.[3] The status and interpretation of the polluter pays principle within EU waste law is thus an interesting subject, as it is currently evolving. The application of the principle in EU waste law is also interesting, as the question of who the polluter is cannot be answered easily. In cases concerning waste management, there are many times many potentially liable actors, ranging from the final holder of the product to the producer of the product from which the waste was created.

1.2 Purpose and main questions

The purpose of the following essay is to investigate the effect the polluter pays principle has within the waste framework directive in the EU. By describing the applications and the theoretical background behind the principle, I aim to discuss whether the principle as such is an appropriate tool for attribution of liability in EU waste law. It can thus be said that the purpose of the essay is twofold. I will examine the current legal situation within the EU, and based on this investigate whether the polluter pays principle is an effective tool when allocating liability in European waste law, with a perspective of upholding environmental protection.

I have outlined a few questions to help fulfil this purpose. What does the polluter pays principle mean? Who is considered polluter under the polluter pays principle in EU waste law? When does pollution take place, and what is considered pollution? Which costs are the polluter liable to pay? These questions might seem easy to answer, but the interpretation of the polluter pays principle has been far from uniform. Thus, the questions have been answered foremost with reference to EU waste legislation.

1.3 Method and material

In law studies, the method used to reach conclusions is very closely connected to the sources used. This is why these two concepts are combined in the same chapter. When writing this essay, I have used the traditional legal dogmatic method. This method means using traditional legal sources, such as laws, preparatory material, jurisprudence and legal commentaries to describe the current legal situation. After describing the current legal situation, I have used these materials to reflect on whether the polluter pays principle is a useful tool in European waste legislation. The latter part of my method is thus prescriptive rather than descriptive.

[3] Case C-1/03, *Paul Van de Walle and Others v Texaco Belgium SA*, (Van de Walle) ECR [2004] I-07613, Case C-188/07, Commune *de Mesquer v Total France SA and Total International Ltd*, (Total) ECR [2008] I-04501 and Case C-254/08, *Futura Immobiliare srl Hotel Futura, and others v Comune di Casoria*, (Futura), not yet published.

Within the EU law, preparatory material is not of the binding nature that it is in Swedish law, meaning that this category of material will be of less relevance than in Swedish law. I have still used some preparatory material, as some parts of the EU legislation has been recently changed, and the preparatory material in some instances provide an interesting insight into the discussions during the adoption of the material. I am however aware of the fact that these materials are not of the same relevance as the other categories of material used.

When writing, I have taken my starting-point in the European and international legislation to understand how the legal frame is constructed. I have then researched the Court of Justices case law regarding the waste concept and the polluter pays principle, to see how the courts have interpreted the questions interesting to fulfil the purpose of this essay.

Lastly, I have consulted legal commentaries. This has provided me with a deeper understanding of the matter at hand, and also with different interpretations of the questions which have been raised under the course of the writing of the essay.

1.4 Delimitations and clarifications

The Lisbon treaty entered into force in December 2009, and replaced the previous European treaties. I have thus throughout the essay used the terminology provided by the Lisbon treaty. I have also referred to the articles as contained in the Lisbon treaty.

The European waste legislation might, at first glance, appear impenetrable. This matter is not simplified by the fact that there currently are two framework directives in force. The revised framework directive from 2008,[4] is largely based on the previous framework directive from 2006.[5] The framework directive from 2006 is valid until the end of 2010. The framework directive from 2006 is in its turn largely based on another waste framework directive from 1975.[6] I have decided to include all three of these directives in the text, since many of the legal commentaries and the case law referring to the framework directive of 1975 still are relevant. When the provisions in the directives differ, this will be expressly pointed out. References made to the directives will also be references to the directives as lastly amended.

The overview of the European waste legislation is further complicated by the large number of directives which are dealing with specific waste streams. The waste framework directive affects all of the other directives

[4] Directive 2008/98/EC.
[5] Directive 2006/12/EC.
[6] Directive 1975/442/EEC.

with its waste definition. However, in some of the directives concerning specific waste streams, such as the end of life vehicles directive,[7] or the waste electrical and electronics equipment directive,[8] a notion of producer responsibility is emphasised. This producer responsibility is an interesting take on prevention of waste and can be seen as a complement to the polluter pays principle, but also as a contrasting take on the problem of attributing liability. The notion of producer responsibility and the directives concerning the specific waste streams will not be extensively covered within the essay.

In regard to the polluter pays principle, it could be argued that I should have used more international cases to understand how the principle has been interpreted. There is however a lack of cases, and it is also so that the aim of this essay is to investigate the polluter pays principle in relation to European waste law, which is why these cases are of less interest.

1.5 Disposition

The outline of this essay aims at step by step giving the reader an understanding of the application of the polluter pays principle in European waste law. Thus, chapter 2 contains general discussions on the polluter pays principle, where underlying theories of are outlined, as well as the ambiguities contained in the principle. Chapter 2 also introduces the application of the principle in international and European law.

In chapter 3 the use of the polluter pays principle in EU waste legislation is described. The chapter outlines the relevant articles in the waste framework directive, and provides discussions on the evolution of the polluter pays principle in the waste framework directive. Chapter 4 aims at answering the question of when “waste” has been created, and thus when the polluter pays principle is applicable in EU waste law. The chapter shows how the Court of Justice has affected the waste concept, and also how the waste concept can be envisaged to change with the adoption of the revised framework directive.

Chapter 5 describes application of the polluter pays principle in cases by the Court of Justice. The chapter focuses on three recent cases by the Court of Justice, which have forwarded the understanding of the interpretation of the polluter pays principle.

The final chapter ties the essay together. The questions put forward in chapter 1.2 are answered and discussed, and the different parts of the essays are related to each other to provide a concluding understanding of the polluter pays principle and its application under the European waste framework directive.

[7] Directive 2000/53/EC.
[8] Directive 2002/96/EC.

2 Polluter Pays Principle

2.1 Theoretical background of the polluter pays principle

The polluter pays principle is an internationally recognised principle, which can work as a way of preventing pollution, or as a way of establishing liability once pollution has occurred. The polluter pays principle can easiest be described as a way of attributing responsibility for the pollution upon the polluter. This description seems easy to agree upon, but the seemingly clear definition contains several ambiguities, which I will elaborate further upon in chapter 2.2. In this chapter I will proceed to describe the functions and origins of the polluter pays principle.

The legal status of principles has been much debated. Principles should be distinguished from rules, meaning that principles are used to provide interpretative help for rules, and to guide the institutions implementing them. It can also be described as rules being a way of solving conflicts inherent in principles or conflicts when principles contradict each other in a specific area. Principles can thus be balanced against each other, whereas rules are to be applied in a more conclusive manner, should they not provide for exceptions.[9] It would however be clear that principles have legal effect, derived from either legislation or court action.[10] It is the legislators intention to make the principle binding that distinguishes it from policies, which are not legally binding.[11] Thus, the polluter pays principle cannot be considered binding merely due to its status of principle as such. Its status must be derived from some form of action by the authorities. The status of the polluter pays principle in international law is described in chapter 2.3, and the status of it in European law is described in chapter 2.4.

The polluter pays principle can be described as an economic principle through which the polluter is required to pay for his pollution. [12] It can thus be seen as a tool for cost allocation, where external costs, such as environmental costs, are internalised for the polluter. External costs in the environmental field can for example be the costs rising from the polluting emissions in an industry. These emissions create costs for the environment which are not taken into consideration when the company set the price for their product. The result is thus a market where the true environmental costs of the economic activity taking place are not reflected into the price of the

[9] Winter, Gerd, *The Legal Nature of Environmental Principles* in Macrory, Richard (ed), *Principles of European Environmental Law*, Europa Law Publishing, 2004, pp. 15f.
[10] Winter, 2004, p. 27.
[11] Winter, 2004, pp. 13f.
[12] De Sadeleer, 2002, p. 21.

goods, meaning that consumption is taking place at the expense of the environment.[13]

By making the polluter pay for his polluting activities, the costs for pollution must be taken into consideration when setting the price of the goods in question, leading to a market where the correct environmental costs are reflected in the price of the produced goods. This cost allocation can be made in two main ways; by taxation (or charges) corresponding to the (estimated) value of environmental damage, or by regulations prohibiting or limiting certain activities. This can have the result of limiting environmental damage, with the polluter pays principle functioning as a way of attributing environmental liability.[14] It seems clear that the polluters responsibility is not unlimited, at least not in the manner that the principle has been interpreted under European law. The polluter must only pay for what he has contributed to, which shows a proportionality within the polluter pays principle.[15]

The polluter pays principle can also be described as a form of self-monitoring. By making the polluter pay for the control and prevention of the pollution (and thus internalising the environmental costs) it can be argued that the polluters are forced to monitor themselves, which would lead to reduced costs for the state for monitoring. This form of use of the polluter pays principle requires a prior set level of allowed pollution in legislation.[16] Both of these ways of describing the principle somewhat turns on what the polluter should pay. Should the polluter bear the costs of prior monitoring activities as well as costs of cleaning-up after pollution has occurred? This reasoning will be further developed in chapter 2.2.3.

The polluter pays principle and its application can also be described by using a fairness argument. This is a way of making the polluter accountable for his actions, by using the argument that he has created the pollution, and that the costs of mitigating the pollution thus should not be transferred upon a third party, such as the taxpayers.[17] By making the fairness aspect of the polluter pays principle the overriding interest, the polluter pays principle could be interpreted to cover vast costs for the pollution. Bleeker argues that this aspect is less practically useful as an underpinning principle for the polluter pays principle than the aforementioned cost-argument.[18] In my opinion, both of the arguments are interesting and worthy of attention when looking at the polluter pays principle. As Bleeker writes, it would however seem that the cost-argument could be used more effectively in legislation, as it is a clearer way of attributing economic responsibility. The fairness

[13] Ibid.
[14] Ibid.
[15] Bleeker, Arne, *Does the Polluter Pay? The Polluter Pays Principle in the Case Law of the European Court of Justice*, European Energy and Environmental Law Review, December 2009, pp. 289-306, p. 291.
[16] Farmer, Andrew, *Handbook of Environmental Protection & Enforcement*, Earthscan, 2007, pp. 190-191.
[17] Bleeker, 2009, p. 290.
[18] Bleeker, 2009, p. 291.

argument would though seem to lead to a greater responsibility and allow other factors than merely the actual costs for pollution to be included when applying the polluter pays principle. The fairness part of the polluter pays principle is also visible in its expression in law. Should the fairness aspect not have been attributed value, it would be harder to argue that the polluter should pay for costs for mitigation or monitoring, as it could be argued that these costs should be paid by society. Both of the underpinning principles are thus important to the polluter pays principle and balance each other.[19]

Even though the polluter pays principle builds upon economic theory, it is not unquestioned as a way of allocating costs in a market in the economic sphere. Economic theorist Ronald Coase has described the problem of external environmental costs in what is commonly called the Coase theorem. Coase describes the polluting problem as one of a reciprocal nature, where the polluters activities may harm others in his vicinity, but where the right for the society or the harmed people to stop his polluting activities harms the polluter.[20] The harm of the polluting activity must thus be weighed against the harm caused when the polluter is forced to stop his activities.

