Cost recovery as a policy instrument to achieve sustainable and equitable water use in Europe and the Netherlands

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Cost recovery as a policy instrument to achieve sustainable and equitable water use in Europe and the Netherlands

Kostenterugwinning als beleidsinstrument
voor een duurzaam en billijk watergebruik in Europa en Nederland
(met een samenvatting in het Nederlands)

Proefschrift

ter verkrijging van de graad van doctor aan de Universiteit Utrecht op gezag van de rector magnificus, prof.dr. G.J. van der Zwaan, ingevolge het besluit van het college voor promoties in het openbaar te verdedigen op vrijdag 27 maart 2015 des middags te 4.15 uur

door

Petra Eleonora Lindhout

geboren op 29 december 1975

te Amsterdam

Promotoren: Prof.dr. H.F.M.W. van Rijswick

Prof.dr. R. Nehmelman

‘The disenchantment of the world is connected to another massively important phenomenon of the modern age, which also greatly troubles many people. We might call this the primacy of instrumental reason. By “instrumental reason” I mean the kind of rationality we draw on when we calculate the most economical application of means to a given end. Maximum efficiency, the best cost-output ratio, is its measure of success. (…) In one way this change has been liberating. But there is also a widespread unease that instrumental reason not only has enlarged its scope but also threatens to take over our lives. The fear is that things that ought to be determined by other criteria will be decided in terms of efficiency or “cost-benefit” analysis, that the independent ends that ought to be guiding our lives will be eclipsed by the demand to maximize output.’

- Charles Taylor, The Malaise of Modernity, p. 4/5 -

Intrinsically, solidarity with this earth and its coping capacity is lacking.

Preface

Why endure the hardship of writing a PhD thesis alongside being a wife and mother and having an almost full-time job? This question was raised by many people during the last four years. And to be honest, sometimes even I was not sure that I could combine all these things. Of course, my children are number one. I love them dearly and think that they love me likewise, because mum had to work quite often and although sometimes disappointed, they never complained. I am very lucky to have a good marriage and supporting husband. Thank you, my loved ones.

Without my family's relentless support, finishing this thesis would indeed be a hardship. But it was not. Although it meant working very, very hard at times, I have enjoyed my research enormously! Also finding myself in an academic environment once again and, on the other hand, having the experience of real practice in working for three municipalities has been a fruitful combination.

My sincere thanks go to Marleen van Rijswick, my thesis supervisor. She assessed me, not only as a PhD candidate, but also as a person, very well. I remember our conversation in the train to Zaragosa (Spain) about the truly important things in life. Such conversations are for me the fuel for persistence in achieving tasks. They truly matter. Her feedback on the content of this book was always constructive and pushed my thoughts about cost recovery and sustainable water use to a higher plane. Also pulling me out of too many details (!) and addressing the overarching developments in water management have greatly contributed to me getting to grips with the choices that I had to make in this research. Thank you!

I owe Remco Nehmelman many thanks. I remember him reading the concept chapters for the first time. They were even shorter than those published in this book. He delicately pointed me towards the necessity of telling the readers upfront what they may expect. Smooth out the information, otherwise I would run down the reader. The accessibility of this book has improved due to his constructive feedback.

Furthermore, I express my sincere gratitude to the professors in the Assessment Committee: Mr. Ben Schueler, Professor of Administrative Law, Environmental and Planning Law at Utrecht University; Mr. Rob Widdershoven, Professor of European Administrative Law at Utrecht University; Ms. Sacha Prechal, Professor of European Law at Utrecht University and judge at the European Court of Justice in Luxembourg; Ms. Hanna Sevenster, Professor at the Amsterdam Centre for Environmental Law and Sustainability and member of the Dutch Council of State; Mr. Wolfgang Köck, Professor of Environmental Law of the Helmholz Zentrum für Umweltforschung in Leipzig.

I thank Utrecht University for having given me the possibility to carry out this PhD research and thank my colleagues at the Utrecht Centre for Water, Oceans and Sustainability Law for the fine contacts and constructive cooperation during these years. A word of thanks also to Titia Kloos and Peter Morris of the Editing Department for the revision of this book at short notice.

Taking the risk of being terribly incomplete, a word of thanks for supporting me must be extended to my 'seconds' Beatrice Lindhout and Marieke den Braber. They both know what writing a PhD thesis is all about and both have supported and encouraged me during the entire process. My other family members and many friends surrounding me, enquiring periodically about my progress, I also thank.

I thank my employer, the municipality of Leerdam, for having granted me the necessary leave of absence to work on this book. My team members at the legal department and colleagues from

other departments have shown what collegiality is all about. They have provided much intrinsic nourishment and ensured that I was well fed during my leave of absence. Thanks for your support.

But why write a book about cost recovery in water management?

Because I was curious and did not have immediate answers to questions regarding this topic. One could say that this study was instigated by curiosity. Curiosity regarding the role of economic instruments in European and Dutch water legislation. Both on the European and national level the use of economic instruments as one of the means to attain environmental goals is generally acknowledged. The economic instruments used take different forms. On the one side, there are charges, levies and taxes, which mostly intend to discourage certain behaviour by raising the costs for non-environmentally friendly actions. On the other hand, there are subsidies and reductions, et cetera, to acknowledge and stimulate good behaviour or to provide possibilities to adjust behaviour. But water (service) pricing is a delicate topic when it concerns environmental targets. In the Netherlands, where for most water-related services the payment of costs is already general practice, the debate goes on as to whether economic instruments should also be used with regard to ecosystem services. Illustrative is the next example: an opinion poll has been held in the Netherlands regarding the question whether people should pay to have a stroll or to cycle in the countryside.[1] But also questions like 'who is to pay for flood protection? Why not have an insurance policy for that risk instead of cost coverage from the general tax budget?', is a topical issue in the Netherlands. Questions like 'who is to pay for what' and which principles should form the backbone for the choice which has been made?

These issues triggered me to take a close look at the economic instrument of cost recovery from a legal point of view. This book is the product of my research. With this research I hope to have contributed something to the debate on outstanding issues of cost recovery and its relation to sustainable and equitable water use. Not only by means of this book, but also by means of the published articles and annotations I wrote during these research years. For me this research is successful if I have been able to shed a motivated, argumented, light on parts of cost recovery in water activities, contributing to further insights to come to environmentally effective water management. With the utmost sincerity, of course.

Bergambacht (the Netherlands), December 2014,

Petra Lindhout

Contents

1 Introductory chapter

1.1 General introduction

Water is essential for existence of any life on Earth. Water has many different functions. Of course we need water just 'to be'. But besides water as existential live line, it also provides for quality of life. In the Netherlands, where there is an abundance of water, our daily life is imbued with water: for sanitation and recreation, or in relation to enjoying nature (flora/fauna). Water enables economic activity and production processes. Also agriculture is to a very large extent dependent on water for irrigation and water provision for cattle. In water scarce areas, water may be a means of exerting pressure. American intelligence already warned that peoples might go to war about water. In conflict areas water reservoirs and dams are considered strategic positions. The one controlling water has power.

But growing populations and enlargement of prosperity and connecting water uses resulted in negative effects on the quality – and depending on the region - quantity of water. Water pollution, deterioration of ecosystems and reduced water availability are problems to be resolved on international, European and national level. Sustainability of our water resources and ensuring, or even improving, the quality of water is necessary to enjoy also in later times the benefits of water. In this respect an equitable use of water and a fair distribution of the costs of water is considered necessary. Not only for this generation, but also for generations to come.

1.2 Development and objectives water policy

In the last decades the necessity to realize a water policy that strives towards a sustainable and equitable water use and protection of the quality of water, has been acknowledged by many countries. Sustainable water use is to be stimulated. Public information about water use is of great importance to ensure realization on water users' side that sustainable water use is necessary. Another possibility to stimulate sustainable water use may be the use of economic instruments.

Economic instruments may promote a sustainable water use and contribute to an equitable cost allocation between the different water users. Fair cost allocation, including correction mechanisms if allocation of costs would lead to disproportional results, may contribute to equitable water use, ensuring, amongst others, access to water as human right.

The use of economic instruments like subsidies, specific environmental levies and cost recovery gained popularity in the last decades. On international, European and national level the development of water governance proceeds. This development does not only include juridical instruments, but also economic and administrative elements of water policy. The OECD for example considers public sector innovation in the field of water of great importance, as the recent report of water governance in the Netherlands shows.[2] Good water governance is in view of the OECD to attain a number of markers: legitimacy[3], subsidiarity[4], effectiveness[5], efficiency[6] and equity[7].

[2] OECD, Water Governance in the Netherlands: Fit for the Future?, OECD Publishing (2014).
[3] Legitimacy means in this respect complying with international and European Union requirements.
[4] Subsidiarity means in this respect subsidiarity in performing tasks allocated in the framework of a unitary state.
[5] Effectiveness means in this respect effectiveness in delivering policy outcomes in a transparent way and achieving expected results.
[6] Efficiency means in this respect efficiency in doing it at the least cost.
[7] Equity means in this respect ensuring fairness in the service delivery and allocation of uses.

1.2.1 The uprising of economic instruments as solution

In European environmental policy economizing environmental measures has been one of the most important developments since the seventies. The main problem at that time was combating pollution of freshwaters and seawaters. The polluter pays principle, a(n) (economic) principle germinated on European legislative, but also on international economic level (OECD). In its history the polluter pays principle shows a development of growing importance. Starting from a non-legal, economic principle, it became one of the fundamental environmental principles of the Union.[8] It evolved in the economic arena and environmental policy from a non-subsidize principle to a principle holding polluters responsible for also costs like liability payments and costs relating to non-compliance with permits besides the prevention and control costs. Furthermore, the instruments used in relation to this principle changed from withholding subsidies to other polluter pays principles embodying instruments like fees and green taxes.

One of the current environmental economic instruments is cost recovery for water services/use. It has been laid down in European legislation in Article 9 of the Water Framework Directive (hereafter: WFD). It reflects both the user pays principle and the polluter pays principle. When it concerns cost recovery in relation to water use or services, the rationale behind it is that the price of water reflects the sustainable use of the resources used. It means that not only the financial costs of water use/services are transferred to the water user, but also the environmental and resource costs that relate to the water use. These costs are internalised in the water price. If people, industry and other societal economic sectors are aware of the true price of their water use, it is to be expected that it will lead to a more efficient and sustainable water use. That is beneficial for protection of surface water, maintaining ecosystems and the sustainability of water resources.

This development of the uprising of economic instruments on behalf of European and national water policy and environmental policy in general (which will be outlined in this book) has instigated societal discussions on further use of cost recovery or payment for different kinds of ‘services’. The concept of payment for ecosystem services has gained more attention, perhaps due to the inclusion of an economic instrument of cost recovery in European law. As will be shortly highlighted in this book, the WFD embraces ecosystem services if a broad view on water services would be taken.

1.3 Cost recovery in Europe

In 2000 in Europe the WFD explicitly introduced the principle of cost recovery for water services into water law. This was a novelty at the time. The use of cost recovery as a market-based instrument is not new, but the inclusion in a European framework directive is. Cost recovery is mentioned as one of the measures to be used to reach the environmental objectives of the WFD. Besides contributing to the attainment of the environmental objectives, cost recovery may contribute to reaching the overall purposes of the WFD, like sustainable and equitable water use.

1.3.1 A medley of different tunes

It seems, at first hand, that the economic instrument of cost recovery has acquired a strong and solid position in European legislation. One would expect that after about 15 years of existence of the WFD, Member States would be using cost recovery to its full effect to reach the objectives of the WFD. However, Member States have implemented the cost recovery principle for water services in their national legal systems differently and encounter different obstacles.

Sweden, for instance, only determines two water related activities as water service: water supply and waste water services.[9]

Malta, on top of water supply and waste water services determined also the self-abstraction for retail to third parties as a water service.[10]

France seemed to have determined its water services based on the water management plan involved, differing in one plan from only abstraction and waste water treatment to all possible abstractions, water storage, treatment and impoundment in a plan for a different region.[11]

Italy has included in its legislation a widely formulated definition of water services stating that any service that furnishes families, public bodies or any economic activity with extraction, embankment, storage, treatment and distribution of surface waters or ground water constitutes a water service.[12]

In Romania, besides water supply and waste water treatment, a number of water related activities were stipulated as 'public service' to which the cost recovery principle is applied. These services include hydropower, navigation, abstraction, irrigation, water resource use by industry and agriculture.[13]

And, last in this row, Spain decided that all activities related to water management that enable water use constitute water services. These are, amongst others, abstraction, desalination, storage, channelling, rehabilitation, treatment and distribution of ground and surface water and waste water collection and treatment.[14]

A variety of possible interpretations and obscurities with regard to the recovery provision in the WFD contribute to the above Babylonical stipulations. Large differences in interpretation and the existence of obscurities may undermine the effectiveness of the policy instrument of the cost recovery provision in attaining the environmental objectives and goals like sustainable and equitable water use. Independently of the interpretation the European Court of Justice gives or would give to cost recovery, this research focuses on the significance of cost recovery for the attainment of the normative goals of sustainable and equitable water use and identifies from what perspective cost recovery may be addressed to contribute to attainment of these aims.

1.3.2 Cost recovery in the Netherlands (case study)

In this book a case study is included on the Dutch cost recovery system for water services. How is the cost recovery provision implemented in Dutch water law and what are the main differences between the European and Dutch approach? Of course the way Article 9 WFD on cost recovery is interpreted, in a more broad manner or a more narrow manner, is relevant to this end. The Dutch water governance has an excellent track record according to the OECD in its report 'Water governance in the Netherlands: Fit for the future?'.[15] However, as will be shown by the examination of the Dutch cost recovery regime, there still remain some improvements to be made that may enlarge the potential beneficial contribution of cost recovery to the normative goals of sustainable and equitable water use.

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[9] Report from the Commission to the European Parliament and the Council on the Implementation of the Water Framework Directive (2000/60/EC), COM(2012) 670 final, Country specific assessment: Sweden SWD(2012) 379(26).
[10] *Ibid.*, Country specific assessment: Malta SWD(2012) 379(20).
[11] *Ibid.*, Country specific assessment: France SWD(2012) 379(14).
[12] *Ibid.*, Country specific assessment: Italy SWD(2012) 379(17).
[13] *Ibid.*, Country specific assessment: Romania SWD(2012) 379(25).
[14] *Ibid.*, Country specific assessment: Spain SWD(2012) 379(2).
[15] OECD, Watergovernance in the Netherlands: Fit for the future?, OECD Studies on water, (2014).

1.4 Research question

In this research I reflect upon the economic environmental instrument of cost recovery for water services as provided for in the WFD. An examination is made whether the current provision may contribute to the normative goals of reaching sustainable water use and equitable water use. In other words, is the cost recovery instrument as provided for and positioned (and interpreted) in the WFD in such a manner that allows its application to reach full effect?

The main research question therefore is:

What is the aim of the cost recovery provision in the WFD and what obscurities arise in its interpretation that may hinder its effectiveness to attainment of these aims?

Effectivity in this respect relates to the potential of the instrument to contribute to the goals of the legislation in which the instrument is positioned. May the environmental goals of sustainable and equitable water use be contributed to by the cost recovery provision? The effectiveness of the instrument of cost recovery in this respect is not truly measurable. First of all, because a number of elements related to recovery of the costs cannot be measured based on hard criteria (in monetary terms). Non-use values of water are difficult to measure. It is difficult to measure the improvement of the quality of the environment, let alone to relate it to an individual instrument. As will be shown in this book, the discretionary room of Member States to comply with the so-called 'principle of cost recovery for water services' seems to be very large. It pressurizes the potential effectivity of the instrument of cost recovery.

As the effectiveness of the cost recovery provision is not measurable based on hard criteria, the findings of this research result in the end in reflections on the obscurities that arise with respect to the current cost recovery provision and the current interpretation of it by the European Court of Justice. This study identifies, amongst others, interpretation difficulties with regard to the cost recovery provision in the WFD. In this respect a teleological approach in the examination of European legislative documentation was used in order to reflect upon the potential effectiveness of the cost recovery provision in relation to the normative goals/aims to be reached. In fact, this study may be considered an exploration of the (mal)functioning of the cost recovery provision in the WFD and is to a certain extent descriptive of nature. The findings and reflections, however, may provide further insight on how to position cost recovery in European (and Dutch) legislation in order to enlarge its potential beneficial contribution to the objectives in European water policy.

1.5 Methodology

This research is primarily based on classical legal research. European legislative documents, amongst which are primary law and relevant secondary law, including travaux preparatoires, have been studied and analysed; Relevant European Treaties, Environmental Action Programmes, policy documents, guidance documents, legislative documents, et cetera. The study of the drafting documents of the WFD has provided valuable insights into the positions of relevant parties in the European legislative process and insights into the background and possible purposes of the provision in question. But also the documentation of the Organisation of Economic Cooperation and Development (OECD) has been examined, and other relevant documentation, like information from non-governmental organisations, has been used to come to a solid analysis of the questions raised in this thesis.

At the start of this research little literature on the legal requirements with regard to cost recovery for water services in Europe was available. This changed during the years of the research as cost recovery as a policy instrument in water management became more important and therewith the

study of the aspects of cost recovery and the use of economic instruments became more prominent. For this research, an examination of the relevant legal literature in different European countries found its effect in providing me with an insight into the difficulties/uncertainties that countries face with regard to (the effectuation of) cost recovery for water services.

Valuable insights were gained when co-organising and attending the meeting of the Réseau européen du droit de l'eau (European Network for Water Law) in November 2012 in Zaragosa (Spain). For this meeting I prepared the questionnaires on cost recovery for participants from nine different European countries to complete in order to exchange views on aspects of cost recovery (mechanisms).[16] Exchanging views with these scholars confirmed to me the existence of differences in the interpretation and effectuation of the cost recovery provision. Some illustrative examples of cost recovery in other European countries have been included in this book. This study, however, does not provide for a full comparative legal analysis of the systems in the different European countries, due to the fact that a comparative legal examination of the systems of just two countries itself would ensure a very interesting thesis in itself. I have chosen to focus on an examination of the aim of the cost recovery and the obscurities that arise with the current cost recovery provision and – by means of application - an assessment of the Dutch cost recovery system. A comparative legal study of the cost recovery mechanisms with other European countries would be interesting for the future.

Furthermore, relevant jurisprudence of the European Court of Justice has been examined. Especially with regard to the polluter pays principle concrete markers have been extracted from this jurisprudence, which I used to assess the compatibility of cost recovery with the polluter pays principle.
The relevant Dutch legislation at the national, regional and local level, if applicable, has been studied, as have the documents regarding the legislative history with regard to relevant legislation. The same applies to Dutch legal literature and the jurisprudence of the different national courts which were used to assess the current view on difficulties that arise in cost recovery for water services and the legal status of these difficulties.

As mentioned, this research has been based on a classical legal research method. Therefore, an interdisciplinary approach was not used. However, this does not mean that no use at all was made of the information available in other disciplines. Research articles with regard to the WFD are available from other disciplines, like environmental economics or ecology. Publications from the economic disciplines frequently focus on defining cost types, valuation techniques and the economic assessment of boundless cost terminology, but also sometimes shed light on the positions taken concerning also more legally relevant issues, like the interpretation of water services.

Last but not least, the main findings of these research years have in the meantime been published during the last three years in the form of the following preliminary publications that have led to this thesis:

1. P.E. Lindhout, 'A wider notion of the scope of water services in EU water law, Boosting payment for water related ecosystem services to ensure sustainable water management?', *Utrecht Law Review,* vol. 8, issue 3 (2012), p. 86-101.

[16] The completed questionnaires are on file with the author.

2. P.E. Lindhout, 'Application of the Cost Recovery Principle on Water Services in the Netherlands', *Journal for European Environmental & Planning Law*, Issue 10.4 (2013), Martinus Nijhof Publishers/Brill, p. 309-332.

3. P.E. Lindhout & G.M. van den Broek, 'The Polluter Pays Principle: Guidelines for Cost Recovery and Burden Sharing in the Case Law of the European Court of Justice', *Utrecht Law Review,* vol. 10, issue 2 (2014), p. 46-59.

These publications are mentioned here explicitly, as a substantial part of these publications have formed an inspiration for this book and this book reflect further insights on the findings in these publications. As an explicit reference to these publications that underlie this thesis is made in this section, a systematic reference to these publications in this book is therefore not made.

1.6 Limitations

In order to ensure that this book would sufficiently convey my findings and arguments, but still result in an acceptable length, I have developed several restrictions in my research. First of all, the legal analysis is limited to mainly the European (legislative) setting and the national Dutch setting. International environmental water law was not separately studied as a specific legal level. That choice was made because this thesis focuses explicitly on cost recovery as provided for in the WFD. It does not mean that international water law would not prove to be at all relevant or is not referred to at all, but no specific legal analysis of cost recovery in international law was made.

As outlined above, no comparative legal analysis of the cost recovery systems of other European countries with the Dutch system has been made. The reason for that choice lies in the extensiveness that comparative legal analysis requires with regard to the necessity to have an intrinsic knowledge of the foreign legal system. However, some illustrative examples of the application of cost recovery in other European countries have been included for the reader for the purpose of showing that the Dutch way of doing things is not necessarily the only way or method.

References to other European directives are only included where I found this to be relevant for the purpose of this research. For example, references to the Directive on the management and assessment of flood risks are made where relevant.

Due to the international relevance of my research topic, this thesis has been written in the English language. Because of that fact, I have used the English text of the WFD and not the Dutch text. For the assessment of the compliance of the Dutch cost recovery system this choice may seem rather strange, as all Directive texts in the national language of the Member States are equally valid and no preference exists between them as to their validity. For practical purposes and the desire to provide research that is internationally accessible, however, the English text was used and, if necessary, reference is made to differences in comparison with the Dutch text.

1.7 Structure of this study

This study is structured as follows.

Chapter 2: In this chapter the following question is addressed:

What has been the development in European water policy, what goals are to be reached and where is cost recovery positioned?

It is relevant to obtain insight in the development of water EU water policy and the aims to be achieved in order to position cost recovery in relation to the policy and

its aims. This examination highlights the policy development from a sectoral approach to integrated water management and from a regulated approach to a programmatic approach. As will be shown the use of economic instruments is strongly promoted as a very important key instrument to achieve environmental water goals as sustainable and equitable water use. To the end of answering the above mentioned question in this chapter the following items will be addressed:

- What goals are to be reached?
- What are the (current) problems water policy aims at resolving and in what way has water policy tried to tackle these problems?
- Where is the cost recovery provision situated in the WFD and how does it interrelate to other provisions?

Chapter 3: In this chapter the following question is addressed:

What constitutes the cost recovery obligation(I)?

The explicit insertion of an economic instrument in a European Directive was a novelty at the time and expectations on the use of economic instruments in environmental law were high, but what constitutes this cost recovery obligation? In order to assess what constitutes the cost recovery obligation as laid down in Article 9 WFD in this chapter first an extensive examination of the coming about of the text of the provision is made. The next chapter will approach this question from a different perspective, i.e. a legal theoretical perspective. In this chapter the examination of the coming about of the text of the cost recovery provision will show that issues of divergence existed between the Council and the European Parliament. The relevance of this review is not primarily the legal effects the travaux preparatoires will or should have, but to understand the development and difficulties in coming to this specific provision text. In order to assess what constitutes the cost recovery obligation the following question will be addressed:

- What issues on cost recovery arose during the legislative process and how where these issues solved?

Chapter 4: In this chapter the following question is addressed:

What constitutes the cost recovery obligation (II)?

As cost recovery has been implemented by means of a provision in the WFD it is relevant to assess the span of control of this provision. The span of control can be assessed from different viewpoints. From a legal theoretical perspective one may question whether the cost recovery provision has the character of a (legal) principle or a (legal) rule. This is relevant as principles and rules differ in application and connecting results that are achieved. This study will show that the cost recovery provision, from a legal theoretical approach, has the main character of a rule, leading to a stricter behavioural norm to be attained. How the European Court of Justice encounters the cost recovery provision in this respect will also be examined. To the end of answering the above mentioned question in this chapter, the following items will be addressed:

- What is the (main) character of the cost recovery provision using a legal theoretical approach? Is it a legal principle or a rule?

- How does the European Court of Justice encounter the provision? As a legal principle or as a rule?

Chapter 5: In this chapter the following question is addressed:
What questions or points of debate with regard to the provision on cost recovery for water services can be identified and in what way are these dealt with and by whom?

Many Member States have incurred difficulties in implementing the WFD when it concerns the cost recovery provision. There are many questions that need answering. In order to asses in what way the cost recovery provision may truly contribute to attainment of sustainable and equitable water use, the questions hereunder will be addressed in order to obtain an overview which obstacles are (or are not) present that prevent cost recovery to contribute effectively to underlying objectives and how these obstacles can be overcome. The following items will be addressed:

- What main difficulties and obscurities arise when it concerns 'water services' in the cost recovery provision?
- What main difficulties and obscurities arise when it concerns 'water use' in the cost recovery provision?
- What main difficulties and obscurities arise when it concerns 'environmental and resource costs' in the cost recovery provision?
- What main difficulties arise when it concerns 'the polluter pays principle' in the cost recovery provision?
- What main difficulties arise when it concerns the 'derogation clause of Article 9 (4)' in the cost recovery provision?

Chapter 6: The following question is addressed in this chapter:
How is the cost recovery obligation implemented in Dutch water law and what are the main differences between the European and Dutch approach and can these differences be justified?

In this chapter, by means of a case study, the manner in which the Netherlands deals with cost recovery is examined and outlined. The water services identified by the Dutch government for cost recovery applied are addressed. As will be shown, different underlying principles can be identified in the Dutch cost recovery scheme. In the Netherlands, the inclusion of environmental and resource costs is only partly regulated in legislation. Even though the Netherlands has overall an excellent reputation on sound water management, improvement on the application of cost recovery is still possible. Especially where it concerns taking into account of the polluter pays principle and ensuring a fair burden sharing between categories of water users improvements seem possible. To the end of answering the above mentioned question in this chapter, the following items will be addressed:

- What water related services does the Dutch government stipulate a service for which the costs need to be recovered?
- What is the underlying (policy) principle for cost recovery for a given service?
- Who or what is subject of the levy/charge and how is the levy/charge effectuated?

- What costs are recovered?
- What critical remarks regarding cost recovery in the Netherlands can be made?

Chapter 7: In this chapter the research question in this book returns: What is the aim of the cost recovery provision in the WFD and what obscurities arise in its interpretation that may hinder its effectiveness to attainment of these aims?

2 Development and goals of European water policy

In order to position (the instrument of) cost recovery within European water policy it is relevant to obtain a view on the development of water policy in Europe and the goals that are set. In this chapter the development of European water policy, its goals and the means used to reach these goals are addressed in order to understand in what circumstances cost recovery germinated. As will be shown in this chapter high expectations exist with regard to the effectiveness of the use of market-based instruments in attaining environmental policy objectives. Cost recovery can be considered such a market based instrument. Cost recovery is furthermore closely related to, perhaps even the imperative result of the polluter pays principle. Therefore, the development of the polluter pays principle is examined. The direct interaction of the polluter pays principle with cost recovery as outlined in Article 9 WFD, however, will be outlined in section 5.7. This chapter focuses on the historic development underlying the instrument of cost recovery.

In this chapter the following question is addressed: What has been the development in European water policy, what goals are to be reached and where is cost recovery positioned? This question is addressed by answering a number of questions:

a. What goals are to be reached?
b. What are the (current) problems water policy aims at resolving and in what way has water policy tried to tackle these problems?
c. Where is the cost recovery provision situated in the WFD and how does it interrelate to other provisions?

2.1 Goals of EU water policy

2.1.1 Normative goals: sustainable development

The concept of sustainable development emerged first in international law. Although the idea of sustainable development already existed in the seventies[17], the need for sustainable development was globally acknowledged in the Rio Declaration on Environment and Development, following the UN Conference on Environment and Development in 1992. This declaration holds a number of principles that States would have to take into account to ensure sustainable development. Principle 1 states that human beings are at the centre of concerns for sustainable development and they are entitled to a healthy and productive life in harmony with nature. An integral approach of environmental development in relation to other developments is promoted (principle 4) and elimination of unsustainable patterns of production and consumption (principle 8) is considered a requirement to aim for sustainable development. The declaration also explicitly appealed upon national authorities to enhance the internalization of environmental costs and the use of economic instruments (principle 16). The declaration principles provide guidance for States how to strive for sustainable development, but does not provide a definition of the concept. The Brundtland report did provide a definition of sustainable development. Sustainable development is the:

> 'development which meets the needs of the present without compromising the ability of future generations to meet their own needs'[18]

In general, the idea of sustainable development is that economic goals (profit), social goals (people) and environmental goals (planet) should be interlinked and integrated in order to ensure

[17] J. Verschuuren, *Principles of Environmental Law*, Umweltrechtliche Studien/Studies on Environmental Law, no. 30 (2003), p. 20.
[18] Brundtland Report, [http://www.un-documents.net/ocf-02.htm#I].

sustainability on all three areas. It concerns a continue balancing of economic, social and environmental concerns. There are, however, different definitions of sustainable development. As stated, the Brundtland Report describes sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[19] In the report sustainable development includes 'the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.' This definition is frequently used, but it does not directly refer to the coping capacity of ecosystems. In my view this precondition to come to sustainable development should be included in its definition. Therefore, I prefer to define sustainable development in line with Jans & Vedder. Jans & Vedder outline sustainable development as 'the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystem, by maintaining natural assets and their biological diversity for the benefit of present and future generations'.[20]

In Europe, striving towards a sustainable growth while respecting the environment was laid down in Article 2 of the Maastricht treaty. The connecting policy programme 'Towards sustainability', stated that the word sustainability, in line with the Brundtland definition, was 'intended to reflect a policy and strategy for continued economic and social development without detriment to the environment and the natural resources on the quality of which continued human activity and further development depend.'[21] To date the concept of sustainable development as normative goal to be achieved forms the basis of European environmental policy as the Union 'has set itself the objective of becoming a smart, sustainable and inclusive economy by 2020'.[22] However, this inclusion in the environmental policy seems to be instigated by foremost the economic and financial crisis Europe is in as of 2008. It is based on - and refers to - the overall strategy "Europe 2020", with the objective of becoming a smart, sustainable and inclusive economy. Remarkably, in this overall strategy of the Council the word 'environment' does not occur.[23] Does this mean that environmental sustainability is no priority at all anymore? I do not think so, as the transformation to a green economy, which respects the limits of nature, is considered to be a necessity to reach also a sustainable economy. Therefore again, the strong interrelation between economy, people and planet returns, albeit that the necessity for environmental protection may be instigated more by economic and social concerns instead of environmental concerns.

The concept of sustainability also found its way into the WFD. The purpose of the Directive is to establish a framework for the protection of inland surface water, transitional water, coastal water and groundwater which should contribute to, amongst others:

> 'the provision of the sufficient supply of good quality surface water and groundwater as needed for sustainable, balanced and equitable water use'.[24]

2.1.1.1 Sustainability: sustainable water use as extract of sustainable development?

One question, in this respect, needs to be addressed. Should sustainable water use, which concept is explicitly mentioned in the WFD, likewise as the concept of sustainable development, take into

[19] *Ibid.*
[20] J.H. Jans and H.B. Vedder, *European Environmental Law, After Lisbon,* European Law Publishing (2012): p. 8.
[21] Towards Sustainability. A European Community programme of policy and action in relation to the environment and sustainable development, OJ C 138, 17 May 1993, p. 12 sub 5.
[22] Decision No. 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', OJ L 354, 28 December 2013, preamble.
[23] Conclusions of the European Council of 17 June 2010, EUCO13/10.
[24] Article 1 WFD.

account economy and society (profit and people)? Or is its sustainability limited to water use from an environmental point of view? Gleick considered what sustainable water use is by examining what unsustainable water use is. He considers:

> 'Gaining an understanding of the sustainable use of water can also be approached by understanding what constitutes the "unsustainable" use of water. Using the definitions above, water use is unsustainable if the services provided by water resources and ecosystems, and desired by society, diminish over time. (…) Given all of these issues, Gleick et al. (1995) offer a working definition of sustainable water use as: *the use of water that supports the ability of human society to endure and flourish into the indefinite future without undermining the integrity of the hydrological cycle or the ecological systems that depend on it.*'[25]

I think he is right. Sustainable water use focusses on the sustainability of the possibility to use water. Water use can only be sustainable if the source is sustainable. The regeneration of water resources or regenerative power of ecosystems is leading for sustainable water use. One may find confirmation of this in the Convention on Biological Diversity, which defines sustainable use in Article 2 as:

> '"Sustainable use" means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.'[26]

This point of view also seems to be acknowledged, albeit implicitly, by the EU legislator, by obliging Member States in the WFD to ensure, with respect to protection of groundwater quality, a balance between abstraction and recharge of groundwater.[27] The sustainability of water use is a different sustainability of the concept of sustainable development. The concept of sustainable water use should primarily be viewed from an environmental perspective.

2.1.2 Normative goals: equitable water use

Like sustainability, the concept of equity, or principle of equity, evolved in international law. Equity is often referred to as fairness, or a fair judgement or reasonableness.[28] It is a strong normative principle that can be used by the judiciary in several ways. It can soften the results of the objective application of the law by using it as a correction mechanism. It may be used as a guideline to decide in cases where rules are not clear and need to be interpreted. An example from European jurisprudence of the last is the judgment of the European Court of Justice in *Geuting* in which case the question arose whether farmer Geuting should be allowed to transfer his premium rights regarding suckler cow premiums for a certain year into the following year, or that his premium right should be transferred to the national reserve. In this respect the Regulation No 3886/92 on regarding premium schemes on the market of beef mentioned that where a producer has not made use of at least 70% of his rights during each calendar year, the part not used shall be transferred to the national reserve, except 'in duly justified cases'. The European Court of Justice had to judge whether in this

[25] P.H. Gleick, 'Water in crisis: Paths to sustainable water use', *Ecological applications* (1998).
[26] Convention on Biological Diversity, 5 June 1992,
[https://treaties.un.org/Pages/CTCTreaties.aspx?id=27&subid=A].
[27] Article 4(1)b(ii) jo. Article 2 (20)(28) jo. Annex V, table 2.1.2. WFD.
[28] The Advanced Learner's Dictionary of Current English states that equity is fairness or a right judgement and explicitly that it amounts to 'principles of justice used to correct laws when these would apply unfairly in special circumstances.', A.S. Hornby, E.V. Gatenby and H. Wakefield, *The Advanced Learner's Dictionary of Current English*, Oxford University Press (1963).

case the circumstances would constitute such duly justified case. In this respect the Court considered:

> 'Firstly, it should be noted that the existence of a duly justified exceptional case permits derogation from the rule that the unused part of premium rights is to revert to the national reserve and must therefore be interpreted strictly. Such strict interpretation is mandatory in view of the use, in that provision, of the term 'exceptional'. The last indent of Article 33(2) of Regulation No 3886/92 *appears*, in the light of the general scheme of that provision, *to express a general principle of equity* intended to cover situations other than those set out in the preceding indent (…) Like the cases referred to in the preceding indents, these are situations in which it would be *equitable* for the producer to be permitted to make use of his premium rights at a later stage even though, for exceptional reasons, he is temporarily unable to use them.'[29]

The Court continues in this case to consider that in absence of determination of such exceptional cases, it is up to the national Court to decide upon, which Court will have to take account of 'all the circumstances, both subjective and objective, in order to determine whether there are, among them, one or more factors which may show the existence of an exceptional case.'[30]

Furthermore, the principle of equity may be used to fill in lacunae in legislation[31], which can be recognised in, amongst others, *Lührs*, in which case the European Court of Justice referred to equity as 'natural justice', considering:

> 'Thus the appropriate answer is that in view of the uncertainties inherent in Regulation No 348/76, natural justice demands that for the purpose of converting the tax on exports into national currency the exchange rate which at the material time was less onerous for the tax payer concerned should be applied.'[32]

In a later judgment of the European Court of Justice this ruling was referred to as a case where the Court had to decide upon 'in the absence of express transitional provisions'.[33]

However, a correction on equitable grounds by the national courts in matters that have been regulated on Union level by Union legislation is not allowed. This is confirmed in settled European case law as – for example – outlined in the judgment of the European Court of Justice in *Cosun* where the Court considers to this end:

> 'However, it is settled case-law that there is no legal basis in Community law for exemption on equitable grounds from charges due under that law (…) In addition, without prejudice to the special cases expressly provided for by the Community legislature (…), there is no general legal principle in Community law that a Community provision which is in force may not be applied by a national authority if it causes the person concerned hardship which the Community legislature would clearly have sought to avoid if it had envisaged that eventuality when enacting the provision (…) Equity cannot therefore be regarded as

[29] C-375/05 *Geuting* ECLI:EU:C:2007:574, paras. 52-53.
[30] *Ibid.*, para. 54.
[31] See also regarding equity as a general principle in international law: J.M. White, 'Equity – A General Principle of Law Recognised by Civilised Nations?', *Law and Justice Journal*, vol. 4 issue 1, (2004), p. 110.
[32] C-78/77 *Lührs* ECLI:EU:C:1978:20, para. 13
[33] T-48/96 *Acme Industry vs Council* ECLI:EU:T:1999:251, p. 29.

> allowing any derogation from the application of provisions of Community law, save as provided for by the legislation or where the legislation is itself declared invalid (…).[34]

Sometimes legislative provisions explicitly refer to equity, equitability, or equitable results to be achieved. The Aarhus Convention, for instance, explicitly states that legal procedures regarding access to justice should, amongst other things, be 'fair, equitable and timely'.[35] The 'Council regulation on the protection of the European Communities financial interests' for example explicitly refers to the 'general principle of equity' outlining in its preamble:

> 'Whereas not only under the general principle of equity and the principle of proportionality but also in the light of the principle of ne bis in idem, appropriate provisions must be adopted while respecting the acquis communautaire and the provisions laid down in specific Community rules existing at the time of entry into force of this Regulation, to prevent any overlap of Community financial penalties and national criminal penalties imposed on the same persons for the same reasons'[36]

The principle of equity can furthermore be recognised in the political accommodation or, in other words, the discretionary room provided in either the wording or application of rules.[37] Vague terminology, for instance, will make it easier to correct the outcome of application of rules on the basis of equity. Terminology such as 'disproportionate costs' as mentioned in the WFD is a good example of wording that allows equitable arguments to take the lead.[38] Rules may be worded in such a way that the application of the principle of equity, in either a correcting form, an interpreting way or a complementary form, is not limited. As will be shown further on in this book, the principle of equity has a strong interrelation with (application of) cost recovery.

2.1.2.1 Equity: fair accessibility to and distribution of water

What is an equitable result is not on forehand determined. All circumstances will need to be taken into account to assess if the result of a problem leads to an equitable outcome. For instance, the affordability of water may be ensured on the basis of equity arguments, even though it may lead to infringements to other policy principles. This is because everyone is entitled to lead a life in compliance with the human right standards having access to affordable drinking (and sanitation) water. Non-affordable drinking (and sanitation) water is not considered an equitable result. Equity as fairness is therefore a strong normative principle.

Regarding the use of water the principle of equity is first explicitly recognised in international law regarding the use and allocation of international water resources. It has been laid down in, amongst others, the 1997 UN Watercourses Convention, the 1992 UNECE Convention on Transboundary Watercourses and Lakes and the International Law Association's Berlin Rules on Water Resources.[39] From an international law point of view, a number of relevant factors are laid down in

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[34] C-248/04 *Cosun* ECLI:EU:C:2006:666, paras. 63-64 and case law referred to therein.
[35] Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998, Article 9(4).
[36] Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ L 312, 23 December 1995.
[37] This offers room for equitable arguments to be taken into account in policy making. See for instance for further reading on the complexity of injustice in global environmental energy questions: K. Bickerstaff, G. Walker, H. Bulkeley, *Energy Justice in a Changing Climate : Social Equity and Low Carbon Energy*, Zed Books (2013), p. 128, 129.
[38] See likewise R. Brouwer, 'The potential role of stated preference methods in the Water Framework Directive to assess disproportionate costs', *Journal of Environmental Planning and Management*, vol. 51, issue 5 (2008), p. 611.
[39] P. Birnie, A. Boyle and C. Redgwell, *International Law & the Environment,* Oxford University Press (2009),

Article 6 of the UN Watercourses Convention regarding the equitable and reasonable use of international waters. These are:

a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
b) The social and economic needs of the watercourse State concerned;
c) The population dependent on the watercourse in each watercourse State;
d) The effects of the use or uses of the watercourse in one watercourse State on other watercourse States;
e) Existing and potential uses of the watercourse;
f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
g) The availability of alternatives, of comparable value, to a particular planned or existing use.

These factors are also relevant in non-transboundary water matters. Equitable use of water resources is to be assessed in each specific case and depends on weighing several factors of importance. This implicitly also follows from Article 1 WFD as different aims mentioned in that article are to contribute to sustainable, balanced and equitable water use. According to Article 1 WFD the purpose of the Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwaters addressing specific aims like water quality/ecosystem protection, promotion of sustainable water use, pollution protection and reduction, mitigation of the effects of floods and droughts. This framework is to contribute amongst others to the provision of sufficient supply of good quality surface water and groundwater as needed for sustainable, balanced and equitable water use. Therefore, no fixed set of rules exists regarding the application of the concept of the equitable use of water resources in my view.

2.1.2.2 Equity: fair burden sharing

Equity may also relate to fair burden sharing and can be recognized frequently in different principles. One manifestation of equity is for instance the polluter pays principle that arose due to the inequitable result of people bearing the costs of pollution or damage without having caused it. To date that is considered to be an inequitable result. The polluter pays principle corrects this wrong by means of the preposition that the polluter is the one who should bear the costs of his actions. When it concerns pollution or damage from a specific identifiable source, it will be more easy to obtain an equitable result when it comes to burden sharing. However, when it concerns diffuse pollution, of which it is difficult to which polluter (category) the connecting damages should be accounted to, reaching an equitable result will be more difficult.

In section 5.7.2 a number of markers are identified from European Case Law, that may guide European Member States in ensuring fair burden sharing.

2.1.2.3 Equity: sustainable water use to ensure future generations of a fair water share

Equity is not limited to resolving problems of the current generation, but also in relation to future generations.[40] This is referred to as intergenerational equity. Intergenerational equity, relates to the responsibility of people to preserve the natural heritage for future generations to also use for its well-being.[41] The protection of water (resources) from an intergenerational equity perspective can

p. 542, with references to the mentioned conventions.

[40] See Principle 3 of the Rio Declaration: 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

[41] See for further reading on intergenerational and intragenerational equity: P. Birnie, et al. *International Law & the Environment*, Oxford University Press (2009), p. 119-123; S. Beder, 'Costing the Earth: Equity, Sustainable Development and Environmental Economics', *New Zealand Journal of Environmental Law,* vol. 4 (2000).

also be recognized in the consideration in preamble sub. (1) of the WFD, that stipulates water 'as a heritage, which must be protected, defended and treated as such'. The necessity of sustainable water use to ensure intergenerational equity is obvious. Unsustainable water use endangers the possibilities for future generations for water usage.

2.2 Necessity for protection: water pollution and pressure on water resources

In European environmental policy the necessity for water protection has been acknowledged already in the seventies. The high standard of living, in combination with a high density and concentration of people and the magnitude of economic activities resulted in threatened and sometimes unusable waters. Life in many waters was destroyed by severe pollution.

The second and third environmental action programme gave specific priority to the protection and purification of freshwaters and sea waters.[42] Besides aiming to conserve waters for social and economic needs, also the necessity for maintenance of vital ecological balances was recognized. In essence however, environmental policy was to serve economic and social development. Measures that were instigated under the first action programme where further implemented or intensified. Environmental policy was, especially in the eighties positioned in the economic problems at that time and, if possible, was to contribute to economic restoration, easing unemployment.[43]

At the end of the eighties, besides executing the earlier measures regarding pollution prevention and control and implementing quality standards for certain water uses, the necessity to address specific forms of water pollution arose.[44] Especially, the water pollution by agriculture/livestock effluents and the excessive use of fertilizers and pesticides arose as one of the severe problems not tackled yet.

In 1992 the Commission presented a report on the state of the environment which was quite alarming. In short, the Commission addressed the fact that past environmental policy was not adequate as the state of water resources did not improve, ground waters were still too polluted, water resources were not used in a sustainable way, which would lead to economic and social pressures on water especially in countries in Southern Europe, ecosystems were still pressured by eutrophication and pesticides still were problematic for water quality purposes.[45] Environmental policy was to contribute to continued economic and social development, however not to the detriment of the environment. Therefore, a sustainable development was necessary, referring to the Brundlandt definition:

> 'development which meets the needs of the present without compromising the ability of future generations to meet their own needs'[46]

In the last decade the continuing global climate change ruled the environmental debate. The impact of climate change on society is enormous. Global temperature increase will lead to a higher threat of extreme weather conditions (excess rainfall, floodings or long term droughts elsewhere) and will

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[42] Council Resolution of 17 May 1977 on the continuation and implementation of a European Community policy and action programme on the environment, OJ C 139, 13 June 1977, p. 9-12.
[43] Council Resolution of 7 February 1983 on the continuation and implementation of a European Community policy and action programme on the environment (1982-1986), OJ C 46, 17 February 1982, p. 1: 'Whereas account should be taken of the economic and social aspects of environment policy, and particularly of its potential to contribute to the easing of current economic problems, including unemployment'
[44] Also marine pollution /protection of the sea was one of the main concerns; in this book, however, protection of the sea is not specifically addressed.
[45] Commission of the European Communities, *Report on the State of the Environment*, COM(92)23 final
[46] Towards Sustainability. A European Community programme of policy and action in relation to the environment and sustainable development, OJ C 138, 17 May 1993, p. 12.

influence quality and availability of water resources negatively (ecosystem deterioration, biodiversity loss and detrimental consequences for water users like agriculture, water supply et cetera).[47]

2.3 EU policy strategy to tackle the problems

Because of the severe pollution problems in the seventies, the first environmental action programme focussed on the implementation of the – at the time newly recognised - polluter pays principle to combat pollution in general. It states:

> "Charging to polluters the costs of action taken to combat the pollution which they cause encourages them to reduce that pollution and to endeavour to find less polluting products or technologies thereby enabling a more rational use to be made of the resources of the environment. Moreover, it satisfies the criteria of effectiveness and equitable practice."[48]

Besides promoting adherence to the polluter pays principle, which principle is further outlined in section 2.4 hereafter, three important water directives came about in this period: the Directive concerning the quality required of surface water intended for the abstraction of drinking water[49], the Directive concerning the quality of bathing water[50] and the Directive on pollution caused by certain dangerous substances discharged into the aquatic environment.[51] By means of introducing quality standards for a number of different types of water uses (surface water, drinking water, bathing water and groundwater) the minimum quality level of these waters was to be assured. Furthermore, cost-benefit assessment of environmental measures was – already at that time - thought to be very important. The second environmental programme reads to this end:

> 'However, when assessing the advantages of the proposals, comparison with the costs will not always be possible without attributing some particular interpretation and weighting to the advantages. First, the improvement of the quality of the environment, which represents the beneficial effects of the measures taken, often cannot be assessed in monetary terms. This means that in such cases it is impossible to compare the benefits directly with the costs involved in implementing the measures; (…) Secondly, it is to be expected that the implementation of environmental measures will generally encourage industry to perfect less expensive anti-pollution techniques. This means that the cost of anti-pollution measures – which is measured on the basis of the state of advancement of the technique – will usually be over-estimated as compared with long-term costs.'[52]

> 'The benefits of an environmental policy are a reduction in the social costs of pollution and an improvement in the quality of the environment. Their evaluation in monetary terms poses very complex and difficult problems, primarily because of the inevitable subjective nature

[47] Commission of the European Communities, White paper, Adapting to climate change: Towards a European framework for action, COM(2009) 147 final, 4-5.
[48] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ C 112, 10 December 1973.
[49] Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States, OJ L 194, 25 July 1975.
[50] Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, OJ L 31, 5 February 1976.
[51] Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, OJ L 129, 18 May 1976.
[52] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ C 112, 10 December 1973, para. 215.

> of a large number of the factors involved. It is therefore unlikely that satisfactory methods of evaluation in monetary terms can be found quickly.'

In the eighties, the focus from control of pollution gradually changed to environmental policy based on preventive actions. Optimal use of resource allocation was to be promoted, including application of the polluter pays principle therein. Water pollution specifically was to be combated by the control of pollution by dangerous substances, the control of pollution from oil spills and by intensifying monitoring and control of water quality. In the meantime the Single European Act was concluded, laying down a number of principles European environmental policy should be based on.

Article 130 r (2) was inserted in the EC Treaty stating:

> 'Action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies.'[53]

Besides the larger role the preventive principle gained, the Commission considered proposing also water quality standards for industrial water use and agricultural water use.[54]

Although many legislative acts[55] were installed in the last two decades to combat the environmental problems, the efforts did not have the effect wished for. Groundwater was still polluted and water resources were not used in a sustainable way. Pesticides and eutrophication of water by agriculture pressurized ecosystems. New approaches needed to be found, as the environment was still in a deteriorating state.[56] A shift from a sectoral approach to an integral water management approach came about. This meant an approach that should ensure a better integration of environmental policy into other policy fields, enlarging awareness with regard to sustainable solutions, improving data availability and redefining cost –benefit evaluation criteria.[57] Also the idea that both substance and procedure in environmental protection needed to be regulated to the fullest was abandoned. A more programmatic approach manifested. A programmatic approach can be described as a plan-based approach. National authorities need to set up one or more plans to attain requested results. In a plan-based approach it is usually to the authority to decide upon which measures to include to attain the requested results.

One of the first results of these two shifts in environmental strategy – from a sectoral to an integrated approach and from a regulated to a programmatic approach - was the WFD, of which preamble sub. (9) states 'It is necessary to develop an integrated policy on water'. Much is to be expected by the implementation of the WFD in order to achieve a good ecological and chemical status of waters and to achieve sustainable water management. In this respect the necessity to use an analysis of benefits and costs, taking into account the need to internalize environmental costs is thought to be elementary and was stressed (again).[58] Furthermore, the system of the WFD is programmatic based,

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[53] Single European Act, OJ L 16, 29 June 1987.
[54] Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment, OJ C 328, 7 December 1987, p. 24.
[55] Towards Sustainability: The Commission mentions acts regarding pollution of the atmosphere, water and soil, waste management, safeguards regarding chemicals and biotechnology, product standards, environmental impact assessment and protection of nature.
[56] Towards Sustainability. A European Community programme of policy and action in relation to the environment and sustainable development, OJ C 138, 17 May 1993, p. 11.
[57] Towards Sustainability. A European Community programme of policy and action in relation to the environment and sustainable development, OJ C 138, 17 May 1993.
[58] Decision No. 1600/2002/EC of the European Parliament and of the Council of 22 July 2002, laying down the

as Member States need to set up so-called River Basin Management Plans, in which they include a summary of the measures (laid down in a programme of measures) that should ensure attainment of the environmental objectives in the Directive. The structure of the WFD will be outlined further in section 2.4.3.2.

At present, in its combat against climate change, EU environmental policy, besides focusing on mitigation strategies, has placed its focus to adaptation strategies. Adaptation strategies emerged as mitigation alone would not deal with the environmental problems arising from climate change, like global temperature increase and the necessity to bring down greenhouse gas emissions. The awareness to decouple environmental pressures from economic growth grew. However, in the sixth environmental action programme environmental protection combats within the concept of sustainable development in other policy areas, not having a preference position. On the other hand, the use of market based instruments to attain environmental policy goals gained an even stronger position in European policy in the strategic approach against climate change. High expectations exist on the use of these instruments. In 2007 the Commission launched a 'Green paper on market-based instruments for environment and related policy purposes' outlining these high expectations:

> 'This paper launches a discussion on advancing the use of market-based instruments in the Community. In line with the announcement in the Action Plan on Energy Efficiency, the green paper explores possible ways forward with the Energy Taxation Directive with the aim of launching its announced review. In this sense the paper fits into the framework set by the new integrated energy and clime change agenda where market-based instruments and fiscal policies in general will play a decisive role in delivering the EU's policy objectives. (…) Water needs to be managed in a sustainable way. The Water Framework Directive (WFD) provides an overall framework for action. It requires that Member States introduce by 2010 water-pricing policies that encourage efficient water use. This will make all users bear costs (incl. external environmental and resource costs) under the "polluter pays principle", which in certain cases is not yet fully applied. Member States also have to report on the steps they take to implement these provisions in their river-basin management plans by 2009. Several Member States already apply taxes or charges on groundwater and/or surface water abstraction or on water consumption, which have reduced consumption, leakage, and pollution. The Commission considers the use of MBI [PL: market-based instruments] essential to meet the requirements of the WFD.'[59]

Lastly, the environmental programme for the coming decade shows slowly an implicit shift to guaranteeing the sustainable management of natural resources as prerequisite for any development.[60]

2.4 The uprising of economic instruments: cost recovery and the polluter pays principle

The internalisation of environmental costs and the use of economic instruments to attain sustainable development is – already for a long time - a widely held environmental principle. Internationally, it

Sixth Community Environment Action Programme, OJ L 242, 10 September 2002, p. 4.

[59] Commission of the European Communities, Greenpaper on market-based instruments for environment and related policy purposes, COM (2007) 140 final, p. 1, 11-12.

[60] Decision No. 1386/2012/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', OJ L 354, 28 December 2013.

has been explicitly acknowledged in the Rio Declaration on Environment and Development. Principle 16 of the Declaration reads:

> 'National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.'

From the outline in the prior section one can recognize the high importance that market-based instruments are intended to have in European environmental/water policy.

In European environmental policy economizing environmental measures has been one of the most important developments since the seventies. Due to the severe pollution problems that existed in that period new and alternative methods were to be found to address pollution combating. The introduction of the polluter pays principle was one of those novelties. In the next two – extensive - sections, the historic development of the polluter pays principle and the positioning of cost recovery in the WFD are outlined. From this outline, one may conclude that cost recovery is the imperative result of a broad interpretation of the polluter pays principle. It confirms a broadening of the use of cost recovery from recovery of costs of pollution to recovery of costs of (general) resource use. This section reflects in what way water policy has tried to tackle the environmental problems by means of the polluter pays principle and ultimately by introducing cost recovery into the European legislative framework. The question where the cost recovery provision is situated in the WFD and how it interrelates to other provisions will be addressed in section 2.4.3.

As a start the development of the polluter pays principle is examined. First of all because the polluter pays principle is explicitly mentioned in the cost recovery provision in the WFD and thereby forms one of the elements of cost recovery (the interaction between the polluter pays principle and application of cost recovery will be assessed in section 5.7). Secondly, the polluter pays principle, depending on its interpretation and application, will fulfil a norm, or in other words, a marker for the application of the cost recovery provision examined in this book. In order to profoundly assess the influence of the polluter pays principle on development of cost recovery, in this section first the development of the polluter pays principle is discussed, starting with an historic overview of its development in the economic arena of the Organisation for Economic Co-operation and Development (OECD). Furthermore, the position of the polluter pays principle in European primary law is addressed after outlining its development in (initially) the Environmental Action Programmes. The position of the principle in (other) secondary law acts is not explicitly discussed, due to the necessary restriction of this research. This, however, does not mean that there is no influence of (the application of) the polluter pays principle as mentioned in other directives, but that influence, if directly relevant to the application of the principle in the WFD, is addressed when discussing European case law in section 5.7.2.

The effects of inclusion of the polluter pays principle to (effectuation of) cost recovery as mentioned in the WFD is not discussed in this section, but in section 5.7.

The main findings of the evolution of the polluter pays principle in conjunction to the principle of cost recovery have been published – during this research – in an intermediary publication written together with Van den Broek in the Utrecht Law Review and in that publication a reference is also made to this forthcoming thesis.[61]

[61] P.E. Lindhout & G.M. van den Broek, 'The polluter pays principle: Guidelines for Cost Recovery and Burden Sharing in the Case Law of the European Court of Justice', *Utrecht Law Review*, vol. 10, issue 2 (2014).

2.4.1 Development of the Polluter Pays Principle at the OECD

The Organisation for Economic Co-operation and Development (OECD) introduced the polluter pays principle in 1972 in a recommendation as one of the guiding principles concerning the international economic aspects of environmental policies.[62] The fact that natural resources are limited and that consumption and production have a negative impact on these resources paved the way for the introduction of the polluter pays principle. As countries started to introduce more stringent environmental policies, also more subsidies were provided to industry for complying with these policies. A fear existed among the member countries that in response to subsidizing activities on one side, import restrictions or tariff measures were being taken to protect the economies, both having a negative impact on the competitiveness of industry.[63] In response to this development the OECD introduced the polluter pays as one of the guiding principles concerning the international economic aspects of environmental policies.[64] It formulated the target of the polluter pays principle as (a) 'to avoid wasting natural resources' and (b) 'to put an end to the cost-free use of the environment as a receptacle for pollution.' [65]

Recommendation (1972) states:

> 'The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter-Pays Principle". This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.'

The costs involved are, for example, the costs of pollution removal, but also administrative costs like costs for supervision and measurement costs.[66]

The principle at the time implied that:

a) Only costs of pollution prevention and control measures are included; green taxes or liability costs are not (yet) included in this definition;
b) The polluter should only bear the costs of pollution prevention and control measures, that are decided upon by public authorities; therefore it is up to the discretion of the public authorities to decide which (part of the) costs are to be paid for by the polluter;
c) By application of the polluter pays principle, the environment should at least be in an 'acceptable state'. Therefore, the OECD members do not have to ensure a 'good' state of the environment, just an acceptable one is enough.

[62] OECD, Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies, 26 May 1972, C(72)128.
[63] OECD, Environmental Principles and Concepts, OECD, GD(95)124, p. 12.
[64] OECD, Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies, 26 May 1972, C(72)128.
[65] OECD, Environment Monographs, The Polluter Pays Principle, OECD Analyses and Recommendations, OCDE/GD (92)81.
[66] See also Joint Working Party on Trade and Environment, OECD, The Polluter Pays Principle as it relates to international trade, COM/ENV/TD(2001) 44/Final, (2002).

General subsidies for pollution control of course interfered with the principle. Limited exemptions (for instance, in transitional periods) were however considered allowable.

The content of the principle was further elaborated upon in the next recommendation on the subject in 1974, outlining in which limited circumstances certain aids by means of subsidies, tax advantages et cetera were allowed to be provided to polluters.[67] During the following decades the OECD promoted a broader view on the polluter pays principle. The principle should not only be applicable in situations of continuous pollution, but also in cases of accidental pollution from hazardous installations.[68] Not only the actual damage from accidental pollution should be borne by the polluter, but also reasonable costs relating to (also public) prevention /risk control. Regarding the use of fees and taxes as a damage cost recovery tool the position was taken that public authorities could introduce fees and taxes for hazardous installations as a means to retrieve or cover the damage costs and this was considered to be in line with the polluter pays principle subject to the condition that the proceeds of these fees and taxes were to be allocated to accidental pollution prevention and control.

As Grossman extensively outlines in her article 'Agriculture and the 'polluter pays' principle' a further change in the content of the polluter pays principle surfaced during the years: from the internalization of (only) the pollution prevention and control costs to a higher level of the internalization of environmental costs.[69] This higher level of the internalization of environmental costs also includes liability payments and specific taxation possibilities and can be considered an interpretation of the polluter pays principle in a broad sense:

> ' "PPP in a broad sense", i.e. a fairly extensive principle of internalization that goes beyond the PPP "in a strict sense", increases liability payments and includes "green taxes" of varying amounts. The extent of this internalization varies from one country to another, depending on the degree to which environmental costs are taken into account in public policy. For this reason, trade problems may arise insofar as polluting firms from "high internalization countries" are competing with equivalent companies in "low internalization countries".'[70]

In effect, over the years the view on the polluter pays principle within the OECD changed from being a non-subsidize principle to a principle that entailed polluters being responsible for more than

[67] OECD, Recommendation of the Council on the Implementation of the Polluter Pays Principle, C(74)223, (1974).
[68] OECD, Recommendation of the Council concerning the Application of the Polluter Pays Principle to Accidental Pollution, C(89)88/Final, (1989).
[69] M.R. Grossman, 'Agriculture and the Polluter Pays Principle', *Electronic Journal of Comparative Law*, vol. 11, issue 3 (2007), p. 8.
[70] Joint Working Party on Trade and Environment, OECD, The Polluter Pays Principle as it relates to international trade, COM/ENV/TD(2001)44/Final, (2002), p. 14. It needs to be remarked that the 'broad sense' interpretation of the polluter pays principle was more limited than, for instance, the WATECO working group defined in its guidance document for the implementation of the WFD. Also the 'broad sense' interpretation did not include (or at least did not mention that it included) resource costs. Common Implementation Strategy for the Water Framework Directive (2000/60/EC), Guidance doc. No. 1 Economics and the Environment, WATECO Working group 2.6 (Luxembourg, OOPEC 2003): In this document guidance was provided to stakeholders and experts which needed to implement the WFD in their countries. The guidance document states with regard to environmental costs : 'environmental costs represent the costs of damage that water uses impose on the environment and ecosystems and those who use the environment (for example, a reduction in the ecological quality of aquatic ecosystems or the salinisation and degradation of productive soils).' Resource costs are defined as follows: 'represent the costs of foregone opportunities which other users suffer due to the depletion of the resource beyond its natural rate of recharge or recovery (e.g. linked to the over-abstraction of groundwater).'

just the costs of pollution prevention and control, now also taking into account other costs/measures like liability payments, green taxes and costs relating to non-compliance with permits et cetera.

