

Just Dipping a Toe in the Water? On the Reconciliation of the European Institutions with Article 9 of the Water Framework Directive

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ABSTRACT

In 2000, a provision requiring the full recovery of the costs of water services—Article 9 of the Water Framework Directive—was hailed by many as a notable innovation in the environmental policy of the European Union (“EU”) and a major advance in water management. Almost twenty years later however, it is apparent that Article 9 has not triggered a real change in the behavior of Member States. This article investigates the causes of Article 9’s underwhelming impact, finding them in the many legal problems affecting the provision (in particular, the existence of a variety of goals underlying the principle of full cost recovery), as well as in the approaches taken by the two institutions mainly responsible for its implementation: the European Commission and the European Court of Justice. The Commission takes the execution of Article 9 seriously, but its commitment to its State aid policy has undermined Article 9’s impact. At the same time, the court has thus far advanced a rather stripped-back interpretation of the provision. A careful analysis of these issues may help the EU reconcile Article 9’s goals with those of other important continental policies—and, at the same time, further a better understanding of central questions in environmental law and policy. The intertwining of multiple, uncoordinated actors, multiple policies with only partially different objectives, multiple competing objectives within the same policy, and multiple means to the same end, makes Article 9 of the Water Framework Directive a wonderful case study for those interested in both EU and environmental law.

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INTRODUCTION

If the Water Framework Directive¹ (“WFD”) lies at the heart of the body of laws of the European Union (“EU”) in the field of water policy, its Article 9, on the recovery of costs for water services, is the backbone of such body. Despite its critical importance, in recent cases, the European Court of Justice (“ECJ”) has

1. Council Directive 2000/60, 2000 O.J. (L 327) 1 (EC).

offered a soft interpretation of Article 9, downplaying its content and construing it as providing Member States with significant latitude in choosing how to comply with its provisions.² As a consequence, the effects of Article 9 have been watered down, and the European Commission (“EC”) has been left alone to spearhead its implementation.

The limited results of Article 9 are not entirely attributable to the judiciary, however. The very birth of the provision was flawed as the inclusion of stringent and clear-cut requirements relating to the recovery of costs for water services was opposed from the beginning by some EU countries. As a result, Member States now enjoy considerable leeway in complying with Article 9.³ True, this subject does not lend itself to ready-made solutions. It is not only politically sensitive, but it is also technically complex because the recovery of costs for water services entails difficult considerations drawn from economics and environmental sciences. It is an issue less suited for strict, binding legislation than for lengthy, non-binding guidelines. In fact, such guidelines have been issued multiple times since the promulgation of the WFD.⁴ However, the problems with Article 9 go well beyond this. First, as discussed in Part I, the very objectives of Article 9 are uncertain, and its demands are potentially contradictory. Second, as discussed in Part II, even if the Article’s policy goals were clear, it would still be possible for Member States to circumvent them due to the Article’s loosely-designed escape clause. Finally, as discussed in Part III, a look at Article 9 in the wider context of EU law, especially the rules governing competition and the internal market, reveals conflicts that further undermine the provision’s implementation.

2. Case C-686/15, *Vodoopskrba i odvodnja d.o.o. v. Željka Klafurić*, 2016 E.C.R. I-927; Case C-525/12, *Comm’n v. Germany*, 2014 E.C.R. I-2202.

3. GOETZ REICHERT, *TRANSBOUNDARY WATER COOPERATION IN EUROPE* 71 (Brill-Nijhoff ed., 2016). In general, the European Council of Ministers opposed water pricing since the beginning, while the European Commission and the European Parliament played as hardliners. Maria Kaika & Ben Page, *The EU Water Framework Directive: Part 1. European Policy-making and the Changing Topography of Lobbying*, 13 *EUROPEAN ENV’T* 314 (2003).

4. See, e.g., *Information Sheet on Assessment of the Recovery of Costs for Water Services for the 2004 River Basin Characterisation Report (Art 9)*, Common Implementation Strategy Working Group 2B: Drafting Group ECO1 (2004) [hereinafter *Information Sheet on Assessment of the Recovery of Costs for Water Services*]; *Assessment of Environmental and Resource Costs in the Water Framework Directive*, Common Implementation Strategy Working Group 2B: Drafting Group ECO2 (2004); *Guidance Document No. 1—Economics and the Environment: The Implementation Challenge of the Water Framework Directive*, Working Group 2.6—WATECO (2003) [hereinafter *Guidance Document No. 1*]. A draft version of more recent guidelines can be found in *A Guidance for Assessing the Recovery of Environmental and Resource Costs in the Context of the Water Framework Directive*, Common Implementation Strategy Working Group on Economics (2015). See Meeting of the Strategic Coordination Group for the Water Framework Directive (WFD) Common Implementation Strategy (CIS) (May 7, 2015) (minutes) (on file with the Georgetown Environmental Law Review). Other guidance materials relating to Article 9 may be found elsewhere, such as *WFD Reporting Guidance 2016: Final—Version 6.0.6*, Common Implementation Strategy for the Water Framework Directive and the Floods Directive, at 284–94 (2016) (on the reporting obligations of Member States).

It is not easy to assess the overall impact of Article 9 on the vast European territory, but it seems that its achievements are mixed at best. For instance, water tariffs for agricultural uses, which should reduce water consumption, substantially increased in the Mediterranean area, the region where the most irrigation farming (a very water-intensive activity and one of the major sources of water use) takes place.⁵ However, the European Environmental Agency has noted that across the continent, “water tariffs have not recorded significant increases in recent years.”⁶ In some countries, the rise in water prices over the surveyed period was below or in line with inflation, whereas in other Member States, prices even decreased.⁷ Conversely, the decline in water consumption—which is arguably the primary aim of Article 9—seems not to have progressed much in the course of the 2000s, as total extraction in the region did not show significant variation.⁸

The lack of substantial results in the implementation of Article 9 might be due, in part, to the WFD coming about relatively late in the development of European water pricing policies. The directive was only approved in 2000, setting 2010 as the deadline for putting Article 9 into effect. However, water pricing policies gained momentum prior to the WFD’s enactment. By the 1990’s, Organization for Economic Co-operation and Development countries already were demonstrating an “increasing acceptance of the need for ‘full cost recovery’ in the provision

5. Elias Giannakis et al., *Water Pricing and Irrigation Across Europe: Opportunities and Constraints for Adopting Irrigation Scheduling Decision Support Systems*, 16 WATER SCI. & TECH.: WATER SUPPLY 245, 248 (2016).

6. European Env’t Agency, *Assessment of Cost Recovery Through Water Pricing*, at 55 (2013) [hereinafter *Assessment of Cost Recovery Through Water Pricing*].

7. *Id.* The same was underlined by the EU Commission: “The [River Basin Management Plans] in the majority of cases report a status quo of existing pricing policies.” *European Overview Accompanying the 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*, at 225, SWD (2012) 379 final (Nov. 14, 2012). In 2010, the Organization for Economic Co-operation and Development wrote that the level of prices has “increased, at times substantially, over the last decade,” and that in some countries, water tariffs for water supply services increased at nominal rates that were twice the Consumer Price Index. Organization for Economic Co-operation and Development [OECD], *Pricing Water Resources and Water and Sanitation Services*, at 33, 48, (Mar. 15, 2010), https://read.oecd-ilibrary.org/environment/pricing-water-resources-and-water-and-sanitation-services_9789264083608-en#page1. In any case, large increases are easier when starting prices are very low, so the resulting prices could still be quite far from attaining full cost recovery (which, in these studies, seldom includes environmental and resource costs as the WFD prescribes). However, this comment focuses on how the WFD influenced water prices. If a static view is taken instead, it might well be that in a river basin district, a rise in water prices is not needed as they already meet all costs and that even areas with very low water supply costs are close to full cost recovery despite very low prices. See Antonio Massarutto, *Water Pricing and Irrigation Water Demand: Economic Efficiency Versus Environmental Sustainability*, 13 EUROPEAN ENV’T 100, 104 (2003).

8. HENRI L.F. DE GROOT ET AL., ECORYS, *MAPPING RESOURCE PRICES: THE PAST AND THE FUTURE* 312–13 (2012). Water consumption and water withdrawals are two different notions, but they are conflated here to signal a uniform trend.

of water services.”⁹ This has also been true for many European States, which, in the same decade, raised water tariffs (especially for household and industrial usage) in real terms to varying extents.¹⁰ The rise in the price of water was likely one of the factors that contributed to the reduction of water consumption being a trend well before 2000.¹¹

Thus, the overall impact that the WFD has had on the cost recovery policies of EU Member States has been somewhat limited and partly dependent on a tendency that was already underway. My intention here is not to argue that European institutions should pursue the goals of Article 9 more aggressively; the desirability of such objectives is ultimately a policy decision best left to experts in environmental economics and public policies. Instead, my aim is to affirm that Article 9’s effects are likely to remain limited absent both more vigorous and consistent enforcement by the EC and significant changes by the ECJ in how it approaches the provision. The court has recently rendered judgments on cases concerning Article 9, manifesting its belief that the substantive and procedural requirements Article 9 imposes on Member States are relatively limited.¹² Although enforcing Article 9 presents many challenges, at least some of the issues stemming from the interpretation and application of Article 9 should not be skipped or dealt with hastily, such as the identification of the main purpose, or

9. Organization for Economic Co-operation and Development [OECD], *The Price of Water: Trends in OECD Countries*, Executive Summary (Aug. 16, 1999), <https://www.oecd.org/env/resources/1934075.pdf>.

10. European Env’t Agency, *Indicator Fact Sheet—(WQ05) Water Prices*, at 1 (Nov. 24, 2003), <https://www.eea.europa.eu/data-and-maps/indicators/water-prices/water-prices>.

11. Starting at least from the 1980s, some such countries began stabilizing their water abstractions “through more efficient irrigation techniques, the decline of water-intensive industries . . . , increased use of cleaner production technologies and reduced losses in pipe networks.” Organization for Economic Co-operation and Development [OECD], *Environment at a Glance: OECD Environmental Indicators*, at 81 (2005), <https://www.oecd-ilibrary.org/docserver/9789264012196-en.pdf?expires=1540736854&id=id&accname=guest&checksum=7272D2BEAD8012DF2B5655628A54AEC9>. This was in line with a tendency of all developed countries which saw the stagnation or even the diminution of water usage in both the industrial and domestic sectors. As for domestic usage, “[b]ehavioral changes and technological improvements but also transformation processes led to a phase of moderate increase or stagnation between 1970 and 2000.” M. Flörke et al., *Domestic and Industrial Water Uses of the Past 60 Years as a Mirror of Socio-Economic Development: A Global Simulation Study*, 23 GLOBAL ENVTL. CHANGE 144, 154 (2013). This was accompanied by a marked decrease of per-capita consumption at the world level such that, even if global water withdrawal is still on the rise, adjusting this information for population growth reveals that the pace of the former has been slower than that of the latter. During the period from 1970 to 2010, the world population grew at a rate of almost 1.6% per year, while water withdrawal rose by 1.1% per year. Data available at U.S. Food & Agric. Org., *Water Uses*, AQUASTAT, http://www.fao.org/nr/water/aquastat/water_use/index.stm (last visited Oct. 29, 2018). Although agriculture is still a major source of water consumption in the EU, positive signals witnessing a slowing down of the expansion of water use for farming pre-dated the start of the New Millennium, as was the case in Mediterranean countries, accounting for more than two-thirds of this kind of water use in the whole of Europe. *Sustainability of European Irrigated Agriculture under Water Framework Directive and Agenda 2000*, WADI, at 27 (2004); Massarutto, *supra* note 7, at 102.

12. See *infra* Part IV.

purposes, of the provision.¹³ In addition, in interpreting Article 9, the ECJ can always resort to the argumentative tools it has previously used in cases where scientific uncertainty and economic complexity were present—where it has shown some deference to the EC’s views.¹⁴ Moreover, even if the ECJ decides that Article 9 is not as substantively powerful as others believe, a less timid approach to the more procedural requirements of Article 9 might still help the EC better enforce EU law as EU treaties require.¹⁵

The contribution of this article to existing legal literature on water management is twofold. On the one hand, it offers the first comprehensive and coherent overview of a provision that lies at the heart of EU water policy and is meant to help solve critical issues experienced almost everywhere. It also brings together insights from disciplines other than law, which too often are neglected by legal scholars. The impression resulting from such analysis is that Article 9 is a case study of how not to design a substantive policy provision due to the intertwining of multiple, uncoordinated actors, multiple policies with only partially different objectives, multiple objectives within the same policy, and multiple means to the same end. On the other hand, and more prudently, the issues dealt with by Article 9 are inherently complex and cannot be easily solved. Even if the article maintains that EU judges should address the most evident problems in their interpretation and application of the provision thus far, it also acknowledges the possibility that an implementation that is too demanding is not necessarily the best or most cost-effective way to obtain Article 9’s objectives. In this sense, the provision also becomes an instructive case study for the role and limits of the law. The legal discourse on how much law is needed and how intrusive and detailed it needs to be to optimally address a given issue is certainly underdeveloped. This article frames a situation where hypotheses can be tested. Nonetheless, irrespective of the stance one is willing to take on this issue, the main purpose of this article is to demonstrate that there are at least some measures that the EU institutions can take to reconcile with Article 9 and, as far as the ECJ is concerned, to bring judgments on the provision in line with the court’s case law.