Coase suggests that the polluter pays principle (or rather the theory of externalities upon which this principle builds) is less effective than a system of liability which is built upon ownership. Ownership over land would be seen as a factor of production, which in turn is to be seen as a right. The owner has a right to use his land in a way that might cause harmful effects. The right for the owner to use his land would thus also result in a loss for someone else.[21] Such a regime would cause the liability for pollution to be resolved through a negotiation between the parties, establishing what they are willing to pay for their respective rights, and thus creating maximum economic efficiency. The economic efficiency can only be achieved through negotiation when the rights of the parties are defined in a clear way, and the information needed for the negotiation is complete and accessible to both parties. The costs of transaction must also remain at a level where they are negligible.[22]

According to De Sadeleer, the Coase theorem might be economically efficient in an optimal world, but due to the prerequisites needed in order for it to work, its practical significance will be limited. The Coase theorem also lacks the preventative function entailed in the polluter pays principle, where the cost of polluting functions as a discouraging factor. The Coase theorem also ignores the fact that the pollutions of today will stay in the world long enough to affect future generations as well. This will mean that the Coase theorem faults in establishing the parties affected by the pollution, as the interests of future generations will not be included in the negotiations.[23]

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[19] Ibid.
[20] Coase, Ronald, *The Problem of Social Cost*, (1960) III J L & Econ 1-44, p. 2.
[21] Coase, 1960, p. 44
[22] De Sadeleer, 2002, p. 22.
[23] Ibid.

2.2 Ambiguities of the polluter pays principle

2.2.1 When does the pollution take place?

There are two possible interpretations of the question of when pollution has taken place. According to the first interpretation, the pollution occurs when a set threshold value has been exceeded. Thus, any environmental damages arising when the polluter has not exceeded a threshold value will not be subject to liability or charges based on the polluter pays principle. This interpretation thus requires an a priori intervention by the authorities, in setting the threshold levels at an appropriate level, in order to create an environmental protection.[24]

According to the second possible interpretation of the principle, a pollution occurs when damage occurs. The relation between the polluter and damage has been emphasised in several EU and international documents.[25] It is the effect on the environment that is the central question.[26] Pollution in this sense will thus be judged in respect of its effect, more than its cause.[27]

This interpretation of the polluter pays principle seems to be contrary to an ex ante application of the principle, as such an interpretation does not require pollution to have taken place. The polluter pays principle as contained in the waste framework directive does also not talk about damage,[28] but only about the costs of waste disposal, respectively waste management. The fact that these events can entail adverse environmental consequences has not been contested.

Reading the polluter pays principle in conjunction with the principle of prevention,[29] leads to an interpretation where the polluter should pay not only where actual damage has occurred, but also when there exists a risk of such damage occurring. The question thus still remains, what is pollution? De Sadeleer proposes that this question must be solved in legislation, as there can be no conclusive answer.[30]

[24] De Sadeleer, 2002, p. 38.
[25] See for example Recommendation 75/436/Euratom; ECSC; EEC., or Article 1(d) of the OSPAR Convention.
[26] De Sadeleer, 2002, p. 39.
[27] De Sadeleer, 2002, p. 40.
[28] Directive 2006/12/EC article 15, and directive 2008/98/EC article 14.
[29] The principle of prevention is also an integrated part of the EU environmental policy. See Article 191(2) TFEU.
[30] De Sadeleer, 2002, p. 41.

2.2.2 Who is the polluter?

The easy answer to the question of who the polluter is would be the person that causes the pollution. This answer would not seem to reward enough consideration to the complexity of the polluting situation in waste management cases. The person causing the pollution can be the producer of the product, but also the person who sells the product, or the consumer, among many others. Even when deciding upon one category, it can be hard to determine which of the actors within a certain category should be held liable. The stance taken in this question in European waste framework directives will be further analysed in chapter 3, and the interpretation of the legislation by the Court of Justice will be discussed in chapter 5.

2.2.3 What must the polluter pay?

The polluter pays principle can be interpreted in a manner which would result in all external costs becoming internalised. The principle can also be interpreted to only internalise parts of the costs.

The problem in interpreting the extent of the internalisation is however not the only problem in deciding what the polluter should pay. Deciding upon what should be deemed as covered by the liability in the polluter pays principle is yet another problem. Whether the polluter should bear the costs for monitoring and control as a way of enforcement mechanism is also debated. It could be argued that the costs for these activities should be covered by government budgets.[31] The fairness aspect of the polluter pays principle seems to suggest that these are costs that the polluter, due to his responsibility for the pollution, will need to bear. Philippe Sands argues that it seems clear from the wording of the polluter pays principle that it would be used to make the polluter pay for the costs incurred by public authorities for pollution prevention and control.[32] Examples of this use of the polluter pays principle can e.g. be found in environmental taxation.

The extent to which the polluter must pay for decontamination or clean-up after the polluting activities has internationally been regarded as controversial.[33] The line of reasoning by the Court of Justice in the cases described in chapter 5 would suggest that these costs are part of the costs that are internalised by the polluter pays principle. Should they not be included in the principle, it would only have internalised part of the costs, leaving the major part of the costs to the authorities. The inclusion of costs for decontamination and clean-up is also complicated by the fact that it is often difficult to attach a price to environmental damages, as much of these are irreversible or creating effects lasting into future generations.[34]

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[31] Farmer, 2007, pp. 190-191.
[32] Sands, Phillippe, *Principles of International Environmental Law*, 2nd edition 2003, Cambridge University Press, p. 285.
[33] Ibid.
[34] De Sadeleer, 2002, p. 44.

In my opinion, it would seem clear that the preventative aspect of the polluter pays principle would be the most preferable way of dealing with pollution. Effective monitoring and control are necessary in order to avoid the pollution. Should self-monitoring be seen as an effective way of control which would lead to reduced pollution, it would thus be clear that the costs for this monitoring and control should, to some extent, be carried by the polluter.

A report from the Swedish National Council for Crime Prevention, shows that self-monitoring can be a helpful tool in prevention if combined with state governing in environmental law enforcement. A problem with the use of self-monitoring in this way might be that the most compliant actors, that is, the ones who file the reports needed for effective self-monitoring, would be the ones "punished" by the authorities, whereas bigger actors with more polluting activities might go by unnoticed due to their substandard self-monitoring.[35] These facts are thus indicative of the fact that self-monitoring need to be combined with strong governmental monitoring in order for an effective control.

Should the costs for these monitoring activities then be paid by the polluters? In my opinion, it would only seem fair to put some of the burden on the polluters. This would seem to be in line with the internalising effect that the polluter pays principle has. The cost of producing something need to reflect on all the costs of production, which means that the monitoring and prevention costs also need to be internalised. I mean that internalisation requires consideration to be taken also to the monitoring costs. However, it would also seem clear that parts of these costs would be the government's responsibility, as it would be their authorities exercising the control. A proportional application of the polluter pays principle, where the polluter only pays the costs to which he has contributed, would also point towards shared responsibility. A combined responsibility for control and monitoring would then seem reasonable, even when taking the fairness argument into consideration.

2.3 The polluter pays principle in international law

The polluter pays principle has been internationally recognised; in the preambles of conventions, where it serves as a tool for interpretation, as well as in the operational part of conventions.[36] Beyond these two categories, the

[35] Skagerö, Alfred, Korsell, Lars, *Är vi bra på miljöbrott? En snabbanalys*, Brottsförebyggande rådet 2006, Webbrapport 2006:5, p. 15.

[36] For incorporations in the preamble of documents, see for example the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC Convention) or the Lugano Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment. For the principle in its binding form, see for

polluter pays principle has also been incorporated into soft-law instruments, such as the Rio Declaration on Environment and Development.[37] In the soft law instruments, the principle is not legally binding, albeit the existence of the principle in the soft law instruments might act as a precursor to its inclusion in hard law documents.[38]

In the Rio Declaration principle 16 it is stated that states should *"…endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account that the polluter should, in principle, bear the cost of pollution with due regard to the public interest and without distorting international trade and investment"*. This wording of the principle can be contrasted with the one contained in the 1992 OSPAR Convention.[39] Here, the polluter pays principle is expressed in article 2.2(b) as *"The contracting parties shall apply: … (b) the polluter-pays principle, by virtue of which the cost of pollution prevention, control and reduction measures shall be borne by the polluter."*. The wording of the OSPAR convention is much firmer than the one used in the Rio Declaration. The OSPAR convention establishes a responsibility for the contracting states to apply the polluter pays principle, and also defines the manner in which it shall be applied, whereas the Rio Declaration merely declares that the states shall "endeavour to promote" the internalisation of external costs for the environment, and that the polluter should pay, in principle. The Rio Declaration also makes room for deflections to be made from the polluter-pays principle, with a reference to public interest and international trade and investment. The version of the polluter-pays principle contained in the Rio Declaration thus seems a vague and unenforceable version of the principle compared to the wording in other documents. As Phillippe Sands suggests, the vague wording of the principle in the Rio Declaration, which is a broad agreement between many countries, show how countries are willing to use the polluter pays principle at the national level, but that they are unwilling to concede to it governing state relations at the international level.[40]

It is thus clear that the polluter pays principle is a part of international law, recognised in several international legal documents, both serving as a form of guidance on how to interpret the conventions in question, as well as conferring obligations on the parties to the conventions. Whether the principle forms part of the customary international law is though uncertain.[41]

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example Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992, (OSPAR Convention), the Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992, or the London Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1996.

[37] The Rio Declaration on Environment and Development, adopted 1992, as a part of the Agenda 21 documents.

[38] De Sadeleer, 2002, p. 313.

[39] Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992, (OSPAR Convention).

[40] Sands, 2003, p. 281.

[41] De Sadeleer, 2002, p. 25.

Customary law evolves through substantially consistent and general state practice. The state practice must be spread to a significant number of states. State practice encompasses actual activity from the state, as well as statements in concrete disputes, abstract statements regarding the principle and legislation.[42] There is also a possibility for customary law to be local, where two or more states regard a principle or practice as binding. Both forms of customary law must have some duration, although, the length of time needed can differ from case to case. In addition to the described elements of state practice, there must exist an *opinio juris*, that is, states must regard the principle in question as binding.[43] Should the polluter pays principle be found to have customary value, the result would be that the principle would be applicable and enforceable not only to states parties to conventions in which the principle has been used, but to all states.

Phillippe Sands argues that the polluter pays principle's status as customary international law is uncertain, as the principle has not been used as frequently in international law as for example the principle of prevention.[44] Arne Bleeker calls the principle a general principle of international environmental law, but makes no reference to its status as customary law.[45] This opinion is also supported by other authors.[46] As such, they influence the interpretation and application of international treaties, but their application cannot run counter to the wording of the treaties. The general principles of international law have become so due to the endorsement by states through their recognition by the states, or in other words, by their opinio juris. These principles affect the law and the states, albeit not in the way that treaties or customary law does.[47] This would thus mean that the polluter pays principle is only legally binding insofar that it has been expressively used in treaties or conventions. However, Sands continues to express his view that the polluter pays principle is regional customary law in the OECD countries, or in the European Union.[48]

2.4 The polluter pays principle in EU law

2.4.1 The use of the polluter pays principle in legislation

The polluter pays principle was first recognised in the first community environment action programme (EAP) in 1973, under which it was stated

[42] Dixon, Martin, *Textbook on International Law*,6th edition 2007, Oxford University Press, p. 31ff.
[43] Dixon, 2007, pp. 33ff.
[44] Sands, 2003, p. 280.
[45] Bleeker, 2009, p. 291.
[46] Birnie, Patricia, Boyle, Alan, Redgwell, Catherine, *International Law and the Environment*, Oxford University Press, 3rd edition 2009, p. 27f.
[47] Ibid.
[48] Sands, 2003, p. 280.

that the polluter should be held liable for costs incurred by prevention and control of nuisances.[49] The first EAP was followed by a Recommendation from the Commission,[50] in which the principle and its EU interpretation is defined.