2.4.2 Development of the Polluter Pays Principle in European Primary and Secondary Law

In this section an overview is provided with regard to the polluter pays principle in the European legal setting. The polluter pays principle in primary European law, such as in secondary European law, will be addressed. As an outline of the polluter pays principle in secondary law is extremely extensive, only the most relevant issues for this research regarding the interpretation and/or norm setting of the principle in relation to cost recovery are highlighted. No attention will be given to directives other than the WFD. A discussion of European primary and secondary law will be limited to an outline of the principle in the European Treaties, an assessment of the relevant recommendations and the (coming about of the) principle in the Environmental Action Programmes. Although it would seem more logical to address the position in primary law at the first instance, the overview however starts with the Environmental Action Programmes as in these programmes the polluter pays principle first originated and environmental protection was as such not included in the EEC Treaty.[71]

Environmental action programmes are general action programmes, currently under Article 192(3) TFEU, setting out the Union's environmental priority objectives which have to be attained. From a legal perspective it is relevant to keep in mind that:

- Only since the Maastricht Treaty was a primary law base provided for action programmes (former Article 175(3) TEC);[72]
- Environmental Action Programmes since then need to be adopted by the European Parliament and the Council, where previously the action programmes were based on Council resolutions;[73]
- In order for Member States to be bound by the Environmental Action Programmes, binding legal acts need to be enacted, such as regulations or directives; The Environmental Action Programmes as such do not bind the Member States;
- The content of the action programmes may however give the European Court of Justice in its case law a certain direction with regard to the interpretation of obscurities or filling in gaps in the legislation, especially if reference to Environmental Action Programmes is made in – for instance – preambles to directives.[74] As an Environmental Action Programme contains 'priority' objectives the content of the programme cannot be neglected in such a case.

The outline hereafter highlights the polluter pays principle as (and if) mentioned in the Environmental Action Programmes. The outline is strictly focused on the principle mentioned in the programmes and explicitly does not intend to summarize the other contents of the programmes, nor does it provide an overview of the policy strategies laid down in the programmes. For a short analysis regarding European environmental policies and a brief summary of the further content of the Environmental Action Programmes reference is made to Hey's article on that subject.[75]

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[71] See for an outline regarding the limitations of the EEC Treaty for environmental protection as a subject of European decision making and the need for an additional legal basis (besides Arts. 100 EEC and 235 EEC): J.H. Jans & H.H.B. Vedder, *European Environmental Law, After Lisbon,* Europa Law Publishing (2012), p. 3-6.
[72] Treaty on the European Union, OJ C 191, 29 July 1992.
[73] See also F. Leidenmuehler, 'Is there a Closed System of Legal Acts of the European Union after the Lisbon Treaty?, *Vienna Journal of International Constitutional Law*, vol. 4, issue 2 (2010), p. 200-201.
[74] For instance, the IPPC Directive (OJ L 24/8) refers explicitly to the Fifth Environmental Action Programme in recital 3 and 9.
[75] C. Hey, 'EU Environmental Policies: A short history of the policy strategies', in *EU Environmental Policy*

2.4.2.1 First Environmental Action Programme (1973)

In the same period when the OECD recognized the polluter pays principle, also on the European Community level the principle germinated. Economic expansion was no longer an end in itself, but should strive for less disparities in living conditions. The first Environmental Action Programme contained a large number of environmental principles[76] and also formulated the polluter pays principle as:

> 'The cost of preventing and eliminating nuisances must in principle be borne by the polluter. However, there may be certain exceptions and special arrangements, in particular for transitional periods, provided that they cause no significant distortion to international trade and investment. Without prejudice to the application of the provisions of the Treaties, this principle should be stated explicitly and the arrangements for its application including the exceptions thereto should be defined at Community level. Where exceptions are made, the need to progressively eliminate regional imbalances in the Community should also be taken into account.'[77]

Protection of the environment, also by means of the polluter pays principle, was to 'really be put at the service of mankind'.

The rational use of environmental resources is the ultimate goal which the application of the polluter pays principle should lead to. Charging polluters in line with the principle would encourage them to find better less-polluting production techniques and to reduce the pollution itself. However, the polluter pays principle still needed to be elaborated with regard to the terms of implementation, the application of exceptions and the determination of the polluter.

2.4.2.2 An Important Recommendation regarding the Polluter Pays Principle

To that end, a Council Recommendation provided more clarity on the scope and application of the principle.[78] This is a legally non-binding recommendation.[79] To date it is not without legal relevance however, as it provides certain definitions and interpretative guidance for situations that other binding legislation does not. The recommendation provides a definition of who the polluter is and

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Handbook, *A Critical Analysis of EU Environmental Legislation*, European Environmental Bureau (2005).

[76] Environment policy should focus on preventing the creation of pollution or nuisances at source. Decision making and technical planning should take into account the effects on the environment at the earliest stage possible. Research on improving scientific and technological knowledge was to be encouraged. A long-term environmental policy would be the fundament of the promotion of global environmental research and policy. National programmes and Community policy should be coordinated and harmonized. For the different categories of pollution the levels of action (local, regional, national or community) should be set in relation to the category of pollution. Activities in one state were not cause environmental degradation in another state.

[77] Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ C 112, 10 December 1973.

[78] Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters, OJ L 194, 5 June 1975.

[79] See currently Article 288 TFEU regarding the different legal acts of the European Union, amongst which is the recommendation. Cf. also Leidenmuehler expressing that although recommendations have no binding force 'they are nevertheless to be classified as legal acts' as 1) 'there legal character results from the Treaty provisions that require the institutions to adopt them', 2) 'although they do not have binding force on their own, they may become binding as part of a binding norm or at least as a necessary stage in a procedure to pass a binding act', 3) 'they do have a legal effect, since the general obligations of loyalty imposed by Article 4, para. 3 TEU also apply to recommendations and opinions', F. Leidenmuehler, 'Is there a Closed System of Legal Acts of the European Union after the Lisbon Treaty?', *Vienna Journal on International Constitutional Law*, vol. 4, issue 2 (2010), p. 191.

what he should pay. In addition it draws up what instruments can be used to effectuate the polluter pays principle and what circumstances justify an exception to the application of the principle. Remarkably, the recommendation lacks a definition of pollution.

2.4.2.2.1 Who is the Polluter and what should he pay?

A 'polluter' was defined as being 'someone who directly or indirectly damages the environment or who creates conditions leading to such damage.' The recommendation is not very clear on how wide an interpretation should be given to this definition. The definition implies that a 'polluter' is anyone who - by whatever activity – damages, directly or indirectly, the environment. The definition does not limit the damaging activities to exclusively polluting activities nor to polluting substances, even though some examples mentioned in the recommendation seem to point in that direction.[80]
The wide view of 'polluter' is confirmed by the fact that charges to be paid by the polluter are connected to the achievement of environmental quality objectives (see hereafter), which does not necessarily mean a one-on-one connection with the pollution caused. Therefore, one could conclude that this definition leaves (at least) room for an extensive interpretation of the 'polluter'.
One comment needs to be made in this respect. In the outline regarding the effectuation of the principle, the polluter is only mentioned in connection with pollution. If the term pollution is to be understood in a limited manner, for instance, limited to the discharge of substances and emissions, the scope of the term polluter is also limited (see section 2.4.2.2.4).
The basis of the principle, as outlined in the recommendation, is that the polluter should pay all costs necessary to achieve an environmental quality objective, which is further detailed into:

a. Costs of pollution control measures (e.g. anti-pollution investments, costs regarding anti-pollution installations et cetera);
b. Charges.

Furthermore, the expenditure regarding administrative costs connected to the implementation of anti-pollution measures should also be borne by the polluter. However, the recommendation leaves room for public authorities to decide not to charge for the public authority costs regarding 'constructing, buying and operating pollution monitoring and supervision installations'.

2.4.2.2.2 Instruments for the Application of the Polluter Pays Principle

The recommendation outlines two main instruments to effectuate the polluter pays principle, being the introduction of environmental standards, and the introduction of charges.
With regard to the environmental standards the recommendation mentions three types of standards:

1) environmental quality standards, which set the maximum level of pollution or nuisance allowed;
2) product standards, which may include maximum pollution levels, product characteristics and product use;
3) process standards, which include emission standards, installation design standards prescribing construction requirements and operating standards (the last also by means of 'codes of practice').

With regard to the instrument of charges the recommendation outlines two different functions of charges, the first being an incentive function to stimulate polluters to take pollution reduction

[80] As an example of cumulative pollution the recommendation states in footnote 3: 'Where, in a built up area, for example, several polluters, such as householders, users of motor vehicles and industrial plants, are simultaneously responsible for polluting the atmosphere with SO2.'

measures as cheaply as possible. The second function being a redistributive one, making the polluter pay his part of the cost of collective measures (like purification costs).

2.4.2.2.3 Exceptions to the Polluter Pays Principle

Specifically the recommendation outlines that exceptions to the polluter pays principle can only be justified in a limited number of cases. Therefore, the general application of the polluter pays principle is the norm.

Two exemptions are addressed:

- In the situation where an immediate application of the principle or the introduction of high charges would lead to greater social costs, some extra product adaptation time can be provided or aids can be provided for a limited period of time only for existing producers or products; no further outline is provided as to what is to be understood to be social costs in this respect.
- In the situation where, due to the effect of other policies (social, agricultural et cetera), investment – which affects environmental protection – benefits from aid which is provided for problems arising in specific policy areas (industrial, agricultural et cetera).

2.4.2.2.4 No Definition of Pollution

Considering the above content of the recommendation it is remarkable that the recommendation does not provide a definition of pollution. From the definition of polluter (section 2.4.2.2.1) one could consider that everything that damages the environment directly or indirectly or conditions (created by man) leading to damage is pollution (and the one executing an activity that causes the damage is the polluter). Also the definition of polluter does not limit damaging activities to only damages by polluting substances.

In respect of this research it is interesting to see what other European documents from this period do provide a definition of pollution.

The Draft European Convention for the Protection of International Watercourses against Pollution (hereafter the Draft European Convention), for instance, provided the following definition of water pollution (Article 1 sub. d):

> ‘ “Water pollution” means (…) any impairment of the composition or state of water, resulting directly or indirectly from human agency, in particular to the detriment of:
>
> - Its use for human and animal consumption;
> - Its use in industry and agriculture;
> - The conservation of the natural environment particularly of aquatic flora and fauna’ [81]

This definition leaves room for the interpretation that everything that damages the (aquatic) environment directly or indirectly is to be considered as pollution. The definition does not provide a specific manner in which the detrimental situation occurs or arises. Therefore, pollution is not limited to the entering into or introducing into the environment emissions or substances. Lammers, at the time, and in my view rightly so, stated that

[81] See [http://www.fao.org/docrep/005/W9549E/w9549e03.htm#bm03.3.1] , with footnote 12: Text in: Legal Problems relating to the non-navigational uses of international watercourses, Supplementary Report by the Secretary General, doc. A/CN. 4/274, United Nations, Yearbook of International Law Commission, 1974, vol. II (part two), p. 346-349.

> 'since the definition appearing in the 1974 Draft European Convention does not describe the *manner* in which the change in the composition or state of the water must have been brought about, it would strictly speaking according to that definition be possible to consider also water pollution a detrimental change in the composition or state of water, which results from a human activity other than that causing the *introduction*, direct or indirect, of certain substances or energy in to the water, for example, by extracting from the water certain substances which are naturally present in the water or by preventing energy or substances from entering the water which nature would otherwise have brought into the water.'[82]

The materialisation of the polluter pays principle in European secondary law at that time, however, shows a rather limited use of the term pollution. For instance, the 'Directive on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community' (hereafter the Directive on pollution by substances) does include a definition of pollution.[83] As the scope of that directive is limited to discharges into the aquatic environment, a more limited definition of pollution suffices (compared to the one in the Draft European Convention). As a first step two lists of substances were provided, the first containing substances selected on the basis of their toxicity, persistence and bio accumulation which should be eliminated, the second containing substances which have a deleterious effect on the aquatic environment, which can be confined to a given area and where the existence of these substances in the aquatic environment needs to be reduced. This directive provided the following definition of pollution (Article 1 sub. 2 sub. e):

> ' "pollution" means the discharge by man, directly or indirectly, of substances or energy into the aquatic environment, the result of which are such as to cause hazards to human health, harm to living resources and to aquatic ecosystems, damage to amenities or interference with other legitimate uses of water.'

In this definition the term pollution is limited to substances or energy that are brought into the aquatic environment. Taking into account the scope of that directive, it is clear that environmental damage due to, for instance, water extraction is not covered by the term 'pollution' as it cannot be considered a discharge nor is it brought into the aquatic environment.

Concluding, one can state that the recommendation of the Council leaves room for a broad, extensive interpretation of pollution (as it was not defined), in line with the definition of 'polluter' therein. As an abstract from the definition of polluter it can be upheld that everything damaging the environment directly or indirectly or conditions (created by man) leading to damage is pollution. However, from the interpretation in practice of the term pollution and its use in secondary law, one may uphold the view that a broad view – if there was one to start with – of pollution changed quickly and was limited to pollution by (1) *discharge* of substances or energy; (2) discharge *into* the environment. Furthermore, that interpretation introduced a causal link between the discharge and the damage ('the result of which'), whereas the term pollution in the recommendation – if interpreted broadly – would not limit 'pollution' to damage as a result of a discharge. In the broad view also the creation of conditions leading to damage would already be considered pollution.

2.4.2.3 Second / Third Environmental Action Programme (1977-1982/1982-1986)

Regarding the application of the polluter pays principle, the second Environmental Action Programme outlined the necessity of further research on the application of the principle, especially

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[82] J.G. Lammers, *Pollution of International Watercourses,* Martinus Nijhoff Publishers (1984), p. 9, [emphasis added].

[83] Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, OJ L 129, 18 May 1976. This Directive was to be repealed 13 years after the entry into force of the Water Framework Directive, see Article 22 sub. 2 WFD.

with regard to the way the system of charges operated. Also the programme announced further research to be carried out on the subject of extraterritorial pollution and the application of the polluter pays principle in such situations.

In the third Environmental Action Programme the polluter pays principle is directly linked to the use of resources outlining that the principle is of 'decisive importance' in a strategy regarding the optimal use of resources. The programme speaks of apportioning the costs of protecting the environment to polluters which constitutes an incentive to polluters to reduce pollution and to promote innovative action to come to less polluting products and technologies. Thus the incentive function of the principle (by means of charges) is mentioned and a warning is provided that charges are not to lead to a 'licence to pollute'. However, the programme does not bring other or further insights into the application (the difficulties) of the polluter pays principle in specifying the content of terms such as polluter and pollution.

2.4.2.4 Fourth Environmental Action Programme (1987-1992)

In the fourth Environmental Action Programme the polluter pays principle is again mentioned in relation to the use of economic instruments. Guidelines for the use of economic instruments in Community legislation were to be designed according to this programme.

Furthermore, the polluter pays principle is not only referred to with regard to pollution (by discharge of substances / emissions), but also with regard to noise. The programme states:

> '4.5.3 Yet noise is an environmental problem, which affects virtually every community citizen; and which according to surveys of public opinion, remains of considerable importance. The Commission accordingly intends, during the period of the Fourth Environmental Action Programme, to endeavour to make progress on an number of matters. These include: (…) – the development of a common approach to noise-related landing charges for aircraft (something which would be entirely consistent with the 'polluter pays' principle)'[84]

The content of the polluter pays principle, being focused on polluting activities by means of emissions of pollutants, is in this programme broadened to also nuisances that do not directly relate to emissions, but reflect a social burden (noise affecting citizens).[85] This would be in line with a broad view on or an extensive interpretation of the polluter pays principle. As nuisance coming from noise was already mentioned as part of the principle in the first Environmental Action Programme, this would confirm quite an extensive scope of the principle. This inclusion of noise nuisance in the polluter pays principle did not appear again in the fifth and sixth Environmental Action Programmes that followed. But in the seventh Action Programme noise - specifically stipulating it as 'pollution' – returned once again.

2.4.2.5 Fifth / Sixth Environmental Action Programme (1992-2002 / 2002-2012)

In the fifth Environmental Action Programme the mindset that long-term economic and social development depends on the capacity of nature to cope with that development is laid down in terms of striving for 'sustainable development'. Sustainable development is described in this programme as 'development which meets the needs of the present without compromising the ability of future

[84] Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment, OJ C 328, 7 December 1987, p. 28.
[85] Cf. Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, OJ L 129, 18 May 1976.

generations to meet their own needs'.[86] The programme stresses that the prices of products should include the costs of production, consumption and environmental costs. However, no specific outline is provided as to what these costs consist of. Also the focus of instruments as charges and levies changed. Where these instruments previously focused on funding sanitation operations, they should now be used to discourage pollution at source and to encourage clean production processes, which complies with the polluter pays principle. Therefore, the incentive function of charges and levies to alter behavior became more prominent.

Principles as a basis for policy making were given an important position in the sixth Environmental Action Programme, also in striving for an increased use of market-based instruments.[87] Policies ought to be particularly based on the polluter pays principle, the principle of rectification of pollution at source, and the precautionary and preventive principle. And although the programme targeted a large number of actions to be taken, the final assessment of the programme outlined that the use of economic instruments was lacking.[88] Furthermore, a long-term vision on environmental policy was lacking. Taking into account that the carrying capacity of nature was still being too readily relied upon, the focus of environmental policy further changed from the remediation of degradation to the prevention of degradation.

2.4.2.6 Seventh Environmental Action Programme (2013 - 2020)

The seventh environmental action programme runs up to 2020. However, the programme has been set in relation to a long-term vision for 2050. This vision states:

> 'In 2050, we live well within the planet's ecological limits. Our prosperity and healthy environment stem from an innovative, circular economy where nothing is wasted and where natural resources are managed sustainably, and biodiversity is protected, valued and restored in ways that enhance our society's resilience. Our low-carbon growth has long been decoupled from resource use, setting the pace for a safe and sustainable global society.'

The decoupling of economic growth and environmental degradation to be able to transform the Union's economy into an inclusive green economy is explicitly addressed. Living 'well' does not necessarily comply with ever growing economic wealth. In relation to the earlier programmes one can identify a shift in addressing the relationship between economic growth and the environment. The position of a sustainable environment or resource use is prioritised differently in relation to economic growth. There is a shift from 'striving to a sustainable environment besides ensuring economic growth' to 'ensuring a sustainable environment besides striving to growth'.

In this programme the polluter pays principle is referred to as one of the principles on which the Union's environmental policy is based. Sources of continuing pollution are addressed, like excessive nutrient releases which negatively impact water quality. And, where it concerns water use, the necessity of improving water efficiency is addressed, with specific reference to the instrument of water pricing as one of the market-based mechanisms to enhance efficient water use. Reducing noise pollution and enhancing the standards for drinking water and bathing water within Europe are explicitly mentioned. The polluter pays principle occupies a strong position in relation to the 6th priority objective in this programme. This objective is 'to secure investment for environment and climate policy and address environmental externalities'. Environmental

[86] Towards sustainability. A European Community programme of policy and action in relation to the environment and sustainable development, OJ C 138, 17 May 1993, p. 12.
[87] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Sixth Environmental Action Programme – final assessment, COM (2011) 531 final, p. 9.
[88] *Ibid.*

externalities should be addressed and the polluter pays principle should be 'more systematically' taken into account.[89] Environmentally harmful subsidies should cease and fiscal measures to stimulate sustainable resource use should be taken. In order to include the involvement of the private sector, instruments such as payment for ecosystem services should be considered.

2.4.2.7 Primary Law

The polluter pays principle was acknowledged in primary law by the inclusion of the principle in the Single European Act. Article 130 r (2) was inserted stating:

> 'Action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies.'[90]

Due to this inclusion the Community was obliged to take into account the polluter pays principle in all environmental actions it would commence. It should be noted that the Community itself is the addressee of this obligation. The article does not address Member States. Also a start was made by stating that environmental protection would influence other Community policies by obliging that environmental protection requirements should at least be a component of other Community policies. Thereby the scope of application of the principle in theory broadened due to the fact that with its influence on the environmental protection requirements, it could also have an effect on other Community policies, even though being a 'component' in other policies does not necessarily ensure actual integration in such a policy field.

The Maastricht Treaty provided further direction on Community environmental policy directing it to aim at a high level of (environmental) protection and severing the obligation to include environmental protection requirements in other policies to integrate them into the definition and implementation of other policies.[91] That inclusion implied that mentioning the environmental relevance in only a preamble would not suffice, as these requirements needed to be *integrated* in the definition and implementation of other policies. Although in the Amsterdam Treaty this phrase was again removed, the Amsterdam Treaty further positioned the polluter pays principle by inserting Article 175(5) TEC.[92] Based on this article, in situations where the measures Member States need to take in order to achieve the environmental objectives (as outlined in Article 174 TEC) result in costs which are deemed disproportionate, the Council may provide specific provisions as temporary derogations or financial support. However, Article 175(5) TEC also obliges that, in allowing such derogations from the environmental objectives, the polluter pays principle needs to be adhered to.[93] One may therefore argue that the fact that the costs of measures to reach environmental objectives are too high does not pardon Member States when the polluter pays principle is not applied, even though Article 175(5) TEC is addressed to the Community and not to the Member States. As the Treaty (currently Article 192 TFEU) is higher in hierarchy than the directive or its implemented national legislation, the directive's content or the national legislation is not allowed to contradict the provisions in the Treaty.

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[89] Decision No. 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', OJ L 354, 28 December 2013, p. 193.
[90] Single European Act, OJ L 16, 29 June 1987.
[91] Treaty on the European Union, OJ C 191, 29 July 1992.
[92] Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European Communities and certain related acts, OJ C 340, 10 November 1997.
[93] Cf. N. de Sadeleer, *Environmental Principles,* Oxford University Press (2002), 30.

In the Nice Treaty and the Lisbon Treaty (Article 192(5) TFEU)[94] this text was retained. In the Lisbon Treaty (Article 11 TFEU) the integration of environmental protection requirements in defining and implementing Union policies and activities was positioned within the scope of sustainable development. The integration of environmental protection requirements must take place 'with a view to promoting sustainable development.'

In the previous sections the goals of European water policy and the problems water policy aimed and aims to resolve have been examined. Both sustainable water use and equitable water use can be considered the ultimate goals of European water policy. European water policy has tried to tackle the environmental water problems of pollution and unsustainable use of water resources by different means. The polluter pays principle was introduced and environmental quality standards were set. Together with the polluter pays principle, the economization of water policy germinated. Cost benefit analyses, and currently cost recovery for water services, are to be considered the output of the economization of water policy. Cost recovery can be considered the imperative result of the polluter pays principle. In the next section, the positioning of cost recovery in the WFD is addressed.

2.4.3 Positioning cost recovery in the Water Framework Directive

The cost recovery provision is laid down in Article 9 WFD and reads:

> '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.
>
> 2. Member States shall report in the river basin management plans on the planned steps towards implementing paragraph 1 which will contribute to achieving the environmental objectives of this Directive and on the contribution made by the various water uses to the recovery of the costs of water services.
>
> 3. Nothing in this Article shall prevent the funding of particular preventive or remedial measures in order to achieve the objectives of this Directive.
>
> 4. Member States shall not be in breach of this Directive if they decide in accordance with established practices not to apply the provisions of paragraph 1, second sentence, and for

[94] Consolidated version of the Treaty establishing the European Community, OJ C 325/108,109, 24 December 2002; Consolidated version of the Treaty on the functioning of the European Union, OJ C 115, 9 May 2008.

that purpose the relevant provisions of paragraph 2, for a given water-use activity, where this does not compromise the purposes and the achievement of the objectives of this Directive. Member States shall report the reasons for not fully applying paragraph 1, second sentence, in the river basin management plans.'

As the provision is included in the WFD, first the legal basis and the scope of the WFD are examined, followed by an overview of the structure of the Directive. Addressing the legal basis of the WFD, even though the Directive was already concluded in 2000, is still relevant. Not to question the validity of the Directive as a whole, but to assess where the application of the cost recovery provision ends. As will be shown in this book, terminology like 'water use' and 'water services', which will be addressed in sections 5.4 and 5.5, are quite extensive terms and, without realizing, one may think that cost recovery relates to all water-related measures. Therefore, it is important to highlight where the (possibly) obligatory cost recovery ends. Furthermore, the status of water in the WFD is addressed, as cost recovery is related to 'water' services (and use). As water has different functions in society for – for instance – social, economic or cultural functions it needs to be determined what is or can be considered to be 'water' in the WFD.[95]

2.4.3.1 Legal basis and scope of the WFD

The WFD is based on the former Article 175(1) TEC, now Article 192 TFEU. According to Article 191 TFEU Union policy shall contribute to the pursuit of, amongst other things, the objective of prudent and rational utilization of natural resources and to the preservation, protection and improvement of the quality of the environment. It states:

'Article 191 (former Article 174 TEC)
1. Union policy on the environment shall contribute to pursuit of the following objectives:
— preserving, protecting and improving the quality of the environment,
— protecting human health,
— prudent and rational utilisation of natural resources,
— promoting measures at international level to deal with regional or worldwide environmental
problems, and in particular combating climate change.
2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.
In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.
3. In preparing its policy on the environment, the Union shall take account of:
— available scientific and technical data,
— environmental conditions in the various regions of the Union,
— the potential benefits and costs of action or lack of action,
— the economic and social development of the Union as a whole and the balanced development of its regions.
4. Within their respective spheres of competence, the Union and the Member States shall

[95] See for a study on the different functions of water: A. Hildering, *International Law, Sustainable Development and Water Management*, Eburon (2007).

cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.
The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.' [96]

The European Parliament and the Council need to adhere to the ordinary co-decision legislative procedure (Article 192(1) in conjunction with Article 294 TFEU) in deciding on what actions are to be taken to achieve the above-mentioned objectives.

If, however, measures to achieve the objectives in Article 191 TFEU are to be taken that affect the quantitative management of water resources or affecting, directly or indirectly, the availability of those resources, and measures that affect land use, a specific legislative procedure applies. For such decisions Article 192(2) TFEU provides for a derogation from the ordinary legislative procedure to a procedure based on unanimity. One of the purposes of the WFD (Article 1) is the mitigation of floods and droughts. One may ask whether the legal basis used for the WFD is correct with regard to this aspect of its purposes. Or whether measures to attain environmental quality objectives concerning water quantity can be justified. The following can be remarked on this.

The WFD, being based on the former Article 175(1) TEC, also provides reflections on and provisions concerning water quantity, amongst others:

- The preamble sub. (19) mentions that the purpose of maintaining and improving the aquatic environment is primarily concerned with the quality of the waters concerned, but acknowledges that the control of quantity, by measures on quantity, is a subsidiary element in securing good water quality.
- Coordinated efforts by means of principles are mentioned in the preamble sub. (23) to improve the protection of waters in terms of not only quality, but also quantity. Furthermore, control on abstraction and impoundment of water are to be addressed by overall principles regarding water quantity with the aim of ensuring the environmental sustainability of the (affected) water system (preamble sub. 41).
- The preamble sub. (34) outlines the necessity of a greater integration of qualitative and quantitative aspects of both surface water and groundwater for the purpose of environmental protection;
- Article 4 sub. (b)-(ii) WFD obliges Member States to protect, enhance and restore all bodies of groundwater, ensuring a balance between abstraction and recharge of groundwater. Again with the aim of achieving a quality objective, i.e. a good groundwater status.

Article 192(2) TFEU - the legislative procedure by means of unanimity - applies in situations where measures affect the quantitative management of water resources or land use. Although it is not completely clear what is to be understood by 'affect', from European case law, in combination with the textual change of Article 130s(2) TEC to Article 175 (now Article 192(2) TFEU), one can uphold that, although provisions or measures in themselves influence land use or water resource management, they do not result in the application of the unanimity procedure.[97] [98]

[96] Consolidated Version of the Treaty on the Functioning of the European Union , OJ C 326, 26 October 2012.
[97] W.Th. Douma, [http://www.asser.nl/default.aspx?site_id=7&level1=12219&level2=14663#_Toc324240979] (22-11-2012).
[98] Jans & Vedder, in my opinion correctly, also reflect that 'the current text of the Treaty which speaks of "affecting" rather than "concerning" makes clear that the mere fact that a measure which has consequences for the physical layout of the territory of a Member State does not mean that it should be taken unanimously.' J.H.

In *Spain vs. Council* the scope of Article 130s(1) TEC and Article 130s(2) TEC was addressed, confirming the limitation in the scope of measures that is to be dealt with via the unanimity procedure. It concerned a request from the Kingdom of Spain to the European Court to annul the Council Decision regarding the conclusion of the Convention on cooperation for the protection and sustainable use of the River Danube based on, amongst others, the plea that the legal basis adopted was not appropriate.[99] According to Spain, the decision of the Council should have been based on Article 130s(2) TEC, as the approved Convention related – according to Spain – 'exclusively to the management of water resources of the catchment area of the River Danube and establishes measures aimed at its rational and non-polluting use.'[100] The Court considered, however:

> 'In that regard, it should be pointed out first of all that it is clear from the objectives of Community policy on the environment and from a reading of Article 130r in conjunction with Article 130s(1) and (2) of the Treaty that the inclusion of the 'management of water resources' in the first subparagraph of Article 130s(2) of the Treaty is not intended to exclude any measure dealing with the use of water by man from the application of Article 130s(1) of the Treaty.'[101]

The Court also reflected on the fact that the measures mentioned in Article 130s(2) TEC, like the ones based on Article 130s(1) TEC, also intend to achieve the environmental objectives of the Community. These measures however relate to the use of the limited territory or resources of a Member State:

> '(…) The territory and land of the Member States and their water resources are limited resources and the second indent of the first subparagraph of Article 130s(2) of the Treaty therefore refers to the measures which affect them as such, *that is measures which regulate the quantitative aspects of the use of those resources or, in other words, measures relating to the management of limited resources in its quantitative aspects* and not those concerning the improvement and the protection of the quality of those resources.'[102]

The Court confirmed that the inclusion of 'management of water resources' in Article 130s(2) TEC does not exclude the coming about of measures dealing with water use from the regular co-decision procedure.

Furthermore, in *European Commission vs. Federal Republic of Germany*, the European Court of Justice confirmed that quantity related measures may be taken and are compliant with the legal basis of the Directive, as long as they are taken with the view of ensuring a good water quality. It considered:

> 'In that regard, it must be noted that Directive 2000/60 is a framework directive adopted on the basis of Article 175 (1) EC (now Article 192 TFEU). It establishes the common principles and an overall framework for action in relation to water protection and coordinates, integrates and, in a longer perspective, develops the overall principles and structures for protection and sustainable use of water in the European Union. (…) As evidenced by recital 19 in the preamble to Directive 2000/60, it aims at maintaining and improving the aquatic environment in the European Union. This purpose is primarily concerned with the quality of the waters concerned. *Control of quantity is an ancillary*

Jans & H.H.B. Vedder, *European Environmental Law, After Lisbon*, Europa Law Publishing (2012), p. 62.
[99] C-36/98 *Spain vs. Council*, ECLI:EU:C:2001:64.
[100] C-36/98 *Spain vs. Council*, ECLI:EU:C:2001:64, para. 15.
[101] *Ibid,* para. 50.
[102] *Ibid,* para. 52, [emphasis added].

> *element* in securing good water quality and therefore *measures on quantity, serving the objective of ensuring good quality, should also be established.*'[103]

Even though during the legislative process of the establishment of the WFD other views on the legitimacy of the legal base of the Directive were heard, the case law of the European Court of Justice confirms that also quantitative measures regarding water can be taken in so far as it serves the objective of ensuring good water quality.[104]

The relevance of the above outline is to assess the boundaries where cost recovery for water services as laid down in the current provision may no longer be justified on the basis of the WFD. The above confirms that cost recovery relating to quantitative measures therefore may also be justified, as long as these quantitative measures have the objective of ensuring a good water quality. Quantitative measures not serving a water quality objective however, do not fall under the scope of the WFD and therefore also fall outside the scope of the current cost recovery provision.

2.4.3.2 Structure of the WFD

The WFD consists of three basic elements: environmental provisions, provisions regarding the application of the execution of the environmental provisions and administrative provisions. This tripartite division is of course arbitrary as some provisions contain both environmental substance elements as execution elements or administrative elements. One can also divide the provisions into substantive provisions and procedural provisions, but procedural provisions in my view should then have an extra dimension, explicating procedural provisions regarding the execution of the environmental provisions and the procedural provisions regarding the relation of Member States with the Commission or the activities to be unfolded at the EU level by the Commission and/or the Parliament and the Council.[105]

Looking at the suggested tripartite division an allocation of the main provisions of the Directive, including Article 9 WFD on cost recovery, would lead to the following allocation:

- Environmental provisions: these are provisions including environmental standards or environmental norms, like:
  - Article 4 (environmental objectives)
  - Article 1 (purposes of the directive) as the main substance
  - Article 7 (waters used for the abstraction of drinking water)
  - Article 10 (combined approach for point and diffuse sources)
  - Article 16 (strategies against the pollution of water)[106]
  - Article 17 (strategies to prevent and control the pollution of groundwater)[107]

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[103] C-525/12 *European Commission vs Federal Republic of Germany*, ECLI:EU:C:2014:2202, paras. 50-51; [emphasis added].

[104] The advisory Committee of Regions reflected upon the first Directive proposal that the legal basis should include both Article 130s(1) and (2) TEC. It held the view that for the management of water resources Article 130s(2) TEC, the unanimity procedure, should apply. Opinion of the Committee of the Regions on the 'Proposal for a Council Directive establishing a framework for Community action in the field of water policy' CdR 171/97 fin. OJ C 180, 11 June 1998, para. 4.2.

[105] Others make a different division. Van Rijswick, for instances, divides the provisions of the WFD into organizational provisions (Articles 3 and 5), substantive provisions (Articles 4, 6, 7 and 16) and procedural provisions (Article 14 and 15); H.F.M.W. van Rijswick, 'Searching for the Right to Water in the Legislation and Case Law of the European Union' in: H. Smets (ed.), *The right to safe drinking water and sanitation in Europe/Le droit à l'eau potable et à assainissement, sa mise en oeuvre en Europe*, Editions Johanet (2012).

[106] Referring to the obligation as mentioned in Article 16 WFD the Directive on environmental quality standards in the field of water policy (2008/105/EC) was established.

[107] Referring to Article 17 WFD the Directive on the protection of groundwater against pollution and deterioration was established.

- Provisions regarding the application or execution of the environmental provisions, like
  - Article 3 (coordination of administrative arrangements within river basin districts)
  - Article 5 (characteristics of the river basin district, review of the environmental impact of human activity and economic analysis of water use)
  - Article 6 (register of protected areas)
  - Article 8 (monitoring of surface water status, groundwater status and protected areas)
  - Article 9 (recovery of costs for water services)
  - Article 11 (programme of measures)
  - Article 13 (river basin management plans)
  - Article 14 (public information and consultation)
  - Article 20 (technical adaptations to the directive)
  - Article 22 (repeal and transitional provisions)
  - Article 23 (penalties)
- Administrative provisions, like
  - Article 12 (issues which cannot be dealt with at Member State level)[108]
  - Article 15 (reporting)
  - Article 18 (Commission report)
  - Article 19 (plans for future community measures)
  - Article 21 (regulatory committee)
  - Article 24 (implementation)
  - Article 25 (entry into force)
  - Article 26 (addressees)

For this research, which focuses on cost recovery provision, not all provisions will be outlined hereafter. The most important provisions that are directly related to Article 9 WFD are briefly highlighted in order to enhance the understanding of the surroundings and content of the cost recovery provision. Shortly the following elements will be addressed in so far as they are relevant for this research: (1) the purpose of the WFD (Article 1 WFD); (2) river basin management plans; (3) environmental objectives (Article 4 WFD); (4) the economic analysis of water use (Article 5 WFD); (5) programme of measures (Article 11 WFD).

But first the status of water in the WFD will be looked at.

2.4.3.3 Status of water in the Water Framework Directive

As cost recovery relates to water services (and use) and questions arise with regard to interpretation difficulties on terminology, it is important to know what we are talking about when it concerns 'water' in the WFD. Water is not defined in the WFD. As it is not defined, one may question what is to be understood when the term 'water' is used in the WFD. Water has many different functions. As part of the environment and ecological system, it can be seen as an environmental good. Water is furthermore of great importance for our (global) economy and can be considered an economic good for that purpose. Besides these two functions, water has cultural and social functions. Much has been written, for instance, with regard to the question of whether or not there exists an (absolute) human right to water.[109] On the international level, the right to safe and clean drinking water and

[108] This provision is allocated to administrative provisions as the wording of the content does not explicitly (although it is likely to) refer to environmental standards or norms. The provision refers to an 'issue which has an impact on the management of its water'. As this is a very general wording, I have decided to allocate it to administrative provisions, also because it reflects the relation between Member States and the Commission.
[109] For further reading on the right to water: H.F.M.W. van Rijswick, 'Improving the right to water in the Netherlands', in: H. Smets (ed.), *The right to safe drinking water and sanitation in Europe/ Le droit à l' eau*

sanitation has been explicitly acknowledged by the General Assembly of the United Nations in one of its resolutions.[110] It calls upon states to provide safe, clean, accessible and affordable drinking water and sanitation for all. Prior to this, in 2002, the Economic and Social Council of the UN had already outlined the human right to water as follows:

> 'The Human Right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.'[111]

In the formulated principles of the International Conference on Water and Sustainable Development in Dublin in 1992, water was addressed as an economic good.
It is explicitly mentioned in Principle 4:

> 'Water has an economic value in all its competing uses and should be recognized as an economic good. Within this principle, it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price. Past failure to recognize the economic value of water has led to wasteful and environmentally damaging uses of the resource. Managing water as an economic good is an important way of achieving efficient and equitable use, and of encouraging conservation and protection of water resources.'[112]

However, more recently the Economic and Social Council of the UN considers that water is *not* primarily an economic good. It holds the position that 'water should be treated as a social and cultural good, and not primarily as an economic good.'[113] Furthermore, the right to water should be realised in a sustainable way, ensuring both the current right to water and enabling future generations to also enjoy their right to water. But in what way should 'water' be interpreted in the WFD?

Two water-related definitions are included in the WFD. The WFD provides definitions of surface water and groundwater:

Surface water is defined: 'inland waters, except groundwater; transitional waters and coastal waters, except in respect of chemical status for which it shall also include territorial waters'[114]

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potable et à assainissement, sa mise en oeuvre en Europe, Academie de l' eau, Editions Johanet, (2012), p. 369-391; H.F.M.W. van Rijswick, 'Searching for the right to water in the legislation and case law of the European Union', in: H. Smets (ed.), *The right to safe drinking water and sanitation in Europe/ Le droit à l' eau potable et à assainissement, sa mise en oeuvre en Europe*, Academie de l ' eau, Editions Johanet, (2012), p. 87-113; J. Verschuuren, 'Recht op water', in Th. G. Drupsteen, H.J.M. Havekes and H.F.M.W. van Rijswick, *Weids Water*, (2006), p. 427-440.

[110] United Nations, Resolution 64/292, 28 July 2010.

[111] Economic and Social Council of the UN, General Comment No. 15, The right to water (Articles 11 and 12 of the International Covenant, 20 January 2003; the right to water was acknowledged in its session of 11-29 November 2002 in Geneva, Switzerland on Economic, Social and Cultural Rights).

[112] The Dublin Statement on Water and Sustainable Development, Principle 4, 1992.

[113] Economic and Social Council of the UN, General Comment No. 15, Substantive issues arising in the implementation of the international covenant on economic, social and cultural rights, E/C.12/2002/11, 20 January 2003, p. 5.

[114] Article 2(1) WFD.

Groundwater is defined: 'all water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil.'[115]

However, a definition of 'water' is lacking. The WFD itself starts by stating that 'water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such'.[116] The legislative process confirms that the Directive does not treat water as primarily a commercial product, but as an environmental and social good. Shortly before an agreement on the text of the Directive was reached between the Council and the Parliament, the European Commission in its final opinion implicitly confirmed that water as included in the Directive proposal was to be considered an environmental and social good. The Commission, responding to suggested amendments stated in this respect: 'Amendment 1 stating that water is a common heritage rather than a commercial product is not accepted. The proposal does not treat water as a commercial product but protects water as an environmental and social good.'[117]

Therefore, it can be concluded that water in the WFD must firstly be considered as a social and environmental good. This is of importance as the Directive includes certain economic-oriented provisions, like cost recovery and requests for an economic analysis of water use, but the Directive's use of water does not primarily include water as an economic or commercial good, but as an environmental and social good.

2.4.3.4 The purpose of the Water Framework Directive

The WFD strives for integrated Community action in water policy by providing 'a transparent, effective and coherent legislative framework'[118], with the purpose of the 'protection of inland surface waters, transitional waters, coastal waters and groundwater.'[119] According to the preamble to the Directive the ultimate aim thereof is to achieve the elimination of priority hazardous substances and to contribute to achieving concentrations in the marine environment near background values for naturally occurring substances. The Directive focuses effectively on two main elements:

1. The protection and improvement of the quality of the Community waters;[120]

This is reflected in Article 1 WFD, where it states that the status of aquatic ecosystems or ecosystems depending on them should be protected and prevented against further deterioration. Furthermore, specific measures should be taken for the protection and improvement of the aquatic environment, like phasing-out and reducing detrimental discharges. And groundwater is to be protected by ensuring a progressive reduction of pollution and protecting it from further pollution.

2. Striving for sustainable water use; Sustainable water use should be promoted and the necessity for the long-term protection of available water resources is a fundament for sustainable water use.

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[115] Article 2(2) WFD.
[116] Preamble sub. (1) WFD.
[117] Opinion of the Commission of 5 June 2000 (COM(2000)219 final), p. 8. Earlier, formulations in the form of 'water is not a commercial product, but a heritage which belongs to the peoples of the EU to be protected as such' were also rejected (Amended proposal for a European Parliament and Council Directive, COM (1999) 271 final, p. 5).
[118] Preamble (18) WFD.
[119] Article 1 WFD.
[120] Quantity-related aspects are covered by the scope of the Directive insofar as it relates to the achievement of the quality objectives, preamble (19).

Besides these two mainstream elements of Article 1 the Directive also mentions the mitigation of floods and droughts as one of its purposes.

All the elements mentioned in Article 1 WFD should contribute to:

- 'The provision of sufficient supply of good quality surface water and groundwater as needed for sustainable, balanced and equitable water use,
- A significant reduction in pollution of groundwater,
- The protection of territorial and marine waters, and
- Achieving the environmental objectives of relevant international agreements (…)'[121]

2.4.3.5 River Basin Management Plan

Where, prior to the WFD, water directives were either mostly emission-oriented or provided, for example, for explicit actions in the field of the elimination of certain substances, i.e. substantive provisions, the WFD provides for a new approach, a governance approach, based on a new starting point: the river basin.[122] A river basin is 'the area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river month, estuary or delta'.[123] Member States need to identify within their territory the individual river basins therein and these individual river basins in turn are assigned to a river basin district. In the case of a multi-state river basin, it needs to be assigned to an international river basin. For each river basin district Member States need to set up a river basin management plan and these plans are to be updated at least once every 15 years after the entry into force of the directive. This obligation to produce a river basin management plan for each river basin district is laid down in Article 13 WFD.

The river basin management plans need to contain a number of obligatory elements, outlined in annex VII of the Directive. In the first place a general description of the characteristics of the river basin district both for surface water and groundwater should be included. This means the mapping of details like the location and boundaries of water bodies. Also assigned protected areas need to be identified and mapped.

Furthermore, a summary of significant pressures and the impact of human activity on the status of surface and groundwater is to be included. This includes different estimations of source pollution, pressures on the quantitative status of water and an analysis of other human activity impacts on the water status.

The river basin management plan should also provide information about the monitoring network details. Member States need to monitor, amongst other things, the surface water with regard to ecological and chemical requirements and groundwater with regard to its chemical and quantitative status. It should further provide a list of the environmental objectives established under Article 4 WFD. As, based on Article 4 WFD, certain derogations are allowed under certain circumstances, the application of these derogations needs to be accounted for in the river basin management plan. It may concern allowed extended deadlines, situations where allowed less stringent objectives apply, situations of allowed temporary deterioration of the water status or other situations for which

[121] Article 1 WFD.
[122] See for an outline regarding a governance approach versus a government approach: J.J.H. van Kempen, *Europees waterbeheer: eerlijk zullen we alles delen?*, BjU (2012), para. 2.1.2.; S. van Holten, M. van Rijswick, 'The governance approach in European Union environmental directives and its consequences for flexibility, effectiveness and legitimacy' in *EU Environmental Legislation,* Edward Elgar Publishing Ltd. (2014), p. 13-47.
[123] Article 2(13) WFD.

the directive provides exemptions/less stringent rules on the environmental objectives to be reached (all mentioned in Article 4 WFD).

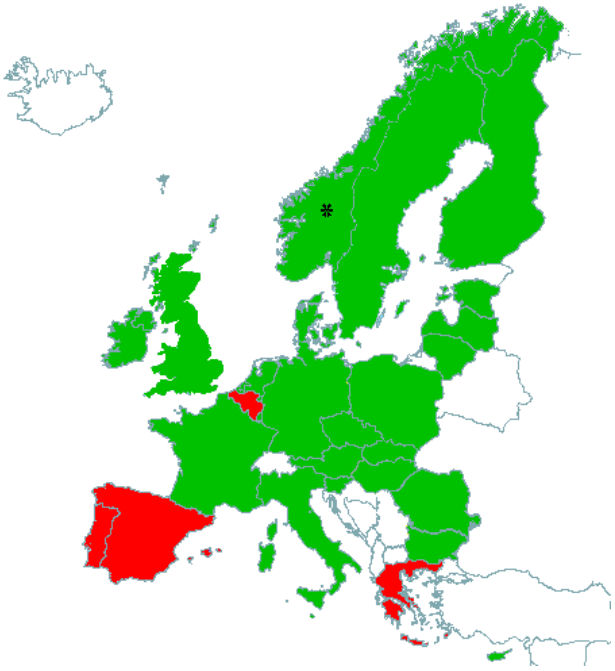
Another element to be addressed in the river basin management plan concerns information on the economic analysis of water use based on Article 5 WFD. For more information on the economic analysis of water use I refer to section 2.4.3.7. A summary of the programme of measures as obliged by Article 11 WFD is to be included. It concerns an outline of the measures (to be) taken to attain the environmental objectives. This summary should also include information on measures taken with respect to the principle of cost recovery for water services (see also Article 9(2) WFD).[124]

Lastly, besides a number of administrative details, the river basin management plans should include a register of any more detailed programmes and management plans, for instance in case of sub-basins and a summary of public information and consultation measures taken and their outcome and evaluation.

The Member States need to report to the Commission by filing their plans and update plans (Article 15 WFD). In the first periodical update of river basin management plans certain evaluative information is also to be included, like the foreseen necessary measures, the evaluation of progress made, an overview of interim measures taken et cetera. The Commission reviews the WFD implementation process and surveys the river basin management plans (Article 18 WFD).

A 2012 Commission report to the European Parliament and the Council shows that, although the river basin management plans should have been adopted and reported to the Commission by 22 December 2009[125], a number of Member States had difficulty in fulfilling that obligation, either by not adopting and filing a plan at all (Portugal/Greece) or by partially fulfilling the obligation, for instance adopting but not filing the plan or not all plans being adopted and/or filed.[126]

[124] The European Commission is sharply monitoring the inclusion in the river basin management plans of the steps taken with regard to cost recovery. In December 2013 it brought an action against Poland to the European Court of Justice with regard to this obligation (C-648/13, in progress) as Poland, in the view of the European Commission, had not fulfilled its obligation to include in the river basin management plans a report with regard to the effectuation of cost recovery.
[125] Article 13 (6) WFD.
[126] Report from the Commission to the European Parliament and the Council on the Implementation of the Water Framework Directive (2000/60/EC), River Basin Management Plans, COM (2012) 670 final, p. 5.



Commission report p. 5, Updated overview at [http://ec.europa.eu/environment/water/participation/map_mc/map.htm]

The Court of Justice, at the request of the Commission, declared that these countries have failed to fulfil their obligations on this point.[127]

2.4.3.6 Environmental objectives (Article 4)

The cost recovery provision on several points refers to the environmental objectives. Water pricing policies need to provide adequate incentives to use water resources efficiently in order to contribute to the environmental objectives of the Directive. Also the reporting obligation in river basin management plans on the cost recovery measures are linked to attaining the environmental objectives of the Directive.[128] The environmental objectives have been laid down in Article 4 WFD. Article 4 WFD sets concrete environmental objectives which the programmes of measures in the river basin management plans should attain and in essence contains the standards to be reached. The preamble to the Directive mentions that environmental objectives should be set to ensure that a good status of surface water and groundwater is achieved and prevention of the deterioration of the status of waters is provided.[129] The environmental objectives are differentiated in objectives regarding surface water, groundwater and objectives regarding protected areas.

It is not yet very clear what obligations Article 4 WFD actually entails for Member States.[130] As this research does not specifically focus on difficulties regarding the achievement of the

[127] C-223/11 *Commission vs. Portuguese Republic*, ECLI:EU:C:2012:379; C-297/11 *Commission vs. Hellenic Republic*, ECLI:EU:C:2012:228; C-366/11 *Commission vs. Kingdom of Belgium,* ECLI:EU:C:2012:316; C-403/11 *Commission vs. Kingdom of Spain*, ECLI:EU:C:2012:612.
[128] See Article 9(1) and (2).
[129] Preamble sub. (25).
[130] See the Request for a preliminary ruling from the Bundeswaltungsgericht (Germany) lodged on 22 August 2013 regarding the Bund für Umwelt und Naturschutz Deutschland E.v. versus Bundesrepublik Deutschland (C-461/13), where the Court of Justice is requested to consider whether a number of sub-provisions of Article 4

environmental objectives in general and the obligations connected thereto, but focuses on the cost recovery obligation (also) as part of the programmes of measures to reach the environmental objectives, it does not fit within this book to provide an in-depth analysis of the particularities of Article 4 WFD. Therefore, only a brief summary of the contents of Article 4 WFD is provided.[131]

For surface waters Member States need to:

- implement measures to prevent deterioration of surface water bodies for which a temporary deterioration applies (Article 4 (6)) or the exemption of Article 4(7) applies;
- protect, enhance and restore all bodies of surface water for the purpose of achieving good surface water status at the latest 15 years after the date of entry into force of the Directive;
- protect and enhance the artificial and heavily modified bodies of water for the purpose of achieving good ecological potential and good surface water chemical status, again at the latest 15 years from entry into force of the Directive;
- implement necessary measures following from Article 16 (1) and (8) WFD to progressively reduce pollution from priority substances and to cease out emissions, discharges and losses of priority hazardous substances.

With regard to the last obligation, further Union legislation is provided by means of the Directive on environmental quality standards in the field of water policy, also called the Priority Substance Directive (PSD).[132]

For groundwater Member States need to:

- implement measures necessary to prevent or limit the input of pollutants into the groundwater and to prevent deterioration of the groundwater bodies on which a temporary deterioration (Article 4(6)) applies or the exemption under Article 4(7) applies;
- protect, enhance and restore all bodies of groundwater and ensure a balance between abstraction and recharge of groundwater for the purpose of achieving a good groundwater status, again within 15 years from entry into force of the Directive, both within the scope of application of Article 4's exemptions;
- implement measures necessary to reverse any significant and sustained upward trend in the concentration of any pollutant resulting from the impact of human activity to progressively reduce pollution of groundwater.

In order to reach a good groundwater status both the chemical status and the quantitative status need to be good. As reaching a good quantitative status is only possible in situations where no over-abstraction of groundwater exists, the sustainability of the water resource itself is to be the starting point for any use thereof. This follows from the text of the provision and can be considered quite an essential new point of view as the coping capacity of the environment is in my view at least implicitly acknowledged as a precondition for sustainable water use.[133]

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imply an obliged refusal of projects if no derogation is granted or that these sub-provisions concern 'merely a statement of an objective for management planning.'.

[131] For further reading on the lack of legal clarity that is observed regarding Article 4 WFD see J.J.H. van Kempen, 'Countering the Obscurity of Obligations in European Environmental Law: An Analysis of Article 4 of the European Water Framework Directive', *Journal of Environmental Law*, (2012), p. 499-533; J.J.H. van Kempen, *Europees waterbeheer: eerlijk zullen we alles delen?*, BjU (2012).

[132] Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council, OJ L 348, 24 December 2008.

[133] Article 4 (1) b (ii) jo. Article 2 (20)(28) jo. Annex V, table 2.1.2 WFD.

With regard to strategies to prevent and control the pollution of groundwater at the Union level further legislation is provided by means of the Groundwater Directive.[134]

For protected areas Member States need to comply with any standards and objectives within 15 years after entry into force of the Directive, unless Union legislation under which the areas have been established specifies differently.

2.4.3.7 The economic analysis of water use

For each river basin district the Member States need to make an economic analysis of water use. This obligation is laid down in Article 5 WFD. The economic analysis is relevant for cost recovery, as Member States in applying cost recovery need to have regard to this economic analysis.[135] Annex III outlines the reasons for making this analysis:

a) The analysis is needed to make relevant calculations for cost recovery based on Article 9 WFD. These calculations should include long-term forecasts of water supply and demand. They may, if necessary, include also estimates of the volume, prices and costs regarding water services and estimates of relevant investments.
b) The analysis is needed in order to determine 'the most cost-effective combination of measures in respect of water uses to be included in the programme of measures under Article 11 based on estimates of the potential costs of such measures.'[136]

The analyses need to be reviewed every six years.

The economic analysis obligation has been included in the Directive for the purpose of enhancing the effectiveness of environmental provisions, on the one hand, and to improve the efficiency of water use, on the other. This enhancement of efficiency and effectiveness of environmental provisions is to be effectuated by a solid system of cost recovery for water services in conjunction with a sound economic analysis, which will in principle lead to a more realistic water price, including environmental and resource costs.[137]

2.4.3.8 Programme of measures (Article 11)

The WFD is a programmatic-based directive.[138] It offers Member States the possibility to use tailor-made solutions and instruments for region-specific problems as they strive to attain the environmental objectives of the Directive. For each river basin the Member States set up a programme of measures.[139] This obligation is laid down in Article 11 WFD. The programme of measures takes account of the characteristics of the river basin district, the review of the environmental impact of human activity and the economic analysis of water use as is to be executed according to Article 5 WFD.

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[134] Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration; OJ L 372, 27 December 2006.
[135] Article 9 (1) WFD.
[136] Annex III sub b WFD.
[137] Proposal for a Council Directive establishing a framework for Community action in the field of water policy, COM(97) 49 final, OJ C 184, 26 February 1997.
[138] For further reading on the programmatic approach in environmental directives: M.N. Boeve & G.M. van den Broek, 'The programmatic approach; a Flexible and Complex Tool to Achieve Environmental Quality Standards', *Utrecht Law Review*, vol. 8, issue 3 (2012); F. Groothuijse & R. Uylenburg, 'Everything according to plan? Achieving environmental quality standards by a programmatic approach.', in *EU Environmental Legislation,* Edward Elgar Publishing Ltd., (2014), p. 116-145. See also for the use of plans and programmes in EU water law: H.F.M.W. van Rijswick & H.J.M. Havekes, *European and Dutch Water Law*, Europa Law Publishing, (2012), p. 205-224.
[139] Or part of an international river basin district within the countries' territory.

Although directives based on a programmatic approach offer Member States flexibility in the methodology and instruments to be used, the WFD does set a number of restrictions. Besides taking account of the analysis of Article 5 WFD (section 2.4.3.7), the content of the programme of measures is partly regulated. Each programme must include prescribed 'basic' measures. These basic measures, as mentioned in Article 11 (3) WFD, are minimum requirements to be complied with. For this thesis the relevant basic measures to be mentioned are:

a) Measures deemed appropriate for the purposes of Article 9
b) Measures to promote an efficient and sustainable water use in order to avoid compromising the achievement of the objectives specified in Article 4.

Regarding the measures deemed appropriate for the purposes of Article 9 WFD, the text of Article 11 WFD is not clear as to what is to be understood as 'the purposes of Article 9'. This may reflect the two elements of cost recovery, being (1) sound water pricing policies that provide adequate incentives for water users to use water efficiently and ensuring adequate contributions by different water uses to the costs of water services. But it may also relate to (2) the purposes of the Directive itself (Article 1 WFD), to the achievement of which cost recovery is supposed to contribute.[140] The wording of the derogation provision in Article 9 (4) WFD points in that direction, referring to the non-application of cost recovery 'where this does not compromise the purposes and the achievement of the objectives of this Directive'.

Regarding measures to promote an efficient and sustainable water use, one may hold the view that 'efficient water use' is an economic terminology and therefore 'efficient' should be interpreted from an economic (and not necessarily environmental) point of view, resulting in water use that may be efficient, but not per se in line with environmental objectives. However, I hold the view that this is not the way 'efficient water use' should be addressed in this respect. As stated in the former subsection, the economic analysis in combination with cost recovery was introduced to enhance the effectiveness of environmental provisions and to ensure a more efficient water use by means of realistic pricing. Both in Article 9 WFD where water pricing policies need to contribute to an efficient use of water resources to contribute to environmental objectives and in Article 11 WFD where efficient water use is to be promoted to avoid compromising the achievement of environmental objectives, it is clear that an interpretation of the economic term 'efficient' without relating it to achieving environmental objectives is not meant to be.

2.5 Concluding remarks

The main question raised in the first section can now be answered: What has been the development in European water policy, what goals are to be reached and where is cost recovery positioned?

The goals to be reached by European water policy can be considered to be summarized in Article 1 WFD: to contribute to the provision of the sufficient supply and good quality surface water and groundwater as needed for sustainable, balanced and equitable water use. Both sustainable water

[140] See P.E. Lindhout, 'A wider notion of the scope of water services in EU water law, Boosting payment for water related ecosystem services to ensure sustainable water management?', *Utrecht Law Review*, vol. 8, issue 3 (2012), p. 88; see also E. Gawel/W. Köck, Reform der Abwasserabgabe: Optionen, Szenarien und Auswirkungen einer fortzuentwickelnden Regelung, Umweltforschungsplan des Bundesministeriums für Umwelt, Naturschutz, Bau und Raktorsicherheid, Texte 55/2014, p. 89: 'Art. 9 WRRL is nicht nur auf Art. 4 WRRL bezogen, sondern hat – genau wie der kombinierte Ansatz des Art. 10 WRRL – eine eigenständige Funktion zur Gewährleistung einer nachhaltigen Wassernutzung auf der Grundlage eines langristigen Schutzes der vorhandenen Ressourcen (Art. 1 lit. b. WRRL) (…) Eine Betrachtungsweise, die die Ziele der WRRL auf rein qualitätsorientierte und regionale (Waserkörper bezogene) Konzepte fokussiert, is deshalb zu eng angelegt. Die Ziehle der WRRL gehen darüber hinaus und damit auch der legitime Einsatzort einer auf Art. 9 WRRL gestützten "Wassergebührenpolitik"'.

use and equitable water use can be considered the ultimate goals of European water policy. Sustainable water use fits within the overall environmental policy goal of sustainable development. However, the sustainability of water use is different from the concept of sustainable development. Where sustainable development request a continuous balancing of environmental, societal and economic factors, sustainable water use focusses on the sustainability of the possibility to use water. As stated, water use can only be sustainable if the source is sustainable. The regeneration of water resources or the regenerative power of ecosystems is leading in order to reach sustainable water use.

