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Herausgegeben von Prof. Dr. Erik Gawel

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**Environmental and Resource Costs
under Article 9 of the Water
Framework Directive**

**Challenges for the Implementation of the Principle
of Cost Recovery for Water Services**

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Preface

Article 9 of the EU Water Framework Directive (WFD) requires Member States to take account of the principle of recovery of the costs of water services, including environmental and resource costs (ERCs). Whilst Member States, in practice, claim discretion when applying Article 9, the discussion of what, in concrete terms, is meant by and due for recovering full costs in European water policy goes on. To make matters worse, in its judgment of 2014, the EU Court of Justice abstained from clarifying niggling problems related to the interpretation of the legal requirements. What is more, this debate still lacks insights from decades of scientific discussion on water pricing in environmental economics.

In response to this, the book provides a current in-depth (economic) analysis of all questions relating to recovering the costs (definition of ERCs, concepts and instruments of cost recovery etc.), referring to the legal as well as the economic aspects of pricing water services in line with Article 9 of the WFD.

The study summarises the findings from economic research conducted over many years at the Helmholtz Centre for Environmental Research – UFZ in Leipzig – a lively and productive interdisciplinary working environment for scholars of law and economics. The work is written from a German implementation perspective. For that reason it refers mainly to the German scientific literature, German jurisdiction as well as German national law as a case study for the implementation challenges to be met across the EU. However, precisely this aspect makes it particularly interesting for the EU-wide discussion on Article 9 of the WFD. Here, probably for the first time, a comprehensive overview of the intense, ongoing German debate is made accessible to an international audience.

I am very grateful to *Johannes Schiller*, *Bernd Klauer*, *Nele Lienhoop*, *Wolfgang Köck*, *Moritz Reese* and *Herwig Unnerstall* for fruitful discussions about the manifold shallows of Article 9 of the WFD. However, the usual disclaimer applies here. I also wish to thank *Anne Wessner* and *Lioba Macht* for their valuable assistance in preparing the manuscript for printing.

Leipzig, August 2015

Erik Gawel

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List of Abbreviations

AbwAG	Abwasserabgabengesetz [German Waste Water Charges Act]
AG	Advocate General
APr	Ausschuss-Protokoll [minutes of a parliamentary committee]
BayVBl.	Bayerische Verwaltungsblätter (Journal title)
BGBI.	(German) Federal Law Gazette
BVerfG	Bundesverfassungsgericht [German Federal Constitutional Court]
CIS	Common Implementation Strategy
COM	European Commission
DVBl.	Deutsches Verwaltungsblatt (Journal title)
DWA	Deutsche Vereinigung für Wasserwirtschaft, Abwasser und Abfall e.V. [German Association for Water, Wastewater and Waste]
EEA	European Environment Agency
EC	European Community
ECJ	EU Court of Justice
EG	Europäische Gemeinschaften [European Communities]
ERC	Environmental and Resource Costs
EU	European Union
EuGH	Europäischer Gerichtshof [European Court of Justice]
GA	Generalanwalt [Advocate General]
gwf	Das Gas- und Wasserfach (Journal title)
HMWB	Heavily Modified Water Bodies
IVM	Institute for Environmental Studies, VU University Amsterdam (NL)
JEEPL	Journal of European Environmental and Planning Law
K	Europäische Kommission [European Commission]
KA	Korrespondenz Abwasser, Abfall (Journal title)
KAG	Kommunalabgabengesetz [German Municipal Charges Act]
L	Legislation (relating to OJ)
LAWA	Bund-Länder-Arbeitsgemeinschaft Wasser [German Working Group on water issues of the Federal States and the Federal Government represented by the Federal Environment Ministry]
LKRZ	Zeitschrift für Landes- und Kommunalrecht (Journal title)
N. F.	Neue Folge [New Series]
NRW	North-Rhine Westphalia (German Federal State)
NVwZ	Neue Zeitschrift für Verwaltungsrecht (Journal title)
OJ	Official Journal [of the European Union]
OVG	Oberverwaltungsgericht [Higher Administrative Court]
Rs.	Rechtssache [Case]
SRU	Sachverständigenrat für Umweltfragen [German Advisory Council on the Environment]
TEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union

UBA	Umweltbundesamt [German Federal Environment Agency]
UFZ	Umweltforschungszentrum [Helmholtz Centre for Environmental Research – UFZ]
UK	United Kingdom
VGH	Verwaltungsgerichtshof [Higher Administrative Court]
WasEG	Wasserentnahmeentgeltgesetz [Water Abstraction Charge Act of the German Federal State North-Rhine Westphalia]
WATECO	Working Group 2.6 of the Common Implementation Strategy for the Water Framework Directive [Water Economics]
WFD	Water Framework Directive
WI	Wirtschaft [Economics] (main department of DWA)
WRRL	Wasserrahmenrichtlinie [Water Framework Directive]
wwt	Wasserwirtschaft Wassertechnik (Journal title)
ZfU	Zeitschrift für Umweltpolitik und Umweltrecht [Journal of Environmental Law and Policy]

A. Problem Statement

In Article 9 of the Water Framework Directive (WFD)¹ the European legislator requires Member States to “take account” of the “principle of recovery of the costs [...] including environmental and resource costs” where “water services” are concerned (paragraph 1, sub-para. 1). At the same time Member States are particularly instructed to “ensure” that the “water-pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of this Directive” (paragraph 1, sub-para. 2). Finally, “in so doing”, i. e. when complying with their obligations arising from sub-paragraphs 1 and 2, the Member States can “have regard to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region affected” (paragraph 1, sub-para. 3).

