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Cost Recovery for Water Services in the EU

The EU Water Framework Directive stipulates the principle of cost recovery, including environmental and resource costs, for European water services. Yet a definition of member states' precise obligations is highly controversial. This particularly holds true for the question whether the request for cost recovery can be restricted to water supply and wastewater disposal only, as many member states argue. The European Court of Justice has now decided on the Commission's infringement proceedings against Germany regarding the scope of the term "water services". In its eagerly awaited substantive decision, the Court dismissed the Commission's action as unfounded but left the door open for further claims. However, many legal arguments in favour of a strict interpretation of cost recovery are not only misleading but also pass up valuable opportunities to deal with scarce water resources in an efficient way.

Article 9(1) of the EU Water Framework Directive (WFD) requires member states to "take account" of the "principle of recovery of the costs [...] including environmental and resource costs" where "water services" are concerned (first subparagraph). 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" (second subparagraph). Finally, "in doing so", i.e. when complying with their obligations arising from the first and second subparagraphs, 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" (third subparagraph).

In its specifications, Article 9 differentiates between "water services" and the more widely defined "water uses", which include water services. Article 2(38) defines water services as "all services which provide, for households, public institutions or any economic activity: (a) abstraction, impoundment, storage, treatment and distribution of surface water or groundwater, (b) wastewater collection and treatment facilities which subsequently discharge into surface water". According to Article 2(39), water use means "water services together with any other activity identified under Article 5 and Annex II having a significant impact on the status of water".

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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.[1] This standard is characterised by laborious compromises made during the legislative process[2] and is studded with terms that require interpretation, about which there is disagreement both in the literature and between the Commission and member states.

Thus, hardly surprising, manifold controversies have arisen around the interpretation and implementation of the cost recovery principle, inter alia:

- the scope of the term "water services"[3]

1 H. Unnerstall: Ökonomische Elemente in der WRRL und ihre Umsetzung, in: F.R. Lauterbach, J. Cortekar, A.K. Buchs, R. Markgraf (eds.): Handbuch zu den ökonomischen Anforderungen der europäischen Gewässerpolitik: Implikationen und Erfahrungen aus Theorie und Praxis, Stuttgart 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 WFD.

2 As far as the genesis of the WFD is concerned, as well as the disagreement regarding the definition of "recovery" in Article 9, see C. Brockmann: Die Handlungsfähigkeit der Europäischen Union – untersucht am Beispiel der EU-WRRL, Heidelberg 2003; H. Unnerstall: Das Prinzip der Kostendeckung in der EU-Wasserrahmenrichtlinie – Entstehung und Gehalt, in: Zeitschrift für Europäisches Umwelt- und Planungsrecht, Vol. 4, 2006, p. 29; H. Unnerstall: The Principle of Full Cost Recovery in the EU-Water Framework Directive – Genesis and Content, in: Journal of Environmental Law, Vol. 18, 2006, p. 29; as well as M. Kaika, B. Page: The EU Water Framework Directive: part 1. European policy-making and the changing topography of lobbying, in: European Environment, Vol. 16, No. 6, 2003, p. 314.

3 See on this E. Gawel: ECJ on cost recovery for water services under Article 9 of the Water Framework Directive: Camera locuta causa non finita, in: Journal for European Environmental and Planning Law, Vol. 12, No. 1, 2015; E. Gawel: Article 9 Water Framework Directive: What does the term "water services" mean? On the EU Court of Justice conclusions of Advocate General Jääskinen in case C-525/12, UFZ Discussion Paper 20/2014, Leipzig 2014.

- the clarification of the member states' concrete legal obligations arising from Article 9[4]

- the meaning itself and the way of both measurement and inclusion of "environmental and resource costs" (ERC)[5]

- the instruments that can be used to recover ERC, especially with regard to whether conventional command-and-control policies are really sufficient in this respect[6]

- whether ERC recovery is still required if the environmental targets of the Directive ("good status" of water bodies) are fulfilled.[7]