Besides striving to sustainable water use, European water policy also request that water use is equitable. This means weighing of different environmental, social and economic needs with regard to the waters concerned to ensure fair access to and distribution of waters, a fair burden sharing and taking into account the interest of future generations. Especially the last factor, the interest of future generations, is pressurized where water use is not sustainable.

A development can be recognized in the problems European water policy needs to resolve. In the seventies the main problem was combating pollution of freshwaters and seawaters. To address this problem the polluter pays principle was introduced. The polluter pays principle is a fundamental environmental principle on which the Union's environmental policy needs to be based.[141] In its history this principle shows a development of growing importance. Starting from a non-legal, economic principle, it became one of the fundamental environmental principles of the Union. In the economic arena the principle evolved from a non-subsidize principle to a principle holding polluters responsible for not only the costs of pollution prevention and control, but – later on – also for connecting costs (of damage) like liability payments and costs relating to non-compliance with permits. Furthermore, the instruments changed from withholding subsidies (besides limited exemptions) to other polluter pays principles embodying instruments like fees and green taxes.

The scope therefore broadened even though there is still uncertainty about how extensive the interpretation of the polluter pays principle should be. The fact remains that a narrow view of the principle - only having a scope from the internalization of pollution prevention and control costs - lost track of time. Neither is it evident that an extensive or broad view of the polluter pays principle, including the coverage of all forms of environmental damage other than by pollution / emissions, will be sustained. If an extensive interpretation of the polluter pays principle should apply, for instance also the environmental damage due to groundwater extraction would be covered by the principle. To date, no jurisprudence at the Union level has been provided that confirms such a scope for the polluter pays principle.

Besides promoting the polluter pays principle to combat pollution, European water policy also tried to tackle the pollution problems by introducing environmental quality standards in a number of specific directives in the seventies. In the same period, the first economization of environmental interest occurred by stressing the need for cost-benefit analysis, even though the measurability or effectiveness of environmental policy cannot fully be measured in monetary terms. Many legislative acts came about, without satisfying effect as in the nineties groundwaters were still polluted and water resources were not used in a sustainable manner and the consequences of climate change became more and more manifest. Two shifts in water policy came about: from a sectoral approach to an integral management approach and from a regulated approach to a (more flexible) programmatic approach. Besides this, the seriousness of climate change requested not only an approach based on mitigation strategies, but also on adaptation strategies. It is to be seen whether

[141] Article 191(2) TFEU.

these strategies will be able to address the current and future environmental problems in a sufficient way.

Four evolutionary changes in European water policy can be recognized in the last two decades:

a) European water policy changed from a sectoral approach to an integral management approach;

b) European water policy changed from a regulated approach to a (more flexible) programmatic approach;

c) European water policy changed focus, by not only focussing on mitigation strategies, but also on adaptation strategies;

d) Economization of, or instrumental reason within European water policy has gained an increasing role of importance;

One of the environmental economic instruments in current European water policy is cost recovery for water services (or use). The inclusion of 'the principle of cost recovery' in Article 9 of the WFD confirms the importance of cost recovery as environmental economic instrument on the one hand and the importance of the polluter pays principle on the other hand. In this chapter the scenery in which the cost recovery provision in the WFD has been positioned was outlined. Addressing the legal basis of the WFD, even though the directive was already concluded in 2000, has shown to be still relevant. Not to question the validity of the Directive as a whole, but to assess where the potential application of the cost recovery provision ends. As will be shown in this book, water use and water services are quite extensive terms and, without realizing, one may think that cost recovery relates to all water-related measures. Therefore, it is important to highlight where the obligatory cost recovery ends.

To assess the cost recovery provision, also the status of 'water' as included in the WFD is shown to be important. As cost recovery relates to water services (and use) and questions arise with regard to interpretation difficulties, it is important to know what we are talking about when it concerns water in the WFD. As addressed, water in the WFD is firstly to be considered as a social and environmental good. In line with the United Nations, water in the WFD is explicitly not primarily an economic good. As many elements in the WFD contribute to the rationalization and economization of decisions to be taken (like monitoring, recent scientific data, cost-benefit analyses, disproportionate costs) the object concerned – water – is not primarily an economic good. It is important to keep this in mind when it may concern juxtaposing water concerns.

Lastly, measures regarding cost recovery for water services have been positioned in the programme of measures of a river basin as a 'basic measure'. This may be considered a first hint of the importance of cost recovery and the (non-)obligatory nature thereof in relation to the environmental quality objectives pursued. The reporting obligation of the measures of cost recovery in the river basin management plans at least provides transparency on the use or non-use of this tool. Article 9 WFD however seems to have a broader scope than the environmental objectives only. 'Measures deemed appropriate for the purposes of Article 9' in my view reflect not only the points of action as mentioned in the cost recovery provision itself and/or the environmental objectives to be pursued, but also refers to the objectives mentioned in Article 1 WFD, the purpose of the Directive.

In the following chapters the question what constitutes of the cost recovery provision is examined.

3 European legislative history on cost recovery

3.1 Introduction – What constitutes the cost recovery obligation (I)

The explicit insertion of an economic instrument in the WFD was a novelty at the time and expectations on the use of economic instruments in environmental law were high, but what constitutes this cost recovery obligation? In order to assess what constitutes the cost recovery obligation as laid down in Article 9 WFD in this chapter first an extensive examination of the coming about of the text of the provision is made. The next chapter will approach this question from a different perspective, i.e. a legal theoretical perspective.

In this chapter the examination of the coming about of the text of the cost recovery provision will show that issues of divergence existed between the Council and the European Parliament. The relevance of this review is not primarily the legal effects the travaux preparatoires will or should have, but to understand the development and difficulties in coming to this specific provision text. In order to assess what constitutes the cost recovery obligation the following question will be addressed: What issues on cost recovery arose during the legislative process and how were these issues solved?

3.2 Proposal for a European Parliament and Council decision

The Council requested the Commission in its resolutions of 25 February 1992 and 20 February 1995 to draw up an action programme and proposals to enhance surface and groundwater protection.[142] In these resolutions the Council requested a detailed action programme to be drawn up for groundwater protection and management, which programme should be part of an overall policy on water protection. The Commission presented its proposal for an action programme for integrated groundwater protection and management in 1996.[143]

Four action lines are presented in this proposal, all mentioning actions to be taken at Member State level or Community level:

1. Integrated planning and management (principles); Fresh water resources should be managed in an integrated manner and the management of groundwater and surface waters should be managed on a long-term basis to ensure the quality and quantity of groundwater; The use of economic instruments is not mentioned in the Member State action list, nor is it in the Community action list.

2. A rational regulatory framework for the abstraction of fresh water; The focus of this suggested action line is securing an appropriate quantity management of groundwater and surface water within the river basin, where groundwater and surface water interact with each other; Furthermore, as an objective is mentioned the encouragement of policy aimed at saving fresh water to keep the abstraction of fresh water low and to ensure that appropriate priority is given to stimulate water savings, re-use and a sound housekeeping of fresh water resources. In this action line an effort is expected of Member States with regard to the use of economic instruments. The Commission mentions as action at Member State level:

[142] Respectively: Council Resolution of 25 February 1992 on the future Community groundwater policy, OJ C 059, 6 March 1992, p. 0002-0002 and Council Resolution of 20 February 1995 on groundwater protection, OJ C 49, 28 February1995 p. 0001-0001.

[143] Proposal for a European Parliament and Council Decision on an action programme for integrated groundwater protection and management, 96/0181 (COD) (1996), COM(96) 315 final, OJ C 355, 25 November 1996.

> 'Possibilities for encouraging saving of water resources and good house-keeping should be considered in order to keep abstraction of fresh water low, especially in areas with water shortage. This could include recommendations for new practices for irrigation, renovation of distribution systems to reduce losses, and differentiation into types of water for different uses, installation of meters, and *use of economic instruments such as appropriate pricing and fiscal incentives to promote efficient use*.'[144]

No action with regard to the use of economic instruments is mentioned at Community level.

3. Diffuse sources of pollution; Protection of groundwater from diffuse sources is the main objective of this action line. Furthermore, a strategy is presented with regard to the use of /restrictions on plant protection products. With regard to this strategy the use of economic instruments at Member State level is mentioned, but always referring to products, like fertilizers, plant protection products et cetera.

4. Control of point source pollution from activities and facilities which may affect groundwater quality; Although point source pollution is in principle well traceable, a high level of protection of groundwater against high-risk installations or activities should be ensured for non-IPPC activities or installations. In this respect Member States are expected to review the use of economic instruments:

> 'Possibilities for using economic instruments such as, as appropriate, charges and fiscal measures as an incentive to internalize environmental costs to reduce the amounts of pollution from discharge of effluent as well as possibilities for the use of voluntary agreements should be reviewed.'[145]

The objective of the suggested programme was 'to ensure protection and use of groundwater through integrated planning and sustainable management aiming at preventing further pollution, maintaining the quality of unpolluted groundwater, restoring, where appropriate, polluted groundwater, as well as preventing the over-exploitation of groundwater resources.'[146] Regarding the inclusion of cost recovery in the proposed action programme, no Community action with regard to (introducing) a cost recovery system is suggested. Throughout the proposal, if any activity is requested with regard to research into the possibilities with regard to economic instruments, the action is to be taken at Member State level. This proposal reflects the use of economic (pricing) instruments or cost recovery as a policy instrument and not (yet) as an environmental policy principle.

3.3 Proposal for a Council Directive

In the first Commission text proposal for the WFD achieving good water status was mentioned as the overall objective.[147] A starter for payment for water use was full cost recovery. The damage to the environment that may occur due to diffuse pollution as a result of water use was omitted in the cost recovery article. The Commission felt that costs with regard to diffuse pollution were sufficiently managed by existing legislation (the Nitrates Directive). The focus in this first proposal with regard to cost recovery was upon improving the efficiency of water use and the effectiveness

[144] *Ibid.*, p. 15 [emphasis added].
[145] *Ibid.,* p. 26.
[146] *Ibid.*, p. 10.
[147] Proposal for a Council Directive establishing a framework for Community action in the field of water policy, 97/0067 (SYN) (1997), COM(97) 49 final, OJ C 184, 26 February 1997.

of environmental provisions that have a relation to water use. Furthermore, cost recovery for water services was seen as contributing to the principle of sound water management. The Commission did not outline what the principle of sound water management exactly is, but implied that the cost recovery mechanism, as introduced in Articles 7 and 12, should lead to a reduction of direct State aid, a reduction of cross-subsidies between the different economic sectors and to a reduction of subsidies between current and future users. It should lead to a higher level of transparency, also in order to assess a possible distortion of competition in non-household water use.

With regard to the text proposal itself the cost recovery obligation is worded in Article 12 (Charges for the use of water). The starting point is full cost recovery for all services provided for water uses. Recovery is to take place from the entirety of water users according to each economic sector (at least divided into households, industry and agriculture). 'Use of water' in this respect was defined as:

a. 'Abstraction, distribution and consumption of surface water or groundwater;
b. Emission of pollutants into surface water and waste water collection and treatment facilities which subsequently discharge into surface water;
c. Any other application of surface water or groundwater having the potential of a significant impact on the status of water.'[148]

'Full cost recovery' was described as follows:

> 'Full cost recovery means that the following cost elements of any service provided in relation to water use are paid by the user through prices or charges:
>
> - Operation and maintenance costs;
> - Capital maintenance costs;
> - Capital costs (principal and interest payments); and
> - Reserves for future improvements and extensions.'[149]

Interesting is one of the suggested possibilities to derogate from the proposed recovery obligation. The first mentioned derogation possibility stated that a Member State was allowed to make exemptions from the cost recovery provision 'in order to allow a basic level of water use for domestic purposes at an affordable price.' (Article 12 -3 sub. a). A basic level of water use was defined as 'the amount of water used by the individual person for basic needs' (34) and this level is based on the minimum amount of water required for human health and hygiene. Water use for domestic purposes was considered to be individual household use. Therefore, water use for commercial activities was excluded and could not be considered as water use for domestic purposes. This proposed derogation possibility however did not imply that water, also the basic needs, should be provided free of costs. The proposal confirmed that even the minimum need for water (the minimum amount required for human health) should be paid for as it stated that the exemption could be used to allow a certain level of water use 'at an affordable price'.

Furthermore, another exemption is that Member States may take account of a specific geographical or climatic situation if the region in question is eligible for certain assistance under the Structural Funds.

[148] *Ibid.*, p. 33.
[149] *Ibid.*

3.3.1 Opinion of the ESC

As part of the legislative process the Economic and Social Committee was requested to advise on the proposed directive.[150] The Committee has an advisory function for the European Parliament, the Council and the European Commission, a function which has currently been laid down in Article 13 TEU. According to its mission statement the Economic and Social Committee 'contributes to strengthening the democratic legitimacy and effectiveness of the European Union by enabling civil society organisations from the Member States to express their views at European level.'[151]

The Economic and Social Committee gave its opinion on the proposal in November 1997.[152] The Committee held the view that water pricing is a useful instrument for encouraging water saving, considering however, that a water pricing instrument may not be a response to commercial criteria, nor may it be solely dependent on economic interests. The Committee remarked that the recovered costs should be reinvested in conservation measures and that specific financial transfer mechanisms should be suggested. With regard to the proposed text the Committee outlined some shortcomings such as which institutions/companies should recover the costs, who should decide on the price level, what should be done concerning systems where there is a free market in water. The Committee, as far as was relevant, concluded by advising that the criteria for the use of exemptions from cost recovery should be better defined.

Before the first reading in Parliament, the Commission amended the original proposal twice.[153] The reason for these amendments does not relate to the cost recovery article in the WFD and therefore it will not be further discussed here. After these amendments it was sent to Parliament for consultation and to the Committee of the Regions for advice.

3.3.2 Opinion of the Committee of the Regions

The Committee of the Regions was critical about the possible introduction of a cost recovery system.[154] It disapproved of the proposed obligation. In short the Committee felt that the suggested charging obligation did not ensure that certain sectors like agriculture and industry were not unfairly or unjustly charged. It furthermore requested further exemptions/derogations from the proposed recovery obligation to meet local and regional specifics (*i.e.* to use an exemption/derogation to prevent local or regional structural disadvantages).

3.3.3 The view of the European Parliament (first reading)

The proposal was forwarded by Parliament to the different advisory committees for advice. In short, the consulted advisory committees provided the following advice.

The Committee on Budgets foresaw changes for three groups with regard to the cost of implementing the WFD, i.e. Member States, consumers and industry & agriculture. The first, Member States, might need to set up administrative water management bodies. Consumers would

[150] Article 192 TFEU (the former Article 175 TEC) in conjunction with Article 13 (4) TEU.
[151] [http://www.eesc.europa.eu/?i=portal.en.about-the-committee] [8 February 2014].
[152] Opinion of the Economic and Social Committee on the 'Proposal for a Council Directive establishing a framework for Community Action in the field of water policy, OJ C 355, 21 November 1997.
[153] Amendment to the Proposal for a Council Directive establishing a framework for Community action in the field of water policy, 97/0067(SYN) (1997), COM(97) 614 final, OJ C 16, 20 January 1998; regarding the inclusion of a simplified and updated version of the existing controls on small installations regarding discharge of dangerous substances (Directive 76/464/EEC) is simpler to achieve the objective of a combined approach towards pollution emissions to water.
Amended proposal for a Council Directive establishing a framework for Community action in the field of water policy /* COM/98/0076 final - SYN 97/0067 */, OJ C 108, 7 April 1998.
[154] Opinion of the Committee of the Regions on the 'Proposal for a Council Directive establishing a framework for Community action in the field of water policy' CdR 171/97 fin. OJ C 180, 11 June 1998.

have to pay a higher price for water, as the investments needed to comply with the quality standards in the WFD would be passed on to consumers. The same would apply to the industry and agriculture group. For the last two groups the Committee also foresaw a more careful use of water and a positive effect with regard to the measures mentioned in the WFD in relation to pollution prevention. Summing up the advice, the Committee on Budgets felt that the net effect of costs and savings would be substantially positive.

The opinion of the Committee on Research, Technological Development and Energy, on the other hand, was negative and critical. It appealed to the Commission to address the quantity of water better in relation to the qualitative aspects. Furthermore, it saw a greater role at Community level in alleviating the impact of floods and drought, a task which was not included in the proposal. The Committee proposed that integrated water management should not be bound by the river basin district borders, but also that the integrated management of water between the different basins should be addressed. Furthermore, with regard to economic measures it remarked that not only water charges should be mentioned but also incentives and penalties with regard to the quantity of water use. In the view of this Committee the water costs and the recovery of these costs was a matter that should be dealt with at state level, possibly on the basis of (just) a general guideline.

The third committee requested to provide an opinion, the Committee on Fisheries, welcomed the intention to recover the costs of water use. This committee proposed an investigation, as part of the economic analysis for the recovery of the costs, not only within a river basin, but also outside of it, i.e. the sea. Also the adverse effects of pollution at sea should be identified, as pollution normally ends up in the sea. Furthermore, the Committee on Fisheries advised that an appeal should be made to the Commission to ensure that a great variety of cost calculating methods would not occur due to the fact that Member States may place more or less importance on aquaculture.

The fourth committee requested to provide an opinion, the Committee on Agriculture and Rural Development, recommended that attention should be given to the apportionment of the costs that should be recovered. This committee remarked that the proposal did not pay attention to the benefits that the agricultural sector (as water users and polluters) has for consumers in producing food and it felt that these benefits should also be addressed. Furthermore, it stressed that the use of water by agriculture does not necessarily mean the pollution of waters and that the social, environmental and economic impact on the regions must be taken into account in assessing the costs of water services. The committee foresaw great difficulties for the agricultural sector if the costs of e.g. constructing polders and other collective drainage systems should be paid for by the agricultural sector. In its view the proposal did not sufficiently outline in which way the costs of such measures would be apportioned over the agricultural and other sectors. Although the Committee on Agriculture and Rural Development was critical, it did not object to a form of cost recovery for water services in itself.

In the report which emanated from this consultation and the resolution which contained Parliament's opinion the following – as far as is relevant – can be addressed.[155]

First of all, Parliament took a position by stating that water is not a commercial product like any other, but should be considered a heritage which belongs to the people of the Union. This heritage should be protected, defended and treated as a heritage. In the final version of the Directive the indication of the ownership of water with the wording 'that belongs to' was not repeated. Parliament also suggested broadening the purpose of the Directive in the sense that not only sustainable water

[155] Proposal and amended proposals for a Council Directive establishing a framework for Community action in the field of water policy, OJ C 150, 28 May 1999.

consumption should be promoted (as proposed in Article 1), but also sustainable water *use*, which also needs to be efficient (amendment 18). Cost recovery should take place by introducing a charging system and these charges should be set at a level which is sufficient to influence the behavior of water users. This behavioral influence in the charging system shows the different point of view of Parliament compared to the proposal which focuses on the recovery of costs and which does not mention charging as an influence mechanism to promote a change of behavior with respect to water use.

The system suggested by Parliament should be applied to all water users, as in the Commission's proposal those who abstract water directly were not mentioned as a target for cost recovery. Furthermore, Parliament disagreed with the proposal that Member States which qualify for assistance under the Structural Funds could apply exemptions with regard to introducing a charging system. At least a basic charging scheme should apply.[156]

It suggested the following text for Article 12:

> '1. By 2010, Member States shall ensure full cost recovery for all costs for services provided for water uses overall, including abstraction and by economic sectors, broken down at least into households, industry and agriculture.
>
> 1. a (new) Where it is not possible, or impractical, to calculate the full environmental costs of water use, charges shall be set at a level which encourages the attainment of the environmental objectives of this Directive.
> 1. b (new) in accordance with the polluter pays principle, Member States shall ensure that the charging system provides that users faced with a need to treat their water as a result of another's polluting activities, can fully recover their additional costs from the polluter.
> 2. Following the analysis required under Article 7 and Annex II of methods for calculating the environmental and resource costs and benefits of water use, the Commission shall, where appropriate, come forward with proposals to ensure that environmental and resource costs not covered under paragraph 1 are reflected in the price of water uses by 2012.
> 3. c. In regions designated as Objective 1, 5b or 6 under the Structural Funds, the water charging schemes established shall still apply but Community assistance, where appropriate, can be used for this purpose. A detailed explanation of the basis for any exemptions, and details of any exemptions granted, shall be sent to the Commission within six months for their entry into force and published in the River Basin District Management Plans.
>
> - 2nd paragraph - A detailed explanation of the basis for any exemptions, and details of any exemptions granted, shall be sent to the Commission within six months of their entry into force and published in the river basin district management plans'[157]

3.3.4 Issues of divergence between the European Parliament and the Council on cost recovery

Only on July 11, 2011 was a report by the Council's Working Party on the Environment declassified. This report outlined part of the problems that the different positions between the Council of Ministers and Parliament ran into. In June 1998 the Council of Ministers debated the

[156] Report on the proposal and amended proposals for a Council Directive on establishing a framework for Community action in the field of water policy. Committee on the Environment, Public Health and Consumer Protection. A4-0261/98, p. 65.
[157] *Ibid.*, p. 29/30.

proposal of the Commission and reached a common understanding.[158] Kaika mentions that any pricing/cost recovery obligation was rejected.[159] Parliament's first reading of the proposal was scheduled for February 1999 and the Council did not want any delay in the procedure, probably to prevent applying the co-decision procedure as would be applicable when the Treaty of Amsterdam would come into force. The Commission had to act as a mediator between the Permanent Representatives Committee and the European Parliament in an attempt to reach a compromise. In the declassified report one of the issues of divergence between the European Parliament and the Council was the article regarding charging for the use of water.

As far as is relevant, the following overview was included in the document:

Proposal for a Water Framework Directive
Issues of divergence between EP Environment Committee report and the latest Council text

	ISSUE	ARTICLE IN COUNCIL TEXT	PROPOSED EP-AMENDMENT	EP	COUNCIL
8	Charging	Art 12	Am 65, 66, 67, 68	Tightens original proposal. Requires full integration of environment and resource costs.	Weaker than original proposal. Member States shall take account of the principle of recovery of the costs of water services, including environmental and resources costs. No legal requirement to charge. Requires exposition of an economic analysis of costs in River Basin Management Plans.

The Council and the Parliament tried to find a compromise during the informal meetings, but could not reach such a compromise on the cost recovery article. In the Council meeting on 11 March 1999 the Council itself reached a political agreement regarding a common position on the proposal.[160] The Council held the view that its own suggested text with regard to the cost recovery article ensured that the directive contained 'a mechanism to take account of the principle of recovery of costs for water services'.[161] The Council introduced the following text:

[158] This common understanding is included in document 9710/98 ENV 300 PRO-COOP 104 (1998), to which it is referred to in document 6404/99 ENV 68 PRO COOP 46, 2 March 1999.
[159] M. Kaika & B. Page, 'The EU Water Framework Directive: part 1. European policy-making and the changing topography of lobbying', [www.interscience.wiley.com/doi/10.1002/eet.331], (2003). Please note that it has not been possible to verify the statement that pricing/cost recovery was 'rejected' as Kaika states.
[160] Common Position, Report from the Permanent Representatives Committee to the Council of the European Union, doc. No. 6404/99 ENV 68 PRO-COOP 46 (1999).
[161] Council meeting (Environment) 11 March 1999, C/99/71, 6546/99 Presse 71.

'Article 12 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 IIIa, and in accordance in particular with the polluter pays principle. Member States may in doing so 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.
2. (…)
3. Member States shall report in the River Basin Management Plans on the practical steps and measures taken to apply this principle.
4. Nothing in this Article shall prevent the funding of particular preventative or remedial measures in order to achieve the objectives of this Directive.'[162]

The Council text suddenly included the word 'principle' of recovery of the costs for water services. Perhaps the Council intended to weaken any legal obligation emerging from the provision. However, as will be outlined in chapter 4, from a legal theoretical point of view the final text still implies a cost recovery obligation, irrespective of the use of the word 'principle'.

Retrospectively, the Council seemed to prefer more of a governance approach, with as few procedural obligations as possible and as much discretionary room as possible for Member States to decide on applying cost recovery as an instrument at all, whereas Parliament was searching for more certainty to ensure that environmental goals could be attained in the future.

Due to the entry into force of the Treaty of Amsterdam, the ordinary legislative procedure under Article 251 TEC (now Article 194 TFEU) (co-decision) became applicable to environmental matters, thereby better positioning the European Parliament in environmental matters, as its approval of the proposed directive became necessary for final decision making.

3.4 An amended proposal for a Water Framework Directive

With regard to the amendments regarding cost recovery for water services made by Parliament, the Commission agreed to some of them in its amended proposal.[163] Abstraction was included as a specific form of water use of which the relating costs should be recovered (amendment 65). Furthermore, the Commission accepted the amendment that included charges to be set at a level which encourages the attainment of the objectives of the directive (amendment 66). It rejected amendments 67, 68 and 69. Amendment 67 suggested that users who needed to treat their water due to pollution by others would be able to recover their additional costs from that polluter. Amendment 68 suggested that a full integration of environmental and resource costs in the cost recovery would be established by 2012. The Commission however found that the retrieval of these costs is essential, but needed further research. The suggestion by Parliament in amendment 69, stating that a charging scheme should still apply in Structural Fund regions and Community assistance – if necessary - can be provided for, was also rejected, but without any explicit consideration being given.

[162] Council meeting (Environment) 11 March 1999, C/99/71, 6546/99 Presse 71.
[163] Amended proposal for a European Parliament and Council Directive establishing a framework for Community action in the field of water policy, 97/0067(COD) (1999), COM(1999) 271 final, OJ C 342, E, 30 November 1999.

3.4.1 The view of the European Parliament (second reading)

In its second reading Parliament again stressed that in its view water is not a regular commercial product but a heritage, although the Commission had rejected the earlier identical amendment.[164] Furthermore, Parliament proposed in amendment 43 that Member States needed to ensure, by 2010, water pricing policies providing adequate incentives for users to use water resources efficiently. Also cost recovery for water services should be effectuated by arranging for an adequate contribution by the different sectors (at least households, industry and agriculture) also by 2010 and taking account of the polluter pays principle.

Parliament also held the view that only 'related' social and economic effects may be considered by Member States in ensuring the above pricing systems and cost recovery effectuation schemes and therefore not all social and economic effects could be taken into account. What is to be understood under 'related' remained unclear, however.

The proposal that only 'related' social and economic effects may be considered in ensuring pricing systems and cost recovery effectuation schemes was not accredited and was not included in the final text version. The relevance of this exclusion became manifest in – for instance – the Netherlands. The Dutch government proposed to raise the tax rate on the 'mains water supply' (*Belasting op leidingwater – Wet belastingen op milieugrondslag (Environmental Taxes Act))* and proposed to abolish the maximum taxable amount of m3 water supplied in order to decrease the general budgetary deficit. Even though the income generated by this tax is formally not earmarked, the tax is considered to be a 'green tax' and is used to solve general budgetary problems instead of specific environmental problems.[165]

Lastly, Parliament obviously wanted cost recovery and efficiency-stimulating pricing schemes to be established within a specific time, as it requested Member States to establish timetables for the full application of the suggested cost recovery article (amendment 46).

3.4.2 Resolving the divergence between the European Parliament and the Council

After the above-mentioned second reading the Commission presented an amended proposal, inserting fully or partially 47 of the 61 amendments by Parliament.[166]

The Commission supported the amendment to oblige Member States to establish timetables for the full implementation of the charging obligations. Furthermore, it accepted the suggestion that Member States should incorporate their plans on the implementation of a charging system in the river basin management plans.

The Commission found itself in a difficult position in proposing the text for the charging provision. It accepted, in principle, the introduction of a water charging system as an incentive actor for the rational use of water preferably as part of a 'global solution on a provision on cost recovery for water services', but it stressed that that ambition was too eager.[167] The distance between the

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[164] European Parliament legislative resolution on the common position adopted by the Council (…), A5-0027/2000, OJ C 339, 29 November 2000.
[165] See on the change of character of this tax from a levy to a tax: Ch.W. Backes a.o., *Milieurecht*, Kluwer (2006), p. 241-242.
[166] Opinion of the Commission pursuant to Article 251 (2) (c) of the EC Treaty, on the European Parliament's amendments to the Council's common position regarding the Proposal for a European Parliament and Council Directive establishing a framework for Community action in the field of water policy (COM (97)49 final, COM (97)614 final, COM (98)76 final and COM (99)271 final) amending the proposal of the Commission pursuant to Article 250 (2) of the EC Treaty 1997/0067 (COD)(2000), COM (2000)219 final (CELEX NUMBER 52000PC0219).
[167] *Ibid,* p. 7

Parliament's and the Commission's point of view was too great, so the Commission reworded the text, partly using the text proposed by Parliament:

Article 9 – Overview

	Common position Council	EP	Commission
Art 9	(1) Member States shall take account of the principle of cost recovery of the costs of water services, including the 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 may in doing so 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.	(1) 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 economic sectors, disaggregated at least into 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. In doing so, Member States may have regard to related social and economic effects, as well as the geographic and climatic conditions of the region or regions affected.	(1) Member States shall ensure by 2010: - A charging system for water services, which acts as an incentive for the sustainable use of water resources so as to achieve the environmental objectives of this Directive; - That various sectors of the economy, a distinction being drawn at least between domestic industrial and agricultural users, contribute fairly to the recovery of all the costs of water services having regard to the economic analysis conducted in accordance with Article 5 and Annex III and in accordance with the polluter pays principle; Member States may in doing so have regard to the resulting social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected.
		2. Member States shall report in the River Basin Management Plans on the planned steps towards implementing a pricing policy which helps ensure that the environmental objectives of this Directive are met, and on the contribution made by the various economic sectors to the recovery of all the costs of water services.	2. Member States shall establish timetables for the full implementation of the provisions of this Article. Details of such timetables shall be included in the River Basin Management Plans required under Article 13.
	3. Member States shall report in the River Basin	-	3. Member States shall report in the River Basin Management

Management Plans on the practical steps and measures taken to apply this principle.		Plans on implementation of a charging system that offers incentives to achieve the environmental objectives of this Directive and on the contribution made by the various sectors of the economy to the recovery of all the costs of water services.
-	3a. Member States shall establish timetables for the full application of the provisions of this Article. Details of such timetables shall be included in the River Basin Management Plans required under Article 13.	-
4. Nothing in this Article shall prevent the funding of particular preventative or remedial measures in order to achieve the objectives of this Directive.	-	-

The Commission defined 'water services' in this respect as;

a. 'All services providing abstraction, impoundment, distribution and treatment of surface water or groundwater;
b. Waste water treatment and waste water disposal into surface water.'

And 'water uses' as:

> 'Water uses includes the main economic sectors such as domestic, agriculture and industry, amenities or other legitimate uses of the environment together with any other activity identified under Article 5 and Annex III having a significant impact on the status of water. This concept applies for the purposes of Article 1 and of the economic analysis carried out according to Article 5 and Annex III, point (b).'

In the Conciliation Committee on 28 June 2000 an agreement was finally reached between the Parliament and the Council on a joint text.[168] The most important subject in this second conciliation round was for Parliament to establish legally binding objectives by ensuring the formulation of 'Member States shall' in several articles.[169] Parliament's session document mentioned that the Directive was aimed at 'introducing a system of full cost recovery pricing of water' and that

[168] Joint text approved by the Conciliation Committee provided for in Article 251 (4) of the EC Treaty 1997/0067 (COD), C-5-0347/00, PE-CONS 3639/00 ENV 221 Codec 513 (2000), OJ L 327, 22 December 2000.
[169] III Report on the joint text approved by the Conciliation Committee for a European Parliament and Council Directive establishing a framework for Community action in the field of water policy (C5-0347/2000 – 1997/0067(COD)) (2000), A5-0214/2000 final.

'Member States will be required by 2010 to charge consumers in all water use sectors the true cost of water', also mentioning some derogation possibilities as 'basic water services to households at an affordable price'.[170] According to Parliament's view the joint text ensured that Member States had to introduce an incentive pricing system for water use and that opting out of the obligation of cost recovery was only possible if this was based on established national practices, actually only mentioning Ireland as a country with an established national practice which would provide for an opt out in as far as it relates not to volume-charging households but covering the costs via taxation.

In the press release by the Conciliation Committee cost recovery was not explicitly mentioned.[171] However, it did mention that the conciliation focused, amongst other things, on Article 11 WFD which concerns the programme of measures to achieve the Directive's environmental objectives. Article 11(3) sub. b WFD mentions that amongst the 'basic measures' to be included in the programme of measures, the measures 'deemed appropriate for the purposes of Article 9' shall be included.

The following final text was adopted:

'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.

2. Member States shall report in the river basin management plans on the planned steps towards implementing paragraph 1 which will contribute to achieving the environmental objectives of this Directive and on the contribution made by the various water uses to the recovery of the costs of water services.

3. Nothing in this Article shall prevent the funding of particular preventive or remedial measures in order to achieve the objectives of this Directive.

4. Member States shall not be in breach of this Directive if they decide in accordance with established practices not to apply the provision of paragraph 1, second sentence, and for that purpose the relevant provisions of paragraph 2, for a given water-use activity, where this does not compromise the purposes and the achievement of the objectives of this

[170] *Ibid.*
[171] Agreement on Water Framework Directive, PRES/00/232, 30 November 2000.

Directive. Member States shall report the reasons for not fully applying paragraph 1, second sentence, in the river basin management plans.'

3.5 Concluding remarks

In this chapter the coming about of the cost recovery provision was examined in order to what constitutes the cost recovery obligation. For this examination an assessment was made what issues on cost recovery arose during the legislative process and how these issues were solved.

The legislative process shows a difference in the point of view of the European Parliament and the Council when it concerns cost recovery for water services. Parliament not only sees cost recovery for water services as an economic principle to retrieve all costs relating to water use, but has explicitly stressed that its function is as a policy instrument to enhance sustainable water use. The Council defended its position on flexibility and wanted to see non-obligatory cost recovery. The final text reflects the best of both worlds: cost recovery is an essential part of the programme of measures to attain environmental objectives and its application seems not free for appreciation. Furthermore, the inclusion of cost recovery in the Directive, both as measure in the programme of measures of the Member States and as separately included provision in the WFD confirms that the recovery of costs is considered a crucial measure to attain the environmental objectives of protecting the water status and attaining the environmental aim of sustainable water use. The price of water should reflect the costs which are involved in using water. On the other hand, the flexibility offered by the inclusion of a widely formulated last sentence of the first article of the provision may undermine the effectiveness of the provision and allow too much discretionary room for Member States to also use water pricing (and non-pricing) to attain non-environmental goals.

The final text of the provision is accompanied with interpretative questions regarding the terminology used. What is meant by water services and what is the difference with water use when it comes to cost recovery? When does a Member State violate its margins of appreciation, its limits of discretion? The wording of the derogative elements in Article 9 (1) last sentence WFD as an example is so broad that judging any limit will be very difficult. The vague terminology may undermine the effectiveness of the provision. Therefore, it is important to consider what elements in the cost recovery provision are clear and what character the cost recovery provision, or parts of it, actually has. By examining the wording and structure of the provision from a legal theoretical point of view, more clarity will be provided for answering the question of what should constitute the cost recovery obligation in the WFD. The manner in which the European Court of Justice considers the provision will be addressed in this respect too. This examination is made in chapter 4 hereafter.

One other finding in the examination of the legislative process is interesting and needs to be mentioned: the documentation relating to the proposals and the documentation by the Parliament and the Council setting out their different views on cost recovery do not confirm an extensive discussion on any divergence relating to the term water services or water use. The documentation implies an atmosphere which suggests that cost recovery is not exclusively limited to just a limited number of water-related activities. The use of cost recovery for water services is considered to be a (obligatory) measure to attain the environmental and Directive objectives.

4 Provision determination: a principle or a rule?

4.1 Introduction – What constitutes the cost recovery obligation (II)?

At several places in the WFD reference is made to the principle of cost recovery for water services. This so-called principle is explicitly laid down in Article 9 WFD. The first sentence of Article 9(1) WFD states that 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.

As the European legislative history shows (section 4.4), the European Parliament and Council, with the Commission acting as a kind of mediator, did perhaps come to a general agreement on the WFD, but real consensus on all aspects of cost recovery is not evident. Parliament and Council thought differently on, for instance, the question whether there is a legal requirement for Member States to charge. Prior to drafting the Directive, more strict formulations proposed by the European Parliament changed to the inclusion of 'the principle' of recovery of the costs for water services. As no real consensus was shown in the legislative history on the norm to be reflected in the legislation, interpreters/judges will have to be cautious in determining what character the provision actually has and - after interpretation – in outlining its normative content.

Hereafter the main obligation as reflected in Article 9(1) WFD is addressed from a legal theoretical point of view. By examining the wording and structure of the provision from a legal theoretical point of view, more clarity will be provided for answering the question of what constitutes (or should constitute) the cost recovery obligation in the WFD. The manner in which the European Court of Justice considers the provision (rule or principle) will, as part of the legal theoretical examination, be addressed in this chapter too. The main question what constitutes the cost recovery obligation is addressed in this chapter by examination of the following questions from a legal theoretical perspective:

What is the character of the cost recovery provision? Is it a legal principle or a rule?

How does the European Court of Justice encounter the provision? As a legal principle or as a rule?

The relevance to address the above questions is that the legal binding force of legal principles is a different one than that of rules, which will be outlined hereafter.

4.2 Theory of legal principles

The first point to address therefore is that the provision obliges Member States to take account of a 'principle'. But what is meant by the 'principle' of recovery of the costs of water services? And does the provision actually reflect a principle or should it be seen as having another character? Clarity about the (binding) character of the provision is necessary to answer the question of what constitutes the cost recovery obligation in the WFD.

In literature there are many different views on provision determination. It goes beyond the scope of this research to present an overview of the historic philosophical discussions with regard to the determination of the concept of a 'principle'.[172] Many different definitions of a 'principle' can be found in the literature:

[172] A translation of the ancient Greek ἀρχή is beginning, principle, starting point, corresponding to the Latin principium (see *Beknopt Grieks-Nederlands Woordenboek ,* J.B. Wolters, ed. 9); and *Beknopt Latijns-Nederlands Woordenboek ,* J.B. Wolters, (1963)). A short, but functional overview of the evolution of the historical discussion about the concept of 'principle' can be found in: H.D. Betz (ed.), *Religion Past and Present, Encyclopedia of Theology and Religion*, vol. x, Koninklijke Brill NV, (2011).

> 'A principle is a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality';[173]
>
> 'A principle is a general proposition of law of some importance from which concrete rules derive; Principles do not set out legal consequences that follow automatically from them';[174]
>
> 'Principles say something about a group of rules or policy goals, indicating what a collection of rules has in common or its common goal, containing a high moral and/or legal value'.[175]

There are many different views on what a 'principle' is and how it refers to rules or other provisions. Different research approaches can be taken. Verschuuren, for instance, reflects upon the ambiguities and effects regarding principles and rules in relation to the concept of sustainable development by using different legal theories (Dworkin, Fuller, Alexy et cetera).[176] That is a fruitful approach as the main elements in respect of provision determination are shown to be embedded rather uniformly within different legal theory approaches. Although the cost recovery provision in the WFD could also be addressed using different legal theoretical approaches at the same time, I have opted to address the provision from a legal theoretical perspective by using the view of Avila on legal principles.[177] The principle of cost recovery reflects upon this theory because on the one hand, it systematically stresses the importance of interpretation when assessing the content of a provision being (more of) a rule, principle or postulate, and on the other hand materialises the different elements that need to be addressed. This theory, in my view, offers rather practical markers for provision determination.

The theory is rather clinical, as little attention is given to the scenery behind the interpretative question. In this respect it must be remembered that – as is for instance shown by the development of the polluter pays principle – the content of a well-known and accepted principle can change over time. If the general public opinion of a relevant group changes on an existing principle, the content of the principle may change when interpretation questions arise. The meaning construed by the interpreter, i.e. judges, by a systematic interpretation of that (same) norm will reflect the norm available/present at that specific time. Avila's theory does not reflect on the social surroundings which are relevant as a basis for interpretation, but focuses on the method used to determine the content of a provision.

Avila's theory of legal principles is first briefly outlined.

4.3 Theory of legal principles according to Avila

Avila's theory of addressing the determination of a provision as a principle or a rule (or a postulate) differs from other established views as he stresses the role of interpretation. He states:

> 'Norms are neither text nor a set of texts, but the meanings construed from the systematic interpretation of normative texts. Therefore, one can say that provisions are the object of interpretation and norms are its result. (…) However, verifying that interpreters construe meanings within the interpretation process should not lead to the conclusion that there is no meaning at all before such interpretation process is over. Stating a meaning is dependent on use is not the same as maintaining that it only arises from specific, individual use. This is

[173] K.C. Culver (ed.), *Readings in the philosophy of law,* Broadview Press Ltd., (1999), p. 179-211.
[174] T. Tridimas, *The General Principles of EU Law,* 2nd ed., Oxford University Press Inc., (2006), p. 1-2.
[175] J. Verschuuren, 'Sustainable development and the nature of environmental legal principles', *Potchefstroom Electronic Journal*, vol. 9, issue 1, (2006), [http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899537].
[176] J. Verschuuren, *Principles of Environmental Law*, Nomos Verlagsgesellschaft, (2003).
[177] H. Avila, *Theory of Legal Principles*, Springer, (2007).

> so because there are minimum traces of meaning incorporated to the ordinary or technical uses of language. (…) In sum, it is exactly because interpreters build norms from provisions that one cannot conclude that this or that provision *contains* a rule or principle within. This normative qualification depends on axiological connections that are not incorporated into the text, neither belong to it; rather, they are built by interpreters themselves. That does not mean, as already stated, that interpreters are free to make the connections between norms and the ends they aim at. The legal order sets forth the realization of purposes, the preservation of values, and the upholding of and the search for some legal assets essential to the realization of such purposes and preservation of such values.'[178]

Avila reflects his theory against the background of three distinction criteria [in italics hereafter] frequently used by scholars for determining whether a provision is a rule or a principle;[179]

a) *The hypothetical-conditional criterion: contrary to a principle, a rule presets a decision, where a principle functions as a base to find a rule; rules can be recognized by their 'if... then' construction;*

Avila criticizes this distinction criterion by stressing that 'the normative content of any norm, whether a rule or a principle, depends on the normative and factual possibilities to be verified in the very process of applying it.'[180] He also stresses that provisions that are called principles can sometimes be rewritten in the 'if…then' mode, therewith stating that 'the existence of operative facts (…) cannot be a distinctive element of a normative species.'[181] He concludes that the interpretative decision ultimately results in a provision being considered as a rule or a principle. 'It all depends on the connections of value that interpreters stress or not with their argumentation, and on the goals they believe should be met.'[182]

b) The final mode of application criterion: According to this criterion a rule has an absolute character in the sense of 'all or nothing', whereas a principle has a 'more or less' character.

Avila views this criterion as not conclusive either. He outlines:

> 'All of these reflections show that it only makes sense to say that rules are applied as *all or nothing* when all questions related to the validity, meaning and final coupling of facts and rules are settled. (…) vagueness is not a distinctive character of principles, but a common element of any provisional statement, whether it is a principle or rule. Likewise, it is important to notice that the specific characteristic of rules (the implementation of a preset consequence) can only arise after they are interpreted. (…) That means that sometimes the conditions of a rule applicability are not met and the rule is still applied [analogy], and sometimes the conditions are met and the rule is not applied anyway. Strictly speaking, therefore, it is not plausible to defend that rules are norms whose application is sure when their operative facts occur. (…) when one argues that principles are applied *more or less*, one focuses his analysis on the state of affairs that can be reached because the due behavior

[178] *Ibid.,* p. 6-8.
[179] Avila mentions, amongst others, the following scholars in this respect: K. Larenz, *Richtiges Recht,* Beck (1979); R. Dworkin, *The Model of Rules*, University of Chicago Law Review 35 (1967) and 'Is Law a system of rules?' in: *The Philosophy of Law*, Oxford University Press (1977); R. Alexy, 'Zum Begriff des Rechtsprinzips' in: *Argumentation und Hermeneutik in der Jurisprudenz*, Dunckler und Humblot (1979). For a full list reference can be made to the references in Avila's book.
[180] *Ibid.*, p. 12.
[181] *Ibid.*, p. 12.
[182] *Ibid.*, p. 13.

> is not described. That means, however, that it is not so that principles are applied gradually, more or less, but it is the state of affairs that can be more or less approximated, depending on the conduct chosen as medium.'[183]

Avila stresses that 'more or less' does not refer to the application of the principle. The concrete behavior to attain the state of affairs of the principle needs to be taken into account in relation to the more or less state of affairs to be attained according to the principle.

c) *The determination criterion of a normative relation / normative conflict: according to this theory when two rules conflict, one of them is not valid. Principles, however, are weighed in the case of conflict, resulting in one principle taking preference over the other*;

The point of view that when two rules conflict, one of them must be not valid, is expounded by Avila by stressing that although the non-validation of one rule is likely, it is not always necessary. Avila explains in his theory that in case of juxtaposing rules, the preliminary meaning of a rule can be overcome by reasoning, actually by weighing reasons which create exceptions. He states:

> 'What matters is that the process through which 'exceptions' are created is also a process of valuing reasons: because there is a contrary reason that axiologically outweighs the reason that serves as the grounds for the rule itself, one decides to create an exception. (…) Weighing of rules takes place in deciding about the applicability of a legal precedent to the case under examination. (…) rule weighing is found in the use of argumentative models such as *analogies* and *contrary arguments*.'[184]

The margin within this reasoning takes place, according to Avila, in the case of rules and this is more limited than with principles, as rules do have a descriptive element and the delimitation of their normative content is smaller, as it still needs to be compatible with the goal that is supported by those rules. However, Avila shows that the statement 'in case of juxtaposing rules one rule must be non-valid' is too rigorous. Juxtaposing principles leave jurisdiction with more room for weighing as the delimitation of a principle focuses on the behavior to realize or preserve a state of affairs. And Avila concludes that the norm in itself does not have weight, but the dimension of weight relates to the judge and the case.

4.3.1 Distinguishing the provision

In addition to the above reflections of Avila on existing provision determination, he stresses that a provision may at the same time provide more than one normative species, i.e. it may provide an immediate behavioral dimension (rule), a finalistic dimension (principle) and/or a methodical dimension (postulate). He outlines three criteria that should be used to distinguish the provision, being: 1) the nature of the described behavior, 2) the nature of the required justification and 3) the amount of contribution to the decision.

Regarding the nature of the described behavior, in summary he outlines that rules can be distinguished from principles by the way they describe certain forms of behavior. Rules describe obligations, permissions and prohibitions in an explicit way, i.e. by describing the conduct that needs to be followed. Principles, on the other hand, outline the purpose, which requires the adoption of certain behavior, without explicitly describing the forms of behavior. Therefore, the difference between principles and norms lies in the behavior prescribed by the rule or required by the principle. Specific requested behavior is not prescribed in principles, but certain normative goals are. A principle will not, as with rules, oblige certain specific behavior upfront. This, however, does not,

[183] *Ibid.*, p. 17-19.
[184] *Ibid.*, p. 22, 25.

according to Avila, change the viewpoint that both rules and principles have the same 'ought to be' content.

Regarding the nature of the required justification for the interpretative decision, Avila outlines that a different assessment applies for the interpretation and application of rules or principles. He discerns the interpretation method for the application of principles and rules by outlining that with rules interpretation by judges follows the path of assessing the accordance between the conceptual construction of facts and the conceptual construction of the norm involved, whereas with principles the interpretative decision is justified by an assessment of the effects of the conduct seen in the specific case in relation to attainment /striving for a state of affairs to be reached.

Lastly, Avila points at the difference between rules and principles with regard to contributing to the decision. He outlines that rules intend to provide a specific solution to a matter. They have a preliminary decisive and inclusive character, whereas principles contribute to decision-making, but other reasons also. Principles therefore have a preliminary complementary character.

Taking the above into account, Avila provides the following definitions of rules and principles:

> 'Rules are immediately descriptive, primarily past regarding norms, which intend to decide and overinclude, whose application requires assessing correspondence, always centered on the purpose supporting it or on the principles axiologically overlying it, between the conceptual construction of the normative description and the conceptual construction of the facts.
>
> Principles are immediately finalistic, primarily future regarding norms which intend to be complementary and partial, whose application requires assessing the correlation between the state of affairs to be promoted and the effects of the conduct seen as necessary to its advancement.'[185]

4.4 Character of the cost recovery provision

As outlined in the introduction of this chapter it is not fully clear what intrinsic understanding was reached on cost recovery for water services at the European legislative level. In the underlying section the provision is examined on the basis of Avila's theory. Are we dealing with a provision that has the character of a rule, or more of a principle? Or may it have more than one character? In the assessment of the character of the cost recovery provision I will mostly focus upon the text of Article 9 (1) WFD focusing on:

1) The intrinsic meaning of words in the provision
2) The nature of the described behavior
3) The nature of the justification required
4) The amount of the contribution to the decision

Article 9 (1) WFD states:

[185] *Ibid.*, p. 40; Besides this distinction in provisions, Avila also determines meta-norms by means of postulates. Postulates in his view provide application criteria for other norms like rules and principles. He differentiates between two forms of postulates: 1) Hermeneutical postulates, which aim at understanding the law; Examples of such a postulate are in this theory the postulate of coherence and the postulate of the unity of the legal order; 2) Applied postulates, which aim at structuring the law. Avila considers the postulates of proportionality, reasonableness and prohibition of excess to be such postulates.

'(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.'

4.4.1 Ad 1) Intrinsic meaning of words in the provision

First, the text of the provision is looked at to assess whether it contains wording which has a specific meaning in itself. According to Article 9 WFD, Member States shall ensure that water pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of the Directive.

Even though it is unclear what adequate incentives are, it is clear that a certain 'meaning' is included in these words, regardless of the final determination of (parts of) the provision. The word 'incentive' is to be a stimulus, something to point people towards a certain action – regardless of in which form – and/or in a certain direction.[186] I.e. incentives to use water resources efficiently. In line with Avila, the word 'incentives' contains a minimum of meaning incorporated in the ordinary use of the language.[187] The same holds true for 'contribution' where the provision states that Member States need to ensure an adequate contribution – regardless of in which form - of the different water uses to the recovery of the costs of water services.[188] The word 'contribution' in itself requests an action in a specific direction from the ones mentioned in connection thereto. Therefore, these two words already hold a minimum level of a norm. The preset part of the meaning of a provision, regardless of its character.

4.4.2 Ad 2) Nature of the described behaviour

In my view it is clear that the provision that Member States shall ensure adequate incentives in water pricing policies and an adequate contribution to the recovery of the costs of water services by the different water uses prescribes certain conduct to be followed. And although the wording of the provision is in several respects vague, its content does require more than vague actions from the Member States: incentives must be provided in water policies and the contributions of water uses need to be ensured. This part of the provision in my view clearly contains an immediate descriptive norm, also confirmed by the deadline provided (2010). It has a substance that is no longer

[186] A.S. Hornby, E.V. Gatenby & H. Wakefield, *The Advanced Learner's Dictionary of Current English*, Oxford University Press (1963) refers to "Incentive" as: that which incites, rouses or encourages a person to do something.
[187] H. Avila, *Theory of Legal Principles*, Springer (2007), p. 6.
[188] A.S. Hornby, E.V. Gatenby & H. Wakefield, *The Advanced Learner's Dictionary of Current English*, Oxford University Press (1963) refers to "Contribute" as: join with others in giving (help, money, et cetera. to a common cause); give (ideas, suggestions, et cetera); have a share in; help bring about.

completely discretionary. Furthermore, the provision very explicitly requires the Member States to ensure contributions from at least three sectors, being households, industry and agriculture. These aspects all hint at the assessment of the provision as being one with the character of a rule.

Does the provision also have elements that would lead to the recognition of the provision as a principle? If so, the provision would describe a purpose, a normative goal. In this respect it is interesting to see that Article 11 WFD (programme of measures) states that amongst the basic measures, measures deemed appropriate for the 'purposes' of Article 9 WFD are included.[189] It is however not clear what the 'purposes' of Article 9 WFD are. Different language versions do not significantly differ as to the formulation on this point.[190] In my view, the fact that Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, can hardly be recognized as a purpose or normative (environmental) goal in itself. In this respect one should keep in mind that the provision is included in an environmental Directive and not in legislation regarding economics. The Directive itself mentions its purpose as a whole in Article 1 WFD being:

> 'The purpose of this Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which:
>
> a) Prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems;
> b) Promotes sustainable water use based on a long-term protection of available water resources;
> c) Aims at enhanced protection and improvement of the aquatic environment, *inter alia*, through specific measures for the progressive reduction of discharges, emissions and losses of priority substances and the cessation or phasing-out of discharges, emissions and losses of the priority hazardous substances;
> d) Ensures the progressive reduction of pollution of groundwater and prevents its further pollution, and
> e) Contributes to mitigating the effects of floods and droughts
>
> and thereby contributes to:
>
> - The provision of the sufficient supply of good quality surface water and groundwater as needed for sustainable, balanced and equitable water use,
> - A significant reduction in pollution of groundwater,
> - The protection of territorial and marine waters, and
> - Achieving the objectives of relevant international agreements, including those which aim to prevent and eliminate pollution of the marine environment, by Community action under Article 16(3) to cease or phase out discharges, emissions and losses of priority hazardous substances, with the ultimate aim of achieving concentrations in the marine environment near background values for naturally occurring substances and close to zero for man-made synthetic substances.'

Taking into account the legislative history of the cost recovery provision (see chapter 3) the purpose underlying the provision of cost recovery is to contribute to the achievement of a sustainable,

[189] See Article 11 WFD stating 'measures deemed appropriate for the "purpose" of Article 9'.
[190] The Dutch text, for instance, mentions 'maatregelen die voor de doeleinden van artikel 9 nodig worden geacht'; the German text mentions 'Maßnahmen die als geeignet für die Ziele des Artikel 9 angesehen werden.'

balanced and equitable water use.[191] That is the normative goal to be reached – the state of affairs - and cost recovery is one of the means to reach it. Therefore, the provision itself has the character of a rule, with sustainable, balanced and equitable water use as the final situation or the 'ought to be' situation.

Of course the sustainable, balanced and equitable water use principle (as one of the objectives/aims laid down in Article 1 WFD) may still juxtapose with other environmental principles laid down in the European Treaty. Sustainable, balanced and equitable water use as a 'state of affairs' should be in line with Article 191 TFEU, which mentions that the Union environmental policy shall aim at a high level of protection, Union environmental policy should be based on the precautionary principle, principles that preventive action should be taken and that environmental damage should as a priority be rectified at source. Furthermore, the polluter pays principle should be adhered to.[192] Although the objectives mentioned in Article 191(1) TFEU outline, amongst others, prudent and rational utilization of natural resources,[193] cost recovery cannot be presupposed to be an obligatory element of this objective. Therefore, the cost recovery (of water services) may be an economic principle, but it is not (an obligatory element of) a principle which Union environmental policy should be based upon. However, cost recovery is in line with the objectives mentioned in Article 191(1) TFEU.

4.4.3 Ad 3) Nature of the required justification

From the current, scarce, European case law regarding cost recovery for water services, it is not yet possible to verify which justifications judges will use to justify the provision determination of Article 9 WFD. As mentioned above, the behavior described in Article 9 (1) WFD indicates a determination of the character of the provision as a rule. If so, a judge, for interpretative issues, will have to look at whether the factual construction corresponds with the normative description and the finality that supports it.

However, certain obscurities may be problematic in assessing whether the factual construction corresponds with the normative description and the supporting finality. As said, the normative description is rather vague. In this respect some particularities can be mentioned:

a) Article 9 WFD is an obligatory element of the programme of measures as mentioned in Article 11 WFD. Article 11 WFD, obliging Member States to set up a programme of measures to achieve the environmental objectives of Article 4 WFD for each river basin district, refers to the cost recovery provision as a 'basic measure' to be included (on an obligatory basis) in the programme. It is however not clear what is actually required by the Member States regarding cost recovery as an obligatory part of a programme of measures. Article 11 WFD states that 'basic measures are the minimum requirements to be complied with and shall consist of …. (b) measures deemed appropriate for the purposes of Article 9'. As outlined above, it is not clear/evident what is to be understood as the 'purposes' of

[191] At the beginning of the legislative process the term 'principle' was not included in the proposed texts. During that process, however, the cost recovery article was reworded, including the term 'principle'.

[192] Although the application of the polluter pays principle includes a form of cost recovery, i.e. in as far as it relates to environmental damage (by pollution), it does not include full cost recovery in general (user pays and polluter pays). One could argue that the polluter pays principle does include full cost recovery as – for instance – the sixth environmental action programme lays down the principle of the internalisation of environmental costs, but that inclusion refers to a cost and benefit analysis.

[193] J.H. Jans & H.H.B. Vedder, *European Environmental Law, After Lisbon,* Europa Law Publishing (2012), p. 36-37. The authors point out that it is not entirely clear what should be understood by 'natural resources', but they conclude with reference to the Stockholm Declaration (ILM 1972, at 1416) that water should be included as a natural resource.

Article 9 WFD, let alone which standard is to be used to determine what is 'deemed appropriate' and in which situation the measures are no longer appropriate.[194] The European Court of Justice in its judgment C-525/12 *European Commission v. Federal Republic of Germany* in essence does not encounter these questions.

b) The normative description reflects by means of the words chosen, such as 'contribution' or 'incentives', at least some sort of a minimum norm, i.e. it is not allowed to have water-pricing policies which do not provide incentives and which request no contribution at all from the different water uses. However, unclear is what is meant by 'adequate' incentives and 'adequate' contributions.[195]

c) The provision-if rule states that the polluter pays principle needs to be adhered to, both in general (first sentence) as well as specifically in ensuring an adequate contribution to the costs of water services for the different water uses. The normative description is thereby difficult to assess. As will be outlined in section 5.7.2 case law has provided certain markers, in other words, minimum norms which apply when reference is made to the polluter pays principle:

   - Where a directive does not provide a definition of a polluter, Member States have a broad discretion to determine who the polluter is;
   - Polluters are only responsible for the pollution they cause; they do not have to pay for the elimination and prevention of pollution to which they do not contribute;
   - Non-polluters or persons who have not contributed to (the risk of) pollution are not to be burdened by the application of the polluter pays principle;
   - Under certain conditions, the use of presumptions regarding the causal relation between activity and pollution is allowable;
   - A differentiation in the contributions of certain categories of polluters is allowable, unless the costs involved are manifestly disproportionate in relation to the polluter's pollution capacity.

   It can be upheld that the provision-if rule obliges at least those minimum markers to be adhered to when effectuating cost recovery for water services. In my view, the inclusion of adherence with the polluter pays principle in the provision itself does not undermine the likelihood of the provision-as rule.

d) The implied discretionary room in the last sentence of Article 9(1) WFD makes an assessment of the accordance between the conceptual construction of the facts and the conceptual construction of the norm more difficult. According to this text '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.'

[194] In this respect it is interesting to see that other referrals, like Article 11(1) sub. D, to Article 7 are grammatically more strictly formulated ('measures to meet the requirements of Article 7, including measures to safeguard water quality...').

[195] The EC Report on the Implementation of the Water Framework Directive (2000/60/EC) (COM 2012, 670 final) reflects that little progress has been made by the Member States to come to the implementation of transparent pricing policies. It furthermore states that an efficient use of water requires measuring the volume of water used and that flat rates, tariffs, that are based on the irrigated area or shared bills do not provide any incentive for sustainable water use. To a certain extent cost recovery is implemented in the categories of households and industry, but implementation in agriculture is more limited. For agriculture in several countries water is charged only to a limited extent.

> One could argue that the construction of the norm is not possible, as Member States have so much discretionary room to determine their activities or the determination of the norm that the provision can no longer be seen as having the character of a rule. However, in my view this is not a correct valuation of the provision. The last sentence of Article 9(1) WFD actually outlines the scope of / room for *application* of the cost recovery obligations. Member States may not just have regard to several conditions, but only 'in so doing'. Therewith the norm is provided – costs have to be recovered - but the application thereof is regulated in a specific way. Taking into account Avila's theory on legal principles, effectively this part of the provision actually provides for a postulate, i.e. the postulate of reasonableness.[196]

As Member States need to transpose the Directive into their national legal order by means of national legislation (if necessary), in any given case the European Court of Justice will have to assess whether that implementation meets the requirements which are obligatory under the Directive.