I. IN SEARCH OF COHERENCE WITHIN ARTICLE 9

A brief glance at Article 9 of the WFD illustrates its complexity. It is necessary to quote it in full in order to study it properly. It reads as follows:

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

13. See *infra* Part V.

14. See *infra* Part V.B.

15. See *infra* Part V.A.

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.¹⁶

There are a couple cleavages in this composite provision that are critical to interpreting it. One is temporal in nature and sets 2010 as a watershed between two different ways of implementing water pricing. A textual reading of Article 9 prescribes that, before 2010, the polluter-pays principle (“PPP”) should be taken into account, but Member States should ensure an adequate contribution to the full recovery of costs for water services. After 2010 however, the relative importance of the two requirements inverts, so the principle of full cost recovery (“FCR”) should be merely considered, whereas Member States should act in accordance with the PPP.¹⁷ As this article is written well into the 2010s, the latter wording is presumably the one to be applied, although the odd architecture of the provision can still undermine a plain textual reading and puzzle the reader. Something similar can be said about the other cleavage concerning the material

16. Council Directive 2000/60, *supra* note 1, art. 9.

17. See Herwig Unnerstall, *The Principle of Full Cost Recovery in the EU-Water Framework Directive—Genesis and Content*, 19 J. ENVTL. L. 29, 33–34 (2007) (describing the decline of the PPP and noting a change in its scope of application from the level of individual polluters before 2010 to that of classes of polluters after 2010).

scope of application of water pricing policies. The FCR principle is tied not only to the notion of water services, but also to that of water *uses*.¹⁸ According to Article 2 of the WFD, the two expressions have to be given different meaning, with water uses being a wider category inclusive of, but not limited to, water services.¹⁹ Scholars have tried to make sense of the convoluted language of Article 9 to understand what *must* be charged a price under that provision versus what *can* be.²⁰ This cleavage is of such great importance to the application of the provision that the ECJ was asked to take a stance on the issue.²¹

Two other cleavages, which are no less important but are far less discussed, concern the geographical and teleological scope of Article 9. First, the recovery of costs for water services (and perhaps uses) may be implemented at different scales, such as at the national or sub-national levels, at the river basin or river basin district levels, or at other administrative levels. The WFD sets the river basin and river basin district as the main territorial units of water management. Therefore, it is not surprising that one of the documents guiding the application of the directive considers the issue of the “spatial relevance *vis-a-vis* cost recovery” “rather straightforward,” and identifies the river basin as the most appropriate scale at which data are aggregated and costs computed.²² Such information, however, may be retrieved at different levels, according to what is required by the water uses and services, as well as by the pressures and impacts considered.²³ But if “[t]he desirable disaggregation level will depend on the purpose of data collection,”²⁴ Article 9, which has many possible objectives, might be best implemented at the level demanded by the purpose—and means—taken into account at a given time. Thus, if our main interest is intra- and inter-sectoral efficiency in water use, then the larger the scale the better, given that equality of prices will be

18. For example, Article 9, Paragraph 1 refers to Annex III twice, both times in relation to water services. The same term is used in the annex. However, Annex III is also referenced in Article 5, which only addresses the “economic analysis of water use” (emphasis added). One cannot help but wonder if the two words were chosen carefully when drafting the WFD.

19. Council Directive 2000/60, *supra* note 1, art. 2(38–39).

20. See, e.g., Petra 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?*, 8 UTRECHT L. REV. 86, 88 *passim* (2012); Sarolta Tripolszky, *Water Services and Why a Broad Definition Under the WFD is Needed to Ensure the Polluter Pays Principle*, 2 ELNI REV. 59 (2012); William Howarth, *Cost Recovery for Water Services and the Polluter Pays Principle*, 10 ERA FORUM 565, 572–73 (2009); Unnerstall, *supra* note 17, at 32–33, 35–36. A quasi-official, though non-binding view is in *Guidance Document No. 1*, *supra* note 4, at 73–75; see also ILONA KIRHENSTEINE ET AL., ENTEC, MANAGING SCARCE WATER RESOURCES—IMPLEMENTING THE PRICING POLICIES OF THE WATER FRAMEWORK DIRECTIVE (2010).

21. See *infra* Part V.

22. *Guidance Document No. 1*, *supra* note 4, at 113; *Information Sheet on Assessment of the Recovery of Costs for Water Services*, *supra* note 4, at 8.

23. *Guidance Document No. 1*, *supra* note 4, at 107–15, 131; see also ANIOL ESTEBAN ET AL., ECONOMICS AND THE WATER FRAMEWORK DIRECTIVE: A USER’S MANUAL 20 (2006).

24. *Information Sheet on River Basin Characterisation: Economic Analysis of Water Uses (Art 5 Annex III)*, at 15, Common Implementation Strategy Working Group 2B: Drafting Group ECO1 (2004).

key to a more rational allocation of water over a vast area.²⁵ If, on the other hand, water saving is pursued by linking consumption to prices, smaller geographical units may be preferable because a more direct and visible connection to one's own responsibilities towards a scarce resource might be established.²⁶ Likewise, the choice of a given area may affect the calculation of costs under the WFD.²⁷

Musing on the correct way of interpreting and implementing Article 9 may seem like a very technical exercise, but it is instructive for at least a couple of reasons. First, it shows the degree of complexity environmental matters can reach. It is a kind of complexity that is not purely legal in nature. Instead, it blends more conventional interpretive questions with problems that can only be solved by mastering economic or scientific subjects and digging into hefty data sets.²⁸ Second, it allows one to introduce the discourse on Article 9 as a multi-purpose provision whose application may change depending on the objective to be pursued. Therefore, the following sections describe the four possible objectives that may be rooted in Article 9 and institutional statements addressing its implementation, clarifying the legal or para-legal grounds for each goal.²⁹ These objectives are complicated, and they do not always mesh perfectly with each other. The text of Article 9 also raises significant questions about which objectives should be considered relatively more important.

A. FULL RECOVERY OF COSTS OF WATER SERVICES IN A STRICT SENSE

FCR is the most basic aim of water management: ensuring that water services are not run at a loss. This represents a less ambitious goal of a pricing policy; yet,

25. As it will be seen *infra*, trade-offs between purposes are possible. For instance, a water-scarce river basin or district providing cheap water due to low recovery of costs could end up attracting water users from a water-abundant basin or district where the resource is priced higher because of expensive, pollution-absorbing measures. A more efficient allocation would come at a cost.

26. Thus, if two neighboring but different basins—one with low recovery costs and inhabited by people already limiting their water consumption, the other with higher recovery costs and populated by individuals with less environmentally sound habits—were administratively merged into a larger basin, the effect could be that of unduly shifting part of the costs from the population of the latter to that of the former, thereby decreasing the overall effect of prices on water usage.

27. For instance, if environmental costs are determined through a willingness-to-pay method, it may be that people are more willing to pay for a qualitative improvement of the water in their own sub-basin area instead of for an analogous improvement that would mostly benefit a distant region of the river basin district. For a similar but more accurate consideration, see EFTEC, SCOPING STUDY ON THE ECONOMIC (OR NON-MARKET) VALUATION ISSUES AND THE IMPLEMENTATION OF THE WFD 45–46 (2010).

28. See also *infra* Part VI (discussing the role of the ECJ).

29. A similar taxonomy (a four-tiered one, though the four objectives do not completely overlap with mine) is in Organization for Economic Co-operation and Development [OECD], *Managing Water for All: An OECD Perspective on Pricing and Financing*, at 81 (2009), <https://www.oecd.org/tad/sustainable-agriculture/44476961.pdf>. One main objective and three sub-aims are identified by KIRHENSTEINE ET AL., *supra* note 20, at 15–17. A very useful overview of possible aims and the way each of them is affected by water pricing structures is done by Antonio Massarutto, *Water Pricing and Full Cost Recovery of Water Services: Economic Incentive or Instrument of Public Finance?*, 9 WATER POL'Y 591, 610 (2007).

its practical application is not devoid of technicalities. Leaving aside other kinds of costs, such as environmental or resource costs, a full recovery must include not only the operational and maintenance costs for providing the service, but also all types of financial costs, “including capital costs.”³⁰ According to the EC, the latter are composed of “principal and interest repayment and return on equity where appropriate.”³¹ A capital remuneration rate that is fixed by law hardly conflicts with FCR as understood by the WFD, but it is unlikely that Article 9 requires it.³² Furthermore, the possibility of capital remuneration being problematic under competition rules should not be too swiftly discarded.³³ The role of taxes and subsidies is also an issue of some importance.³⁴

B. PRESERVATION OF WATER QUALITY

FCR *stricto sensu* (in a strict sense) can be inscribed within FCR *lato sensu* (in a wider sense). In other words, the principle of FCR can go well beyond the mere recovery of the costs of running a service. For instance, water prices might be increased to cover environmental harm. This is exactly how the PPP works: polluters are obliged to pay for their noxious behavior and are charged through their water bills for damages caused to water bodies. There is a dual logic behind this: on the one hand, a financial incentive is created to discourage users from polluting; on the other hand, when damage does occur, recovering the corresponding

30. *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*, at 11, COM (2012) 670 final (Nov. 14, 2012) [hereinafter *Report from the Commission*]. In principle, this includes both risk capital and debt capital.

31. *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*, at 14, COM (2000) 477 final (July 26, 2000) [hereinafter *Communication from the Commission*].

32. The reason for advocating a fixed remuneration rate lies in the fact that capital markets would trust service providers more so that investment on part of the latter would be facilitated (forecasts of investments are part of the economic analysis under Annex III). That such fixed return is demanded by the WFD has been rejected by the judiciary in Italy. *See* Tribunale Ammin. Reg., 26 Marzo 2014, n. 779, Foro it. 2014, III (It.); Corte Cost., sez. un., 12 Gennaio 2011, n. 26, Racc. uff. corte cost. 2011, I, 1, ¶ 5.1 (It.).

33. Because “the cost of capital is a direct function of the risk profile,” whenever various types of undertakings (for example, private entities and legally-privatized publicly-owned monopolies) are bidding for the management of a water service, a fixed remuneration rate might underestimate the risk taken by private actors and exaggerate the one taken by public or semi-public monopolies facing low or no market risk. Antonio Massarutto et al., *Private Management and Public Finance in the Italian Water Industry: A Marriage of Convenience?*, 44 WATER RESOURCES RES. 1, 13 (2008).

34. *Information Sheet on Assessment of the Recovery of Costs for Water Services*, *supra* note 4, at 7; Howarth, *supra* note 20, at 578; JETSKE BOUMA ET AL., COST RECOVERY ANALYSIS IN THE WATER FRAMEWORK DIRECTIVE (2001), available at https://circabc.europa.eu/webdav/CircaBC/env/wfd/Library/working_groups/i%20-%20CIS%20activities%202001-2015/programme_20022003/economic_analysis/working_meetings/fourth_working_meeting/Cost%20recovery.doc. As to investment costs, “[i]n several EU Member States, uncertainty remains concerning possible hidden subsidies linked to preferential access to financial resources given to water service operators.” *Assessment of Cost Recovery Through Water Pricing*, *supra* note 6, at 9.

environmental costs allows restorative measures aimed at improving water quality to be put in place.

