Does the Polluter Pay? The Polluter-Pays Principle in the Case Law of the European Court of Justice

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The principle that the "polluter should pay" has been one of the guidelines of EC environmental policy for decades. Nonetheless, a number of problems continue to stand in the way of its effective application. Most importantly, the principle itself does not define* who *the polluter is,* what *pollution is or* to what extent *the polluter needs to pay. This article is an assessment of the role the European Court of Justice (ECJ) has played in answering these questions. It is argued that the Court has adopted an extensive interpretation of the principle, especially in the recent* Erika *judgment. In that sense, the ECJ has certainly contributed to a more effective and enforceable polluter-pays principle in the EC legal order. However, the impact of the ECJ's interpretation is of course limited by the boundaries set by EC legislation. Policies are needed to move towards a European Union in which the polluter actually does pay. Judgments can only serve to buttress and clarify such legislation.

This article provides a comprehensive analysis of the three main cases in which the ECJ has been called upon to interpret the polluter-pays principle (*Standley, Van de Walle *and* Erika*). The focal point is the* Erika *judgment, as this is both the most recent and most far-reaching. In all three judgments, the Court emphasizes that any application of the principle has to be proportional. Polluters cannot be asked to pay for pollution damage beyond their contribution to the creation of that pollution. The Court has not shied away from defining "pollution" in a broad sense in both* Van de Walle *and* Erika*. Establishing who the "polluter" is, however, has proven far more difficult. Of particular interest is whether the producer of the* product *might be held liable in the case of the accidental creation of pollution, such as an environmental disaster. In the* Erika *case, the Court very significantly introduces a risk liability standard; product producers might be deemed "polluters" solely on the basis of their contribution to the* risk *of pollution. This is a significant development from* Van de Walle*, in which the Court considered a direct causal link or negligent behaviour necessary for product producer liability. In addition,* Erika *underlines that Member States cannot limit the scope of the polluter-pays principle in EC secondary legislation, even if this leads to a contradiction with a Member State's international obligations such as the International Oil Pollution Compensation regime.

In short, the* Erika *judgment builds on* Standley *and* Van de Walle *but adds significant impetus to the polluter-pays principle at the EC level. However, the risk liability standard it establishes will be difficult to apply and it remains to be seen how the legislator will react to the Court's extensive interpretation.

I. Introduction

As economic activity increases and the global population grows at unprecedented speed, the proliferation of pollution is ever more damaging to the environment and to human health. In order to try to deal with those problems, the European Community bases its environmental policy on a number of action principles. One of these principles is aimed specifically at the problem of pollution and reads that the "*polluter* should *pay*". The polluter-pays principle (PPP) seems both logical and fair. Nevertheless, a number of problems have severely hampered its effective application and its enforceability before EC and national courts. This is mainly due to the wide margin of discretion that the principle allows for. *Who* is the polluter? *What* is pollution? *To what extent* should the polluter pay?

In light of its lack of precision, a key role for the interpretation of the PPP is played by the judiciary. At the EC level, three cases have raised questions on the scope and status of the principle before the European Court of Justice (ECJ). This article will be an attempt to investigate and analyse to what extent this court has increased the relevance of the PPP in the EC legal order through its judgments.

The first section will introduce the PPP in general terms and briefly review its history in both international and EC legislation. Secondly, the most important unresolved questions that stand in the way of the application and enforceability of all the environmental action principles will be outlined. The effectiveness of these principles suffers greatly from a lack of clarity on both their status and scope. Finally, this section will zoom in on some of the specific problems of applying the PPP. As mentioned, these problems centre on defining more closely the terms "polluter" and "pollution".

The first section will hopefully create a clear picture of the role of the PPP in the EC legal order and the major uncertainties that stand in the way of its application. The PPP is not a hard and fast rule: and it is clear that the courts have an essential role to fulfil in clarifying the status and the scope of the principle.

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In the second section the focus will therefore be on explaining and analysing three key cases in which the Court has had to interpret the PPP: *Standley,*[1] *Van de Walle*[2] *and Erika.*[3] Understanding the context of these judgments is fundamental towards establishing whether the Court has in fact "breathed life" into the PPP through its interpretations. Most attention will be paid to the recent *Erika* case. This is justified on the grounds that it is the most recent and unexplored of the three cases. More importantly, it is also the most far reaching.

The third and final section will try to synthesize the first two sections in the sense that it compares the problems of applying the PPP outlined in the first section to the interpretation given by the Court in its case law. Firstly, we will try to identify and explain any patterns or an "evolution" in the Court's reasoning in the three cases, or, alternatively, explain the lack thereof. Secondly, the *Erika* case will once again be placed in the spotlight to see if this latest case has given new meaning to the PPP as an enforceable principle of EC law, or whether its effects are in fact far more limited. Thirdly, the section will discuss the interplay between ECJ judgments and secondary EC legislation. Throughout this chapter we will try to project to some extent how the ruling in the *Erika* case will affect the current environmental liability regime in the EC, particularly concerning the creation of accidental pollution. In short, this section will attempt to answer our primary research question: whether the ECJ, through its judgments, has increased the relevance of the PPP in the EC legal order.

Given the density of Europe, pollution is a problem that affects every citizen as well as the environment itself. Nonetheless, relatively little attention has been paid to the PPP as the basis for reducing the level of pollution. On the other hand, there are several reasons not to overestimate the relevance of this principle in the EC legal order. Most importantly, it is in itself too vague to be directly applied or enforced. Several gaps need to be filled through interpretation before it can really be considered an "operational" principle. Despite these problems, however, the logic supporting the PPP remains solid and relevant: through holding polluters accountable for pollution, pollution levels in economic production will be reduced. It is for this reason that this attempt at assessing the contribution of the ECJ to resolving the most important barriers to applying the PPP seems justified. In spite of all its shortcomings the PPP remains a profoundly logical and fair starting point for building a body of legislation which will help to stem the ever-growing tide of pollution in Europe.

II. The Polluter-Pays Principle in EC Law

This first section is the framework for our analysis of the role of the ECJ in increasing the relevance of the polluter-pays principle (PPP) in EC law. Consequently, this section starts with a short explanation of the origins of the PPP and its role in legislation, both at the level of the EC and in international law. Following these remarks, the section will go on to analyse more deeply some of the most relevant questions concerning the role and function of environmental action principles, such as the PPP, in EC law. The last part of this section will then be dedicated to introducing the specific problems of applying the PPP that will lie at the heart of our analysis in sections 2 and 3. It is important to understand that questions such as *who* the polluter is and *what* constitutes pollution under the PPP are contested and debatable. Against this background we can then analyse to what extent the ECJ has contributed to solving or clarifying some of these unresolved issues in sections 2 and 3.

2.1 Origins of the Polluter-Pays Principle

As difficult as it is has proven to apply the polluter-pays principle, as easy it is to understand: in principle, the person or persons responsible for pollution (the polluter) should pay for the costs of dealing with that pollution (reducing, preventing or eliminating the pollution).[4] This basic explanation of the principle is easy on the eyes and ears: it is hard to contest with the logic that polluters should clean up after themselves. This basic definition is not contested as such, but different authors have emphasized different interpretations of the principle according to different perceptions of its origin. Two perspectives are particularly interesting.

A first perspective can be that the PPP is a manifestation of the principle of *equity* known to common law systems. There are indeed strong arguments supporting claims that the PPP is in essence an equity or "fairness" principle as it seeks to assign responsibility to a polluter and to hold him accountable for the pollution he has created in order to avoid passing on costs to third parties who did not contribute to the creation of that pollution. In particular, the PPP is used to obtain an equitable distribution of pollution damage costs between polluters and the general public.[5] This definition of the PPP as a manifestation of equity is of course extremely

[1] Case 239/97, *The Queen v Secretary of State for the Environment and Minister of Agriculture Fisheries and Food ex parte H.A. Standley and Others and D.G.D. Metson and Others,* [1999] ECR I-02603.
[2] Case 1/03, *Criminal proceedings against Paul Van de Walle, Daniel Laurent, Thierry Mersch and Texaco Belgium SA*, [2004] ECR I-07613.
[3] Case 188/07, *Commune de Mesquer v. Total France SA and Total International Ltd*, [2008] ECR I-04501.
[4] P. Davies, *European Environmental Law: an introduction to key selected issues*, Aldershot, Ashgate 2004, p. 52.
[5] C. Hilson, *Regulating Pollution: A UK and EC Perspective,* Hart Publishing, Oxford 2000, p. 120.

elastic and can be stretched to cover very interesting but wide debates such as on the "fair" distribution of the economic and social costs of mitigating climate change according to responsibility for causing emissions in the past.[6] An "equity" interpretation makes the PPP a central feature within the notion of "environmental justice".[7]

An alternative and more useful approach is to think of the PPP in terms of *efficiency*. This is a more economic rationale which sees the principle as a means towards achieving a more efficient allocation of resources in economic production. Pollution is a negative environmental externality (or side-effect) of economic activity. The PPP calls for the internalisation of such negative externalities in the cost of the product. In other words, an application of the PPP in this sense means that the costs of pollution of a product are reflected in its price and therefore borne by the producers and consumers (the polluters) of that particular product rather than the society at large.[8] Consequently, the prices of products go up according to the amount of pollution they cause (ceteris paribus). Consumer preferences for lower prices will therefore be an incentive for producers to produce less polluting, more eco-friendly products.[9] An economic orientation towards the PPP seems more useful in practice than approaching the principle from the point of view of equity. The PPP is essentially an economic principle translated into law. Nevertheless, these two interpretations of the origin of the PPP are complementary rather than conflicting. An element of "equity" or "fairness" is reflected in the PPP by its focus on internalizing negative externalities into the price of products, rather than imposing these costs on society. At the same time, the proportionality element of the PPP means it is "inequitable" to impose costs on polluters for dealing with pollution they did not contribute to.