The finality that the provision-if rule would support is, as said, ultimately laid down in Article 1 WFD, i.e. to contribute to the achievement of a sustainable, balanced and equitable water use. In other words, regarding sustainable water use it concerns a contribution to a situation where the carrying capacity of nature regarding water provision is the starting point in the reasoning and cost recovery is a means to contribute to the sustainable use of the water available in line with this carrying capacity.

4.4.4 Ad 4) The amount of the contribution to the decision

The last element to be examined is the amount of the contribution of the provision to the decision. As outlined before, Avila outlines that there is a difference in the contribution to the decision between rules and principles as, according to his theory, rules intend to provide a specific solution to a matter, whereas principles contribute to decision-making, but other reasons also.

In considering the amount of the contribution of the provision to the decision, hereafter the jurisprudence of the European Court of Justice is looked upon to assess in which manner (principle, rule, postulate) the Court encounters the provision.

To date at European level there are only two judgments of the European Court of Justice that include preliminary rulings referring to Article 9 WFD. Hereafter a summarized overview is provided with regard to the judgments of the European Court of Justice where Article 9 WFD directly or indirectly was included for the purpose of examining the amount of the contribution of the provision to the decision (judgment) for application of Avila's theory.

C-43/10 Nomarchiaki Aftodioikisi Aitoloakarnanias e.a.

This dispute concerned the legality of the decision of the Greek authorities regarding the partial diversion of the upper waters of the river Acheloos to the region Thessaly. This diversion was approved based on considerations of irrigation needs of the region, electricity production needs and the need for sufficient supply of water to towns in the region. The first four (out of fourteen!) questions raised include Article 9 WFD on cost recovery.

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[196] H. Avila, *Theory of Legal Principles*, Springer (2007), p. 99: 'Reasonableness is only applicable where there is a conflict between general and individual, between a norm and the reality it regulates and between a criterion and a measure. Its applicability is dependent on the existence of specific elements (general and individual, norm and reality, criterion and measure)'.

The first question addressed was whether Article 13(6) of the WFD – ultimate publication of the river basin management plan - only provided a time-limit for the production of river basin management plans or whether it also sets a transposition time-limit regarding, amongst others, Article 9 WFD. The European Court of Justice considers in this respect that the Member States needed to ensure implementation ('bring into force the laws, regulations and administrative provisions') to comply with the WFD at the latest by 22 December 2003.It considers that Article 13 (6) refers to only fixing 'a final date for the implementation of one of the measures which the Member States must take (…).' It concludes – insofar relevant with regard to Article 9 WFD – that the date of expiry for transposition by the Member States of Article 9 WFD is ultimately 22 December 2003.[197] The second, third and fourth question also include an explicit referral to Article 9 WFD, however, the Court of Justice approaches these three questions at once, rephrasing the questions to 'whether Directive 2000/60 must be interpreted as precluding a provision of national law whereby consent is given, prior to 22 December 2009, to a transfer of water from one river basin to another or from one river basin district to another where the river basin management plans concerned were not yet adopted by the competent national authorities.' In answering these questions, Article 9 WFD is not referred to anymore. From this judgment of the European Court of Justice, no insights can be obtained with regard to the question what main character the cost recovery provision in the WFD, rule or principle, might be in the view to the Court, let alone with what considerations the Court would come to such conclusion.

C-525/12 European Commission vs. Federal Republic of Germany

In the infringement procedure that the Commission started against Germany, the Commission requested the European Court of Justice to declare that Germany failed its obligations under the WFD, because it excluded certain services from the concept of water services as mentioned in Articles 2 (38) and 9 WFD. This judgment will be outlined more extensive in chapter 5 addressing interpretation difficulties. At this point it suffices to examine the judgment in relation to the question whether there are hints as to the provision having the character of a rule or a principle in the view of the Court. In this case the Commission held the view that due to Germany's very narrow interpretation of the term water services, it was misapplying Article 9 concerning cost recovery. By excluding certain activities from the scope of cost recovery, Germany would be undermining the purpose of the directive. The Commission holds a broad view on water services, possibly even including ecosystem services.[198] Germany, on the other hand, brought forward that cost recovery is a tool, an instrument, to contribute to the attainment of the objectives of the directive, but it is not the only one. Germany stresses the need to be able to weigh up the water protection requirements against legitimate rights of use of water. It interprets the concept of water services very narrowly, only including the water supply and waste water treatment. Germany disagrees with the Commission that water services would include activities as water use for navigation or hydropower, as the concept of services would require a bilateral relationship, which is not the case with such services. In contrast to the Commission's view, lastly, Germany views a broad concept of water services undermining the definition of water uses, as included in the WFD (Article 2(39) WFD).

The Court in its decision does not clearly reflect upon the character of the cost recovery provision relating to the question whether this provision should be considered principle or a rule. It considers:

[197] C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias e.a.* ECLI:EU:C:2012:560, para. 47.
[198] See on the consequences of a very broad interpretation of water services: P.E. Lindhout, 'A wider notion of the scope of water services in EU water law, Boosting payment for water related ecosystem services to ensure sustainable water management?', *Utrecht Law Review*, (2012).

> 'Next, Directive 2000/60, in requiring in Article 9 that Member States have regard to the principle of recovery of the costs of water services and ensure that water-pricing policies provide adequate incentives for users to use water resources efficiently and thereby contribute to the environmental objectives of that directive, *does not per se impose a generalised pricing obligation in respect of all activities relating to water use*'.

From this consideration, however, it cannot be established whether the provision itself is considered having the character of a principle or rule. Considering the provision a principle or rule does not imply that it would impose a generalised pricing obligation for all activities relating to water use. Furthermore, the Court positions cost recovery as a part of the programme of measures (Article 11 WFD) Member States need to set up, in which programme the Member States outline in which manner they intend to attain the environmental objectives of Article 4 WFD. Positioning cost recovery in this manner however also does not shed a light on the question whether the considerations of the Court point at a principle or rule.

Furthermore, the Court considers that the directive has the character of a 'framework' directive, which 'establishes the common principles and an overall framework for action in relation to water protection and coordinates, integrates and, in a longer perspective, develops the overall principles and structures for protection and sustainable use of water in the European Union.'[199] In this judgment the Court does not seem to consider the principle of cost recovery to (already) be one of the common principles established.[200] However, the fact that the Court does not position cost recovery as a common principle set in the Directive, does not per se imply that the provision has the character of a rule.

Concluding, the current European jurisprudence does not provide adequate information to assess the amount of the contribution of the provision to the two judgments. From these judgments it is not clear whether the Court encounters the provision as containing a principle or a rule (or postulate).

[199] C-525/12, *European Commission vs Federal Republic of Germany,* ECLI:EU:C:2014:2202, para. 50.
[200] See para. 5.3 regarding the judgment of the European Court of Justice in C-525/12 *European Commission v Federal State of Germany*.

4.5 Concluding remarks

In this chapter further research was done on the question what constitutes the cost recovery obligation. This question was addressed by examining what the (main) character is of the cost recovery obligation from a legal theoretical point of view. This examination was executed using the legal theory of Avila. The examination shows that the first part of the cost recovery provision as included in the WFD can be typified as having the character of a rule. The provision contains at least a minimum level of the specified actions required (the nature of the described behavior assessment). Member States cannot ignore the clear instruction to have (adequate) incentives introduced in their water policies and ensure (adequate) contributions by - at least a minimum of three specifically specified categories of - water users.

Although the text of Article 9 WFD contains obscurities in the content of its 'purposes' as referred to in Article 11 WFD, it is in my view clear that the ultimate aim which cost recovery contributes to is to come to a sustainable, balanced and equitable water use.

Besides having the character of a rule, part of the provision has the character of a postulate. As stated, the last sentence of Article 9(1) WFD, leaving the Member States *in so doing* to have regard to different social, economic, environmental, geographic and climatic circumstances, provides a hint as to what room there is to *apply* (by Member States and judges) the cost recovery obligations. The application of the first part of the provision is regulated in a specific way. The cost recovery obligation is to be applied taking into account (only) a certain level of reasonableness. Implicitly this part of the provision offers political accommodation to apply equitable reasons to correct the full application of the (main) rule.

Part of the above examination was also to address how the European Court of Justice encounters the cost recovery provision: as a legal principle or as a rule. As has been outlined, the scarce jurisprudence of the European Court of Justice to this end does not conclusively entail in which manner the Court encounters the provision.

5 Essentials of the cost recovery provision

5.1 Introduction

Many Member States have incurred difficulties in implementing the WFD when it concerns the cost recovery provision. There is a large number of questions that need answering. In order to asses in what way the cost recovery provision may truly contribute to attainment of sustainable and equitable water use, the questions hereunder will be addressed in order to obtain an overview which obstacles are (or are not) present that prevent cost recovery to contribute effectively to underlying objectives and how these obstacles can be overcome. The following items will be addressed. What main difficulties and obscurities arise:

- when it concerns 'water services' in the cost recovery provision?

- when it concerns 'water use' in the cost recovery provision?

- when it concerns 'environmental and resource costs' in the cost recovery provision?

- when it concerns 'the polluter pays principle' in the cost recovery provision?

- when it concerns 'the derogation clause of Article 9 (4)' in the cost recovery provision?

The cost recovery provision can been seen as a manifestation of the user pays principle. The user pays principle is a generally accepted economic principle that the user of services needs to pay for them and for the consequences arising from that use. The UN defined the user pays principle in relation to the environment as follows:

> The user-pays principle is the variation of the polluter pays principle that calls upon the user of a natural resource to bear the costs of running down natural capital.[201]

This definition is a rather negatively formulated definition ('running down natural capital'). The user pays principle in essence is in my view a neutral principle but for one thing, that the user should pay. Using a service or the benefits from nature does not in all situations lead to the running down of natural capital. Where the regeneration capacity of renewable resources is recognised and adhered to, one can still use the benefits from nature without running down natural capital. And the user pays principle still implies that also in a sustainable environment respecting the regeneration capacity of resources, the user should be the one who should pay.

The cost recovery provision contains several elements that constitute its content. In this chapter the most essential elements of the provision are examined to assess which questions or points of debate exist thereon and what positions may be taken on these points of debate.

5.2 Elements of Article 9 WFD

Several questions and/or points of debate exist with regard to the terminology used in Article 9 WFD. The terminology used – as will be shown hereafter – sometimes leaves a great deal of room for interpretation. Concerning almost every word in the provision a discussion may arise.[202] Hereafter a selected number of elements will be addressed. This selection has been made firstly because the main reason for this research is not to provide a textual analysis as such, but to address the main difficulties and obscurities that arise in cost recovery as inserted in the WFD. Furthermore,

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[201] United Nations, Glossary of Environment Statistics, Studies in Methods, Series F, No. 67, New York, 1997 [https://stats.oecd.org/glossary/detail.asp?ID=2827] [10-07-2013].

[202] In this respect the publication by F. Stangl, *Ökonomische Instrumente im Wasserschutz,* Umweltdachverband, Manzsche Verlags- und Universitätsbuchhandlung (2012) provides a – sometimes very detailed – overview of the possible interpretation of words within the provisions of Article 9 WFD.

the elements mentioned below reflect the terminology on which either most of the discussion has been taking place, or it concerns elements that are still unclear but form the essence of the application of the provision. The following elements will be examined:

a. Water services
b. Water use
c. Environmental and resource costs
d. The polluter pays principle
e. The derogation clause of Article 9 (4) WFD

This summary omits an extensive examination of the (possible) scope of application of the derogative elements in the cost recovery provision mentioned in Article 9 (1) WFD. Under certain circumstances Member States are allowed in cost recovery to 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, although they will only be mentioned if they are applicable or relevant. The reason for not outlining this element of Article 9 WFD extensively is that the Member States have a seemingly broad margin of appreciation/discretionary room when determining the content of these factors. The derogation clause in Article 9 (4) WFD, however, which outlines that cost recovery may be exempt in certain circumstances, is addressed.

5.3 C-525/12 Commission vs. Federal Republic of Germany (ECJ judgment)

Before examining the above mentioned elements of Article 9 WFD, first the judgment of the European Court of Justice with regard to the infringement case against Germany will be outlined. The Court's view on water services, but also on the position of cost recovery as an instrument within the WFD is outlined. When addressing the above mentioned elements in the following sub sections, if relevant, the Court's judgment regarding that element will be included in the reflections made with regard to existing (or remaining) obscurities. The below outline is broader than an examination of the interpretation of the term water services, it also reflects on the manner in which the European Court of Justice has positioned the cost recovery provision as a whole.

Reflections on the findings of the European Court of Justice's judgment will be provided in the concluding remarks in this chapter.

5.3.1 Dispute on water services and cost recovery

In the infringement procedure that the Commission started against Germany, the Commission requested the European Court of Justice to declare that Germany failed its obligations under the WFD, because it excluded certain services from the concept of water services as mentioned in Articles 2 (38) and 9. The Commission mentioned as example of incorrectly excluded services: the impoundment of water for the purposes of hydroelectric power generation, navigation and flood protection, abstraction for irrigation and industrial purposes and personal consumption. Germany, besides contesting the Commission's view on water services, also contested the admissibility of the application of the Commission with the Court. The Commission and Germany hold a different view on the interpretation of the term 'water services' as mentioned in Article 2 (38) and 9 of the WFD. Article 2 (38) WFD states:

> "water services" means all services which provide, for households, public institutions or any economic activity: (a) abstraction, impoundment, storage, treatment and distribution of surface water or groundwater, or (b) waste-water collection and treatment facilities which subsequently discharge into surface water.

Article 9 WFD states:

> "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.
>
> 2. Member States shall report in the river basin management plans on the planned steps towards implementing paragraph 1 which will contribute to achieving the environmental objectives of this Directive and on the contribution made by the various water uses to the recovery of the costs of water services.
>
> 3. Nothing in this Article shall prevent the funding of particular preventive or remedial measures in order to achieve the objectives of this Directive.
>
> 4. Member States shall not be in breach of this Directive if they decide in accordance with established practices not to apply the provisions of paragraph 1, second sentence, and for that purpose the relevant provisions of paragraph 2, for a given water-use activity, where this does not compromise the purposes and the achievement of the objectives of this Directive. Member States shall report the reasons for not fully applying paragraph 1, second sentence, in the river basin management plans."

5.3.2 The Commission's view on the dispute

The Commission sees water services 'as a wider notion that also includes water abstraction for the cooling of industrial installations and for irrigation in agriculture; the restriction of surface waters for navigation purposes, flood protection or hydro power production; and wells drilled for agricultural, industrial or private consumption.'[203] In taking that position, the Commission found that several Member States were not interpreting 'water services' in line with its view.[204] The Commission took the position that those countries, including *in casu* Germany were therefore not

[203] European Commission, Press release IP/11/1101.

[204] The Commission's view developed over time. In 2002 the question of whether the use of hydroelectric power is a water service was raised at the Commission; the answer was provided that it is 'impossible to provide a general response on the role of hydroelectric power plants in the context of cost recovery for services'. This answer seems to reflect a Commission at the time still *in dubio* on the exact meaning of water services. Written question E-1571/02 by Rolf Linkohr (PSE) to the Commission, 4 June 2002.

applying Article 9 WFD correctly. The Commission does recognize that the Member States have a certain room for discretion in not always applying (full) cost recovery for water services, as the exemptions mentioned in Article 9 (4) WFD may be applied in specific situations leading to the (partial) absence of cost recovery, but it reflects that this room for discretion does not relate to the determination of the water services themselves. The Commission communicated on this:

> 'The use of the concept "water services" by the defendant is contrary to Article 9 of the Water Framework Directive (WFD). The defendant excludes water services such as impoundment which is intended for hydro-electric power production, navigation and flood protection from the scope of water services within the meaning of the Directive. Such a narrow interpretation is not compatible with the WFD, undermines the effectiveness of Article 9 WFD and thereby jeopardises the attainment of the Directive's objectives. It is true that the Member States enjoy a certain margin of discretion on the basis of Article 9 WFD to exclude water services from recovery of costs. They might first have regard to the social, environmental and economic effects of the recovery of costs as well as the geographic and climatic conditions. Further, a Member state might under Article 9(4) WFD decide not to apply the provisions of the second sentence of Article 9(1) WFD in relation to water-pricing policies and recovery of the costs of water services. That option is subject to the condition that there is an established practice in the Member State and that the purposes and the achievement of the objectives of the Directive are not compromised. However, the complete exclusion of a substantial range of water services, as effected by the defendant, goes far beyond that margin of discretion.'[205]

The Commission therefore holds the view that due to Germany's very narrow interpretation of the term water services, it is misapplying Article 9 concerning cost recovery.

Furthermore, the wording of the definition of water services (Article 2 (38) WFD) does not preclude the solitude activities from being a water service, as - according to the Commission - a water service does not require that all in Article 2 (38) listed activities should be present cumulatively. By excluding certain activities from the scope of cost recovery, Germany would be undermining the purpose of the directive. The Commission holds a broad view on water services, possibly even including ecosystem services.[206]

5.3.3 The view of the Federal Republic of Germany on the dispute

Germany, on the other hand, brings forward that cost recovery is a tool, an instrument, to contribute to the attainment of the objectives of the directive, but it is not the only one. Germany stresses the need to be able to weigh up the water protection requirements against legitimate rights of use of water and holds the position that the Commission's interpretation of Article 2 (38) and 9 WFD disregard the management system of the Directive.

Germany interprets the concept of water services very narrowly, only including the water supply and waste water treatment. In Germany's view, Article 2 (38) WFD refers to water supply services and waste water treatment services (only) and the separate elements in Article 2 (38) WFD in themselves cannot constitute a water service. Germany disagrees with the Commission that water 'services' would include activities as water use for navigation or hydropower, as the concept of services would require a bilateral relationship, which is not the case with such services.

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[205] C-525/12, *European Commission vs. Federal Republic of Germany,* 2012, OJ C 26, 26 January 2013.

[206] See on the consequences of a very broad interpretation of water services: P.E. Lindhout, 'A wider notion of the scope of water services in EU water law, Boosting payment for water related ecosystem services to ensure sustainable water management?', *Utrecht Law Review*, (2012).

In contrast to the Commission's view, lastly, Germany views a broad concept of water services undermining the definition of water uses, as included in the WFD (Article 2 (39) WFD).

5.3.4 The findings of the European Court of Justice

Although one might expect that the Court would provide an interpretation of the concept of water services, it does not. The Court starts by outlining its method of interpretation. Interpretation of a provision of EU law requires not only that the wording of the provision is taken into account, and the objectives the provision pursues, but also its context and provision of EU law as a whole. The travaux preparatoires may furthermore contribute to the interpretation.[207]

The Court starts by outlining the two provisions concerned and ascertains that the concept of 'services' is not defined therein. In order to assess whether any service relating to the activities mentioned in Article 2(38) WFD would be subject to the principle of cost recovery the Court starts by analysing the context and overall scheme of the provisions in question. The Court considers, based on the travaux preparatoires, that as practices in the Member States vary widely, the EU legislature intended that Member States may determine the measures to be adopted for the purposes of the application of the principle of cost recovery without extending it to all services associated with water use. The Court furthermore considers that 'in requiring in Article 9 that Member States are to have regard to the principle of recovery of the costs of water services and ensure that water-pricing policies provide adequate incentives for users to use water resources efficiently' and thereby contribute to the environmental objectives of the WFD, Article 9 'does not per se impose a generalised pricing obligation in respect of all activities relating to water use'.[208]

As a second step in interpretation the Court examines the scope of the two provisions in the light of the objectives pursued by the WFD. It starts by noticing that the WFD is a framework directive, which provides for common principles and an overall framework for action, that Member States need to further develop.[209] It does not provide for complete harmonisation of the rules of the Member States concerning water. The Court furthermore considers that preamble sub. (19) of the directive reflects the purpose of the directive, i.e. maintaining and improving the aquatic environment.[210] Referring to preamble sub. (13) of the Directive, which entails that the diverse conditions and needs in the Union are to be addressed in planning and execution of measures, which planning and measures are to be decided upon as close as possible to the locations where water is affected or used, the Court concludes that 'priority must be given to actions coming within the jurisdiction of the Member States in drawing up action programmes adapted to local and regional conditions'.[211]

The Court further considers that the directive is based on principles of management per river basin, which the Court summarizes:

- the setting of objectives per body of water;
- plans and programmes;
- an economic analysis of the detailed arrangements governing water pricing;

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[207] See on the increasing importance of the travaux preparatoires for interpretation: K. Lenaerts & J. Gutiérrez Fons, 'To Say What The Law of the EU Is: Methods of Interpretation and the European Court of Justice', AEL 2013/9.
[208] C-525/12 *European Commission v Federal Republic of Germany* ECLI:EU:C:2014:2202, para. 48.
[209] *Ibid.*, para. 50.
[210] *Ibid.*, para. 51.
[211] *Ibid.*, para. 52.

- the taking in to account of the social, environmental and economic effects of cost recovery as well as the geographic and climatic conditions of the region(s) concerned.

To that end, the programme of measures of the Member States, obliged by Article 11 WFD, needs, as *minimum requirement*, to include measures relating to the recovery of the costs for water services, such as those provided for under Article 9 of Directive 2000/60.[212] The Court considers that cost recovery measures are 'one of the instruments available to Member States in water management to achieve rational water use'.[213] Even though the activities listed in Article 2 (38) may undermine the achievement of objectives of the Directive, *it is not necessarily so that the failure to attain the objectives is due to the absence of pricing for those activities*. Lastly, the Court considers in addition that Article 9 (4) WFD provides that Member States may, under certain circumstances, opt *not to proceed with the recovery of costs for a given water use activity, where this does not compromise the purposes and achievement of the objectives of the WFD*.[214] Having outlined the above, the Court dismisses the Commission's action as the fact that Germany does not make *some* of the water activities mentioned in Article 2 (38) WFD subject to the principle of cost recovery for water services does not by itself establish a failure to fulfil its obligations under Articles 2 (38) and 9 WFD.

5.4 Water services

Hereafter the question what difficulties and obscurities arise when it concerns water services is addressed.

First a remark needs to be made about the limitation on water services as mentioned in the WFD. The definition of water services refers to surface water or groundwater. Both surface water and groundwater have been defined in the WFD. Surface water being 'inland waters, except groundwater; transitional waters and coastal waters, except in respect of chemical status for which it shall also include territorial waters.'[215] Groundwater is defined as 'all water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil.'[216] Cost recovery for water services, based on the definitions, is limited to these two 'types' of waters, thereby excluding services for water use from collected rainwater. Stangl also mentions that cost recovery is not applicable with regard to water that is not yet part of the saturation zone and thereby not (yet) groundwater.[217]

In the first series of Directive proposals a definition of water services was lacking. The text with regard to cost recovery focused on the different water uses and the internalization of environmental and resource costs. Water services are defined for the first time in the Common Position.[218]

Water services were defined as: (a) abstraction, distribution and consumption, or use in any economic activity of surface water or groundwater; (b) emission of pollutants into surface water and wastewater collection and treatment facilities which subsequently discharge into surface water.

[212] *Ibid.*, para. 54.
[213] *Ibid.*, para. 55.
[214] *Ibid.*, para. 57 [emphasis added].
[215] Article 2(1) WFD.
[216] Article 2(2) WFD.
[217] F. Stangl, et al., *Ökonomische Instrumente im Wasserschutz*, Manzsche Verlags- und Universitätsbuchhandlung (2012), p. 21.
[218] Common Position (EC) No. 41/1999 adopted by the Council, OJ C 343, 30 November 1999.

Although Parliament did not reject this definition, the Commission suggested a change in order to come to an agreement on the text.[219] It argued that the renewed wording of Article 9 WFD brought along a new definition of water services. Water services is defined in Article 2 (38) WFD as follows:

> ' 'Water services' means 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. Waste-water collection and treatment facilities which subsequently discharge into surface water.'

For the cost recovery of water services as mentioned in Article 9 WFD, but also for the (scope of the) economic analysis as mentioned in Article 5 WFD, the interpretation of water services is of great importance. Different interpretations are possible, ranging from a 'narrow' view of water services to a 'broad' view. These are discussed below, after outlining the European Court of Justice's view on water services.

5.4.1 The view of the European Court of Justice on water services

In its judgment C-525/12 *Commission vs Federal Republic of Germany* the European Court of Justice first considers that both in Article 2(38) and in Article 9 WFD the concept of 'services' is not defined, due to which it remains unclear whether the activities in Article 2 (38) (abstraction, impoundment, storage, treatment and distribution of surface water or ground water) each in themselves may be subject to cost recovery.[220] However, the European Court of Justice does not provide any real clarity on this question. As outlined in section 5.3, the Court relies on positioning cost recovery within (only) the programmes of measures, retaining full discretion to the Member States to decide on application and object of cost recovery, and thereby the Court does not have to consider which water activities do or do not – in this action brought before its Court – constitute a water service. It considers:

> 'Having found that the existing conditions and requirements call for specific solutions, the EU legislature intended, as is apparent inter alia from recital 13 in the preamble to Directive 2000/60, that that diversity of solutions be taken into account in the planning and implementation of measures aimed at ecologically viable protection and use of water in river basins and that decisions be taken at the level as close as possible to the places of use or degradation of water. Consequently, and without prejudice to the importance of water pricing policies and the polluter pays principle, as reaffirmed by that directive, priority must be given to actions coming within the jurisdiction of the Member States, in drawing up action programmes adapted to local and regional conditions. (…)It is thus clear that measures for the recovery of the costs for water services are one of the instruments available to the Member States for qualitative management of water in order to achieve rational water use. Although, as rightly pointed out by the Commission, the various activities listed in Article 2(38) of Directive 2000/60, such as (…) may have an impact of the state of bodies of water and are therefore liable to undermine the achievement of the objectives pursued by that directive, it cannot be inferred therefrom that, in any event, the absence of pricing for

[219] Opinion of the Commission pursuant to Article 251(2) (c) of the EC Treaty, on the European Parliament's amendments to the Council's common position regarding the Proposal for a European Parliament and Council Directive establishing a framework for Community action in the field of water policy. COM (2000) 219 final (CELEX NUMBER 52000PC0219).
[220] C-525/12 *Commission vs Federal Republic of Germany,* ECLI:EU:C:2014:2202, para. 45.

> such activities will necessarily jeopardise the attainment of those objectives. It follows that the objectives pursued by Directive 2000/60 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, as maintained in essence by the Commission. In those circumstances, the fact that the Federal Republic of Germany does not make some of those activities subject to that principle does not establish by itself, in the absence of any other ground or complaint, that that Member State has thereby failed to fulfil its obligations under Articles 2(38) and 9 of Directive 2000/60.'[221]

From this judgment not much clarity is provided on what constitutes a water service. The Court implicitly acknowledges that the cumulative presence of all the activities in Article 2 (38) WFD is not constitutive for determination of one of the activities as water service. Each of these activities *may* constitute a water service. However, appointment as water service is – within the programmatic approach – to be determined by the Member States, as *in casu* 'the fact that the Federal Republic of Germany does not make some of those activities subject to that principle [i.e. cost recovery for water services] does not establish by itself (…) that that Member State has thereby failed to fulfil its obligations under Articles 2 (38) and 9 of Directive 2000/60.'[222]

The impact of this Court judgment is high when it concerns the potential effectivity of the cost recovery provision. The Court positions the cost recovery provision fully and only within the programmatic approach on water management as included in the WFD. The Court judgment positions cost recovery as a practically voluntary tool to be used by Member States. It is effectively up to the Member States, to decide whether cost recovery is a measure to be applied and to which water related activities. The Court's judgment seems circumstantial as it seems to hint that its judgment is this one 'in the absence of any other ground or complaint'. However, as will be outlined in the concluding remarks in this chapter, due to this interpretation and positioning of the cost recovery provision in the manner the Court did, it will be very difficult for the Commission to address cost recovery again. The Court's consideration that even if the objectives of the directive are not attained it does not mean that it is a result from a lack of pricing, in conjunction with the discretionary room left to Member States, will hardly ever result in any Member State failing its obligations from cost recovery.

As outlined above, the European Court of Justice does not provide much information what is to be considered a water service. This however does not prevent a further analysis based on available information as what water (related) activities may or should constitute a water service. Hereafter several positions taken by scholars, NGO's, in guidance documents et cetera are highlighted to assess in which manner Member States may address the concept of water services.

5.4.2 Arguments in favour of a narrow interpretation of water services?

As mentioned above, a number of Member States take the position that only the supply of drinking water and the disposal and treatment of wastewater are water services, holding a so-called 'narrow view' of water services.[223] However, the reason for taking this position remains often unclear. Sometimes inconsistencies can be identified in the arguments used in the determination of water services. For example, the Netherlands acknowledges that hydropower production can be considered a water service.[224] It did not however appoint hydropower as a WFD water service. The

[221] *Ibid.*, paras. 52, 55-59.
[222] *Ibid*. para. 59.
[223] European Commission, Press release IP/11/1101; IP/11/1264; IP/11/1433.
[224] See also H.F.M.W. van Rijswick & H.J.M. Havekes, *European and Dutch Water Law*, Europa Law Publishing (2012), p. 431, remarking that in the implementation process of the WFD in the Netherlands, the

Netherlands justifies its decision not to attribute hydropower as a water service on the minimal use of hydropower in the Netherlands. Furthermore, the Netherlands holds the view that this minimal use of hydropower does not have a significant negative effect on water and cannot therefore be considered as a water service.

These arguments are not convincing, however. The minimal use of a water service is, in my view, not a legitimate justification for Member States not to appoint it as a water service. First because any exemption regarding the recovery of the costs of such (minimal) water service should be based on the exemption/derogation possibilities as mentioned in Article 9 WFD. Member States may, with regard to the cost recovery obligation, 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. Or, under certain conditions, in the case of established practices they may decide not to apply cost recovery (Article 9 (4) WFD). Therefore, the sole argument that hydropower in the Netherlands is only used minimally does not in itself justify its non-appointment as a water service. Secondly, the absence of a significant (negative?) effect on water is not relevant, as the significance of the impact on water is only relevant to determine water uses, and not water services (see Article 2 (39) WFD in comparison to Article 2 (38) WFD).

An inconsistent determination also emerges in the Dutch treatment of the impoundment of surface waters and water services for recreational purposes. The Netherlands deals with the impoundment of surface waters for navigation purposes and water for recreational purposes as water use not being a water service.[225] It is however unclear upon which exemption/derogation in the WFD the Netherlands relies in taking this position or why these water activities would not fall under the definition of water services in the WFD (a lack of reasoning).

Irrespective of the above-mentioned examples of an inconsistent or insufficiently reasoned determination, some scholars also seem to hold a narrow view of water services. Brouwer, in his inaugural speech, also interpreted the definition of water services (very) narrowly, relating them to just drinking water, wastewater collection and treatment, but not however elaborating as to why he has taken this position.[226] But what could justify such a position? And should water services be interpreted more broadly than in the Member States involved, and (perhaps) as Brouwer has done?

One argument for interpreting water services narrowly would result from a possible interpretation of the definition of water services. If the enumeration in Article 2 (38) WFD is to be considered as cumulative, only a very limited number of water-related activities will result in water services. Krull and also Reese[227] refer to this point of view.[228] The European Commission, however, takes a

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position was taken that the concept of water services should be interpreted broadly, referring to Dutch parliamentary proceedings: Kamerstukken II 2002/2003, 28 808, nr. 3, p. 16-17. However, regardless of this remark in parliamentary documents a number of water-related activities/services were not earmarked as a water service.

[225] Rijkswaterstaat, Kostenterugwinning van Waterdiensten in Nederland, RWS Waterdienst rapport 2008.051, p. 11.

[226] R. Brouwer, 'Payment for Ecosystem Services: Making Money Talk', inaugural speech at the Vrije Universiteit Amsterdam (2010), p. 21.

[227] M. Reese, 'Application of the Cost Recovery Principle on Water Services in Germany', *Journal for European Environmental & Planning Law*, (2013).

[228] D. Krull, 'Infrastrukturelle Wasserdienstleistungen? Mögliche Auswirkungen des Art. 9 der EG-Wasserrahmenrichtlinie auf die Stromerzeugung aus Wasserkraft', *Dresdner Wasserbaukolloquium* (2011), stating 'Bund und Länder nach wie vor die Ansicht, dass sich die in der WRRL aufgezählten Tatbestände kumulativ zu verstehen seien und sich daher nur auf die Bereiche der Wasserver- und Abwasserentsorgung beziehen können'; See differently H. Unnerstall, 'Kostendeckung für Wasserdienstleistungen nach Art. 9 EG-Wasserrahmentrichtlinie', *Zeitschrift für Umweltrecht*, vol. 20, issue 5 (2009), p. 234-242.

different point of view and does not view the enumeration as being cumulative, resulting in – for instance – the storage of surface water already being possibly considered as a water service.[229]

From the outline of the judgment of the European Court of Justice in section 5.3, one may conclude that the Court implicitly acknowledges that the cumulative presence of all the activities in Article 2 (38) WFD is not constitutive for determination of one of the activities as water service. The Court considered:

> 'It is thus clear that measures for the recovery of the costs for water services are one of the instruments available to the Member States for qualitative management of water in order to achieve rational water use. Although, as rightly pointed out by the Commission, the various activities listed in Article 2(38) of Directive 2000/60, such as (…)may have an impact of the state of bodies of water and are therefore liable to undermine the achievement of the objectives pursued by that directive, it cannot be inferred therefrom that, in any event, the absence of pricing for such activities will necessarily jeopardise the attainment of those objectives. It follows that the objectives pursued by Directive 2000/60 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, as maintained in essence by the Commission. In those circumstances, the fact that the Federal Republic of Germany does not make some of those activities subject to that principle does not establish by itself, in the absence of any other ground or complaint, that that Member State has thereby failed to fulfil its obligations under Articles 2(38) and 9 of Directive 2000/60.'[230]

From this consideration it is clear that the Court allows Member States to appoint each of the activities mentioned in Article 2 (38) WFD as a water service and that – for appointment as water service – the cumulative presence of all the activities in Article 2 (38) WFD is not necessary. Therefore, each of these activities *may* constitute a water service.

In my view, the enumeration in Article 2 (38) WFD should not be interpreted as being cumulative. It is merely an enumeration of water activities that can (in themselves) constitute water services if they provide for households, public institutions or any economic activity. This is confirmed indirectly by the European Court of Justice in its judgment, but is also confirmed by legislative history documents. From the legislative history documents - which reflect, with regard to the compulsory application of cost recovery, a significant difference of opinion between the Parliament and the Council - on the question of a cumulative enumeration or not, even the Council did not consider the elements to be cumulative in the first place. In the Common Position which was adopted by the Council water services were defined as 'abstraction, distribution and consumption, or use in any economic activity of surface water or groundwater'.[231]

5.4.3 Arguments in favour of a broad interpretation?

Whether water services are interpreted narrowly or broadly makes a great deal of difference with regard to cost recovery. A broad interpretation of water services will have a significant influence on cost recovery in the Member States, as Member States are then obliged to take into account the principle to recover the cost of these services as prescribed and within the boundaries of Article 9 WFD. Where, for instance in the Netherlands, activities for protection against flooding, or water

[229] Stangl, for instance, also holds such a view as he considers the enumeration in Article 2 (38) to be 'alternativ, nicht kumulativ zu verstehen'. F. Stangl in presentation held at *ÖWAV-Leitungsausschusssitzung der Arbeitsgemeinschaft Hochwasserschutz* on 23 January 2013, 'Hochwasserschutzfinanzierung aus europarechtlicher Sicht – das Kostendeckungsprinzip nach Art 9 WRRL und seine Umsetzung.
[230] C-525/12 *Commission vs Federal Republic of Germany,* ECLI:EU:C:2014:2202, paras. 55-59.
[231] Common Position (EC) No. 41/1999 of 22 October 1999, OJ C 343, 30 November 1999.

services for shipping purposes or hydropower are not considered to be water services cost recovery is firstly not obligatory and, secondly, if recovery takes place, it is not obligatory to adhere to Article 9 WFD. As cost recovery is one of the measures to attain the environmental objectives of the WFD, a broad interpretation leads to many water-related activities being appointed as water services.

The discussion with regard to the narrow or broad interpretation of water services was instigated by a number of non-governmental organisations. The World Wide Fund (WWF) and the European Environmental Bureau (EEB) filed a complaint in 2006 with the Commission with regard to the – in its opinion – failure of several Member States to comply with Article 5 (1) of the WFD, due to not properly interpreting water services.[232]

The WWF and the EEB complained with the Commission requesting that it should take action to come to a similar ('broad view') understanding of water services in the Member States. The WWF and the EEB based their complaint on the non-compliance of the countries involved with Article 5(1) WFD. Article 5 (1) WFD states:

> '1. Each Member State shall ensure for each River basin district or for the portion of an international river basin district falling within its territory:
>
> - an analysis of its characteristics
> - a review of the impact of human activity on the status of surface waters and on groundwater and,
> - an economic analysis of water use
>
> is undertaken according to the technical specifications set out in Annex II and III and that it is completed at the latest four years after the date of entry into force of this Directive.'

The economic analysis of Article 5 WFD is necessary to make calculations for cost recovery for water services and to decide on the most cost-effective combination of measures to be included in the programme of measures (Article 11 WFD).

The complainants held the view that an economic analysis as meant in Article 5 (1) WFD can only be satisfactory from an environmental point of view if 'water services' are defined broadly. And as – in their view – several countries have a 'too narrow' view of water services, a meaningful economic analysis is not possible, therewith undermining the purpose of the WFD ('sustainable water management').

The complainants raised the following arguments that call for a broad interpretation of water services:

1. The WATECO Guidance document suggests a broad interpretation of water;[233]
2. Member States identified hydro-morphological impacts arising from water infrastructure works, like services for navigation, hydropower or irrigation works, as major environmental problems for achieving the objectives of the WFD; by this exclusion of these services the economic analysis cannot comply with the content of Annex III WFD;
3. An argument that the collection of data necessary for the economic analysis would be disproportionate is not a valid argument to uphold a limited interpretation of water services;

[232] Complaint to the European Commission concerning failure of Austria, Belgium, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Poland, Sweden and the Netherlands to comply with the provisions of the EU Water Framework Directive 2000/60/EC ('WFD') Article 5§1, Brussels, 17 July 2006, WWF/EEB.

[233] Common Implementation Strategy for the Water Framework Directive (2000/60/EC), Guidance Document no. 1, Economics and the Environment (2003).

4. A water service does not only exist in case of remuneration. Taking an opposite view (*i.e.* remuneration is essential) comprehends a too narrow interpretation of water services. Complainants state that a narrow interpretation like this 'would run against the intention of the WFD to use water pricing to provide incentives for achieving the environmental objectives, as all activities not currently remunerated would not be automatically excluded. […] And indeed, in most cases, Member States have already identified "self-services"- which are not remunerated – as water services.'[234]
5. The negotiations regarding the coming about of the WFD do not confirm a narrow view on water services.

It seems that the Commission acknowledged the view of these NGO's on water services. Hereafter an outline is made which arguments can be found in favour of a broad interpretation of water services.

First of all, the coming about of the Directive implies that a broad interpretation is allowed. The explanatory memorandum with the first formal Directive proposal mentions with regard to charges for water use:

> 'However, there is scope for improving the efficiency of water use and the effectiveness of environmental provisions relating to its use by ensuring that, so far as is reasonable, the price of water is a genuine reflection of the economic costs involved, including the environmental and resource costs. This concept was not outlined in the Commission's Communication, but has emerged from the consultation exercise as a means of more fully implementing the polluter-pays principle in this sector.
>
> To this end, Article 7 [now 5] of the Directive requires an economic analysis of different water uses to be carried out which, *inter alia*, will allow a more realistic view of the economic costs of different water uses in the River Basin Districts to emerge. Article 12 [now 9] then requires that prices for water use reflect the economic costs more closely. (…) Article 12 [now 9] of this Directive obliges Member States to ensure that all costs (as specified) for *all services in relation to water use* [emphasis] are fully recovered, overall, *i.e.* from the entirety of users, and by economic sector, *i.e.* from within each economic sector when splitting up all water uses of that particular service of that particular sector into at least the following three economic sectors: households, industry and agriculture by 2010.'[235]

It must be said that in that proposal a definition of water services was lacking. The text only speaks of the recovery of all costs for 'services provided for water uses'. 'Use of water' in this first proposal was defined as:

> '(a) abstraction, distribution and consumption of surface water or groundwater;
>
> (b) emission of pollutants into surface water and waste water collection and treatment facilities which subsequently discharge into surface water;
>
> (c) any other application of surface water or groundwater having the potential of a significant impact on the status of water.'

[234] Complaint to the European Commission concerning failure of Austria, Belgium, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Poland, Sweden and the Netherlands to comply with the provisions of the EU Water Framework Directive 2000/60/EC ('WFD') Article 5§1, Brussels, 17 July 2006, WWF/EEB, p. 6.
[235] Proposal for a Council Directive establishing a framework for Community action in the field of water policy, COM(97) 49 final, p. 16-17.

Then in the amended proposal[236] (Article 12 (1) a) Member States were requested to take into account the principle of the recovery of the environmental and resource costs of water use, 'with a view to setting charges at a level which encourages the attainment of the environmental objectives of this Directive'.[237] The definition of water use did not change.

'Water services' were defined for the first time in the Common Position in Article 2 (34):

> ' "Water services" means:
>
> (a) Abstraction, distribution and consumption, or use in any economic activity of surface water or groundwater;
> (b) Emission of pollutants into surface water and waste water collection and treatment facilities which subsequently discharge into surface water.'[238]

Water use was defined in Article 2 (35) as:

> ' "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. This concept applies for the purposes of Article 1 and of the economic analysis carried out according to Article 5 and Annex III, point (b).'

The Commission again reworded the definition of water services (Article 2 (34)) and water use (Article 2 (35)):

> ' "Water services" means:
>
> c. All services providing abstraction, impoundment, distribution and treatment of surface water or groundwater;
> d. Waste water treatment and waste water disposal into surface water."
>
> "Water uses" includes the main economic sectors such as domestic, agriculture and industry, amenities or other legitimate uses of the environment together with any other activity identified under Article 5 and Annex III having a significant impact on the status of water. This concept applies for the purposes of Article 1 and of the economic analysis carried out according to Article 5 and Annex III, point (b).'[239]

The cost recovery article in the WFD (the former Article 12) was also reworded (Article 9), stressing that the charging system for water services would act as an incentive for the sustainable use of water resources and directly relates to achieving the environmental objectives of the Directive, having the various economic sectors contribute fairly to the costs of water services.

No further explanation or clarification as to the interpretation of the final text of Article 9 WFD or the definitions of water services and water use was provided when a joint text between the Parliament and the Council was reached. The final text therefore became (Article 2 (38) WFD):

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[236] Amended proposal for a European Parliament and Council Directive establishing a framework for Community action in the field of water policy, (COM(97)49 final), COM (1999) 271 final, p. 26.
[237] Although in this concept text the Member States needed to take into account the principle of cost recovery with a view to setting charges at a level which encourages the attainment of the environmental objectives, therefore limiting it to the objectives mentioned in Article 4 WFD and no longer to Article 1 WFD, this changed again in later versions by redefining 'water use' and relating this water use (including services) to the purposes of Article 1 WFD (see Article 2 (39) WFD second sentence).
[238] Common Position (EC) No. 41/1999 of 22 October 1999, OJ C 343, 30 November 1999, Article 2(34).
[239] Opinion of the Commission, COM (2000) 219 final, (CELEX NUMBER 52000PC0219).

> ‘ “Water services” means 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) waste-water collection and treatment facilities which subsequently discharge into surface water.’[240]

Interesting is that Annex VII regarding the content of the river basin management plans explicitly mentions at no. 7.2:

> ‘River basin management plans shall cover the following elements: (…)
>
> 7.2 a report on the practical steps and measures to apply the principle of recovery of the costs of water **use** in accordance with Article 9;’[241]

Secondly, a broader interpretation is compatible with the purpose of the Directive (Article 1 WFD), where the recovery of the costs of water services contributes to sustainable water use and compliance with the polluter pays principle thereby prevents any (further) pollution of surface water and groundwater.[242] Any narrow interpretation, reducing water services to only the supply of drinking water and wastewater treatment would degrade the purpose of the Directive as outlined in Article 1 WFD to an almost empty shell.

Thirdly, a broader interpretation is not related one-on-one to the obligatory payment for services, as Article 9 WFD explicitly provides a derogation possibility that Member States may use to take certain circumstances into account.[243] Member States may, with regard to the obligations regarding the drawing up of incentive-inducing water pricing policies and ensuring adequate contributions by water uses to the costs of water services, 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.

Fourthly, the existence of a water service is not connected to the existence of certain technical means. Unnerstall, for instance, interprets water services as a wider notion, but relates the existence of a water service to the water use in conjunction with a technical means or in relation to an economic activity.[244] In his view a technical means, which changes the key characteristics of water, is a necessity to come to a water service. Perhaps this position is considered in relation to the view on water services as provided in the Guidance document no. 1 of the Common Implementation Strategy.[245]

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[240] Joint text approved by the Conciliation Committee provided for in Article 251 (4) of the EC Treaty 1997/0067 (COD), C-5-0347/00, PE-CONS 3639/00 ENV 221 Codec 513 (2000), OJ L 327, 22 December 2000.
[241] [Emphasis and underlining added].
[242] See P.E. Lindhout, ‘A wider notion of the scope of water services in EU water law, Boosting payment for water related ecosystem services to ensure sustainable water management?’, *Utrecht Law Review*, (2012); see also E. Gawel, W. Köck et al. , ‘Reform der Abwasserabgabe: Optionen, Szenarien und Auswirkungen einer fortzuentwickelnden Regelung’, Umweltforschungsplan des Bundesministeriums für Umwelt, Naturschutz, Bau und Raktorsicherheit, Texte 55/2014, p. 89; Furthermore E. Gawel, ‘Cost recovery for ‘water services’/Critical review of the EU Court of Justice conclusions of Advocate General Jääskinen in case C-525/12, *Europäische Wasserrahmenrichtlinie*, 19 August 2014.
[243] See also Van Kempen on the presence of exemptions in Directives in J. van Kempen, ‘Countering the Obscurity of Obligations in European Environmental Law, An analysis of article 4 of the European Water Framework Directive’, *Journal of Environmental Law,* vol. 24, issue 3 (2012), p. 499-533.
[244] H. Unnerstall, ‘The principle of full cost recovery in the EU-Water Framework Directive – Genesis and Content’, *Journal of Environmental Law,* vol. 19, issue I (2007), p. 35.
[245] Common Implementation Strategy of the Water Framework Directive (2000/60/EC), Guidance document no. 1, Economics and the environment, the implementation challenge of the Water Framework Directive, (2003).

According to this guidance document a water service can be considered an intermediary between the natural environment and the water use itself. It states that the purpose of a water service is the modification of the key characteristics of natural or discharged water. The guidance document mentions as examples of a water service the provision of drinking water, wastewater treatment and purifying wastewater before returning it to the environment. The guidance document also provides some examples of modifications to the characteristics of waters that exist through a water service:

- 'Its **spatial distribution**, *e.g.* a water supply network for ensuring that water is reallocated
  spatially to every individual user;
- Its **temporal distribution**/flows, *e.g.* dams;
- Its **height**, *e.g.* weirs and dams;
- Its **chemical composition**, *e.g.* treatment of water, and wastewater;
- Its **temperature**, *e.g.* temperature impact on water.'[246]

This guidance document reflects an informal consensus position on the best practices of all participants involved in drafting the document, but does not reflect a formal position of any of them.[247] Furthermore, a guidance document is not legally binding for the Member States.[248] Although acknowledging that water services will be more readily discernible when there is technical means as an intermediary, the Directive text itself does not outline the necessity of technical means to establish, for instance, a modification of the key characteristics of water.

The fact remains that some Member States have interpreted water services narrowly or have designated water services on a limited basis. The arguments to support a narrow interpretation of water services are, in my view, not very convincing. A broader interpretation seems to be more logical, taking into account the legislative process and the purpose of the Directive. Furthermore, the fact that the cost recovery provision provides for the possibility to make a derogation offers enough room for discretion for Member States to provide for a tailor-made cost recovery system. The effectiveness of the Directive as an environmental directive and the effectiveness of Article 9 WFD in particular would be pressurized when water services are interpreted narrowly. However, it is also important to examine what would be the effect of a broad interpretation of water services. This will be highlighted in the next – illustrative – section.

5.4.4 WFD water services and water-related ecosystem services

In order to illustrate the possible scope of activities that a broad or narrow interpretation of the term 'water services' brings about, ecosystem services in relation to WFD water services will hereafter be reflected upon.[249] Can the WFD embrace the concept of payment for water-related ecosystem services and, if so, to what extent?

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[246] Common Implementation Strategy of the Water Framework Directive (2000/60/EC), Guidance document no. 1, Economics and the environment, the implementation challenge of the Water Framework Directive, (2003), p. 73.

[247] *Ibid*; Participants in this guidance document were the European Commission, all Member States, Accession Countries, Norway and other stakeholders and NGOs.

[248] See on the difficulties with the implementation of environmental directives, outlining also the function of guidance documents therein: B.A. Beijen, 'The Implementation of European Environmental Directives: Are Problems Caused by the Quality of the Directives?', *European Energy and Environmental Law Review* , vol. 20, issue 4 (2011).

[249] Concerning the interpretation of water services and the consequences of this interpretation, during this research I published my preliminary findings: P.E. Lindhout, 'A wider notion of the scope of water services in EU water law, Boosting payment for water related ecosystem services to ensure sustainable water management?', *Utrecht Law Review,* vol. 8, issue 3 (2012), p. 86-101.

The purpose of the WFD, as outlined in Article 1 WFD, is amongst other things *the prevention of further deterioration and protection of the status of aquatic ecosystems and promotion of sustainable water use* based on the long-term protection of available water resources (Article 1 a / b WFD).[250] No definition of ecosystems is provided in the WFD.

Definitions of the term ecosystem can be found in many forms. Ecologists may use a different definition than, for instance, economists or lawyers.[251] For this research the descriptions of an ecosystem, a water-related ecosystem and water-related ecosystem services as used in the Recommendation on Payments for Ecosystem Services will suffice:

> *'Ecosystem*: means a dynamic complex of plant, animal and microorganism communities and their nonliving environment interacting as a functional unit. Ecosystems vary from relatively undisturbed ones, such as natural forests, to landscapes with mixed patterns of human use and ecosystems that are intensively managed and modified by humans, such as agricultural land and urban areas.'
>
> *'Water-related ecosystems*: means ecosystems such as forests, wetlands, grasslands and agricultural land that play vital roles in the hydrological cycle through the services they provide.'
>
> '*Water-related ecosystem services*: means such services as flood prevention, control and mitigation; regulating runoff and water supply; improving the quality of surface waters and ground waters; withholding sediments, reducing erosion, stabilizing river banks and shorelines and lowering the potential of landslides; improving water infiltration and supporting water storage in the soil; and facilitating groundwater recharge. Water-related ecosystem services also include cultural services, such as recreational, aesthetic and spiritual benefits of forests and wetlands.'[252]

Also with regard to sub-definitions of water-related ecosystem services several divisions can be made. Some make a sub-division into:

- Production services (*e.g.* drinking water supply)
- Regulating services (*e.g.* water regulation)
- Cultural services (*e.g.* water for recreation/religious purposes et cetera)
- Supporting services (*e.g.* water as a medium for processes like navigation or nutrient transport)[253]

As the focus in this section is not on the different purposes of water use, but on addressing the congruence of ecosystem services with WFD water services, another more functional division is made. The division made in the Recommendation on Payments for Ecosystem Services (UNECE, 2007) is used.

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[250] [Emphasis added].
[251] *E.g.* D.M. Post et al. (eds.), 'The problem of boundaries in defining ecosystems: A potential landmine for uniting geomorphology and ecology', *ScienceDirect Geomorphology,* vol. 89, issue 1-2, (2007), p. 113: 'They also provide us with a useful definition of an ecosystem – a region of strong interactions among organisms and between organisms and the flux and flow of energy or material.' Also see the other definitions of ecosystems provided in this article.
[252] Recommendation on Payments for Ecosystem Services in Integrated Water Resources Management, UN Doc. ECE/MP.WAT/22 (2007), p. 2 [Emphasis added].
[253] T.C.P. Melman & C.M. van der Heide, Ecosysteemdiensten in Nederland: verkenning betekenis en perspectieven. Achtergrondrapport bij Natuurverkenning 2011, WOt rapport 111 (2011).

Water-related ecosystem services can be differentiated as follows:

- *services regarding water quantity;*
- *services regarding water quality*.

Water *quantity* services are, for instance, flood protection and water regulation (diversion of water, run off / drainage, retention and storage).[254] The means by which this ecosystem service can be provided are amongst others forestation, specific forms of agriculture or flood plain restoration. These activities can provide, in the form of an ecosystem service, better flood protection and/or water regulation due to the fact that they create a better run-off of excess water, better infiltration possibilities or a better retention and storage of excess water.

With regard to water *quality* services, these concern, for instance, activities regarding restriction/curbing water pollution and water purification. One may think of increasing extensive land use, introducing pollution quotas or creating swamps as a means by which these water quality services may be provided.

It is important to realize that the above differentiation into quality and quantity services is an artificial one as the ecosystem services regarding the quantity of water also affect its quality.[255] However, for the focus of this section some of the above examples are used to outline the crux of the coming together of water-related ecosystem services and WFD water services.

Water-related ecosystem services are not always evidently also a water service as defined in the WFD. As Table I shows and as is elaborated upon below, depending on the interpretation of water services (WFD) being narrow or broad, a water-related ecosystem service can more or less be evidently discerned as being also a WFD water service.

If a 'narrow' interpretation of water services is adopted, *i.e.* only the supply of drinking water and the disposal and treatment of wastewater are water services, then only ecosystem services relating to purification can be identified as being a WFD water service. These activities can be stipulated as (waste)water treatment. Examples thereof are wetland restoration, creation and preservation, paddy cultivation[256] and land buffer zones.

Curbing water pollution (as a *quality* ecosystem service) by means of the extensivisation of (agricultural) land use is, when adopting a 'narrow' view, not a WFD water service, as it does not provide for the supply of drinking water or the disposal and treatment of wastewater.

From a 'broad' point of view, however, this is already more doubtful. If the extensivisation of land use directly relates to curbing water pollution, one can take the position that curbing water pollution as an ecosystem service is indeed a WFD water service, as the service effectively provides for the storage, treatment and distribution of surface water.[257] The WFD definition of water services is not limited by the intention relating to the activity performed. Therefore, the fact that the extensivisation of land use is – in this example – directly related to /instigated by the target of curbing water

[254] Recommendation on Payments for Ecosystem Services in Integrated Water Resources Management, UN Doc. ECE/MP.WAT/22 (2007), p. 4.
[255] See for instance Millennium Ecosystem Assessment, [http://www.maweb.org/en/Condition.aspx], chapter 7, p. 185.
[256] Not applicable for Europe as there are is no paddy cultivation in Europe.
[257] Recommendation on Payments for Ecosystem Services in Integrated Water Resources Management, UN Doc. ECE/MP.WAT/22 (2007), p. 4: 'Conservation agriculture refers to a range of soil management practices that minimize effects on composition, structure and natural biodiversity and reduce erosion and degradation (…) Furthermore, 'less contamination of surface water' (emphasis added) occurs and water retention and storage are enhanced, which allows recharging of aquifers.'

pollution, the effect of the activity can still be determined to be a water service which provides for the storage, treatment and distribution of surface water. The same applies for the restoration and preservation of natural land cover.

Somewhat differently, the water quality ecosystem service of curbing water pollution[258] by means of the introduction of pollution quotas does improve water quality, but cannot be considered to be a WFD water service, both within a narrow or broad interpretation of water services. It is not a water service which provides for households, public institutions or any economic activity in the abstraction, impoundment, storage, treatment and distribution of surface water or groundwater.

Table I – The merging of water services and ecosystem services

Interpretation	**Water service WFD**	**Quality ecosystem service**	**How/means**
Narrow	Supplying drinking water		
	Wastewater collection		
	Wastewater treatment ←	Purification	Wetland restoration/ creation/ preservation; Paddy cultivation; Land buffer zones;
Broad	Service which provides for the storage, treatment and distribution of surface water ←	Curbing water pollution	Extensivisation of land use;
	Service which provides for the storage, treatment and distribution of surface water ←	Curbing water pollution	Restoration/preservation natural land cover;
Interpretation	**Water service WFD**	**Quantity ecosystem service**	**How/means**
Narrow	Supplying drinking water		
	Wastewater collection		
	Wastewater treatment		
Broad	a.o. flood protection ←	Flood protection / water regulation**	Forestation
			Specific forms of agriculture (conservation agriculture)
			Flood plains (creation/restoration)

** run off/infiltration/retention/storage

[258] *Ibid.*, p. 4.

The same ambiguity holds true for water quantity ecosystem services. When interpreting water services 'broadly', also water-related ecosystem services such as flood protection would fall under the definition of WFD water services. As certain water-related ecosystem services contribute to flood protection or mitigating the effects of floods, logically these activities are then considered to be water services to that extent. That again implies that the costs of the activities concerning the ecosystem service, *i.e.* for instance forestation, stimulating specific forms of agriculture and the creation, restoration and conservation of flood plains, need to be paid for via cost recovery under Article 9 WFD, including disaggregation into at least industry, households and agriculture.

If 'water services' are interpreted broadly, the WFD embraces the concept of payment for water-related ecosystem services. Water-related ecosystem services such as flood protection, purification and – to a certain extent - curbing water pollution fall within the scope of the WFD. It is however unclear where the boundaries of a broad interpretation of water services lie. The broader the interpretation of water services, the more water-related ecosystem services should be stipulated to be a WFD water service, resulting also in obligatory cost recovery as required under Article 9 WFD. How should one deal – for instance - with activities falling under the concept of multi-layer flood risk management, where the prevention of floods and mitigating the effects of floods are not only found in higher and/or more stable dykes, but also in better spatial planning and flood-proof building?[259]

For example, in the Netherlands, public project costs regarding private building initiatives for – for instance – flood-proof building are fully retrieved from the private initiator.[260] Should flood-proof building be required due to flood protection policies and – in line with a broad view of water services – be considered a WFD water service, the full retrieval of water service costs (*i.e.* flood protection) from exclusively the private initiator might be contradictory to Article 9 WFD, as an adequate contribution by different water uses (industry, households and agriculture) to the recovery of the costs should be ensured and flood protection extends further than only the private initiator.

The system under Article 9 WFD would mean that the costs concerned would have to be adequately paid for by industry, households and agriculture in situations where this may currently not be the case.

5.5 Water use

Water use in the WFD is a wider notion than water services. Water use is defined in Article 2 (39) WFD as follows:

> ' "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.'
>
> This concept applies for the purposes of Article 1 and of the economic analyses carried out according to Article 5 and Annex III, point (b).'

Water services are a form of water use, but water use does not always have to constitute a water service. Article 5 WFD roughly outlines that each Member State shall ensure that for a river basin district an analysis of its characteristics is made, a review of the impact of human activity on the status of surface waters and on groundwater is carried out and that an economic analysis of water use is made. As the analysis of the characteristics and the economic analysis of water use itself cannot have a significant impact on the status of water, the human activity is 'any other activity

[259] See a.o. Rijkswaterstaat, 'Syntheserapport Gebiedspilot meerlaagsveiligheid', nr. 0243629.00, (2011).
[260] See Article 6.2.4 Besluit ruimtelijke ordening (21 April 2008); *e.g.* environmental research costs, costs for the backfilling of surface waters, planning costs, compensation costs for the loss of water facilities, damage costs.

identified under Article 5'. That human activity having an impact on the status of surface waters and on groundwater, and assuming that it is not a water service, is only a 'water use' as defined in Article 5 WFD if it has 'a significant impact on the status of water' (and will therefore be identified under Annex II, see hereafter). If it does not have a significant impact, it is not a water use under Article 5 WFD. Recreational angling, for instance, will not qualify as water use, as it is not a water service and it is an activity that does not have a significant impact on the status of surface water or groundwater.