If the recovery of the operational costs of water services is inherent in Article 9, as expressed by its title, the purpose of preserving and even improving water quality is found in both the PPP, which is cited twice in the provision, and in the reference to environmental costs. Moreover, a contextual interpretation of Article 9 requires that it be read considering Article 4 on the environmental objectives of the WFD, which aims to raise the quality of European water basins to a “good” status. However, there is no consensus within legal scholarship on the importance to be attributed to both the PPP and environmental costs. The PPP appears twice in Article 9, but it being preceded by the phrases “in accordance with” and “taking account of” raises doubts about its cogency.³⁵ Environmental costs are only mentioned once, where it is said that they must be included in FCR, but again, the sentence just requires that “Member States shall take account of the principle of recovery of the costs of water services.” Does environmental costs not being mentioned again in the second indent of Paragraph 1, where it is demanded that FCR be ensured, mean that they can ultimately be disregarded?³⁶

From a practical point of view, authors have wondered whether it is sensible to incorporate environmental costs in FCR or to pursue environmental goals through water pricing because more efficient, less onerous alternatives exist.³⁷ The computation of such costs can be burdensome. Furthermore, neither Article 9 nor Annex III (on economic analysis) indicates how environmental costs should be assessed. The annex merely allows States to consider “the costs associated with collection of the relevant data.”³⁸ This precept can guide the choice of one method over the many that are suggested by scientific literature.³⁹

35. See *supra* note 17 and related text.

36. On this, two approaches have been taken: the bracketing approach and the separation approach. See ERIK GAWEL, ENVIRONMENTAL AND RESOURCE COSTS UNDER ARTICLE 9 OF THE WATER FRAMEWORK DIRECTIVE: CHALLENGES FOR THE IMPLEMENTATION OF THE PRINCIPLE OF COST RECOVERY FOR WATER SERVICES 33–35 (2015).

37. For instance, Martínez and Albiac state that, even if the implementation of pollution control measures may be more demanding than a simple water-pricing policy, “[a] tax on nitrogen utilization results in more significant pollution reductions at much lower costs in terms of quasi-rent, and with gains in terms of social welfare” than an increase in water prices. Yolanda Martínez & Jose Albiac, *Nitrate Pollution Control Under Soil Heterogeneity*, 23 LAND USE POL’Y 521, 525–27, 530 (2006). Gawel remarks that the calculation of environmental costs is far from being a simple and neutral task and proposes wastewater charges (like in Germany) or pesticide charges (like in Denmark and Sweden) as more viable solutions. Erik Gawel, *Article 9 of the EU Water Framework Directive: Do We Really Need to Calculate Environmental and Resource Costs?*, 11 J. EUROPEAN ENVTL. & PLANNING L. 249, 270 (2014).

38. Council Directive 2000/60, *supra* note 1, at annex III.

39. Some methods are listed in Nikitas Mylopoulos & Chrysostomos Fafoutis, *Full Cost Recovery in the Urban Residential Sector According to the Water Framework Directive*, 9 URBAN WATER J. 161, 170, 173 (2012). A more thorough and technical treatment of the matter can be found in *Assessment of Environmental and Resource Costs in the Water Framework Directive*, *supra* note 4, and ROY BROUWER ET AL., AQUAMONEY, ECONOMIC VALUATION OF ENVIRONMENTAL AND RESOURCE COSTS AND BENEFITS

For environmental costs to be calculated however, they must be defined. We can describe them as the economic damages suffered by the environment due to the provision of water services. They include both direct and indirect damages to water resources.⁴⁰ The risks related to the provision of water services could also give rise to environmental costs, such as higher insurance costs for an increased probability of flood events.⁴¹ Whether damages to the environment and impairment of ecosystem services *per se* count as environmental costs—this would happen if such damages did not even indirectly affect humans or human activities—is an open question.⁴² Moreover, although, in principle, the PPP should cover not just point source pollution but also diffuse pollution, this is not necessarily the case in practice.⁴³ However, according to the second indent of Article 9, Paragraph 1, environmental costs can be recovered by levying contributions from three broad categories of users—households, industry, and agriculture. This might be a method for facilitating the application of the PPP to diffuse pollution.

The relationship between the duty to recover environmental costs and the PPP is not entirely clear. The PPP is a key principle in European environmental law and policy, one that is enshrined in other legal instruments and that has also been the object of ECJ decisions.⁴⁴ Should the PPP, as used in Article 9, be given the same meaning as when it appears in other pieces of EU legislation? Perhaps the scope of the principle is to be derived from interpreting Article 9 and referring to

in the Water Framework Directive: Technical Guidelines for Practitioners (2009), available at http://s3.amazonaws.com/zanran_storage/www.aquamoney.org/ContentPages/2483937804.pdf.

40. This includes, for instance, the harm done to aquatic ecosystem services. *Report from the Commission, supra* note 30, at 11.

41. Unnerstall, *supra* note 17, at 37–38.

42. *Id.* at 39. It is possible to qualify recreational, cultural, or even spiritual benefits as services.

43. The PPP may find application in cases of diffuse pollution, but in some cases, it was not meant to apply to this kind of pollution, as recognized by the same EC apropos the Environmental Liability Directive. Compare Arne Bleeker, *Does the Polluter Pay? The Polluter-Pays Principle in the Case Law of the European Court of Justice*, 18 EUROPEAN ENERGY & ENVTL. L. REV. 289, 293–94 (2009) (reporting on the *Standley* case relating to the Nitrates Directive) and Petra E. Lindhout & Berthy van den Broek, *The Polluter Pays Principle: Guidelines for Cost Recovery and Burden Sharing in the Case Law of the European Court of Justice*, 10 UTRECHT L. REV. 46, 57 (2014) with European Commission MEMO/04/78, Questions and Answers Environmental Liability Directive (Apr. 1, 2004). Diffuse pollution is sometimes addressed by means more like the user-pays principle than the PPP, the so-called beneficiary-pays principle. Organization for Economic Co-operation and Development [OECD], *Diffuse Pollution, Degraded Waters: Emerging Policy Solutions*, at 60 (Mar. 22, 2017), https://read.oecd-ilibrary.org/environment/diffuse-pollution-degraded-waters_9789264269064-en#page1; see also D. Assimacopoulos, *Recovery of Full Cost and Pricing of Water in the Water Framework Directive*, NAT'L TECH. UNIV. OF ATHENS, at 5 (Jan. 2002), <http://environ.chemeng.ntua.gr/wsm/Uploads/Publications/Recovery%20of%20full%20cost%20and%20pricing%20of%20water%20in%20the%20Water%20Framework%20Directive.pdf>. As to the WFD, the EC expects Member States to report on the contribution of agricultural users to the recovery of costs linked to diffuse pollution. *WFD Reporting Guidance 2016: Final—Version 6.0.6, supra* note 4, at 294.

44. Nicolas de Sadeleer, *The Polluter-Pays Principle in EU Law—Bold Case Law and Poor Harmonisation*, in PRO NATURA: FESTSKRIFT TIL HANS CHRISTIAN BUGGE PÅ 70-ÅRS DAGEN 2. MARS 2012, 405, 406 (Inge Lorange Backer et al. eds., 2012); Youri Mossoux, *Causation in the Polluter Pays Principle*, 19 EUROPEAN ENERGY & ENVTL. L. REV. 279 (2010); Bleeker, *supra* note 43.

its negotiating history. Such analysis was conducted by two authors who concluded that the PPP should be construed narrowly (covering only direct pollution) instead of broadly (requiring that the polluter pays for any environmental damage that can be traced back to her or him). In their view, the broader understanding would fall within the concept of recovery of environmental costs.⁴⁵ However, whereas the PPP can be, almost by definition, resorted to whenever water *uses*—as defined by Article 2, Paragraph 38—are concerned, Article 9 seems to make the recovery of environmental costs incapable of going beyond the class of water *services*. But water services, unlike uses, can hardly be polluting activities *stricto sensu*: they imply only minor environmental costs. What ensues is a singular scenario whereby categories of uses⁴⁶ would be asked to pay for water treatment services based on each use’s impact on the quality of water; at the same time, a bit paradoxically, such impacts would not be used to calculate, together with the shares of the costs, their value.⁴⁷ The maladroit design and use of the terms “water uses” and “water services” can create serious problems at the implementation level.⁴⁸

Water quality improvement through FCR is a goal of Article 9,⁴⁹ but it entails several interpretive issues. The “use or service” dichotomy, and the other problems illustrated above, are but a few of the many conundrums to be unraveled. Additional questions are: What is the relationship between Article 9 as an environment-oriented rule and the notions of cost-benefit analysis and disproportionate costs in Article 4 of the directive?⁵⁰ Are the funds made available through

45. Lindhout & van den Broek, *supra* note 43, at 56–58.

46. The WFD speaks of “uses” collectively, but those who are asked to pay are actually users belonging to the different categories of uses.

47. Let us imagine that agriculture, industry, and households, as categories of water uses, contribute to the generation of water-related costs. Agriculture contributes 30%, industry contributes 55%, and households contribute 15%. Charges for water services provided to each category should be proportional to each category’s contribution. However, because adequate contribution is calculated based on water *uses*, but costs to be recovered stem from the provision of *services*, the amount to be paid will not include the costs of those activities that are uses but not services. For example, factories pouring wastewater into a river will increase their *share* of costs of water uses towards competing uses, but the *amount* of the costs of that pollution will not be computed as costs of water services beyond the actual costs relating, for example, to a wastewater treatment service—if any.

48. For example, did the legislator realize that environmental costs are to be recovered only to the extent that the underlying damages are treated by means of a water service, so that, absent such service, polluting uses are outside the scope of FCR?

49. As recognized by the ECJ. *See infra* Part IV.

50. For instance, we could wonder whether environmental costs and benefits under Article 9 should be outlined the same as under Article 4. If damages to non-aquatic ecosystems are not computed among environmental costs for the purposes of cost recovery, can non-aquatic ecosystem services be considered when calculating the benefits obtained from an environmental measure? Against which parameter should costs be considered disproportionate? One possibility would be to set as a reference point the resources available to those who must pay for the implementation of the environmental objectives of the WFD. Benjamin Görlach & Britta Pielen, *Disproportionate Costs in the EC Water Framework Directive—The Concept and its Practical Implementation*, APPLIED ENVIRONMENTAL ECONOMICS CONFERENCE, at 2 (2007), <http://ecologic.eu/sites/files/presentation/2013/goerlach-pielen-envecon>

the recovery of environmental costs and the PPP to be spent on improving the status of water resources?⁵¹ Do environmental costs cease to be factored into FCR once a “good” water status—the objective of the WFD according to Article 4—has been attained?⁵² What about the still-ongoing environmental costs stemming from the consequences of activities (uses) that are not carried on any longer?⁵³

C. PRESERVATION OF WATER QUANTITY

The environmental objectives of the WFD demand not only that water quality be improved (polluter-pays principle), but also that water not be used excessively (user-pays principle⁵⁴). Put differently, water saving should be encouraged. This is what the directive means by demanding that pricing policies “provide adequate incentives for users to use water resources efficiently,” a purpose that is also echoed by Article 11, which requires that programs of measures “promote an efficient and sustainable water use.”⁵⁵ The keyword here is efficiency, which can operate in at least two ways through a higher price of the resource: by making the wasting of water more expensive and by making water-saving investments more attractive. In particular, an increased price of water would decrease consumption, foster water re-use,⁵⁶ help develop water-saving technologies and adopt water-

paper.pdf. Are these resources calculated, at least in part, based on the costs that must be recovered from water users? Would this remain true if the collector is a different entity than the one in charge of enacting and financing the measure? According to *Guidance Document No. 1*, *supra* note 4, at 177, 193, both cost-benefit and disproportionate cost analyses may consider ability to pay.

51. After all, Article 9 requires “that water-pricing policies . . . contribute to the environmental objectives of this Directive,” and money use constraints could be necessary whenever the payment of environmental costs becomes a mere fee for polluting. A specific provision addressing this issue was suggested to the European Parliament prior to the enactment of the WFD, but, evidently, the proposal fell flat. GEORGE KALLIS, *USE OF NEW TECHNOLOGIES AND COST OF WATER IN VIEW OF THE NEW WATER DIRECTIVE OF THE EU 81 (2000)*, available at <https://docplayer.net/49949389-Use-of-new-technologies-and-cost-of-water-in-view-of-the-new-water-directive-of-the-eu.html>.

52. See GAWEL, *supra* note 36, at 49–50 (also referring to resource costs and answering the question in the negative); *cf. id.* at 91.

53. For instance, mining activities, even when defunct, may require the establishment of a pumping system in order to dewater excavation voids and prevent groundwater level increases, swamping of the soil, flooding, water infiltration, and possibly water contamination. In a similar scenario, a Polish company in charge of the operation of a pumping system could receive State funds for bearing the costs of avoiding environmental damages. *European Commission on “State Aid SA 37609 (2013/N)—Poland”*, C (2014) 7283 final (Oct. 15, 2014).

54. As it is called in European Env’t. Agency, *Water Resources Across Europe—Confronting Water Scarcity and Drought*, EEA Report No. 2/2009, at 46 (Mar. 12, 2009). That these principles sometimes are phrased in a non-conventional way demonstrates that legal consequences should not be drawn whenever the word principle is uttered. See, e.g., László Vasa, *The Water Pricing Effects on the Water Use of the Hungarian Households*, 2 EURASIAN J. BUS. & ECON. 91, 96 (2009) (condensing the contaminating-or-using-party-is-paying principle).