2.2 The Polluter-Pays Principle in EC Legislation and International Law

The PPP has been integrated into the legislation of regional economic integration organisations, most importantly the OECD and EC.[10] In fact, the first appearance of the PPP at the international level was in the context of a 1972 OECD recommendation on environmental policy.[11] The EC soon followed suit by including the PPP in the First Environmental Action Programme (EAP)[12] (and every EAP since). In addition, the principle is recognized as a general principle of international environmental law and has subsequently been integrated into certain "soft law" instruments such as the important 1992 UN Rio Declaration.[13]

The history of the PPP in EC legislation has been similar to those of the other environmental principles. In the 1970s the principle was included as an "inspirational basis" for important secondary EC legislation, including an important Directive on waste.[14] It was not until the Single European Act in 1987 that the principle that "the polluter should pay" was included as one of the specific environmental action principles of the Community.[15] The principle is today listed in Article 174 EC, alongside the other environmental action principles of precaution, prevention and rectification of damage at source. These principles form the "general objectives of the Community in matters of the environment", as the ECJ stated in the Peralta case.[16] Community legislation, perhaps unsurprisingly for a system inspired primarily on civil law traditions, generally approaches the PPP in terms of *efficiency*. As a result, the principle is a starting point for market-based instruments aimed at internalising the negative environmental externalities of human activity. The 6th EAP, for example, calls for an Integrated Product Policy which envisages environmental costs to be internalised in the price of products along the production value chain of a product.[17]

It is clear that the EC legislator has used the PPP as a source of inspiration for measures which are distinctly market-based yet aimed at achieving the high level of environmental protection envisaged in Article 2 EC. The impact of such measures based on the PPP on human (economic) activity is potentially very large as they seek to decouple the increased use of resources and the generation of waste from economic

[6] J. Ashton, X. Wang, "Equity and Climate: In Principle and Practice", in Pew Center on Global Climate Change (ed.), *Beyond Kyoto: Advancing the international effort against climate change*, Arlington 2003, p. 64.

[7] Davies, *supra* note 1, p. 121.

[8] N. De Sadeleer, *Les principes du pollueur-payeur, de prévention et de précaution: essai sur la genèse et la portée juridique de quelques principes du droit de l'environnement,* Bruylant, Brussels 1999, p. 50.

[9] H. Jans, H. Vedder, *European Environmental Law*, 3rd ed., Europa Law Publishing, Groningen 2008, p. 267.

[10] N. De Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, Oxford University Press, Oxford 2002, p. 23.

[11] OECD Council Recommendation (C(72)128) on Guiding Principles concerning International Economic Aspects of Environmental Policies (Paris, 26 May 1972).

[12] Council and Governments of the Member States Declaration, of 22 November 1973, on the programme of action of the European Communities on the environment, OJ 1973 C 112.

[13] UN Declaration on Environment and Development (Rio de Janeiro, 14 June 1992)

[14] Council Directive 75/442/EEC, of 15 July, 1975, on waste, O.J. 1975 L 194/39, as amended by Council Directive 91/156/EEC, of 18 March, 1991, O.J. 1991 L 78/32.

[15] De Sadeleer, *supra* note 8, p. 59-60.

[16] Case 379/92, *Peralta,* [1994] ECR I-03453, at 57.

[17] European Parliament and Council Decision No. 1600/2002/EC, of 22 July, 2002, laying down the Sixth Community Environment Action Programme, O.J. L 242, 10/09/2002.

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growth.[18] "Use less to produce more" is the somewhat paradoxical doctrine of such measures: less input of resources and less waste generation but more (sustainable) economic growth. Another way to conceptualize the PPP within the Community is as a *harmonizing* instrument. This is particularly true in the area of state aids to compensate firms for cleaning up their pollution. Such (financial) aids run counter to the logic of the PPP *stricto sensu* and distort the internal market.[19] After all, they lead to a situation in which the taxpayer, rather than the polluter, pays.[20]

The legislation dealt with so far mostly concern ex-ante measures: reducing the pollution and waste streams along the production chain of a product by giving pollution a price and reflecting this cost in the price of the product. Another group of PPP-based measures, however, are more ex-post in their application. Sometimes pollution cannot be avoided; this is particularly the case for accidents and other environmental disasters. In such cases the question arises who is responsible and liable to "deal" with the waste according to the PPP. In this vein, two items of legislation stand out: the Waste Framework Directive of 2008[21] (replacing the 1975 and 2006 Directives) and the Environmental Liability Directive.[22] The newest Waste Framework Directive makes an express referral to the PPP as a guiding principle at the European and international level and in Article 14 explicitly states that the costs of waste management should be allocated in accordance with the PPP. This provision therefore obliges Member States to set up waste management schemes in concord with the PPP. The Environmental Liability Directive is essentially aimed at preventing and remedying damage to the environment based on the PPP, as Article 1 of the Directive reads. Even after its adoption, it remains a heavily-debated and controversial item of legislation, to say the least. Among academics its effectiveness, scope and clarity remain contested[23] and it will undoubtedly give rise to many interesting cases in the future.

In broad terms we can conclude that "manifestations" of the PPP in EC law take on a number of different forms. Firstly, the PPP is a guiding principle of EC environmental policy and secondary legislation, particularly the Environmental Action Programmes of the Community, which aim to bring direction and continuity to the environmental policy of the Community. Secondly, it serves as the legal basis for a range of legislation through Art. 175 EC. Such legislation can include ex-ante measures aimed at reducing waste streams along production chains or ex-post measures dealing with responsibility and liability for waste or other forms of pollution after it has been created.

2.3 Environmental Action Principles in EC Law – Problems of application

Without a doubt, the "promotion" of the principles of environmental action into primary legislation (since the SEA of 1987) has increased their legitimacy as both a guideline for law-makers and an interpretative tool for courts. However, a number of problems still stand in the way of their full application at the EU/EC level. Most importantly, there remains significant uncertainty regarding the status of the principles of Article 174 EC and their enforceability before the courts.[24] The ECJ often recalls that EC law must be interpreted in concord with the general principles of Community law. However, it is doubtful whether the environmental action principles of precaution, prevention, rectification at source and polluter-pays can be considered to be such "general" principles. A significant proportion of commentators believe that these are generally too vague to be considered general principles of Community law, and need to be transformed into more precise rules in order to become legally enforceable.[25] In addition, even if such principles could be invoked before the Courts it is unclear how courts should enforce them given their wide margin of discretion.[26] How could a measure concerning the internal market for cars be annulled on the basis that it breaches the principle of prevention, for example, when this principle has not been precisely formulated? One would first need to clearly define the aim and scope of such a principle, including how it is be weighed in light of other priorities (an element of proportionality) for the ECJ to be able to conduct a full review of all EC measures in light of the environmental action principles.[27] Hence, it can certainly be argued that the environmental action

[18] Davies, *supra* note 1, p. 37.
[19] Jans, Vedder, *supra* note 6, p. 267.
[20] Although this manifestation of the PPP falls outside the scope of this paper because it is primarily an issue of competition rather than environmental law, it is interesting to read the opinion of AG Jacobs in the GEMO case in this context. Advocate General's Opinion in Case C-126/01, *Ministre de l'économie, des finances et de l'industrie v GEMO SA*, [2003] ECR I-13769.
[21] European Parliament and Council Directive 2008/98/EC, of 19 November, 2008, on waste and repealing certain Directives, O.J. L 312/3.
[22] European Parliament and Council Directive 2004/35/EC, of 21 April, 2004, on environmental liability with regard to the prevention and remedying of environmental damage, O.J. L 143/56.
[23] See M.G. Faure, "De Europese Richtlijn Milieuaansprakelijkheid: kritische inleidende bedenkingen", in R. Mellenbergh, R.uylenburg (ed.), *Aansprakelijkheid voor schade aan de natuur*, Europa Law Publishing, Groningen 2005, p. 4.
[24] l. Krämer, *EC Environmental Law*, 6th ed., Sweet & Maxwell, London 2007, p. 14-16.
[25] G. Winter, "The Legal Nature of Environmental Principles in International, EC and German Law", in R. Macrory (ed.), *Principles of European Environmental Law*, Europa Law Publishing, Groningen 2004, p. 17-22.
[26] Krämer, *supra* note 24, p. 13-16.
[27] *Ibidem*, p. 12-16.

principles are in fact relatively ineffective towards achieving the high level of protection for the environment the EC envisages. The main problems, as explained, can be categorized into problems of *status* (what is the place in the hierarchy of EC law of the environmental action principles) and problems of *scope* (what is the potential reach of these principles in reviewing EC and Member State measures).

2.4 The polluter-pays principle: particular problems of application

The general problems regarding the status and scope of the environmental action principles are also reflected in the particular problems impeding the application of the PPP in Community law. As previously mentioned, the PPP is easy to look at but hard to apply. A closer look at the wording of the principle reveals a number of unanswered questions that render it less legally precise and therefore lower its usefulness before the Courts. In particular, it remains unanswered *who* is the polluter, *what* is pollution and *how and to what extent* the polluter needs to pay. The EC legislator has in the past tried to clarify some of these issues by giving a more acute definition of the PPP, for example in a 1975 Recommendation[28] (See Annex I).