Annex II outlines, amongst other things, that Member States should identify antropogenic pressures to which the identified surface water bodies in a river basin district are liable to be subject. It mentions (under 1.4):

- significant point source pollution
- significant diffuse pollution
- significant water abstraction for urban, industrial, agricultural and other uses, including the loss of water in distribution systems
- significant water flow regulation, including water transfer and diversion
- significant morphological alterations to water bodies
- other significant anthropogenic impacts on the status of surface waters
- land use patterns, including the identification of the main urban, industrial and agricultural areas, fisheries and forests (the last two only if relevant)

For groundwater an identification needs to be made of:

- the impact of human activity (2.3 – only for bodies of groundwater being at risk of failing to meet the environmental objectives under Article 4 WFD). This includes, amongst others, rates of discharge of identified substance into the groundwater body and the identification of land use in the catchment or catchments from which the groundwater body receives its recharge, including pollutant inputs and anthropogenic alterations to the recharge characteristics such as rainwater and run-off diversion through land sealing, artificial recharge, damming or drainage
- The impact of changes in groundwater levels
- The impact of pollution on groundwater quality

One question addressed in the literature is whether the definition of water use in Article 2 (38) WFD is meant to be the same water use as quoted in Article 9 (1) second indent WFD. This is rather unclear. In the English version of the Directive Article 9 (1) second indent WFD speaks of 'an adequate contribution of the different water uses'. The Directive provides a definition of water use. From this congruence one might think that it is rather clear: the ones using water (or a water service) having a significant impact on the status of water should pay for the costs relating to that use. Water uses not having a significant impact or not constituting a water service do not need to contribute towards cost recovery. This seems to be a rather fair result, as there will be few uses that cannot be considered as a service (in a broad interpretation of water services) or do not have a significant impact.

However, Stangl, for instance, has compared the different directive texts and is of the view that the definition of water use (Wassernutzungen) does not evidently apply to Article 9 WFD. He disconnects the two texts. He outlines that the directive text versions of the Member States differ on this point. The French text for instance refers in Article 9 (1) second indent WFD to economic water use sectors and no reference to the definition of water use in Article 2 WFD can be made.

The Dutch version speaks of 'watergebruikssectoren' (water use sectors), which may partly comply with the definition of water use, albeit that the water use is categorised per sector.

Although the Directive texts in the different Member States do differ on this point, a link between the two texts (the definition of water use in Article 2 WFD and the text of Article 9 WFD on cost recovery) can be found in the parliamentary documents when amending the definitions of water services and use in conjunction with rephrasing Article 9 WFD and adjusting Article 5 WFD.[261] An implicit relation between both the definitions of water services and use is made. However, that in itself may nuance the point of view of Stangl to some extent, but on the other hand it is not – in itself – enough to be convincing that a one-on-one application of the definition of water use in Article 9 WFD is evident.

In my view the effect of applying Article 9 (1) second indent WFD should be that water uses, categorised in certain groups, should be paying for water use having a significant impact on the status of water. That certain directive texts of Member States refer to groups (of users) is a manifestation of the means of execution.

A second question, obscurity, that can be identified is whether there is any interrelation between the concepts of water services and water use that should be reflected in the interpretation of the two concepts. This obscurity became explicit in the Conclusion of Advocate General Jääskinen in Case 525/12 *European Commission vs Federal Republic of Germany,* as Germany to that end upheld the view that a broad interpretation of water services, meaning that the different activities mentioned in Article 2 (38) WFD each on them own could constitute a water service, would interfere with the concept of water use. In view of Germany, such interpretation would run the concept of water use empty. Advocate General Jääskinen considered in this respect:

> 'By contrast, it seems to me to be pointless to attach great importance to analysis of the structure of the provision at issue, and in particular to the conjunctions and commas used. Indeed, where a provision of EU law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness. (69) In addition, for the reasons set out below, an interpretation of Article 2(38) of the WFD such as that proposed by the Commission has the effect of erasing the difference between, on the one hand, the concept of water services and, on the other hand, that of water use, and, ultimately, of throwing off balance the relationship desired by the legislature between several instruments with a view to preserving the effectiveness of the WFD.'[262]

I do not agree to this reasoning. The possibility that the activities in Article 2 (38) WFD each on their own constitute a water service (and therefore are subject to the principle of cost recovery for water services) does not interfere with the concept of water use. In the preparatory documents of the Directive I did not find arguments that underlie an explicit interrelation between the scopes of the two concepts. This view is also recognized in the doctrine. Gawel states, in my view convincingly, about this matter:

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[261] Opinion of the Commission, Amending the proposal of the Commission, COM (2000)219 final (CELEX NUMBER 52000PC0219), p. 7. (…) The Commission's proposal aimed at a more ambitious provision but acknowledging that that level of ambition is not supported and taking into account the divergence between the common position and the Parliament's amendments Article 9 has been redrafted based on the principles and parts of amendment 43. The wording of the definitions of water services and water use in Article 2(34) and (35) is also adjusted to the revised Article 9 on charging. Consequential changes are also made in corresponding Article 5 and Annex III.'

[262] Opinion of Advocate General Jääskinen of 22 May 2014 in C-525/12, ECLI:EU:C:2014:449, para. 63.

> 'More as an aside, and again without an effort to provide reasons, the Advocate General picks up the argument that interpreting water services to mean more than supply and disposal would lead to a situation where the distinction between water services on the one hand and water use on the other would be eliminated (paragraph 63). However, the Directive does not indicate any requirement for a specific differentiation between the scopes of the two concepts anywhere, nor is such a requirement evident from the spirit of the matter (functionality of recovery of costs and user responsibility). Had the European legislator intended to subject only the bipolar drinking water supply and waste water disposal to the principle of recovery of costs, in such a clear and unambiguous manner, without including any own services, one has to wonder why such an unambiguous intent should have been couched in such ambiguous phrasing.'[263]

As outlined in section 5.3.4, the European Court of Justice does not seem to agree (or disagree) to the Advocate General's view to interpret water services narrowly in order to maintain the suggested interrelationship between water services and water use. The Court in its judgment does not reflect on any interrelation between the two concepts when it concerns their scope or interpretation.

5.6 Environmental and resource costs

Cost recovery for water services as laid down in Article 9 WFD includes, besides the costs of providing the water service itself, also environmental and resource costs. According to the legislative documents these costs 'represent the costs of environmental damage that certain water users impose on other users, including future users, or on society as a whole and the costs of foregone opportunities which other water users suffer due to depletion of a resource beyond its natural rate of recharge or recovery.'[264]

In order to assess which damage occurs by - for example - water pollution or the extraction of groundwater, Member States are to conduct an economic analysis as outlined in Annex III of the Directive. Annex III states:

> 'The economic analysis shall contain enough information in sufficient detail (taking into account the costs associated with collection of the relevant data) in order to:
>
> a. Make the relevant calculations necessary for taking into account under Article 9 the principle of recovery of the costs of water services, taking account of long term forecasts of supply and demand for water in the river basin district and, where necessary:
>   - Estimates of the volume, prices and costs associated with water services, and
>   - Estimates of relevant investment including forecasts of such investments;
> b. Make judgments about the most cost-effective combination of measures in respect of water uses to be included in the programme of measures under Article 11 based on estimates of the potential costs of such measures.'

According to the European Commission in one of its communication papers water pricing policies are to reflect three types of costs:

a. Financial costs of *water services*. These include the costs of providing and administering these water services containing operation and maintenance costs and capital costs.[265]

[263] E. Gawel, 'Cost recovery for 'water services' / Critical review of the EU Court of Justice conclusions of Advocate General Jääskinen in case C-525/12', *Europäische Wasserrahmenrichtlinie,* 19 August 2014.
[264] Amended proposal for a Council Directive establishing a framework for Community action in the field of water policy, COM(97) 49 final, OJ C 108, 7 April 1998, p. 17.
[265] Capital costs include principal and interest payments and the return on equity if applicable.

b. Environmental costs. These costs reflect the costs of damage that *water uses* impose on the environment, on ecosystems and on those who use the environment. Examples of these costs are a reduction in the ecological quality of aquatic ecosystems or salinisation and degradation of productive soils.

c. Resource costs. These costs represent costs related to foregone opportunities which other [resource] *users* suffer due to the depletion of the resource beyond its recovery rate. These costs are, for example, costs for lost opportunities due to the over-abstraction of groundwater.[266]

It is important to keep in mind that the above division reflects the European Commission's view as to which costs are to be included in cost recovery and its interpretation of the different cost elements. Such a Commission paper is not binding on the Member States.

That Member States have difficulty in implementing cost recovery for water services as mentioned in the WFD is shown by the Commission's third report on the implementation of the WFD. Few Member States have implemented 'a transparent recovery of environmental and resource costs', and neither does it seem as if the polluter pays principle is being correctly adhered to.[267] The Commission addresses the need for a shared methodology for calculating the costs to be recovered, but it is not likely to come up with a legislative proposal to this effect as it recommends that the Member States should:

a. Ensure the transparency and fairness of water pricing policies and base them on metering;
b. Improve cost-benefit assessment to ensure cost recovery.

It is difficult to assess what is and what is not to be considered as environmental costs. Is, for instance, (economic) damage (or the risk thereof due to possible flooding) to agricultural fields and the related loss of production to be seen as environmental costs? No binding legal definition exists.

Some comparison in (international) documents provide different views on what can be considered as environmental costs. The definition of the European Commission does not elaborate on what is to be considered the 'environment'. Also according to that definition, environmental costs reflect the costs of damage that water uses impose on the environment, ecosystems and on 'those who use the environment' and does not limit that environmental use to, for instance, the use of water.

The Drafting Group ECO 2 have outlined the following in their Information Sheet regarding the assessment of environmental costs:

> 'Environmental costs consist of the environmental damage costs of aquatic ecosystem degradation and depletion caused by a particular water use (e.g. water abstraction or the emission of pollutants). Following the definition in the Wateco guidance, a distinction can be made between damage costs to the water environment and to those who use the water environment. Interpreted in terms of the concept of total economic value, one could argue that the environmental damage costs refer to non-use values attached to a healthy functioning aquatic ecosystem, while the costs to those who use the water environment refer to the corresponding use values. Use values are associated with the actual or potential future

[266] See for all descriptions of costs: Communication from the Commission. Pricing policies for enhancing the sustainability of water resources, COM (2000) 477 final, p. 10; these definitions are also included in the Common Implementation Strategy Guidance document no. 1, Economics and the environment, 2003, p. 69, 70 and 72, [Emphasis added].
[267] Report on the Implementation of the Water Framework Directive (2000/60/EC), COM (2012), 670 final, p. 11.

> use of a natural resource (e.g. drinking water, fish consumption, irrigation water). Non-use values are not related to any actual or potential future use, but refer to values attached to the environment and natural resource conservation based on considerations that, for example, the environment should be preserved for future generations or because plants and animals also have rights. In both cases, however, it is humans who hold the values for the different possible states.'[268]

The WFD Guidance document mentions that part of environmental costs is also a loss of welfare, which, according to that document, may also encompass lost production or consumption opportunities as well as non-use values.[269]
Some scholars interpret environmental costs to include economic externalities 'such as the loss of employment in the services sector in rural areas due to the impacts of a social nature due to the degradation of the water resources'.[270] Unnerstall refers to the inclusion of risk premiums as a reflection of hypothetical insurance costs for risks regarding floods or industrial accidents.[271]

Regarding resource costs, at least two different views can be pointed out. On the one hand, there are some who look upon resource costs as the costs related to an economically inefficient allocation of water, resulting in costs which have to be taken into account in the recovery.[272] On the other hand, there are those who consider that resource costs represent costs related to foregone opportunities which other [resource] uses suffer due to a depletion of the resource beyond its recovery rate. This view implies that no resource costs exist in the 'use or consumption of the water service within the said limits'.[273]

A shared methodology in calculating the environmental (and resource) costs would be recommendable as otherwise we will be comparing apples with oranges. The lack of a shared methodology undermines the Directive's aim to provide a transparent, effective and coherent

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[268] Drafting Group ECO2 Common Implementation Strategy – Working Group 2B, Assessment of Environmental and Resource Costs in the Water Framework Directive, 2004, p. 2.
[269] WFD CIS Guidance document no. 1, Economics and the Environment, p. 121.
[270] A. Martinez, et al., 'Assessment of Environmental Water Cost Through Physical Hydronomics', Springer Science + Business Media B.V. (2011), published online 11 March 2011 [http://link.springer.com/article/10.1007%2Fs11269-011-9786-1#]; dissenting view in H. Unnerstall, 'The principle of full cost recovery in the EU Water Framework Directive – Genesis and Content', *Journal of Environmental Law*, vol. 19, issue 1 (2007), p. 38 where it is mentioned that environmental costs do not include the effects on employment.
[271] H. Unnerstall, 'The principle of full cost recovery in the EU Water Framework Directive – Genesis and Content', *Journal of Environmental Law*, vol. 19, issue 1 (2007), p. 29-42. Unnerstall also mentions that direct damage to individuals caused by the provision of water services is recovered by the system of civil law. He allocates those costs to be part of the maintenance costs and therefore financial costs.
[272] For instance the Drafting Group ECO2 takes this position outlining: 'Resource costs only arise if alternative water use generates a higher economic value than present or foreseen future water use (i.e. the difference between net benefits is negative). There may be a variety of reasons why this is the case, including institutional ones (e.g. historical water abstraction rights or the current or future distribution of pollution permits). Contrary to the definition in the Wateco guidance document, resource costs are therefore not necessarily confined to water resource depletion only (in terms of water quantity or water quality). They arise as a result of an inefficient allocation (in economic terms) of water and/or pollution over time and across different water users, because an alternative water use generates a higher net economic value', in: Assessment of Environmental and Resource Costs in the Water Framework Directive, Information sheet prepared by Drafting Group ECO2 Common Implementation Strategy, Working Group 2B (2004); Furthermore, the Dutch state uses this method as mentioned in RWS Waterdienst, Kostenterugwinning van Waterdiensten in Nederland, rapport 2008.051, p. 14.
[273] See H. Unnerstall, 'The principle of full cost recovery in the EU Water Framework Directive – Genesis and Content', *Journal of Environmental Law*, vol. 19, issue 1 (2007), p. 38 referring to 'WATECO, supra n 17 at Annex IV.1.14; cf. E. Roth, 'Water pricing in the EU', (*EEB (European Environmental Bureau) Publication* 2001/002) at 13 ff.'

legislative framework for Union (previously Community) water policy. Uniform calculating methods will increase the effectiveness of the environmental provisions of the WFD and will enhance the level playing field regarding the costs of water use for the Member States.[274]

5.7 Cost recovery and the polluter pays principle

Article 9 WFD obliges Member States to take account of the principle of the recovery of the costs of water services in accordance with – in particular – the polluter pays principle. It is interesting that the polluter pays principle is explicitly mentioned in this article, as it is a generally accepted, fundamental principle in European (environmental) law. The intention is obviously to instruct Member States to adopt a specific application of cost recovery, i.e. in a way which takes this principle into account. As it is specifically mentioned, an examination has been carried out in chapter 2 on what the status of this principle is. One of the obscurities that arise in this respect is what influence the polluter pays principle has or should have on cost recovery of water services? In this section, this question is addressed and markers are retrieved from the polluter pays principle that Member States need to adhere to when applying cost recovery. To this end, case law of the European Court of Justice is discussed below. As will be shown the identified markers have a significant impact on the application of cost recovery for water services.

5.7.1 A broad or narrow interpretation of the polluter pays principle in the WFD?

There are different views on the extensiveness of the polluter pays principle, ranging from a narrow view, only containing emissions, to an extensive and broad view, intrinsically including payment for environmental and resource damage. A question that arises when reading Article 9 WFD is whether – taking into account that the polluter pays principle needs to be adhered to in applying cost recovery for water services – the polluter pays principle itself already includes the recovery of both environmental and resource costs. If so, this would imply an even broader interpretation of the polluter pays principle than usual. There are however already signals that confirm an extensive interpretation of the polluter pays principle. Mossoux for instance mentions that, although himself having another point of view, one could argue that in EU primary law the polluter pays principle covers every conduct that causes environmental damage. As environmental damage is broader than 'pollution' in a strict sense of the word, this interpretation of the polluter pays principle would also include the user pays principle insofar as use results in environmental damage.[275]

It is interesting to examine whether this broad interpretation of the polluter pays principle is applicable to or is used in Article 9 WFD. One can find arguments that would confirm this broad interpretation, but there are also arguments that do not confirm it.

First of all, the WFD does not define the polluter pays principle. The preamble sub. (11) refers to the Treaty outlining:

> 'As set out in Article 174 of the Treaty, the Community policy on the environment is to contribute to pursuit of the objectives of preserving, protecting and improving the quality of the environment, in prudent and rational utilisation of natural resources, and to be based on the precautionary principle and on the principles that preventive action should be taken,

[274] See also P.E. Lindhout, 'Application of the Cost Recovery Principle on Water Services in the Netherlands', *Journal for European Environmental & Planning Law*, vol. 10, issue 4 (2013), p. 309-332.
[275] Y. Mossoux, 'Causation in the Polluter Pays Principle', *European Energy and Environmental Law Review* (2010), p. 282 in conjunction with note 40; see differently: F. Stangl, *Ökonomische Instrumente im Wasserschutz,* Umweltdachverband, Manzsche Verlags- und Universitätsbuchhandlung (2012), p. 39-40.

> environmental damage should, as a priority, be rectified at source and that the polluter should pay.'[276]

The polluter pays principle is not explicitly mentioned as being part of the framework relating to the purpose of the Directive (Article 1 WFD). Therefore, one can argue that the application of the principle is not limited to – for instance – the aim of ensuring a progressive reduction of the pollution of groundwater and the prevention of further pollution (sub. d), but may also relate to the promotion of sustainable water use (sub. b).

And although 'pollutant' and 'pollution' are defined (mainly in relation to Article 16 WFD regarding the strategies against the pollution of water) focussing on the emission of substances, the polluter is not defined.

As the reference to the polluter pays principle in the preamble to the WFD refers to the Treaty, one may refer to the Council recommendation regarding cost allocation and action by public authorities in environmental matters, that did provide a definition of a polluter.[277] A polluter being 'someone who directly or indirectly damages the environment or who creates conditions leading to such damage.'. In that (broad) sense, the one causing resource damage due to the over-abstraction of groundwater would be a 'polluter'. Emissions of pollutants are not per se a condition. One could argue that this broad interpretation of the polluter pays principle is also confirmed because the recommendation also mentions that the polluter should pay *all costs necessary to achieve an environmental quality objective*. Again this formulation leaves room for a broad interpretation.

But is a broad interpretation of the polluter pays principle actually meant to be inserted /applied in the WFD?

5.7.1.1 Arguments in favour of a broad interpretation

In the coming about of the Directive, one can find – with regard to Article 9 WFD – some confirming elements that support a broad interpretation. The explanatory memorandum of the first official proposal mentions the following with regard to charging for water use (3.7):

> 'The abstraction and consumption of surface water and groundwater and the emission of pollutants into surface water are distinct ways of using water. These activities, as well as some *in-situ* water uses, have the potential to cause damage to the environment if they are not controlled and regulated and, in fact, such activities are the subject of a great deal of legislation which will be coordinated within the framework of this Directive. Whilst the Commission recognizes the difficulties inherent in attributing diffuse pollution to its exact source, it feels that the costs of this pollution is internalized in existing legislation which follows the polluter-pays principle, e.g. the Nitrates Directive.
>
> However, there is scope for improving the efficiency of water use and the effectiveness of environmental provisions relating to its use by ensuring that, so far as is reasonable, the price of water is a genuine reflection of the economic costs involved, including the environmental and resource costs. This concept was not outlined in the Commission's Communication, but has emerged from the consultation exercise as a means of more fully implementing the polluter-pays principle in this sector.' [278]

[276] Directive 2000/60/EC, preamble sub. (11).
[277] Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters, OJ L 194, 5 June 1975.
[278] Commission of the European Communities, 'Proposal for a Council Directive establishing a framework for Community action in the field of water policy, 97/0067 (SYN) (1997)'; COM(97) 49 final, OJ C 108, 7 April

The last part was not recalled at a later stage. Also the WATECO Guidance document on economics and the environment seems to imply a broad interpretation, as it states with regard to the calculation of the recovery rate of costs of water services: 'the polluter pays principle (PPP) requires that *users pay according to the costs they generate*.'[279]

This would also be in line with the extensive view of the polluter pays principle in the Directive on environmental liability, where in the preamble sub. (2) it states:

> 'The prevention and remedying of environmental damage should be implemented through the furtherance of the polluter pays principle, as indicated in the Treaty and in line with the principle of sustainable development. The fundamental principle of this Directive should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.'[280]

That Directive refers directly to the WFD where it concerns water damage (Article 2(b)), being referred to as 'any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the water concerned, with the exception of adverse effects where Article 4(7) of that Directive applies.' One may conclude that there are at least a number of plausible starting points to argue for a broad interpretation of the polluter pays principle. However, also a number of arguments can be found that favour a narrower interpretation.

5.7.1.2 Arguments in favour of a narrow interpretation

From the text in Article 9 WFD and the rest of the WFD a broad interpretation of the polluter pays principle is not evident. In so far as one looks at the definitions of pollutant and pollution (Article 2 sub. 31 and 33) it reflects that substances are to be brought 'into' the environment. Extracting resources from the environment does not seem to be included.

As no relation is made to environmental or resource damage as a result of the use (not necessarily polluting) of water, one should be cautious in stating that a broad interpretation of the polluter pays principle is indeed intended.

Also Article 9 WFD is worded in a way that makes it unlikely that the user pays principle (and damage resulting from (non-polluting) use) is included in the polluter pays principle. The article mentions that account should be taken of the principle of the recovery of the costs of water services, including environmental and resource costs, and that that should be done in accordance in particular with the polluter pays principle. Due to this extra stress laid upon compliance with the polluter pays principle ('in particular') it is made clear that as water use should be charged (from users), the polluter pays principle needs to be adhered to, i.e. the extra costs incurred due to pollution may not be retrieved solely from users in general, but a user being also a polluter should be identified and in the water cost retrieval this double-cost factor needs to be taken into account. If a broad

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1998 [underlining added].

[279] Guidance Document No. 1 Economics and the Environment, The Implementation Challenge of the Water Framework Directive, *WATECO* (2003) [*emphasis added*].

[280] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30 April 2004 [underlining added].

interpretation of the polluter pays principle was intended, this extra stress in the wording would not be necessary, nor would the explicit mentioning of resource costs.

5.7.2 Markers regarding the Polluter Pays Principle in Case Law

Another question arising from the inclusion of the polluter pays principle in the cost recovery provision is *how* Member States may or should take account of this principle in application of cost recovery. The jurisprudence of the European Court of Justice provided a number of markers with regard to the application of the polluter pays principle. These markers should be taken into account by the Member States when applying cost recovery. The following markers – as far as relevant for this research – are found:

I. Where a directive does not provide a definition of a polluter, Member States have a broad discretion to determine who the polluter is;

Over the years the case law of the European Court of Justice has clarified a number of things regarding the question of who the polluter is and what discretion Member States have in defining the polluter in national legislation. With regard to this research two situations of relevance are addressed where it concerns defining the polluter:

a) The directive *does not* provide a definition of the polluter;

In this situation defining the polluter falls within the competence of the Member State itself. Primary law does not define the polluter when referring to the polluter pays principle. If no definition is provided in the applicable directive, national authorities have a broad discretion to determine the polluter themselves, as is confirmed in the relevant case law:

> '(…) where a criterion necessary for the implementation of a directive adopted on the basis of Article 175 EC has not been defined in the directive, such a definition falls within the competence of the Member States and they have a broad discretion, in compliance with the Treaty rules, when laying down national rules developing or giving concrete expression to the 'polluter pays' principle (see, to that effect, Case C-254/08 *Futura Immobiliare and Others* [2009] ECR I-6995, paragraphs 48, 52 and 55.)' [281]

However, it does not imply complete freedom, as guidance should be taken from and weight should be given to the content of the recommendation regarding the application of the polluter pays principle.[282] In this recommendation a 'polluter' was defined as being 'someone who directly or indirectly damages the environment or who creates conditions leading to such damage'. That definition can be used, or better, should be used and is at least weighed in order to determine the polluter in situations where the applicable European and national legislation does not provide a (solid) definition. This follows from the *Grimaldi* case:

> 'However, in order to give a comprehensive reply to the question asked by the national court, it must be stressed that the measures in question cannot therefore be regarded as having no legal effect. The national courts are bound to take recommendations in to consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where

[281] C-378/08 *ERG and others*, ECLI:EU:C:2010:126, para. 55.
[282] Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters, OJ L 194, 5 June 1975.

they are designed to supplement binding Community provisions.' [283]

b) The directive *does* provide a definition of a polluter:

If the directive does provide a definition of a polluter in a directive, that definition should be taken into account by the national legislator when implementing the directive, thereby leaving no room for a discretionary assessment by the national legislator. If the Member State fails to implement the definition correctly in national legislation, the European Commission can start an infringement procedure at the European Court of Justice.

II. Polluters are only responsible for the pollution they cause; they do not have to pay for eliminating and preventing pollution to which they do not contribute;

III. One who does not pollute or has not contributed to (the risk of) pollution is not to be burdened by the application of the 'polluter pays' principle;

Two markers can be retrieved from the European Court's judgement in *Standley*[284] and *Pontina Ambiente*.[285] These are that polluters are only responsible for the pollution they cause. They do not have to pay – and may not be burdened with costs – for the elimination and prevention of pollution to which they do not contribute. Furthermore, the one that does not pollute or has not contributed to the risk of pollution is not to be burdened by the application of the polluter pays principle.

The *Standley* case concerned the Nitrates Directive.[286] The Nitrates Directive's main objective is to reduce water pollution from nitrates of agricultural origin that are discharged into waters. *Standley* found that farmers in designated areas were burdened disproportionately as pollution of agricultural origin was only one of several sources of nitrates in the water.

[283] C-322/88, *Grimaldi,* ECLI:EU:C:1989:646, paras. 13, 16, 18.
[284] Case C-293/97 *Standley*, ECLI:EU:C:1999:215, paras. 51, 52. See also C-188/07 *Commune de Mesquer,* ECLI:EU:C:2008:359, where the Court, regarding the question whether in the event of an oil tanker sinking the oil producer, among others, can be required to bear the costs of the waste disposal even if the actual substance spilling occurred during transport by a third party (a carrier at sea), considered (paras. 79-80, 82): 'As noted in paragraph 69 above, in circumstances such as those of the main proceedings, the second indent of Article 15 of Directive 75/442 provides, by using the conjunction "or", that the cost of disposing of the waste is to be borne either by the "previous holders" or by the "producer of the product from which" the waste came. In this regard, in accordance with Article 249 EC, while the Member States as the addressees of Directive 75/442 have the choice of form and methods, they are bound as to the result to be achieved in terms of financial liability for the cost of disposing the waste. They are therefore obliged to ensure that their national law allows that cost to be allocated either to the previous holders or to the producer of the product from which the waste came. (…)However, if it happens that the cost of disposal of the waste produced by an accidental spillage of hydrocarbons at sea is not borne by that fund, or cannot be borne because the ceiling for compensation for that accident has been reached (…) even though they are to be regarded as "holders" within the meaning of Article 1 (c) of Directive 75/442, such a national law will then, in order to ensure that Article 15 of that directive is correctly transposed, have to make provision for that cost to be borne by the producer of the product from which the waste thus spread came. *In accordance with the "polluter pays" principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur.'* [Emphasis added].
[285] C-172/08 *Pontina Ambiente*, ECLI:EU:C:2010:87.
[286] I.e. Council Directive 91/676 EEC concerning the protection of waters against pollution caused by nitrates from Agricultural sources, OJ L 375, 31 December 1991.

The European Court of Justice considered:

> 'As regards to the 'polluter pays' principle, the directive does not mean that farmers must take on burdens for the elimination of pollution to which they have not contributed, because the Member States are to take account of the other sources of pollution when implementing the directive and, having regard to the circumstances, are not to impose on farmers costs of eliminating pollution that are unnecessary. Viewed in that light, the 'polluter pays' principle reflects the principle of proportionality. The same applies to the principle that environmental damage should as a priority be rectified at source.' [287]

In *Pontina Ambiente* this point of view was confirmed once again. One of the questions addressed was whether Directive 1999/31 on the landfill of waste[288], a Directive which stated that the Member States need to take measures to ensure that the price charged for waste disposal in a landfill covers all the costs involved in the setting up and operation of the facility, prevented the introduction of a levy for the operator of the landfill which initially has to be paid by the operator of the landfill and is then passed on to (reimbursed by) the holder who deposits the waste. The European Court of Justice found such a levy system to be allowable, although it confirmed that a non-polluter should not effectively be burdened by the levy due to this 'reimbursement scheme'.

The European Court of Justice considered:

> 'However (…) Article 10 of Directive 1999/31 requires the Member States to take measures to ensure that the price charged for waste disposal in a landfill covers all the costs involved in the setting up and operation of the facility. That requirement is an expression of the "polluter pays" principle, which implies, as the Court has already held in regard to Directive 75/442 and Directive 2006/12/EC of the European Parliament and of the Council of 5 april 2006 on waste (OJ 2006 L 114, p.9), that the costs of disposing the waste must be borne by the waste holders (…). Consequently, although a Member State can introduce a levy on waste to be paid by the landfill operator and reimbursed to the latter by the authorities depositing waste in the landfill, it can do so only on the condition that the fiscal provision in question is accompanied by measures to ensure that the levy is actually reimbursed within a short time so as not to impose excessive operating costs on the operator on account of late payment by those authorities, thereby undermining the "polluter pays" principle. Causing the operator to bear such charges would amount to charging to him the costs arising from the disposal of waste which he did not generate but of which he merely disposes in the framework of his activities as a provider of services.' [289]

In *Pontina Ambiente* the European Court of Justice clearly interpreted the boundaries of the polluter pays principle by using the principle as a starting point in its considerations. By first determining that the requirement in question is an expression of the polluter pays principle - and therewith taking the principle as a starting point in the reasoning - the effective conclusion that a non-polluter or non-contributor to (the risk of) pollution may not be burdened, in my view, directly reflects the boundaries of application of the polluter pays principle. Therefore, this may be considered as a concrete marker.

IV. Use of presumptions in determining causation between activities and pollution/environmental damage is allowable

[287] C-293/97 *Standley*, ECLI:EU:C:1999:215, paras. 51, 52.
[288] Council Directive 1999/31/EC on the landfill of waste, OJ L 182, 16 July 1999.
[289] C-172/08 *Pontina Ambiente*, ECLI:EU:C:2010:87.

The above conclusion that a non-polluter or non-contributor to the risk of pollution is not to be burdened by the polluter pays principle does not imply, on the other hand, that Member States are forbidden (if European legislation does not determine otherwise) from using presumptions in determining causation between certain activities and pollution/environmental damage.[290] However, such presumptions may not be an empty shell. From the *ERG and others* case it follows that the competent authority in question 'must have plausible evidence capable of justifying its presumption, such as the fact that the operator's installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities.'[291]

V. Member States are allowed to differentiate in contributions from categories of polluters to cost recovery unless the costs involved are manifestly disproportionate in relation to the pollution capacity;

Member States are allowed to differentiate in contributions to cost recovery from categories of polluters. This can be concluded from the considerations of the European Court of Justice in *Futura Immobiliare.*[292]

In this case the European Court of Justice had to decide on whether a waste disposal charging system was allowed in relation to the correct application of the polluter pays principle. The matter in this respect focused on the question whether it was allowed to charge based on estimates instead of the actual waste generated. In principle the costs of disposing of waste should be borne by the waste generator. The Court however acknowledged that it is difficult to determine the precise volume of waste generation and concluded that the directive in question (Directive 2006/12), more specifically Article 15 thereof, does not preclude national laws from using a waste charging system employing a tax or charge calculated on the basis of an estimate of the volume of waste generated. It found, in this case, that Member States were not obliged to charge on the basis of the quantity of waste actually produced. Also the system used - where criteria such as a) waste production capacity based on property surface areas and the use thereof, or b) the nature of the waste produced - was deemed allowable.

The polluter pays principle returns in the Court's decision with regard to the question of how the costs of the waste collection service are to be retrieved *amongst* the service user groups. The consideration is directly related to the polluter pays principle itself and can therefore also be considered a marker of the principle. The European Court of Justice considered:

> 'Second, the "polluter pays" principle does not preclude the Member States from varying, on the basis of categories of users determined in accordance with users' respective capacities to produce urban waste, the contribution of each of those categories to the overall cost necessary to finance the system for the management and disposal of urban waste.

[290] C-378/08 *ERG and Others*, ECLI:EU:C:2010:126.
[291] *Ibid.* For further reading on the polluter pays principle and causation questions regarding activities, pollution and environmental damage see: Y. Mossoux, 'Causation in the Polluter Pays Principle', *European Energy and Enviromental Law Review* (2010), p. 279-294.
[292] C-254/08 *Futura Immobiliare*, ECLI:EU:C:2009:479.

> However, this freedom of allocation is limited. The polluter is not to be burdened by costs which are "manifestly disproportionate to the volumes or nature of the waste that they are liable to produce." '[293]

This consideration further crystallizes the scope of the polluter pays principle: cost retrieval amongst categories is allowable, but not if such allocation does not stem, within reason, from the volumes or nature of the waste that a polluter is liable to produce. The allocation of costs to a specific group is not in line with the polluter pays principle if this allocation is manifestly disproportionate as mentioned above. This marker of the polluter pays principle is actually formed by the proportionality that needs to be taken into account.

5.7.3 Reflections: equity

As outlined in section 2.1.2, the principle of equity can be recognized in several outings: reasonableness or fairness in legal judgements; in legislative provisions as an explicit reference to results to be achieved; and in the political accommodation or, as the case may be, the discretionary room provided for in the provision concerned.

Regarding the cost recovery provision in the WFD, the principle can also be recognised (Article 9 WFD including the polluter pays principle). The effects of the provision of cost recovery are to reflect a fair result, being that the ones not damaging the environment by water use should not be the ones paying. The ones using and damaging the environment by using water services are the ones that in principle have to pay. One could say that due to the explicit inclusion of the polluter pays principle in the provision, a principle which needs to be accounted for, a fair result needs to be the outcome. In other words, by the inclusion of the polluter pays principle, a fair result, fair burden sharing, is (supposed to be) guaranteed, even though equity is not explicitly referred to. Inclusion and application of the polluter pays principle may contribute to attainment of the aim of sustainable and equitable water use as mentioned in Article 1 WFD.

Even though the inclusion of the polluter pays principle on the one hand tightens the discretionary room that Member States have in the application of cost recovery, there is still enough discretionary room left to adjust unequitable results should they occur. The derogative elements in Article 9 (1) last sentence WFD provide, both in the wording as well as in the provision itself, enough political room to use equitable arguments to correct the application of the (main) rule. It allows Member States to ease the cost recovery burden when the recovery has specific social, economic or environmental effects or when the geographical and climate conditions of a region require a correction to full cost recovery. Due to the fact that these circumstances have not been defined, a great deal of room for discretion is left for Member States to use equitable arguments so as not to apply cost recovery to the fullest. This may also be one of the main risk factors which threaten the success of the cost recovery obligation. The derogative elements are worded so openly that the effects of the main rule (full cost recovery) may well be pressurised with equity corrections even though the main rule already provides for a fair result (fair burden sharing).

[293] C-254/08 *Futura Immobiliare*, ECLI:EU:C:2009:479, paras. 52, 56.

Spain

In the Spanish cost recovery system a large number of discounts and exceptions exist when it concerns cost recovery. These discounts and exceptions are based on criteria of social equity.

The Spanish cost recovery system takes into account variables concerning the region, like population age, income, the degree of dispersion and family size. Deductions and special cost recovery treatment can be recognised for at least the following groups:

- Families
- Large families
- Retired pensioners
- Unemployed people
- Official uses, uses by institutional and social practices.

The last category includes, for instance, colleges, sports areas and water use by municipalities.

Source: Compilation of information in the country-specific information from the questionnaire for the Conference 'The price of water: water as an ecosystem service", November 2012, Zaragoza, Spain. The questionnaire for Spain was completed by Víctor Escartín Escudé, Faculty of Law, Zaragosa University and is available on file with the author.

5.8 The derogation clause in Article 9 (4)

Article 9 (4) WFD holds a derogation clause for Member States on cost recovery and reads:

> 'Member States shall not be in breach of this Directive if they decide in accordance with established practices not to apply the provisions of paragraph 1, second sentence, and for that purpose the relevant provisions of paragraph 2, for a given water-use activity, where this does not compromise the purposes and the achievement of the objectives of this Directive. Member States shall report the reasons for not fully applying paragraph 1, second sentence, in the river basin management plans.'

In order to use the derogation possibility two elements are essential:

1) Established practices: this implies at least a certain duration of the use of these practices.
2) The non-application of cost recovery does not compromise the purpose and objectives of the Directive.

5.8.1 Established practices

The Member States shall not be in breach of the Directive if they decide 'in accordance with established practices' not to apply the cost recovery provision obligations. But what is to be considered established practices?

Not much can be found on this term in the parliamentary documents. The possibility to derogate from the cost recovery obligation was only introduced in the parliamentary documents in the final round of the conciliation procedure and it offers Member States the possibility to opt out of the obligation of cost recovery if this is based on 'established national practices'.[294] From the

[294] EP session document A5-0214/2000/final.

parliamentary process one can see that the household water financing system was discussed, especially in relation to Ireland. Ireland, at the time, did not charge households based on water and sewerage volume but ensured cost recovery for these water services via general taxation. Whittaker stated that Ireland has not charged for domestic water (use) since 1997.[295] If this information is correct, then apparently – keeping in mind that the Directive itself was finalized in 2000 – a three-year period would be considered as 'established practices'.

5.8.2 Non compromise of purpose and objectives of the Directive

The European Court of Justice refers in its judgment C-525 *Commission vs Federal Republic of Germany* to the second element of the derogation clause. It refers to it in relation to the consideration that even though water activities as mentioned in Article 2 (38) WFD may undermine the achievement of the Directive's objectives:

> 'it cannot be inferred therefrom that, in any event, the absence of pricing for such activities will necessarily jeopardise the attainment of those objectives. In that regard, Article 9(4) of Directive 2000/60 provides that the Member States may, subject to certain conditions, opt not to proceed with the recovery of costs for a given water use activity, where this does not compromise the purposes and the achievement of the objectives of that directive. It follows that the objectives pursued by Directive 2000/60 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, as maintained in essence by the Commission'.[296]

In this judgment the derogation clause of Article 9 (4) WFD is presented as a 'no longer proceed with cost recovery' clause, which non proceeding is only allowed if it does not compromise the purposes and the achievement of the objectives of that directive. First of all, it is remarkable that the Court, addressing the clause explicitly as an option for Member States 'not to proceed' with cost recovery takes the derogation clause in this manner into consideration, as the action brought before the Court by the Commission does not refer to that situation. The case brought before the Court related to the situation where cost recovery was not applied and, in view of the Commission, should. Therefore, the case did not relate to a situation where it was applied and no longer is. Germany has also not claimed exemption based on this derogation clause.[297]

These considerations of the Court, however, reduce the derogation clause to almost an empty shell as the Court firstly stresses that cost recovery is not – not even by means of principle – necessarily applicable to the water activities as mentioned in Article 2 (38) WFD. The Court considers in this respect that the objectives of the Directive would not imply such applicability. Secondly, the Court considers that even if activities mentioned in Article 2 (38) WFD in themselves may be undermining the achievement of the Directive's objectives, that does not bring about that any lack of pricing of those activities will necessarily jeopardise the attainment of the objectives. Thirdly, it seems that the Court has considered that what actions to be included in a programme of measures is to the full discretion of the Member States. It considered:

> 'Consequently, and without prejudice to the importance of water-pricing policies and the polluter-pays principle, as reaffirmed by that directive, priority must be given to actions

[295] A. Whittaker, 'Water Framework Directive', Philip Lee Solicitors (2009): [http://www.philiplee.ie/Libraries/Publications/Water_Framework_Directive_Council_Review_-_Issue_30.sflb.ashx].

[296] C-525/12 *Commission vs Federal State of Germany* ECLI:EU:C:2014:2202, para. 56-57.

[297] In the arguments of Germany as outlined in the Court's decision, no reference to the derogation clause is made at all.

> coming within the jurisdiction of the Member States, in drawing up action programmes adapted to local and regional conditions. (…) To that end, Article 11 provides that each Member State must ensure the establishment for each river basin district (…) of a programme of measures, taking account of the results of the analyses required under Article 5 of that directive, in order to achieve the objectives established under Article 4 thereof. Under Article 11(3)(b), measures relating to the recovery of the costs for water services, such as those provided for under Article 9 of Directive 2000/60, are among the minimum requirements to be included in such programme. It is thus clear that measures for the recovery of the costs for water services are one of the instruments available to Member States for qualitative management of water in order to achieve rational water use.'[298]

If so, it would seem that the derogation clause of Article 9 (4) WFD is redundant, as there is no main obligation to apply cost recovery (not even to a minimum extent). In order to give the derogation clause back its substance, there should be at least some content to the referring main obligation which is derogated from. Of course, that would lead to difficult questions to be answered. For instance, it would be unclear how and to what extent Member States must prove that the non-application of cost recovery for a specific water service does not compromise the purpose and objectives of the Directive. It should be noted that the derogation clause mentions the *objectives of the Directive*.[299] Therefore, this provision is not limited to the environmental objectives of Article 4 WFD. As cost recovery is one of many measures in the programme of measures to attain the Article 4 objectives, it will be difficult to make it plausible that the non-application of cost recovery for a specific water service as one element is an element which already compromises the Article 4 objectives, let alone to make it plausible that the purpose and objective of the Directive (Article 1 WFD) are not at stake. Would it not be allowed to rely on the derogation clause until the Member State proves that compromising the objectives and purpose is due to another measure or a combination of measures or other causes?[300] Or should it be even more strict: as long as the objectives are not reached, this derogation possibility is not open to application? From European case law it is clear that it would be up to the Member State appealing upon the derogation clause to at least convincingly show that the conditions for the application of this derogation clause have been met.[301] This may be rather difficult in case of a more strict interpretation of the derogation clause.

One thing is clear, that is that taking the Court's considerations into account it will be very difficult to sufficiently state and prove that a Member State has applied the derogation clause not legitimately. This is even harsher when one considers that derogation clauses are to be interpreted in a strict manner.[302] What is left to be considered in a strict manner in the derogation clause after this judgment seems rather questionable.

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[298] C-525/12 *Commission vs Federal State of Germany* ECLI:EU:C:2014:2202, para 52-55.
[299] [Emphasis added].
[300] Such an assumption is upheld by A. Whittaker, 'The challenge for Irish Water: Setting the price of water and recovering costs', *Public Affairs Ireland* (2012), p. 7, stating: 'Arguably, Ireland cannot adequately demonstrate compliance with the purposes and objectives of the Directive in light of current inadequacies in water services infrastructure and leak prevention. Inefficient use of water and waste through loss of 'unaccounted for water' may be linked to non-charging of household water services and the failure to fully recover charges from the non-domestic sector.' [Underlining added].
[301] The burden of proving the existence of circumstances that justify application of a derogation clause lie upon the person seeking to rely on such provision. See regarding the burden of proof C-57/94 *Commission of the European Communities vs Italian Republic,* ECLI:EU:C:1995:150, para. 23 and case law referred to. And regarding the necessity to prove 'convincingly': *Ibid.*, para. 27.
[302] C-14/06 and C-295/06 *European Parliament and the Kingdom of Denmark vs Commission of the European Communities*, ECLI:EU:C:2008:176, paras. 71-75; C-57/94 *Commission of the European Communities vs Italian Republic,* ECLI:EU:C:1995:150, para. 23; C-375/05 *Geuting* ECLI:EU:C:2007:574, para. 52.

5.9 Concluding remarks

The chosen legislative form of a WFD and the formulation of the cost recovery provision leaves Member States with a great deal of room to implement the Directive in their own legislative model so as to attain the Directive's goals, on the one hand, and still have enough discretionary room to ensure tailor-made water management. However, the vagueness of the terminology, the fact that crucial elements have not been defined and the existence of clearly different views on the extensiveness of the cost recovery provision in the European Member States do not enhance the transparency, effectiveness and coherence of the WFD. Based on the findings presented in this chapter I doubt whether the Member States have been provided with enough guidance for a sound implementation of cost recovery in their water policy.

This chapter addressed what main difficulties and obscurities arise when it concerns 'water services', 'water use', 'environmental and resource costs', 'the polluter pays principle' and 'established practices' in the cost recovery provision. Hereafter concluding remarks are provided upon these difficulties and obscurities. However, first the judgement of the European Court of Justice is reflected upon.

Findings of the European Court of Justice in case C-525/12

In the infringement procedure that the Commission started against Germany, the Commission requested the European Court of Justice to declare that Germany failed its obligations under the WFD. According to the Commission Germany incorrectly excluded certain services from the concept of water services as mentioned in Articles 2(38) and 9 WFD. The Commission mentioned the impoundment of water for the purposes of hydroelectric power generation, navigation and flood protection, abstraction for irrigation and industrial purposes and personal consumption as services that should have been stipulated as water service. Germany contested the Commission's view on water services and the consequences such stipulation would have. Germany also contested the admissibility of the application of the Commission with the Court. The reflections hereafter, however, do not relate to the admissibility claim. The substance of the dispute is commented upon.

Although one might expect that the Court would provide an interpretation of the concept of water services, it does not. The Court starts by outlining its method of interpretation. Interpretation of a provision of EU law requires not only that the wording of the provision is taken into account, and the objectives the provision pursues, but also its context and provision of EU law as a whole. The *travaux preparatoires* may furthermore contribute to the interpretation.[303]

The Court starts by outlining the two provisions concerned and ascertains that the concept of 'services' is not defined therein. In order to assess whether any service relating to the activities mentioned in Article 2 (38) WFD would be subject to the principle of cost recovery the Court starts by analysing the context and overall scheme of the provisions in question. The Court considers, based on the *travaux preparatoires,* that as practices in the Member States vary widely, the EU legislature intended that Member States may determine the measures to be adopted for the purposes of the application of the principle of cost recovery without extending it to all services associated with water use. The Court furthermore considers that 'in requiring in Article 9 that Member States are to have regard to the principle of recovery of the costs of water services and ensure that water-pricing policies provide adequate incentives for users to use water resources efficiently' and thereby

[303] See on the increasing importance of the travaux preparatoires for interpretation: K. Lenaerts & J. Gutiérrez Fons, 'To Say What The Law of the EU Is: Methods of Interpretation and the European Court of Justice', AEL 2013/9.

contribute to the environmental objectives of the WFD, Article 9 WFD 'does not per se impose a generalised pricing obligation in respect of all activities relating to water use'.[304]

As a second step in interpretation the Court examines the scope of the two provisions in the light of the objectives pursued by the WFD. It starts by noticing that the WFD is a framework directive, which provides for common principles and an overall framework for action, that Member States need to further develop.[305] It does not provide for complete harmonisation of the rules of the Member States concerning water. The Court furthermore considers that preamble sub. (19) of the directive reflects the purpose of the directive, i.e. maintaining and improving the aquatic environment.[306] Referring to preamble sub. (13) of the Directive, which entails that the diverse conditions and needs in the Union are to be addressed in planning and execution of measures, which planning and measures are to be decided upon as close as possible to the locations where water is affected or used, the Court concludes that 'priority must be given to actions coming within the jurisdiction of the Member States in drawing up action programmes adapted to local and regional conditions'.[307]

The Court further considers that the directive is based on principles of management per river basin, which the Court summarizes:

- the setting of objectives per body of water;
- plans and programmes;
- an economic analysis of the detailed arrangements governing water pricing;
- the taking in to account of the social, environmental and economic effects of cost recovery as well as the geographic and climatic conditions of the region(s) concerned.

To that end, the programme of measures of the Member States, obliged by Article 11 WFD, needs, as *minimum requirement*, to include measures relating to the recovery of the costs for water services, such as those provided for under Article 9 of Directive 2000/60.[308] The Court considers that cost recovery measures are 'one of the instruments available to Member States in water management to achieve rational water use'.[309] Even though the activities listed in Article 2 (38) WFD may undermine the achievement of objectives of the Directive, *it is not necessarily so that the failure to attain the objectives is due to the absence of pricing for those activities*. Lastly, the Court considers in addition that Article 9 (4) WFD provides that Member States may, under certain circumstances, opt *not to proceed with the recovery of costs for a given water use activity, where this does not compromise the purposes and achievement of the objectives of the WFD*.[310] Having outlined the above, the Court dismisses the Commission's action as the fact that Germany does not make *some* of the water activities mentioned in Article 2 (38) WFD subject to the principle of cost recovery for water services does not by itself establish a failure to fulfil its obligations under Articles 2 (38) and 9 WFD.

This Court decision is of great importance for Member States. The Commission started on similar grounds infringement procedures against many Member States.[311] Not only provides this judgment (a bit more) clarity on the Court's view on the concept of water services, it also positions the

[304] C-525/12 *European Commission v Federal Republic of Germany* ECLI:EU:C:2014:2202, para. 48.
[305] *Ibid.*, para. 50.
[306] *Ibid.*, para. 51.
[307] *Ibid.*, para. 52.
[308] *Ibid.*, para. 54.
[309] *Ibid.*, para. 55.
[310] *Ibid.*, para. 57.
[311] These are Austria, Belgium, Denmark, Finland, Hungary, the Netherlands and Sweden (European Commission, Press release IP/12/536).

function of the cost recovery provision within the programmatic approach on water management as included in the WFD.

The Court judgment positions cost recovery as a practically voluntary tool to be used by Member States at least offering the Member States a huge margin of appreciation. It is effectively up to the Member States, to decide whether cost recovery is a measure to be applied for certain water uses or services. They are not obliged to. Even if the objectives of the directive are not attained, that does not mean that it is a result from a lack of pricing.

In itself, in first instance that judgment seems logic. However, a few critical notes may be placed with this Court decision. The first critical note refers to the underlying idea of cost recovery, its rationale, is to contribute to sustainable and equitable water use by internalisation of not only financial costs of water services, but also environmental and resource costs in water prices and to provide adequate incentives in water policy to stimulate an efficient water use.[312] By this judgment the Court limits the potential effectiveness of the cost recovery provision drastically by ignoring parts of its goals. Furthermore, the programme of measures each Member State needs to set up includes different measures and tools to ensure the achievement of the objectives set for the specific river basin. But if the application of cost recovery would be fully to the discretion of Member States, the inclusion of this specific economic instrument in a separate provision in the WFD results in an empty shell.

There are a number of arguments that would underline a more obligatory requirement for Member States to take cost recovery into account.

I. The cost recovery provision is not limited to the programme of measures

One of the first things that should be noticed is that the Court of Justice seems to relate cost recovery exclusively in relation to Article 11 WFD (programme of measures) and Article 4 WFD (environmental objectives). It is not clear what considerations underlie this point of view. In the Court's considerations regarding its interpretation it does not consider the position of cost recovery in relation to the defined purpose in Article 1 of the WFD at all. The purpose of the Directive is not at all included in the considerations. Besides taking into account the statements of the preamble, taking account of the purpose of the Directive as laid down in Article 1 WFD should have been included.[313] The purpose of the WFD is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater. It is a framework to which end aquatic ecosystems and their water needs need to be protected and enhanced. Furthermore, this framework needs to promote sustainable and equitable water use, based on a long term protection of water resources. Thirdly, the framework should ensure better protection of the aquatic environment against pollution and quality degradation. Also the framework is to contribute to mitigating the effects of floods and droughts. In my view, Article 9 WFD holds, besides its relation to the environmental objectives of Article 4 WFD and the programme of measures in Article 11 WFD also an independent position in relation to the purpose of the Directive.[314] It is remarkable that the

[312] See for an extensive outline of the rationale for cost recovery: W. Howarth, 'Cost recovery for water services and the polluter pays principle', *ERA Forum* (2009), para. 2.

[313] Illustrative regarding methods of interpretation in this respect, see C-195/12 *Industrie du bois de Vielsalm & Cie (IBV) SA*, ECLI:EU:C:2013:598, (rapporteur A. Prechal), para. 54-55, where the Court of Justice, with regard to the contextual interpretation of subject and purpose of the legal act explicitly starts at the purpose as defined in the legal act. Considerations of the preamble support the interpretation of the defined purpose to that end.

[314] See P.E. Lindhout 'A wider notion of the scope of water services in EU water law, Boosting payment for water related ecosystem services to ensure sustainable water management?', *Utrecht Law Review*, (2012); See also E. Gawel, W. Köck et al. 'Reform der Abwasserabgabe: Optionen, Szenarien und Auswirkungen einer

Court of Justice does not consider cost recovery in respect of the diversely formulated purposes of Article 1 WFD at all.

II. The Framework character of the directive does not preclude a more strict approach to cost recovery as (preliminary) obligation.

It is a fact that the cost recovery provision is included in a 'framework' directive. The Court considers that the character of a framework directive brings along that the directive does not intend for complete harmonisation on the rules of the Member States concerning water. It states that the WFD establishes the common principles and an overall framework for action in relation to water protection and coordinates, integrates and, in a longer perspective, develops the overall principles and structures for protection and sustainable water use. These considerations, in my view, however do not conclusively lead to the position that cost recovery should be to the full discretion of the Member States to use as an environmental policy instrument. The lack of intention for complete harmonisation on the rules of the Member States concerning water does necessarily mean that no basic harmonisation of elements of water rules was intended. It denies the specific inclusion of the principle of cost recovery provision in the WFD. Is the cost recovery provision not moreover one of the first common principles agreed upon? Cost recovery, by which not only financial costs, but also environmental and resource costs, are to be recovered and by which efficient water use is to be stimulated, is one of the policy principles of sound water management.[315] The Advocate General Jääskinen, although I do not agree to his overall view, in my view rightly remarks that the integration of environmental costs is one of the principles of water management. Economization has been an important element of European environmental policy since the seventies and internalisation of environmental costs can be considered an international environmental principle.[316] The Court however does not position the cost recovery provision in this setting at all. Furthermore, the fact that the WFD has the character of a framework directive does not, in itself, mean that Member States have a great amount of policy discretion. The WFD replaces a wide range of water directives and knows quite specific obligations for the Member States, like the establishment of river basin management plans and reporting requirements[317], setting up water quality monitoring systems and reporting on monitoring results[318], and the explicit requirement to achieve a level of protection of waters at least equivalent to that provided in the earlier directives. Regarding the last, Advocate General Jääskinen, in his opinion to case C-461/13 *Bund für Umwelt und Naturschutz Deutschland e.V.* addresses the minimum requirements that Member States should fulfil with regard to protection of the water status, referring to the preamble sub. (51) jo. Articles 4 (8) and (9) and 11 (3) sub a KRW.[319]

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fortzuentwickelnden Regelung' Umweltforschungsplan des Bundesministeriums für Umwelt, Naturschutz, Bau und Raktorsicherheit, Texte 55/2014, p. 89;
Furthermore E. Gawel, 'Cost recovery for 'water services' / Critical review of the EU Court of Justice conclusions of Advocate General Jääskinen in case C-525/12', *Europäische Wasserrahmenrichtlinie,* 19 August 2014, considering: 'Rather, the responsibility for costs pursuant to Article 9 of the Water Framework Directive 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 Water Framework Directive as a whole, as per Article 1 of the Directive.'

[315] Not putting a price on a scarce resource like water can be regarded as an environmentally-harmful subsidy, Blueprint, COM (2012) 673.

[316] See Resolution of the Council of the European Communities (…) of 17 May 1977 on the continuation and implementation of a European Community policy and action programme on the environment, OJ C 139, 13.6.77, chapter 2; see regarding internalisation of environmental costs as international environmental principle: Principe 16 van de 'Rio Declaration on Environment and Development'.

[317] See a.o. C-403/11 *Commission v Spain*, ECLI:EU:C:2012:612.

[318] See C-351/09 *Commission v Malta*, ECLI:EU:C:2010:815.

[319] [No English text available [17 November 2014]] Conclusie AG Jääskinen bij zaak C-461/13 van 23 oktober

III. Cost recovery as species of economic instruments

Furthermore, the Court does not seem to distinguish cost recovery from other economic instruments when examining the scope of the two provisions in the light of the objectives pursued by the Directive. And that may prove to be relevant for the scope of Article 9 WFD. The Court quotes in that respect a number of considerations in the preamble, but does not mention preamble sub. (38) regarding economic instruments, which seems to be relevant in this respect. It states:

> '(38) The use of economic instruments by Member States may be appropriate as part of a programme of measures. The principle of recovery of the costs of water services, including environmental and resource costs associated with damage or negative impact on the aquatic environment should be taken into account in accordance with, in particular, the polluter-pays principle. An economic analysis of water services based on long-term forecasts of supply and demand for water in the river basin district will be necessary for this purpose.'

'Economic instruments' is a much broader concept than cost recovery for water services. Economic instruments may include fiscal instruments like subsidies, environmental taxes, refund schemes et cetera. Cost recovery is a species of an economic instrument, specifically laid down in Article 9 WFD and therewith separated from 'economic instruments in general'. Economic instruments in general are only included in the WFD as voluntary tool to Member States (see hereafter). It would confirm that the principle of cost recovery is laid down as a common principle to be taken into account.

IV. Cost recovery is a basic measure

Based on Article 11 WFD Member States must provide a programme of measures for each river basin, which programme should take account of the results of the economic analyses of Article 5 WFD, in order to achieve the objectives as mentioned in Article 4 WFD (environmental objectives). The programme of measures ex. Article 11 WFD should include the 'basic measures' of which one is 'the measures deemed appropriate for the purposes of Article 9'.

As stated above, the use of other economic instruments is mentioned in the list of 'supplementary measures'. Economic or fiscal instruments as supplementary measure are explicitly mentioned in Annex VI – Part B. Those measures are voluntarily.

Since the Court of Justice leaves the application of cost recovery to the full discretion of the Member States, I feel that the 'reason d' être' of the specific cost recovery provision and it's indication as basic measure of a programme of measures is nullified. If there is no principle to recover the costs of water services as a starter anyway, why provide a separate provision at all? Why include it (and not other economic instruments) in the list of 'basic measures'?

V. A more obligatory character still offers Member States enough discretionary room for tailor-made solutions and acknowledges the specific inclusion of cost recovery in a separate legal provision / Contextual interpretation allows a more obligatory character of the cost recovery provision

A question that may be addressed is whether the interpretation of the Court of Justice to leave the application of cost recovery to the full discretion of the Member States is the only plausible interpretation that is in line with and/or serves the wording of the provision and complies with the context and coming about of the provision. A more strict obligation is as much possible, taking into

2014, ECLI:EU:C:2014:2324, para. 108; Please note that the European Court of Justice in its forthcoming judgment may differ from the opinion of AG Jääskinen.

account the wording, context and legislative history. If a more strict obligatory character would be embraced, it offers the Member States enough discretionary room to take into account specific circumstances in the river basin concerned. The provision states to this end that Member States 'in so doing', i.e. *in recovering the costs as mentioned in Article 9*, may take into account the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected. This more strict approach would be (better) in line with the wording of the provision and the objectives it pursues, without putting it out of context or mismatching the provisions of EU law otherwise. Where different interpretations of a provision of EU law are possible, preference should be given to that interpretation which ensures that the provision retains its effectiveness.[320] It would maintain the provision's 'effet utile', without crossing the contextual borders.[321] The Member States can find the necessary flexibility in the stipulation that they may take into account the social, environmental and economic effects of the recovery and the geographic and climatic conditions in the specific area. The programmatic approach can still be applied, albeit that cost recovery for water services is a sincere starting point, a common and in the legislative history agreed upon principle to be truly taken into account, still considering the specific circumstances in the Member States.

VI. Cost recovery provision limited to a heavy reporting requirement?

Lastly, by interpreting the cost recovery provision in this manner, positioning it to the full discretion of Member States to use - or not use - this specific instrument in the attainment of the objectives of the WFD, the Court not only denies the difference in position of cost recovery to other (voluntary) economic instruments, but also reduces the scope of the (extensive and detailed) cost recovery provision to effectively only the requirement to 'report on the practical steps and measures taken to apply the principle of recovery of the costs of water use in accordance with Article 9 WFD' in the programme of measures.[322] It reduces the potential effectiveness of the cost recovery provision to an administrative burden. It makes it even harsher when one considers that there seems no sanction possible to non-application of cost recovery in a programmatic approach, because – as the Court worded – 'the absence of pricing will not necessarily jeopardise the attainment of the Directive's objectives'. Exactly because the last is true and the Court of Justice in addition limits cost recovery to the programme of measures and environmental objectives instead of also the purpose of the directive itself, it should be preferred to position the cost recovery provision more strongly in its principle obligation (take into account cost recovery and in so doing consider also social, economic, environmental and certain other aspects). Now the provision seems to be reduced to not more than an empty shell.