55. Council Directive 2000/60, *supra* note 1, art. 11(3)(c). Programs of measures are those measures that Member States are required to plan and implement in order to attain the environmental objectives of the WFD, which are stated in Article 4 of the Directive.

56. *Guidelines on Integrating Water Reuse into Water Planning and Management in the context of the WFD*, Common Implementation Strategy for the Water Framework Directive and the Floods

saving techniques, and trigger a shift towards less water-intensive production (such as the choice of more sustainable crops).⁵⁷ The EC, in its communications and suggestions to Member States, detailed actions that should be taken in this regard. For instance, it stated that “volumetric charges based on real use” should be the standard,⁵⁸ whereas the adoption of flat rates should be avoided as they provide little incentive to reduce unnecessary consumption.⁵⁹ “An efficient use of water requires measuring the volume of water used.”⁶⁰ To this end, “the revenues of cost-recovery instruments should be sufficient for the river basin authorities to effectively execute their water management tasks,” including the “update and maintenance of register of abstractions.”⁶¹ Curiously, the EC thinks that self-abstraction should also be charged a fee under Article 9, despite—according to a textual interpretation of Article 2—it patently not falling within the notion of a water service.⁶² Also among the tasks of water managers—service providers in this case—is the recovery of the costs for infrastructure projects and investments for extension and refurbishment,⁶³ to “promote more efficient irrigation net works”⁶⁴ and reduce water wastage due to leakages.⁶⁵

It is important to highlight that not all of the above-mentioned effects are fully within the control of policymakers. A service provider can raise water charges and thus induce greater conservation of the resource by spending the newly inflowing capital on improved waterworks and water-saving devices to be donated to users. The mechanics behind this process are rather linear. Nonetheless, it seems that Article 9 sparked no meaningful capital investments in

Directive, at 30 (2016). The European Commission has prompted water reuse policies. *See Report on the Progress in Implementation of the Water Framework Directive Programmes of Measures Accompanying the Communication from the Commission to the European Parliament and the Council*, at 92, SWD (2015) 50 final (Mar. 9, 2015) [hereinafter *March 9, 2015 Report*]. This is also a European target in order to meet the United Nations Sustainable Development Goals. Indeed, “minimum requirements for reused water (SDG 6) will be set.” *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Next Steps for a Sustainable European Future—European Action for Sustainability*, at 9, COM (2016) 739 final (Nov. 22, 2016).

57. *Communication from the Commission to the European Parliament and the Council—The Water Framework Directive and the Floods Directive: Actions Towards the ‘Good Status’ of EU Water and to Reduce Flood Risks*, at 12–13, COM (2015) 120 final (Mar. 9, 2015) [hereinafter *March 9, 2015 Communication on the WFD*].

58. *Id.* at 10.

59. *Report from the Commission*, *supra* note 30, at 11. This appears to be consistent with empirical observations. *See OECD*, *supra* note 29, at 76.

60. *Report from the Commission*, *supra* note 30, at 11; *see also March 9, 2015 Communication on the WFD*, *supra* note 57, at 10, 12. This means that the use of metering should be expanded, especially in the household and agricultural sectors.

61. *March 9, 2015 Report*, *supra* note 56, at 107.

62. *Compare id.* at 107, 118 with Council Directive 2000/60, *supra* note 1, art. 2(38).

63. *March 9, 2015 Communication on the WFD*, *supra* note 57, at 10; *see also Part I.A.*

64. *March 9, 2015 Report*, *supra* note 56, at 92.

65. *March 9, 2015 Communication on the WFD*, *supra* note 57, at 13.

Europe.⁶⁶ Moreover, an increase in price will not necessarily lead to a decrease in consumption. Several factors influence the relationship between water price variations and water use. A major factor is the economic sector that is considered. Whereas domestic usages seem to be more responsive to changes in water prices—though this is not always the case⁶⁷—agricultural demand is quite inelastic with respect to a change in water tariffs.⁶⁸ More precisely, the slope of the water demand curve may depend on a great deal of circumstances, such as climatic conditions, the demand for the good that is produced as well as the market value of the crop, the size of the cultivated area, and the relative weight of other production inputs like fertilizers, seeds, and labor, in the total production cost. Even if this is not enough reason for an utter rejection of water pricing as a control tool for water consumption, it represents a warning for an intelligent recourse to, and design of, tariff schemes. Moreover, it demonstrates that the genesis of Article 9 reflects, at least in part, an ill-informed approach of the EC, which, in a 2000 preparatory document for the WFD, stated that “[e]fficient water pricing policies have a demonstrable impact on the water demand of different uses. As a result of changes in water demand, efficient water pricing reduces the pressure on water resources. This is particularly true for the agricultural sector.”⁶⁹ Nearly two decades later, with hindsight and increased knowledge of the mechanics of water

66. *Assessment of Cost Recovery Through Water Pricing*, *supra* note 6, at 55–57. It has been noted that “there is normally no link between higher water charges and better operation and maintenance,” given that, quite often, revenues go to the general treasury. William I. Jones, *The World Bank and Irrigation*, WORLD BANK OPERATIONS EVALUATION, at 6 (July 1995), available at <http://documents.worldbank.org/curated/en/113931468740164324/pdf/multi-page.pdf>. This is why the World Bank recommends that full financial autonomy be granted to the provider of the service, even if public. K. William Easter & Yan Liu, *Cost Recovery and Water Pricing for Irrigation and Drainage: What Works?*, in AGRIC. & RURAL DEV. NOTES—ISSUE 2 2 (Dec. 2005). Though, in Europe, the problem might be less serious than elsewhere, earmarking water tariffs for re-investment in water efficiency is an option. For an analogous proposal, *cf. supra* note 51.

67. For a couple of case studies demonstrating scarce responsiveness, see Bartolomé Deyà-Tortella et al., *Analysis of Water Tariff Reform on Water Consumption in Different Housing Typologies in Calvià (Mallorca)*, 9 WATER 425 (2017); Vasa, *supra* note 54; see also FOOD & WATER WATCH, PRICELESS—THE MARKET MYTH OF WATER PRICING REFORM 9–10 (2010), available at https://www.foodandwaterwatch.org/sites/default/files/priceless_report_sept_2010.pdf; OECD, *supra* note 29, at 76.

68. Even the temple of the free-market creed, the World Bank, tends to consider water quotas more trustworthy than charges when a reduction in water consumption is the aim. WBG, AN EVALUATION OF WORLD BANK SUPPORT, 1997–2007: WATER AND DEVELOPMENT—VOLUME 1 31 (2010), available at <http://documents.worldbank.org/curated/en/359131468338472634/pdf/558350PUB0Wate1C0disclosed071221101.pdf>. A greater suitability of water quotas for reducing agricultural water use in Spain is also argued by Giacomo Giannoccaro et al., *Comparative Analysis of Water Saving Policies in Agriculture: Pricing Versus Quotas*, in TECHNOLOGICAL PERSPECTIVES FOR RATIONAL USE OF WATER RESOURCES IN THE MEDITERRANEAN REGION 231 (Maroun El Moujabber et al. eds., 2009). On the potential and limits of water pricing more generally, see François Molle & Jeremy Berkoff, *Water Pricing in Irrigation: Mapping the Debate in the Light of Experience*, in IRRIGATION WATER PRICING: THE GAP BETWEEN THEORY AND PRACTICE 21, 45 *passim* (François Molle & Jeremy Berkoff eds., 2007).

69. *Communication from the Commission*, *supra* note 31, at 3.

pricing, we can say the EC was overly optimistic in its assumptions about the effects tariffs would have on water usage.

D. EFFICIENT ALLOCATION OF WATER RESOURCES

Emphasizing the noteworthy disparity in the value of water across different economic sectors, a couple of authors wondered “whether the WFD has the radical intent of promoting resource transfers or whether it merely means to operate within the status quo of water rights.”⁷⁰ Stimulating an optimal allocation of water, or at least a better one, among its various uses would be radical indeed, as it would lead to a reshuffling of the economy of a country by moving water from low- to high-value activities within the same sector (for example, the shift to a different crop) and across sectors (for example, the extinguishment of fishing in favor of hydro-power generation). Although daring, this objective has a legal basis in the text of the directive, the already-mentioned reference to efficient use, and, most importantly, the notion of resource costs. The way these are defined by one set of official guidelines leaves little room for doubt, as they are said to “only arise . . . as a result of an inefficient allocation (in economic terms) of water and/or pollution over time and across different water users, i.e. if alternative water use generates a higher net economic value.”⁷¹ Other, informal guidelines on the same topic further clarify that “[a]llocation decisions of scarce water resources always imply an opportunity cost. . . . Economically efficient water pricing will have to include the opportunity costs of water use, sending a signal to the water users of the economic value of water.”⁷² As a result, higher-priced water will “flow” to activities generating higher income.⁷³ This is perhaps the most ambitious of all the objectives of the WFD, though it did not deter some river basin authorities from linking the price of water to its availability.⁷⁴

70. Dominic Moran & Sabrina Dann, *The Economic Value of Water Use: Implications for Implementing the Water Framework Directive in Scotland*, 87 J. ENVTL. MGMT. 484, 493 (2008).

71. *Assessment of Environmental and Resource Costs in the Water Framework Directive*, *supra* note 4, at 16.

72. ROY BROUWER ET AL., *supra* note 39, at 82–83.

73. This is in line with the Roadmap to a Resource Efficient Europe. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Roadmap to a Resource Efficient Europe*, at 13–14, COM (2011) 571 final (Sept. 20, 2011) (promoting “[b]etter demand management through economic instruments (pricing, water allocation),” because “[c]hanges in ecosystems, land use, in production and water consumption and re-use patterns could cost-effectively reduce scarcity and ensure water quality”).

74. THOMAS DWORAK ET AL., *ÉCOLOGIC, ASSESSMENT OF AGRICULTURE MEASURES INCLUDED IN THE DRAFT RIVER BASIN MANAGEMENT PLANS—SUMMARY REPORT 66* (2010), available at <http://ec.europa.eu/environment/water/quantity/pdf/summary050510.pdf>. The authors quote a couple of cases. One of them is the French basin of Adour-Garonne, in which “la quantité de la ressource disponible [est un] de facteurs à prendre en compte” when pricing water. AGENCE DE L’EAU ADOUR-GARONNE, *LE PRIX DE L’EAU SUR LE BASIN ADOUR-GARONNE*, at 14 (AEAG ed., 2016).

E. OVERLAP AND CONTRADICTIONS BETWEEN ARTICLE 9'S GOALS

That Article 9 is a multi-purpose provision is not without consequences. The most problematic is the possibility of these purposes conflicting with one another, which would result in the need to prioritize them. True, all the above-mentioned goals overlap to a great extent as they are coupled both theoretically and factually. Some of those that I described as self-standing objectives may also be deemed to be intermediate aims, objectives that serve other objectives. For example, recovery of costs is of use to preservation of water quantity because a sound management of water services is likely to be conducive to water savings through, for instance, a better pipeline network. In turn, preservation of water quantity helps accomplish preservation of water quality given the strict relationship between the health of an aquatic ecosystem and its sustainable use. Preservation of water quantity is also connected with efficient allocation of water. If resource costs are “the costs of foregone opportunities which other uses suffer due to the depletion of the resource beyond its natural rate of recharge or recovery (for example, the over-abstraction of groundwater),”⁷⁵ and they “arise if demand is not fully met,”⁷⁶ then increasing the availability of water will have an impact on its allocation among competing users. Other linkages exist, perhaps less obviously despite the linearity of the underlying rationale. For instance, preserving water quality can feed back into recovery of costs, as when an improved status of water resources allows for reduced expenses for construction and upkeep of sewage plants.⁷⁷

However, the interactions between these multiple goals are not necessarily virtuous and unproblematic. On the contrary, the pursuit of one of them may undermine or draw off the attainment of another. For example, it has been noted that “water pricing (aiming at allocative objectives) and cost recovery can often be at odds; and prevalence of one or the other objective also depends on whether the main issue at stake is financing infrastructure development and maintenance or allocating scarce water resources.”⁷⁸ In other words, a contradiction might arise between full cost recovery and efficient allocation of water. At the same time, the achievement of efficient allocation of water could conflict with the possibility of fully realizing preservation of water quality because a more economically rational allocation of water resources is not necessarily beneficial to the environment, and economic efficiency is not always consistent with sustainability. Higher prices will lead to a substantial reduction in water demand in some areas, whereas in

75. *Guidance Document No. 1*, *supra* note 4, at 72.

76. ROY BROUWER ET AL., *supra* note 39, at 79 (using the expression “scarcity costs” or “resource scarcity costs”).

77. See the comparison between Denmark and the Netherlands in Eva Roth, *Water Pricing in the EU—A Review*, EUROPEAN ENVTL. BUREAU, at 14 (2001), available at www.semide.net/media_server/files/g/r/ReviewWaterPricing2001.pdf.