> "...natural or legal persons governed by public or private law who are responsible for pollution must pay the costs of such measures as are necessary to eliminate that pollution or to reduce it so as to comply with the standards or equivalent measures which enable quality objectives to be met or, where there are no such objectives, so as to comply with the standards or equivalent measures laid down by the public authorities."

The Recommendation has legal effect insofar that it confers an obligation on national courts to take it into consideration when deciding disputes relating to the subject of the Recommendation in question. National courts shall especially take the Recommendations into consideration when they can be helpful for the interpretation of national measures implementing the Recommendations.[51] However, the Recommendations do not confer rights upon individuals, and they can thus not be the sole legal basis for a national dispute.[52] As the Recommendation in question still is in force, it can still serve as a help for national courts to harmonise their interpretation of legislation affected by it.

The principle is now contained in article 191(2) of the Treaty of the functioning of the European Union (TFEU),[53] where it is stated that the environmental legislation and action in the Union shall be based on the polluter pays principle, among other principles.[54] This is meant to guide the implementation of the EU environmental policy,[55] which in turn means that the polluter pays principle will now influence all areas in the environmental legislation of the EU, not only where the secondary legislation expressively says so. It would seem reasonable that all secondary legislation in the environmental area adopted after the inclusion of the polluter pays principle in the Treaty would incorporate the principle. The polluter pays principle forms a prominent part of European waste legislation, which has contained references to the principle since 1975.

The polluter pays principle has, as has been previously said, been codified in legislation as well as used by the Court of Justice. This means that the European institutions, such as the Commission, the Council, the European Parliament and the Court of Justice will be forced to take the polluter pays principle into consideration when adopting and interpreting legislation. According to De Sadeleer, there still exists a degree of discretion for the

[49] De Sadeleer, 2002, p. 28.
[50] Recommendation 75/436/Euratom; ECSC; EEC.
[51] C-322/88**,** *Salvatore Grimaldi v Fonds des maladies professionnelles*, ECR [1989] 04407 para 18.
[52] De Sadeleer, 2002, p. 28.
[53] The polluter pays principle was previously contained in Article 174(2) of the EC Treaty.
[54] Article 191 TFEU also mentions the precautionary principle, the principle of prevention and the principle of rectification of damage at source.
[55] De Sadeleer, 2002, p. 30.

institutions regarding the use of the polluter pays principle, especially when reading article 191(2) TFEU in conjunction with article 191(3) TFEU. Article 191(3) TFEU allows the institutions to take into consideration for example different environmental conditions in the Member States, and the economic and social conditions in the Member States. Thus, the polluter pays principle and the other environmental principles can be applied flexibly depending on the situation at hand. However, as the polluter pays principle is integrated into the Treaty as well, the institutions cannot completely ignore it.[56]

It is not clear to what extent the principles in article 191 TFEU serves as enforceable principles. The principles are called general principles of Community law, but have been considered too vague to be able to be invoked before a court by commentaries. Thus, many commentaries believe that they will need to be clarified in secondary legislation in order to be able to serve as a real legal base. The vagueness of the principles also render them inappropriate to be tried in a court. Due to the wide margin of appreciation that they will be afforded because of their vagueness, the outcome of a case based solely on one of these principles would be very uncertain.[57]

The EU has framed the polluter pays principle with reference to its cost basis, that is, the more economic sense of the principle. Thus, the instruments based on the principle are often market-based ones, which aim at internalisation of external costs to a certain degree.[58] The use of the polluter pays principle in European law can also be divided into ex ante and ex post measures. The ex ante measures aims at reducing the pollution throughout the production. These measures have been the most common within the EU. Ex post measures are concerned with what will happen once the pollution has occurred. These are less common, but the use of the principle in the waste framework directive serves as an excellent example of an ex post use of the polluter pays principle.[59]

2.4.2 A proportional application of the polluter pays principle

Within its case law, the Court of Justice has repeatedly referred to the polluter pays principle in proportionality terms.[60] The proportionality

[56] Ibid.
[57] Bleeker, 2009, p. 292.
[58] Bleeker, 2009, p. 291.
[59] Bleeker, 2009, p. 292.
[60] In the case of Standley (C-293/97, *The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others*, ECR [1999] I-02603), the Court of Justice first applied its proportional interpretation of the polluter pays principle, where it said that polluters should be liable for pollution to which they have not contributed to, and that the polluter pays principle thus reflects the principle of proportionality, in para 52. The proportional

principle is a general principle of EU law, applying to all EU actions, which regulates how the EU can exercise its legislation.[61] Proportionality also regulates the member states legislation. Their legislation and actions taken in member states must thus also fulfil the requirements of the proportionality principle. The principle is contained in article 5 of the Treaty on the European Union. Proportionality has been described as a three part test, where the factors to be considered when looking at a measure from the EU are as follows. The measure must be suitable for the legitimate aim the Union aims at achieving. It must also be necessary to achieve such an aim, which means that it must be the least restrictive measure available. The third part of the test, which by some commentators is not considered a requisite for proportionality, sees to the applicants interests. These must not be affected excessively by the measure.[62] As some authors point out, the principle of proportionality confers great political powers to the courts, as these will have to make considerations based on suitability and necessity when deciding whether a measure is compatible with the proportionality principle.[63]

Applying this principle to the use of the polluter pays principle thus leads to a greater implementation of the fairness aspect of the polluter pays principle, as the interests of the polluters must be weighed against the aim wished to be achieved. Proportionality has also, in cases concerning the polluter pays principle been interpreted as meaning that contribution to or causation of the pollution is necessary for the application of the polluter pays principle. The application of the proportionality principle is thus interesting in the cases where more than one person could be regarded responsible for the pollution.

When attributing liability within the circle of potentially liable actors, the proportionality principle can consequently be the basis of channelling liability from one liable actor to another. Channelling of liability is interesting when the first actors funds cannot cover the pollution, or when other actors within the chain of liability actors can be seen as so responsible that it would be fair to channel liability to them. Should the threshold regarding the contribution or causation be set too high, the result could however be that the general public would be forced to pay the costs of pollution, which would seem contrary to the fairness aspect of the polluter pays principle. The fair application of the polluter pays principle will thus in the most cases coincide with the proportional application of the principle. However, the way in which the polluter pays principle is applied might lead to an outcome of the case which can seem unfair.

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interpretation of the polluter pays principle is also visible in the cases discussed in chapter 5.

[61] Chalmers, Damian, Tomkins, Adam, European Union Public Law, Cambridge University Press, 2007, pp. 209f.

[62] Chalmers et al, 2007, p. 449.

[63] Chalmers et al, 2007, p. 450.

In my opinion, the role of the polluter pays principle as a general principle of EU law can thus be described as uncertain. The general principles would probably be too vague to base any form of claim on, and the vagueness of the principle in general, with the many ambiguities that it contains, would probably mean that the polluter pays principle in EU law contains a wide discretion. This allows the legislators and the Court of Justice to adapt their use of it on a case by case basis.[64]

The polluter pays principle has however been put into secondary legislation via several documents. The most important for the purpose of this essay is the waste framework directive. The references to the polluter pays principle in the directive dates back to 1975. The polluter pays principle as contained in the waste framework directive has also been tried before the Court of Justice at three occasions, which hopefully will serve as some guidance of what the polluter pays principle in European waste law really consists of.

[64] Bleeker, 2009, p. 293.

3 European waste framework legislation

3.1 Introduction

There are a number of directives dealing with the treatment of waste, some of which are overlapping. The central piece of legislation is the framework directive,[65] which provides a definition of the concept of waste, and the treatments preferred for waste management. The framework directive also codifies the waste management policy developed by the Commission. This policy sets out a waste hierarchy describing which treatments of waste are considered most preferable.

The framework directive influences all of the other legislative acts within the policy area, as their waste definition is dependent on the framework directive. These legislative acts are mainly directives dealing with specific waste streams, such as end of life vehicles, batteries, packaging or electronic equipment. This chapter will give an overview of the use of the polluter pays principle in EU waste law. The waste definition will be described in chapter 4.

3.2 The waste management policy

The waste management policy, as defined by the Commission in 1996,[66] establishes a hierarchy of waste management. This waste management policy permeates the Union legislation within the waste management area. The Commission states that the key objective of any waste management scheme in the Union must be to prevent the creation of waste, as the mere generation of the waste is seen as a form of pollution, contributing to unsustainable use of resources.[67] If prevention is impossible, the next form of management should be recovery of the waste, or, lastly, safe disposal of waste. This hierarchy is contained in the framework directives of 1975 and 2006.[68] The hierarchy is, according to the Commission, to be applied with flexibility, meaning that in application of it, economic and social costs need to be taken into account, as well as the benefits for the environment.[69]

[65] Currently there are two framework directives in force in the European Union, Directives 2008/98/EC and 2006/12/EC. In December 2010 the framework directive of 2006 will cease to be valid.
[66] European Commission *"Communication from the Commission on the Review of the Community Strategy for Waste Management"* COM(96) 399.
[67] COM(96) 399, p. 6.
[68] See articles 3-4 of the framework directive of 1975, and articles 3-4 of the framework directive of 2006.
[69] COM(96) 399 p. 6.

The waste hierarchy is still contained in the framework directive of 2008, albeit somewhat re-defined, with five levels instead of the previous three.[70] Prevention is still the most preferred form of action, followed by preparing for re-use, recycling, other recovery and finally, disposal of waste, taking into consideration the technical feasibility and economic viability of the options when applying the waste hierarchy. These changes can be seen as encompassing the new technical opportunities to deal with waste, rather than as a change of the Union approach to dealing with waste.[71]

3.3 The framework directive of 1975

The first European waste framework directive was adopted in 1975,[72] as a result of raised awareness of the increased problems in the European Union (EU) due the lack of proper waste management. The lack of proper and harmonised management could lead to detrimental effects on both human health and the environment.[73]

The framework directive contains a provision on the polluter pays principle, stating that *"…the cost of disposing 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"*.[74] The polluter pays principle in the framework directive of 1975 is thus connected to the producer of the goods, as well as the holder or previous holders of the waste or the product. The principle is, however, not giving any guidance on which of the two categories shall be held economically liable. It seems that the member states thus are free to choose their method of interpreting article 15, and that different people can be held liable in different states.[75]

The polluter pays principle in the framework directive of 1975 thus only applies to the costs of waste disposal.[76] There is no reference to the inclusion of monitoring costs in the principle. This could lead to a rather narrow sense of a polluter pays principle, as, if interpreted restrictively, the costs of unlawful disposal with pollution as a side effect could be seen as not covered by the principle. In the cases where the polluter pays principle in waste legislation has been interpreted by the Court of Justice, it has however been interpreted teleologically, with a significantly wider polluter pays principle as a result.