Hereafter the findings of the examination of the five questions regarding the difficulties and obscurities on the elements of Article 9 WFD are summarized.

Main difficulties and obscurities regarding 'water services' in the cost recovery provision.

The current discussion in the literature and in the infringement procedures regarding the extensiveness in the interpretation of the term 'water services' is of crucial importance for the scope

[320] C-187/87 *Saarland a.o.*, ECLI:EU:C:1998:439, para. 19; C-434/97 *Commission v France*, ECLI:EU:C:2000:98, para. 21; C-402/07 and C-432/07 *Sturgeon a.o.*, ECLI:EU:C:2009:716, para. 47.
[321] Lenaerts & Gutiérrez Fons consider in respect of a contextual interpretative approach by the ECJ: 'This means that each provision of EU law must be interpreted in such a way as to guarantee that there is no conflict between it and the general scheme of which it is part. As a token of rationality, the EU legislater must also avoid useless duplication. Accordingly, no provision of EU law should be redundant. Instead, each and every provision of law must be interpreted in light of its *'effet utile'*; K. Lenaerts & J. Gutiérrez Fons, 'To Say What The Law of the EU Is: Methods of Interpretation and the European Court of Justice', AEL 2013/9, p. 14.
[322] See Article 11 WFD in conjunction with Annex VII regarding river basin management reports, sub 7.2.

of application of cost recovery. Arguments can be found both for a narrow interpretation as well as for a broader interpretation of water services. The effectiveness of the instrument of cost recovery in water policy with the aim of attaining environmental objectives will be served more with a broad interpretation. If, however, a broad interpretation is to be adhered to, for which good arguments can be found, it would lead to new questions. Where do the boundaries of a broad interpretation of water services lie? As shown in this chapter, a broad interpretation in relation to water-related ecosystem services would lead to cost recovery for activities that people would perhaps not even recognize as being related to environmental water objectives, like forestation. And what should be the decisive factor concerning cost recovery in that situation? The purpose for which an activity is performed? That seems very arbitrary and may lead to numerous legal procedures concerning questions such as what decisions are and what decisions are no longer taken within the government's room for discretion.

Main difficulties and obscurities regarding 'water use' in the cost recovery provision.

Besides the discussion on water services, the terminology on water use as defined in the WFD also gives rise to questions. Two can be identified. The first is whether the definition of water use in Article 2 (38) WFD is meant to be the same water use as quoted in Article 9 (1) second indent WFD. Even though there is some doctrine on this matter, it remains unclear. Different directive texts do not evidently apply the concept of water use as defined uniformly to Article 9 WFD. Although the Directive texts in the different Member States do differ on this point, I have outlined that a link between the two texts (the definition of water use in Article 2 WFD and the text of Article 9 WFD on cost recovery) can be found in the parliamentary documents when amending the definitions of water services and use, but that this only confirms an implicit relation between both the definitions of water services and use and is insufficient to convince that a one-on-one application of the definition of water use in Article 9 WFD is evident. However, looking at the rationale behind cost recovery and the manner in which Article 9 WFD came about and is formulated, the rationale of referring to water use in Article 9 is that water uses, categorised in certain groups, should be paying for water use having a significant impact on the status of water.

The second obscurity identified is whether there is any interrelation between the concepts of water services and water use that should be reflected in the interpretation of the two concepts. In other words, would a broad interpretation of water services run down the concept of water use to an empty shell? The Advocate General Jääskinen, in his advice in case C-525/12 *European Commission vs Federal State of Germany* argued that such interpretation would erase the difference between water use and water services. I have argued that there is no clear relationship between the scope of the two concepts of water use and water services in the sense that the scope of the definition of 'water use' should be bordered by that of water services. The European Court of Justice in its judgment in case C-525/12 did not outline its position on this question, as it was not (presented as) part of the dispute.

Main difficulties and obscurities regarding 'environmental and resource costs' in the cost recovery provision.

The provision of cost recovery, requiring also environmental and resource costs to be recovered, askes from Member States to determine what environmental and resource costs are. I have outlined in this chapter that many different views on these concepts exist. Questions like whether economic damage to agricultural fields may be considered environmental costs?; whether environmental costs also include damage for limiting environmental use other than the use of water?; how to value non-use values?; is loss of welfare an environmental cost?; are resource costs only to be accounted for in situations of over-abstraction/resource exhaustion?

The non-clarity of these two costs need to be resolved quickly and a uniform interpretation of the concepts is necessary in order to guarantee a level playing field within the European Union. As the recovery of these costs is an essential part of the recovery provision - i.e. the rationale behind cost recovery is amongst others internalisation of environmental costs – in my view at least a minimum list of what is to be understood as environmental and resource costs needs to be provided for in the directive itself by means of the inclusion of – for example – a definition. The Commission stressing the need for a shared methodology for calculation of these costs is to be appreciated, but in my view will not prove to be very effective. The earlier guidance document on these costs did not result in an uniform view on these costs by the Member States. Therefore, if the interpretation of these costs is left to the Member States, differences in the main types of costs that are recovered will definitely occur/remain.

Main difficulties and obscurities regarding 'the polluter pays principle' in the cost recovery provision.

What influence the polluter pays principle has or should have on cost recovery of water services depends on the extensiveness of its interpretation (and application). In this chapter different views on the extensiveness of the polluter pays principle were addressed. A broad view on the polluter pays principle, for which different arguments have been found as outlined in this chapter, includes in fact the user pays principle. In this view, all damage arising from resource use is considered pollution and should be covered by the polluter pays principle. However, as outlined in this research, such a broad view on the polluter pays principle is not likely when it concerns cost recovery for water services. Article 9 WFD mentions that account should be taken of the principle of the recovery of the costs of water services, including environmental and resource costs, and that that should be done in accordance *in particular* with the polluter pays principle. Due to this extra stress laid upon compliance with the polluter pays principle ('in particular') it is made clear that as water use should be charged (from users), the polluter pays principle needs to be adhered to, i.e. the extra costs incurred due to pollution may not be retrieved solely from users in general, but a user being also a polluter should be identified and in the water cost retrieval this double-cost factor needs to be taken into account.

The second question addressed in this chapter was regarding the polluter pays principle is *how* Member States should take account of the polluter pays principle in cost recovery for water services. To this end, five relevant markers were be determined with regard to the polluter pays principle:

1. Where a directive does not provide a definition of a polluter, Member States have a broad discretion to determine who the polluter is;
2. Polluters are only responsible for the pollution they cause; they do not have to pay for the elimination and prevention of pollution to which they do not contribute;
3. Non-polluters or persons who have not contributed to (the risk of) pollution are not to be burdened by the application of the 'polluter pays' principle;
4. Under certain conditions, the use of presumptions regarding the causal relation between activity and pollution is allowable;
5. A differentiation in contributions from categories of polluters is allowable, unless the costs involved are manifestly disproportionate in relation to the polluter's pollution capacity.

The above identified markers of the principle therefore need to be taken into account in determining the boundaries and norms underlying the principle of the recovery of the costs of water services. From a water financing point of view the above implies that the financing system chosen for water services should be (mostly) based on the profit principle, that is based on the starting point that the

polluter and user should pay for damage due to pollution and/or the use of water. Adherence to the polluter pays principle (as mentioned in Article 9 WFD) seems less easy to be achieved if water financing for services is completely, or almost completely, based on the principle of solidarity. Mixes of the two systems seem to be allowed to a certain extent. Some hold the point of view that it is justifiable to allow concerns of affordability prevail over the idea that the polluter should pay. These scholars find it allowable to rely on cross-subsidies or general taxes for achieving public service obligations such as affordability or universal access to sanitation facilities.[323] In my opinion this is quite defensible if - for instance - the cost recovery regarding the provision of a minimum extent of water for drinking and sanitation, a right which is a fundamental human right, is based on the principle of solidarity. But the question arises whether or not that should be done by means of water policy and by way of cross-subsidies or general taxes.

Main difficulties and obscurities regarding the 'derogation clause' in the cost recovery provision?

Member States shall not be in breach of the WFD if they decide - in accordance with established practices - not to apply cost recovery - where this does not compromise the purposes and the achievement of the objectives of the Directive. This is, in general wording, the derogation clause on cost recovery which is included in Article 9 WFD. Two questions regarding this derogation clause were raised in this research: 1) what is to be considered established practices? And 2) what difficulties and obscurities arise with regard to the second element of the derogation clause: 'where this does not compromise the purposes and achievement of the objectives of the Directive'.

Regarding the first question, an established practice implies in my view at least a certain duration of the cost recovery practice. However, as outlined in this research, no information on the content of this concept 'established practices' was found in legislative documentation.

On the second element of the derogation clause, more reflections were possible. The European Court of Justice, in its judgment C-525 *Commission vs Federal Republic of Germany* referred to the derogation clause of Article 9 (4) WFD as a 'no longer proceed with cost recovery' clause. Non-proceeding would be only allowed if it does not compromise the purposes and the achievement of the objectives of the Directive. I have argued that the Court reduces the derogation clause to almost an empty shell due to three considerations: 1) the Court stresses that cost recovery is not – not even by means of principle – necessarily applicable to the water activities as mentioned in Article 2 (28) WFD; 2) the Court considers that even if activities mentioned in Article 2 (38) WFD in themselves may be undermining the achievement of the Directive's objectives, that does not bring about that any lack of pricing of those activities will necessarily jeopardise the attainment of the objectives; 3) What actions to be included in a programme of measures is to the full discretion of the Member States. In this light, the derogation clause of Article 9 (4)WFD seems rather redundant, as there is no main obligation to apply cost recovery (not even to a minimum extent). In order to address this deficit c.q. enhance the effectiveness of the derogation clause, it is necessary to give at least some content to the main cost recovery obligation. I identified that such position would lead to new, difficult questions to be answered with regard to the burden of proof placed upon Member States to convincingly show that the purpose and objectives of the Directive are not compromised if cost recovery is not applied anymore.

The result of the current interpretation of the cost recovery provision and the derogation clause therein by the European Court of Justice is however not satisfactory. In my view it brings about that

[323] D. François, et al., 'Cost recovery in the water supply and sanitation sector: A case of competing policy objectives?', *Utilities Policy*, vol. 18, issue 3 (2010), p. 135-141.

it will be very difficult to sufficiently state and prove that a Member State has applied the derogation clause not legitimately.

6 Case study: cost recovery in the Netherlands

6.1 Introduction

In this chapter, how the cost recovery provision is implemented in Dutch water law and what the main differences between the European and Dutch approach are and whether these differences can be justified, is examined. This examination is done by means of a case study, an illustration in what way Member States may implement cost recovery in their national systems. However, as will be shown, also in the Netherlands critical remarks can be made with regard to cost recovery for water services. This chapter intends to provide further insights on how the cost recovery provision has been implemented in Dutch water law and what the main differences are between the European and Dutch approach. To this end the first sub question- what water related services the Dutch government stipulates as water services for which costs need to be recovered - is addressed first. The following questions are addressed in an integrated way per water service:

a. What is the underlying (policy) principle for cost recovery for a given service?
b. Who or what is subject of the levy/charge and how is the levy/charge effectuated?
c. What costs are recovered?
d. What critical remarks, by means of reflections, regarding cost recovery in the Netherlands can be made?

In the Netherlands the WFD was implemented in the existing legislative system and therefore a number of laws were consulted to assess the Dutch water finance system and the way Article 9 WFD was implemented. First, the legal status of water in the Netherlands will be highlighted and an overview will be provided of the Dutch parliamentary process regarding the view on water services. Then the cost recovery mechanism of the identified water services is discussed. This will be done in a systematic way, first outlining the legal setting and the nature of the recovery system, including the identification of the underlying principles, followed by an outline of the subject of recovery. The taxation or levy basis will be identified as the measurement rate (*heffingsmaatstaf*). If applicable, particularities with regard to the cost components (financial costs, environmental and resource costs) will be addressed. Each outline will be concluded with a short overview of the relevant jurisprudence and, where applicable, reflections in the form of critical remarks are made.

Lastly, a number of water activities that have not been determined as water services (as defined in the WFD) will be examined. They concern protection against flooding, hydropower and water activities to serve shipping or recreational purposes.

Dutch water management has a highly decentralized character. Water management activities are performed by the State, the provinces, the regional water authorities, municipalities and drinking water companies.[324] Also the finance system of Dutch water management has this decentralised character. A preliminary remark needs to be made with regard to the different finance systems. In the Netherlands there are several methods the government can use to recover costs. In order to understand the different characters of the recovery methods used a characterisation of the definitions of finance methods is provided for this chapter:

Charge/price (*Retributie*): a charge or a price when the (public) services delivered have a direct link between the payment due and the individual benefit of the beneficiary;

[324] For further reading on the organization of Dutch water management see: H.F.M.W. van Rijswick & H.J.M. Havekes, *European and Dutch Water Law*, Europa Law Publishing (2012), p. 135-201.

Levy (*Bestemmingsheffing*): a levy when payment is due for specific services for a specific group of beneficiaries, which payment is only to be used for those activities (earmarked) and no direct link between payment and individual benefit exists;

Tax (*Belasting*): a tax when payment due is accounted for as general tax income; such tax can be used for water-related activities, but the government is not obliged to do so.

6.2 Legal status of water in the Netherlands

In the Netherlands water is considered to be a public good. Water management is a responsibility of the Dutch government. Although water is considered a public good, no absolute right to water for its inhabitants has been recognised in Dutch legislation as such. The former Minister of Foreign Affairs of the Netherlands stated during the UN Human Rights Council (2008) that the Netherlands was to recognise the human right to water, but no explicit right to water has been laid down in Dutch legislation so far.[325] That does not mean that the right to water is not implicitly included in Dutch legislation. Article 22 of the Dutch Constitution states that the authorities shall take steps to promote the health of the population. The provision of – for instance - drinking water is seen as a duty of care of the government based on this constitutional provision.[326] However, as neither acts of the Dutch Parliament nor treaties can be reviewed by the courts as to their constitutionality, the implicit right to water cannot be relied upon via Article 22 by Dutch citizens.[327]

Even if there is an implicit right to (drinking) water in the Dutch Constitution and even though Articles 11 and 12 IVESC include a right of access to water and sufficient and affordable water, this (human) right to water does not imply that water should be available free of charge, as is confirmed in Dutch case law.[328] As Dutch legislation and case law currently stand, there exists no absolute right to water provision in the Netherlands.

The same applies to a right to protection against water (flooding) or the protection and improvement of the quality of water. Article 21 of the Dutch Constitution states that 'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment'. Dutch water (safety) legislation can be seen as the materialization of this constitutional right, but keeping the country habitable does not imply a duty of care in eliminating all risks regarding water.[329]

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[325] [http://www.rijksoverheid.nl/documenten-en-publicaties/toespraken/2010/02/10/statement-by-maxime-verhagen-at-the-7th-session-of-the-human-rights-council-geneva-3-march-2008.html]: 'For people to live their lives in dignity, it is important to fulfil not only their civil and political rights, but also their economic, social and cultural rights. President Roosevelt rightly included 'freedom from want' among his famous four freedoms. In that sense, I am proud to announce here today that the Netherlands will join the group of countries who have recognised the right to water as a human right.'

[326] Parliamentary proceedings: Nieuwe bepalingen met betrekking tot de productie en distributie van drinkwater en de organisatie van de openbare drinkwatervoorziening (Drinkwaterwet), (*Kamerstukken II*), 2006-2007, 30 895, Memorie van Toelichting, no. 3.

[327] See for further reading on the right to water and sanitation: H.F.M.W. van Rijswick, 'Improving the right to water in the Netherlands', in: H. Smets (ed.), *The right to safe drinking water and sanitation in Europe/ Le droit à l' eau potable et à assainissement, sa mise en oeuvre en Europe*, Academie de l ' eau, Editions Johanet (2012), p. 369-391; J. Verschuuren, 'Recht op water', in Th. G. Drupsteen, H.J.M. Havekes and H.F.M.W. van Rijswick, *Weids Water* (2006), p. 427-440.

[328] Court of Appeal of Den Bosch, 2 March 2010 (published 5 March 2010), ECLI:NL:GHSHE:2010:BL6583

[329] Van der Pot-Donner, *Handboek van het Nederlandse Staatsrecht*, W.E.J. Tjeenk Willink (2001), p. 389-390. J. Verschuuren, 'Recht op water', in Th. G. Drupsteen, H.J.M. Havekes and H.F.M.W. van Rijswick, *Weids Water* (2006), p. 427.

6.3 Parliamentary process: determination of water services

In determining which water activities should be considered water services (as defined in the WFD) the following considerations from the Dutch parliamentary process can be extracted from the parliamentary documents:

In 2002 the legislator acknowledged that the definition of water services in Article 2 sub. 38 WFD needs to be interpreted 'broadly', at least including extraction and impoundment, storage, treatment and distribution of surface water and groundwater. More specifically the legislator mentioned examples such as the functioning of wastewater treatment plants. The collection of wastewater was included in water services, as was the municipal wastewater collection and drinking water supply. It was debated whether to assess water quantity management as a water service or not, referring to the extraction and impoundment of surface water for agriculture and shipping.[330] It was also considered whether to define purification activities to improve the ecological status of nature as water services.[331]

In 2003/2004 questions were raised in Parliament concerning to which specific water services cost recovery would apply. The legislator replied that a preliminary list of water services was made, including the extraction and purification of water for drinking water purposes, the collection, transport and purification of wastewater, the production and extraction of water for cooling and production purposes (including irrigation), the discharge of effluent, drainage and hydropower.[332] Self-services were not excluded from the determination of water services.

With regard to the costs to be recovered the State Secretary mentioned that the term 'service' is not related to a specific governmental task, but refers to the 'use of the water system', outlining that if there are no costs for the government or the environment, the principle of cost recovery would not lead to extra charges/levies.[333] This answer seems to imply still quite a broad view of water services, relating a service to the use of the water system.

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[330] Parliamentary proceedings: Wijziging van de Wet op de waterhuishouding en de Wet milieubeheer ten behoeve van de implementatie van richtlijn nr. 2000/60/EG van het Europees Parlement en de Raad van de Europese Unie van 23 oktober 2000 tot vaststelling van een kader voor communautaire maatregelen betreffende het waterbeleid (PbEG L327) (Implementatiewet EG-kaderrichtlijn water), (*Kamerstukken II*) 2002-2003, 28 808, Memorie van Toelichting, no. 3, p.16-17.

[331] On questions by the 'Overlegorgaan Waterbeheer en Noordzee-aangelegenheden' (OWN) ('Consultative Body for Water Management and North Sea Affairs') as to whether water quantity management activities are or are not to be considered as water services for which the water user needs to pay, the legislator replied as follows (freely translated): Regarding cost recovery OWN stresses the important question of in what situation there is a water service for which the water user needs to pay, and in what situation there is a public water task that needs to be financed through the general tax system. (...) Regarding this there is no separation between public water tasks and water services: there is an overlap between these two fields. Article 9 WFD leaves some room for the current finance method of public water tasks financed through general taxes, which tasks are also considered water services. As OWN remarks, also other costs regarding, for instance, the purification of drinking water in a broad sense and for making a good ecological status for the function of nature need to be considered in executing Article 9 WFD.

[332] Parliamentary proceedings: Wijziging van de Wet op de waterhuishouding en de Wet milieubeheer ten behoeve van de implementatie van richtlijn nr. 2000/60/EG van het Europees Parlement en de Raad van de Europese Unie van 23 oktober 2000 tot vaststelling van een kader voor communautaire maatregelen betreffende het waterbeleid (PbEG L327)(Implementatiewet EG-kaderrichtlijn water), (*Kamerstukken* II) 2003-2004, 28 808, Nota naar aanleiding van het verslag, no. 6, p. 28.

[333] Parliamentary proceedings: *Ibid.,* (*Kamerstukken* II) 2003-2004, 28 808, Verslag wetgevingsoverleg, no. 21.

In the end, however, the Netherlands identified, according to the River Basin Management Plans (2009), five water services, being:

- The production and supply of water (*productie en levering van water)*
- The collection and discharge of rain and wastewater *(inzamelen en afvoer van hemel- en afvalwater)*
- Wastewater treatment *(zuiveren van afvalwater)*
- Groundwater management *(grondwaterbeheer)*
- Regional water management *(watersysteembeheer)*[334]

As mentioned in section 6.4.2, the European Commission found that several Member States, including the Netherlands, were not interpreting 'water services' in line with the Commission's broad view. It started several pre-litigation procedures by sending a formal notice.[335] Regarding the Netherlands, in January 2013 a reasoned opinion was given by the Commission asking the Netherlands to bring its water laws into line with EU legislation.[336] The Commission holds the view that the Netherlands has not determined its water services correctly by not recovering costs for impoundments for purposes of navigation and flood protection.[337] The Netherlands is of the view that the term water services is limited to the supply and discharge of water (drinking water and wastewater), whereas the Commission includes also other functions of water (like hydropower, shipping and flooding management).[338] As the Dutch reply to the Commission, as with all correspondence between the Commission and the Dutch government, has not been made public at this stage of the infringement procedure, no insight can be provided as to the arguments of the Dutch government and the position which it has taken.[339]

6.4 Production and supply of (drinking) water

The responsibilities regarding drinking water supply in the Netherlands are laid down in the Drinking Water Act (*Drinkwaterwet*). This Act aims to ensure a sustainable, public supply of

[334] See also RWS Waterdienst, Kostenterugwinning van Waterdiensten in Nederland, rapport 2008.051.

[335] European Commission, Press release IP/11/1101; IP/11/1264; IP/11/1433. The three press releases differ slightly on the formulation of the services (re 'impoundment or storage of surface waters for navigation purposes' vs. 'restriction of surface waters for navigation purposes') and the consequences of the exclusion of the water services by the country involved ('exclusion hinders the full and correct application of the Water Framework Directive' vs. an extra addition 'contributing to inefficient or wasteful use of water').

[336] A reasoned opinion was given to the Netherlands. This is stage two of an infringement procedure. An infringement procedure starts with a notice by the Commission to the Member State, addressing its supposed non-compliance with European legislation and requesting a response from the Member State (Article 258 TFEU). The Member State may then provide its observations on the matter to the Commission. If the differences in views are not resolved and the Commission still holds the view that the Member State is non-compliant, a reasoned opinion will follow to pressure the Member State into changing its ways (stage two). If the Member State concerned does not comply with the opinion within the period laid down by the Commission, the Commission can bring the case to the European Court of Justice (ECJ).

[337] Memo/13/22 European Commission, January infringement package, Brussels 24 January 2013 [http://europa.eu/rapid/press-release_MEMO-13-22_en.htm] [15-03-2013].

[338] Parliamentary proceedings: Vaststelling van de begrotingsstaten van het Ministerie van Infrastructuur en Milieu (XII) voor het jaar 2012, (*Kamerstukken II*), 2011-2012, 33 000 XII, Brief van de Staatssecretaris van Infrastructuur en Milieu, no. 60.

[339] Also questions were raised in the European Parliament regarding the abolishment of the Dutch (general) tax on groundwater and mains (tap) water (*Belastingen op grond- en leidingwater*) and cost recovery under Article 9 WFD; Parliamentary questions to the Commission – G.J. Gerbrandy, E-000316/2012.

drinking water taking into account the Council Directive on the quality of water intended for human consumption.[340]

Government bodies are responsible for *securing,* in a sustainable manner, the public supply of drinking water (Article 2 Drinking Water Act). Securing a public drinking water supply means for a government body, like municipalities and/or provinces (as frequent owners of drinking water companies):

- ensuring public ownership of those drinking water companies;
- ensuring that the drinking water companies comply with the applicable legislation;
- cooperating with the drinking water company in case of an emergency in the supply of drinking water;
- taking into account this duty of care in executing its competences in other fields (like urban planning).[341]

The drinking water companies are to ensure a sufficient and sustainable *execution* of the public drinking water production within a specific geographic area. The drinking water company also needs to ensure the *supply* of drinking water.[342] There are approximately 10 drinking water companies in the Netherlands, producing about 1.141 million m3 of water.[343]

6.4.1 Subject of the levy and rate/tariff

The person upon whose behalf and upon whose request a water supply connection is provided and to whom drinking water is supplied is liable to pay the water price. Water is affordable in the Netherlands. The average water price in the Netherlands in 2010 was € 1,32 m3, including € 0.16 on taxes/levies (excluding VAT).[344] Water companies can set their own water price and usually this price consists of three elements:

- Installation charges;
- A fixed rate for infrastructure: this can include also licence/concession costs, a meter rent, sufferance taxes and surcharges for public fire protection provisions;
- A water price per m3; (the user pays principle)

The price may be differentiated, charged to the following different groups:

- Limited consumption (households)
- Small businesses/industries
- Extensive businesses/industries

The Association of Dutch Water Companies (VEWIN) periodically publishes drinking water statistics, reflecting (developments in) water prices.

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[340] Council Directive on the quality of water intended for human consumption, no. 98/83/EC, OJ L 330, 5 December 1998.
[341] Parliamentary proceedings: Nieuwe bepalingen met betrekking tot de productie en distributie van drinkwater en de organisatie van de openbare drinkwatervoorziening (Drinkwaterwet) (*Kamerstukken II*), 30 895, Memorie van Toelichting, no.3, p. 39.
[342] Article 3 Drinking Water Act (*Drinkwaterwet*).
[343] [http://www.vewin.nl/Drinkwater/Drinkwaterbedrijven/Pages/default.aspx] [30-01-2013].
[344] VEWIN, 'Drinkwaterstatistieken 2010' (*Drinking Water Statistics 2010*), 2012, [http://www.vewin.nl/SiteCollectionDocuments/Publicaties/Drinkwaterstatistieken%202012/Vewin%20Drinkwaterstatistieken%202012%20lowres.pdf] [30-01-2013].

6.4.2 Costs to be recovered

Article 11 Drinking Water Act determines that the rate/price needs to cover the costs. This means that 100% of the costs need to be recovered. The price should furthermore be transparent and may not be discriminatory. Regarding the costs to be recovered these need at least to include the financial costs and environmental & resource cost.[345]

The financial costs of drinking water supply are the costs of providing and administering the water service. These costs contain operation and maintenance costs and capital costs. In general, in the Netherlands the direct costs and related indirect costs of the service provided can be recovered.[346] The Drinking Water Act specifically mentions one element that is part of the costs to be recovered, e.g. the capital cost. Article 10 Drinking Water Act determines that the Minister of Infrastructure and the Environment (I&M) needs to determine the maximum margin of capital costs that may be included in the cost recovery.

The recovery of *environmental costs* is less evident or clear. Articles 3 and 7 of the Drinking Water Act lay down that the water company needs to ensure a sustainable (public) water supply. However, no specific part of the charges relates to the sustainability part of this responsibility. There is no causal relationship between the revenues and the internalization of environmental and resources costs and the actual rectification of any environmental damage.

A provincial groundwater abstraction levy is levied on those that are entitled (by means of a permit) to abstract groundwater (see hereafter section 6.17). This levy is, by means of transfer pricing, included in the final charge to drinking water users and can be used to rectify any damage that occurs due to groundwater abstraction.

The Drinking Water Act does not contain specific provisions relating to the recovery of *resource costs*. To date, resource costs cannot be specified separately. In the Netherlands the resource costs are assumed to be included in the mitigating measures that are taken. One assumes that the current mitigating measures sufficiently compensate detrimental environmental effects so as to reach the environmental quality level that the WFD requires.[347] Monitoring results however show that Dutch (surface) waters do not reach the water quality standards by far and that further action is necessary.[348]

6.5 Reflections: a non-incentive water price

The fee structure for water supply does not provide a stimulus to use water efficiently for (large) businesses, because the water rate may – and in practice does - decrease per m3 of water used.[349] A

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[345] Commission of the European Communities, Communication from the Commission to the Council, the European Parliament and the economic and social committee, Pricing policies for enhancing the sustainability of water resources, COM (2000) 477 final, p. 10; these definitions are also included in Common Implementation Strategy Guidance document no. 1, Economics and the environment, 2003, p. 69, 70 and 72.

[346] Examples of *direct* costs are: the capital costs of investments, like replacement costs, renovation costs and de-activation costs; personnel costs for the maintenance of the system; maintenance costs and exploitation costs. Examples of *indirect* costs are: the personnel costs of policy makers (partially); aalary administration costs (partially); housing costs (partially); and other related costs like shipping costs, reproduction costs and literature costs (partially).

[347] RWS Waterdienst, Kostenterugwinning van Waterdiensten in Nederland, rapport 2008.051, p. 14.

[348] CBS, PBL, Wageningen UR (2012). Kwaliteit oppervlaktewater, 2009 (indicator 1438, versie 04, 5 december 2012). www.compendiumvoordeleefomgeving.nl. CBS, The Hague; Planbureau voor de Leefomgeving, The Hague/Bilthoven and Wageningen UR, Wageningen; RIVM Report 609715005/2013, Bescherming drinkwaterbronnen in het nationaal beleid, 2013.

[349] E.g. [http://www.oasen.nl/direct-regelen/Paginas/Zakelijketarieven-Artikel.aspx] [01-02-2013], where the

digressive rate structure is, however, not a rate structure that provides adequate incentives to water users to use water efficiently.[350] As the WFD requests in Article 9 (sub. 1 first indent) that water pricing policies provide adequate incentives for users to use water resources efficiently, and thereby to contribute to the environmental objectives of the Directive, this digressive rate does not seem to be in line with this provision as a digressive rate cannot be stipulated to be an incentive at all, let alone an adequate incentive to use water efficiently. This is also remarkable as the derogative elements mentioned in Article 9 WFD are to provide tailor-made pricing policies. Therefore, only the social, environmental and economic effects of the recovery as well as geographic and climatic conditions offer the Member States some room in setting pricing policies. As the Netherlands has not relied on this derogative elements, a digressive rate structure seems hard to justify.

6.6 Reflections: tax on mains (tap) water

The State levies against water companies a so-called tax on mains water (*belasting op leidingwater*). This tax finds its legal basis in the Environmental Taxes Act (*Wet Belastingen op milieugrondslag)*. The tax is levied on a quantity of 300 m3 of piped water as a maximum per twelve months at a rate of € 0.165 per m3.[351] The water companies transfer the taxation to the water user by effectively charging the water user for that water.

For 2014 the Dutch government intended to raise the tax rate on piped water in order to contribute to the State's general deficit.[352] This gave rise to may rumours within society. Both the water companies and industries that depend on extensive water use rebelled against this proposed tax rate increase and the abolition of any cap. The first proposal suggested doubling the tax rate and abolishing the taxation maximum of 300 m3, which would result in a much higher tax income than 'needed' at first instance. It would mean much higher water costs for those industries that use large quantities of water. As a compromise the State Secretary for Finance suggested the introduction of a digressive rate without the introduction of a new tax cap.[353] The justification for this digressive rate structure would be that the tax on mains water is to be a so-called 'small use tax', but it is desirable to also tax large water users in order to provide incentives for them to use water efficiently. Two things may be remarked about this suggested new tax structure:

1) Although the tax on mains water is included in the Environmental Taxes Act, and therewith suggests being rationalised from an environmental protection point of view, the real character of the tax is a regular tax which is added to the general state income. The tax revenues are therefore are not used ensure environmental protection. The revenues are not earmarked. Therefore, the digressive rate structure is not hindered by few incentives.
2) The suggested rate structure also introduces a lower tax rate for water use in the category 300 m3 to 100.000m3 effectively ensuring a lower tax rate for small businesses (*MKB*) and agricultural water use. Agricultural piped water use is therefore treated with special care. This is again a confirmation of the special position of agriculture in the Netherlands, as agriculture is also mostly exempted from regulation and payment for – for instance – groundwater abstractions (see section 6.17), while the agricultural sector can be seen as one of the great

first 2500 m3 of water for businesses is charged at € 0.821 running up to the use of approximately 50.000-100.000 m3 having a water price of € 0.729.

[350] See for instance also F. Stangl, *Ökonomische Instrumente im Wasserschutz,* Umweltdachverband, Manzsche Verlags- und Universitätsbuchhandlung (2012), p. 119-120 regarding the friction between applying a fixed tariff structure or a digressive tariff structure and Article 9 WFD.

[351] Environmental Taxes Act (*Wet belastingen op milieugrondslag*), Articles 13-21 [http://wetten.overheid.nl/BWBR0007168/geldigheidsdatum_12-11-2013].

[352] The proposal in the end was not effectuated and was withdrawn.

[353] Parliamentary proceedings: Wijziging van enkele belastingwetten en enige andere wetten (Belastingplan 2014), (*Kamerstukken II*), 33 752, Letter by the State Secretary of 8 November 2013, no. 21.

polluters of surface waters.[354] Also in the use of piped water this sector has maintained a special position by means of a specific tax rate. Water use efficiency within the agricultural sector is therefore not stimulated to any great extent, either by the recovery of the costs of water services nor by the so-called 'green taxes' as is the case with the mains water tax.

Denmark

In Denmark most water companies charge water users, like in the Netherlands, for the following:

- Installation charges
- An annual contribution
- A tariff on m3 water used

Furthermore, a "green tax" is paid (revenues € 1.7 billion annually) by households. This so-called "drinking water protection tax" is to encourage water savings in households.

The rate amounts to 0.67 DKK per m3 of water (Act on Tax on Piped Water). This "green tax" is earmarked and is to be used to protect drinking water. Part of the revenues (about 70%) is used to cover the expenditure for the mapping of water resources and the costs of tax collection (Ministry for the Environment). The other part (about 30%) is transferred to municipalities to cover the costs of action plans to protect drinking water.

Source: Compilation of information in the country-specific information from the questionnaire for the Conference 'The price of water: water as an ecosystem service", November 2012, Zaragoza, Spain. The questionnaire for Denmark was completed by H.T. Anker and L. Baaner of the Faculty of Sciences, Copenhagen University.

6.7 Jurisprudence and the supply of (drinking) water

No absolute right to water

Even if there is an implicit right to (drinking) water in the Dutch Constitution (see section 6.2) and even though Articles 11 and 12 IVESC include a right to access to water and sufficient and affordable water, this (human) right to water does not imply that water should be provided free of charge in the Netherlands. This point of view has also been confirmed in national case law in a case concerning a water company in Limburg where the Dutch Court of Appeal overruled a lower Court decision that a citizen who was in arrears concerning his water bill was not to be cut off by the water company.[355] The water company requested – as far as was relevant – access to the home of the debtor to shut off the water supply. The lower Court rejected this access based on an assumed human right to water laid down in articles 11 and 12 IVESC and the statement by the Dutch Minister for Foreign Affairs (see above). The Court of Appeal however reasoned its decision as follows [freely translated]:

> 'Different from the lower Court's judge, the Court of Appeal finds that neither from articles 11 and 12 IVESC, nor from other treaties acknowledged by the Netherlands or international sources of law can one deduce an absolute right to water – even without payment. WML correctly pointed to a right to have *access* to water in General Comment 15 on the Right to

[354] OECD, 'Water Governance in the Netherlands: Fit for the Future?' OECD Publishing (2014), p. 64-65, 233-234.
[355] Court of Appeal of Den Bosch, 2 March 2010 (published 5 March 2010), ECLI:NL:GHSHE:2010:BL6583.

> Water of the Committee for Economic, Social & Cultural Rights of 26 November 2002: "The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses" and "Economic accessibility: Water, and water facilities and services must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the Covenant rights." From this already it follows that the (human) right to have access to water does not include the provision of water free of charge.'[356]

Concluding, as Dutch legislation and national case law currently stand, there exists no absolute right to (free) water provision in the Netherlands.

Fixed rate/tariff structure

In the Netherlands the tariff structure that water companies use reflects the user pays principle. As stated the price charged usually consists of installation charges, a water price per m3 and a fixed rate for infrastructure. The user pays principle is evidently reflected in the water price per m3, but indirectly also in the charge of the fixed rate for infrastructure. The fixed rate is currently usually levied per (calculated) housing unit. Public housing corporations, exploiting apartment complexes with one central meter, which were previously charged for the fixed rate only once (per meter), objected to the introduction of a fixed rate based on the number of housing units. This dispute concerning the water company Dunea in the Province of South Holland reached the Court of Appeal of The Hague.[357] The Court of Appeal had to decide whether to allow a tariff structure change by the water company. The water company used to charge public housing corporations a fixed rate for apartment complexes based on a (one) central meter used by complexes. As of January 2007 the water company levied the fixed rate based on the number of housing units (using the central meter). The public housing corporations objected against this tariff structure change, arguing that it was unreasonable because, amongst other things, there existed a lack of transparency concerning the costs to be recovered by the fixed rate and that the usage of a central meter incurred less costs for the water company due to the absence of specific user costs like fee collection costs and invoice costs. The water company stated that the former system of a fixed rate per central water meter was unfair, as the availability of reliable drinking water 24 hours a day is equal to situations of housing with an individual meter. Tenants of apartments with a central meter use the necessary infrastructure equally. Furthermore, the water company argued that the balance between fixed costs and variable costs had changed over the years as a result of decreasing water use. The tariff structure had to be adjusted from an economic point of view and the levy of a fixed rate per user address had become common practice in the Netherlands.

The Court of Appeal agreed with the water company. Equal treatment of housing complexes with a central meter and houses with an individual meter was fair and allowable based on financial reasons. The Court did not see any justification why inhabitants of housing complexes should pay less than individual units, as they all use the water infrastructure to the same extent. In the view of the Court, the water company sufficiently outlined that besides capital costs also operational costs like maintenance and chemicals for purification are included in the coverage by the fixed rate. As the corporations had not sufficiently proved that the suggested absence of costs was 'substantial' so that the current tariff structure change would not be allowable, the Court of Appeal rejected their objections and declared that the tariff structure change was indeed legitimate.

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[356] *Ibid.*

[357] Court of Appeal of The Hague, 5 July 2011 (published 6 July 2011), ECLI:NL: GHSGR:2011:BR0527.

6.8 Collection and discharge of rain and wastewater

The water tasks of local municipalities are laid down in different laws. Article 10.33 of the Environmental Management Act (*Wet Milieubeheer*) states that municipalities have a duty to arrange for the collection and transport of urban wastewater coming from the territory within the county.[358] The collected wastewater needs to be transported to a wastewater treatment plant. These tasks can be seen as 'water service tasks'.

Furthermore, Articles 3.5 and 3.6 of the Water Act (*Waterwet*) outlines, in general, a duty of care for municipalities regarding:

- Effective collection and discharge of rain;[359]
- Measures to prevent structural detrimental effects of the groundwater level to the land/territory destination.[360]

These tasks can be described as 'water system tasks'.[361]

The finance system for these municipal water tasks changed in 2008. Before 2008 only the costs regarding the construction and maintenance of the sewerage system were to be financed by the municipality sewerage tax with the character of a charge (*retributie*). This meant that there had to be a direct link between the payment due and the individual benefit for the beneficiary. Because of the fact that sewerage-related costs incurred in relation to collective responsibilities[362] were not allowed to be covered by this charge, coming together with the enlargement of the water responsibilities of municipalities to the above-mentioned duties of care, the finance system needed to be changed.[363] In the words of Van Rijswick: 'Whereas in the past the municipal sewerage tax had to confine itself specifically to the costs directly involved in the construction, management and maintenance of sewers, the spending objective of this tax has now been substantially broadened. The costs incurred by a municipal authority in connection with its new duties of care for run-off rainwater and urban groundwater (...) can now be financed via the sewerage tax.'[364]

6.8.1 Subject of the levy and levy rate

Article 216 Municipalities Act allows municipalities to introduce a levy/tax by means of a bye-law and this bye-law must stipulate the subject of the levy. The subject is usually the user of the property from which the water runs off and directly or indirectly reaches the county sewer system. The legal basis for the levy regarding the collection and discharge of rain and wastewater is laid down in

[358] Sewerage management needs to be reported in a county sewerage plan (Article 4:22 Environment Management Act). Based on Article 216 of the Municipalities Act the local Council can levy local taxes by means of bye-laws.
[359] Activities include: collection, storage, transport and infiltration of (either after purification) rain in surface water or groundwater.
[360] Activities include: collection, storage, transport and infiltration of (either after purification) groundwater on the surface or in the ground, and the improvement of the water permeability of the ground top layer or hydrological compartment of the ground.
[361] Parliamentary proceedings: Wijziging van de Gemeentewet, de Wet op de waterhuishouding en de Wet milieubeheer in verband met de introductie van zorgplichten van gemeenten (…), (*Kamerstukken II*) 2005-2006, 30 578, Memorie van Toelichting, no. 3, p. 7.
[362] Like the collection and transport of access rain or measures to prevent detrimental effects to the groundwater level.
[363] Parliamentary proceedings: Wijziging van de Gemeentewet, de Wet op de waterhuishouding en de Wet milieubeheer in verband met de introductie van zorgplichten van gemeenten (…), (*Kamerstukken II*) 2005-2006, 30 578, Memorie van Toelichting, no. 3, p. 21.
[364] H.F.M.W. van Rijswick & H.J.M. Havekes, *European and Dutch Water Law*, Europa Law Publishing (2012), p. 436-437.

Article 228a Municipalities Act (*Gemeentewet*), according to which a sewerage levy can be levied to recover the costs of:

a. The collection and transport of urban and industrial wastewater and the purification of urban wastewater;
b. The collection and management of run-off rainwater and measures to prevent or reduce the structural detrimental effects of the groundwater level to the land/territory destination.

The effectuation of this levy is allowable for both costs (a and b above) together in one levy or by means of a separate levy. The local municipalities can decide whether two levies for the different water duties are desirable or not.

6.8.2 Costs to be recovered

The sewerage levy is maximized to 100% of the costs. Regarding the *financial costs* the direct costs and related indirect costs of the service provided can be recovered. Besides the direct costs of the service like operation costs and investment costs, the value added tax (VAT) due is also considered to be a cost component that can be taken into account in the recovery.[365] Legislation does not provide a fixed enumeration of costs that can be included in the cost recovery. However, the cost must be directly or indirectly related to the above-mentioned water tasks. The parliamentary documents mention a number of direct costs that can be taken into account:

- Capital costs of investments in the sewerage system, like replacement costs, renovation costs and de-activation costs; [366]
- Personnel costs for the maintenance of the sewerage, rain and groundwater system;
- Maintenance costs and exploitation costs (costs for pumps, cleaning costs, inspection/research costs).[367]

The indirect costs can be taken into account in so far as they are related to the water service. Indirect costs explicitly mentioned in the parliamentary documents are the personnel costs of policy makers, salary administration costs and housing costs, and other related costs like shipping costs, reproduction costs and literature costs.

Regarding *environmental costs,* the costs related to the protection of surface water can be recovered by means of the sewerage levy if they are related to the municipal sewerage, rain, and groundwater system.[368] Examples mentioned in the parliamentary documents are measures for sewage run-over thresholds, helofyt filters to prevent any deterioration of relatively clean rain discharges, sewage sludge cleaning from basins, but also permit costs.

As stated before, in the Netherlands the *resource costs* are assumed to be included in the mitigating measures that are taken and are assumed to be sufficient to reach the environmental quality level as prescribed in the WFD. The legislation regarding the sewerage levy does not contain specific provisions relating to the recovery of resource costs.

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[365] Article 228a Municipalities Act.
[366] The costs regarding the provision of a new connection to the sewerage system can also be retrieved by means of a charge with a retributive character, based on Article 229 sub. 2 Gemeentewet or via the Land Exploitation Act (*Grondexploitatiewet*) Article 6.2.5 Bro or via an agreement (*anterieure overeenkomst*).
[367] The examples referred to are laid down in parliamentary proceedings (*Kamerstukken II*), 2005-2006, 30578, no. 3, 4.
[368] Parliamentary proceedings: Wijziging van de Gemeentewet, de Wet op de waterhuishouding en de Wet milieubeheer in verband met de introductie van zorgplichten van gemeenten (…), (*Kamerstukken II*), 2005-2006, 30 578, Memorie van Toelichting, no. 3, p. 24.

6.9 Reflections: implementation of the polluter pays principle

The third Commission report on the implementation of the WFD shows that Member States have difficulty in implementing cost recovery for water services. Few Member States have implemented 'a transparent recovery of environmental and resource costs', and neither does it look like the polluter pays principle is being correctly adhered to, the Commission reports.[369] However, it remains unclear which Member States have done well. In reviewing the countries' reports for this research one finds that none of the Member States received full approval for the transparency of the recovery system with regard to environmental and resource costs.

One of the recommendations of the Commission is to base pricing policies on metering. However, this seems difficult to realise in the current Dutch legislative system for the collection and discharge of rain and wastewater if a municipality decides to impose a levy for water service tasks and water system tasks by means of one levy for both costs (a and b). The water services tasks do not have the character of a charge. If a municipality decides to split the levy per activity - which is allowable - in order to be compliant to Article 9 WFD and the polluter pays principle, the water services tasks (sub. a) should, in my view, be levied from the water users and be based on metering.

Germany

In Germany activities regarding the discharge of rain are not considered to be WFD water services. However, the cost recovery principle is applied also with regard to these activities. Previously, the costs regarding the discharge of rain were accounted for in an all-inclusive wastewater charge. However, currently a separate charge for rainwater run-off is applied, which also provides a stimulus for landowners to innovate with regard to the local purification and use of rainwater.

Source: M. Reese, 'Cost recovery and water pricing in water services and water uses in Germany', *Journal for European Environmental & Planning Law,* 10.4 (2013), p. 355-377

Also a critical remark can be made regarding the levy base. In practice the levy base is frequently the economic value of real estate (*WOZ waarde*). A levy by means of a combined levy for both water service tasks and water system tasks based on the economic value of real estate may also not be in line with Article 9 WFD as it does not comply with the polluter pays principle. As outlined in the previous chapter, Member States are allowed to use presumptions in determining causation between activities and pollution/environmental damage, but these presumptions must subscribe to a certain relation between damage or pollution and certain activities.[370] Furthermore, a levy base like the economic value of real estate does not seem to provide adequate incentives to use water efficiently. Therefore, to ensure adherence with the cost recovery principle as included in the WFD, the cost recovery system for sewerage services would need adjustment.[371]

[369] European Commission, Report on the Implementation of the Water Framework Directive (2000/60/EC), COM (2012) 670 final, p. 11.
[370] C-378/08 *ERG and Others*, ECLI:EU:C:2010:126.
[371] See M.P. van der Burg's annotation (*Noot*) in Belasting Blad 2009, 844 on the Supreme Court's decision of 15 May 2009 (no. 07/13148), ECLI:NL:HR:2009:BD5477.

6.10 Jurisprudence regarding the collection and discharge of rain and waste- water

Indirectly related or not ?

As stated before, legislation does not provide a fixed enumeration of costs that can be included in the cost recovery regarding the collection of rain and the discharge of wastewater. The cost must be directly or indirectly related to the above-mentioned water tasks. The question arises which costs can be considered to be indirectly related and which cannot?

This question has arisen on several occasions in the Dutch courts from which some kind of general outline to assess allocation has arisen.[372] In a decision of the Supreme Court of the Netherlands the following outline for assessment was confirmed.[373] The Court of Appeal had to determine whether the costs of dredging and groundwater inspections were correctly included in the cost recovery through sewerage charges (the former system). This depended on the question whether the costs 'were not or were merely marginally' related to the service in question, in this case sewerage services. The Supreme Court confirmed the viewpoint of the Court of Appeal that the guideline of costs that are not or are merely marginally related is applicable when the costs relate to the service for less than 10%. Therefore, if the costs are completely or almost completely related to other purposes, they cannot be considered as costs related to the water service.

The Supreme Court also confirmed the view of the Court of Appeal that one should consider the (main) purpose for which the costs are incurred. But does this automatically lead to non-allocation to, in this particular case, sewerage cost recovery if the related indirect costs are for instance 5%?

In an earlier decision regarding the possibility of allowing a limited cost allocation of research costs the Court of Appeal considered the following (freely translated):

> 'Regarding the cost component "research into the groundwater level" the defendant has stated that less than 10% of these costs were allocated to sewerage costs to be recovered and that this part can be related to the maintenance of the sewer. In this respect the defendant stated that the registration of groundwater levels is also carried out to collect data for the calculation of the necessary fluctuations in groundwater levels and for assessing risks regarding building foundations and dehydration of the ground. The Court of Appeal accepts this reasoning, from which it concludes that in this case a different situation exists from the one which led to the Supreme Court's decision of 31 March 1999, no. 33 427, BNB 1999/221, in which apparently all such costs were allocated to the sewerage costs or the causal relation between those costs while the maintenance of the sewerage system was not sufficiently contended.' [374]

This Court of Appeal's decision had been delivered before the system was changed (from a charge to a levy) in 2008. It is to be expected, in my view, that it will continue to be possible to allocate indirectly related costs to cost recovery by means of a sewerage levy even if the allocated costs do not exceed 10% provided that a sufficient relationship exists between incurring these costs and the services provided.

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[372] Supreme Court of the Netherlands, ECLI:NL:HR:2010:BL0990, 4 June 2010.
[373] *Ibid.*
[374] See also Van Leijenhorst's annotation (*Noot*) in BNB 2010/235 on the Supreme Court's decision of 4 June 2010 (no. 08/00314), ECLI:NL:HR:2010:BL1015.

6.11 Reflections: the effectiveness/direct effect of Article 9 WFD regarding a sewerage levy

The question whether Article 9 WFD has direct effect in the national (Dutch) legal order was put forward in the Dutch lower court as part of an objection by a home-owner to his sewerage levy assessment.[375] In this case the home-owner (and at the same time user) objected to the sewerage levy assessment.[376] This assessment was based on a local bye-law executing the sewerage levy as laid down in Article 228a Municipalities Act and addressed to/levied against the home-owner.[377] The claimant stated that the bye-law, on which the assessment was based, was unlawful because of non-compliance with the WFD. More specifically he stated that the assessment was based on home-ownership and not on home-usership, thereby not adhering to the polluter pays principle as laid down in Article 9 WFD, a principle which should be taken into account in cost recovery. The Court found that it is true that Community law, in this case a Directive, can confer rights on individuals which they can uphold in the national courts if the Directive has not been implemented in the national legal order within the prescribed period or implemented incorrectly. In such a case it should, however, concern obligations which are unconditional and state a clear and sufficiently precise obligation for the Member States. The Court held the view that the wording of the obligations as mentioned in Article 9 WFD offer the Member States a certain room for discretion regarding their execution / implementation as a result of which there does not exist an obligation for the Member States that is unconditional and clear and sufficiently precise. Also the polluter pays principle as mentioned in Article 9 WFD did not change this point of view, as – according to the Court – the claimant was a home-owner having a sewerage connection and therefore had to be identified as part of the category of 'households' as mentioned in the Directive and – because of that – had to pay the sewerage levy as a polluter. The claimant's objection was not upheld.

Although this decision seems clear and logical, the reasoning of the Court in my view is not fully sufficient.[378] The Court did not reflect on the situation that Directive provisions can have direct effect even if they are not unconditional and sufficiently precisely formulated when Member States go beyond their limits of discretion and whether or not that situation occurred here.[379] The Court in my view then also had to examine whether the local authority had exceeded its available discretion. An infringement would be applicable when the competent authority manifestly fails to comply with the requirements of the 'polluter pays' principle.[380] The lower Court, however, does not reflect on this issue at all. Furthermore, the reasoning that a home-owner is to be included in the category of 'households' and therefore is to be considered a polluter is in my view also not conclusive. A home-owner allocated in the category of 'households' does not automatically make him a polluter. The adequate contribution, as Article 9 WFD requests, of the different categories of water uses should comply with the polluter pays principle. That principle contains a number of markers as outlined in EU jurisprudence, one of which is that someone evidently not polluting should not be considered to be a polluter and should not therefore be burdened by the recovery of the costs of the pollution.[381]

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[375] For more reading on direct effect see J.H. Jans, R. De Lange e.o., *Europanisation of Public Law*, Europa Law Publishing (2007), chapter III.

[376] District Court of Arnhem, 26 January 2012, ECLI:NL:RBARN:2012:BV2676, with annotation (*Noot*) by P.E. Lindhout in *Milieu & Recht* 2012/107.

[377] And not levied against the home-user, which in this particular case did not differ, but of course in tenant situations this can be different.

[378] See also my annotation: District Court Arnhem, 26 January 2012, ECLI:NL:RBARN:2012:BV2676, with annotation (*Noot*) by P.E. Lindhout in *Milieu & Recht* 2012/107.

[379] Compare C-72/95*Kraaijeveld*, ECLI:EU:C:1996:404.

[380] Compare C-254/08 Opinion of Advocate General Kokott – *Futura Immobiliare srl*, ECLI:EU:C:2009:264 paras. 58-59.

[381] Compare C-188/07 Opinion of Advocate General Kokott – *Commune de Mesquer*, ECLI:EU:C:2008:174,

Last but not least, if the Court would have justified why the home-owner in in this case was to be considered a polluter, then it should have considered whether the contribution that needs to be paid is proportional. For this it is important to consider that the polluter pays principle does not preclude Member States from varying, on the basis of categories of users determined in accordance with their respective water use capacities, the contribution of each of those categories to the overall costs which are necessary to finance the water service system, but allocation to a category is not allowed to be 'manifestly disproportionate' to the volume or nature of the pollution it produces.[382]

Groenewegen stated in reaction to this Court decision that it is now clear that Article 9 WFD has no direct effect in the Dutch legal order.[383] However, taking into account the above-mentioned omissions in the essential considerations of the Court, this conclusion is also rather bold.

6.12 Pollution levy for discharge into surface waters

The costs for wastewater treatment in the Netherlands are recovered by means of two different levies: the pollution levy for discharge into surface waters and the water purification levy.

The pollution levy for a (direct) discharge into surface waters is based on Article 7.2 Water Act and is instituted by the water regulatory institution (on a State level and/or on regional water authority level). The aim of the pollution levy for discharge into surface waters is to provide an incentive to reduce polluted discharges and to apply the polluter pays principle.[384]

6.12.1 Liability to pay and the rate/tariff

The user of the object or the one discharging is liable to pay the pollution levy. The levy is connected to the object from which the discharge takes place (housing or business accommodation).[385] A limited number of exemptions are available, amongst other things for discharges via the sewerage system.[386] The pollution levy instituted by the State (for discharge into State-regulated waters) is collected by means of assessment like a tax system, but that does not alter the levy character of the amount due.[387] The pollution levy by the State is ensured in the Water Act itself, as the State levy is not allowed without being explicitly laid down in formal legislation.[388]

Based on Article 7.2 sub. (5) Water Act the revenues need to be used for water system management. The levy rate – which for the non-state level can be set by the regional water authority - is based on an assumed pollution unit which refers to the discharge value per person. The intrinsic value of the discharge is based on estimates of the pollution level. For households, there is a levy rate of 3 pollution units, a single pollution unit applies to a single-person household. For companies in principle the levy rate is based on a monitored discharge, taking into account the quality (the pollution level) of the discharge. For some companies that evidently discharge less than a certain pollution level, a fixed (assumed) discharge value is used. Sometimes a franchise (disregarding the minimum level of discharge) is applicable. In this levy the polluter pays principle applies.[389]

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paras. 120 and C-254/08 *Future Immobiliare srl*, ECLI:EU:C:2009:264, paras. 33-35.

[382] Compare C-254/08 *Futura Immobiliare srl*, ECLI:EU:C:2009:479, paras. 52, 56.

[383] Groenewegen, G., annotation (*Noot*): District Court of Arnhem, 26 January 2012 (ECLI:NL:RBARN:2012:BV2676) in *NTFR* 2012/852.

[384] Parliamentary proceedings: Waterbeleid (*Kamerstukken II*), 2009-2010, 27 625, Brief van de Minister van Verkeer en Waterstaat, no. 168.

[385] Article 7.2 Water Act.

[386] Article 7.8 Water Act.

[387] Article 7.10 sub. 1 in conjunction with Article 7.13 sub. 1 Water Act.

[388] Article 104 Dutch Constitution in conjunction with Articles 7.10-7.13 Water Act.

[389] Parliamentary proceedings: Regels met betrekking tot het beheer en gebruik van watersystemen (Waterwet) (*Kamerstukken II*), 2006-2007, 30 818, Memorie van Toelichting, no. 3, p. 61.

6.12.2 Costs to be recovered

With regard to the *financial costs* that can be taken into account in the levy, the legislation itself does not outline what costs may be included. In principle, all direct costs and related indirect costs can be recovered. Direct costs are, amongst others, costs for personnel, housing, specific ICT costs, material costs and overheads. Indirect costs can be recovered if they are related to the service delivered. Examples are costs for policy making, control costs, VAT and – although still disputed – costs regarding legal procedures.[390] However, the Netherlands is of the view that all costs related to this water service (therefore also operation, maintenance and capital costs et cetera if applicable) are *environmental costs* and therefore no specific costs are accounted for as financial costs. The revenues from the pollution levy on discharges into surface waters are also to be used for necessary measures to be taken to prevent or compensate for detrimental effects to the water system. The costs for such measures are therefore to be included in the levy and in this way the environmental costs of this water service are supposed to be accounted for. In fact, as mentioned before, all costs regarding the activities financed by means of the pollution levy, being activities regarding the purification of wastewater, are supposed to relate to environmental costs according to the Directorate General for Public Works and Water Management (RWS).[391]

The Water Act does not contain specific provisions regarding *resource costs* in relation to the purification of surface water in cases of discharges into it. In the Netherlands the resource costs are assumed to be included in the mitigating measures that are taken. One assumes that the current mitigating measures compensate detrimental environmental effects sufficiently to reach the environmental quality level that the WFD requires.[392] Monitoring results show, however, that Dutch (surface) waters do not reach the water quality standards by far.[393]

6.13 Jurisprudence on the pollution levy on the discharge into surface waters and costs

Costs regarding claims for damages

An interesting judgment regarding cost recovery by means of a pollution levy was provided by the Court of Appeal in 2005.[394] And although the former legislation regarding discharges (*Wet verontreiniging oppervlaktewater* (Pollution of Surface Waters Act)) was applicable, the judgment is still relevant insofar as it concerns the possibilities for the water authorities to retrieve the costs of claims for damages via the pollution levy. In this specific case the appellant objected to the inclusion of the costs of claims for damages in the total costs to be recovered via the pollution levy. The water authorities needed to pay damages to the former sludge company.

The Court of Appeal considered in this respect that the costs regarding the specific claim for damages are to be stipulated as costs of measures to discourage and prevent the pollution of surface waters as these costs are to be specified as costs relating to the quality management of surface waters. Also if accounting provisions are used for water quality management, these can be included in the costs to be retrieved.[395]

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[390] Deloitte Belastingadviseur BV for the Ministry of the Interior and Kingdom Relations, Handreiking kostentoerekening, leges en tarieven, 2010, p. 47.
[391] RWS Waterdienst, Kostenterugwinning van Waterdiensten in Nederland, rapport 2008.051, p. 27.
[392] *Ibid.*, p. 14.
[393] CBS, PBL, Wageningen UR (2012). Kwaliteit oppervlaktewater, 2009 (indicator 1438, versie 04, 5 december 2012). www.compendiumvoordeleefomgeving.nl. CBS, Den Haag; Planbureau voor de Leefomgeving, The Hague/Bilthoven en Wageningen UR, Wageningen.
[394] Court of Appeal of Arnhem, 10 November 2005, ECLI:NL:GHARN:2005:AU7323.
[395] The Court of Appeal referred in this respect to: Parliamentary proceedings: Vervanging van hoofdstuk IV van de Wet verontreiniging oppervlaktewateren, (*Kamerstukken II*), 1998-1999, 26 367, Memorie van Toelichting,

6.14 Reflections: the pollution levy and compliance with the polluter pays principle

A parliamentary proposal in 2012 to adjust the State pollution levy for discharges into surface waters was debated as the proposal suggested excluding discharges of heavy metals and magnesium sulphates from the discharge values, effectively leading to a higher rate for businesses that do not discharge these substances and exempting the ones that do from this specific discharge. The tariff increase was justified in the proposal in order to retain the same level of revenues. In the drafting process and legislative history compliance with the cost recovery obligation of Article 9 WFD was addressed.

The Council of State, in my opinion correctly, remarked that by omitting the parameters of heavy metals and magnesium sulphates from the levy base and increasing the rate for the pollution units for companies that discharge so-called oxygen-binding compounds (*zuurstofbindende stoffen*), these companies are in fact paying for those companies that do (also) discharge heavy metals and magnesium sulphates. Furthermore, the Council of State requested a further justification with regard to the effects of this proposed change on the incentive function of the pollution levy.