78. Massarutto, *supra* note 29, at 591.

other regions, only minor effects will be registered, or an increase in consumption may result—particularly in some of the most water-stressed areas.⁷⁹

Sometimes, although an outright conflict is not present, one goal might not be totally consonant with another. One example is preservation of water quantity on the one hand, which aims at preserving water through its re-use, and recovery of costs on the other. “Treated wastewater must itself be priced lower than potable water in order to gain public acceptance. In such cases, encouraging water reuse takes precedence over cost recovery.”⁸⁰ More generally, volumetric water prices are usually more effective in incentivizing water savings (preservation of water quantity) but might not be the most suitable method for covering operational costs (recovery of costs) due to their high implementation costs.⁸¹ Therefore, “[t]here should be a clear linkage between objectives and pricing methods.”⁸² Policymakers must decide which goals are to take priority before deciding on a water pricing strategy.

If Article 9’s aims and sub-aims are thought of as essentially driven by different principles, it is not easy to strike a balance among them. Reaching one of the aims may come at the cost of preventing another from being realized. As illustrated by some water experts,

[a]chieving best practice pricing principles in the context of water . . . is also disrupted by the contradictions between some of the criteria required to achieve best practice. Put differently, there is often perceived trade-offs between the principles embodied in best practice pricing. For instance, achieving allocative efficiency may require compromises in order to secure revenue adequacy. Similarly, achieving efficiency may come at the expense of compromises in equity . . . There might also be trade-offs within a single criterion, such as between achieving efficiency on allocative or dynamic grounds.⁸³

79. As detailed by Massarutto, *supra* note 7. A similar outcome may result from a different scenario, the one that is allowed by water markets, which are meant to maximize profits from the use of water. In Spain, water trade between the city of Madrid and farmers in the Henares river basin, who sold a share of the resource they did not intend to use, led to an increased abstraction from the aquifer and thus, to its further depletion. Monica Alessi & Sébastien Treyer, *Economic Models and Water Pricing Towards Water Efficiency*, 48 *INTERECONOMICS* 150, 153 (2013).

80. U.N. WORLD WATER ASSESSMENT PROGRAMME, UNITED NATIONS WORLD WATER DEVELOPMENT REPORT 2017—WASTEWATER: THE UNTAPPED RESOURCE 147 (2017).

81. B. BOSWORTH ET AL., WATER CHARGING IN IRRIGATED AGRICULTURE: LESSONS FROM THE LITERATURE (REPORT OD 145) 16 (2002).

82. *Id.*

83. Bethany Cooper et al., *Best Practice Pricing Principles and the Politics of Water Pricing*, 145 *AGRIC. WATER MGMT.* 92, 96 (2014). Equity is a moral idea that was not explicitly mentioned in the discussion above, though it is not totally extraneous to the objectives I sorted out. Among the parameters that can be used to assess equity in order to share the financial burdens of an environmental measure are the responsibility for the damage to be repaired, the benefit received by the measure, and the ability to pay. Giles Atkinson et al., *Balancing Competing Principles of Environmental Equity*, 32 *ENV'T. & PLANNING A: ECON. & SPACE* 1791 (2000).

Thus, the accomplishment of one objective might hinder the fulfilment of another one. The reasons for these potential contradictions may be endogenous (for example, the structure of the water tariff scheme) or exogenous (for example, the social and geographical conditions of a region). Considering said inconsistencies, the absence of a clear order among Article 9's competing goals is problematic. No hierarchy among the goals can be deduced based on the plain text of Article 9, nor can hints be detected in the official documents of the EC (which, in any case, are not dispositive of Article 9's meaning). A Member State that is facing the dilemma of whether resource costs should be recovered—whether an efficient allocation should be promoted—at the expense of sustainability, is left without clear guidance. A contextual interpretation of Article 9 seems to require that, if possible, preference be given to preservation of water quality, as the main purpose of the directive is the attainment of a good ecological status of water bodies—but this is far from certain.⁸⁴ Therefore, it can be assumed that States enjoy ample leeway in prioritizing the aims of the WFD.

Finally, a prescriptive or descriptive hierarchy among objectives cannot be inferred from their mutual positions on the scale of water pricing. We cannot sort these objectives based on how much each of them requires water to be priced. Also, such positions on the scale cannot be determined *a priori*, without considering theoretical as well as factual circumstances. The hierarchy ultimately depends on many factors, including the way a given objective is construed (for recovery of costs, whether “full costs” are composed of, in addition to operation and maintenance costs, the initial investment for building infrastructure), the way a given cost is calculated (for preservation of water quality, which system is resorted to for estimating environmental costs), and factors external to Article 9 (for preservation of water quantity, the degree of responsiveness to price variations, and for preservation of water quality, the pollution levels of a river basin). Therefore, it is not always possible to establish in advance which rung of the price ladder one objective corresponds to, and whether it ranks higher or lower than another goal—namely, whether its attainment is more or less “costly” than another goal. This means that the objectives successfully pursued in different river basins for every given price of water may not overlap. Conversely, for every chosen objective, the price of water needed to reach it may diverge in different basins.

In the end, the contradictions and lack of clarity within Article 9's text has undermined the achievement of its goals. Without clear guidance on which goals are to be attained or to take precedence, Member States have been able to craft policies that fit their own objectives, to the detriment of achieving an effective water policy across the EU. In the next Part, it will become clear that this implementation problem is even bigger than I have described so far.

84. See *infra* Parts II, III.

II. A (LOOP)HOLE IN THE WATER:⁸⁵ THE MANY WAYS STATES MAY EVADE THE OBJECTIVES OF ARTICLE 9

The limited impact that Article 9 has had on the water pricing policies of EU Member States has a twofold explanation. On the one hand, some European States have been implementing FCR-inspired policies at least since the 1990's, so that when they entered the 2000's, they were already in compliance with Article 9, or, at least, not too distant from the target of FCR. On the other hand, and more importantly, this target is not clearly set out. Not only is it severable into multiple, non-fully-overlapping objectives,⁸⁶ but its scope also depends on the way EU Member States construe Article 9. A narrow interpretation of the provision's key terms limits the reach of the obligation of FCR.⁸⁷ Some States have taken this path overtly. Even if EU members were compelled to adhere to a broader and more challenging interpretation of Article 9 however, some loopholes are present that accord States substantial discretion in the implementation of the provision.⁸⁸

A. NARROW INTERPRETATION OF KEY TERMS

Getting the legal and practical intricacies of Article 9 straight is not easy, but fully understanding the many ways Member States can circumvent Article 9 may be even harder. Member States have many routes to reduce the duties stemming from Article 9. One is to interpret Article 9 narrowly. For example, a State could leave some water-related activities out of the box of water services, as Germany did,⁸⁹ in a move that would frustrate the purpose of making users and polluters pay. Or, it could oppose the application of FCR to self-extraction, which amounts to a very large share of the total water supply in many European countries⁹⁰ and is an object of disagreement between the EC and Member States.⁹¹ Still another escape is provided by considering the calculation of environmental and resource costs as an option instead of a compulsory requirement.⁹²

85. This is a pun based on the Italian expression *buco nell'acqua* ("hole in the water"), meaning "a failed attempt:" what Article 9 could be!

86. *See supra* Part I.

87. *See infra* Part II.A.

88. *See infra* Part II.B.

89. *See infra* Part IV.

90. *Water Statistics*, EUROSTAT: STATISTICS EXPLAINED, ¶ 1.2 (July 11, 2018, 11:38 AM), https://ec.europa.eu/eurostat/statistics-explained/index.php/Water_statistics.

91. As recognized in *Agri-Environmental Indicator—Water Abstraction*, EUROSTAT: STATISTICS EXPLAINED, ¶ 3.1 (Sept. 7, 2018, 9:19 AM), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Archive:Agri-environmental_indicator_-_water_abstraction; *see also supra* note 62 and related text.

92. *See supra* note 36 and related text.

B. DISCRETION GIVEN TO MEMBER STATES

Sometimes, strictly construing Article 9 or interpreting its lacunae and silences opportunistically is not necessary because its obligations may be phrased in a way that grants States a significant margin of leeway. The PPP is only “to be taken into account,” and it suffices for the contribution of the different water uses to the recovery of costs to be “disaggregated into . . . industry, households and agriculture.”⁹³ This allows for intra-sectoral cross-subsidies—transfers of (environmental) costs within the same category of users, irrespective of who consumes or pollutes water the most.⁹⁴ Furthermore, the economic analysis upon which FCR will be based should be conducted, according to Annex III of the WFD, by “taking account of the costs associated with collection of the relevant data.”⁹⁵ Because gathering detailed information can be rather expensive, data on the costs to be recovered could well be incomplete or inaccurate.

As if this were not enough, States may make use of a near-complete exception clause, which closes Article 9 as well as two other sentences that mitigate the principle of FCR. Article 9, Paragraph 4 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.⁹⁶

The scope of this rule seems to cover the whole of Article 9 as a binding norm because it refers to its most salient part, requiring States to ensure the full recovery of the costs of water services. Though it clarifies that the waiver from FCR concerns only “a given water-use activity,”⁹⁷ there is, in principle, no limit to the number of activities that can be exempted from the application of the FCR principle—at least if the achievement of the goals of the WFD are not compromised.

Here, a couple of issues are particularly important. The first one concerns the decision not to apply the provisions of Paragraph 1. According to the EC, which was pressed on the issue by an Irish Member of the European Parliament,⁹⁸ reasons for such a decision must be put forth and reported in the river basin management plan. In the case at hand, once Ireland formally committed to complying with the FCR principle, it was prevented from reverting to any previous practice

93. Council Directive 2000/60, *supra* note 1, art. 9(1).

94. Delphine François et al., *Cost Recovery in the Water Supply and Sanitation Sector: A Case of Competing Policy Objectives?*, 18 *UTIL. POL'Y* 135, 139–40 (2010) (pointing out that this allows for “measures that aim at improving the affordability of water supply and sanitation services”).

95. Council Directive 2000/60, *supra* note 1, at annex III.

96. *Id.* art. 9(4).

97. *Id.*

98. Paragraph 4 was reportedly added to Article 9 so as to accord Ireland the possibility of upholding its no-price policy for household consumption.

which did not do so.⁹⁹ Thus, there is seemingly no turning back from a policy of water pricing which pursues FCR once enacted. Moreover, in the view of the EC, the previous, non-complying practice should have been established “at the time of adoption of the directive.”¹⁰⁰ This sentence may be read to rule out the possibility of starting to implement Article 9 but then falling short of fully realizing FCR by invoking Paragraph 4. According to such interpretation, this move would not be allowed even if the environmental objectives of the directive, unlike the other purposes of Article 9, were met.

The second problem concerns the “objectives of th[e] Directive” to which Paragraph 4 refers. Are the goals of the WFD only environmental in nature, or is the recovery of costs also an objective in and of itself? The question was posed—again, by an Irish Member of the European Parliament—to the EC. In its answer, the Commission identified the objectives of Article 9, Paragraph 4, as those expressed in Articles 1 and 4 of the WFD. The EC clarified that

[t]he purpose of the Water Framework Directive specified in Article 1 includes promotion of the sustainable water use based on the long-term protection of available water resources. The environmental objectives are set out in Article 4 and include the prevention of deterioration of water bodies and the achievement of good status.¹⁰¹

Prima facie, according to the EC, the exception clause in Article 9 can be invoked as long as the non-implementation of Article 9 does not preclude the accomplishment of the *environmental* objectives of the directive. The word “include” appearing twice in the quoted sentence does not open other paths because all other objectives listed in Articles 1 and 4 are manifestly environmental in character. A closer analysis, however, reveals what is likely to be a link to Article 9 because one of the purposes of the provision is to “promot[e] . . . a sustainable water use.”¹⁰² More specifically, sustainable use is a synonym for preservation of water quality and quantity, two objectives illustrated in the previous Part. This would confirm what others have suggested: Article 9 is not merely instrumental in achieving a good status of water resources—the goal of Article 4—but is also a self-standing objective.¹⁰³ This interpretation is reasonable only to the

99. See *Parliamentary Questions: Answer to Question No. P-004707/2016*, EUROPEAN PARLIAMENT (last updated June 24, 2016), <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2016-004707&language=EN>. But Mr. Vella dodged the question, which was about the topic to which the next footnote refers.

100. See *Parliamentary Questions: Answer Given by Mr. Potočnik on Behalf of the Commission*, EUROPEAN PARLIAMENT (last updated June 21, 2010), <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-3366&language=EN>.