[70] Directive 2008/98/EC, article 4.
[71] European Commission, *Proposal for a Directive of the European Parliament and of the Council on waste* COM(2005) 667 final p. 9.
[72] Directive 1975/442/EEC.
[73] European Commission, *The story behind the strategy – EU waste policy*, p. 8.
[74] Directive 1975/442/EEC, article 15.
[75] For a discussion on this, see chapter 5.3.
[76] Directive 1975/442/EEC, article 1(e).

The framework directive of 1975 was replaced and consolidated by the framework directive of 2006.[77] The framework directive of 2006 contains in its original form no changes to the definition of waste contained in the directive of 1975 as amended, and can thus be seen as a purely consolidating framework directive. This means that the jurisprudence of the Court of Justice referring to the provisions regarding the concept of waste under the framework directive of 1975 is still very much relevant.[78] The framework directive of 2006 is however repealed as of the 11th of December 2010 by the revised framework directive of 2008.

3.4 The revised framework directive of 2008

The new and revised framework entered into force the 12th of December 2008, and as of December 11th 2010, it will be the only valid framework directive considering waste legislation in the EU. The framework directive not only amends and revises the previous framework directives, but it also integrates the directives on hazardous waste,[79] and waste oils.[80] The changes made in this directive aims at clarifying the waste definition and the criterion of when something is disposed of, as a way of making waste legislation increasedly environmentally protective and cost effective.[81]

The polluter pays principle is still a part of the new directive, albeit differently worded from the principle contained in the previous directives. In article 14, it is stated that *"…the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders."*. The second part of article 14 contains a provision enabling the member states to put liability on the distributors of the product from which the waste came.

Regarding the persons potentially liable for pollution, the principle has been limited somewhat. The polluter pays principle within the previous framework directive confer liability upon the previous holders of the product from which the waste was generated, among other actors. In the new version of the principle, the legislator has explicitly limited responsibility to the producer of the product or the current or previous holders of the waste. The previous holders of the product have been excluded from the circle of potentially liable actors within the revised framework directive. The producer of the product can still be seen as liable, as can the distributors of the product. It is uncertain whether the distributors

[77] Directive 2006/12/EC.
[78] Jans, Jan H., Vedder, Hans H.B., *European Environmental Law*, 3rd edition 2008, Europa Law Publishing, p. 420f.
[79] Directive 91/689/EEC.
[80] Directive 75/439/EEC, Directive 2008/98/EC, Article 41, and Articles 17-20.
[81] Art 8(2)(iv) Decision no 1600/2002/EC, European Commission, *Taking sustainable use of resources forward: A Thematic Strategy on the prevention and recycling of waste*, COM(2005) 666 final, p. 6f

and the holders of the product will be regarded to be the same category of actors. The liability conferred upon the producers of the product has now been expressly worded as a possibility for the member states, and seems to be an additional feature of the polluter pays principle, rather than being covered by the actual ambit of the principle. The legislator thus seems to suggest that the primary actor to be held liable should be the producer of the waste or the current or previous holders of the waste.

It is also important to note that the wording of the polluter pays principle in the revised framework directive talks about *"the costs of waste management"*,[82] whereas the framework directive of 1975 refers to *"the cost of waste disposal"*.[83] This would thus mean that the polluter pays principle and its use has been extended largely in the revised framework directive. Waste management covers *"…the collection, transport, recovery and disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including actions taken as dealer or broker."*[84]

Waste disposal is however defined as *"…any of the operations provided for in Annex IIA"*[85] which are among other things deposit onto land,[86] or release into water.[87] It has thus been a simplified process to establish which activities by the polluter that are covered by the polluter pays principle, as there no longer exists a need to differentiate between recovery and disposal to establish that the polluter pays principle applies as a way of allocating the costs and liability.

Combined with the polluter pays principle as a way of allocating liability in the revised framework directive, the directive also incorporates a notion of producer responsibility. This concept is not new to EU waste law, as it has previously been seen in the end of life vehicles directive and the waste electrical and electronic equipment directive.[88] Producer responsibility aims at strengthening the responsibility put on the producer of the product, by for example making the producer accept the return of used products, in order to forward re-cycling and re-use of products. Eco-design, the design of products to decrease the creation of waste and reduce their environmental impact, is also mentioned as something which the member states should endeavour to promote.[89] The extended producer responsibility shall also be applied without prejudice to the responsibility created by the polluter pays principle, but when applying it, considerations must be given the technical feasibility and economic viability of the application. The effects on the environment and the inner market shall also be considered.[90] This could thus

[82] Directive 2008/98/EC, article 14.
[83] Directive 1975/442/EC, article 15.
[84] Directive 2008/98/EC, article 3(9).
[85] Directive 1975/442/EEC, article 1(e).
[86] Directive 1975/442/EEC, Annex IIA, D1.
[87] Directive 1975/442/EEC, Annex IIA, D6.
[88] Directive 2000/53/EC and Directive 2002/96/EC.
[89] Directive 2008/98/EC, article 8.
[90] Directive 2008/98/EC, article 8(3) and 8(4).

mean that the producer responsibility could cover the situation when the polluter pays principle excludes the producer of the product from liability. It can also be said that the extended producer responsibility most likely will function within the ex ante sphere of the legislation, and thus increasingly promote prevention of waste and pollution.

The new version of the polluter pays principle thus seems to be extended as to the question of what pollution is, but has been limited in reference to who the polluter is. This discussion will be developed further in chapter 5 and chapter 6.

4 The European concept of waste

4.1 Introductory remarks

The answer to the question of what pollution is lies in the determination of what is considered waste. It is thus crucial to understand the waste definition, in order to understand the importance of the polluter pays principle in waste law. How widely or restrictively the waste definition is interpreted determines the environmental protection possible to be upheld in the Union in this area.

This definition, differs somewhat between the framework directive of 2006 and the revised framework directive of 2008. As they are both still in force, and the definition in the directive of 2008 builds upon the previous definition, it will be necessary to outline the legal commentaries and the case law of the Court of Justice. The changes to the waste definition are clarifying rather than radically changing, meaning that the case law of the Court of Justice probably, in the most parts, will continue to be relevant. I will however only briefly mention the parts of the waste definition that can be envisaged having little or no effect under the revised framework directive.

This chapter will provide an overview of the waste definition. I will explain how the definition has evolved, and also how the definition has been interpreted by the Court of Justice.

4.2 The waste definition in the waste framework directives

In the waste framework directives of 1975 and 2006, waste is defined as *"…any substance or object in the categories set out in Annex 1 which the holder discards or intends or is required to discard"*.[91]

The substances in Annex I are listed in categories, and the list must be considered extensive. The final category (Q16) of Annex I refers to *"[a]ny any materials, substances or products which are not contained in the above categories"*. This category is thus drafted in a very imprecise manner, and it could be argued that Annex I thus virtually could cover anything. [92] This has rendered the Annex I definition an impractical tool in deciding whether a

[91] Directive 1975/442/EEC, article 1(a), or Directive 2006/12/EC article 1(a).
[92] Jans, Vedder, 2008, p. 420f.

substance is waste. This has also been a part of the implementation and interpretation problem with the framework directive of 2006.

In the revised framework directive, the Annex I definition has been excluded, but the essence of the waste definition will remain largely the same.[93] The definition in the revised framework directive is split in two parts. The main definition is *"any substance or object which the holder discards or intends or is required to discard"*.[94]

The second part of the definition of waste is introduced in the revised framework directive. The new *end of waste* concept applies when something which is seen as waste according to article 3(1) ceases to be waste due to circumstances specified in article 6 of the revised framework directive. This end of waste status can be envisaged to have a large effect on so called residuals. The new provisions regarding the re-definition of by-products and the end of waste status are contained in chapters 4.4 and 4.5.

The key question under both of the framework directives will thus be the question of when something has been discarded. This question will be answered in the following chapter.

4.3 Discards or intends to discard

The framework directives provides no guidance on the definition of when the holder of waste discards or intends to discard the substance, but as stated in the previous chapter, this definition is crucial to be able to understand when a substance or product is considered as waste in the meaning of both of the framework directives. It can be said that the wording "to discard" effectively determines what will fall under the EU waste legislation,[95] and thus also what will be considered pollution under the polluter pays principle in European waste law.

In legal literature, "discarding" has been debated thoroughly in the light of the Court of Justice case-law. De Sadeleer suggests that there are three things to keep especially in mind when deciding whether something is waste or not. Firstly, the legal notion of waste must be interpreted broadly in order for the definition and thus the European waste legislation to fulfil the objectives of the European Union. These have been expressed in for example article 191 TFEU, where it is stated that the Union policy in the environmental area shall ensure a high level of protection. The framework directive of 2006, as well as the revised framework directive, also states the

[93] Nash, Hazel Ann, *The Revised Directive on Waste: Resolving Legislative Tensions in Waste Management?*, Journal of Environmental Law (2009) 21:1 139-149, p. 142. See also European Commission, *Proposal for a Directive of the European Parliament and of the Council on waste*, COM(2005) 667 final, p. 10.
[94] Directive 2008/98/EC, article 3(1).
[95] De Sadeleer, Nicolas., *EC Waste Law or How to Juggle Legal Concepts*, JEEPL 6 2005 pp 458- 477, p. 460.

environmental protection as one of the goals of the legislation.[96] To ensure that this protection is upheld and the waste legislation thus is effective, the concept of waste must encompass various products and substances.[97]

Secondly, waste must be considered together with discarding, as merely looking at the inherent qualities of the product in question overlooks the subjective character waste has. There can be no clear definition of waste, considering that it fluctuates depending on other circumstances, such as the intention to discard, or someone being obligated to discard the product. This is the third thing needed to keep in mind – the individual circumstances of the case in question.[98]

The Court of Justice has been forced to embark upon a road of rather extensive interpretation regarding the definition of discarding. The court has case by case built a definition of 'discarding', leading up to the ground upon which we stand today.

In the Inter-Wallonie case,[99] the Court of Justice stated that it is clear that the discarding notion contained in the framework directive embraces recovery processes as well as disposal processes. These processes are contained in Annex IIA and IIB of the framework directive of 2006, and in Annex I and II of the revised framework directive. The operations listed in the two directives are nearly identical, however, in the revised directive, it is emphasised that these are non-exhaustive.[100] This has also been the interpretation made by the Court of Justice under the previous directive, where the court has stated that the Annexes are non-exhaustive.[101] There can thus be a presumption that substances referred to the processes contained in the Annexes will be seen as discarded,[102] albeit, the fact that they have not been subjected to such an operation will not exclude them from the waste definition. The abandonment of waste is for example a form of discarding not covered by the disposal or recovery operations.[103]

The fact that a substance or a material has been consigned to a recovery or disposal operation will however not serve as the single decisive factor in deciding whether it has been discarded. There will still exist a need to consider other things as well, such as the holder's intention to discard, among other things.[104] Albeit, the fact that the treatment used is one that is

[96] See preamble of Directive 2006/12/EC at para. 2.
[97] De Sadeleer, 2005, p. 462.
[98] Ibid.
[99] Case C-129/96 Inter-Environnement Wallonie ASBL v Région wallonne (Inter-Wallonie), ECR I-07411.
[100] Directive 2008/98/EC Article 3(15) and 3(19).
[101] Case C-457/*02 Criminal Proceedings against Antonio Niselli* (Niselli), ECR I-10853, para 40.
[102] De Sadeleer, 2005, p. 463.
[103] Niselli, para 38-39.
[104] Palin Granit OY, para 30. See also ARCO Chemie, para 46-50.

commonly used to get rid of the waste could serve as an indication on the holder's intention to discard the product.[105]

The financial interest of the holder is a factor which is to be taken into consideration when deciding whether something is waste. The fact that the material in question has inherent possibility for economic reutilisation will not exclude it from the waste definition, as can be seen in the Vessoso and Zanetti cases.[106] However, the absence of an economic interest can serve as a guiding factor in the process of deciding whether something has been discarded. In the Palin Granit OY case the Court of Justice held that the only foreseeable use for the material in question would constitute a burden for the holder,[107] and that the material thus would be considered waste.