The polluter pays principle does not entail, in my view, that levy systems cannot be changed. In fact, if, for instance, the specific pollution is no longer present or the pollution does not incur extra costs, it may very well be defensible that the levy system is changed. In the Netherlands, the Dutch government wanted to simplify the pollution levy for discharges into surface waters. In itself this was a legitimate aim. However, in this situation the legislator was not able to provide conclusive justification for the exemption of the specific pollution substances (heavy metals and magnesium sulphates) from the levy base other than one of efficiency. The total related costs of the levy in relation to the revenues was considered to be disproportional. Only at the second instance did the legislator state that the costs regarding the discharge of one sort of pollution (like heavy metals) could not be separated from the other costs regarding water quality management and that this was a further justification as to why the companies discharging heavy metals were not to be levied an extra amount.[396] On the other hand, the legislator had previously contended that a number of heavy metals were included in the levy base because extra costs were incurred. This implied that at that time, in 1993, one did have an insight into the extra costs incurred due to discharge of heavy metals; an insight that the legislator is not able to reproduce in 2014.[397]

Although the legislator does state that the discharge of heavy metals has decreased significantly over the years and that the related cleaning up of heavy metal-polluted water beds has mostly been completed, implying that no extra costs will be incurred with respect to this type of discharge, it still increases the levy rate to ensure the same revenues for water quantity management. In my view, the legislator is caught between a rock and a hard place, on the one hand justifying the exemption from the levy base on the fact that costs are no longer incurred for this specific type of discharge and, on the other, stating that the costs involved cannot be separated from the other costs of water quality management.

From a polluter pays point of view, it should be decisive whether this discharge incurs extra costs. If so, the polluters in this discharge of heavy metals should be the ones who pay for the costs incurred and not companies that do not discharge these substances. If, for reasons of efficiency, the

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no 3, p. 3 where it is explicitly mentioned that accounting provisions for costs relating to quality management are allowed to be considered as costs to be retrieved.

[396] Parliamentary proceedings: Wijziging van de Waterwet en enkele andere wetten (…), (*Kamerstukken I*), 2013-2014, 33 503, C, Memorie van Antwoord, p. 2-3.

[397] Parliamentary proceedings: Wijziging van de Waterwet en enkele andere wetten (…), (*Kamerstukken II*), 2012-2013, 33 503, Nota naar aanleiding van het verslag, no. 6, p. 3.

government does not recover those costs, that in itself does not make the levy system unlawful. However, raising the rate also for companies that do not discharge these substances, in combination with the above outlined arguments, is in my view not in line with the polluter pays principle.

Last but not least, an interesting detail with regard to the incentive function of the levy on heavy metals: the legislator has stated that the levy system has surely contributed to company innovation with regard to cleaning-up processes. However, according to the legislator the abolition of the levy on heavy metals will not lead to an increase in discharges, because of the permit requirements that will be maintained. This seems to be a logical conclusion, as companies that have innovated over the years, perhaps in order to decrease their levy costs, are not likely turn the clock back. However, at the same time, the legislator states that it is not clear which part of the reduction in the discharge of heavy metals over the years is to be attributed to the permit requirements or to the levy.[398] And at the same time, according to a letter by the Minister in 2010, the levy has provided an adequate incentive to reduce discharges of heavy metals and salt effectively. The arguments of the legislator seem somewhat ambivalent in this respect.

6.15 Purification levy

The purification levy, as another part of the cost recovery instruments for wastewater treatment services, is levied by the regional water authorities and is only to be used to cover the costs related to the purification of wastewater (Article 122d Water Authorities Act). Furthermore, the revenues may also be used for providing subsidies for the costs of measures that dischargers need to take with regard to the purification of water (Article 122d sub. (5) Water Authorities Act) and for providing subsidies to the payers of levies to ensure that their purification plants will not be shut down.

6.15.1 Liability to pay and the rate/tariff

The levy is directed against households and businesses (Article 122d sub. (3) Water Authorities Act).[399] The polluter pays principle is the main principle underlying this levy, as the pollution quantity and the quality of the discharge transported in a year forms the levy base (Article 122e Water Authorities Act).[400]

The levy rate is based on an assumed pollution unit which refers to the discharge value per person (for households). The intrinsic value of the discharge is based on estimates of the pollution level.[401] For households a levy rate of 3 pollution units is used, while there is a single pollution unit for a single-person household. It is however possible, by means of a water authority bye-law/regulation to base the pollution level of a unit (for households) on m3 drinking water delivered (the so-called *waterspoor* (water trail)). The data on water use in that situation will have to be provided by the drinking water company (Article 122h sub. (2) Water Authorities Act).

For companies, in principle, the levy rate is based on a monitored discharge, taking into account the quality (the pollution level) of the discharge or on an assumed quality of the discharge.[402] If certain

[398] Parliamentary proceedings: Wijziging van de Waterwet en enkele andere wetten (…), (*Kamerstukken I*) 2013-2014, 33 503, E, Nadere Memorie van Antwoord, p. 1.
[399] Municipalities, which are responsible for the sewerage system, are only levied for the discharge they are responsible for themselves.
[400] If the so-called 'waterspoor' is applied, i.e. basing the pollution level of a unit (for households) on m3 of drinking water delivered, the user pays principle emerges as the main underlying principle, as the volume of the discharge may not always imply the level of pollution involved.
[401] It is possible by means of a Regional Water Authority Regulation to base the pollution level of a unit (for households) on m3 drinking water delivered (Article 122h sub. 2 Water Authorities Act).
[402] Article 122 j Water Authorities Act.

criteria are met, a company being subjected to a levy may request to have the pollution units assessed by a specifically prescribed method. In the Netherlands such companies are referred to as 'tabelbedrijven'. The assessment method for 'tabelbedrijven' is based on the amount of water used (and therewith not the amount of water discharged!) and a certain assumed wastewater coefficient.

The method used to effectuate the levy can be by means of assessment, by means of payment on return (filing) or in another way, but not by means of prepayment on assessment.[403] The levy rate is set by the general board of the regional water authority (Article 110/111 Water Authorities Act).

6.15.2 Costs to be recovered

Regarding the *financial costs* that can be taken into account, these include at least the costs relating to the building and exploitation of water purification plants, but also costs relating to plans/policy, costs relating to permits and control activities, documentation and levy costs, management and external communication costs and costs relating to cooperation with municipalities (as they are responsible for the sewerage system).[404]

The revenues from the purification levy may also be used for providing subsidies for the costs of measures that dischargers need to take with regard to the purification of water. This is explicitly laid down in Article 122d sub. (5) sub. (a) Water Authorities Act. The revenues may also be used for providing subsidies to levy subjects to ensure that purification plants will not be shut down.[405] Can these be considered *environmental costs*? The former - financing, by means of subsidies, the costs of measures to ensure the purification of water - can reasonably be considered to be related to the limitation of environmental costs. Article 9 (3) WFD allows the funding of, in particular, preventive or remedial measures in order to achieve the objectives of the Directive. The latter - providing subsidies to prevent the shutting down of purification plants 'in order to prevent an increase in the tariff' – is in my view a different case. Even though detrimental environmental effects are prevented by ensuring the existence of these purification plants, the legislator explicitly mentioned the reason for this financing possibility: preventing a tariff increase. That is not an environmental protection issue, but an economic or financial goal to be reached.

The legislation with regard to the purification of wastewater does not contain specific provisions relating to the recovery of *resource costs*. I presume that, as with the other stipulated water services in the Netherlands, these are assumed to be included in the mitigating measures that are taken and are assumed to be sufficient to reach the environmental quality level as prescribed in the WFD.

6.16 Jurisprudence on the purification levy and the use of assumptions

There are several judgments regarding the purification levy. For this research, however, I have very strictly screened the relevance of these decisions for the subject of cost recovery. One judgment, which is illustrative of the use of assumptions in the purification levy system, will be addressed.

A company subjected to a levy may request to have the pollution units assessed by a specifically prescribed method, provided certain conditions for application are met. The assessment method for these so-called 'tabelbedrijven' is based on the amount of water used and a certain assumed wastewater coefficient. The Court of Appeal had to determine whether it was justified to make a correction to the amount of water used, which would – if allowed – result in a lower purification levy assessment.[406] In this specific case the levy subject owned a distillery and appealed against the

[403] Article 125 Water Authorities Act.
[404] Deloitte Belastingadviseur BV for the Ministry of the Interior and Kingdom Relations, Handreiking kostentoerekening, leges en tarieven, 2010, p. 32.
[405] Which would result in an increased tariff.
[406] Court of Appeal of The Hague, 20 October 2010, ECLI:NL:GHSGR:2010:BO1947.

preliminary purification levy assessment. The appellant was of the view that the water used for the production process and the product itself – being water that is not discharged into the sewer system – should not be accounted for when calculating the levy due. The Court of Appeal stated, however, that the relevant Dutch legislation for 'tabelbedrijven' does not allow any deviation from the fixed calculation methodology. It determined that this methodology has a 'fixed character'.

This consideration by the Court of Appeal was repeated in several judgments, thereby making it perfectly clear that if the calculation method for 'tabelbedrijven' is used, deviations from this method are not allowed, even if the final assessment does not comply with the actual amount of water discharged into the sewer.[407]

6.17 Groundwater management

The costs for groundwater management are recovered by means of a groundwater abstraction levy. The Provincial Council can levy the water abstraction units/companies. The legal basis on which the levy is based is Article 7.7 Water Act in conjunction with Articles 145 and 220 Provincial Act (regarding the competence of the Provincial Council).

Article 7.7 Water Act mentions, in a limited fashion, for which costs the levy can be implemented:

- The costs of measures directly related to the prevention and reduction of the detrimental effects of groundwater extraction and infiltration of water;
- Research costs necessary for groundwater management policy;
- Administrative costs regarding the obligation to keep a register of the extractions of groundwater and infiltration of water;
- Compensation costs for those who endure detrimental effects/damage from the permitted groundwater management activities (Article 7.14 Water Act). Therefore not for those resulting from a tort;
- Research costs regarding claimed damages due to permitted groundwater extractions or infiltration of water.

The method for effectuating the levy is laid down in the Provincial Act (Article 227c), which states that provincial levies/taxes can be levied by means of assessment, payment on return (filing) or in another way, but not by means of prepayment on assessment.[408]

In case of damages due to groundwater abstraction that cannot reasonably be prevented, the coverage of the costs is first to be ensured by the permit holder.[409] If the causal relation between the damage due to groundwater level fluctuations and the specific groundwater abstraction is not established (within a reasonable time), the claimant can request the province in which the real estate is situated to compensate the damage, in return for which the province gains a right of recourse.[410]

As for certain forms of damage where it is not evident that the costs can be retrieved from the instigator, coverage by means of the groundwater abstraction levy will take place. Examples from parliamentary history regarding the former Groundwater Act[411] are for instance situations in which:

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[407] See also Court of Appeal of The Hague, 5 January 2010, ECLI:NL:GHSGR:2010:BL4536; District Court of Roermond, 20 March 2012, ECLI:NL:RBROE:2012:BW0437.
[408] As an example: some provinces use the abstraction and infiltration data that a user needs to report based on Article 6.11 Waterbesluit (an administrative order) as 'filing' by the user (Province Utrecht, 2012); some provinces request a separate filing for levy purposes (Province of Groningen, 2012).
[409] Article 7.18 Water Act.
[410] Article 7.19 Water Act.
[411] Parliamentary proceedings: Wijziging van de Grondwaterwet (verbreding heffingsdoeleinden),

- The abstractor cannot reasonably be requested to cover the damages due to the long duration during which abstractions took place;
- In situations where there is no damage as such, but preventive and other measures need to be taken to prevent (ground) dry out;
- The abstractor no longer exists.

The principle that the instigator/originator of the damage needs to cover the costs clearly underlies this system.

6.17.1 Liability to pay and the rate/tariff

The groundwater abstraction levy is levied from designated abstraction units/companies.[412] Exemptions regarding levy liability are laid down in Article 7.1 of the administrative order (*Waterbesluit*). Exempt are, for instance, closed geothermic heat systems, abstractions for groundwater purification purposes and for land ice rink purposes.

The levy is based on the user pays principle, as the levy base is m3 amount of water abstracted, minus the amount of m3 infiltrated.[413]

The tariff per m3 is set by the Provincial Council in its regulation.[414] The expected revenues may not exceed the expected costs. The revenues from the levy are exclusively to be used for measures to rectify the negative consequences of water abstraction and infiltration.

6.17.2 Costs to be recovered

As mentioned above the Water Act provides a limited list of costs that can be recovered by means of the groundwater abstraction levy (Article 7.7 Water Act). Policy research costs and register costs can be stipulated as *financial* (service) *costs*. Other related bureaucracy costs incurred by the Provincial Council are not to be financed by means of the groundwater abstraction levy. The bureaucracy costs are paid for by the general budget of the Provincial Council.[415]

Compensation costs for those who endure detrimental effects/damage from the permitted groundwater management activities (Article 7.14 Water Act) can also be recovered by the groundwater abstraction levy. Depending on the type of damage to be compensated that compensation may either be financial costs or environmental costs.

A groundwater abstraction levy can be implemented amongst other things for the costs of certain measures directly related to the prevention and reduction of the detrimental effects of groundwater extraction and infiltration of water. These costs can also be for compensation, including research costs, for those who have to endure detrimental effects or suffer damage due to the permitted activities. These costs can be considered *environmental costs*. Again, regarding the *resource costs*, in the Netherlands the resource costs are assumed to be included in the mitigating measures that are taken.[416]

6.18 Reflections: Environmental costs and agricultural water abstractions

A particular feature of the Dutch legislation needs to be mentioned relating to environmental costs due to groundwater abstraction. An abstraction permit is only needed for large water abstractions

(*Kamerstukken II*), 1995-1996, 24 546, Memorie van Toelichting, no. 3, p. 5-6.
[412] Article 7.7 sub. 2 Water Act.
[413] Infiltration is regulated and only allowed if it is mentioned in the company's/unit's permit.
[414] Article 7.7 Water Act in conjunction with Article 145/220 Provincial Act.
[415] See also RWS Waterdienst, Kostenterugwinning van Waterdiensten in Nederland, rapport 2008.051, p. 29 regarding cross-subsidies.
[416] *Ibid.*, p. 14.

for industrial use (>150,000 m3 per annum) and for abstractions for drinking water supply and soil energy systems or in case of abstractions exceeding 10 m3 per hour (with regularly a franchise of 150,000 m3 per annum). This effectively means that, for instance, individual agricultural abstractions that remain below the permit requirements are not considered to use the water service of groundwater management. One may however question whether that is in line with Article 9 WFD. The definition of water services in the WFD is rather clear on this point: Water services means *all* services (…). Therefore, not applying cost recovery for the agricultural extractions due to the size of the individual extractions, effectively omitting payment for this water service by one (a whole) specific category, i.e. agriculture, does not seem to comply with the Directive.

The argument of exempting agricultural abstractions based on the limited or minimal use of the water service in my view also does not comply with the Directive as exemptions from the application of cost recovery should be based on the derogation possibilities as mentioned in Article 9 WFD. The Netherlands may, with regard to the cost recovery obligation, take into consideration the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected. The point of view that for smaller abstractions no use is made of the water service groundwater management seems rather strange and many small abstractions may have detrimental environmental effects which are equivalent to one large abstraction.[417]

Water use by agriculture in the Netherlands (million m3)[418]

		2009 (SO)	2010
Water use		140	166
a.o.	Mains water (*leidingwater*)	47	44
	For cattle	26	25
	Water for greenhouse cultivation	2.3	2.2
	Groundwater (irrigation)	39	54
	Surface water (irrigation)	6.5	14
	Groundwater or surface water (irrigation)	8.2	12
	Groundwater or surface water (for cattle)	37	40

As stated before Article 7.7 Water Act mentions, in a limited fashion, for which costs the groundwater levy can be implemented. The costs mentioned in Article 7.7 Water Act can only be retrieved by the Province from permit holders.[419] Environmental damage due to, for instance, small abstractions therefore have no legal basis for coverage by /recovery from the one causing the damage. Furthermore, the Province has room for discretion when deciding to recover damages paid to third parties due to abstractions from permit holders. There is no legal requirement to do so, as the legislation states that the Province 'can' recover instead of 'must'. This does not seem to be in line with the polluter pays principle.

[417] Nor is the absence of a significant (negative?) effect on water relevant, as the significance of the impact on water is only relevant to determine water uses, and not water services (see Article 2 (39) WFD in comparison to Article 2 (38) WFD). As the Netherlands considers groundwater management to be a water service, exemptions from the application of cost recovery should be based on the derogation possibilities in Article 9 WFD.

[418] Figures by CBS, PBL, Wageningen UR (2012), Watergebruik in de land- en tuinbouw 2001-2010, [http://www.compendiumvoordeleefomgeving.nl/indicatoren/nl0014-Watergebruik-landbouw.html?i=11-61].

[419] See Articles 7.17, 7.18 Water Act.

6.19 Reflections: water (availability) as a decisive element in policy making (equity)

Recently a discussion has commenced regarding the question of whether the availability of water should be a leading factor in policy-making decisions or water requests. In this respect it is interesting to point to the advice of the Advisory Committee on Water in 2013 regarding freshwater availability (which partly comes from groundwater).[420] As a matter of principle the Committee has advised that shortages of freshwater should be limited to the fullest extent, advising a strategy of 'facilitating activities if possible and accepting water shortage where necessary'.[421] It has stressed that compliance with the WFD should be seriously considered when allowing extra (additional) water requests. Even the reallocation of activities is mentioned. In my view this is a significant debate instigated by the Advisory Committee on Water. It points out the crux of what it is all about: should society accept limitations such as the non-execution of (economic) activities or the reallocation of activities in order to prevent the depletion of water resources? The natural rate of the recharge or recovery of the water resources should be a leading factor in decision making and only in the case of very significant (temporary) interests should this starting point be deviated from. Such a deviation should, if reasonably possible, also entail cost allocation to the users or polluters who instigated the water request beyond the natural recovery rate. If the polluter pays principle and the user pays principle are leading principles in 'normal' water use, extra weight should be attached to them in the case of additional excessive water use beyond the natural recovery rate of the water resource.

Having water availability as a decisive element in policy making is indeed a new point of view, a different way of thinking about water and water use. The importance of the viewpoint taken in what should be decisive in water policy is of importance for equitable purposes. Equitable water use in policy making requires a constant weighing of environmental, social and economic needs. If policy making would start by using water availability as a starting point, it may result in a different way of reaching equitable results in the future. Water availability will have acquired a sort of 'higher' ranking (starting point, principle) than social or economic factors. If this starting point in the reasoning would systematically be laid down in water policy, the acceptance that perhaps not every desire relating to water can be fulfilled, would internalize. It may even provide for new innovative solutions to water shortages. In fact, it is a whole new way of thinking.

6.20 Jurisprudence regarding the groundwater levy

The applicable rate for the groundwater abstraction levy is set by the Provincial Council in its regulation. In principle, the Provincial Council has room for discretion in assessing the rate and to ensure that service-related costs are covered by the set rate. However, the method used should not be arbitrary or unreasonable, as was confirmed by the Court of Appeal of 's Hertogenbosch.[422] This Court heard a case regarding the setting of the rate for the abstraction of groundwater. The appellant, a designated abstractor, was charged a groundwater abstraction levy based on the Provincial bye-law. This bye-law stated that the rate for the groundwater levy was Dfl. 150 for abstractions less than 7500 m3. For abstractions exceeding 7500 m3, for every additional m3 an amount of Dfl. 0.02 was due. The appellant disagreed with this difference, stating that he was only obliged to pay the amount of water abstracted in m3 x Dfl. 0.02 and not the amount of Dfl. 150. The Province held the view that the amount of Dfl. 150 was supposed to cover the costs of the execution and collection of the groundwater abstraction levy. Furthermore, the Province outlined that the rate of Dfl. 0.02 per m3 covered relating costs. The Court of Appeal determined, based on these two outlines regarding

[420] Advisory Committee on Water (*Adviescommissie Water*), Advies Zoetwatervoorziening, 11 March 2013, AcW-2013/41609.
[421] *Ibid,* p. 5.
[422] Court of Appeal 's-Hertogenbosch, 26 May 2004, ECLI:NL:GHSHE:2004:AQ1739.

the rate/tariff structure, that the related execution and collection costs decrease when the water abstraction increases and that as from 7500 m3 obviously the assessment does not include any costs for execution and collection. As no sufficient explanation was provided by the Province for the absence of any costs regarding execution and collection in case of larger abstractions, the fixed rate for abstractions less than 7500 m3 was judged to be arbitrary and unreasonable.

6.21 Regional water management – the water system levy

In the Netherlands regional water management includes the governance and maintenance of the (regional) water infrastructure (waterways, regional flood protection/dykes et cetera) which aims to control water quantity in the area. It also includes all activities aiming to improve the (regional) surface water quality (excluding wastewater purification).

6.21.1 Liability to pay and the rate/tariff

To finance these activities, regional water authorities can levy a water system levy up to a maximum of the related costs (100%).[423] The revenues are only to be used for the costs related to the water system management. The costs are levied against the following user groups (categories):

a. Inhabitants in the district of the regional water authority who are registered as such at the beginning of a calendar year and use residential space (households)
b. A person owning, possessing or having a property/an indefeasible right to untilled real estate;
c. A person owning, possessing or having a property/an indefeasible right to nature areas/undisturbed grounds;[424]
d. A person owning, possessing or having a property/an indefeasible right to 'built-up' real estate.[425]

The levying method, without going into too much detail, can be described as follows. The regional water authority has the obligation to lay down in a in bye-law the cost allocation to the different categories. The total costs to be recovered are allocated to the above-mentioned categories based on a prescribed method which is laid down in the Water Authorities Act.

For that part of the total costs to be allocated to category 'a' (inhabitants) the inhabiting population density within the district of the regional water authority is decisive. The cost part to be allocated to this category is regulated and varies between a minimum of 20% in case of a low population density to a maximum of 60% of the total costs to be recovered in case of high population density.[426] The allocation with regard to categories b-d (above) and their interrelationship is based on the economic value of the property in that category and this valuation is prescribed in the administrative order (*Waterbesluit*).

By means of a bye-law the allocation of two cost types can differ from the above system. The regional water authority is allowed – but not obliged - to allocate the following costs directly to the category in question:

- Recovery and collection costs (*kosten van heffing en invordering*)

[423] Article 117 Water Authorities Act.
[424] The category qualification is of importance as the applicable tariff differs. For instance, the applicable tariff for nature areas is lower than for untilled real estate. For further reading (in Dutch): P.E. Lindhout, annotation, judgement of the Court of Appeal of Zwolle (ECLI:NL:RBZLY:2012:BY2026) in *Milieu & Recht*, no, 1 (2013), p. 61-64.
[425] Article 117 Water Authorities Act.
[426] Article 120 (2) (3) Water Authorities Act.

- Election costs for the general board members (*kosten van verkiezingen van leden van het algemeen Bestuur*)[427]

When the total costs to be recovered have been divided between the categories, also the levy effectuation method within the categories is prescribed.[428] For inhabitants the rate to be applied is based on an equal amount per living unit. For untilled real estate and nature areas (b & c) the rate should be set at an equal amount per hectare and for real estate the rate is a fixed percentage of the economic value of that real estate. The actual rate is set by the Water Authority in a bye-law.[429]

For a limited number of objects within one of the categories the levy rate can be adjusted, using a differentiated rate. For example: lower for real estate situated outside of dykes, lower for untilled real estate which is used for water storage, but higher for public roads or areas under glass (*glasopstanden*). The maximum adjustment is laid down in the Water Authorities Act.[430]

The effectuation of the water system levy can be executed by means of assessment, payment on return (filing) or in another way, but not by means of prepayment on assessment.[431]

6.21.2 Costs to be recovered

Regarding *financial costs* in principle all direct costs and related indirect costs can be recovered. Direct costs are, amongst others, the costs for personnel, housing, specific ICT costs, material costs and overheads. Indirect costs can be recovered if they are related to the service delivered. Examples are costs for policy making, control costs, VAT and – although still disputed – costs regarding legal procedures. The preliminary cost budget[432] is the basis for the recovery of the costs and reflects the net costs, an amount for unforeseen costs, costs regarding the settling of debts, expected dividend amounts and other revenues, expected revenues from levies, additions and abstractions from reserves et cetera.[433]

The Water Authorities Act does not provide any obligation to specifically use the recovery revenues to rectify *environmental* damage that arises from water (system) use. The Act only mentions that the revenues from this levy need to be used to cover the costs of water system management.[434] The revenues can be used for the general task of caring for the water system and ensuring wastewater purification (Article 1 Water Authorities Act). There is no formal relation between (part of the revenue) and specifically the rectification of environmental damage related to the water service.

Costs regarding damage in case of excess water or flooding due to morphological changes to dykes or other activities enlarging the storage or carry-down capacity of water systems are costs that can be recovered (if they are related and is possible from permit holders).[435]

Also payments by the regional water authority regarding compensation for lawful acts by the authority are to be included in the costs to be recovered. Costs in this respect can be – for instance - compensation costs for damage to users/owners of land that are confronted with the detrimental effects of the land use due to the necessary and deliberate flooding of the property for water

[427] Article 120 Water Authorities Act.
[428] Article 121 Water Authorities Act.
[429] Article 110/111 Water Authorities Act.
[430] Article 122 Water Authorities Act.
[431] Article 125 Water Authorities Act.
[432] Article 4.24 sub. 3 *Waterschapsbesluit* (administrative order).
[433] Deloitte Belastingadviseur BV for the Ministry of the Interior and Kingdom Relations, Handreiking kostentoerekening, leges en tarieven, 2010, p. 144-148.
[434] Article 117 Water Authorities Act.
[435] Article 1.1 in conjunction with Article 2.1 in conjunction with Article 7.15 Water Act.

management.[436] The payment of such compensation is however not a guarantee that the environmental damage is rectified.

For regional water management tasks, related *resource costs* (if any) are assumed to be included in the mitigating measures that are taken. As however monitoring results regarding the water quality level to be reached (according to the WFD) show a rather poor water quality, a further assessment of related resource costs and the recovery thereof is to be preferred.[437]

6.22 Reflections: the water system levy and the polluter pays principle

The water system levy has a double character: on the one side, the allocation of part of the total costs to the inhabitants of the district reflects a certain solidarity. The part of the levy on inhabitants is based on the number of inhabitants within the water authority district. Each household pays the same amount.

The other part of the cost allocation is based on profits that the service provides to this category of users. This part depends on their interest in the water service.[438] As the profit principle underlies this cost recovery method, the choice to base cost allocation on the economic value in the different categories is understandable.

The double character of the levy complies with the fact that regional water management relates to activities from which everybody in the district profits (the general interest) as well as to activities for the benefit of a specific group (specific interest).[439] Financing systems based on the profit principle usually reflect the incorporation of the user pays principle. As users are usually, but not always, also polluters, finance mechanisms based on the profit principle would be compatible with the requirements in Article 9 WFD. However, there may be situations where the polluter pays principle is not, or is not sufficiently, adhered to in financing mechanisms based on the profit principle.

For the water system levy, even if one would consider the categories as mentioned in Article 122 Water Authorities Act to be categories of polluters, European case law implies that such a presumption must be based on plausible evidence capable of justifying the presumption (of polluting or damaging activities).[440] 'Use' may be such an activity on which the presumption may be based, however, not all use results in environmental damage. Furthermore, the cost allocation between the categories may not result in a manifestly disproportionate allocation in relation to the pollution capacity. Even though the water system levy is (partly) based on the profit principle, profit as such does not always comply with the polluter pays principle. Therefore, the water authorities will have to justify both the cost allocation to the respective categories also from a polluter pays perspective and the rate differentiation within a certain category.

In Dutch practice, for instance, rate differentiation is applied to public roads to a maximum increase of 400%.[441] Differentiation is applied *within* a cost allocation category, in this case untilled real estate. One may question whether and how the polluter pays principle should be taken into account.

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[436] Article 5.26 Water Act.
[437] CBS, PBL, Wageningen UR (2012). Kwaliteit oppervlaktewater, 2009 (indicator 1438, versie 04, 5 december 2012). www.compendiumvoordeleefomgeving.nl. CBS, Den Haag; Planbureau voor de Leefomgeving, Den Haag/Bilthoven en Wageningen UR, Wageningen.
[438] Parliamentary proceedings: Wijziging van de Waterschapswet en de Wet verontreiniging oppervlaktewateren (…), (*Kamerstukken II*), 2005-2006, 30 601, Memorie van Toelichting, no. 3, p. 14.
[439] *Ibid.,* p. 23.
[440] See section 5.7.2.
[441] Article 122 (3) sub. c Water Authorities Act.

Rate differentiation for public roads was introduced in 2009 because of the fact that roads may lead to a peak in water transport, requiring a relatively high capacity for the water system. A further justification was that roads form one of the most important diffuse sources of pollution, a form of pollution which needs to be countered.[442] The maximum rate differentiation was set at 100%.

In 2010 a parliamentary resolution was agreed upon in which the government was requested to allow the water authorities to raise the maximum rate for road owners from 100% to 400%, in order to lower disproportionate rates for farmers/agriculture. This resolution was brought forward because of the intended rate increase in Midden-Delfland (a specific area in the Netherlands), in which area a great deal of infrastructure is available. As the value of infrastructure is relevant for the cost allocation for the water system levy, a correction by rate differentiation would be necessary to ensure no disproportionate results. Therefore, one may conclude that the change in Dutch legislation from rate differentiation for road owners of a maximum 100% to a maximum of 400% has been introduced to correct 'disproportionate costs' for farmers.

As rate differentiation is an exemption from the regular cost recovery methodology, in my view the application thereof needs to be soundly justified. The fact that the application of the regular methodology results in higher costs for farmers as such is not a sufficient reason to apply differentiation. The parliamentary process clearly outlines that differentiation is a correction mechanism to correct 'disproportionate' costs for farmers. As agriculture is one of the largest causes of diffuse pollution, a correction to benefit agriculture at the expense of road owners seems not to be in line with the polluter pays principle if it is not accompanied with very sound justification as to why application of the regular methodology would lead to disproportionate results. This justification needs to answer at least the following questions:

- Why apply a correction for farmers at the expense of roads if farmers are – like roads – also an important source of diffuse pollution? The sole argument of a difference in hectares does not suffice from an environmental point of view if it is not underpinned with (at least assumed) polluting data.
- Is it ensured that no other category or sub-category will have to bear costs that are evidently disproportionate to its polluting capacity and the nature of its pollution?[443] A comparison between the different categories therefore needs to be made.

If these questions are not sufficiently addressed, one may uphold the view that the water authorities do not adhere to the boundaries of their room for discretion in applying the possibility of a tariff rate differentiation.

6.23 Jurisprudence regarding the water system levy and the category assessment

As stated before, the costs are levied from specific user groups (categories), being:

a. Inhabitants in the district of the regional water authority who are registered as such at the beginning of a calendar year and use residential space (households)
b. A person owning, possessing or having a property/an indefeasible right to untilled real estate;

[442] See to this end: Parliamentary proceedings : Wijziging van de Waterschapswet en de Wet verontreiniging oppervlaktewateren (…), (*Kamerstukken II*), 2006-2007, 30 601, Amendment Lith/Lenards of 12 October 2006, no. 15.
[443] C-254/08 *Futura Immobiliare,* ECLI:EU:C:2009:479, paras. 52, 56.

c. A person owning, possessing or having a property/an indefeasible right to nature areas/undisturbed ground;
d. A person owning, possessing or having a property/an indefeasible right to 'built-up' real estate.[444]

The qualification of the category is of importance as the applicable tariff differs. Since 2009, when the category of nature areas/undisturbed ground was introduced, numerous court cases followed as the applicable tariff for nature areas is lower than for untilled real estate.[445] Three of these cases will be highlighted below in order to illustrate the assessments made, together with some personal notes.
The District Court of The Hague had to judge whether the water system levy was correctly based on the assessment of the ground as 'untilled real estate' instead of a 'nature area'.[446] In this respect the definition of a nature area is of importance: *untilled real estate of which arrangement and maintenance is 'completely or almost completely' and 'durably' focused on the 'preservation or development' of nature*.[447] The collector of the levy was of the opinion that as agricultural activities took place on the ground in question and as intensive pasture (grazing) was still possible, it could not be assessed as a nature area. The appellant disagreed with this point of view and stated that he had received a rearrangement and function change subsidy from the Province and that he had thereby agreed under a (private law) contract to use the ground in such a way as to preserve its nature. The Court considered that both parties agreed that the sole fact that agricultural activities were taking place in itself does not have to be decisive if and as long as the nature function is the main function. The Court considered that the above-mentioned (private law) contract and the fact that the current agricultural activities fully served the purposes of nature preservation, without a sufficient objection by the levy collector against this, were sufficient to uphold the position that the ground should be categorised as nature area. The nature function, even if agricultural activities were taking place, was indeed the main function.

The Court of Appeal of Arnhem in its judgement of 29 November 2011 (also considering a matter regarding the assessment as a nature area) was more explicit as to how to interpret 'completely or almost completely and durably focused on the preservation or development of nature'.[448] It considered that 'completely or almost completely' was to be interpreted as '90% or more', outlining that the arrangement and maintenance of the ground were only limitedly, less than 10%, to be focussed on purposes other than the preservation and development of nature. It also provided information on how one should assess to what extent the arrangement and maintenance of ground are focussed on the preservation and development of nature. It should be assessed to which extent the ground is arranged and actually used (*daadwerkelijk worden gebruikt*) for other purposes.

From its decision in this specific case one can conclude that it was a very factual examination, as the Court of Appeal concluded that in this matter the cattle grazing on the ground served the

[444] Article 117 Water Authorities Act.
[445] Amongst others Court of Appeal of Arnhem, 29 November 2011, ECLI:NL:GHARN:2011:BU7721; District Court 'of The Hague, 18 May 2011, ECLI:NL:RBSGR:2011:BQ8436; District Court of Zwolle, 24 October 2012, ECLI:NL:RBZLY:2012:BY2026; District Court of Dordrecht, 22 June 2012, ECLI:NL:RBDOR:2012:BX0095 and ECLI:NL:RBDOR:2012:BW9615; District Court of Utrecht, 29 March 2013, ECLI:NL:RBMNE:2013:BZ5924; District Court of Zwolle, 22 June 2012, ECLI:NL:RBZLY:2012:BW9591.
[446] District Court of The Hague, 18 May 2011, ECLI:NL:RBSGR:2011:BQ8436.
[447] Article 116 Water Authorities Act [emphasis added; freely translated].
[448] Court of Appeal of Arnhem, 29 November 2011, ECLI:NL:GHARN:2011:BU7721.

purposes of meat production and cattle breeding and the grasses situated in the fields were thereby fertilized.

However, the fact that it is difficult to provide objective qualification markers for the category assessment testifies to the difficulty in applying the '90% or more' rule and this was made clear in a case which had to be decided by the District Court of Zwolle.[449] In that case the collector of the levy sent the appellant a water system levy assessment based on the category 'untilled real estate' instead of 'a nature area'.[450] The appellant objected to this assessment, explaining that he had bought the land to develop into a nature area and was actually executing this development. The Court referred to the assessment criterion (90% or more) in the judgement of the Court of Appeal of Arnhem (above), but applied it in a different way. It considered to which extent activities can take place for purposes other than nature. The Court assessed what minimum agricultural production was (in theory) possible during this development stage of the area. It concluded that this theoretical production was 38% and thus exceeded the limit of 10%, of which arrangement and maintenance is allowed to be focussed on purposes other than nature. The fact that this agricultural production was not taking place or that the maintenance was in compliance with the preservation or 'development' of nature was not considered relevant.

I wrote a critical note against this judgment.[451] The 'development of nature' is explicitly mentioned in the definition of a nature area, on which development arrangement and maintenance is to be focused completely or almost completely and durably. In the parliamentary documents it is stressed that also the factual or final designation of the ground is of importance in the assessment of the ground as a nature area.[452] The parliamentary documents even explicitly mention a contrasting example where (building) ground is not being used and in due time it develops flora and fauna but it still cannot be assessed as a nature area as its final designation is as building ground. In the above case specific ground had been acquired in order to develop it into a nature area and preliminary activities to that effect had already started (such as inactivating drainage). However, its final designation as a nature area or the preliminary activities to that effect did not seem to have been considered. In my view the assessment of the Court of Appeal of Arnhem, which considered the actual arrangement and the actual use of the ground (*daadwerkelijk worden gebruikt*) to be decisive for assessing compliance with the 90% rule, was more precise. That assessment method retains room for including areas for the 'development of nature' in the category 'nature area' of the water system levy.

6.24 Activities debated: water service 'yes' or 'no'

There are a number of activities that are debated in the Netherlands as to whether they constitute a water service as defined in the WFD. It concerns at least the following activities: protection activities to prevent flooding, activities to generate hydropower, activities such as impoundment or storage for shipping purposes and activities for recreational purposes. That these activities are being debated is not limited to the Netherlands. In several countries similar debates exist. When discussing

[449] District Court of Zwolle, 24 October 2012, ECLI:NL:RBZLY:2012:BY2026.
[450] In this case the question also arose whether nature areas were to be considered a species of untilled real estate. Based on the parliamentary documents and the text of the Water Authorities Act, I hold the position that the category nature is not a species of untilled real estate, but a separate specific category. See for an outline of that position (in Dutch): P.E. Lindhout, annotation to the judgement of the District Court of Zwolle (ECLI:NL:RBZLY:2012:BY2026) in *Milieu & Recht*, no. 1 (2013), p. 61-64.
[451] P.E. Lindhout, annotation to the judgement of the District Court of Zwolle (ECLI:NL:RBZLY:2012:BY2026) in *Milieu & Recht*, no. 1 (2013), p. 61-64.
[452] Parliamentary proceedings: Wijziging van de Waterschapswet en de Wet verontreiniging oppervlaktewateren (…), (*Kamerstukken II*), 2005-2006, 30 601, Memorie van Toelichting, no. 3, p. 54.

the status of the Dutch debate, if applicable some reference articles or documents from other countries or foreign institutions will be mentioned in the footnotes for further reading.

6.25 Protection against flooding

As the Netherlands is situated to a large extent below sea level and many areas are threatened by the sea or flooded rivers, a good and durable primary (and secondary) protective structure is essential for Dutch existence.[453] The Dutch government has not yet designated activities for protection against flooding as water services. This point of view is confirmed in the parliamentary process (see section 6.3 in respect of the implementation of the WFD), but this is also indirectly acknowledged once again in the parliamentary process regarding a change in financing primary protective structures. The advisory committee that provided advice on different financing possibilities remarked the following (freely translated):

> 'The Directive on the assessment and management of flood risks is attuned to the Water Framework Directive, which directive obliges Member States to come to an integrated water policy. Policy regarding flood protection is included, but merely marginally. This is the reason why a separate Directive was instigated. The Water Framework Directive does have relevance because of the principle of cost recovery for water services. Costs for water services in principle need to be borne by the one on whose behalf the services are provided, taking into account the polluter pays principle. The question is whether protection against flooding should be determined to be a water service. On the one hand, the theme flood protection is covered by the content of the Water Framework Directive, but the term water service seems to relate only to the abstraction, storage, distribution et cetera of surface water and groundwater (for example, for the supply of drinking water) and for the treatment of wastewater. The Commission holds the view that activities regarding protection against flooding should not be considered to be a water service for which the costs should be allocated to the inhabitants.'[454]

6.25.1 Arguments for protection against flooding as a water service

From the parliamentary process in the Netherlands the arguments for not considering flood protection as a water service are rather vague. As has been just mentioned, the Dutch government holds the opinion that activities performed for the purpose of flood protection cannot be seen as the abstraction, storage, distribution or treatment of surface waters. Why these activities (the services provided) do not fall under the definition remains unclear.

There are arguments that would confirm that flood protection activities constitute water services. Firstly, in contrast to the aforementioned view, one can reason that Article 2 (38) WFD explicitly mentions a number of services that are also executed in flood protection and that those activities can be considered as WFD water services. These are activities like the impoundment, storage and distribution of surface waters. Dykes and dams ensure the impoundment and/or distribution of water (steerable dams[455]), but also the creation of overflow areas/retention areas/water storage areas enlarging storage capacity in river banks to protect against flooding fall within the scope of a water

[453] See for the Dutch flood risk strategy (including flooding maps): Beleidsnota Waterveiligheid 2009-2015, Ministry of Infrastructure and Environment, 22 December 2009.
[454] Adviescommissie Financiering Primaire Waterkeringen, Tussensprint naar 2015, Advies over financiering van de primaire waterkeringen voor de bescherming van Nederland tegen overstroming, Klimaatcentrum Vrije Universiteit, 2006, p. 12-13.
[455] For instance, the steerable dam at Driel (the Netherlands) and the Maaslantkering (Nieuwe Waterweg, the Netherlands).

service as currently defined. If activities for flood prevention do not fall within the scope of the wording of the definition of water services, then they cannot be stipulated to be a water service, for instance the closure of land infrastructure and the provision of information.[456] One can also seek confirmation in the reference to the Directive on the assessment and management of flood risks, as that Directive explicitly refers to Article 9 WFD with reference to activities like flood risk management. Consideration 19 of the preamble states:

> '(19) In cases of multi-purpose use of bodies of water for different forms of sustainable human activities (e.g. flood risk management, ecology, inland navigation or hydropower) and the impacts of such use on the bodies of water, Directive 2000/60/EC provides for a clear and transparent process for addressing such uses and impacts, including possible exemptions from the objectives of 'good status' or of 'non-deterioration' in Article 4 thereof. Directive 2000/60/EC provides for cost recovery in Article 9.'[457]

The parliamentary process regarding the coming about of the Directive on the assessment and management of flood risks confirms that cost recovery and the internalisation of environmental and resource costs are to take place. The reference to cost recovery was introduced after the second reading by the European Parliament. The Commission accepted that amendments regarding cost recovery were to be incorporated in the Common Position and responded:

> 'Although the parts of amendments 35 and 60 (identical wording) on costs and benefits are reflected in the Common Position *(Article 7)*, these amendments also introduce cost recovery and internalisation of environmental and resource costs, which the Commission accepts, provided it is coherent with the principles and procedures for cost recovery as applied in Directive 2000/60/EC.'[458]

No further alterations were made.

In the Netherlands flood protection measures in a particular region are for a substantial part paid for by cost recovery from the inhabitants (households), thereby reflecting a certain solidarity. Flood protection measures to be taken by the State (for State-regulated waters/primary protective structures) are not stipulated to be a water service as defined in the WFD. In light of the above findings this choice of the Dutch government is not conclusive, as there are profound arguments to consider also national flood protection as a water service. If so, questions regarding cost recovery amongst user groups arise. As the Netherlands holds the view that flood protection in relation to primary waters is matter of national interest, the current cost recovery scheme is based on solidarity. This may conflict with the user pays principle underlying the cost recovery provision in the WFD. However, there may be arguments that should flood protection be stipulated as a water service, then it may be exempt from applying the pre-set cost recovery obligation of Article 9 WFD based on so-called 'established practices' (see section 5.8). Article 9 (4) WFD states that Member States shall not be in breach of the Directive 'if they decide in accordance with established practices not to apply the provisions of paragraph 1, second sentence, and for that purpose the relevant provisions of

[456] H. Unnerstall, 'Kostendeckung für Wasserdienstleistungen nach Art. 9 EG-Wasserrahmentrichtlinie', *Zeitschrift für Umweltrecht,* vol. 20, issue 5 (2009), p. 236.
[457] Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks, OJ L 288, 6 November 2007.
[458] Communication from the Commission to the European Parliament pursuant to the second sub-paragraph of Article 251 (2) of the EC Treaty concerning the Common position of the Council on the adoption of a European Parliament and Council Directive on the assessment and management of floods /* COM/2006/0775 final - COD 2006/0005 */, COM(2006) 775 final, sub 3.2.1.

paragraph 2, for a given water-use activity, where this does not compromise the purposes and the achievement of the objectives of this Directive.' In that situation the Netherlands is to report the reasons for not fully applying cost recovery for water services as laid down in Article 9 (1) WFD in the river basin management plans.

6.25.2 Arguments against protection against flooding as a water service

However, one can also proclaim that cost recovery as mentioned in the Directive on the assessment and management of flood risks is provided as a voluntary tool, as the text in the preamble is rather open: 'provides for cost recovery'. It does not actually stipulate the mentioned activities to be (all) water services. As for instance Article 9 (3) WFD provides the opportunity to apply cost recovery for 'preventive or remedial measures to achieve the objectives of the Directive'- which include, according to Article 1 WFD, also mitigating the effects of floods and droughts – it is not necessarily so that the activities mentioned are, just by this reference, concluded to be WFD water services.

6.26 Hydropower

Hydropower production in the Netherlands goes back centuries in the form of the traditional water mills of which many existed in the Middle Ages. There are a number of these traditional water mills still in operation. Most hydropower is now collected by the modern hydropower plants situated on the large rivers in the Netherlands, like the ones in Hagestein, Alphen and Maurik.[459] And subsidies for hydropower collection have been made available to stimulate this form of green energy production.[460]

The Netherlands acknowledges that hydropower production can be considered as a water service.[461] However, it justifies not attributing it as a water service on the minimal use of hydropower in the Netherlands.[462] This does not seem to be a solid argument in assessing whether or not it is a water service. The minimal use of a water service is not a legitimate justification for Member States not to appoint it as a water service. Any exemption regarding the recovery of the costs of such (minimal) water service should be based on the derogation possibilities as mentioned in Article 9 WFD. Member States may, with regard to the cost recovery obligation, take into consideration the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected. Therefore, the sole argument that hydropower in the Netherlands is only minimally used does not in itself justify not appointing it as a water service. Nor is the absence of a significant (negative?) effect on water relevant, as the significance of an impact on water only seems to be relevant in determining water uses that are not also water services (see Article 2 (39) WFD in comparison with Article 2 (38) WFD).

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[459] Plans existed to build a new hydropower plant in Borgharen and a permit to that effect was issued by the Minister of Infrastructure and the Environment. However, the Supreme Court granted an appeal due to the fact that the consequences for fish migration and the fish population had not been adequately researched and therefore there existed no sound decision underlying the permit, ECLI:NL:RVS:2012:BV3249.

[460] [http://www.rijksoverheid.nl/documenten-en-publicaties/persberichten/2009/02/20/energie-door-waterkracht-krijgt-nu-ook-subsidie-via-de-regeling-duurzame-energie.html] [20-07-2013].

[461] See also H.F.M.W. van Rijswick & H.J.M. Havekes, *European and Dutch Water Law*, Europa Law Publishing (2012), p. 431, remarking that in the implementation process of the WFD in the Netherlands, the position was taken that the concept of water services should be interpreted broadly, referring to Dutch parliamentary proceedings: Kamerstukken II 2002/2003, 28 808, no. 3, p. 16-17. However, regardless of this remark in parliamentary documents a number of water-related activities/services were not appointed to be a water service.

[462] The Netherlands holds the view that hydropower is not a water service due to its very limited use in the Netherlands (not significant) and the fact that it has a limited effect on water. The effect which it does have was not however considered.

6.27 Water services for shipping purposes

In the Netherlands water activities performed for the purpose of shipping are not stipulated as water services as defined in the WFD. The European Commission, however, considers at least the restriction of surface waters for navigation purposes a WFD water service.[463] The WFD Navigation Task Group released a position paper in 2008, upholding the view that navigation is not a water service.[464] As such - navigation in itself is not a water service – this is of course correct. The Task Group also takes the position that the infrastructure associated with navigation, or necessary for navigation, is also to be considered as a water use and not a water service. The latter, however, does not seem to comply with the definition of water services. The definition of water services in Article 2 (38) WFD includes services which also provide for the impoundment of surface water. It is quite defensible that certain activities performed for shipping purposes can be seen as services that provide for impoundment. One can think of dredging activities performed to ensure the navigation infrastructure[465], ensuring night shelter ports for inland shipping purposes[466], and installing and operating locks and dams and other construction works for shipping purposes.

Inland waterways are used in the Netherlands for different purposes, like shipping/navigation, recreational purposes, water supply purposes, industrial use (for instance, cooling purposes) and irrigation purposes. Ecorys has researched, at the instigation of the European Commission, possibilities to charge for navigation infrastructure use, as the Commission was interested in increasing the efficiency and sustainability of the navigation transport system.[467] From that study one may conclude that approximately 80% of the total 'inland waterway' costs incurred are in fact incurred with regard to shipping/navigation (transport) purposes.[468] With reference to the Ecorys report, the following costs involved, besides investment costs, can at least be identified:

- infrastructure costs like dredging costs and the operation costs of locks and bridges;
- safety and accident costs, like costs for the river police;
- congestion costs;
- environmental costs, like the costs for landscape deterioration, noise pollution, water pollution and air pollution, but also the costs for compensation measures due to diminishing ecological quality.

As stated above, activities that can be stipulated as services providing for impoundment for shipping purposes constitute, in my view, WFD water services. It brings along the necessity for effectuating cost recovery and to assess which part of the total costs of waterways should be allocated to shipping purposes, and which part to other beneficiaries/users of the water service.

However, from the background documentation for the purposes of the second generation river basin management plans one can see that it is suggested that shipping is to be considered a water use. Shipping in this respect is interpreted very literally, not including activities as dredging and infrastructural adjustments for shipping. In this documentation shipping is not considered a water use as the principle that the polluter should pay would not be applicable. That principle would not

[463] See a.o. European Commission, Press release IP/11/1101.
[464] WFD Navigation Task Group Position Paper, November 2008, Navigation as a water use vs. water service. The WFD Navigation Task Group is a thematic cluster of European navigation-related organisations, providing the navigation sector's contribution to the WFD Common Implementation Strategy.
[465] For instance, the deepening of the River Scheldt in order to ensure that commercial shipping can reach the Port of Antwerp (Belgium).
[466] See for instance RWS, Nota van Uitgangspunten Bestemmingsplan Overnachtingshaven Bergambacht, version 4 March 2013, 11K145.NvU.
[467] Ecorys Transport, 'Charging and pricing in the area of inland water ways, Rotterdam, 4 August 2005.
[468] *Ibid.,* p. 14.

be applicable because no waste water is discharged and only use is made of the waters.[469] Unclear however stays in what way the environmental damage to the water environment by under water noise is addressed in respect to cost recovery, including environmental costs. Remarkable in this respect however is that the background documentation does mention, based on Article 2 WFD, that retention and storage are water services of which stipulation as such by the Dutch government stays unclear, as attention is to be paid to the economic interests of water transport related industries.[470]

Should water-related activities for shipping purposes indeed constitute a water service (or be appointed as such), then effectuation of cost recovery for inland shipping will not be easy, due to the Revised Convention for Rhine Navigation (1868) that stipulates that inland shipping (including its cargo) should be safeguarded from any levies.[471]

6.28 Water services for recreational purposes

The same arguments as mentioned above regarding shipping also apply to water services performed for recreational purposes. Based on the Bathing Water Directive, the Dutch government (i.e. the Provinces) is responsible for the quality of natural bathing locations.[472] Besides monitoring and an active obligation to provide information to the public, the government needs to ensure at least a sufficient quality of bathing water in the designated waters and is also obliged to take measures to prevent, reduce or eliminate the causes of water pollution.[473] These measures may include the treatment of these waters and they thereby fall within the scope of the definition of WFD water services as they can be stipulated to be a service that provides for the treatment of surface waters.

6.29 Concluding remarks

The findings in this chapter outline how the cost recovery obligation in the WFD was implemented in Dutch water law. The cost recovery system has a highly decentralised character, compliant with the responsibilities for water management of the governmental bodies involved (the State, provinces, water authorities and municipalities). The implementation process of, amongst others, the cost recovery obligation shows an evolving point of view when it comes to the Dutch position on 'water services'. Although at first a broad view of water services existed, over the years a narrower view of water services manifested itself. This narrow view of water services, resulting in only a limited number of services for which cost recovery would be obligatory, was laid down in the Dutch river basin management plans. The outcome of the infringement procedure between the Commission and Germany will be of great importance also for the stipulation of water services in the Netherlands. If a broad view of water services would be found to be the right view by the European Court of Justice, the impact on many water-related activities, like water activities for hydropower, recreational purposes, shipping purposes and possibly flood prevention, will be extensive as cost recovery for those services should then be compliant with the methodology as outlined in Article 9 WFD.

With regard to the current stipulated water services, the findings and reflections per identified water service were addressed in this chapter. I will not repeat them here but will suffice with a short summary of the main findings/reflections:

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[469] Background documentation river basin management plans 2016-2021; Achtergronddocumenten SGBP 2016-2021 'Belangrijke waterbeheerkwesties', p. 36-37.

[470] Achtergronddocumenten SGBP 2016-2021 'Belangrijke waterbeheerkwesties' http://www.helpdeskwater.nl/onderwerpen/wetgeving-beleid/kaderrichtlijn-water/2016-2021/aanvullende-pagina'/sgbp-2016-2021/ .

[471] Revised Convention for Rhine Navigation of 17 October 1868 as set out in the text of 20 November 1963, unofficial consolidated text, [http://www.ccr-zkr.org/files/conventions/convrev_e.pdf] [5-4-2014].

[472] Directive 2006/7/EC of the European Parliament and the Council, of 15 February 2006, concerning the management of bathing water quality and repealing Directive 76/160/EEC, OJ L 64, 4 March 2006.

[473] *Ibid.,* Article 5(4)a(iii).

Production and supply of (drinking) water:

- Cost recovery instituted by the drinking water companies;
- Cost recovery is to a large extent based on the user pays principle;
- There exists no absolute right to the provision of water;
- Price differentiation may apply between user groups;
- The inclusion of the costs to be recovered in legislation is only very limited (capital costs);
- There is no specific legislative provisions on environmental & resource costs;
- The existence of digressive rate structures prevents fully incentive water pricing; therewith adequate incentives for users to use water resources efficiently may be questioned;
- The tax on mains water is being sold as 'green tax' by the Dutch government, but is effectively being used to cut the general state deficit;
- The agriculture user group is effectively being spared from a higher rate of tax on mains water.

Collection and discharge of rain and wastewater:

- Municipalities have water service tasks (the collection and transport of wastewater) and water system tasks (the collection and discharge of rain and measures to prevent the structural detrimental effects of the groundwater level to the land/territory destination);
- Municipalities can decide to levy water services and water system tasks by means of a combined levy or by means of a separate levy;
- Cost recovery is maximized to 100% of the costs;
- Direct service-related costs can be recovered; The allocation of indirect related costs is not possible if costs are completely or almost completely related to other purposes; Dutch jurisprudence confirms that indirect costs which are only marginally related (less than 10%) may not be taken into account in cost recovery;
- There is no specific legislative provisions regarding environmental & resource costs;
- The combined levy for water service tasks and water system tasks prevents pricing policy based on metering with regard to the water service tasks; In that situation cost recovery does not seem to be compliant with the polluter pays principle;
- The frequently used economic value of real estate as a levy base does not seem to be compliant with the polluter pays principle, nor does it provide adequate incentives to use water efficiently;
- There is, as yet, no conclusive judgment that Article 9 WFD has no direct effect in the Dutch legal order.

The pollution levy for discharge into surface waters:

- Cost recovery is instituted by the State for state-regulated waters and by the regional water authorities for regionally-regulated waters;
- The cost recovery system is based on the polluter pays system; for households assumptions regarding the pollution level are used; for companies cost recovery is based on monitored discharges;
- There is no specific legislative provision on environmental & resource costs; An assumption applies that all costs related to this water service are environmental costs;
- The government's justification for the recent simplification of the levying system, excluding specific substances from the levy base and thereby excluding specific charges for identifiable polluters, does not seem to be compliant with the polluter pays principle.

The purification levy:

- Cost recovery is instituted by the regional water authorities; the revenues are to be used to cover the costs related to the purification of wastewater or may be used for the provision of certain subsidies;
- The cost recovery system is based on the polluter pays principle as the pollution quantity and the quality of the discharge transported in a year is the levy base;
- The levy rate for households is based on an assumed pollution unit; for businesses the levy is based on a monitored discharge or – if applicable – a specific charge regime applies ('tabelbedrijven') which is based on an assumed discharge; if this specific regime applies, it is not allowed to deviate from the fixed calculation methodology;
- There are no specific legislative provisions regarding environmental & resource costs; the provision of allowed subsidies may result in lower environmental costs.

Groundwater management:

- Cost recovery is instituted by the Provincial Council;
- The cost recovery system is based on the user pays principle as the levy base is the m3 amount of water abstracted, minus the amount of m3 infiltrated in the ground;
- Legislation regarding groundwater management includes a limited enumeration of the costs that can be recovered (or damages to be compensated);
- Cost recovery takes place from abstraction permit holders. An abstraction permit is only required for large water abstractions for industrial use (>150,000 m3 per annum), for abstractions for drinking water and soil energy systems and for abstractions exceeding 10 m3 per hour (with a regular franchise of 150,000 m3 per annum); Agriculture is effectively exempt from permit requirements and therewith from cost recovery;
- Environmental damage due to small abstractions has no legal basis for coverage by/recollection from the one causing the damage;
- Water availability as a starting point in policy making may change what is to be considered an equitable result in water use. The political and social debate on water availability as a starting point in policy making is only just starting within the Delta programme.[474]

Regional water management

- Cost recovery by means of a water system levy is instituted by the regional water authorities;
- The levy is maximized to 100% of the costs and revenues are to be used for water system management;
- There are no specific legislative provisions regarding environmental & resource costs;
- Four user groups are defined; inhabitants in the district, owners of untilled real estate, owners of property (nature areas), owners of real estate; The qualification of the applicable user group is important as the applicable levy rate differs;
- For the levy regarding inhabitants a certain solidarity applies as each household pays the same amount; regarding the other user groups the levy is based on the profit principle;
- The allocation of costs amongst the user groups is laid down in detail in legislation (Water Authorities Act); However, the polluter pays principle requires that cost allocation between the categories or sub-groups within one category may not result in manifestly disproportionate allocation in relation to the pollution capacity; it is not clear if this marker is fully met in the application of the (differentiation of the) water system levy.

[474] [http://www.rijksoverheid.nl/onderwerpen/deltaprogramma] .

7 Final concluding remarks

In this research I have reflected upon the economic environmental instrument of cost recovery for water services as provided for in the WFD. These reflections were made in order to address the question 'What is the aim of the cost recovery provision in the WFD and what obscurities arise in its interpretation that may hinder its effectiveness to attainment of these aims?' In order to address the main question an examination was made whether the current cost recovery provision in Article 9 WFD has been positioned (and interpreted) in a manner that allows its application to reach full effect. That means whether it is positioned in such manner to contribute to the (environmental) objectives of sustainable, balanced and equitable water use of the WFD. In this respect a teleological approach in the examination was used in order to reflect upon the potential effectiveness of the cost recovery provision in relation to the normative goals to be reached. In this approach, first the normative context of the cost recovery provision was examined. This examination has been based on, firstly, a review of the position the cost recovery provision, as economic instrument, has been given in the WFD, related to the normative environmental goals. Secondly, the legislative history of the cost recovery provision was examined to determine what constitutes the cost recovery provision. In this respect also a legal theoretical approach has been used to determine what kind of character the cost recovery provision entails, the main character of a principle or rule. This approach was taken because the preliminary determination or assessment of a provision having the character of a principle or rule is frequently ignored, but in my view relevant, as the legal scope of provisions with the character of a principle or rule differ and will or should influence the performance of the provision within its normative context. The examination of the most important elements of the cost recovery provision furthermore has shown that many obscurities exist and vague, not sufficiently defined terminology is used.

In this book arguments are provided to address cost recovery from in a different manner than the European Court of Justice seems to have done. A manner that may enhance the effectiveness of the instrument of cost recovery to contribute to reaching sustainable and equitable water use. I recall that no all-inclusive answer to the question 'What is the aim of the cost recovery provision in the WFD and what obscurities arise in its interpretation that may hinder its effectiveness to attainment of these aims?' can be provided. This is because the effectiveness of the cost recovery provision is not measurable based on hard (legal) criteria. The findings/reflections in this book therefore intend to provide further insight on how to position cost recovery in European (and Dutch) legislation in order to enhance its potential effectiveness. This research does not intend to determine the weight of the contribution or the intensiveness of the effectiveness of the cost recovery provision in relation to the objectives pursued.

Hereafter a summary of the findings and a final reflection on cost recovery is provided.

What has been the development in European water policy, what goals are to be reached and where is cost recovery positioned?