101. *Id.*

102. Council Directive 2000/60, *supra* note 1, art. 1(b).

103. See GAWEL, *supra* note 36, at 27. The author, though, refers to Article 9, Paragraph 1, which demands “that water-pricing policies . . . contribute to the environmental objectives of this Directive.” Therefore, he thinks that Article 9 does not cease to have effect when a good status of water is reached. See *supra* note 52 and related text.

extent that the “escape clause” of Paragraph 4 is applied to a water use which gives rise to negligible costs. Otherwise, such a clause would be doomed to nonsensical circularity: implementation of Article 9 can be waived provided that the objectives of the WFD are met, including the requirements set forth in Article 9.

Although the exception clause leaves some leeway in the application of the directive, the real loophole is created by the last sentence of Paragraph 1. It allows Member States to recover the costs of water services by “hav[ing] 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.” Social, environmental, economic, geographic, and climatic reasons all seem to provide a justification. Doubts can be raised about the meaning of “having regard,” but it is plausible that, by having regard to these factors, a State can disregard the application of Article 9—at least to the extent that such conditions make the recovery of costs more difficult, deleterious, or (perhaps) unjust.

It is well known that climate and geography impact water use and productivity (the so-called “crop-per-drop” ratio) in agriculture.¹⁰⁴ Europe is located, from East to West and North to South, in different climate zones, and the quantity of water needed for farming changes based on which zone is considered.¹⁰⁵ In light of this, two diverse—but not necessarily alternative—applications of Paragraph 1 can be put forward. On the one hand, those regions where water is less productive (irrespective of their total agricultural output) could be unjustly disadvantaged if they were required to make agricultural users pay as much as farmers living in countries with a higher crop-per-drop ratio. On the other hand, a large share of the European agricultural production is concentrated in these latter countries. Thus, if they had to give full and unconditional application to Article 9, they could denounce an excessive burden on a vital economic sector. And what about precipitation? Where rainfall is scarce, rainfed agriculture is not an option, and irrigation is the only way to make land productive.¹⁰⁶ In sum, options for avoiding Article 9’s requirements are available to everybody.

In any case, it is undeniable that the principle of FCR can have disruptive effects on the economy of a country and the welfare of its populace. As said in Part I, agricultural consumption of water shows a low elasticity with respect to prices.¹⁰⁷ This means that a large increase in the price of water is needed to

104. This becomes particularly evident when we think of climate change. See Yinhong Kang et al., *Climate Change Impacts on Crop Yield, Crop Water Productivity and Food Security—A Review*, 19 *PROGRESS IN NAT. SCI.* 1665 (2009).

105. See *Water Use by Economic Sector in Different Biogeographical Regions*, EUROPEAN ENV’T. AGENCY (last updated Mar. 21, 2016), http://www.eea.europa.eu/data-and-maps/daviz/seasonal-water-use-by-economic#tab-chart_1.

106. “In large parts of southern [Europe], irrigation enables crop production where water would otherwise be the limiting factor.” *Agri-Environmental Indicator—Water Abstraction*, EUROSTAT: STATISTICS EXPLAINED, ¶ 1.1 (Nov. 19, 2014), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Archive:Agri-environmental_indicator_-_water_abstraction&oldid=206617.

107. See *supra* note 68 and related text.

decrease its usage. Moreover, the dynamics of such a reduction involve the existence of an exit price. Below the threshold, consumption is scarcely responsive to a price change, but when the exit price is reached, farmers begin being pushed out of the market.¹⁰⁸ For this reason, and because of the individual and collective economic losses that this process entails,¹⁰⁹ water pricing has been deemed inapt as a tool for balancing supply and demand.¹¹⁰ After all, “it does not seem economically sound to dismantle entire sectors of irrigated agriculture on the principle that the full cost of water should be covered at all costs.”¹¹¹

In principle, household consumption is up against the same problem because domestic water needs cannot be compressed drastically even if high tariffs and charges are levied. Sure, profligacy must be discouraged, but this may not be done at the expense of social equity and individual financial sustainability. Luckily, this seems not to be the case in the EU, where households would experience affordability issues from tariffs in only a few States.¹¹² But the matter is sensitive, and considering that the alleged impact of water pricing reforms on the equality in the distribution of water expenditures depends on the models used to render water demand,¹¹³ serious analyses will have to be undertaken to ensure that such policies have no regressive effects. After all, attention to this issue is also demanded by the need to respect the human right to water, which is now part of the European *acquis*¹¹⁴ and provides relief to individual users who cannot

108. Massarutto, *supra* note 7, at 113.

109. A study conducted in Spain estimates “that farmers’ incomes would need to fall by 25 to 40 percent before an increase in the price of water would lead to significantly lower water consumption.” See K. WILLIAM EASTER & YANG LIU, AGRIC. AND RURAL DEV., COST RECOVERY AND WATER PRICING FOR IRRIGATION AND DRAINAGE PROJECTS (DISCUSSION PAPER 26) 20 (2005). Other studies confirm this pattern. According to some scholars, reductions in farm income ranging from ten to fifty percent would follow from limited increases in water prices—such that recovery would still remain below FCR rates. ARCADIS, THE ROLE OF WATER PRICING AND WATER ALLOCATION IN AGRICULTURE IN DELIVERING SUSTAINABLE WATER USE IN EUROPE 24 (2012), available at http://www.enorasis.eu/uploads/files/Water%20Governance/role_water_pricing.pdf.

110. See Petra J.G.J. Hellegers & Chris J. Perry, *Can Irrigation Water Use Be Guided by Market Forces? Theory and Practice*, 22 WATER RES. DEV. 79 (2006).

111. Henry Tardieu & Bernard Préfol, *Full Cost or ‘Sustainability Cost’ Pricing in Irrigated Agriculture. Charging for Water Can Be Effective, But Is It Sufficient?*, 51 IRRIGATION & DRAINAGE 97, 101 (2002).

112. See Arnaud Reynaud, *Assessing the Impact of Full Cost Recovery of Water Services on European Households*, 14 WATER RES. & ECON. 65 (2016).

113. Steven Renzetti et al., *An Empirical Examination of the Distributional Impacts of Water Pricing Reforms*, 34 UTIL. POL’Y 63 (2015).

114. The *acquis communautaire*, or simply *acquis*, of the EU is the whole body of laws and case law the European institutions have produced up to the present day. This body includes the right to water—which is not explicitly mentioned in the Charter of Fundamental Rights of the European Union—because of Article 6 of the Treaty on European Union, which states that “[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.” Treaty on European Union, art. 6, 1992 O.J. (C 224) 1.

afford to pay too high a price for water.¹¹⁵

At the end of the day, the opportunities to evade or at least reduce the requirements of Article 9 are both many and varied. Important terms within Article 9 can be interpreted narrowly according to each Member State's policy goals. The text of Article 9 also explicitly allows Member States not to comply with critical portions of the provision as long as its overall objectives are still met. These characteristics allow Member States to avoid following the spirit of Article 9 while making a decent argument that they follow its letter. It is not a surprise that the WFD was compared to Swiss cheese because of its numerous "holes."¹¹⁶ Moreover, there is still another potential loophole in Article 9 that deserves close inspection. Paragraph 3 establishes that "[n]othing . . . shall prevent the funding of particular preventive or remedial measures in order to achieve the objectives of this Directive."¹¹⁷ In the ensuing Part, I provide the legislative context for such funding measures.

III. THE RELATIONSHIP BETWEEN ARTICLE 9 AND SURROUNDING LEGISLATION

The ways the WFD and its objectives are linked to other laws and regulations at the EU level are countless, and a thorough account of them cannot be given here. In principle, due to the interdependence of all parts of the environment, most land management policies have some bearing on the quantity or quality of water resources. Likewise, but the other way around, water use (and non-use) policies do not leave the rest of the ecosystem unaffected. In this regard, the same considerations stated above about the relations among different policy objectives can be reiterated here. The purposes of the WFD may be, and often are, mutually supportive of those of other environmental norms. However, the existence of trade-offs and inconsistencies cannot be dismissed as the attainment of one water-related goal might adversely impact the objective of another legal instrument. For instance, irrigation engenders both positive and negative environmental effects. Though a reduction of pressure on water resources may be beneficial to

Moreover, according to Article 52(3) of the Charter, the Charter must be interpreted in light of the European Convention on Human Rights:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.

Charter of Fundamental Rights of the European Union, art. 52(3), 2000 O.J. (C 364) 18. Therefore, the human right to water was incorporated into the EU *acquis* thanks to the case law of the European Court on Human Rights, which recognizes that right. See Katharina Franziska Braig, *The European Court of Human Rights and the Right to Clean Water and Sanitation*, 20 WATER POL'Y 282 (2018).

115. On the link between Article 9 and the right to water, see Fulvia Staiano, *Il Principio del Recupero dei Costi e l'Accesso all'Acqua nel Diritto dell'Unione Europea*, 12 STUDI SULL'INTEGRAZIONE EUROPEA 677 (2017).

116. Michael Schmalholz, *Die EU-Wasserrahmenrichtlinie—Der 'Schweizer Käse' im europäischen Gewässerschutz?*, 40 ZEITSCHRIFT FÜR WASSERRECHT 69 (2001).

117. Council Directive 2000/60, *supra* note 1, art. 9(3).

the sustainability of aquatic ecosystems, the recession of irrigated lands may also cause losses to biodiversity,¹¹⁸ which is another concern of the EU.¹¹⁹ This Part analyzes the intermingling of the WFD with other non-water-related EU policies with a view to assess their *prima facie* compatibility. Overall, I find that the integration of the purposes of Article 9 into the surrounding EU legislation is still imperfect, and that, despite explicit consideration of the provision by other norms, there are cases where environmental objectives have been pursued through means that are the opposite of an FCR-based policy, such as public funding.

A. THE COMMON AGRICULTURAL POLICY

The EU is heavily committed to supporting the agricultural sector of the Member States—both production and producers. Even though funds have sharply decreased over time, the funds devoted to subsidizing the sector still make up a very large share of the EU budget.¹²⁰ Their distribution is governed by complex mechanics. In the following sections, I illustrate how (1) direct payments to farmers and (2) the rural development policy work, and how they interact with Article 9.

1. Direct Payments to Farmers

The European policy most intertwined with the WFD is the Common Agricultural Policy (“CAP”). In the EU, the use of water for agricultural activities amounts to a large share of the overall water use—one-fourth to one-third depending on how “use” is defined¹²¹—though huge regional differences exist. Here too, synergies as well as occasions for conflicts exist. Some authors have

118. INST. FOR EUROPEAN ENVTL. POL’Y, A REPORT FOR THE ENVIRONMENT DIRECTORATE OF THE EUROPEAN COMMISSION 31, 35 (2000), available at <http://ec.europa.eu/environment/agriculture/pdf/irrigation.pdf>.

119. See, e.g., Joint Nature Conserv. Comm., *Relationships Between EU Directives Affecting Nature Conservation*, JNCC 08 D08, at 2 (2008). On the relationship between the Habitats Directive and the WFD, see *Links between the Water Framework Directive and Nature Directives*, EUROPEAN COMM’N (2011), available at <http://ec.europa.eu/environment/nature/natura2000/management/docs/FAQ-WFD%20final.pdf>; see also Peter De Smedt & Marleen van Rijswick, *Nature Conservation and Water Management: One Battle?*, in *THE HABITATS DIRECTIVE IN ITS EU ENVIRONMENTAL LAW CONTEXT: EUROPEAN NATURE’S BEST HOPE?* (Charles-Hubert Born et al. eds., 2015); KERSTIN SUNDSETH, EUROPEAN ECONOMIC INTEREST GROUP, *WORKING TOWARDS CREATING SYNERGIES BETWEEN THE WFD, MSFD AND THE HABITATS AND BIRDS DIRECTIVES: SELECTED CASE STUDIES* (2015), available at <http://ec.europa.eu/environment/nature/natura2000/management/docs/Compilation%20WFD%20MSFD%20HBD.pdf>.

120. As of 2016, 41% of the total budget of the EU. *CAP Expenditure in the Total EU Expenditure*, EUROPEAN COMM’N (2018), available at https://ec.europa.eu/agriculture/sites/agriculture/files/cap-post-2013/graphs/graph1_en.pdf.