The concept of waste can thus very much turn on subjective circumstances, as what constitutes waste for one manufacturer might be a necessary production material for another. Even though the intention of the manufacturer is an indication, the waste definition can also turn on the opinion of the general public, and the common methods used.[108] In ARCO Chemie the court held that the fact that the burning of fuel is a common method of recovering waste, and that there thus exists a presumption that it in this case also has been used in that manner.[109] According to the Advocate General (AG) in ARCO Chemie, the producer's claims regarding his intention to discard cannot be awarded too much attention, as there generally exists a wish to circumvent the rules applying to the treatment of waste.[110] This can be seen as a way of ensuring that the object of the framework directive in fact can be met.

Something can also be regarded as waste even where it has been disposed of in a manner which has not been environmentally damaging.[111] There is thus no need for damage to have occurred in order for the waste definition and the rules in the directive to apply. As one of the guiding principles in the environmental legislation of the Union is be the precautionary principle,[112] such a reasoning is sound. The fact that the substances have been subjected to ecologically responsible treatment would in fact also mean that the rules in the framework directive have been followed, considering that these rules demand that recovery and disposal of waste shall be made without harming the environment or human health.[113] Upholding this jurisprudence could also lead to a forwarded respect for said rules in the framework directives,

[105] De Sadeleer, 2005, p. 463.
[106] Joined cases C-206/88 and C-207/88, Criminal Proceedings against G. Vessoso and G. Zanetti (Vessoso and Zanetti), ECR [1990] I-01461, paras 8-9.
[107] Palin Granit OY, para 38.
[108] De Sadeleer, 2005, p. 466.
[109] ARCO Chemie, para 73.
[110] Opinion of AG Alber in ARCO Chemie, para 59.
[111] Inter Wallonie, para 30, ARCO Chemie, para 65.
[112] Article 191 TFEU.
[113] Directive 2008/98/EC, article 5.

as the ecologically sound treatment of the waste facilitates the application of the directives.[114]

4.4 Residual substances and by-products

The Court of Justice has recently handled many cases concerning residual substances from a production process. The revised framework directive seeks to simplify the distinction between waste and residues not considered as waste. Before I move on to describing these new rules, which can be envisaged to have effect on the residual substances, I will start by giving an overview of the case law of the Court of Justice referring to the previous rules.

The court held that the fact that a holder disposes of a residual substance leads to a very strong presumption of said substance being discarded, and thus becoming waste.[115] As held in the above-mentioned Inter Wallonie case, the residual substance can be considered as being waste even where it is an integral part of an industrial production process.[116]

Where no use for the residual substance or material other than disposal can be envisaged, this serves as an additional indicator of the substance or material being waste, as no market exists for them. This means that the holder will be seen as being required to discard the substance.[117] Even where another use is foreseen, and this use would require special precautions for the environmental impact being made, these precautions serve as indicators that the substance is in fact waste.[118]

Also, the fact that the future use of the substance could lead to adverse effects on the environment or on human health, would in the opinion of the Court of Justice be a factor leading to the substance or material being waste.[119] As the framework directive aims at keeping the protection of the environment, it is my opinion that this interpretation of the concept is welcome.

The question regarding when residual substances are to be considered by-products which are excluded from the waste concept has thus, for a long time, been debated. In the revised framework directive, four criterions aim at clarifying when by-products are excluded from the waste definition. The following use of the product must be certain. This use shall take place without the need of further processing, however, normal industrial practice can be accepted as processing. The substance must also be an integral part

[114] De Sadeleer, 2005, p. 466.
[115] ARCO Chemie, para 83-87.
[116] Inter Wallonie, para 32.
[117] ARCO Chemie, para 86.
[118] ARCO Chemie, para 87.
[119] Palin Granit OY, para 38.

of the production process, and the further use must be lawful.[120] This lawfulness aims at national and European environmental standards, among other things. The inclusion of these criterion is thus a step made by the legislator towards clarification of when by-products are not waste.

Whether these legislative criteria will result in a clarified and simplified process remains to be seen. Nash speculates in whether these criteria will result in substances escaping regulatory control, and also points out that this re-classification is likely to result in confusion, especially due to the vagueness of concepts such "normal industrial practice".[121] The re-classification can also be said to circumvent the application of the polluter pays principle, as these by-products are excluded from the scope of this principle under the waste framework directive. However, article 191 TFEU still requires the actors within the Union to take the polluter pays principle into consideration. This could mean that the polluter pays principle still applies to the by-products. As I have previously written in chapter 2.4, the polluter pays principle as contained in article 191 TFEU has an inherent flexible application, and it is yet not clear whether the polluter pays principle in article 191 TFEU can be interpreted as a principle which applies to certain cases.

4.5 End of waste status

The revised framework directive also introduces a second part to the waste definition. This new end of waste status is intended to clarify how waste ceases to be waste, as a recycling matter.[122]

The waste shall have undergone a recovery process, e.g. recycling, and the waste must also comply with the conditions in article 6 in order to be reclassified.[123] The conditions relate to the demand for the substance, the common use, and whether it fulfils the technical requirements and the product legislation applicable. The use of the substance must also not lead to adverse effects on the environment or on human health. According to the preamble of the revised framework directive, this end of waste status is meant to be further clarified by the issuing of further criteria to help interpret the conditions by the Commission.[124]

4.6 Summary

The waste definition which is contained in the waste framework directive will be the base for the waste legislation within the Union. There is no

[120] Directive 2008/98/EC, article 5.
[121] Nash, 2009, pp. 147-148
[122] Nash, 2009, p. 142.
[123] Ibid.
[124] Preamble of Directive 2008/98/EC, para 47.

express demand for harm or damage to have occurred in order for the waste definition to be applicable. That something is seen as waste is a prerequisite for the application of the polluter pays principle.

If something has become waste will turn on whether it will be seen as discarded. That something has been consigned to a recovery or disposal process will function as a presumption that the product has been discarded, and thus become waste, but it cannot be considered to be the only criteria in determining the waste definition. The holders intention to discard, the absence of an economic interest and the opinion of the general public, among other things, will also function as things needed to be considered.

The revised waste framework directive introduces an end of waste status and a new provision regarding by-products. These might reduce the application of the polluter pays principle in waste law, as they remove products from the waste category, leading to a smaller scope for the principle. The effects of these categories can, however, yet not be seen.

5 The application of the Polluter Pays Principle in the case-law of the Court of Justice

5.1 Introductory remarks

This chapter will give an analysis of three important judgments by the Court of Justice within the field of waste management and the polluter pays principle. These cases are the Van de Walle case, the Total case and the Futura case.[125] The Van de Walle and the Total case concerns very atypical situations, where what is in fact contamination of land and water has been considered to be waste. The definitions in the framework directive have had to be stretched by the Court of Justice to cover these situations. These cases are the only cases by the Court of Justice which elaborate on the application of the polluter pays principle under the waste framework directive, which is why I have chosen to focus on them. More typical cases by the Court of Justice which focus on the determination of what typically is waste have been covered in the previous chapter.

The legislator reacted forcefully after the Van de Walle case, and made changes to the framework directive which effectively rendered the findings of the court in regard to the interpretation of the waste definition in the Van de Walle case obsolete. The revised framework directive states that unexcavated contaminated land in situ will not be seen as waste.[126]

In the Total case, the reasoning behind the European concept of waste would probably not be covered by the exemption made by the legislator in reaction to the Van de Walle case.[127] Even if the Courts reasoning behind the waste definition will be seen as faulty, in my opinion the discussions regarding the polluter pays principle still remain of interest. The focus in the case analyses will be on the interpretation of the polluter pays principle. This means that the following chapter mainly answers the questions of which costs are to be covered by the polluter pays principle, and perhaps most importantly, who the polluter is.

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[125] Case C-1/03, *Paul Van de Walle and Others v Texaco Belgium SA,* (Van de Walle) ECR [2004] I-07613, Case C-188/07, *Commune de Mesquer v Total France SA and Total International Ltd,* (Total) ECR [2008] I-04501, Case C-254/08, *Futura Immobiliare srl Hotel Futura, and others v Comune di Casoria,* (Futura), not yet published.

[126] Directive 2008/98/EC, article 2(1)(b).

[127] De Sadeleer, Nicolas, *Liability for Oil Pollution Damage versus Liability for Waste Management: The Polluter Pays Principle at the Rescue of the Victims*, Journal of Environmental Law, 21:2 (2009) pp 299-307, p. 303, note 15.

5.2 Paul Van de Walle and Others v Texaco Belgium SA

5.2.1 Facts

During renovation of a building in Brussels, it was found that water saturated by hydrocarbons was leaking in from the adjacent Texaco service station.[128] The leakage was attributable to deficient storage facilities in the service station.[129] The owner of the premises and Texaco had a commercial lease which covered the service station, but the station was operated by a manager under an operating agreement. According to this agreement the manager was provided with the equipment and property needed for the service station to function properly by Texaco, but he operated the premises on his own behalf, albeit without the right to make changes to the premises without Texaco's prior written permission. Texaco also provided the manager with the petroleum.[130]

The questions raised before the Court of Justice were whether the contaminated soil could be seen as waste, and whether Texaco could be considered to be holder or producer of said waste. The questions are in other words what pollution is under the waste framework directive, and who is considered polluter. Considering the developments in legislation, the second question will be the one of most interest for this chapter.

5.2.2 Opinion of Advocate General Kokott

The AG concludes that unexcavated contaminated soil could be regarded as waste.[131] The AG also remarks that the classification of the soil as waste will very much turn on whether there is an intention or an obligation to discard the soil. In this case, the AG leaves this question to be decided by the national court.[132]

The AG then proceeds to investigate whether Texaco could be seen as the holder or the producer of the waste.[133] In the opinion of the AG, the producer definition as contained in the framework directive of 1975 would be someone whose activities are closely linked to a substance becoming waste.[134] It would thus not suffice that Texaco sold the petroleum to the manager of the service station, as it would furthermore be necessary that Texaco is seen as the operator of the service station when the fuel leaks. This could be the case as the manager of the service station seemed to be

[128] Van de Walle, para 14.
[129] Van de Walle, para 16.
[130] Van de Walle, para 15.
[131] Opinion of AG Kokott in Van de Walle, para 33.
[132] Opinion of AG Kokott in Van de Walle, para 40.
[133] Opinion of AG Kokott in Van de Walle, para 50.
[134] Directive 1975/442/EEC, article 1(b).

operating under Texaco's business. In order for the polluter pays principle to apply to Texaco the case in question, there must thus be some responsibility for causing of the waste, and consequently also the pollution, on Texaco's side. The AG concludes that this would need to be settled by the competent national court.[135] In the AG's opinion there would thus exist a possibility that the producer concept could encompass Texaco.