In the second chapter the environmental water policy goals were addressed with a focus on sustainable and equitable water use. These goals are also laid down in Article 1 of the WFD. Sustainable water use fits within the overall environmental policy goal of sustainable development. But sustainable water use differs from the concept of sustainable development. Sustainable water use focusses on the sustainability of the possibility to use water. The regenerative power of water ecosystems is leading in this concept. Sustainable development on the other hand requires the continuous balancing of environmental, societal and economic factors. The water policy goals of equitable water use requests also weighing of environmental, societal and economic factors, but from the point of view of fairness. This may relate to fairness in distribution and access to water, fair burden sharing or taking into account the interests of future generations.

Fair burden sharing and ensuring good water quality for future generations were items that can be recognized in European water policy development since the seventies. Besides setting water quality standards, the polluter pays principle was introduced in the combat against water pollution. The polluter pays principle grew in importance over the years and is currently a fundamental Union environmental principle. The scope of the polluter pays principle, as outlined in this study developed during the years from holding the polluter responsible for costs of pollution prevention and control to holding the polluter responsible for a wide range of costs, like costs for damage/liability payments, permit costs, but also including green taxes and fees. The scope of the polluter pays principle broadened over the years and includes the use of economic instruments. The last grew in importance in European water policy over the last thirty years. It fits in the trend of economisation of, or instrumental reason within, European water policy and it gained an increasing role of importance.

One of the environmental economic instruments in current European water policy is cost recovery for water services as laid down in Article 9 WFD. The inclusion of 'the principle of cost recovery' in Article 9 WFD confirms the importance of cost recovery as environmental economic instrument and the importance of the polluter pays principle. Cost recovery was positioned in a separate provision in the WFD. An examination of the legal base of the WFD was made to assess the boundaries where cost recovery for water services as laid down in the current provision may no longer be justified on the basis of the WFD. During the legislative process of the establishment of the WFD a debate on the legitimacy of the legal base (former Article 175 (1) TEC) existed whether quantitative measures taken in relation to the objectives of the WFD were also covered by the scope of the WFD. As outlined in this book the case law of the European Court of Justice confirms that also quantitative measures regarding water can be taken in so far as it serves the objective of ensuring good water quality. That view brings these quantitative measures within the scope of cost recovery. Quantitative measures that do not serve a water quality objective do not fall under the scope of the WFD and therefore also fall outside the scope of the current cost recovery provision.

The cost recovery provision furthermore holds a strong relation with Article 4 WFD (environmental objectives) and Article 11 WFD (programme of measures). Measures deemed appropriate for the purposes of Article 9 WFD are considered an obligatory part of the programme of measures and are appointed a 'basic measure'. However, Article 9 WFD seems to have a broader scope than only the environmental objectives and in my view also refers to the objectives mentioned in Article 1 WFD (purpose of the Directive).

What constitutes the cost recovery obligation in the WFD?

What constitutes the cost recovery obligation was firstly examined in chapter 3 by an in depth analysis of the coming about of the cost recovery provision. An assessment was made what issues on cost recovery arose during the legislative process and how these issues were solved. The divergence between the European Parliament and the Council focussed on two main elements: how to position cost recovery as a policy instrument within the legislative framework in order to enhance sustainable water use and giving it a binding character (Parliament) and how to ensure flexibility, enough discretionary room for Member States in the use of the instrument of cost recovery (Council). The final provision text confirms that cost recovery is an important instrument to achieve sustainable water use and offers the Member States enough discretionary room to ensure for tailor-made solutions. However, the provision text is accompanied with interpretative questions regarding the terminology used and the scope of application of the derogative elements of the provision. In order to address these questions, an examination of the wording and structure of the provision from a legal theoretical point of view was made based on the legal theory on principles of Avila in order to establish what the main character of the provision is, a principle or a rule or a postulate. The examination shows that the cost recovery provision (Article 9 (1) WFD) can by typified as having the character of a rule. The provision contains at least a minimum level of specified actions required. Member States cannot ignore the clear instruction to have (adequate) incentives introduced in their water policies to use water resources efficiently (and thereby contribute to the environmental objectives of the WFD) and ensure (adequate) contributions to recovery of the costs of water services by – at least a minimum of three specifically specified categories of – water users. Besides having the character of a rule, part of the provision has the character of a postulate. Where it concerns cost recovery Member States may 'in so doing have regard to different social, economic, environmental, geographic and climatic circumstances'. This part of the provision, from a legal theoretical point of view refers to the postulate of reasonableness. The inclusion of this wording regulates the room available for Member States to apply the cost recovery provision. Implicitly this part of the provision offers political accommodation to apply equitable reasons to correct the full application of the (main) rule. However, it also confirms that cost recovery is not fully free for appreciation and at least a certain extent of cost recovery needs to apply ('in so doing').

As stated above, the preliminary determination or assessment of a provision having the character of a principle or rule is frequently ignored, but in my view relevant, as the legal scope of provisions with the character of a principle or rule differ and will or should influence the performance of the provision within its normative context. However, from the scarce jurisprudence of the European Court of Justice it is clear that the Court does not consider this preliminary determination. That fact in itself however does not mean that the European Court of Justice ignores the relevance of the difference between principles or rules, but from the current jurisprudence available it is not (yet) possible to establish whether the Court addresses the provision to have the main character of a rule or a principle and what effects the Court would give to such determination.

What questions or points of debate can be identified regarding the principle of cost recovery for water services and in what way are these dealt with and by whom?

In chapter 5 the most essential elements of the cost recovery provision were examined to assess which questions or points of debate exits about them and what positions may be taken upon these

points of debate. These elements are: water services, water use, environmental and resource costs, the inclusion of the polluter pays principle and the derogation provision in Article 9 (4) WFD. However, first the current view of the European Court of Justice on cost recovery was addressed. The European Court of Justice in its judgment C-525/12 *European Commission v Federal State of Germany* seems to have positioned cost recovery as a practically voluntary tool to be used by Member States, at least offering the Member States a huge margin of appreciation. It seems to allow Member States to decide whether cost recovery is a measure to be applied for certain – by the Member States to determine - water services. I have placed a number of critical notes with this judgment, which are summarised hereafter:

I. The cost recovery provision is not limited to the programme of measures.

The European Court of Justice seems to relate cost recovery exclusively in relation to the programme of measures (Article 11 WFD) and limits its relevance to the environmental objectives (Article 4 WFD) without taking into consideration the purpose of the Directive as determined in Article 1 WFD at all. I have argued that the scope of the cost recovery provision is not limited to the programme of measures and the environmental objectives only.

II. The Framework character of the directive does not preclude a more strict approach to cost recovery as a (preliminary) obligation.

The European Court of Justice considers that the WFD having the character of a framework directive brings along that the directive does not intend for complete harmonisation on the rules of the Member States concerning water. It states that the WFD establishes the common principles and an overall framework for action in relation to water protection and coordinates, integrates and, in a longer perspective, develops the overall principles and structures for protection and sustainable water use. These considerations however do not, in my view, conclusively lead to the position that cost recovery should be to the practically full discretion of the Member States to use (or not use) as an environmental policy instrument. The lack of intention for 'complete harmonisation' does not necessarily mean that no basic harmonisation on elements of water rules was intended. It denies the specific inclusion of the principle of cost recovery (as separate) provision in the WFD. It is more likely that cost recovery is supposed to be the first common principle to have been agreed upon. That view is also in line with the economisation of European water policy over the last thirty years and would confirm the international environmental principle of internalisation of environmental costs.

III. Cost recovery as species of economic instruments.

The European Court of Justice does not seem to distinguish cost recovery from other economic instruments when examining the scope of the two provisions (water services & cost recovery) in the light of the objectives pursued by the Directive and does not address the preamble sub. (38) with regard to the inclusion of cost recovery at all. I outlined that economic instruments as included in the preamble is a much broader concept than cost recovery for water services and cost recovery can be typified as a species, laid down specifically in Article 9 WFD, whereas the concept of economic instruments is positioned as voluntary tool to Member States.

IV. Cost recovery is a basic measure.

The European Court of Justice seems to leave the application of cost recovery practically to the full discretion of the Member States and therewith nullifies the 'reason d'être' of the specific and separate cost recovery provision and denies its position as basic measure of the programme of measures in relation to the voluntary (economic) measures possible.

V. A more obligatory character still offers Member States enough discretionary room for tailor-made solutions and acknowledges the specific inclusion of cost recovery in a separate legal provision. Contextual interpretation allows a more obligatory character of the cost recovery provision.

The cost recovery provision states that Member States may 'in so doing', i.e. in recovery the costs as mentioned in Article 9 WFD, take into account the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region affected. Contrary to the view of the European Court of Justice, which leaves the application of cost recovery practically to the full discretion of the Member States, a more strict approach would be better in line with the wording of the provision and the objectives it pursues, without putting it out of context or mismatching the provisions of EU law otherwise. In my view, the current interpretation of the Court of Justice of the cost recovery provision is, without due considerations, not in line with its 'effet utile' and therewith retains the provision's effectiveness.

VI. Cost recovery provision is limited by the European Court of Justice to a heavy reporting requirement.

By its interpretation of the position of the cost recovery provision as outlined above, the European Court of Justice in my view reduces the scope of the (extensive and detailed) cost recovery provision to effectively only the requirement 'to report on the practical steps and measures taken to apply the principle of recovery of the costs of water use in accordance with Article 9 WFD' in the programme of measures.[475] It reduces the potential effectiveness of the cost recovery provision to an administrative burden.

Furthermore, the consideration by the European Court of Justice that 'the absence of pricing will not necessarily jeopardise the attainment of the Directive's objectives', surfaces a deficit with regard to retention of the cost recovery obligations. There seems no sanction possible to non-application of cost recovery if it is limited to only a programmatic approach. For this reason also it should be preferred to position the cost recovery provision as solitary provision more strongly in its principle obligation (take into account cost recovery, including environmental and resource costs and - in so doing - consider also social, economic, environmental and certain other aspects).

Returning to the examined elements of Article 9 WFD, the most topical debate exists with regard to the interpretation of the term 'water services'. A debate that takes place between scholars, stakeholders, Member States and Member States in relation to the Commission at the European Court of Justice. As a number of Member States interpret this term rather narrowly, the Commission started the above mentioned infringement procedure to attain a legal judgment from the European Court of Justice on the interpretation of the concept of water services. The judgment of the Court (C-525/12), however, does not provide much information on what activities constitute a water

[475] See Article 11 WFD in conjunction with Annex VII regarding river basin management reports, sub 7.2.

service as defined in the WFD. The Court implicitly acknowledges that the cumulative presence of all the activities in Article 2 (38) WFD is not constitutive for determination of one of the activities as water service. Each of these activities *may* constitute a water service. However, according to the Court, appointment as water service is – within the programmatic approach – to be determined by the Member States.

The question arose whether the term water services should be interpreted narrowly or broadly. Arguments can be found for a narrow interpretation as well as for a broader interpretation of water services. Some scholars have provided arguments in favour of a narrow interpretation of water services, pointing at the necessity of a cumulative presence of the elements mentioned in the definition of water services in Article 2 (38) WFD. During my research I however concluded that cumulative presence of these activities is not necessary to stipulate an activity as a water service. This view seems to have been confirmed by the European Court of Justice, albeit implicitly. In my view, the effectiveness of the instrument of cost recovery in water policy will be served more with a broad interpretation. A broad interpretation should be preferable, in summary, for the following reasons:

- the coming about of the Directive implies that a broad view is allowable;
- a broad(er) interpretation is compatible with the purpose of Article 1 WFD (which purpose is the finality that the cost recovery provision supports);
- the derogative elements in Article 9(1) last sentence WFD ensures that Member States can provide for tailor made solutions; no narrow interpretation is necessary;
- the existence of a technical mean is not necessary for stipulation as water service;
- there are no convincing arguments that the activities mentioned in Article 2 (38 WFD) should be cumulatively present in order to establish a water service as defined in the WFD.

However, a broad interpretation will lead to new questions regarding the boundaries of a broad interpretation of water services, which has been illustrated in this book by reflecting on the possible inclusion of ecosystem services within the scope of water services. Determination of what should be the decisive factor in stipulating ecosystem services as water service, for instance the purpose of the activity performed, is rather arbitrary and may lead to legal uncertainty.

In this research I furthermore identified two questions with regard to the terminology on ‘water use’ in the WFD. The first is whether the definition of water use in Article 2 (38) WFD is meant to be the same water use as quoted in Article 9 (1) second indent WFD. In general one may presume that definitions provided apply to the same terminology used in the Directive. However, the different language versions of the Directive text seem to differ to a certain extent in the consequent use of terminology. I found that no conclusive arguments can be provided based on the available material whether the definition of water use does or does not apply in the cost recovery provision. The underlying purpose of cost recovery is to ensure that the costs (including environmental and resource costs) of water use are recovered from water users. Water uses, categorised in certain groups, should be paying for water use. This is, for as far as the use does not constitute a water service, limited to water uses that have a significant impact on the status of water, following from the definition of water uses. Differences in directive texts of Member States of the water use definition refer, in my view, to the groups (of users) as a manifestation of a way of execution of cost recovery.

The second question identified with regard to 'water use' is whether there is any interrelation between the concepts of water services and water use that should be reflected in the interpretation of the two concepts. I have argued in this book that there is no clear relationship between the scope of the two concepts of water use and water services in the sense that the scope of the definition of 'water use' should be bordered by that of water services.

A third important finding in this research is the unclearness of environmental and resource costs. Member States are obliged to take these costs into account in cost recovery, but no definition has been provided in the directive text. My research shows that different views exist in Member States and amongst scholars on what is considered environmental and resource costs. Are economic damages or the risk thereto to agricultural fields due to possible flooding environmental costs? Can loss in welfare or loss in employment be considered environmental costs? The Commission finds that a shared methodology in calculating environmental and resource costs is necessary, but does not suggest to regulate this at EU level. I agree with the necessity of a shared calculation methodology, but would suggest, if cost recovery truly is to contribute to a transparent, effective and coherent legislative framework for water policy[476], stipulation by means of a definition of at least a number of costs that should be considered environmental and resource costs is necessary at EU level. Otherwise, taking into account the large differences in view on these costs, in relation with the extensive derogation possibilities provided, the level playing field between Member States may be pressurized.

What influence the polluter pays principle has or should have on cost recovery of water services depends on the extensiveness of its interpretation and application, as was addressed in chapter 2 and section 5.7. The inclusion of the polluter pays principle in cost recovery provision leads to a certain equitable outcome regarding burden sharing. The effects of the provision of cost recovery are to reflect a fair result, being that the ones not damaging the environment by water use should not be the ones paying. The ones using and damaging the environment or the aquatic ecosystem by using water services are the ones that are expected to pay. The inclusion of the polluter pays principle can be considered the equitable correction factor to ensure that a fair result in burden sharing is reached, even though equity is not explicitly referred to in Article 9 WFD. Therefore, further equity corrections on the outcome of application of cost recovery should, in my view, be limitedly applied. The current derogative elements of Article 9 (1) last sentence WFD are very widely formulated. Due to this formulation, much discretionary room is left for Member States to use equity arguments not to apply cost recovery to the fullest. As outlined in this book, this fact may also be one of the main risk factors in the successfulness of the cost recovery obligation.

In order to give Member States concrete markers in attending to the polluter pays principle when recovering the costs for water services, five markers were identified from jurisprudence of the European Court of Justice regarding the application polluter pays principle:

1. Where a directive does not provide a definition of a polluter, Member States have a broad discretion to determine who the polluter is;
2. Polluters are only responsible for the pollution they cause; they do not have to pay for elimination and prevention of pollution to which they do not contribute;
3. Non-polluters or persons who have not contributed to (the risk of) pollution are not to be burdened by application of the polluter pays principle;
4. Under conditions, the use of presumptions regarding the causal relation between activity and pollution is allowable;

[476] Preamble sub. (18) of Directive 2000/60/ec.

5. Differentiation in contributions from categories of polluters is allowable, unless the costs involved are manifestly disproportionate in relation to the polluter's pollution capacity.

From a water financing point of view a cost recovery system based on the principle of solidarity seems difficult to align with the polluter pays principle's markers, which have to be taken into account in cost recovery. However mixes of different cost recovery systems, like a system partly based on solidary and partly on profit, seem to be allowable to a certain extent, especially when the part based on solidarity relates to the financing of the provision of a minimum extent of water for drinking and sanitation.

Lastly, obscurities regarding the derogation clause in Article 9 (4) WFD have been identified. According to this derogation clause Member States shall nog be in breach of the WFD if they decide, in accordance with established practices, not to apply cost recovery where this does not compromise the purposes and achievement of the objectives of the Directive. What is to be considered established practices stays unclear. No information on the content of this concept was found in legislative documents and in the travaux preparatoires. In my view, established practices imply at least a certain duration of the cost recovery practice. With regard to the second condition mentioned in the derogation clause, i.e. not compromising the purposes and achievement of the objectives of the Directive, I have argued that the interpretation that the European Court of Justice seems to give to the main obligation of cost recovery – allowing appointment of water services and appreciating cost recovery practically free by/to the Member States - results in a derogation clause that is effectively redundant. It will be very difficult to sufficiently state and prove that Member States have applied the derogation clause not legitimately if the Court's current view would be maintained. To address this deficit and enhance the effectiveness of the derogation clause, it is necessary to give at least some content to the main cost recovery obligation.

How is the cost recovery obligation implemented in Dutch water law and which principles underlie the Dutch financing structure of water services?
and
What are the main differences between the European and Dutch approach and can these differences be justified? If not in what way should the Dutch system be changed?

In chapter 6 an extensive examination, by means of a case study, is provided of the way the Netherlands implemented cost recovery for their stipulated water services. In general, without repeating the findings in detail again, the following main remarks can be made where it concerns compliance with or possible deficits of the Dutch implementation of the cost recovery obligation.

First, the Dutch cost recovery system is to a large extent compliant with the cost recovery obligation as laid down in the WFD. The user pays principle and/or the polluter pays principle underlies at least to a certain extent the cost recovery methods used for different water services. Still, with regard to the adherence of the polluter pays principle, some progress can be made. Not all pricing policies/laws are based on/include metering. It will, for instance be difficult to realise in the current Dutch legislative system for collection and discharge of rain and waste water cost recovery based on metering if a municipality decides to levy for water services tasks and water system tasks by means of one levy for both costs. It would be preferable to split the levy base per activity in order to more fully comply with Article 9 WFD and the polluter pays principle. The water services tasks then could be levied from the water users and be based on metering. The levy base used by some municipalities, the economic value of real estate (*WOZ waarde*) does not seem to comply with the polluter pays principle either. As outlined in this book, Member States are allowed to use

presumptions in determining causation between activities and pollution/environmental damage, but these presumptions must subscribe to a certain relation between damage or pollution and activities. I did not find any arguments that the economic value of real estate has a certain causation with the pollution or damage of water use activities in this respect.

With regard to the recent change in the pollution levy for discharge on surface waters in the Netherlands also the argumentation with regard to compliance with the polluter pays principle can be considered doubtful. The criticism of the Council of State - that by leaving out the parameters of heavy metals and magnesium sulphates from the levy base and raising the rate for the pollution units for companies that discharge the so-called oxygen binding compounds (*zuurstofbindende stoffen*), these companies in fact are paying for the companies that do (also) discharge heavy metals and magnesium sulphates – still stands.

From a polluter pays point of view, the polluters of this discharge of heavy metals should be the ones paying for the incurred, related costs (including environmental and resource costs) and not companies that do not discharge these substances. If for reasons of efficiency, the government does not recover those costs, that in itself does not make the levy system illegitimate. Raising however the rate for also companies that do not discharge these substances without a conclusive argumentation, is in my view not in line with the polluter pays principle.

The polluter pays principle influences furthermore the allocation of costs between categories (user groups). That influence does not end at the three in the WFD prescribed categories of households, businesses and agriculture if a country uses different categories. The polluter pays principle, in my opinion, also needs to be adhered to when it relates to burden sharing between sub groups within a category. The example described in this thesis is the – in Dutch legislation provided – water system levy rate differentiation for public roads versus agriculture, where these two user groups are combined in one and the same category. Cost allocation between the categories may not result in manifestly disproportionate allocation in relation to the pollution capacity following from the principle of proportionality. In my view, the same applies with regard to sub categories within the same levy category. This requires that water authorities will not only have to motivate from a polluter pays perspective the cost allocation to the respective categories, but also have to motivate from a polluter pays perspective the allocation of the burdens within a certain category. If motivation is lacking or is insufficient, questions may rise whether the water authorities adhere the boundaries of their margin of appreciation in applying the cost recovery.

Next, sometimes the rate structure undermines this underlying principle. A digressive rate structure for specific user groups does not seem compliant with the obligation to provide adequate incentives for water users to use water efficiently.

For most water services a legal anchoring of the costs to be recovered in legislation is lacking. Only the legislation regarding ground water management includes a limitative enumeration of the costs that can be recovered (or damages to be compensated). Especially with regard to environmental and resource costs much unclearness exists about what these costs constitute and how they are (or are not) recovered. Legislation regarding the water system levy as an example, provides in detail not *which* costs can be recovered, but *how* the costs need to be allocated to the different user groups. However, regarding this specific allocation questions may be raised to what extent the discretionary room of the authorities reach when it comes to coherence with the polluter pays principle of the allocation applied.

Lastly, attention needs to be drawn to the specific position of the user group of agriculture in the Netherlands. This user group seems to hold a special, protected position when it concerns cost recovery for water services. It is doubtful whether agriculture pays the costs that are caused by agriculture regarding their water use.[477] A lower tax on piped water would apply effectively for most agricultural businesses. Furthermore, agriculture is mostly exempted from regulation and payment for ground water abstractions. Ground water abstractions that may contribute to for instance descending of grounds. Agriculture is to a large extent responsible for pollution from diffuse sources. Agriculture holds a strong representation in the board/management of the Water Authorities where it concerns the interests of agriculture for amongst others drainage purposes for which the water system levy is levied. Regarding the last levy, only after questions in parliament where raised concerning the change in allocating costs from agriculture to households, the minister of infrastructure and environment announced that in 2015 an evaluation of the position of stakeholders in the board/management of water authorities would take place.[478] A careful preview for what will be the next societal debate on cost recovery would suggest the question whether agriculture pays its fair share in cost recovery for the water services used.

Final remark

At this point a final remark needs to be made. In this book I examined what the aim of the cost recovery provision in the WFD is and what obscurities arise in its interpretation that may hinder its effective attainment of these aims, i.e. the normative water policy goals of sustainable and equitable water use. I pledge for adjustment of the cost recovery provision of Article 9 WFD and/or application of a more strict interpretative approach than the European Court of Justice did. The main obligation of the provision (including water services/use, environmental and resource costs, what adequate contributions are) should be clear to enlarge its effectiveness and to position any derogations made in a sound manner. However, the political reality in Europe is that there exists a tendency to view less matters as (partly) a Union responsibility. Eurosceptic parties have gained substantial influence in the last elections and Union legislation is more and more felt as unwanted interference with matters that should be decided upon at national level. This makes a plea for adjusting – actually fine tuning - the cost recovery obligation an unwelcome plea. I expect that the Commission felt that a legislative proposal to fine tune the cost recovery obligation to enhance its effectiveness was due to fail. The legislative process of the WFD itself already was a very difficult one. The Commission instead addresses the need for – for instance - a shared methodology for calculating the costs to be recovered without presenting a legislative proposal for it. This would set at ease the Member States that favour adherence to the principle of subsidiarity in this respect. However, one may question whether the aims to be reached, sustainable and equitable water use, including internalisation of environmental costs in water use and attainment of the (environmental) goals, will be achieved. Member States interpret the obligations and derogation room differently, even though many guidance documents were provided to enlarge a sound implementation of the WFD. The question arises whether subsidiarity and effectiveness are interchangeable to this end. Even though this research has tried to contribute to enlarging the insights of the scope of the cost recovery provision, a number of obscurities in the cost recovery provision maintain. The judgement

[477] The agricultural sector was protected from additional financial burdens due to implementation of the WFD by means of an adopted motion in Dutch Parliament. This motion states 'that no additional financial burden may be imposed/effectuated on the Dutch agricultural sector due to implementation of the WFD'. Parliamentary proceedings: (*Kamerstukken II*) Waterbeleid, 27 625, Motie van het lid Van der Vlies, no. 92.

[478] Letter of the Minister of Infrastructure and Environment to Parliament dated 7 March 2014 , (reference IenM/BSK-2014/47921) concerning answers to questions by members of parliament concerning the change in allocation of costs from agriculture to households by means of the water system levy.

of the European Court of Justice in the infringement case of the European Commission versus the Federal Republic of Germany (C-525/12) does not resolve these obscurities. There remains to a certain extent an unclear main obligation to recover costs, an extensive derogative clause in Article 9 (1) last sentence WFD and a practically redundant derogative clause in Article 9 (4) WFD. What is actually managed then? In my view, as cost recovery at this point ís included in the WFD (fact), it would be better to arrange a provision outlining the obligation of cost recovery in a clear manner, for only a uniform interpretation liable. The current (extensive) derogative provision in Article 9 (1) WFD in that situation still offers Member States enough room to adjust to local problems. That would contribute on the one hand to sound water management and tailor made solutions in Member States. The use of the derogation clause of Article 9 (4) WFD would incorporate content and the overall effectiveness of the cost recovery provision is enhanced. That, at the same time, may contribute to the existence of a fair level playing field in and between Member States.

Samenvatting

Water is essentieel voor leven op aarde: het kent veel verschillende functies en voorziet in kwaliteit van leven. Het dagelijks leven is, letterlijk en figuurlijk, doordrenkt van water: voor drinkwater, sanitatie, recreatie of in relatie tot natuur. Water is van groot belang voor de economie, voor productieprocessen, maar ook voor de agrarische sector. De toename van welvaart en mensen heeft tot negatieve effecten geleid voor de waterkwaliteit en – afhankelijk van de regio – de waterkwantiteit. Watervervuiling, achteruitgang van ecosystemen en beperktere beschikbaarheid van water zijn problemen die op internationaal, Europees en nationaal niveau spelen. Duurzaamheid van onze zoetwatervoorraden en het in stand houden, of zo mogelijk verbeteren, van de waterkwaliteit is van belang om ook toekomstige generaties van water gebruik te kunnen laten maken. In dat opzicht wordt een billijk gebruik van water en een eerlijke kostenverdeling over watergebruiksgroepen met betrekking tot water-gerelateerde activiteiten als noodzakelijk gezien. In de laatste decennia is een duurzaam en billijk watergebruik en bescherming van de waterkwaliteit als uitgangspunten in het waterbeleid naar voren gekomen. Duurzaam watergebruik dient te worden gestimuleerd. Informatie aan het publiek is hiervoor belangrijk, maar ook andere manieren om duurzaam watergebruik te stimuleren, zoals het gebruik van economische instrumenten. Het gebruik van economische instrumenten kan duurzaam watergebruik stimuleren en draagt bij aan een billijke kostenverdeling tussen de verschillende watergebruikscategorieën. Billijke kostenverdeling, inclusief (juridische) correctiemechanismen, wanneer toerekening van kosten tot disproportionele resultaten zou leiden, kan vanuit mensenrechtenperspectief bijdragen aan een billijk watergebruik en tevens aan het verzekeren van de toegang tot water.

Het gebruik van economische instrumenten is in de afgelopen decennia in populariteit toegenomen. Een van de economische instrumenten is de zogenaamde ‘kostenterugwinning voor waterdiensten’. Kostenterugwinning voor waterdiensten is juridisch verankerd in Europese wetgeving in artikel 9 van de Kaderrichtlijn Water (2000/60/EG). Wanneer het gaat om kostenterugwinning in relatie tot watergebruik of waterdiensten is de rationale dat de prijs van water het (duurzame) gebruik ervan en van de waterbronnen reflecteert. Dit houdt in dat niet alleen financiële kosten voor watergebruik/diensten bij de watergebruiker terecht zouden moeten komen, maar ook de zogenaamde milieu- en bronkosten. Deze kosten dienen geïnternaliseerd te worden in de waterprijs. Op basis van artikel 9 van de Kaderrichtlijn Water dienen Europese Lidstaten rekening te houden met het beginsel van terugwinning van de kosten van waterdiensten, inclusief milieukosten en kosten van de hulpbronnen. Concreet dienen lidstaten met inachtneming van een economische analyse en rekening houdend met het ‘vervuiler betaalt principe’ ervoor te zorgen dat het waterprijsbeleid adequate prikkels bevat voor gebruikers om watervoorraden efficiënt te gebruiken. Daarnaast dienen de verschillende watergebruikssectoren, zoals huishoudens, bedrijven en landbouw, een redelijke bijdrage te leveren aan de terugwinning van de kosten van waterdiensten. Ook hierbij dient met het ‘vervuiler betaalt principe’ rekening gehouden te worden.

De verwachting bestaat dat als de prijs van water de werkelijke kosten reflecteert, watergebruikssectoren zullen worden aangemoedigd om water op een meer efficiënte en duurzame wijze te gebruiken, wat ten goede komt aan de verbetering van de kwaliteit van het oppervlaktewater, de instandhouding van ecosystemen en de duurzaamheid van de waterbronnen.

Het uitgangspunt van kostenterugwinning is middels artikel 9 van de Kaderrichtlijn Water al sinds 2000 in Europees waterrecht aanwezig. Het gebruik van kostenterugwinning als economisch instrument was destijds op zichzelf niet nieuw, maar de expliciete opname in een Europese richtlijn

wel. Kostenterugwinning is genoemd als een van de basismaatregelen die lidstaten in hun maatregelenprogramma dienen op te nemen teneinde de milieudoelen uit de richtlijn te behalen. Daarnaast draagt de kostenterugwinningsverplichting bij aan het behalen van de in de richtlijn benoemde overkoepelende doelen, zoals een duurzaam en billijk watergebruik (artikel 1). Lidstaten hanteren kostenterugwinning voor waterdiensten echter op verschillende wijzen en lopen tegen veel onduidelijkheden en obstakels aan waar het gaat om uitvoering geven aan de verplichtingen van de richtlijn op dit gebied. De grote verschillen in interpretatie van de verplichting en de aanwezigheid van onduidelijkheden kunnen de effectiviteit van het instrument van kostenterugwinning voor het realiseren van milieukwaliteitsdoelen en doelen als duurzaam en billijk watergebruik beperken.

Het voor deze studie uitgevoerde onderzoek heeft dan ook tot doel de vraag te beantwoorden wat de achtergrond en het doel van de kostenterugwinningsbepaling in de KRW is en welke problemen er benoemd kunnen worden die de effectiviteit van kostenterugwinning ten behoeve van het behalen van watermilieudoelen in de weg kunnen staan (*What is the aim of the cost recovery provision in the WFD and what obscurities arise in its interpretation that may hinder its effectiveness to attainment of these aims?*).

Is de bepaling zodanig gepositioneerd dat deze kan bijdragen aan de watermilieudoelen van een duurzaam en billijk watergebruik (artikel 1 KRW)? In dit onderzoek is een teleologische aanpak gebruikt, wat wil zeggen dat het vraagstuk steeds vanuit het perspectief van de doelen - duurzaam en billijk watergebruik - is benaderd. De centrale vraag wordt in dit onderzoek benaderd vanuit verschillende perspectieven. Ten eerste is onderzoek gedaan naar de positie van de kostenterugwinningsbepaling in de KRW door de ontwikkeling en doelen van het Europees waterbeleid in beeld te brengen en te bezien welke positie economische instrumenten binnen dit beleid innemen. De totstandkomingsgeschiedenis, vanuit een juridisch perspectief, is diepgaand geanalyseerd om na te gaan wat de kostenterugwinningsbepaling behelst of beoogt te zijn. Naast een analyse van de totstandkomingsgeschiedenis is vervolgens een rechtstheoretische aanpak gebruikt om te bepalen wat het overwegende rechtskarakter van de huidige kostenterugwinningsbepaling is: het karakter van een rechtsbeginsel of van een rechtsregel. De juridische gevolgen bij bepalingen met het karakter van een rechtsbeginsel of een rechtsregel verschillen (of zouden moeten behoren te verschillen). Ten derde is een aantal belangrijke elementen uit de huidige kostenterugwinningsbepaling nader bezien en is een aanzienlijk aantal vragen gedestilleerd met betrekking tot de reikwijdte en interpretatie van deze, veelal vaag geformuleerde, elementen.
In dit onderzoek wordt een aantal argumenten gegeven om kostenterugwinning op een andere wijze te benaderen dan – tot op heden – het Europese Hof van Justitie lijkt te doen. Een andere benaderingswijze zal de potentiële effectiviteit van de kostenterugwinningsbepaling ten behoeve van het behalen van de milieudoelen van een duurzaam en billijk watergebruik vergroten. Dit onderzoek beoogt niet een sluitend antwoord op gestelde vragen te geven. Dat is niet mogelijk, omdat de effectiviteit van de kostenterugwinningsbepaling niet meetbaar is op basis van alleen juridische criteria. De bevindingen in dit boek beogen dan ook (slechts) bij te dragen aan een verder inzicht in de vraag hoe kostenterugwinning in Europese (en Nederlandse) wetgeving gepositioneerd kan worden om effectiever te kunnen zijn in relatie tot de doelen duurzaam en billijk watergebruik. Hierna volgt een samenvatting van de belangrijkste bevindingen.

Wat is de ontwikkeling geweest in het Europees water beleid, welke doelen zijn gesteld en waar is kostenterugwinning gepositioneerd?
In het tweede hoofdstuk van dit boek worden de Europese waterbeleidsdoelen uiteengezet met een focus op duurzaam en billijk watergebruik. Deze doelen zijn tevens verankerd in artikel 1 KRW.

Duurzaam watergebruik past binnen het overkoepelend (milieu)beleidsdoel van duurzame ontwikkeling. Duurzaam watergebruik echter richt zich op de duurzaamheid van de beschikbaarheid van water en de mogelijkheid van duurzaam gebruik ervan. Bij duurzaam watergebruik is het regeneratieve vermogen van waterecosystemen leidend. De waterbeleidsdoelstelling van een billijk watergebruik vraagt een continue afweging van milieu-, maatschappelijke en economische factoren, waarbij billijkheid uitgangspunt dient te zijn. Het kan hier gaan om billijkheid met betrekking tot distributie van en toegang tot water, een billijke kostenverdeling, maar ook op een rechtvaardige manier rekening houden met de belangen van toekomstige generaties.

Een billijke kostenverdeling en het verzekeren van een goede waterkwaliteit voor toekomstige generaties zijn elementen die al sinds de jaren '70 in het Europese beleid zijn benoemd. Naast de introductie van waterkwaliteitseisen is ook het 'vervuiler betaalt principe' geïntroduceerd om de watervervuiling te bestrijden. Het principe dat de vervuiler betaalt is in de loop der jaren steeds belangrijker geworden en is geworden tot een fundamenteel rechtsbeginsel binnen de Europese Unie. De reikwijdte van het vervuiler betaalt beginsel is ook in de loop van de jaren veranderd. Waar het eerst vooral ging om de vervuiler verantwoordelijk te houden voor de kosten van het voorkomen van vervuiling en controlekosten, verbreedde de reikwijdte zich en wordt het beginsel nu ook geacht milieuschadevergoedingen, 'groene belastingen', vergunningskosten et cetera te behelzen. In de praktische vormgeving omvat het 'vervuiler betaalt principe' het gebruik van zogenaamde economische instrumenten. Het gebruik daarvan wordt door Europese beleidsmakers al jarenlang aangemoedigd. Een van de belangrijkste economische instrumenten in het huidige Europese waterbeleid is dat van kostenterugwinning. Opname van kostenterugwinning in artikel 9 KRW bevestigt dat juist kostenterugwinning voor waterdiensten een belangrijk instrument is in het Europees waterbeleid. Ook het belang van het in acht nemen van het 'vervuiler betaalt principe' wordt opnieuw bevestigd, omdat artikel 9 KRW verschillende malen expliciet naar dit beginsel verwijst.

De kostenterugwinningsbepaling is als afzonderlijke bepaling in de KRW opgenomen. Een van de vragen die rijst, is hoe ver de kostenterugwinningsverplichting reikt. Bij analyse van de totstandkomingsgeschiedenis van de KRW is gebleken dat er debat werd gevoerd over de legitimiteit van de juridische basis van de KRW (toenmalig artikel 175 (1) EC). Voor Europese waterkwantiteitswetgeving geldt namelijk een andere totstandkomingsprocedure (unanimiteit). De vraag is in hoeverre kwantitatieve watermaatregelen in relatie tot het behalen van waterkwaliteitsdoelen dan toelaatbaar is en daarbij de kostenterugwinning van de kosten van die maatregelen. Onderzoek is gedaan naar de juridische basis van de KRW zelf met als doel na te gaan waar de grenzen met betrekking tot de (juridische) toepassing van de kostenterugwinningsbepaling zijn gelegen. Waterkwantiteitsmaatregelen, en in het verlengde daarvan kostenterugwinning met betrekking tot die maatregelen, zijn toelaatbaar mits deze in relatie staan tot de waterkwaliteitsdoelen en met het oog op het behalen van die doelen worden genomen. Dit is recentelijk ook bevestigd door het Europese Hof van Justitie in zijn uitspraak C-525/12 (Commissie v Duitsland).

De kostenterugwinningsbepaling is daarnaast sterk verbonden met de milieudoelen als vermeld in artikel 4 van de KRW en het programma van maatregelen als vermeld in artikel 11 KRW. 'Maatregelen die voor de doeleinden van artikel 9 nodig worden geacht' dienen onderdeel uit te maken van het maatregelenprogramma van Lidstaten. Deze maatregelen worden in artikel 11 aangeduid als een (verplichte) 'basismaatregel'. De vraag rijst of kostenterugwinning, als neergelegd in artikel 9 KRW, een zelfstandige juridische verplichting behelst of dat deze bepaling

uitsluitend effect sorteert binnen het maatregelenprogramma als bedoeld in artikel 11 KRW. Dat programma refereert uitsluitend aan de milieudoelen als vermeld in artikel 4 KRW en niet naar de doelen van de richtlijn (artikel 1 KRW). Als de kostenterugwinningsbepaling uitsluitend effect zou sorteren binnen het maatregelenprogramma en geen zelfstandige positie kent in de KRW, is de potentiële effectiviteit van kostenterugwinning in relatie tot doelen als duurzaam en billijk watergebruik (artikel 1 KRW) duidelijk beperkter. In dit onderzoek betoog ik dat artikel 9 KRW een bredere reikwijdte lijkt te kennen dan alleen in relatie tot het maatregelenprogramma van artikel 11 KRW. Artikel 9 KRW benoemt zelfstandige doelen, verder reikend dan de milieudoelen in artikel 4 KRW waaraan het maatregelenprogramma dienstbaar is. Het uitgangspunt van het berekenen van een reële waterprijs om te komen tot duurzaam watergebruik, samen met de internalisering van milieukosten, heeft aan de basis gestaan van opname van de bepaling in de KRW. De kostenterugwinningsbepaling reflecteert het internationale rechtsbeginsel van internalisatie van milieukosten en houdt duidelijk verband met de doelen van de KRW zoals die in artikel 1 staan vermeld (waaronder een duurzaam en billijk watergebruik).

Wat houdt de kostenterugwinningsverplichting in de KRW in?
Welke verplichtingen de huidige kostenterugwinningsbepaling voor lidstaten inhoudt, komt aan bod in hoofdstuk 3 via, ten eerste, een analyse van de totstandkomingsgeschiedenis van de bepaling. Onderzocht is welke vraagstukken in die totstandkomingsgeschiedenis speelden en hoe deze zijn opgelost. Vast staat dat er een aanzienlijk verschil van inzicht bestond tussen het Europees Parlement en de Raad met betrekking tot de (juridische) positionering van kostenterugwinning als beleidsinstrument. Het Europees Parlement benadrukte de mogelijkheden van kostenterugwinning om te komen tot duurzaam watergebruik en de, in zijn ogen benodigde, juridische gebondenheid van lidstaten daartoe. De Raad bepleitte juist de instandhouding van flexibiliteit en discretionaire ruimte voor lidstaten met betrekking tot het gebruik van kostenterugwinning. De uiteindelijke wettekst gaat echter gepaard met verschillende interpretatieve vragen met betrekking tot gebruikte terminologie en met betrekking tot de reikwijdte van de verschillende derogatieve elementen die artikel 9 KRW kent. Deze vragen worden in dit onderzoek als eerste bezien vanuit een rechtstheoretisch perspectief aan de hand van de rechtstheorie van Humberto Avila. Aan de hand van zijn rechtstheorie is een analyse gemaakt van de kostenterugwinningsbepaling, waarbij bezien is wat het overwegende juridische karakter (beginsel/principe, regel of postulaat) is van de bepaling (of zou moeten zijn op basis van deze theorie). De rechtsgevolgen van een bepaling dat een beginsel beoogt te duiden, is een andere dan die van een bepaling die een regel geeft. Een beginsel, in de theorie van Avila, kan worden omschreven als een bepaling gericht op een toekomstige situatie, een beoogde staat die moet worden bereikt (*state of affairs*), waarbij de correlatie dient te worden vastgesteld tussen de te bereiken staat en de effecten van het beoordeelde gedrag teneinde die staat te bereiken. Een voorbeeld van een dergelijk beginsel zou duurzame ontwikkeling kunnen zijn (*sustainable development*). Een beginsel is derhalve toekomstgericht en globaler of breder van aard. Een regel in deze theorie is een bepaling waarin duidelijk een antwoord wordt neergelegd op de vraag wat heeft te gelden in een bepaalde situatie, waarbij de toepassing van de regel plaatsvindt door weging in het perspectief van het doel dat met de regel wordt beoogd (of de beginselen/principes waaruit de regel is voortgekomen). Hierbij dient een rechter de conceptuele constructie van de normatieve waarde van de regel en geconstrueerde feiten van een zaak naast elkaar te plaatsen alvorens tot een oordeel te komen. Een regel is derhalve minder toekomstgericht en beoogt als zodanig niet een bepaalde toekomstige staat te bereiken. De toepassing van de rechtstheorie van Avila leert dat de huidige kostenterugwinningsbepaling in de KRW het overwegende karakter kent van een rechtsregel en dat een ondergeschikt deel van de bepaling kan worden gekenmerkt als een postulaat. De derogatieve elementen uit artikel 9 lid 1 KRW kunnen worden gekenmerkt

als het postulaat van de redelijkheid. De bewoordingen van dit deel van de bepaling reguleert de ruimte die Lidstaten hebben in de (verplichte, uit het hoofdkarakter van regel voortvloeiende) toepassing van kostenterugwinning en bevestigt in dit verband mede dat de toepassing van kostenterugwinning niet ter volledig vrije discretie aan de lidstaten is overgelaten.

Welke vragen of punten van debat kunnen worden geïdentificeerd met betrekking tot het kostenterugwinningsbeginsel en op welke manier en door wie zijn deze vragen opgelost?
In hoofdstuk 5 van dit boek zijn de bevindingen opgenomen met betrekking tot een analyse van een aantal belangrijke elementen uit de kostenterugwinningsbepaling. Bezien is over welke elementen debat heeft plaatsgevonden/plaatsvindt. Deze elementen zijn: waterdiensten, watergebruik, milieu- en bronkosten, het 'vervuiler betaalt principe' en de derogatiebepaling in artikel 9 lid 4 KRW. In dit verband is tevens stilgestaan bij de recente uitspraak van het Europese Hof van Justitie met betrekking tot kostenterugwinning. Het Europese Hof van Justitie lijkt, in zijn uitspraak in de zaak tussen de Commissie en Duitsland (C-525/12), het instrument van kostenterugwinning zoals dat in artikel 9 KRW is opgenomen aan te merken als praktisch vrijwillig te gebruiken instrument. Het Hof laat de lidstaten een zeer ruime marge van waardering waar het gaat om het wel of niet toepassen van kostenterugwinning in het watermilieubeleid. In dit boek plaats ik een aantal kritische opmerkingen bij deze uitspraak, welke ik in deze samenvatting slechts zeer kort benoem:

I. De kostenterugwinningsbepaling is niet beperkt tot het programma van maatregelen;
II. Het karakter van een 'kaderrichtlijn' van de KRW staat niet in de weg aan een stringentere benadering van kostenterugwinning, waarbij kostenterugwinning als uitgangspunt geldt;
III. Kostenterugwinning is een species van een economisch instrument;
IV. Kostenterugwinning is een basismaatregel;
V. Een meer verplichtend karakter geven aan kostenterugwinning geeft Lidstaten nog steeds voldoende ruimte om lokale maatwerkoplossingen te vinden en bevestigt tegelijkertijd de specifieke opname van kostenterugwinning in een aparte richtlijnbepaling. Contextuele interpretatie laat een meer verplichtende toepassing van de kostenterugwinningsbepaling goed toe.
VI. De kostenterugwinningsbepaling wordt door de huidige interpretatie van het Europese Hof van Justitie onnodig beperkt tot een zware rapportagelast.

Met betrekking tot de onderzochte elementen van artikel 9 KRW gaat het meest actuele debat over de interpretatie van de term 'waterdiensten'. Het gaat om een debat tussen rechtsgeleerden, economen, belanghebbenden, lidstaten onderling en in relatie tot de Commissie en het Europese Hof van Justitie. In de doctrine zijn verschillende argumenten te vinden voor zowel een beperktere interpretatie van het begrip waterdiensten als een meer omvattende, bredere, interpretatie van het begrip. Een van de argumenten voor een beperktere interpretatie zou de noodzaak zijn van de (opeenvolgende) aanwezigheid van alle in artikel 2 lid 38 KRW genoemde water-gerelateerde activiteiten om tot een waterdienst te komen. In dit onderzoek wordt beargumenteerd dat deze redenering niet sluitend is, hetgeen ook impliciet wordt erkend door het Europese Hof van Justitie (C-525/12). In mijn optiek laat de wettekst een bredere interpretatie van het begrip waterdiensten open en is dat ook meer passend dan een beperktere interpretatie vanwege de volgende redenen:

- De totstandkomingsgeschiedenis van de richtlijn houdt een bredere interpretatie van waterdiensten open;

- Een bredere interpretatie past binnen het richtlijndoel zoals dat in artikel 1 KRW is neergelegd;
- De derogatieve elementen uit artikel 9 lid 1 KRW laten Lidstaten nog voldoende ruimte om lokaal maatwerk te verzorgen; hiertoe is geen beperktere interpretatie nodig;
- Een technisch hulpmiddel om tot een waterdienst te komen ligt weliswaar voor de hand, maar is geen constitutief vereiste in de KRW;
- Er zijn geen overtuigende argumenten dat de activiteiten als benoemd in artikel 2 lid 38 KRW allen aanwezig dienen te zijn bij een wateractiviteit teneinde tot een waterdienst te geraken.

Een bredere interpretatie van het begrip waterdiensten, waarbij ook ecosysteemdiensten als waterdienst zouden kunnen worden gezien, leidt echter wel tot nieuwe vragen met betrekking tot de begrenzing van het begrip waterdiensten. De vraag is wat het onderscheidend criterium dient te zijn met betrekking tot water-gerelateerde ecosysteemdiensten alvorens tot stipulatie als een waterdienst wordt overgegaan. Wanneer een water-gerelateerde ecosysteemdienst als een waterdienst zou worden gestipuleerd, zou bijvoorbeeld het 'doel' van de uitgevoerde (ecosysteem)activiteit doorslaggevend kunnen zijn voor de vraag of het als waterdienst zou moeten gelden. Echter, een dergelijke afweging (doel) is, mijns inziens, erg arbitrair en kan leiden tot rechtsonzekerheid.

Naast het debat over waterdiensten kunnen tevens de nodige vragen gesteld worden met betrekking tot de term 'watergebruik' in de KRW. De eerste vraag is of de term watergebruik in artikel 2 lid 38 KRW (definitie watergebruik) over hetzelfde watergebruik gaat als benoemd in de kostenterugwinningsbepaling. Uit dit onderzoek volgt dat geen sluitende (juridische) argumenten gevonden zijn op basis van het bestudeerde materiaal dat het hier om verschillende terminologie van watergebruik zou gaan. Watergebruikers, gecategoriseerd in bepaalde groepen, dienen te betalen. Verschillen in de richtlijnteksten van de lidstaten op dit punt refereren vooral aan de groepen van gebruikers als manifestatie van een bepaalde uitvoering van kostenterugwinning en duiden niet op een andersoortig 'watergebruik' in artikel 9 KRW ten opzichte van de gegeven definitie in artikel 2 KRW. De tweede vraag met betrekking tot 'watergebruik' die in dit onderzoek geadresseerd is, is of er een relatie bestaat tussen de concepten 'waterdiensten' en 'watergebruik'. Ik beargumenteer in dit onderzoek dat er geen duidelijke relatie bestaat tussen de twee concepten in de zin dat de reikwijdte van watergebruik zou moeten worden beperkt in relatie tot de reikwijdte van waterdiensten.

Milieu- en bronkosten vormen het volgende element uit artikel 9 KRW dat aandacht verdient. Het onderzoek laat zien dat lidstaten ook deze kosten dienen terug te winnen, maar dat er geen definitie is gegeven van wat deze kosten zijn. Er bestaan daardoor verschillende visies in de lidstaten over deze begrippen en deze visies zijn zeer uiteenlopend. Is economische schade of het risico daarop voor landbouwvelden als gevolg van potentiële overstromingen of een verlies van welvaart c.q. arbeidsmogelijkheden aan te merken als milieukosten? De Commissie benadrukt dat het noodzakelijk is dat er een gedeelde methodologie komt voor berekening van deze kosten, maar heeft niet de intentie hiervoor wetgeving voor te stellen. Ik onderschrijf de noodzaak om te komen tot een gedeelde, geüniformeerde methodologie voor berekening van deze kosten, maar geef daarbij een kanttekening: indien kostenterugwinning daadwerkelijk moet bijdragen aan een transparant, effectief en coherent juridisch kader voor waterbeleid, dan dient ten minste een aantal kosten die als milieu- en bronkosten zou moeten worden aangemerkt, op Europees niveau benoemd te worden. Indien dat niet gebeurt, rekening houdend met de grote verschillen die er over deze kosten in de lidstaten bestaan, zal er, zeker in relatie tot de grote discretionaire ruimte

die lidstaten hebben ter zake, een ongelijk (economisch) speelveld tussen de lidstaten kunnen ontstaan.

Bij kostenterugwinning dienen lidstaten rekening te houden met het ‘vervuiler betaalt principe’ . Dit principe wordt meerdermalen expliciet in de kostenterugwinningsbepaling genoemd. Met betrekking tot de inclusie van het ‘vervuiler betaalt principe’ in de kostenterugwinningsbepaling kunnen eveneens de nodige vragen gesteld worden, zoals: welke invloed heeft dit principe of zou het moeten hebben op (uitvoering van) kostenterugwinning voor waterdiensten? Feit is dat het meerdere malen expliciet in de bepaling is opgenomen, daar waar het ‘vervuiler betaalt principe’ al een algemeen, fundamenteel Europees rechtsbeginsel is. De importantie van dit principe is duidelijk extra benadrukt door de Europese wetgever. De inclusie van het ‘vervuiler betaalt principe’ beoogt een billijke kostenverdeling (*fair/equitable burden sharing*) te verzekeren, in de zin dat diegenen die door het watergebruik het milieu niet schaden, niet de rekening daarvoor gepresenteerd horen te krijgen en diegenen die het milieu wel schaden dus wel. Nu de inclusie van het ‘vervuiler betaalt principe’ juist als een correctiemechanisme fungeert met betrekking tot kostenverdeling, dient mijns inziens terughoudend omgegaan te worden met verdere billijkheidscorrecties ten nadele van de toepassing van het ‘vervuiler betaalt principe’. Echter, de huidige derogatieve elementen in artikel 9 lid 1 KRW geven lidstaten veel ruimte om billijkheidscorrecties toe te passen op de principiële toepassing van het ‘vervuiler betaalt principe’.

Maar hoe kunnen lidstaten bij kostenterugwinning nu op een goede manier rekening houden met het ‘vervuiler betaalt principe’ ? In dit onderzoek zijn hiertoe uit de jurisprudentie van het Europese Hof van Justitie vijf richtlijnen gedestilleerd die Lidstaten in acht dienen te nemen bij toepassing van kostenterugwinning. Deze richtlijnen zijn:

1. Indien een richtlijn geen definitie van ‘vervuiler’ geeft, hebben lidstaten in beginsel een grote discretionaire ruimte om te bepalen wie als ‘vervuiler’ wordt aangemerkt.
2. Vervuilers zijn alleen verantwoordelijk voor de vervuiling die zij veroorzaken; zij hoeven niet te betalen voor verwijdering of preventie van vervuiling waaraan zij niet hebben bijgedragen/bijdragen.
3. Niet-vervuilers of diegenen die niet hebben bijgedragen aan (het risico op) de vervuiling dienen niet de lasten te dragen van toepassing van het ‘vervuiler betaalt principe’.
4. Het gebruik van aannames met betrekking tot causaliteit tussen activiteiten en vervuiling/milieuschade is tot op zekere hoogte toelaatbaar.
5. Differentiatie in bijdragen van verschillende categorieën vervuilers is toegestaan, tenzij de kosten evident niet in proportie staan tot de vervuilingscapaciteit van de vervuilers.

Deze richtlijnen duiden erop dat een kostenterugwinningssystematiek vooral gebaseerd zou moeten worden op - bijvoorbeeld - het profijtbeginsel (en vervuiler betaalt beginsel) en minder eenvoudig gebaseerd kan worden op het solidariteitsbeginsel. Voor toepassing van het solidariteitsbeginsel lijkt slechts beperkt ruimte.

Ten slotte rijzen de nodige vragen met betrekking tot de derogatieclausule van artikel 9 lid 4 KRW. Op basis van dit artikel kunnen lidstaten onder specifieke omstandigheden afzien van toepassing van kostenterugwinning voor waterdiensten: wanneer zij in overeenstemming met ‘gevestigde gebruiken’ daartoe beslissen en indien het doel van de richtlijn en het bereiken van dit doel niet in het gedrang komt en de niet-toepassing motiveren in de stroomgebiedsbeheersplannen. Wat bedoeld wordt met ‘gevestigde gebruiken’ is niet duidelijk. Er

werd geen informatie over de inhoud van dit begrip gevonden in de juridische totstandkomingsdocumentatie van de KRW. In mijn optiek impliceert 'gevestigde gebruiken' ten minste een bepaalde duur van die gebruiken. Met betrekking tot het tweede element van de derogatieclausule - de eis dat het doel van de richtlijn en het bereiken van het doel niet in het gedrang mag komen bij niet-toepassing van kostenterugwinning - beargumenteer ik in dit onderzoek waarom de huidige interpretatie van het Europese Hof van Justitie van de kostenterugwinningsbepaling de derogatieclausule vrijwel inhoudsloos maakt. Het wordt, doordat het aan de lidstaten lijkt te zijn overgelaten of zij kostenterugwinning wel of niet toepassen, erg moeilijk om aannemelijk te maken dat Lidstaten niet legitiem een beroep doen op de derogatieclausule. Om de effectiviteit van de derogatieclausule te vergroten, is het noodzakelijk om een meer verplichtende inhoud te geven aan de kostenterugwinningsbepaling, hetgeen binnen de huidige richtlijntekst en context ook goed mogelijk is.

Hoe is kostenterugwinning in Nederland geïmplementeerd en welke principes liggen ten grondslag aan de Nederlandse financieringsstructuur van waterdiensten?
&
Wat zijn de belangrijkste verschillen tussen de Europese en Nederlandse aanpak en kunnen deze verschillen gerechtvaardigd worden? Indien dit niet het geval is, op welke wijze dient het Nederlandse kostenterugwinningssysteem te worden aangepast?
In hoofdstuk 6 van dit boek is een uitvoerige analyse opgenomen in de vorm van een *case study* van de wijze waarop Nederland kostenterugwinning heeft vormgegeven voor de aangewezen waterdiensten. De wijze van kostenterugwinning die Nederland toepast is in grote mate congruent met de vereisten zoals die uit de KRW voortvloeien. Zo is het 'gebruiker betaalt principe' en het 'vervuiler betaalt principe' veelal verankerd in de kostenterugwinningssystematiek. Een aantal kanttekeningen kan echter gemaakt worden. Zo verdient de toepassing van het 'vervuiler betaalt principe' in sommige gevallen meer aandacht. Niet alle kostenterugwinningssystemen zijn bijvoorbeeld gebaseerd op bemetering, daar waar dat in sommige situaties wel goed mogelijk is. Ook kunnen vragen gesteld worden bij bepaalde heffingsgrondslagen die worden gebruikt. Een gemeentelijke rioolheffing gebaseerd op de WOZ waarde van een woning lijkt niet congruent met het uitgangspunt dat de vervuiler betaalt in relatie tot geproduceerde vervuiling. Lidstaten mogen weliswaar bepaalde aannames doen en onder omstandigheden zelf bepalen welke categorieën als vervuiler worden aangemerkt, maar er dient wel een bepaalde relatie te bestaan tussen de vervuiling / milieuschade en de vervuilende activiteit. Ook met betrekking tot de recentelijke aanpassing van de verontreinigingsheffing, waarbij bepaalde verontreinigende stoffen die voorheen tot heffing leidden, thans zijn uitgesloten, maar dezelfde heffingsopbrengst nu opgebracht moet worden mede door bedrijven die deze stoffen niet uitstoten, kunnen vragen gesteld worden in hoeverre deze aanpassing congruent is met het 'vervuiler betaalt principe'.

De toepassing van het vervuiler betaalt beginsel dient ook van invloed te zijn op de allocatie van kosten tussen de verschillende (heffings)categorieën. De KRW bepaalt dat de kosten - ten minste - dienen te worden teruggewonnen van de categorieën huishoudens, landbouw en industrie. De praktijk leert dat meer categorieën bij de verschillende heffingen worden toegepast, hetgeen op zichzelf geoorloofd is. Echter, de vijf richtlijnen die vanuit de Europese jurisprudentie zijn gedestilleerd met betrekking tot het 'vervuiler betaalt principe' dienen niet alleen te gelden tussen de drie in de KRW genoemde categorieën, maar ook tussen eventueel door lidstaten gebruikte subcategorieën. Een voorbeeld waarbij een knelpunt in de praktijk bestaat, is de door waterschappen toegepaste tariefdifferentiatie voor de subcategorie van 'wegen' ten opzichte van de subcategorie 'landbouwgronden'. Zonder motivering hoe de toegepaste tariefdifferentiatie zich verhoudt tot de vervuiling die de subcategorieën veroorzaken (ook in hun onderlinge verhouding),

kunnen vraagtekens gesteld worden of deze systematiek congruent is met het ‘vervuiler betaalt principe’ dat in acht genomen dient te worden bij kostenterugwinning voor de waterdiensten die het waterschap levert. In zijn algemeenheid lijkt de heffingssystematiek die voor verschillende waterdiensten gehanteerd wordt, de agrarische sector in Nederland, welke categorie ook door de Commissie als een van de grote vervuilers wordt aangemerkt, meer te ontzien dan andere categorieën. Het is niet waarschijnlijk dat de waterprijs die de agrarische sector betaalt overeenkomt met de mate van vervuiling en schade die deze sector aan het watermilieu veroorzaakt. Ik verwacht dan ook dat in de nabije toekomst een verder maatschappelijk debat zal plaatsvinden met betrekking tot de kostenverdeling voor waterdiensten tussen de verschillende watergebruikssectoren, waarbij de vraag of de agrarische sector een reële waterprijs betaalt prominent naar voren zal komen.

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Curriculum Vitae

Petra Eleonora Lindhout was born on 29 December 1975 in Amsterdam, the Netherlands. After graduating grammar school at the Fioretticollege in Lisse in 1994, she obtained a degree in Management, Economics and Law at the Haarlem University of Professional Education in 1998. She started her career at the international tax consultancy firms of Arthur Andersen and Deloitte in the period 1998 to 2004. Besides her work she studied as of 2000 Dutch Law at the University of Amsterdam, finalising this by obtaining her degree in 2004. She worked as a lawyer for mostly small and medium sized businesses during the following years. As of 2009 she has been working in public service, lastly as Head of the Legal Department of three cooperating municipalities in the Netherlands. She finalised an extensive post-doctoral specialisation course in Environmental and Spatial Planning Law in 2010 before commencing this PhD research in 2011 at Utrecht University. During her PhD research she published several articles in peer-reviewed international journals, co-organised and introduced her research at a meeting of the European Network for Water Law in November 2012 in Zaragosa (Spain) and contributed to different activities of the Utrecht Centre for Water, Oceans and Sustainability Law.