Such attempts at sharpening the PPP by the legislator can be of some support to the courts entrusted with ensuring respect for the PPP, for example in a case brought before the ECJ for annulment of a Community act (Article 230 EC). It does not, however, provide definitive answers. The role of the PPP can differ significantly from case to case, as we will see in our analysis of the ECJ case law. In short, the PPP creates a rather large "discretionary space" that can be occupied both by the legislator (EC or Member State) and the courts (ECJ or national) alike. Legislators can give one interpretation to the principle when making laws concerning, for example, waste management or environmental liability. A court, on its turn, can give a different interpretation when reviewing the legality of such measures. Not only legal certainty is lost in this interpretative mire. The effective protection of the environment would have much to gain from a uniform conceptualization of the PPP and its correct application.

2.5 Conclusion

At first sight, the polluter-pays principle appears both logical and equitable. Furthermore, it provides a market-based tool aimed at reducing the level of pollution by inciting economic production to be more efficient and generate less waste. In its application, however, numerous problems and unresolved questions come to the surface concerning its scope and interpretation. In addition to the problems common to all environmental action principles listed in Article 174 EC (concerning their status and scope), the PPP basically lacks a uniform interpretation of the two terms it juxtaposes: the polluter and what he pays for. It is in these uncharted waters that the ECJ finds itself when asked to interpret the PPP in the cases brought before it. As we will see, the Court has not shied away from using its discretionary space when interpreting this principle, particularly in the recent *Erika* case.[29]

III The Polluter-Pays Principle in ECJ Case Law

After having set the parameters of the debate in the first section, the next step is to look at the role of the European Court of Justice (ECJ). For that purpose, this section delves deeper into the case law of the ECJ involving the PPP. Three cases are instrumental for understanding how the ECJ has interpreted this principle. These cases (the *Standley* case,[30] the *Van de Walle* case[31] and the *Erika* case[32]) will be dealt with in chronological order. Following a brief recall of the facts and the most important contentious issues of each case, the focal point of our analysis will be the way in which the Advocates-General and the Court interpret the PPP in each of the cases. Due to the fact that the *Erika* case is the most recent and, it is argued, the most important of the three cases, it will receive the most attention. In fact, it is quite remarkable this case has gone relatively unnoticed so far in environmental law publications. The information and analysis of this chapter will allow us to evaluate whether the Court has clarified some of the major uncertainties described in the first chapter concerning the application of the PPP in section 3.

3.1 ECJ Cases Involving the Polluter-Pays Principle

3.1.1. The Standley Case

3.1.1.1. Facts

The *Standley* case concerned the implementation by the UK government of the so-called Nitrates Directive.[33] This Directive is aimed at reducing water

[28] Council Recommendation 75/436, of 3 March, 1975, regarding cost allocation and action by public authorities on environmental matters, O.J. L 194.

[29] Case 188/07, *Commune de Mesquer v. Total France SA and Total International Ltd*, [2008] ECR I-04501.

[30] Case 239/97, *The Queen v Secretary of State for the Environment and Minister of Agriculture Fisheries and Food ex parte H.A. Standley and Others and D.G.D. Metson and Others,* [1999] ECR I-02603.

[31] Case 1/03, *Criminal proceedings against Paul Van de Walle, Daniel Laurent, Thierry Mersch and Texaco Belgium SA*, [2004] ECR I-07613.

[32] *Commune de Mesquer*, *supra* note 29, [2008] ECR.

[33] Council Directive 91/676/EEC, of December 12, 1991, concerning the protection of waters against pollution caused by nitrates from agricultural sources, O.J. L 375/1.

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pollution from nitrates discharged into waters from agricultural sources. By means of implementation, Member States could designate "vulnerable zones" and carry out suitable action programmes to ensure that the concentration of nitrates in the water stay within certain limits. The UK government had designated the area of the rivers Waveney, Blackwater and Chelmer as nitrate vulnerable zones and drawn up action programmes that limited agricultural activities in these zones. For obvious reasons, a number of farmers in these areas were not pleased with these measures and contested the implementation of the Directive by the UK government. One of the grounds for annulment they brought was the alleged infringement of the PPP.[34]

3.1.1.2. Role of the PPP

The argument Standley and a number of other plaintiffs use concerning the PPP centres on a consideration of proportionality. Placing the burden of reducing the concentration of nitrates in the designated areas solely on the farmers would infringe the PPP because their activities are known to be only one of several sources of nitrates in the water. A strict application of the PPP would therefore mean the polluter (the farmer) pays only for the pollution his activities actually cause and is not required to bear the costs of pollution created by other polluters. The Directive, therefore, violates the PPP from the point of view of proportionality; it does not distribute costs in "proportion" to the source of pollution.[35]

3.1.1.3. Advocate General's Opinion

AG Leger approaches the issue by firstly setting out the two different methods of application of the PPP.[36] As discussed in Chapter 1, the PPP can be applied ex-ante (taking on a preventive function) or ex-post (restoration function). The Nitrates Directive falls into the first category of ex-ante measures as it calls on Member States to put into place programmes to prevent water pollution from agricultural sources. The costs associated with these measures (in this case through a limitation of agricultural production) are borne by the agricultural producers. The Directive as such is therefore in concord with the PPP. Finally and essentially, however, the AG stresses that the Directive should be interpreted in such a way that only the costs of reducing or avoiding water pollution for which the farmers are actually responsible, "to the exclusion of any other cost" can be imposed on the farmers.[37] Such an interpretation, as AG Leger rightly points out, complies with a strict and proportional interpretation of the PPP.

3.1.1.4. Interpretation by the ECJ

The Court agrees with the AG that the Directive does not (and should not) mean that the farmers have to pay for eliminating or preventing pollution to which they do not contribute.[38] The Court makes an essential linkup with the principle of proportionality. It states that the PPP as applied through the Nitrates Directive in essence reflects this principle.[39] The Nitrates Directive calls on Member States to take account of both agricultural and other sources of nitrates when drawing up the action programmes. Furthermore, the Member States must take into account the specific characteristics of the vulnerable zone and adapt the action programmes accordingly. In other words, the Directive is to be applied in a flexible manner taking into account all the possible data and information on the particular situation, following the principle of proportionality. The flexibility of the Directive gives Member States enough lee-way in implementing the Directive as to ensure they do not infringe the PPP as a reflection of the proportionality principle. It was for the national courts, the ECJ underlines, to ensure that these principles are observed.[40] Briefly, the Court holds the Nitrates Directive up against the light of the PPP and finds that it does infringe this principle of EC environmental action. The Directive itself obliges Member States to apply the PPP as much as possible in a proportional way (i.e. farmers do not pay for pollution they do not cause). For example, if it is established that a certain industrial plant discharges large amounts of nitrates into the water upstream, it would be contrary to a strict interpretation of the PPP to impose all the costs of reducing the level of nitrates in the river on the farmers downstream. They should contribute only *in proportion* to the harm for which they are responsible.

3.1.2. The Van de Walle Case

3.1.2.1. Facts

The *Van de Walle* case concerns an ex-post application of the PPP. Hydrocarbons (petroleum product for motor vehicles) were unintentionally spilled from a service station in Brussels which was leased by its owner to the oil firm Texaco and operated by a "manager" with whom Texaco had concluded an operating agreement. Under the terms of this agreement, Texaco supplied the petrol.[41] The building next to the service station, owned by the Brussels-Capital Region (the regional government), was being renovated until it was discovered that water mixed with petrol was leaking into that building's cellar and foundations. The source of the pollution was easy to

[34] *Standley, supra* 30, [1999] ECR at 14-20.
[35] *Ibidem,* at 42.
[36] Advocate General's Opinion in *Standley*, see *supra* note 30, [1999] ECR at 93-96.
[37] *Ibidem*, at 98.
[38] *Standley*, *supra* note 30, [1999] ECR at 51.
[39] *Ibidem,* at 52.
[40] *Ibidem,* at 50.
[41] *Van de Walle*, *supra* note 31, [2004] ECR at 15.

find; it came from the Texaco service station and was found to be leaking from defective storage facilities. The service station was shut down by Texaco and the operational contract terminated, as Texaco claimed the manager had been seriously negligent in his operational duties. Even though it disclaimed liability, Texaco proceeded to decontaminate the polluted soil and replaced the defective storage facilities. According to the Brussels-Capital Region, however, the decontamination had not been completed. The regional government wanted to pass the costs for the additional remedial measures on to Texaco. As a result, proceedings were brought against Texaco and a number of its officers, including Mr. Van de Walle by the Brussels-Capital Region. The Belgian Cour d'Appel asked two preliminary questions in the course of these proceedings under Article 234 EC.[42]

3.1.2.2. Role of the PPP

In *Van de Walle*, the role of the PPP is slightly more complex than in the *Standley* case as it is interwoven with the definition of the term "waste" and "producer/holder of waste" under the Waste Framework Directive of 1975 (hereafter: WFD).[43] This important Framework Directive in Article 1 defines waste as "any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard". Article 15 of the WFD in turn is aimed at establishing liability for the costs of dealing with waste: in accordance with the PPP, the holder and/or previous holder or producer of the product from which the waste came can be held liable. Unsurprisingly, the questions that arise from the provisions of this Directive mirror some of the general ambiguities of the PPP, as discussed in Chapter 1. Firstly: what exactly is covered by the definition of waste in Article 1 (i.e. *what* is pollution)? Secondly: who can fall within the definition of (previous) holder and/or producer of Article 15 (*who* is the polluter)? Obviously, these questions called for an interpretation by the ECJ of the scope of the PPP as expressed in the WFD. Referring back to the analogy used in the first chapter, one could say that the ECJ had to fill the "discretionary space" that is created by the principle.