5.2.3 Judgment of the Court of Justice

The Court of Justice finds that the spilled hydrocarbons must be waste, as they are not capable of re-use, and as they have no market value, the holder must have discarded them, even if it would have been involuntary.[136] As the Court of Justice rightly says, the framework directive would be rendered useless if spillages and contamination would be excluded from its application based on the sole fact that they had been done inadvertently.[137] The Court of Justice also proceeds to find that the unexcavated contaminated soil is waste.[138]

The Court states that the liability under article 15 of the framework directive must be differentiated from the responsibility for waste management, which includes the actual referring of the waste to recovery or disposal operations. The management of waste is a responsibility for any holder of the waste, whereas the cost for disposal of waste shall according to the Court of Justice be borne by the person causing the waste, holder, possessor or producer.[139] The term holder also encompasses producer as well as possessor.[140]

The Court of Justice also finds that Texaco can be considered the holder of the waste, should the leakage be considered attributable to their actions.[141] The Court of Justice states that the actor which is to be considered as holder of the hydrocarbons would be the actor whose actions contributed to the poor storage facilities. In order to be liable under the polluter pays principle, responsibility for the causation or pollution must be established. Not only must the actor be responsible, said responsibility must be based on causation and negligence. There exists a possibility to channel the responsibility for the pollution down the chain of actors in the production process, which could be used to make Texaco liable even when the manager is considered holder. According to the Court of Justice, such channelling would however need to be based on some form of fault on the part of Texaco, which has contributed to their responsibility.[142]

[135] Opinion of AG Kokott in Van de Walle, paras 52-54.
[136] Van de Walle judgment, para 47.
[137] Van de Walle judgment, para 48.
[138] Van de Walle judgment, para 53.
[139] Van de Walle judgment, para 55.
[140] Directive 75/442/EEC, Article 1(c).
[141] Van de Walle judgment, para 61.
[142] Van de Walle judgment, para 60. See also Bleeker, 2009, p. 296.

5.2.4 Case analysis

The Van de Walle case has, especially with regard to the definition of waste and the consequences this definition has entailed, been a very debated case by legal commentaries. The judgment shows that the Court of Justice is willing to make rather extensive interpretations of what will fall within the waste framework directive when applying the polluter pays principle. The question of when pollution has occurred has thus been given a very wide answer by this judgment. The changes made to the European waste legislation has significantly limited the actual effects of the Van de Walle judgment, and especially so with regard to the question of what pollution is. However, the reasoning by the Court of Justice and the AG on the question of who the polluter is still remains interesting, if only theoretically. The Van de Walle judgment is also important as the Total judgment to a great extent builds upon it. Considering the changes made to the framework directive because of this judgment, the discussion regarding what pollution is will be left out of the following chapter. The following discussion is instead focused on the court's reasoning regarding the concept of holder within the polluter pays principle in the waste framework directive, thus, the question of who will be considered to be polluter.

The judgment by the Court of Justice clearly shows the difficulties in deciding who is considered polluter. The framework directive's article 15 makes provisions for the holder of the waste, and/or previous holders and the producer to be held liable for pollution in accordance with the polluter pays principle. The revised framework directive mentions virtually the same actors as article 15.[143] Within the revised framework directive, the producer of the product from which the waste came will only be considered liable should the member states choose to transpose the article in that manner. This might thus lead to a reduced circle of actors which could potentially be liable.[144]

The judgment seems to suggest that the actor with the main responsibility under the polluter pays principle is the producer of the waste, in this case the manager of the service station. Holding the producer of the waste rather than the producer of the product liable would in nearly all cases mean that the final holder would be the liable person. The threshold for channelling liability down the chain of actors who legally can be held liable under the polluter pays principle is, according to the Van de Walle judgment, that their actions or contractual obligations show "causation and negligence".[145] This causation and negligence threshold is an example of the proportionality

[143] For a discussion regarding the differences in the actors mentioned in the framework directives, see chapter 3.5.

[144] It is important to remember that the member states have been free to transpose the polluter pays principle as they see fit also under the previous waste framework directive. This follows from article 288 TFEU, where it is stated that a directive is binding as to the result which shall be achieved, but not to the form. The member states can thus transpose the directives as they wish, as long as the result of the directive still can be achieved.

[145] Bleeker, 2009, p. 296.

part of the polluter pays principle, where the actor only can be held liable insofar that he has contributed to the pollution in question. However, in my opinion it would be fair to argue, that Texaco, within their role as the producer of the oil, has contributed to the pollution, even if the actions might not have reached the causation and negligence threshold proposed by the Court of Justice. The responsible actor, or in other words, the polluter, is thus, according to the Court of Justice, the producer of the waste, if causation and negligence cannot be shown on the part of another actor mentioned in article 15 of the framework directive of 1975.

Bleeker means that the reasoning by the Court of Justice and the AG which presupposes fault-based responsibility in order for the liability to be channelled down the production chain could be detrimental with regards to upholding environmental protection. He continues by saying that if this interpretation of the polluter pays principle would be upheld in practice, it would be rather easy to escape liability by the framing of the contract.[146] Bleeker also continues his argument in the following terms; that by the strict proportionality element visible in the judgment, which is legally sound and viable, the "deep pockets" of Texaco are out of reach. The resources that the managers, that is, the final holders, command would in many cases be limited compared to the resources big oil companies like Texaco have at their disposal.[147] The result of this proportionality argument of the court could be that should the producer of the waste not be able to pay the costs for the disposal, and can not enough causation be shown on the part of the previous holder, the liability to pay for clean-up would be referred on to the general public, i.e. the tax payers.

De Sadeleer argues that the judgment of the Court of Justice is correctly judged in this instance. Limiting the responsibility in the first phase to the producer of the waste and demanding causation and negligence on the part of the previous holders or the producer of the product could in his opinion be preferable based on considerations of economic efficiency and administrative simplicity.[148]

De Sadeleer's argument works in a case like this, where the potentially liable actors are relatively easily identified. Most often, environmental damage works diffusely, where it is hard to establish which damage is attributable to which actor. In these cases, there is a problem of deciding what the pollution is, which of course further obstructs the question of who the polluter is.[149] A too high threshold for channelling the liability to for example the previous holders or the producer of the product, might mean that no actor can be held liable for the pollution, meaning that the government will have to pay for all costs for the pollution. A threshold like this will also result in only parts of the costs becoming internalised, as the

[146] Ibid.
[147] Bleeker, 2009, p. 301.
[148] De Sadeleer, Nicolas, *Case C-1/03, Paul van de Walle, Judgment of the Court (Second Chamber) of 7 September 2004, not yet reported.*, CMLRev 43: 207-223, 2006, p. 216.
[149] De Sadeleer, 2006, p. 217.

costs for the producer of the product will not be internalised, even where he contributes to the pollution, albeit not so much that his actions can be fit into "causation and negligence". However, it could also be argued that the potentially liable actors would be easily defined in cases regarding waste management.

Something to be considered when reading the Van de Walle judgment is that the judgment concerns involuntary waste disposal. The manager of the service station never had the intention of polluting the environment, nor was he aware of that he was doing this. This would also make the step of channelling liability to Texaco bigger than it might be if the pollution had been made in a different manner. This could in my opinion be part of an explanation for the high threshold of fault needed for channelling the liability to the producer of the products or the previous holders.

The argument made by Bleeker, suggesting that the fault-based liability could be detrimental when looked at from an environmental perspective is in my opinion sound and valid. However, the effects on the environment must be weighed against the proportionality of the polluter pays principle, and consequently also the fairness aspect of said principle. Referring liability upon actors with no responsibility for the pollution in question seems unjust and disproportionate. If the result of this fault-based liability is that the responsibility for dealing with the pollution is put on the tax payers, the result seems equally unjust and disproportionate. This discussion would thus lead to the conclusion that in order to avoid an unjust and disproportionate result, the qualified liability for previous holders must remain in place. However, the threshold suggested by the Court of Justice could be lowered. Having a threshold for financial liability to enter seems valid from a view of economic efficiency, as Sadeleer suggests. The question must thus be at what level this threshold should be put. The answer to this question can be found in the case discussed in the next chapter.

5.3 Commune de Mesquer v Total France SA and Total International Ltd

5.3.1 Facts

In 1999, the Maltese oil tanker Erika sank outside of the French coastline, causing oil spillage and resulting in pollution of the French coast. Erika transported heavy fuel oil, intended to be used for electricity production, to the Italian company ENEL, which had a contract with the French company Total France SA for the delivery. Total France SA sold the oil to Total International Ltd, who then chartered Erika and carried out the transportation to Italy.[150] There are thus four actors involved in the transportation of the oil. Total France SA who were the original owners and

[150]Total, paras 24-25.

producers of the oil, Total International Ltd who carried out the transportation and the owner of the ship, which had the control over the oil as the ship sank. The final actor is ENEL, whose responsibility is regulated by the contract it had with Total France SA.

The Total case and the liability question was complicated further due to the rules on liability for oil pollution laid down in international conventions, [151] to which 24 member states have acceded, while the EU however has not, even though references have been made to the conventions in official documents. France had acceded to the conventions, which circumvents the scope of article 15 of the framework directive when determining which actors can be liable for pollution, and to which extent they can be so. The conventions channel the liability for pollution to the ship-owners, without possibility to channel the liability further to other actors.

The case before the Court of Justice regards three main questions; whether the fuel oil in itself can be considered waste, whether the fuel oil when mixed with sediments and water can be considered waste, and finally, if Total France SA can be held liable under article 15 of the framework directive of 1975.

5.3.2 Opinion of Advocate General Kokott

The response by AG Kokott to the first and second question is not different from the response made by the Court of Justice to these questions. These will thus be discussed in the next chapter.

Total International can, according to the AG, be held liable if considered producer of the waste. This could be the case if it would be shown that Total Internationals contractual obligations suggest so. The AG finds that the national court would be most competent to decide whether this is the case.[152] There also exists a possibility that Total France SA could be held liable, due to their actions.[153]

The Total companies argue the application of article 15 on them would run counter to the polluter pays principle, as they did not create the waste, but

[151] In this case, the applicable conventions are the International Convention on Civil Liability for Oil Pollution Damage, 1969, which imposes strict liability for the ship-owners, but only up to a fixed roof, calculated by the tonnage of the ship, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, which sets up a Compensation Fund, which covers compensation up to a certain sum. These Conventions read in conjunction with each other thus set out an international legal framework for the compensation for oil pollution damage, which is limited to only covering the ship-owner, and not the other actors mentioned in article 15 of the waste framework directive. It is possible that the pollution damage in question might be so large that the Compensation Fund does not cover the cleaning up, and that the ship-owners liability is limited by the Civil Liability Convention.
[152] Opinion of AG Kokott in Total, para 113.
[153] Opinion of AG Kokott in Total, para 115.

merely the product from which the waste came. The producer of the waste would in nearly all cases be the final holder, whereas the producer of the product from which the waste came might be someone far down a chain of liable persons.[154] The AG states that the Court of Justice in the Van de Walle case has held that the holder of the waste primarily should be held liable.[155] In her opinion, article 15 should be interpreted together with the proportionality principle, meaning that polluters should not pay for what they did not contribute to.[156] However, producers of products have, in her opinion, also contributed to the creation of waste, meaning that they can be held liable without it being contrary to article 15. This responsibility can not be unlimited, as the producers in many cases have no control over what happens to their products. Thus, the producers can not be held liable for extraordinary events which they did not contribute to according to AG Kokott.[157] It is interesting to see how the AG Kokott, while referring to the same principles as the Court of Justice did in the Van de Walle case, reaches a different conclusion regarding the threshold level to be applied for channelling of liability, suggesting contribution rather than causality to be the determining factor.