Infringement proceedings against Germany

At the heart of the present infringement proceedings against Germany[8] lies the definition of the concept of water services, and thus the scope of the principle of recovery of costs as arising from Article 9(1) of the WFD. The view taken by Germany – as well as by Austria, Sweden, Finland, Hungary, the UK and Denmark, which have joined the action as interveners – is that "water services", as per Article 2(28) of the WFD, merely refers to water supply and wastewater disposal as provided by independent service providers.[9] The Commission, on the other hand, interprets this more widely, so that it also includes the "impoundment for the purpose of generating electricity from water, shipping and flood control, abstraction for irrigation and industrial purposes, as well as own use".[10] It is asserted that any implementation of the WFD which fails to include these services in the interpretation of water services and the recovery obligations tied to them constitutes an infringement. In order to have the infringement established, the Commission brought an action before the European Court of Justice (ECJ) on 19 November 2011.[11]

The proceedings are of principal importance, as the ECJ's judgement could resolve the contentious scope of the principle of recovery of costs in a binding manner. The government of the Federal Republic of Germany currently takes the view that it already fully satisfies the requirements of Article 9 regarding the recovery of costs on the basis of the country's financial cost-recovering communal charges[12] for water supply and wastewater disposal and – with respect to environmental and resource costs – by way of the German federal wastewater charge[13] and water abstraction charges[14] levied by 13 (out of 16) federal states. By contrast, if the ECJ were to agree with the interpretation of the Commission, it would become necessary to at least consider the recovery of costs for a large number of further water uses across Europe and to justify formally any deviations.

Water services: no definition of scope by the ECJ

Given this background, anyone who had hoped that the highest court would provide a convincing, or at least fi-

4 E. Gawel: Umwelt- und Ressourcenkosten: Begriff und Stellung im Rahmen von Art. 9 WRRL, in: Die Öffentliche Verwaltung, Vol. 67, No. 8, 2014, p. 330.

5 Ibid.; E. Gawel: Article 9 Water Framework Directive: Do we really need to calculate environmental and resource costs?, in: Journal for European Environmental and Planning Law, Vol. 11, No. 3, 2014, p. 249.

6 E. Gawel: Instrumente zur Berücksichtigung von Umwelt- und Ressourcenkosten nach Art. 9 WRRL, in: Natur und Recht, Vol. 36, No. 2, 2014, p. 77.

7 E. Gawel, H. Unnerstall: Adequate Consideration of Environmental and Resource Costs According to Article 9 WFD in the Real World, in: Korrespondenz Abwasser, Vol. 61, 2014, No. 1, p. 49, and No. 3, p. 223; E. Gawel, H. Unnerstall: Ist der Kostendeckungsgrundsatz in Art. 9 WRRL allein umweltzielbezogen?, in: Deutsches Verwaltungsblatt, Vol. 129, No. 15, 2014, p. 963.

8 Case C-525/12.

9 This also appears to be the prevailing opinion, albeit with different assessments of own use – see in this respect S. Kolcu: Der Kostendeckungsgrundsatz für Wasserdienstleistungen nach Art. 9 WRRL, Berlin 2008, p. 57; S. Desens: Wasserpreisgestaltung nach Artikel 9 EG-WRRL, Berlin 2008, p. 148f.; E. Gawel, H. Köck, K. Kern, S. Möckel, R. Holländer, M. Fälsch, T. Völkner: Weiterentwicklung von Abwasserabgabe und Wasserentnahmeentgelten zu einer umfassenden Wassernutzungsabgabe, Dessau-Roßlau 2011, p. 42ff.; W. Durner, C. Waldhoff: Rechtsprobleme einer Einführung bundesrechtlicher Wassernutzungsabgaben, Baden-Baden 2013, p. 29ff.; M. Reese: Cost Recovery and Water Pricing in Water Services and Water Uses in Germany, in: Journal for European Environmental and Planning Law, Vol. 10, No. 4, 2013, pp. 361ff.

10 Application of the Commission, cited as per the conclusions of the Advocate General Niilo Jääskinen, dated 22 May 2014, case C-525/12, p. I.1. Similarly in literature, see H. Unnerstall: Anforderungen an die Kostendeckung in der Trinkwasserversorgung nach der WRRL, in: Neue Zeitschrift für Verwaltungsrecht, Vol. 25, No. 5, 2006, p. 528; H. Unnerstall: Kostendeckung für Wasserdienstleistungen nach Art. 9 EG-Wasserrahmenrichtlinie, in: Zeitschrift für Umweltrecht, Vol. 20, No. 5, 2009, p. 236; H. Unnerstall: Ökonomische Elemente in der WRRL und ihre Umsetzung, in: F.R. Lauterbach, J. Cortekar, A.K. Buchs, R. Markgraf (eds.): Handbuch zu den ökonomischen Anforderungen der europäischen Gewässerpolitik, Stuttgart 2012, p. 96ff.; F. Stangl, in: Umweltdachverband (ed.): Ökonomische Instrumente im Wasserschutz, Wien 2012, p. 80; H.F.M.W. van Rijswick, H.J.M. Havekes: European and Dutch Water Law, Groningen 2012, p. 430ff.; H. Brackemann, H.-P. Ewens, E. Interwies, A.R. Kraemer, A. Quadflieg: Die Wirtschaftliche Analyse nach EG-Wasserrahmenrichtlinie, in: Wasser und Abfall, Vol. 4, No. 6, 2002, p. 38.