3.1.2.3. Advocate General's Opinion

The first of the questions referred to the Court sought to establish whether soil contaminated by leaked hydrocarbons can be regarded as waste. This would then place the situation within the liability regime of Article 15 of the Framework Directive. Logically, the second question concerned the whether Texaco could be regarded as the producer or holder of the "waste" in this case. If this were the case, the PPP would dictate that could Texaco be held liable for the costs of the entire cleanup, as the Brussels-Capital Region asked. AG Kokott first deals with the definition of waste. In her opinion, the hinging point in this case is "whether the holder discards or intends or is required to discard a thing".[44] Following the ARCO,[45] Palin Granit[46] and Saetti and Frediani[47] judgments, Kokott points out that the definition must be determined in light of all the circumstances of the case and in relation to the objective of the Directive. Hence, "waste" must not be interpreted restrictively as the Directive is aimed at setting a high level of protection for the environment and human health. Contaminated soil in this case should be considered as waste.[48] Regarding the second question, Kokott uses a notion of "responsibility for causation" to explain the scope of the terms "producer and/or holder of waste".[49] She states the national court will have to consider who, in law and fact, controlled the storage operations and the installations from which the hydrocarbons leaked. Only if Texaco is in some way responsible for causing the waste can the oil firm be held liable. Her approach recommends an in depth investigation into the contractual relationship between Texaco and the service station operator, as well as into the actual conduct of both parties. This pragmatic interpretation of the PPP might be useful in this case, but it offers little in the sense of legal certainty. It does not really contribute to a more acute definition of the PPP in general terms.

3.1.2.4. Interpretation by the ECJ

The ECJ's approach is similar to that of the AG. Concerning the scope of waste, the Court states that the very substance of the WFD would in fact be rendered nugatory if it did not include hydrocarbons spilt by accident as in the *Van de Walle* case. In this way, the Court takes a shortcut to including contaminated soil as "waste" within the Directive.[50] With regard to liability, the Court emphasizes the importance of responsibility for the causation of the waste. In the WFD, a differentiation is made between the holder of the waste (who is responsible for the actual cleanup of the pollution) and the previous holders of the waste and/or producer of the product from which the waste came, who can be held liable for (part of) the costs of the cleanup, in accordance with the polluter-pays principle.[51] Despite this differentiation, however, the question the Court is faced with remains in essence

[42] *Ibidem,* at 14-20.
[43] *Waste Framework Directive 74/442/EEC, supra* note 14.
[44] Advocate General's Opinion in *Van de Walle, supra* note 31, [2004] ECR at 27.
[45] Joined Cases 418/97 and 419/97, *ARCO Chemie Nederland and Others*, [2000] ECR I-4475.
[46] Case 9/00, *Palin Granit and Vehmassalon kansanterveystyon kuntayhtyman hallitus*, [2002] ECR I-3533.
[47] Case 235/02, *Saetti and Frediani*, [2004] ECR I-1005.
[48] Advocate General's Opinion in *Van de Walle*, *supra* note 31, [2004] ECR at 32-33
[49] *Ibidem,* at 53.
[50] *Van de Walle*, *supra* note 31, [2004] ECR at 52-53.
[51] *Ibidem*, at 57.

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defining the "polluter" under the PPP. Nonetheless, this differentiation in the Directive does mean that even if the manager of the service station is the holder and producer of the waste (and directly responsible for cleanup), former holders or even producers of the *product* from which the waste came might be held liable for the costs of this cleanup.[52]

The Court recognizes the possibility to "channel" liability along the production chain of the waste, and this channelling can even include parties who held or produced the product before its transformation into waste. However, the Court imposes a significantly condition on channelling by making it subject to a test of "causation and negligence". It is for the national court to assess if the production of waste was in any way caused by a disregard of the contractual obligations by Texaco or to other actions that could render it liable.[53] An example of such a disregard might be the supply of the wrong type or wrong quantity of oil, causing damage to the storage tanks. In practical terms, this will mean that Texaco will be able to block channelling of costs for cleanup of the pollution if it can prove it has acted in conformity with its contract with the manager and none of its actions have contributed to the actual production of the waste. This is in fact quite a high threshold for the Court to find Texaco liable. Although the Court's interpretation of the PPP in this case might seem far-reaching at first sight as it recognizes a possibility of imputability along the production chain, it might be considered unsatisfactory from the point of view of environmental protection. Contracts can still very easily be used to escape liability, for example. One author has therefore correctly characterized the Court's approach as "nuanced".[54]

3.1.3. The Erika Case

3.1.3.1. Facts

In the *Erika* case, the factual context is complicated but essential towards understanding the reasoning of the ECJ. A concise summary of these facts is therefore warranted.

In 1999 the oil tanker *Erika*, chartered by the oil firm Total International, sank off the coast of Bretagne, France, spilling part of her cargo of heavy fuel oil into the sea and thereby causing massive pollution to the French Atlantic coast.[55] The heavy fuel oil was on the way to being supplied to ENEL, an Italian energy firm. ENEL had bought the oil from Total International. In order to fulfil this contract, Total International in turn bought the oil from Total Raffinage Distribution (later renamed Total France) and chartered the Erika to transport the heavy fuel oil. Following the disaster, the Commune de Mesquer (a French municipality) and a number of other plaintiffs brought proceedings against several parties before the French courts, including Total International, Total France, the ship's classification society (an organization that carries out regular, independent checkups of ships) and the ship-owner and manager. The plaintiffs asked for a declaration of liability for the consequences of the damage and that the firms be ordered to cover the costs paid by the parties for cleaning and other anti-pollution measures. The French Tribunal de Grande Instance of Paris awarded the plaintiffs a total sum of €192 million in damages. The calculation of this sum was made taking into account the International Oil Pollution Compensation regime.[56]

The International Oil Pollution Compensation regime (hereafter "IOPC regime") is composed of two instruments: a convention governing liability[57] (the Convention) and a fund to compensate oil pollution damage (the Fund).[58] Although the EC is not a party to either of these Conventions, 23 EU Member States are. A detailed explanation of the IOPC regime is not important in this context, but it is important to understand that the aim of this regime is basically twofold. Firstly, the Liability Convention (Article III) "channels" liability for oil pollution damage exclusively to the owner of the ship, thereby insulating other parties such as the classification society of the ship or the charterer from civil liability. These "other parties" can only be held liable under this regime if the oil pollution resulted directly from their actions, committed recklessly or with the intent to cause such damage. Obviously, this criterion is very hard to fulfil. The second aim is to limit the liability of the owner by establishing a ceiling on possible compensation for damages (Article V). The Fund is "fed" by oil firms and used to provide compensation for oil pollution if the funds available under the Liability Convention prove to be insufficient. However, the Fund itself also establishes a ceiling on compensation payments.

[52] *Ibidem*, at 58.
[53] *Ibidem*, at 60.
[54] N. De Sadeleer, "Case C-1/03 Paul Van de Walle", (2006) 43 *CMLRev*. 209.
[55] C. Rousseau, D. Jamoteau, *Pollution de l'Erika : compte rendu de la visite d'une delegation d'observateurs de la communaute européene*, DG Environment, Brest, January 2000, http://ec.europa.eu/environment/civil/marin/reports_publications/erika_report.pdf
[56] Jugement de 16 Janvier 2008 du Tribunal de Grande Instance de Paris, No. 9934895010. Available at: http://www.fortunes-de-mer.com/documents%20pdf/jurisprudence/Arrets/7%20TGI%20Paris%2016012008%20Erika.pdf.
[57] International Convention on Civil Liability for Oil Pollution Damage adopted at Brussels on 29 November 1969, as amended by the Protocol signed in London on 27 September 1992 (reproduced in O.J. 2004 L 78, p.32)
[58] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage adopted at Brussels on 18 December 1971, as amended by the Protocol signed in London on 27 November 1992 (reproduced in O.J. 2004 L 78, p. 48)

In the judgment of the French Tribunal de Grande Instance of Paris, the Commune de Mesquer was denied an additional €67 million in compensation for the damage not covered by the IOPC regime. The Commune therefore appealed to France's highest court, the Cour de Cassation. This court referred three questions concerning the definition of waste and the liability of Total to the ECJ under Article 234 EC.[59]

3.1.3.2. Role of the PPP

Just as in *Van de Walle*, the *Erika* case called for an interpretation of the PPP in the context of the WFD. Two of the three preliminary questions concerned the definition of waste: could the heavy oil fuel, independently or once mixed with water, be considered waste? The third question asked if Total, as producer and/or seller of the heavy fuel oil and/or charterer of the Erika could be held liable to pay the costs in accordance with the PPP as expressed in Article 15 of the WFD. An important hinging point in this case was of course the fact that the fuel was transported by a third party, the carrier by sea. Basically, the Court was faced with the question whether Total should escape liability because it had passed on responsibility for the cargo to the sea carrier, following the IOPC regime. Or could Total, as a previous holder/producer of the product that caused the waste, be held liable to pay the cleanup costs? Was this liability limited by the causation and negligence element as in the *Van de Walle* case? The ECJ was called upon to resolve these questions on the "chain of responsibility". In addition, it had to solve with the legal puzzle of the relationship between the WFD, the French law that implemented it and the IOPC regime, to which France had signed up.