The full wording of Article 9(1) of the WFD is as follows:

“Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis conducted according to Annex III, and in accordance in particular with the polluter pays principle.

Member States shall ensure by 2010

- that water-pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of this Directive,
- an adequate contribution of the different water uses, disaggregated into at least industry, households and agriculture, to the recovery of the costs of water services, based on the economic analysis conducted according to Annex III and taking account of the polluter pays principle.

Member States may in so doing have regard to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected.”

It is not easy to ascertain exactly what the Member States are meant to be obligated to do by Article 9(1) of the WFD.² Yet it is even more difficult to determine that water-pricing is unequivocally in violation of Article 9. The provision is charac-

¹ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for the Community action in the field of water policy, OJ L 327, 22. 12. 2000, p. 1–73.

² *Unnerstall* (2012), p. 103, understandably comments that despite extensive efforts on his part, it is “hardly possible to fully clarify the content of the provisions of Article 9(1) of the Water Framework Directive”.

terised by laborious compromises in the legislative procedure³ and is also studded with terms that require interpretation, over which there is disagreement both in the literature and between the Commission and Member States.⁴ This applies especially to the term “environmental and resource costs” (ERCs). The term is obviously borrowed from the field of environmental economics, but even there it is not in common usage. Economic terms and concepts certainly play a key role in Article 9 (cost recovery, resource efficiency, incentives, economic analysis).⁵ Although the (German) legal literature emphasises that the WFD does not, for example, render a specific economic concept binding but rather naturally carries out an independent standardization of the problem area which requires interpretation,⁶ not without subsequently turning to the field of economics for help in order to gain insight into the concepts and terms in question.⁷

It is therefore not surprising that so many controversies have grown up around the interpretation and implementation of the cost recovery principle, inter alia:

- the scope of the term “water services”,⁸
- the clarification of the Member States’ concrete legal obligations arising from Article 9,⁹
- the meaning of and manner in which “environmental and resource costs” (ERCs) should be measured and included,¹⁰
- the instruments that can be used to recover ERC, especially the question whether conventional command-and-control policies were really sufficient in this respect,¹¹

³ Concerning the evolution of the Water Framework Directive and the disagreement over the definition of cost recovery in Article 9, see *Brockmann* (2003); *Unnerstall* (2006a), p. 29; *id.* (2006b), p. 449; as well as *Kaika/Page* (2003), p. 314.

⁴ The controversy centres mainly on the key term “water services”, which has also been the subject of infringement proceedings before the ECJ. For an overview see *Reese* (2013), p. 355, 361 ff. On the ECJ judgment in 2014 see section III. with further references.

⁵ See also *Hansjürgens/Messner* (2006), p. 424: “Behind this approach lies an environmental economics perspective [...]”

⁶ *Desens* (2008), p. 110; *Kolcu* (2008), p. 88, even sees a “dictatorial claim” made by economic theory, which of course must be fended off. *Reinhardt* (2006) also calls for safeguarding against an “economisation of the law”. In a similar manner – although with regard to water abstraction charges – *Durner/Waldhoff* (2013), p. 91, also insist, almost indignantly: “The purpose of the law is still determined by the legislature and not by environmental economists”. This can no doubt be understood to mean that the interpretive jurisdiction should rest with (legislative) lawyers, but not with economists.

⁷ See for example the corresponding analyses of the economic literature in *Desens* (2008), p. 95 ff., 199 ff., *passim*.

⁸ See on this point *Gawel* (2015a); *id.* (2014b) as well as section III.

⁹ *Gawel* (2014f), p. 330; *id.* (2015c), p. 224 ff., as well as section IV.

¹⁰ *Gawel* (2014h), p. 249; *id.* (2014f), p. 330, as well as sections V. and VI.

¹¹ *Gawel* (2014c), p. 77; *id.* (2015c), p. 260 ff.; as well as section VII.

- the question whether ERC recovery is still due if the environmental targets of the Directive (“good status” of water bodies) are fulfilled.¹²

The much bemoaned fuzziness of Article 9 affects the concept of ERCs in a particular way, because these are anyway only mentioned in recital 38 and in Art. 9 para. 1 sub-para. 1 of the WFD. In addition, there is no dogmatically sound and implementable analogue to be found in economics. *Hansjürgens/Messner* (2006), for example, state:

“Thereby [...] environmental and resource costs in particular represent an entirely new challenge for which certain methods are being discussed among scientists, but for which in practice there are no universally valid solutions at hand.”¹³

Thus environmental and resource costs pose a special challenge to the implementation of the requirements arising from Article 9 WFD which to date has not been solved satisfactorily.¹⁴ Hence it is first necessary to examine the meaning behind the term (section B.). In a similar fashion the key concept of “water services” also needs to be defined (section C.). Then the position/status of ERCs in the norm architecture of Article 9 WFD has to be clarified (D.). A further question is precisely “what” costs are to be covered (E.) and in what manner (“how”) can ERCs be “taken into account” and how in terms of concrete organisation can they be included in the cost recovery (F.). Section G. discusses which environmental and water pricing instruments can be applied to cover ERC. The work closes with an overall conclusion (H.).

¹² *Gawel/Unnerstall* (2014a), pp. 49 ff.; *id.* (2014b), pp. 223 ff.; *id.* (2014c), p. 963, as well as section V.4.

¹³ *Hansjürgens/Messner* (2006), p. 424 (translation by the author).

¹⁴ See on the concrete implementation efforts so far across the EU Member States e. g. *Reese* (2013) on Germany, *Aragao* (2013) on Portugal and *Lindhout* (2013) for the Dutch case.