11 OJ C 26, 26.01.2013, p. 35.

12 For a critical view of the alleged congruence of this particular fee-related principle of cost recovery in the German law with the European principle pursuant to Article 9 WFD, see E. Gawel: Art. 9 EG-Wasserrahmenrichtlinie: Wo bleibt die Reform des Kommunalabgabenrechts?, in: Kommunale Steuer-Zeitschrift, Vol. 61, No. 1, 2012, p. 1.

13 See on this E. Gawel: Taking into Account Environmental and Resource Costs for Waste Water Discharge: Current Challenges for and Perspectives of the German Waste Water Charge, in: Journal of Environmental Law and Policy, Vol. 37, No. 3, 2014, p. 301.

14 E. Gawel et al.: Weiterentwicklung von … , op. cit.

nal, clarification of the notion of "water services" under Article 2(38) of the WFD will be disappointed.[15] Indeed, the Court did find the Commission's claim against Germany to be admissible, deviating in this respect from the opinion of the Advocate General (AG), who questioned the admissibility of the claim.[16] In its remarks on the alleged lack of substantive merits of the action, the ECJ[17] did not wish to deal with the central conceptual dispute at all, but instead focused entirely on the examination of the alleged failure to meet obligations, ultimately leaving aside the "water services" element of the case. No conclusions could be drawn from a literal interpretation of the wording of the provisions of Articles 2 and 9 of the WFD that would finally clarify the dispute (paragraph 45 of the judgement). However, the ECJ does at least state that the failure of the Commission's action is not attributable to the "water services" criterion. The judgement expressly states that the contested water-related "activities" can have a significant impact on waters and therefore may entail the risk of failure to meet the objectives of the Directive (paragraph 56). At any rate, the ECJ stays well clear of the unambiguousness in every aspect asserted by the AG.[18] This means, however, that the precise content and above all the boundaries of the "water services" concept remain unfortunately completely open.

The ECJ's goal-oriented approach

The ECJ rejects a clarification based on the pure wording of Articles 2(38) and 9 of the WFD. Instead, the historical development and overall scheme of the provisions should be analysed first. The ECJ infers from the legislative history that, in view of the deliberate provision of discretionary scope to the member states, the original intention was not to extend the cost recovery obligation to all water services in the EU without exception (paragraph 47), which of course nobody had claimed anyway. Furthermore, the Court holds that Article 9 "does not per se impose a generalised pricing obligation in respect of all activities relating to water use" (paragraph 48), which is equally undisputed. Next, the ECJ continues with a teleological interpretation (paragraph 49ff.), which it deems necessary in respect of cost recovery "in the light of the objectives pursued by Directive 2000/60". It is from this that the Court finally draws its decisive arguments.

In this context, the ECJ first refers to the character of the WFD as a framework directive adopted on the basis of Article 192 TFEU, which "does not seek to achieve complete harmonisation of the rules of the Member States concerning water" (paragraph 50). Furthermore – similar to the previous opinion of the AG – the Court focuses on the WFD's approach to decentralised management planning, which is aimed at making "specific solutions" possible in the framework of river basin-based programmes of measures (paragraph 52f.). In doing so, the "measures for the recovery of the costs of water services" are characterised – albeit less clearly than in the opinion of the AG – as one instrument *among others* "available to the Member States for qualitative management of water in order to achieve rational water use" (paragraph 55). Then, although the Court concedes to the Commission that the water-related "activities" listed in Article 2(38) WFD may put the achievement of the objectives of the Directive in danger, it holds that this does not mean that "the absence of pricing for such activities will necessarily jeopardise the attainment of those objectives" (paragraph 56).