3.1.3.3. Advocate General's Opinion

In her opinion, AG Kokott deals with the 3 questions separately. With regard to the scope of "waste" she differentiates between the heavy fuel oil before and after it was spilt into the sea. Heavy fuel oil as such cannot be classified as waste because it has an independent economic value. Waste, Kokott highlights, is characterized by the fact that the holder discards, intends to discard or is required to discard it. This has been confirmed by the Court in the *Inter-Environment Wallonie* case.[60] In this case, however, it cannot be established there was an intention or obligation to discard the heavy fuel oil, a very valuable product.[61] Regarding the second question, however, the AG argues that once the heavy fuel oil was mixed with water and sediment it effectively lost its independent economic value and became waste. In line with her opinion in *Van de Walle*,[62] she considers the leaked oil and contaminated substance as one entity after it has been mixed. This is justified by the fact that the components of the oil-water-sediment mix cannot be easily separated and differentiated. This "new product" cannot be economically re-used and should therefore be qualified as "liquid waste" for the purpose of the case.[63]

After having qualified the oil-water-sediment mix as waste, the AG moves on to consider the question of liability. Recalling *Van de Walle*, Kokott states that the Court has held that the cost of dealing with waste must in principle be borne by the producer of that waste.[64] In *Van de Walle*, the element of causation and negligence was key for establishing liability for the producer of the product which later transformed into waste. In an interesting twist, however, Kokott points out that only the German language version of the polluter-pays principle[65] implies a notion of causality. Referring back to the *Standley* case, the AG states the Court has in the past interpreted the PPP as an expression of the principle of proportionality. Therefore, liability for the producer of the product (rather than the waste) does not run counter to the PPP. In short, Total cannot (ab)use the PPP to escape liability because it produced the product and not the waste. Instead, the PPP should be applied in proportion to *responsibility* for producing the waste. The producer of a product can bear a part of this responsibility, Kokott argues, simply by virtue of the fact that they are part of the production chain of waste. As the AG correctly explains:

> "In the case of most products the producer must assume that they will become waste at some time when they are used as intended. By producing economic goods the producer therefore causes waste and is therefore also responsible in accordance with the polluter-pays principle"[66]

The AG takes the view that the "chain of responsibility" for waste cleanup costs can run parallel to the product production chain. This line of reasoning is of course in sync with the interpretation of the PPP as an economic principle aimed at the internalization of negative externalities in the production process. However, it is essential to note that the AG underlines the fact that this reasoning cannot be extended unreservedly to waste that is created through extraordinary events, such as the sinking of an oil tanker.[67] This would be unreasonable, as it would extend

[59] *Commune de Mesquer*, *supra* note 29, [2008] ECR at 24-28.
[60] Case 129/96, *Inter-Environment Wallonie*, [1997] ECR I-7411, at 26.
[61] Advocate General's Opinion in *Commune de Mesquer, supra* note 29, [2008] ECR at 58.
[62] Advocate General's Opinion in *Van de Walle, supra* note 31, [2004] ECR at 24.
[63] Advocate General's Opinion in *Commune de Mesquer, supra* note 29, [2008] ECR at 79-80
[64] *Ibidem*, at 118-119.
[65] See Krämer, supra note 24, p.27.
[66] Advocate General's Opinion in *Commune de Mesquer, supra* note 29, [2008] ECR at 125.
[67] *Ibidem*, at 129.

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liability to the producer of a product which causes waste used in an *unintended* way. Heavy fuel oil, after all, is not produced with the intention of spilling it at sea. For "accidental waste", account must be taken of the influence the different parties along the production chain of waste have had on its creation.[68] Key in such matters as the sinking of the Erika is who was able to *prevent* the accident. In accordance with the PPP, liability should be divided proportionally according to the contribution to the extraordinary creation of waste. In the case of the Erika, the AG feels that the PPP would preclude liability for Total unless it can be proven that it contributed personally to causing the leak of the heavy fuel oil.[69]

Regarding the relationship between the IOPC regime and the WFD, Kokott gives a rather ambiguous answer. On the one hand, the EC is not bound by this regime as it is not a signatory party.[70] On the other hand, because most of the EU Member States are IOPC parties and following the obligation of loyalty between the EC and Member States, a conflict between EC law (the WFD) and international law obligations is to be avoided.[71] However, the EC measure calls for an application of the PPP to cover the full costs of the pollution, whilst the international regime "channels" the liability towards only one "polluter" (the ship owner) and then limits the maximum amount this polluter pays. AG Kokott deals with this contradiction by giving a rather ingenious interpretation of the PPP. Although Article 15 of the WFD calls on the polluter to pay, this does not mean the general public (the taxpayer) cannot be called on to cover a part of the costs of pollution. This can be justified by considering that the general public accepts that States allow oil freighters to pass through its waters, thereby implicitly accepting the risk that one day a freighter may sink and cause environmental damage.[72] The general public, therefore, can be included as a "polluter" under the PPP.

In summary, her reasoning would allow the French Court to hold Total liable as producer/seller of the heavy fuel oil in accordance with the WFD and the PPP. On the other hand, this liability can be limited in accordance with France's international obligations. The AG squares this circle by interpreting the PPP as meaning that the general public (who would have to pay for the costs not covered by the IOPC regime) is also a polluter. After all, it is the citizen who benefits from the international transportation of oil as the end consumer. Therefore, asking this citizen to bear a part of the burden in case of an accident such as in the *Erika* case does not run counter to the PPP.

This interpretation of the PPP, this author submits, would lead to an extremely diluted and ineffective notion of environmental liability. Should a citizen who owns a car and therefore benefits more from the international transport of oil pay more than a citizen who owns a bicycle? AG Kokott seems to be reasoning along the lines of the *Standley* case, in which the ECJ interpreted the PPP as an expression of the proportionality principle. The taxpayer can therefore be asked to contribute in proportion to his/her contribution to the damage, even if this is only because he/she accepted the risk of oil transports. As the AG points out, the ceilings of the IOPC regime are high enough to cover the costs of most tanker accidents.[73] However, what if a disaster of such magnitude occurred that the international regime covers only a fraction of the costs? Would it then not be contrary to the PPP *and* the principle of proportionality to ask the taxpayer to pay for the rest of the costs? What if a disaster occurs in the waters of one Member States but the damage is mostly felt in another? AG Kokott's interpretation on this point seems faulty from a principled point of view, it is submitted, as it sets a threshold of risk liability for the general public which is very easily met. The PPP is an economic principle that should lead to the internationalization of negative environmental externalities into the cost of a product. It might seem like a pragmatic solution to impose additional costs outside the scope of the IOPC regime to the general public in the *Erika* case, given the highly complex interplay between EC law, national implementation law and international law. However it would run contrary to the full application of the PPP at the EC level. As we will see below, the Court found a different solution to this legal conundrum.

3.1.3.4. Interpretation by the ECJ

The ECJ follows the AG on the first two questions regarding the definition of waste. Heavy fuel oil as such is not waste,[74] but once mixed with oil and sediment it can no longer be exploited or marketed without prior processing. Consequently, it can then be considered waste within the context of the WFD.[75]

Concerning liability, the Court underlines that just as in *Van de Walle* and in accordance with the PPP, liability for cleanup costs of persons other than the holder of the waste at the time of the accident (i.e. the ship-owner) is not precluded by Article 15 of the WFD.[76] In fact, the Court even goes as far as to say that a proper application of the PPP would be frustrated if such persons escaped their financial liability. Having established that channelling along the waste production chain is allowed, the Court is then faced with a more complex question. Could Total, as *seller* of the heavy fuel oil and charterer of

[68] *Ibidem*, at 130.
[69] *Ibidem*, at 147.
[70] *Ibidem*, at 84.
[71] *Ibidem*, at 101-103.
[72] *Ibidem*, at 142.
[73] *Ibidem*, at 144-145.
[74] *Commune de Mesquer, supra* note 29, [2008] ECR at 48.
[75] *Ibidem*, at 64.
[76] *Ibidem*, at 69-72.

the ship, be considered part of this waste production chain? The alternative would be that the French law implementing the WFD precludes liability for Total, following the IOPC regime.

It is essential to point out that the IOPC regime, commendable as its goal of providing compensation for damage from oil pollution may be, does not follow the PPP. It establishes subjective "ceilings" on damage payments and channels liability to one single party instead of objectively considering who the actual polluter is and what the actual costs of the pollution are. As a result, the ECJ had to resolve a contradiction between this international regime, to which almost all its Member States had signed up, and the PPP as laid down in Article 174 (2) EC and the WFD.

It is also important to recall that the Court was faced with a complicated set of facts. As explained above, the Erika disaster gave rise to civil and criminal proceedings against several parties. The French court held the ship-owner and classification society criminally and civilly liable.[77] Total was also held to be liable for chartering a vessel beyond her life expectancy (the Erika was 25 years old) to transport such a dangerous good, which was considered negligent conduct. In addition, the internal "vetting"[78] procedure conducted by Total was heavily criticized.[79] The French judgment was therefore already a very broad interpretation of the relevant French law for oil pollution, extending liability along the maritime safety chain (charterer, classification society, ship-owner).[80] However, the IOPC regime does not allow for channelling of the oil pollution costs along the production chain of the product from which the waste came, as opposed to the EC's WFD.