121. The figure is 33% if a general use is considered. European Env’t Agency, *Towards Efficient Use of Water Resources in Europe*, EEA Report No. 1/2012, at 12 (2012). However, it is likely that that percentage refers to water consumption. Agricultural activities do not return part of the water that is abstracted, which, in turn, amounts to 24% of all water withdrawals. See SANDRA BERMAN ET AL., *BIO*

maintained that the way the CAP was designed in the 1990s intensified water consumption in agriculture. This was because the subsidies that were granted to farmers were tied to the size of the cultivated land such that more hectares resulted in more generous payments but also in a greater use of water.¹²² Subsidies were also tied to the growing of certain continental crops, and this may have led to “a ‘potential demand’ for irrigation by artificially increasing the marginal value of water.”¹²³

These problems led to calls for a revision of the CAP, which was actualized in 2003 with the full decoupling,¹²⁴ in most cases, of direct payments and conditions such as land use and crop production. The impacts of such major reforms on water are not easy to assess, and they are typically evaluated on a case-by-case basis. A recent study focusing on Greece indicates that the post-2003 CAP can be effective in inducing water saving, at least if water prices rise (whereas, at low prices, we may witness contradictions between the agricultural and water policies).¹²⁵ Conversely, other surveys and projections have found that the decoupling strategy is not necessarily conducive to positive effects on water quality and quantity, and that under certain circumstances, it might even bring forth an intensification of irrigation.¹²⁶ Even in such cases however, a partial decoupling would not totally defeat the purpose and functioning of Article 9, as water use could be made more sensitive to changes in the price of water, so that the threshold price beyond which agricultural consumption falls would decrease.¹²⁷

Awareness of the importance of spurring farmers to adopt virtuous behaviors accompanied the process of reform of the CAP. In 2003, the EC approved a regulation that has made subsidies contingent upon compliance with a number of existing European rules of environmental character (Statutory Management Requirements, or “SMRs”) and other ecological standards (minimum requirements of Good Agricultural and Environmental Condition, or “GAECs”). According to this mechanism, called “cross-compliance,” failure to comply could

Intelligence Service, *Water Saving Potential in Agriculture in Europe: Findings From the Existing Studies and Application to Case Studies*, Final Report 19 (2012).

122. What is more, irrigated acreage was subsidized more than non-irrigated acreage. JULIO BERBEL ET AL., *Int'l Water Mgmt. Inst., Water Pricing and Irrigation: A Review of the European Experience*, in *IRRIGATION WATER PRICING: THE GAP BETWEEN THEORY AND PRACTICE* 295, 309 (François Molle & Jeremy Berkoff eds., 2007).

123. Massarutto, *supra* note 7, at 103.

124. In EU legal jargon, “decoupling” means removing the link between the receipt of European aids and a condition previously set as a requirement for being a recipient (such as growing a particular crop or cultivating a particular land).

125. Athanasios Kampas et al., *Price Induced Irrigation Water Saving: Unraveling Conflicts and Synergies Between European Agricultural and Water Policies for a Greek Water District*, 113 *AGRIC. SYS.* 28 (2012).

126. THOMAS DWORAK ET AL., *ECOLOGIC, EU WATER SAVING POTENTIAL (PART 1—REPORT)* 22–24 (2007), available at http://ec.europa.eu/environment/water/quantity/pdf/water_saving_1.pdf.

127. *Id.*

result in a curtailment of direct payments or even their cancellation.¹²⁸ Abidance with such norms is up to farmers, though Member States must translate both the SMRs and the GAECs—which are listed in the regulation—into operational requirements.

Water-related rules were and still are scant, despite the 2003 regulation's repeal and replacement in 2009¹²⁹ and again in 2013.¹³⁰ Only two legal instruments concerning water are quoted among the SMRs, namely, the directive on the protection of groundwater against pollution caused by certain dangerous substances¹³¹ and the directive concerning the protection of waters against pollution caused by nitrates from agricultural sources.¹³² The WFD does not appear in such regulations as a parameter against which decisions must be taken on the outlay of direct payments.¹³³ However, a joint statement by the European Parliament and the Council attached to the 2013 regulation urges the EC to

come forward, once [the WFD has] been implemented in all Member States and the obligations directly applicable to farmers have been identified, with a legislative proposal amending this regulation with a view to including the relevant parts of these Directives in the system of cross-compliance.¹³⁴

As to GAECs, water-related conditionalities are almost absent. None were present in the 2003 regulation, but the two superseding regulations list a couple of requirements that concern water: one is procedural, whereas the other demands that buffer strips be set up along watercourses.¹³⁵ A reference to such buffer strips is also present in another 2013 regulation that establishes rules for direct

128. Council Regulation No. 1782/2003, 2003 O.J. (L 270) 1 (EC) (establishing common rules for direct support schemes under the common agricultural policy, establishing certain support schemes for farmers, and amending Regulation Nos. 2019/93, 1452/2001, 1453/2001, 1454/2001, 1868/94, 1251/1999, 1254/1999, 1673/2000, 2358/71, and 2529/2001).

129. Council Regulation No. 73/2009, 2009 O.J. (L 30) 16 (EC) (establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers, amending Regulation Nos. 1290/2005, 247/2006, and 378/2007 and repealing Regulation No. 1782/2003).

130. Council Regulation No. 1306/2013, 2013 O.J. (L 347) 549 (EC) (on the financing, management and monitoring of the common agricultural policy and repealing Council Regulation Nos. 352/78, 165/94, 2799/98, 814/2000, 1290/2005, and 485/2008).

131. Council Directive 80/68, 1979 O.J. (L 20) 43 (EC) (on the protection of groundwater against pollution caused by certain dangerous substances). Since 2013, this directive is no longer in force; it is for this reason that, in Annex II of the 2013 regulation, *see* Council Regulation No. 1306/2013, *supra* note 130, at annex II, it appears among the GAECs instead of the SMRs. *See id.* at pmb1, recital 56.

132. Council Directive 91/676, 1991 O.J. (L 375) 1 (EC) (concerning the protection of waters against pollution caused by nitrates from agricultural sources).

133. The WFD is sporadically cited in other provisions however, such as Article 34(2)(b)(i) (on the conditions for the activation of some payment entitlements) and Annex V (on compatible support schemes) of the 2009 Regulation as well as Article 12(2)(d) (on advisory duties of States) of the 2013 Regulation. *See supra* notes 129, 130.

134. Council Regulation No. 1306/2013, *supra* note 130, ¶ 607.

135. *See* Council Regulation No. 73/2009, *supra* note 129, at annex III; Council Regulation No. 1306/2013, *supra* note 130, at annex II.

payments to farmers,¹³⁶ where it appears as the only water-specific measure in a list itemizing the practices farmers may set up to be entitled to EU payments.¹³⁷ A couple of other water-related provisions are also provided for by that regulation, but their scope is limited.¹³⁸ This unambitious approach was consciously pursued, as was manifested when a standard aimed to “ensure balance of irrigation, drainage and water table replenishment” had been proposed for inclusion in the 2013 regulation but was eventually dropped.¹³⁹

Thus, despite multiple opportunities to amend the CAP to make it more consonant with EU water policy, the agricultural policy has yet to make meaningful references to the WFD. The European Court of Auditors reached analogous conclusions in a study issued soon after the adoption of the 2013 regulation. It recognized that “[t]he instruments currently used by the CAP to address water concerns have not so far managed to achieve sufficient progress towards the ambitious policy targets set as regards water” because of the design and application of cross-compliance between the CAP and the WFD.¹⁴⁰ The Court further noticed that direct payments to farmers are not reduced any time the latter uses pesticides or phosphorus in the immediate vicinity of water bodies.¹⁴¹ Moreover, the PPP does not influence such payments, as the penalties enforced against the CAP beneficiaries who are responsible for defiling a river basin are not commensurate with the magnitude of the harm done to the environment.¹⁴² This has a direct bearing on the effective application of Article 9.

2. The Rural Development Policy

Article 9 is better integrated into the rural development policy, the so-called second pillar of the CAP,¹⁴³ where we find more explicit references to the provision or its underlying principles. The policy finances rural development programs through the European Agricultural Fund for Rural Development (“EAFRD”) and

136. Council Regulation No. 1307/2013, 2013 O.J. (L 347) 608 (EC) (establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy).

137. *Id.* at annex IX(III)(2). Article 43 of the regulation refers to Annex IX practices by the word “include”, thus suggesting the non-exhaustive character of the list, but it covers only “environmental certification schemes . . . going beyond the relevant mandatory standards established pursuant to Chapter I of Title VI of Regulation (EU) No 1306/2013, which aim to meet objectives relating to . . . water quality.” *Id.* art. 43(3)(b).

138. *Id.* art. 24(6) (establishing a more favorable regime for farmers owning permanent grasslands affected by natural constraints related to water supply); *id.* art. 9(2) (prohibiting direct payments to persons operating waterworks).

139. See EUROPEAN COURT OF AUDITORS, IS CROSS COMPLIANCE AN EFFECTIVE POLICY? 14 (2008).

140. See EUROPEAN COURT OF AUDITORS, INTEGRATION OF EU WATER POLICY OBJECTIVES WITH THE CAP: A PARTIAL SUCCESS 47 (2014).

141. *Id.* at 26.

142. *Id.* at 40.

143. The first pillar is the regime of direct payments discussed *supra* Part III.A.1.

is governed by a 2013 regulation.¹⁴⁴ The EAFRD is subject to another 2013 regulation,¹⁴⁵ which also governs other funds—the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund, but *not* the European Agricultural Guarantee Fund, which is entrusted with the duty of disbursing direct payments to farmers¹⁴⁶—and lays down general rules for all covered funds (collectively named, “ESI Funds”), including water-related provisions.

Thus, the 2013 regulation governing the abovementioned funds, including the EAFRD, requires Member States and their managing authorities to respect the principle of sustainable development and comply with the PPP.¹⁴⁷ More remarkably, the same regulation expects that “[i]nvestments shall be consistent with the water management hierarchy, in line with [the WFD], with a focus on demand management options. Alternative supply options shall only be considered when the potential for water savings and efficiency has been exhausted.”¹⁴⁸ Moreover, according to Article 9, each ESI Fund shall support a number of objectives, including the preservation and protection of the environment and the promotion of resource efficiency. In the water sector, this entails making investments “to meet the requirements of the Union’s environmental acquis.”¹⁴⁹ To this end, a set of general (applicable to all funds) and thematic (valid for specific funds) conditionalities have been established. Though the notion of conditionality has a peculiar meaning that shapes the functioning of the funding mechanism,¹⁵⁰ the

144. Council Regulation No. 1305/2013, 2013 O.J. (L 347) 487 (EC) (on support for rural development by the European Agricultural Fund for Rural Development (“EAFRD”).

145. Council Regulation No. 1303/2013, 2013 O.J. (L 347) 320 (EC) (laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund).

146. The European Agricultural Guarantee Fund and the EAFRD are the two CAP-related funds, and provide funding for first and second pillar measures, respectively. They have been established with Council Regulation No. 1290/2005, which was repealed by Council Regulation No. 1306/2013. This covers both funds but makes reference to Council Regulation 1303/2013 as far as the EAFRD is concerned. *See* Council Regulation No. 1306/2013, *supra* note 145, at pmbl. recital 24.

147. Council Regulation 1303/2013, *supra* note 145, art. 8; *cf. id.* at pmbl. recital 14; *id.* at annex I(5)(2)(1). As these provisions recall, sustainable development is a principle of EU law thanks to Article 3(3) of the Treaty on European Union, whereas the PPP is set out in Article 191(2) of the Treaty on the Functioning of the European Union.

148. *Id.* at annex I(5)(2)(3).

149. *Id.* at annex XI(1)(6).

150. *See id.* art. 2(33). Article 2(33) defines an “applicable *ex ante* conditionality” as “a concrete and precisely pre-defined critical factor, which is a prerequisite for and has a direct and genuine link to, and direct impact on, the effective and efficient achievement of a specific objective for an investment priority or a Union priority.” Article 19(1) of the same regulation adds further details:

Member States shall assess in accordance with their institutional and legal framework and in the context of the preparation of the programmes and, where appropriate, the Partnership Agreement, whether the *ex ante* conditionalities . . . are applicable to the specific objectives pursued within the priorities of their programmes and whether the applicable *ex ante* conditionalities are fulfilled. Ex

regulation on the ESI Funds applies water-related conditionalities only to the European Regional Development Fund and the Cohesion Fund, whereas the regulation on the rural development policy applies them also to the priority measures that are financed through the EAFRD.¹⁵¹ In brief, this conditionality requires that a system of water pricing be in place in the country submitting the program. More specifically, it requires that in the sectors supported by the funds of the EAFRD, the country has ensured that each water use contributes to the recovery of the costs of water services, as demanded by Article 9 of the WFD.