Here the ECJ succumbs to the same serious misunderstanding that already characterised the AG's opinion: the affirmation of the extension of cost recovery obligations to additional water uses beyond water supply and water treatment does not in the final analysis mean that full cost recovery has to be applied to each and all activities. The cost recovery programme arising from Article 9(1) is designed openly and flexibly in respect of the actual interpretation (e.g. regarding the instruments) and is moreover conditioned by the third subparagraph of Article 9(1) (proportionality assessment). Indisputably, the European legislator has opposed making a strict, across-the-board application of the cost recovery policy binding. But nobody has argued for this – certainly not the Commission in its forms of order. Instead, the ECJ was asked to establish whether the "activities" in question must, in principle, be included in the member states' deliberations on appropriate cost recovery policies or whether, in terms of legal criteria, they are a priori outside the sphere of obligation reserved for "services". Merely establishing that failure to fulfil the obligations of the WFD is not an inevitable consequence of foregoing certain cost recovery measures obviously fails to address the test question that needed to be clarified.

Yet another question arises in this context: What exactly should be understood under the term "objectives of the Directive", which, if jeopardised, would give grounds to reinstate cost recovery obligations for certain "activities"? An understanding of objectives based solely on environmental objectives as per Article 4 of the WFD ("good status") would in any event be inappropriate and would fail to satisfy the overall goals of the WFD, which are primarily

15 The WFD ties the obligation in Article 9 to take account of the "principle of recovery of the costs of water services, including environmental and resource costs" to Article 2(38).
16 Application of the Commission, op. cit., paragraph 30.
17 ECJ, Case C-525/12 – Commission v Germany.
18 Application of the Commission, op. cit., paragraph 55.

set out in Article 1.[19] Therefore, cost recovery according to Article 9 of the WFD is not just some random instrument among many, which would appear to some extent expendable. Rather, according to Article 11(3)(b) WFD, it is one of the minimum requirements ("basic measures") for a management programme and, as a fundamental ordering principle of cost responsibility in dealing with resources, has its own status in the context of the sustainability objectives of Article 1.

Commission invited to take renewed action

Yet by stating that the objectives of the Directive "do not *necessarily* imply that Article 2(38)(a) thereof must be interpreted as meaning that they all subject all activities to which they refer to the principle of recovery of costs" (paragraph 58, emphasis added), surely the ECJ establishes that this could at least be possible. Consequently, according to the ECJ, the fact that Germany "does not make some of those activities subject to that principle does not establish *by itself, in the absence of any other ground of complaint*" that it has failed to fulfil its obligations (paragraph 59; emphasis added). This can be understood as a barely encrypted hint that, in the future, the Commission above all has to either claim that there is a threat of a specific failure to comply, e.g. simply because no compliance-equivalent measures have been taken beyond cost recovery, or that the conditions laid down by the European legislator for a partial suspension are not met, or that the obligation to report and state reasons has been infringed. The Court takes the view that the Commission complained too little, as it were, and confined its complaint to the failure to consider certain "activities", relying in this respect on the notion of "water services". Since this alone does not hold up, a substantiated account of a failure to fulfil obligations would be required. This opens the way for further infringement proceedings.

Hence, in the context of, for instance, the liability for water abstraction charges, one is eager to find out the extent to which the far-reaching exemptions from water abstraction charges in the 13 German federal states where they are levied,[20] as well as the complete absence of abstraction charges in the remaining three federal states, can be allowed without posing any risk to the attainment of the WFD's objectives. Furthermore, one is curious as to how the complete lack of formal justification can be in compliance with the mandatory reporting requirements.

Causa non finita: continuation foreseeable

Under the circumstances, the next stage of the dispute is likely to follow soon. The Commission will feel positively encouraged to submit a new complaint to the ECJ after readjusting and extending its grounds for complaint. A promising line of argument was delivered, as it were, by the current judgement. Yet whether a detailed statement of grounds will hold enough weight to successfully establish that e.g. Germany has failed to fulfil its obligations is admittedly doubtful. Here the ECJ would at the same time have to substantially strengthen the substantive content of the obligations arising from Article 9 WFD against the numerous conditions and exemption powers that apply here. However, the most recently presented ECJ judgement does not necessarily indicate that this really will occur.