The Court states, however, that the chain of responsibility can extend to the seller-charterer if the national court can establish that Total contributed to the *risk* that the pollution would occur. In particular, the Court states, the choice of vessel by the seller-charterer is relevant.[81] By highlighting the choice of tanker by Total as a particular action that might have contributed to the risk of pollution, the Court shows a high sense of awareness of the particular factual context of the *Erika* case. After all, the ECJ would have noted that Total was held liable by French courts within the terms of the IOPC regime and the French law precisely for its poor choice of tanker. The French judgment, as it has been noted, calculated damages taking into account the ceilings this regime establishes. If it wanted to apply the PPP to cover the full scope of the costs, however, the Court would have to somehow set aside this international regime.

As already stated, the approach of the ECJ towards the relationship between the IOPC regime and the WFD differs significantly from AG Kokott's. The Court underlines the fact that the EC itself is not bound by the international regime, as it is not a signatory party, even if EU Member States are.[82] The Court therefore limits itself to an interpretation of Article 15 of the WFD as it stood at the time of the *Erika* case (the 1975 version).[83] As the Court points out, the Member States as addressees of the Directive are responsible for its correct implementation under Article 249 EC. This means the Member States must ensure that following Article 15 of this Directive and therefore in accordance with the PPP, costs associated with pollution are allocated either to the holder, the previous holder or to the producer of the product from which the waste came. Article 15 does not, however, preclude the Member States from engaging in international commitments such as the IOPC regime. In fact, the Member States are also allowed to adopt a law "channelling" liability to the ship-owner as holder of the waste and establish a fund to pay damages resulting from oil pollution. Such a fund can even include certain limitations on liability damage payments.[84]

However, the Court's interpretation of the hierarchy between the IOPC regime and the WFD is highly relevant: it gives precedence to the EC secondary legislation and hence to the PPP.[85] This means that if the actual damage caused by an oil spill exceeds the maximum damage payment under the national law/IOPC regime, it is the obligation of the Member State to interpret this national law in conformity with EC law[86] as to make sure the costs are borne by the producer of the product from which waste came.[87] In other words, the PPP, as expressed in Article 15 of the WFD, cannot be disregarded because

[77] Jugement du Tribunal de Grande Instance, 16 Janvier 2008, *supra* note 56, at 344-353.

[78] Vetting" is the process by which oil companies conduct an investigation of a ship"s safety before chartering it for oil transport.

[79] *Ibidem,* at 348.

[80] V.J. Foley, R. Nolan, "The Erika Judgment – Environmental Liability and Places of Refuge: A Sea Change in Civil and Criminal Responsibility that the Maritime Community Must Heed", (2008) 33 *Tulane Maritime Law Journal* 77.

[81] *Commune de Mesquer*, *supra* note 29, [2008] ECR at 78.

[82] *Ibidem*, at 85.

[83] *Waste Framework Directive 75/442/EEC, supra* note 14.

[84] *Commune de Mesquer, supra* note 29, [2008] ECR at 79-81.

[85] See also Case C-308/06, *Intertanko and Others*, [2008] ECR I-0000 for another conflict in which the ECJ rules in the same sense. For a commentary, see F. Dopagne, "Arrêt 'Intertanko': l'appréciation de la validité d'actes communautaires au regard de conventions internationales (Marpol 73/78, Montego Bay)", (2008) 152 *Journal de droit Européen*, 241.

[86] The ECJ follows the "Marleasing doctrine" in which it was established that Member States have to interpret national laws transposing EC Directives, as much as possible, in conformity with EC law. See Case C-106/89, *Marleasing*, [1990] ECR I-4135.

[87] *Ibidem*, at 82.

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a national law establishes limits on damage payments following an international agreement. At the same time, however, the Court states that a correct application of the PPP means that a producer of a product which became waste cannot be asked to bear any costs unless the national court can establish that this producer has contributed to the risk that the pollution might occur. Through asserting the autonomy of EC law, therefore, the Court sets aside the IOPC regime in as far as it does not apply to the full scope of costs associated with the damage of pollution.

3.2 Conclusion

In the three most important cases involving the PPP brought before it, the ECJ has emphasized different aspects of the principle. In the *Standley* case, the Court underlined that the PPP must be seen as a reflection of the principle of proportionality and that costs assigned to the polluter must therefore reflect their actual contribution to the creation of this pollution. In *Van de Walle* and *Erika*, the Court had to answer questions both on the scope of the term "waste" within the WFD and concerning liability for dealing with the waste. It is interesting to note that whilst the Court employs a broad scope when interpreting the definition of "waste" (*what* is pollution under the polluter-pays principle) it was far more reluctant to broaden the category of liable parties for dealing with the waste (*who* is the polluter under the polluter-pays principle). In the third chapter we will try to further explain the reasoning of the Court and reflect on the consequences of the Court's interpretation of the PPP. Again, special attention will be paid to the *Erika* case as both the most recent and most important PPP case.

IV. Section 3: Towards an enforceable polluter-pays principle?

In this final section, we will first focus on further analysing the Court's interpretation of the PPP in the three cases we have dealt with in detail in Chapter 2. In particular, a linkup must be made with some of the problems of applying the PPP as explained in Chapter 1. Secondly, we will analyse in particular whether the Court's judgment in the *Erika* case will affect the role and importance of the PPP as an enforceable environmental action principle in the EC legal order. Finally, we discuss the relationship between the ECJ case law and the secondary EC legislation. In short, this section explores whether the Court has truly given "effet utile" to the PPP as a legal principle of EC law?

4.1. Comparative analysis of the ECJ's interpretation

From the cases we have analysed so far, a number of conclusions can be drawn about the interpretation of the PPP by the ECJ. Firstly, it is interesting to note how the Court makes a linkage between the PPP and the principle of proportionality in all three of the cases. Given the wide margin of discretion and the lack of precision of the PPP in EC law, its proportionate application appears to be the only way to ensure an equitable outcome. After all, a proportionate approach to the PPP means that polluters only pay in proportion to their contribution to the damage. Secondly, in both *Van de Walle* and *Erika*, the Court takes important steps in clarifying *who* might be considered a polluter in the case of accidental pollution in the specific context of the WFD. As we will see in the next section, the ECJ's resolution of this problem in *Erika*, however, seems significantly more extensive than in *Van de Walle*.

In the *Standley* case, the Court had to apply the PPP to an ex-ante measure aimed at reducing the level of nitrates in certain rivers in the UK. The Court's reasoning is sound from a legal point of view; even though limiting agricultural activities is the prescribed measure in the Nitrates Directive, a proportional application of the PPP cannot lead to a result through which farmers are asked to contribute to pollution they did not create. Proportionality, it will be recalled, is a recognised and enforceable general principle of European law.[88] The principle can be used as a ground for review of EC measures and, in general terms, is aimed at protecting the rights of the individual vis-à-vis the far reaching powers of authorities, such as the EU/EC.[89] In its interaction with the PPP, the proportionality principle fulfils exactly this function by limiting the liability of polluters to their actual contribution to the pollution. In fact, it can be said that there must be an inherent element of proportionality to the PPP. From the point of view of environmental protection, however, such a strict proportionality test for applying the PPP does not always led to satisfactory results. In the *Standley* case, for example, the Court's interpretation of the PPP means that the administration will somehow have to calculate to what extent the farmers contribute to the nitrates in the river water. The action programmes will have to be adapted according to the farmer's contribution to the pollution. This seems to place an almost impossible responsibility on the administration (establishing the contribution of each farmer).

In *Van de Walle*, the Court explained that a producer of petrol which later transformed into waste might be held liable to pay for cleanup costs if it can be proven that it had broken a contractual obligation or its negligent conduct had somehow contributed to the causation of the waste. In such cases, "causation and negligence" is established as a key condition for

[88] Case C-4/73, *Nold v Commission*. [1974] ECR 491 and Case 11/70, *Internationale Handelsgesellschaft v Einfuhr und Vorratsstelle Getreide* [1970] ECR 1125.

[89] T. Tridimas, *The General Principles of EU Law*, Oxford University Press, Oxford 2006, p. 138.

liability of parties other than the "holder" of waste. This condition forms a significant barrier for stretching the term "polluter" to cover the producer/seller of the product from which the waste came. Contracts can be constructed in such a way that sellers of a product are not easily in breach of their obligations and negligent conduct is not easy to establish. Again, the reasoning in the *Van de Walle* case appears sound from a legal point of view. An application of the PPP that would hold Texaco liable to pay for cleanup costs without taking an element of causation or negligence into account could very well be considered disproportionate. After all, if Texaco's conduct has not in any way contributed to causing the leak that caused the pollution, why should it be considered as one of the polluters who should pay?[90] However, from the point of view of environmental protection and the rectification of environmental damage, placing such a high threshold for product producer liability means that the "deep pockets" of the oil firm remain out of reach. Through skilfully worded contracts product producers would be able to avoid liability under the *Van de Walle* doctrine as liability is channelled to the "holder of the waste". In practice, such holders/producers of waste will often have limited resources. This could either result in a situation of non-rectification (i.e. the pollution is not cleaned up) or a situation in which the costs are passed on to the general public. The former situation is unsatisfactory from the point of view of the environment and human health, whilst the latter appears itself to be a disproportionate application of the PPP. Should the taxpayer be held liable to pay for cleaning up the environment while the producer of the product which caused the pollution does not contribute?

In other words, the interpretation that liability in accordance with the PPP should be an expression of proportionality alone does not solve the problem of diffuse pollution. Diffuse pollution occurs when "multiple causes produce single effects or single causes produce multiple effects."[91] In such cases, direct causation of pollution is particularly difficult to establish. A strict proportionality/causation test, however, would call on courts to disentangle a web of actions and effects and establish liability accordingly (each pays according to his contribution to the pollution). In practice, it would be very difficult for victims of pollution to prove how certain parties have contributed to the damage. The different parties along a production chain, in turn, will use all legal means to insulate themselves from liability (by, for example, channelling all liability to one weaker party who cannot cover all the costs).

