Case Notes

ECJ on Cost Recovery for Water Services under Article 9 of the Water Framework Directive: Camera Locuta Causa non Finita

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In its eagerly awaited substantive decision on the scope of the principle of cost recovery for water services under Article 9 of the Water Framework Directive, the European Court of Justice found the Commission’s action against Germany to be admissible, but dismissed the claim as unfounded. Without any effort to clarify the contentious concept of “water services”, the European Court of Justice essentially focuses on fulfilment of the Directive’s objectives through cost recovery and the authorisation of decentralised management policies. “In the absence of further claim” a partial exemption from cost recovery for certain water uses is, in principle, regarded as compatible with the fulfilment of these objectives. At the same time, the Court makes it clear that renewed action for failure to meet the objectives of the Directive or for an examination of the exemption conditions provided by the European legislator could well end with the establishment of infringement. Thus, the commission suffers defeat, but is in fact invited to take renewed action.
Background and Significance of the Dispute

In Article 9 of the Water Framework Directive (WFD)\(^1\) the European legislator requires member states to “take account” of the “principle of recovery of the costs […] including environmental and resource costs” where “water services” are concerned (paragraph 1, sub-para. 1). At the same time the member states are particularly instructed to “ensure” that their “water pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of this Directive” (para. 1, sub-para. 2). Finally, “in doing so”, i.e. when complying with their obligations arising from the first and second sentences, the member states can “have regard to the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region affected” (para. 1, sub-para. 3). Article 2(38) WFD defines “water services” as “all services which provide, for households, public institutions or any economic activity: (a) abstraction, impoundment, storage, treatment and distribution of surface water or groundwater, (b) waste water collection and treatment facilities which subsequently discharge into surface water”. Under Article 2(39) “water use” means “water services together with any other activity identified under Article 5 and Annex II having a significant impact of the status of water”.

By its application\(^2\) the European Commission asked the Court to establish that, by excluding certain water uses that should be regarded as “water services” (inter alia, impoundment for the purposes of hydroelectric power generation, navigation and flood protection, abstraction for irrigation and industrial purposes as well as personal consumption), Germany had failed to fulfil its obligations arising from Article 9 in conjunction with Article 2(38) WFD. Germany, on the other hand, regards the “services” characteristic according to Article 2(38) as being limited to the supply of drinking water and waste water disposal (excluding self-provision, i.e. in each case with recourse to an external service provider). Austria, Sweden, Finland, Hungary, the United Kingdom and Denmark joined the action as interveners.

The proceedings were of fundamental importance because by clarifying the terms of the WFD the contentious scope of the cost recovery principle could be defined in a binding manner and codified for the first time. Up to the present time, the German government has taken the view that, by anchoring the cost

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2 Official Journal C 26 of 26 January 2013, p. 35.