Article 15 contains no rules on how to appoint which of the actors should be held liable. As AG Kokott puts it, the polluter pays principle in article 15 of the framework directive of 1975 only designates the persons possibly responsible for paying. It is still necessary to pick one of these who should bear the costs,[158] which seems very hard to do. AG Kokott thus urges the legislator to make the clarifications needed in order for the polluter pays principle to be transposed correctly into national law.[159]

5.3.3 Judgment of the Court of Justice

The Court of Justice holds that the heavy fuel oil, when still during transport, can not be considered as waste under the concept of waste in the former framework directive.[160] Regarding the spilled oil, which had been mixed with sediments and water, the Court of Justice comes to a different conclusion. The court finds that hydrocarbons (i.e. oil) that are spilled and mixed with sand and water, requires pre-processing in order to be able to be re-used for economic purposes.[161] The oil mixed with sand and water would thus be considered waste.

The most interesting question of the case is the question of who is to be considered as polluter under the polluter pays principle as worded in the

[154] Opinion of AG Kokott in Total, para 121.
[155] Opinion of AG Kokott in Total, para 118.
[156] Opinion of AG Kokott in Total, para 125.
[157] Opinion of AG Kokott in Total, para 129.
[158] Opinion of AG Kokott in Total, para 119.
[159] Opinion of AG Kokott in Total, paras 123-124.
[160] Total, para 48.
[161] Total, para 57.

framework directive of 1975.[162] As in the Van de Walle judgment, the Court of Justice differentiates the financial burden of waste management from the actual waste management.[163]

The Court of Justice finds, in line with the judgment in the Van de Walle case, that the owner of the ship carrying the hydrocarbons would be in immediate possession of them before the waste was created, and that the owner would have produced the waste. The owner would thus be considered holder of the waste in the meaning of article 15.[164]

However, not only the holder of the waste can be held liable under article 15. The national court has referred the question of whether the company which sold or referred the hydrocarbons to the carrier can be liable to the Court of Justice. The court states that it is in fact possible for such companies to be seen as previous holders in the meaning of article 15. This is however dependent upon whether they have contributed to the risk of the pollution occurring. A factor that may be relevant in this case is whether they have failed to take preventative measures, for example in choosing a ship adequate for the transport. It is, however, a matter for the national court to decide whether such contributing factors are at the hand in this case.[165]

The Court of Justice also elaborates upon the combined interpretation of article 15 and international conventions. According to the court, the member states can choose to transpose the polluter pays principle into national law as they see appropriate, but in order for it to be correctly transposed, the national law must make it possible to impose liability upon the producer or previous holders. National law must thus not, according to the Court of Justice, impose liability on both of these categories.[166] National law can also limit the liability for ship-owners and charterers in accordance with international conventions which the member state in question has acceded to.[167] Should it be the case that these conventions lead to a result where the costs for the disposal can not be fully attributed to someone due to the limitations in the international legal framework, the national law must be interpreted in such a way that the cost must be borne by the producer of the waste, but only when that the producer of the waste in question has contributed to the pollution.[168]

The Court of Justice thus finds that the previous holders, in this case Total France SA, can be held liable for the oil pollution under article 15 of the

[162] The polluter pays principle in the revised framework directive is worded in similar terms. The costs are to be borne by the original waste producer or by the current or previous waste holders. For a further discussion regarding the polluter pays principle in the revised framework directive compared to the principle in the framework directive of 1975, see chapter 3.5.
[163] Total, para 71.
[164] Total, para 74.
[165] Total, para 78.
[166] Total, paras 79-80.
[167] For a discussion on the relevant conventions, see note 151.
[168] Total, para 82.

waste framework directive if they have contributed to the risk of the pollution. The court also finds that they are liable even where international conventions to which France but not the EU has acceded limit the liability for the holders of the waste.

5.3.4 Case analysis

In this case, just as in the Van de Walle case, the Court of Justice greatly extends the concept of what waste is. The court's interpretation of the waste concept is extensive, and in my opinion forwarding environmental protection. The pollution concept must however also be in line with the limits put forward by the legislator. Following the Van de Walle case, the European legislator acted forcefully and quickly to limit the unwanted effects of the judgment. When the Court of Justice in this case makes an equally wide interpretation, albeit with what might be less extensive effects as the national laws regarding contaminated soil will not be affected by the judgment, the reaction by the legislator is uncertain. As Bleeker points out, the new waste framework directive seems to be largely unchanged with regard to the ex post application of the polluter pays principle. Article 14 of the revised framework directive is slightly differently worded and the reference to waste management might extend the application of the principle as to which costs are to be covered.[169] The general impression is though that the legislator has intended for the polluter pays principle to function in more or less the same way after the adoption of the new framework directive. It is in my opinion possible to say that the question of what pollution is under the scope of the framework directive has a very wide ambit. The Court of Justice seems prepared to make wide interpretations in order to help the protection of the environment.

The Court of Justice also shows considerable courage and strength when discussing the role of the international conventions and their effects on European law. The Court of Justice makes an advanced interpretation and concludes that as the EU had not acceded to the conventions, the EU would not be bound by them. Member states can incorporate the conventions into their national law, but this incorporation would have to make room for the polluter pays principle. This means, that the Court of Justice circumvents the international conventions which channel the liability to the ship-owner and excludes liability for the producer of the product or the charterer of the ship. The Court of Justice says that the member states cannot limit the circle of potential actors so far that the costs are not covered. The Court of Justice have thus, by this interpretation, extended the number of people being seen as polluter in cases where the international conventions on oil pollution apply.

Regarding the question of who the polluter is, the Court of Justice has a chance of furthering their reasoning behind the interpretation as made in the

[169] See the discussion regarding the new framework directive in chapter 3.5.

Van de Walle case. The principle as interpreted in the Van de Walle judgment, based the channelling of responsibility to the producer or previous holders in causation and negligence. In the Total judgment, the Court of Justice makes a somewhat different interpretation of said part of the polluter pays principle. A lower threshold has replaced the previous causation and negligence criterion. In the judgment the Court of Justice writes in reference to the producer of the product which caused the waste: *"[i]n 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."*.[170] In order to channel liability to the producer or previous holders, a contribution to a risk of the pollution will suffice. This reasoning is thus, a leap forward in allowing channelling of liability to producers.

This will probably mean that it will be easier to channel liability to previous holders or the producers of the waste. Responsibility for the producer would seem to be in line with some of the other legislative acts in force in the waste area. In for example the end of life vehicles directive,[171] or the waste electrical and electronic directive,[172] producer responsibility is greatly emphasised, along with notions of eco-design. Producer responsibility is also one of the new features of the revised framework directive, meaning that responsibility for the producer now can be incurred at an ex ante level. Combined with the ex post possibilities contained in the polluter pays principle, this would seem to function as extended possibilities to prevent waste creation. If the producers or previous holders more easily can incur liability for their contribution to pollution under the polluter pays principle, it would seem likely that their behaviour would change to if possible reduce the risk of pollution to occur.

5.4 Futura Immobiliare srl Hotel Futura et others v. Comune di Casoria

5.4.1 Facts

The Futura case concerns an ex ante application of the polluter pays principle. The Italian community had charged hotels in the area of Naples with a tax for the collection of their waste. This tax was eight times higher for hotel property than for private residential property. The owners of the hotels argued that the rate was disproportionately high, as it was calculated by the revenue-earning capacity of the hotels rather than their waste production. The basis of the tax is thus the area of the premises owned rather than the amount of waste created.[173] The question of whether this tax is compatible with the polluter pays principle as contained in the framework

[170] Total, para 82.
[171] Directive 2000/53/EC.
[172] Directive 2002/96/EC.
[173] Opinion of AG Kokott in Futura, paras 8-9.

directive of 2006 was referred to the Court of Justice.[174] The question in this case is thus mainly concerned with the basis for the calculation of the costs for the pollution, or in other words, the question of which costs are to be covered by the polluter pays principle.

5.4.2 Opinion of Advocate General Kokott

The AG starts by saying that the real question referred to the court is whether a producer of waste can demand that the charges he is faced with should be judged on his waste producing capacity rather than his economic revenue.[175]

The essence of the polluter pays principle lies, according to AG Kokott, in its possibility to serve as an incentive to avoid pollution, leaving the polluter with the option to pay for his activities, or avoid pollution.[176] The polluter pays principle shall also incorporate the principle of proportionality, as well as the principle of non-discrimination, within the cost allocation element of the principle. Regarding the non-discrimination and proportionality, the AG frames the relevant criterion for use of the polluter-pays principle as a causal contribution to the pollution.[177]

AG Kokott finds that precise cost allocation based on the actual amounts of waste produced would probably be more preventative than the current model.[178] However, she continues, urban waste is a mass industry, where the costs for a specified allocation of costs would be very large. The AG means that this could justify an allocation of costs based on global requirements, rather than precise calculations.[179] This reasoning would require that considerations such as cost-benefit analyses could be included in the polluter pays principle. In the Total judgment the Court of Justice did according to AG Kokott apply a flexible interpretation of the polluter pays principle, requiring only contribution to the waste creation and not only a causal contribution.[180] The AG finds that a flexible implementation of the polluter pays principle can be made with reference to the proportionality principle.[181]

A proportional interpretation of the polluter pays principle would allow the member states to make considerations as to how to base their monitoring and taxation systems in the field. The costs of precise calculation must be weighed against the cost burden on the operators.[182] A reasonable basis for the taxation system must be found, which shows a causal contribution by the

[174] Opinion of AG Kokott in Futura, paras 11-14.
[175] Opinion of AG Kokott in Futura, para 17.
[176] Opinion of AG Kokott in Futura, para 31.
[177] Opinion of AG Kokott in Futura, paras 32-33.
[178] Opinion of AG Kokott in Futura, para 37.
[179] Opinion of AG Kokott in Futura, para 39.
[180] Opinion of AG Kokott in Futura, paras 53-54.
[181] Opinion of AG Kokott in Futura, para 55.
[182] Opinion of AG Kokott in Futura, para 57.

waste producer.[183] Basing the system on the ground area would show such a reasonable connection, whereas a basis on revenue-earning capacity or room occupancy rates for example would not.[184]

5.4.3 Judgment of the Court of Justice

The Court of Justice finds that a tax based on an estimation of the waste generated would in principle be found to be compatible with the polluter pays principle. However, such a tax must not lead to manifestly disproportionate results for the group of holders affected by the tax, in this case, the hotel owners.[185]

The Court of Justice also clearly states that the relevant criterion for the financial obligation imposed on holders under the polluter pays principle is their contribution to the creation of the waste.[186] According to the Court of Justice, causality is thus not a requirement for liability.