Misleading interpretations of economic instruments

In any case, the line of argument put forward by the Advocate General and picked up by the ECJ is completely beside the point. They claim that the absence of a binding instrument for implementing full cost recovery uniformly across all member states according to Article 9 WFD argues for the admissibility of a priori exemption of certain "activities" from *any* cost recovery consideration or justification. It is misconceived here that cost recovery would in either case still be subject to open-ended concretion, interpretation and proportionality assessment according to the third subparagraph of Article 9(1) on the part of the member states, regardless of the fact that nobody wants to deny them their specific decentralised powers. This would be absurd, especially since the first sentence of Article 9(1) merely requires the member states to "take account of" the "principle" of cost recovery, and this principle (along with more detailed specifications from the second sentence) is subsequently also subject to a quite broadly defined provision, by which special sector-specific and regional characteristics may be taken fully into account. This opens up the concept of cost recovery and makes it more flexible, explicitly offering scope for river basin-specific management concepts and circumstances.

So, the decisive question here is not for which activities Article 9 foresees full cost recovery across the board *as the result of water policy enforcement* by the member states, but rather which water uses should be the subject of such open-ended discussions, which also require justification, in the first place. At least the ECJ did not support the AG's further rationale with its highly irritating, stylised interpretation of cost recovery under Article 9 as a coercive instrument that is structurally incompatible with decentralised management and which should be restricted, as it were, to just a small number of water uses to prevent

19 See in this respect E. Gawel, H. Unnerstall: Ist der Kostendeckungsgrundsatz … , op. cit., with further references.

20 See in this respect E. Gawel: Zur Rechtfertigung der Ausnahmen von der Abgabepflicht für Wasserentnahmen, in: Natur und Recht, Vol. 36, No. 1, 2015.

"collateral damage" at the expense of meaningful management adapted to local conditions.[21]

This line of the AG's argument does no less than build up a straw man: one is given the impression that member states would be "forced" to "uniformly" apply full cost recovery and would thus no longer be able to follow their own, bespoke management concepts, or that they would be instrumentally restricted. This is absurd, not least because the first bullet point of Article 9(1) merely posits the "principle" of recovery to be "taken into account" by the member states and subjects this principle (as well as its more detailed specification as per the second bullet point) to a fairly broad caveat in subparagraph 3, with the help of which it is possible to comprehensively take into account specific sectoral and regional features. This opens the way for the principle of recovery of costs being very open and flexible, and to expressly allow for specific management concepts and circumstances.

In addition, it is precisely the exact manner of instrumenting the recovery of costs as per Article 9 which is left open; what is crucial, rather, is an attribution of costs to the user which is fair to the person responsible. It is undisputed that it is possible that measures other than ones which are directly related to price can contribute to an indirect attribution of costs, such as, for example, regulatory provisions, and that those can therefore be considered a measure of "water price policy", for example in respect of environmental and resource costs.

Considering the view widely held in German legal literature that it is precisely due to its vague requirements and far-reaching qualifications that Article 9 effectively does not impose any obligations,[22] it is somewhat surprising to suddenly find it being stylised into a powerful coercive instrument. At the same time, the hypotheses which seems to form the basis for this view – namely that responsible conduct with regard to costs in respect of dealing with resources would in some way "interfere with" regional management planning that is aimed at sustainable use and protection of waters, and that this could only be tolerated as an exception in the supply of water and wastewater disposal – is somewhat bizarre. The whole recovery of costs arising from Article 9 is hereby stylised into some form of foreign matter which must be tamed and tightly controlled so as not to create any further damage (foiling bespoke concepts, wrong choice of instruments).

This perspective can also be found in the AG's finding, which again is not supported in detail, that regulatory controls of the market are "frequently more suitable" than price solutions (AG's opinion, paragraph 91). Even if this were the case, which in certain cases is not disputed from an environmental economics perspective,[23] this is clearly not an argument in favour of restricting the concept of water services to local water services: Article 9 neither excludes regulatory measures in order to allocate costs, nor does it prescribe any specific instrumental regime, nor can such recovery of costs be applied "uniformly" (AG's opinion, paragraph 90), "homogenously" (paragraph 92) or "universally" (paragraph 94) to all member states or all river basin districts. Even if one just looks at the wording of Article 9, the exact opposite is the case!