One possible solution to this legal complication is that the court "channels" liability to the polluter that is most able to pay. In light of the goal of environmental protection, the "polluter who pays" might well be considered to be a different party than the person who actually causes the pollution.[92] In practice this might well be the firm that created the product that formed the base material for waste, particularly if such a product is potentially very damaging to the environment. If a truck full of industrial chemicals tips over on a road and the trucking company does not have the financial means to pay for the cleanup, is it disproportionate to ask the producer/seller of the chemicals to contribute? Alternatively, is it more "proportionate" to impose this burden on the taxpayer?

Such an interpretation that holds producers liable for pollution through a notion of "risk responsibility" might seem far-fetched and arguably unfair, but would work towards achieving a number of goals. Firstly, it would contribute to the protection of the environment by making sure rectification of pollution damage actually takes place. One of the major problems associated with damage to the environment, after all, is that it often appears to be a legal *res nullius*. Often, a causal chain for pollution is so difficult to establish that victims of pollution are left without the opportunity to obtain remedies. This is especially so when the environment itself, which cannot go to Court, is the principal victim of pollution. Secondly, offering opportunities for risk liability along a production chain of a product would be in tune with the EC's objective to develop an Integrated Product Policy by which environmental externalities are reflected in the price of a product.[93] After all, extending liability in case of environmental accidents to product producers would be an incentive for these to develop products less likely to harm the environment. In addition, the idea of extensive product producer liability is widely accepted in US environmental law, which is (in part) organised in such a way that strict liability does not depend on behaviour (i.e. causation) but rather on the relation of the party to the polluting substance or activity.[94] One could of course ask whether it would not be a bridge too far to expect the judiciary, EC or national, to apply an interpretation of the PPP that is *prima facie* contrary to the proportionality principle. This is even more so because such an interpretation would have profound effects on the economy. As AG Kokott hints in her *Erika* opinion, it is far more suitable for the legislator to make such policy decisions.[95] However, the ECJ did take a significant step in the direction of extended producer liability in its *Erika* judgment.

[90] De Sadeleer, "Van de Walle", *supra* note 54, at 218.
[91] *Ibidem*, at 217.
[92] *Ibidem,* at 218.
[93] *Supra* page 5.
[94] B. Baker Roben, "Environmental liability at the national level", *in* F. Morrison, r. Wolfrum (ed.), *International, Regional and National Environmental Law*, Kluwer Law International, The Hague 2000, p. 768.
[95] Advocate General's Opinion in *Commune Mesquer, supra* note 29, at 77-78.

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4.2 The Erika case: breathing life into the polluter-pays principle?

The outcome of the *Erika* case before the French courts is significant for a number of different reasons. For parties involved in shipping, particularly the transport of oil, the French judgment was notable for its strict notion of liability for parties such as the classification society, the oil firm and the ship's captain.[96] After all, the industry has organised itself in such a way as to channel liability towards the ship-owner. Extending liability to parties other than the ship-owner such as in the *Erika* case might well be an incentive for the parties involved in the "maritime safety chain" of oil transport to monitor their behaviour more closely in the future. Another important offshoot of the case is the fact that the French court recognised the right of environmental associations to claim compensation for damages to the environment.[97] However, what is the relevance of the *Erika* case before the ECJ for the PPP as a principle of EC environmental policy?

The Court was faced with a triple hurdle for answering that the French court might be able to apply the PPP as to find Total liable. Firstly, it had to establish that the heavy fuel oil spilled from the tanker could in fact be considered waste within the scope of the WFD. Secondly, the IOPC regime channelled liability to the ship-owner and provided few opportunities to impose costs on other parties. Thirdly, under the *Van de Walle* judgment, the condition of "causation and negligence" of Total as seller of the product that caused the pollution would have to be established.

The first hurdle was taken with relative ease. In line with the *Van de Walle* case and following AG's Kokott's opinion, the Court established that the heavy fuel oil itself did not constitute waste, but once it was mixed with water and sediment and was "discarded" by the holder. The ECJ uses a broad scope concerning the concept of waste and justifies this through a primarily teleological reading of the WFD. From a legal perspective, this seems both sound and welcome. The legislator, in laying down the WFD, cannot be expected to list all the different types of waste possible. Instead, the ECJ must take regard of the objective of the Directive, which is to regulate waste management and reduce waste streams, in establishing whether something qualifies as waste. It is important to realize, however, that the Court has to stay within the limits of the legislation. In a reaction to the *Van de Walle* case, for example, the EC legislator decided to explicitly exclude land and unexcavated contaminated soil from the scope of the newest version of the WFD.[98] It is therefore very questionable whether *Van de Walle* remains "good law" in the sense that the same facts could lead to the same outcome under the new Directive.[99] In general terms, however, it is fair to conclude that the ECJ uses a broad scope when establishing what constitutes "pollution" within the terms of PPP. This is particularly true when it is interpreting secondary legislation such as the WFD.

Establishing that something is pollution in itself does not solve much, however, unless this is coupled with assigning a party responsible for dealing with that pollution. The Court has significantly more problems with this issue. France's obligations under the IOPC regime were made secondary to the consistent interpretation of EC law. The PPP, as expressed in Article 15 of the WFD must be applied, even if this runs contrary to a sectoral liability regime. This is a very important conclusion for the *status* the PPP, as it adds weight to the principle as a real tool for victims in seeking remedies for environmental damage. The Court's "self-confidence" in proclaiming and applying the autonomy of the EC legal order can also be detected in other recent case law, most significantly the joined *Kadi and Al Barakaat* case[100] concerning the relationship between the UN and EU legal order.[101] At the same time, however, it is important to underline that the judgment might have been different if the EC had been party to the IOPC regime.[102] Although the Erika judgment seems to significantly vitalize the PPP as an enforceable principle of EC law, at least when it has been laid down in secondary legislation, the ECJ can only go as far as the law allows it to go. If the EC joins international regimes that channel liability in such a way that the complete application of the PPP is precluded, the Court will have to respect such agreements. In light of the increased presence of the EC/EU as a party to international agreements, this certainly cannot be ruled out. The Court has fleshed out the PPP in the *Erika* case, but it remains to be seen whether the legislator will "rip the flesh" off the principle, in a similar way as it did in its legislative reaction to the *Van de Walle* case.

The Court's extension of the scope of liability to the producer/seller of the heavy fuel oil is also of great significance from the point of view of vitalizing the PPP. The AG and the Court reasoned that Total could be included in the list of "polluters" in the context of the PPP because it had contributed to the causal chain

[96] Foley, Nola, *The Erika judgment, supra* note 80, p. 62-77.
[97] D. Papadopoulou, "The Role of French Environmental Associations in Civil Liability for Environmental Harm: Courtesy of *Erika*", (2009) 21:1 *Journal of Environmental Law*, p. 87.
[98] *2008 Waste Framework Directive, supra* note 21, Article 2(1a).
[99] Interview, N. De Sadeleer, *Professor of EU law, FUSL (Brussels)*, Brussels, 23 April 2009.
[100] Judgment of 3.09.08, in joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, (not yet reported).
[101] N. De Sadeleer, "Arret 'Erika': le principe du 'pollueur-payeur' et la responsabilité pour l'élimination des déchets engendrés par le naufrage d'un navire pétrolier" (2008) 152 *Journal de droit Européen*, 239.
[102] *Ibidem*, 240.

of the production of the waste. In *Van de Walle*, the Court seemed keen to stress the high threshold that would have to be met in order for the producer/seller of oil to meet this criterion. In *Erika*, in contrast, the Court uses the criterion of "contribution to risk that the pollution might occur".[103] Contribution to risk might still be a significant barrier for courts to find producers liable, but seems to be significantly easier to establish than the "causation and/or negligence" criterion, especially in cases of diffuse pollution. In addition, risk liability provides a link between the ex-ante (preventive) and ex-post (restorative) application of the PPP. If producers of a product, within reasonable terms, can be held liable for the accidental creation of waste through the unintended use of their product (such as a tanker accident) they will seek to internalize the costs of preventing such accidents. Of course, the notion of risk liability itself is troublesome, as it can be argued that it does not respect the basic logic underpinning tort law: the ideas of *fault* and *causation*.[104] For this reason, it is submitted that national courts will be reluctant to apply the concept of risk liability even in cases where the ECJ has given the "green light" through a preliminary ruling as in *Erika*. It is also important to underline that the burden of proof in such cases will be on the claimant. Proving that a defendant's conduct contributed to the risk of pollution will be a considerable barrier.[105]

In summary, the ECJ's judgment in *Erika* has given important new impetus to the PPP as an EC environmental action principle by addressing issues of both *status* and *scope*. The inclusion of the oil-water-sediment mix as "waste" under the WFD was to be expected given the reasoning in the *Van de Walle* case and seems justified by taking account of the objective of this Directive. Giving the EC's liability regime "supremacy" over the IOPC regime is a bolder move from the Court, especially in light of the suggestions of AG Kokott that the two systems could be reconciled to avoid conflict. To ensure the effective application and judicial enforceability of the PPP, however, it seems essential to emphasize the autonomy of the EC legal order in the way the ECJ did. The extent to which risk liability will be adopted as a new "leitmotif" in ex-post applications of the PPP to the accidental creation of waste remains to be seen. It is submitted, however, that courts will show due restraint in applying this notion and claimants will have difficulty proving how parties along the product production chain have contributed to the risk of pollution. The ECJ stresses the proportionality dimension of the PPP in the *Standley, Van de Walle* and *Erika* cases and any payment for damages caused by pollution will have to be calculated in proportion to the contribution to risk. Practical legal problems to applying risk liability abound. In one commentary, the consequences of the *Erika* judgment were characterised as "potential unlimited liability for producers of waste."[106] The emphasis in this statement, this author considers, must nonetheless be placed on the word "potential".