The article establishing the polluter pays principle is binding as to the result, but the member states can choose their preferred method of transposition. A tax is thus a method which is allowed under the polluter pays principle.[187] The Court of Justice points out that it is hard to establish the exact amount of waste created by a holder. The costs of the waste can thus be calculated based on the area of the property or the nature of the waste, as these criteria have an impact on the costs for the waste.[188] Further, the polluter pays principle also allows differentiations to be made between categories of holders or users, if these are based on their capacity to produce waste or their contribution to the costs of waste management.[189]

5.4.4 Case analysis

In this case, it seems that the Court of Justice reinforces the contribution to creation requisite that they created in the Total judgment. The Court of Justice does not mention causality in its judgment, leading me to assume that the reasoning in the Total judgment regarding the threshold for channelling liability is still relevant after the Futura judgment.

This case differs from the previous cases mentioned, as it is not contested that the owners of the hotels are the appropriate persons liable under the polluter pays principle. What is contested is how the costs that they shall

[183] Opinion of AG Kokott in Futura, para 59.
[184] Opinion of AG Kokott in Futura, paras 63-69.
[185] Futura, para 57. The notion ”manifestly disproportionate” is also the criterion used by the Court of Justice in proportionality cases, when establishing whether something can be allowed under the test of proportionality.
[186] Futura, para 45.
[187] Futura, para 48.
[188] Futura, para 49.
[189] Futura, para 52.

pay should be calculated, thus, their contribution to the waste is not what is interesting, which explains the terse reasoning on this in the judgment. Instead, it is the connection between the basis of the costs and the pollution that has been the key question in the case.

It is also necessary to remember that this case concerns an ex ante application of the polluter pays principle. There has been no actual pollution, and the tax is introduced to work preventatively, in order to avoid adverse environmental effects by the creation of waste. It is thus possible that the connection between the actions and the impact on the environment can be less strict than in an ex post application of the polluter pays principle. It would be hard to prove effects on the environment when the application of the principle is made in order to avoid such effects. This can also serve as an explanation for why the polluter pays principle is applied with such a weak connection to the amount of waste created.

This application of the polluter pays principle is made while the court refers to the principle of proportionality. The Court of Justice seems to make a cost-benefit analysis, where the cost of introducing a tax system based on the actual waste production is weighed against the effect on the environment of the creation of the waste and the burden on the holder of the waste. The cost-benefit analysis requires a connection between the basis of the calculation and the waste produced by the holder, which might be fulfilled by basing the calculation on the area of the property. The Court of Justice refers this part of the judgment on to the national court. This would thus mean that the Court of Justice has further widened the discretionary ambit of the polluter pays principle. The member states can now make their ex ante applications of the principle in waste cases without more than a reasonable connection to the pollution (in this case thus the waste created). A wide discretionary ambit of the polluter pays principle would in this case seem to lead to greater protection for the environment. The cost-benefit analysis leads to a possibility for the member states to base their ex ante application of the polluter pays principle on what is connected to an impact on the environment rather than the causal contribution to the impact on the environment. In my opinion, this wide discretion has good consequences in the case in question.

The ex ante application of the polluter pays principle can thus be contrasted with the ex post application of the principle. While the Court of Justice seems to base their threshold for liability for the polluter at the same level – the contribution to pollution, the criterion for pollution differs greatly. In the ex ante application in this case, there must only be shown what can be called a reasonable connection to the possible pollution. This thus widens the ambit of the polluter pays principle in ex ante applications in waste legislation. As in the ex post applications of the principle, the Court of Justice shows willingness to extend the application of the principle in regard to the question of what pollution is.

The Futura judgment, while interesting in the way that it explains the ex ante application of the polluter pays principle, thus seems to raise many questions regarding how the principle shall be interpreted. The wide discretionary ambit of the polluter pays principle means that it would seem difficult to ensure that it is applied in the same way in all member states.

6 A discussion of the importance of the polluter pays principle in the waste framework directive

The polluter pays principle is, at the international level, a principle within which many ambiguities are contained. This makes it easy to refer to the principle when talking about environmental liability, as the ambiguities and many possible interpretations of said principle means that the application of the principle can differ very much from case to case. This problem has also been visible at the European level, as the principle as contained in the TFEU seems so vague that references to it will amount to nothing. This chapter will provide a summarized analysis of the application of the principle in EU waste law.

6.1 When does the pollution take place?

The question of what pollution is under the waste framework directive has been answered extensively by the Court of Justice. Previously in the essay, it was stated that there are two main ways of establishing pollution, either by setting a threshold value which will need to be exceeded, or by showing environmental damage. In EU waste law, the interpretation of pollution has been made in a somewhat different manner.

The answer to the question in EU waste law will depend on the answer to the question of what waste is, as the polluter pays principle within the waste framework directive does not refer to damage or environmental impact for applicability. The disposal of waste, or as worded in the revised framework directive, the management of waste, renders the polluter pays principle applicable. In my opinion, the term pollution thus seems somewhat misguiding in the polluter pays principle in the waste framework directive. The creation of waste is a necessary prerequisite for the application of the polluter pays principle. Waste disposal or management must not entail pollution. The environmental effects are adverse, as the creation of waste leads to resource depletion and management problems, but the environmental damage can not be conclusively described. Within the polluter pays principle in the waste framework directive it seems in my opinion that the “pollution” takes place when waste is managed or disposed of, even if no direct environmental damage can be shown. In the Van de Walle and the Total judgments pollution has occurred. This will however not happen in most cases, and is also not a prerequisite for the application of the polluter pays principle.

It has been hard to answer the question of when pollution has occurred decisively, and the adoption of the revised framework directive can be envisaged to complicate the question even further, during a transition period. However, it has been the intention of the legislator that the new end of waste status and the rules regarding by-products will simplify the waste definition. A wide ambit of the waste definition would thus result in a wide ambit for the polluter pays principle.

6.2 Who is the polluter?

The question of who the polluter is in EU waste law is answered in article 15 in the previous waste framework directive, and in article 14 of the revised framework directive. These articles refer liability onto the producer of the waste and the final holder of the waste. These would seem to be the same in nearly all cases. The articles also refer liability onto the previous holders of the waste and the producer of the product. In the revised framework directive, the liability for the producer of the product is framed in a way which merely allows for the member states to refer liability to the producers, but it seems that this is an option rather than a demand by the legislator.

There exists no rules on how to channel liability from one potentially liable actor to another. This has rendered it necessary for the Court of Justice to consider the question in judgments. Firstly, the Court of Justice has stated that the member states are free to transpose the polluter pays principle as they see fit, which follows from article 288 TFEU. This means that the member states can choose to limit the responsibility to one of the actors. The Court of Justice has also stated that in nearly all cases, it will be the final holder of the waste which will be seen primarily liable. Should the case be that the responsibility for this actor is limited under national law, or that this actor cannot bear the costs alone, there will exist a possibility to channel liability down the chain of actors as contained in articles 15 of the old framework directive, and article 14 of the revised framework directive.

In the Van de Walle case, the Court of Justice held that the channelling of the liability to actors other than the final holder would require causation and negligence on the part of the other actor. In the Total case however, the Court of Justice developed this reasoning into resulting in a threshold based on a contribution to the risk that the pollution would occur. The Court of Justice judgment in the Total case, with the reasoning regarding how the member states can limit responsibility and how and when channelling of responsibility can be allowed, thus suggests that the Court of Justice is willing to expand the circle of liable actors. In my opinion, the channelling of liability has its greatest application in cases like these, where pollution has occurred. There can however be other cases where channelling of liability will be necessary. The contribution requirement would seem to be useful in these cases as well.

The notion of extended producer liability which is contained in the revised framework directive could also serve as a way of including the producer of the product in the chain of liable actors. As AG Kokott says in her opinion in the Total case, the producer of the product has contributed to the pollution, while at the same time having great opportunities to influence the composition of the products, which could decrease the potential adverse effects. Thus, the producer can be seen to have contributed to the pollution, albeit his responsibility cannot be stretched to cover situations which seem extraordinary. The extended producer responsibility applies ex ante, and thus serves as a complement to the liability conferred by the polluter pays principle.

A wide circle of liable actors means that more of the costs of the pollution will be borne by the polluter. Channelling the liability to only one of the actors could be preferred as it would be more efficient. It also follows from the wording of the polluter pays principle in the framework directives that more than one of the actors can incur liability at the same time. This can lead to a fairer application of the principle. It can also result in more costs becoming paid by the polluter, but can also lead to the principle becoming harder to use, as the determination of who shall pay what costs complicates the application of the principle.

6.3 What must the polluter pay?

The polluter pays principle later applies to costs for waste disposal, or, as in the revised directive, costs for waste management. This would thus seem to suggest that the polluter pays principle applies only as an ex post principle. However, the Court of Justice held in the Futura case that the application of the polluter pays principle ex ante, as a form of taxation would not be contrary to the sense of the principle as contained in the framework directive. The ex ante application of the principle is also generally accepted among authors. The reference to costs for waste management would also seem to suggest that the new polluter pays principle would be intended to have a wider ambit regarding the costs which are to be included, and thus that costs for monitoring could be included, depending on how the member states transpose the principle.

The ex post application of the polluter pays principle in EU waste law seems uncontested. The Van de Walle and Total cases show how the Court of Justice is prepared to include vast costs in the principle. The question is however how the national courts are prepared to use the principle. It could be argued that the polluter pays principle functions as a tool which allows the member states to impose costs on actors, rather than as a tool which forces the member states to impose these costs on actors. This interpretation would, however, seem contrary to the interpretation of the principle made in the Total judgment.

6.4 The effectiveness of the polluter pays principle

It can be questioned how effective the polluter pays principle is as a liability rule in the waste framework directive. The Court of Justice refers much of the considerations in the cases to the national courts, resulting in uncertainties regarding the application of the principle. It also leads to a flexible principle. The flexibility might increase the effectiveness of the principle, as the member states can consider the circumstances in the case at question, and take account of the special conditions in the country. It allows the member states to model their waste management system as they see fit. The fundamental requirement of the polluter pays principle must however be upheld; the polluter shall pay.

The wide discretionary ambit for the member states and the uncertainties regarding the application could result in large differences in how costs for waste management are paid in the member states. The flexibility and discretionary ambit means that it is very hard to say anything about the effectiveness of the polluter pays principle at the European level. The judgments of the Court of Justice suggest that the principle is a useful tool in attribution of liability where pollution has occurred. The discretionary ambit also allows for the principle to be applied to a variety of circumstances, even though the uniform application of the principle cannot be ensured. In my opinion it is important to consider that the inclusion of the principle in the waste legislation and recent applications of the polluter pays principle might at the moment be the best possible way of dealing with liability issues in waste management. The polluter pays principle thus has advantages in its flexibility, as well as flaws in the discretionary ambit. It would thus seem that the polluter pays principle has inherent room for great effectiveness, but that the result of the application will very much have to rely on transposition into national law.

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