Without any reason, the AG seeks to qualify the meaning of Article 9 ("not an autonomous instrument" – paragraph 76) and comments on the "merely supplementary character of the determination of charges" (paragraph 83). This common image of recovery of costs having merely a supplementary function has already been rejected elsewhere:[24] the WFD does not give any indication that this should be a purely instrumental function (as compared to Article 4 of the Directive), regardless of whether when one analyses the wording of Article 9 or if one interprets it systematically or teleologically. Rather, the responsibility for costs pursuant to Article 9 is a fundamental principle of order in a world of scarce resources, and as such it is an independent part of the framework of order established by the WFD as a whole, as per Article 1. However, it is entirely unclear, both materially and in view of the utmost flexibility granted by Article 9, why the principle of responsibility for costs and user responsibility should not harmonise with the concepts of regional river basin management planning, as the conclusions repeatedly claim or insinuate.

Responsibility for costs as a means of water conservation

On the whole, legal arguing often seems to be permeated by sweeping misunderstandings as far as the content and status of Article 9 itself is concerned, as well as in relation to the principal role that responsibility for costs in dealing with resources plays when dealing with the sustainable management of water resources. "Polluter pays"-orient-

21 For a critical view, see E. Gawel: Begriff der Wasserdienstleistungen in Art. 9 WRRL – Anmerkungen zu den EuGH-Schlussanträgen von GA Jääskinen in Rs. C-525/12, in: Infrastrukturrecht, Vol. 11, No. 7, 2014, pp. 149, 152ff.

22 Thus, for example, C. Waldhoff: Statement, in: Landtag North Rhine-Westphalia, APr 15/239, p. 5; and similarly M. Reinhardt: Kostendeckungs- und Verursacherprinzip nach Art 9 der EG-Wasserrahmenrichtlinie, in: Natur und Recht, Vol. 28, No. 12, 2006, p. 740, who claims to only recognise "empty words".

23 See E. Gawel: Staatliche Steuerung durch Umweltverwaltungsrecht – eine ökonomische Analyse, in: Die Verwaltung, Vol. 28, 1995, p. 201.

24 See in this respect E. Gawel, H. Unnerstall: Ist der Kostendeckungsgrundsatz … , op. cit., p. 963.

ed responsibility for costs is far from being some remote matter in a regional water resources management strategy; rather, it is an essential part thereof. Responsibility for costs limits access to resources to an extent which is economically efficient and thus eases the burden on the ecosystem, prevents an unfair shifting of the burden onto third parties or the general public, and enables the flexibility which is necessary for formative management to work. The details of how exactly such responsibility for costs will need to be implemented in their respective settings as part of a recovery concept, and the consequences that will have to be borne in mind, is precisely something that is at the discretion of the member states (although they have an obligation to report). Ecological responsibility for costs may be undesirable for many from an economic, social and political perspective, but nevertheless it serves the aims of the WFD without limitation. It is exactly Article 9 that opens up the opportunity to also work on this sensitive area, in a decentralised and proportionate manner, as far as economic, social and ecological effects are concerned. Consequently, a restrictive interpretation of the concept of water services is entirely unnecessary.

Therefore, in order to define the term "water services", which, on the whole, is rather indistinct, one should avoid the temptation to denigrate the principle of recovery of costs and the price mechanisms for its implementation as marginal and even problematic, interfering objects which need to be limited. Indeed, attempts to do so could conceivably make it tolerable to strictly restrict these to a few exceptional areas. Just recently the German state of Saxony incorporated hydroelectric power into its water abstraction charges.[25] In doing so, it has managed to demonstrate that pricing hydroelectric energy, pursuant to Article 9, poses neither a risk to the German energy transition towards renewables, the so-called *Energiewende*, nor does it unleash a problematic, coercive instrument which would now impose an obligation on other German federal states or EU member states to follow that particular management assessment. On the contrary, this instrument can serve to allow the market to separate out power stations which are economically inefficient, as they are highly significant from a water ecology perspective, and which do not make a significant contribution to the electricity supply provided by renewables. Any EU member state which does not want to go this route can take a different approach or claim an exemption as per the third indent of Article 9(1).

25 See in this respect E. Gawel: Zur Erstreckung der sächsischen Wasserentnahmeabgabe auch auf die Wasserkraft, in: Sächsische Verwaltungsblätter, Vol. 21, No. 7, 2013, p. 153; B. Dammert, G. Brückner: Verfassungsrechtliche Fragen zur Erhebung einer Wasserentnahmeabgabe auf die Nutzung der Wasserkraft, in: Landes- und Kommunalverwaltung, Vol. 23, No. 5, 2013, p. 193.