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Walter Geller, Jan Blachuta, Šarka Blažková, Evelyn Claus, Alfred Dubicki,
Hildegard Feldmann, Helmut Guhr, Edeltrauda Helios-Rybicka, Hubert
Holzmann, Wiwiana Szalinska, Wolf von Tümpling, Gulay Záray (Eds.)

Department Inland Water Research
UFZ Centre for Environmental Research Leipzig-Halle

Archiv

The authors bear the responsibility for the content of their contributions.

Economic instruments in the Water Framework Directive – An interpretation of Art. 9 WFD and its implementation

HERWIG UNNERSTALL

UFZ Centre for Environmental Research, Department of Environmental and Planning Law, P.O.Box 500 136, 04301 Leipzig, email: herwig.unnerstall@ufz.de

Almost for the first time in European environmental legislation the WFD in Art. 9 urges the member states to use economic instruments in order to reach the environmental objectives laid down in the Directive. The current wording is a compromise of different approaches taken by the European Parliament and the Council. In fact Art. 9 WFD contains three different tasks, whose relationship is rather unclear:

- Cost recovery for water services
- an adequate contribution of water uses to the recovery of the costs of water services,
- water-pricing policies shall provide adequate incentives for users to use water resources efficiently

Different types of measures are necessary to implement these provisions adequately in national law.

1. History of Art. 9 WFD and its interpretation

Art. 9 WFD has been a major issue in the evolution of WFD and therefore has been contested from the beginning onwards. The controversy was around the degree of obligation, the extent of exception from the obligation and the conceptual orientation.

As the Conciliation Committee composed of the Members of the European Parliament and the European Council could not enter into an agreement over a common text, they simply merged their particular proposals to a new version. The final adopted version is the following:

Article 9: Recovery of costs for water services

1. 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.

Art. 9(1) 1st subp. WFD stems from the Council and Art. 9(1) 2nd subp. stems from the Parliament and the 3rd sub. from the Council, but has hardly been disputed by the Parliament. The interpretation of Art. 9 WFD has therefore to start with the hypothesis, that each paragraph has to be read as being “isolated” and complete to identify the overlappings and differences between the 1st and the 2nd subpara. These approach reveals that the both the cost recovery for water services and the adequate contribution of water uses to the recovery of the costs of

water services can be found in the 1st and the 2nd subpara. either directly or by interpretation of the reference to the polluter-pays-principle. Art. 9 WFD contains a step within the degree of obligation: from “taking into account the principle [immediately; H.U.]” to “ensure by 2010”. Only the idea of using water pricing policies as an instrument can only be found in the 2nd subpara. On this instrumental basis water prices may be raised beyond the level of cost recovery, which is important as the proper calculation of costs and the distribution of the costs among the users according to the polluter-pays-principle is rather difficult.

The WFD contains no definition of costs, especially not of environmental and resource costs. The European Commission has tried to define these costs.

Equally important is the question of the scope of “water services”. The LAWA has restricted the scope of application mainly to public water supply and municipal water-disposal. Industrial-commercial water supply (own production), agricultural water supply (irrigation) and industrial-commercial waste-water disposal (direct discharger) are no water services unless they have a significant (considerable) influence on the water balance. The LAWA also excludes impoundments for the purpose of electricity generation and navigation and any measures for flood protection from the “water services”. These restrictions are not in accordance with the guidelines of the CIS-WATECO. There is no difference between publicly and privately run services in the WFD and “impoundments” are explicitly mentioned in the definition of “water service” in Art. 2 no. 38 WFD.

2. Implementation options in Germany

For the implementation of the cost recovery principle different approaches according to the different levels of costs have to be considered. Financial costs of public water supply and wastewater disposal are best recovered by “public” local rates or “private” prices. These instruments are not suited to recover environmental and resource costs. Their recovery has to be settled on a higher level. The water extractions charges of some of the federal states (“Bundesländer”) are a possible starting point. Although they are nationally (as to the Basic Law) not justified with reference to environmental and resource costs, they allow for the necessary differentiation and of water charges according to the regional water balances and different water uses. The Waste Water Charge Act is the appropriate instrument to recover the environmental and resource costs of wastewater disposals, but it has to be revised in several aspects and a regional differentiation has to be invented to fulfil the task adequately. For water services beyond water extraction and wastewater discharge “new” instruments have to be developed, like a charge on the use of waterways that were widely used in Germany till the middle of the 19th century.

Beyond those well-established instruments the implementation of the adequate contribution of those water uses, that are not water services, to the recovery of costs of the water services require new instruments beyond the traditional water law. Activities producing diffuse pollution of waters, like agriculture or individual transport traffic, and therefore increasing the cost of the provision of water services, have to bear these additional costs. A charge on organic or mineral fertilizers has been discussed for 30 years, but hasn’t become reality. There are some highly controversial questions as regards the integration in the system of public dues and the relevant competencies laid down in the Basic Law have to be solved for the introduction of these instruments.