In a case currently pending before the Court, a number of Italian hotels are invoking a breach of the PPP as expressed in Article 15 WFD by a new system for waste collection.[107] The fees under the proposed system are calculated on the basis of the surface area of a building (hotels or private domicile) and its economic capacity instead of on the actual amount of pollution produced and collected. The AG highlights that the case law of the Court demands the PPP be applied proportionally.[108] At the same time, the Court has recognized some flexibility is needed in applying the PPP and it would be too strict to ask that a waste collection system calculates exactly the contribution of each producer. Instead, a few reasonable criteria can be used. There has to be, however, a "reasonable connection" between the waste production and the fees a producer pays.[109] In this instance, the AG reasons that surface area is such a reasonable assumption, but economic capacity is not. As she rightly, points out, a more successful hotel might produce less rather than more waste.[110] This case once again highlights the intrinsic difficulties associated with applying the PPP and the balance that has to be struck between proportionality (paying in proportion to contribution) and the flexibility needed to implement effective legislation based on the PPP. It will be very interesting to read the Court's reasoning in this case.

4.3 Will the legislator limit the effects of the Erika judgment?

Furthermore, the Court could only reach the conclusion it did in *Erika* because the PPP is explicitly mentioned in Article 15 of the WFD. In that sense, the application of the PPP remains first and foremost a policy decision, as it is for the legislator to provide courts with the means to apply the environmental action principles. These principles, as pointed out in section 1, are generally considered to be too vague in themselves to be effectively enforced. It remains to be seen, therefore, how the EC legislator will react to the *Erika* judgment in terms of environmental liability.

[103] *Commune de Mesquer, supra* note 29, at 89.
[104] T. Handfield, T. Pisciotta, "Is the Risk–Liability Theory Compatible with Negligence Law?" (2005) 11:4 *Legal Theory*, p.387.
[105] Ince & Co, "The Erika: potential unlimited liability for producers of waste", Shipping e-Brief October 2008. Available at: www.incelaw.com.
[106] *Ibidem*.
[107] Conclusie van de Advocaat-Generaal van 23.04.2009, in zaak 254/08, *Futura Immobiliare et al. v. Comune di Casoria* (not yet reported).
[108] *Ibidem,* at 32-36.
[109] *Ibidem,* at 51.
[110] *Ibidem*, 64-69.

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The reaction to the *Van de Walle* judgment in the 2008 WFD sets an unpromising precedent, as the legislator has effectively stripped that judgment of most of its effect. The 2008 WFD does not introduce major changes to the issue of ex-post liability for waste, even if the new Article 14 is worded slightly differently from the "famous" Article 15.[111] Other legislation, however, has been far more promising. In a direct reaction to the Erika disaster, the EC has adopted several legislative measures aimed at prevention of such accidents, including the establishment of the European Maritime Safety Agency[112] and moving forward the implementation date for a Directive banning the use of single-hulled tankers[113] such as the Erika.

As a general trend, therefore, the EC legislator prefers a regulatory approach to the prevention of pollution to allowing victims to use an extended notion of the PPP in head-on collisions with "polluters" before the courts. The legislator will show far more care to avoid conflicts with existing international regimes, such as the IOPC regime, than the Court did in *Erika*. In fact, the Environmental Liability Directive[114] explicitly defers the competence to regulate oil pollution liability to the IOPC regime. Although in *Erika* the ECJ decided to give preference to the more stringent liability rules of the WFD, it is only because the Court had Article 15 of this Directive as a support that it could give such an extensive interpretation of the PPP. In other cases, the ECJ might well apply the more general and lenient rules of the Environmental Liability Directive. It remains to be seen how the "battle of jurisdictions" between conflicting EC measures (lex generalis v. lex specialis) and the international regimes will be resolved in future cases.[115]

In addition, it is fair to say that the enforceability of EC environmental action principles such as the PPP before Community and national courts will also be limited by the ability and willingness of victims to go to court. In terms of the law, the environment is notoriously difficult to protect. It is both hard to define and cannot speak for itself.[116] Consequently, the burden for its protection falls onto people. Both public administrations and victims of environmental damage must have the means and willingness to pursue such protection. In the case of the *Erika*, it was only because the small Commune de Mesquer resisted a settlement with Total that the case ever reached the ECJ.[117] Perhaps other victims of pollution can draw inspiration and energy from this small Breton community offering resistance to the far more organised and powerful "polluter". The protection of the environment remains, above all, a human challenge.

V. Conclusion

This article is an attempt to analyse to what extent the ECJ has increased the relevance of the PPP by finding solutions to the major problems that are inherent to this principle. The PPP looks good on paper, but there are major hurdles towards its effective application. Most importantly, defining who the polluter is and what he/she should pay for are often particularly difficult. In many ways, it can be said that the ability of the ECJ to answer such questions is limited. Policies, not judgments, are needed to truly implement the PPP at the EC level. Nevertheless, the Court has made a significant contribution to rendering the principle more effective.

In the three cases we have analysed, the Court has placed different emphases. It is obvious that the Court regards that any application of the PPP must be proportional: a polluter can only be asked to bear the burden of paying for pollution in proportion to the contribution to that pollution. This is particularly clear from the *Standley* case. In both the *Van de Walle* and *Erika* cases, the Court clearly used a wide scope when determining the limits of what can constitute "pollution". In both cases, it was key that the Court could make this determination within the limits set by the WFD. Identifying who might be held to be "polluters" is more problematic; on this issue the *Van de Walle* and *Erika* cases have to be clearly distinguished. In both cases, the producer of the product from which the pollution came was deemed to be part of the "production chain" of the waste. A proportionate approach of the PPP, however, means that courts need to establish to what extent producers contribute to the causation of waste created by a product they no longer control, or of which they are no longer the "holder." This is especially difficult in cases of pollution resulting from accidents. In *Van de Walle*, the Court felt that it would need to be established that Texaco and its executives had in some way contributed to causing the pollution damage, either through a breach of contractual obligations or through negligent behaviour.

Obviously, this "causation and negligence" criterion forms a significant barrier towards holding the producer of a product liable as a "polluter" under the

[111] Interview, De Sadeleer, *supra* note 99 and Conclusie van de Advocaat General in *C-245/08, supra* note 107.
[112] European Parliament and Council Regulation 1406/2002, of 27 June, 2002, establishing a European Maritime Agency, [2002] O.J. L 208/1.
[113] European Parliament and Council Regulation 417/2002, of 18 February, 2002, on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, [2002] O.J. L 64/1.
[114] Environmental Liability Directive, *supra* note 22, Article 4(2).
[115] P. Wennerås, "Towards An Ever Greener Union? Competence in the field of the environment and beyond" (2008) 45 *CMLRev*. 1663-1664.
[116] Krämer, *supra* note 24, p 473.
[117] Interview, De Sadeleer, *supra* note 99.

PPP. In *Erika*, the Court importantly considers that contribution to the *risk* that pollution might occur is enough to establish product producer liability in the case of the accidental creation of waste. The notion of ''risk responsibility'' means it will be considerably easier for courts to regard product producers as ''polluters'' under the PPP, at least within the context of the WFD. At least, it will cause product producers to aim to reduce the risk of their products causing waste. However, it is to be expected that courts will be careful in establishing risk responsibility and victims of pollution will face a heavy burden of proof before reaching the ''deep pockets'' of product producers. Nonetheless, the *Erika* judgment has provided significant clarification on the scope of the PPP. In effect, the Court has stretched both the notions of what constitutes pollution and who the polluter is to their limits within the current framework of EC legislation. It remains to be seen how the legislator will react to this interpretation by the ECJ.

The *Erika* case has also brought clarification regarding the *status* of the PPP, at least in the WFD. The Court decided that the Member States were bound to apply Article 15 of this Directive to its full effect, even if this meant setting aside the IOPC regime, which limited the maximum damage payments. This is an important statement by the Court; not only does it assert the autonomy of EC law, it also safeguards the effective application of the PPP to situations which fall within the scope of secondary legislation. In short, *Erika* is also relevant for the *status* of the PPP. However, it must be pointed out that the Court could only show such bravura because the EC itself is not a member of the IOPC regime. The increased presence of the EU/EC in international environmental accords might well mean that in the future the Court will find its hands bounds. It will not be able to apply the PPP to its full extent if this contradicts an international commitment of the EC.

In conclusion, it is fair to say the ECJ has made a significant contribution to clarifying the role and relevance of the PPP in EC law. This is especially true for *Erika*, a case in which the Court gives a far reaching interpretation to both the scope of the PPP (*who* is the polluter and *what* qualifies as pollution) and its status. The Court has moved the boundaries of the PPP but is of course restricted to the parameters set by the law. It remains to be seen if the legislator will mirror the Court's interpretation of the PPP. In the light of the Europe's self-proclaimed global environmental leadership, adherence to principles such as the PPP would seem a minimum requirement. Unfortunately, history teaches us that in the process of law-making the protection of the environment is too often trumped by more vocal and short-term interests. Public and political courage and foresight are what is most needed to move from a principle that the polluter should pay to a European Union in which the polluter does pay.

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