There are two other water-related provisions in the 2013 regulation on rural development that are worth examining. One, which is more of an exhortation than a rule, says that investments in irrigation can be supported

to provide economic and environmental benefits, provided that the sustainability of the irrigation concerned is ensured. Consequently, . . . support should be granted only if a river basin management plan is in place in the area concerned as required by the Water Framework Directive, and if there is already water metering in place at the level of the investment or it is put in place as part of the investment.¹⁵²

As seen in Part I, this is one of the demands of Article 9 according to the EC.¹⁵³ The other provision is even more interesting, as it enables the EAFRD “to compensate beneficiaries for additional costs and income foregone resulting from disadvantages in the areas concerned, related to the implementation of . . . the Water Framework Directive.”¹⁵⁴

3. Interim Conclusions on the Common Agricultural Policy

This cursory overview of the interconnections between the CAP and the WFD stirs up a couple of considerations. First, CAP conditionalities can prove useful in accomplishing the many purposes of the WFD by offering an incentive to both Member States and farmers to abide by the rules of the directive and, in

ante conditionalities shall apply only to the extent and provided that they comply with the definition laid down in point (33) of Article 2 regarding the specific objectives pursued within the priorities of the programme. The assessment of applicability shall, without prejudice to the definition laid down in point (33) of Article 2, take account of the principle of proportionality in accordance with Article 4(5) having regard to the level of support allocated, where appropriate.

Id. art. 19(a); *cf.* Council Regulation No. 1305/2013, *supra* note 144, art. 9. Thus, it seems that such conditionalities are prerequisites for obtaining EU funds only to the extent they are also prerequisites for achieving a given objective (specifically, the protection of the environment and the promotion of resource efficiency). In light of the multi-purpose nature of Article 9 of the WFD, the potential ineffectiveness of the provision in reaching some of the conditionalities, and the possible contradictions between some of them, the application of *ex ante* conditionalities in this field might not be plain.

151. See Council Regulation No. 1303/2013, *supra* note 145, at annex XI(I); Council Regulation No. 1305/2013, *supra* note 144, at annex V.

152. Council Regulation No. 1305/2013, *supra* note 144, at pmbl. recital 35.

153. See *supra* note 60 and related text.

154. Council Regulation No. 1305/2013, *supra* note 144, art. 30.

particular, Article 9. Basically all the above-mentioned objectives of Article 9 can be detected among CAP conditionalities and the goals they expressly aim at.¹⁵⁵ There is great potential for cooperation between the CAP and the WFD, the former being able to positively affect compliance with the latter. Second, and to some extent conversely, the harmony in the ends pursued by the two policies seems to contrast with a disharmony in means. The way the two pillars of the CAP work is by providing funds, mainly to support the welfare of those who are employed in the agricultural sector, and only incidentally to promote sustainability. However, this appears to conflict with the functioning of Article 9, which aims at sustainability (of both water use and the management of water services) by relying on the incentivizing power of prices. Such power is disrupted by the subsidization policy that is the *raison d'être* of the CAP. In other words, Article 9 is inspired by a market logic, according to which virtuous behaviors are prompted by economically sanctioning reprehensible behaviors, whereas the CAP mainly works by economically supporting virtuous behaviors. If the cost of deleterious, individual, water-related actions as well as deleterious, collective water policies is rebated through direct and indirect payments, is not the main objective of Article 9—“that water-pricing policies provide adequate incentives for users to use water resources efficiently”¹⁵⁶—undermined?

This is even more so because financial support is afforded not just to farmers, but also to other water users, and the rules governing such payments are different based on the sector concerned. We have seen that, under certain conditions, agricultural users may receive, or otherwise benefit from, European funds. Outside of the agricultural sphere however, the more general framework on State aid applies. This framework, in turn, has diverse specifications according to the destination of such financial aid—but all of them may, in principle, undermine the significance of Article 9.

155. One is struck by this fact even though the language we find in the CAP documents and that I reported above is part of a pervasive lexicon and a jargon that the European institutions now speak regularly. See the following excerpt taken from a brief on water scarcity and droughts:

National priorities can also be counterproductive in promoting additional water supply infrastructure as the primary option, going against the logic of the water hierarchy and the need to support water-saving and efficiency measures in the first place. It continues to be essential to ensure that the allocation of funding is sufficiently conditional on independent and ex-ante evidence of full utilisation of water savings and efficiency, effective water pricing policy and metering, minimum performance of public water supply networks or recovery of the costs of projects by the water users concerned. National support measures must also fully respect State aid rules where applicable.

Communication from the Commission to the European Parliament and the Council Addressing the Challenge of Water Scarcity and Droughts in the European Union, at 7, COM (2007) 414 final (July 18, 2007).

156. Council Directive 2000/60, *supra* note 1, art. 9(1).

B. THE GENERAL STATE AID REGIME

As a general rule, EU law bans State aid. However, it also provides for some exceptions, so that State aid is permissible under certain circumstances, namely, if it pursues goals deemed worthy by the EU. One such goal is support to the agricultural sector, whose intersection with Article 9 I analyzed in the previous sections. In this section, I address the general State aid regime from the usual water-related perspective. I focus on the extent to which Article 9 is taken into account when dealing with aid (1) for attaining a better environmental protection, (2) for building infrastructure, and (3) for running services of general economic interest.

1. State Aid for Environmental Protection

State aid is a competition-distorting intervention that occurs whenever a State gives a selected undertaking or group of undertakings an advantage towards its or their competitors by means of a grant, a tax relief, a governmental guarantee, or whatever form such help may take. State aid is mainly governed by what is now Article 107 of the Treaty on the Functioning of the European Union (“TFEU”), which provides for some exceptions to the general prohibition on State aid. Since the founding of the European Economic Community in 1957, the case law on State aid has grown ever more abundant. It is now complemented by special rules crafted for many of the fields in which the EU has competence.¹⁵⁷ One such area is environmental protection and energy, for which the EC devoted a set of guidelines in 2001,¹⁵⁸ 2008,¹⁵⁹ and 2014¹⁶⁰ (the latest replacing the earlier two). The legal regime governing State aid with an environmental purpose is driven by the idea of “incentive effect.” This means that support by the State must result in a change in behavior of the recipient of the aid, so that the level of environmental

157. A sector of EU competence is transport, and compensations for public service operators are now disciplined by Council Regulation No. 1370/2007 on public passenger transport services by rail and by road and repealing Council Regulations Nos. 1191/69 and 1107/70. See Council Regulation No. 1370/2007, 2007 O.J. (L 315) 1 (EC). However, contrary to Council Regulation No. 1191/69 that it repeals, such regulation does not extend to public passenger transport services by inland waterway—which may fall under the category of water uses according to the WFD—unless Member States so choose. *Id.* at pmb. recital 10. Also of interest is Council Directive 96/75 on the systems of chartering and pricing in national and international inland waterway transport in the Community that provides that, “[i]n the field of national and international inland waterway transport in the Community, contracts shall be freely concluded between the parties concerned and prices freely negotiated.” See Council Directive 96/75, art. 2, 1996 O.J. (L 304) 12 (EC). Perhaps ironically, the possibility of maintaining a system of minimum compulsory tariffs phased out in 2000, the same year the WFD was enacted.

158. See Community Guidelines on State Aid for Environmental Protection, 2001 O.J. (C 37) 3 (EC). Though these were far less detailed than the subsequent guidelines, two of the basic tenets of the environment-oriented State aid were already present: the PPP and the principle of the internalization of ecological costs (prices must reflect such costs).

159. Community Guidelines on State Aid for Environmental Protection, 2008 O.J. (C 82) 1 (EC).

160. Guidelines on State Aid for Environmental Protection and Energy 2014–2020, 2014 O.J. (C 200) 1 (EC).

protection would be lower if such aid had not been accorded.¹⁶¹ The guidelines explicitly posit the case of an intervention aimed at remediating contaminated sites, namely soil, surface water, or groundwater. However, the PPP is to some extent spared because State aid “cannot be granted insofar as the beneficiary of the aid could be held liable for the pollution under existing Union or national law.”¹⁶² “In particular, in light of the PPP, undertakings generating waste”—including wastewater—“should not be relieved of the costs of its treatment,” though State aid can make a positive contribution to “the re-use or recycling of water . . . that would otherwise be unused as waste.”¹⁶³

As we already know, the PPP is one of the main tenets of Article 9 together with the FCR obligation. What is the relationship between FCR and the EC’s guidelines on State aid? A pertinent provision is found in the guidelines relating to the agricultural and forestry sectors.¹⁶⁴ The guidelines allow for State compensation for those incurring additional costs and suffering foregone income resulting from disadvantages related to the implementation of—among other directives—the WFD.¹⁶⁵ Reconciling these two State aid provisions is somewhat difficult, as one confirms the validity of the WFD, and therefore, Article 9, whereas under the other, financial payments are permissible to provide redress to people who bear considerable costs due to the application of the WFD. Because Article 9 requires that the costs of water services, including environmental and resource costs, be borne by water users and polluters instead of the general public, it may prove difficult to draw a line where such aid ceases to be in conformity with Article 9 (and its exceptions, in particular the statement at the end of paragraph 1) and starts to encroach on it.

From a more general point of view, all such guidelines recognize the possibility of resorting to subsidies and aid whenever a market failure engenders negative environmental externalities or hinders the production of positive externalities.

161. *Id.* ¶ 3.2.4; Community Guidelines on State Aid for Environmental Protection, *supra* note 159, ¶ 1.3.4.

162. Guidelines on State Aid for Environmental Protection and Energy 2014–2020, *supra* note 160, ¶ 44 (if the term “liable” is to be given its strictly legal meaning then, most likely, the prohibition would not ban State aid in all cases covered by the PPP as intended by Article 9). The way this principle was phrased in the 2008 guidelines was slightly different:

Where the polluter is clearly identified, that person must finance the remediation in accordance with the ‘polluter pays’ principle, and no State aid may be granted. In this context, ‘polluter’ refers to the person liable under the law applicable in each Member State, without prejudice to the adoption of Community rules in the matter. Where the polluter is not identified or cannot be made to bear the costs, the person responsible for the work may receive aid.

See Community Guidelines on State Aid for Environmental Protection, *supra* note 159, ¶ 132.

163. Guidelines on State Aid for Environmental Protection and Energy 2014–2020, *supra* note 160, ¶ 157.

164. European Union Guidelines for State Aid in the Agricultural and Forestry Sectors and in Rural Areas 2014 to 2020, 2014 O.J. (C 204) 1.

165. *Id.* ¶ 244. The affinity with Article 30 of Council Regulation No. 1305/2013 (*supra* note 144) is evident.

“An aid measure will not be considered compatible with the internal market if the same positive contribution to the common objective is achievable through other less distortive policy instruments or other less distortive types of aid instruments,”¹⁶⁶ such as market-based mechanisms like the PPP and FCR. Guidelines have also noted that

[d]ifferent measures to remedy the same market failure may counteract each other. This is the case where an efficient, market-based mechanism has been put in place to deal specifically with the problem of externalities. An additional support measure to address the same market failure risks to undermine the efficiency of the market-based mechanism.¹⁶⁷

It might be hard to determine whether the implementation of such a system is efficient. As the 2008 guidelines highlighted, this may be due to the practical difficulty of calculating the costs of pollution.¹⁶⁸ Moreover, the same source stressed the need to balance the application of a policy of internalization of costs with other exigencies, like avoiding the creation of disturbances in the economy because of too abrupt a rise in the prices of goods.¹⁶⁹ Both provisos were removed from the 2014 guidelines on environmental aid. The guidelines relating to the agricultural and forestry sector, however, state that even “where markets provide efficient outcomes, but these are deemed unsatisfactory from an equity or cohesion point of view, State aid may be used to obtain a more desirable, equitable market outcome.”¹⁷⁰

Overall, it seems that the leeway accorded to Member States is quite ample, which means that the chances that Article 9 and the State aid regime may collide are increased. But upon closer examination, it becomes evident that the freedom of action conceded to national governments under State aid rules overlaps, to a great extent, with the margin of appreciation in the implementation of Article 9 granted to States by virtue of the provision’s exception clause.¹⁷¹

Moreover, the existence of a point where the State aid legal framework and Article 9 become compatible might not be that implausible. This point of contact may be, for example, a market failure. According to EU law, States should aim to “choos[e] measures for which the external costs avoided are significant in relation to the amount of aid.”¹⁷² Such measures will be lawful if they prompt an action on part of the beneficiary that would not have been taken

166. Guidelines on State Aid for Environmental Protection and Energy 2014–2020, *supra* note 160, ¶ 40.

167. *Id.* ¶ 42.

168. Community Guidelines on State Aid for Environmental Protection, *supra* note 159, ¶ 25(a).

169. *Id.* ¶ 25(b).

170. European Union Guidelines for State Aid in the Agricultural and Forestry Sectors and in Rural Areas 2014 to 2020, *supra* note 164, ¶ 54.

171. *See supra* Part II.

172. Community Guidelines on State Aid for Environmental Protection, *supra* note 159, ¶ 35. Nowag perceptively notes that this criterion is not present in the 2014 Guidelines, and complains about

absent the aid.¹⁷³ Excessively stressing the importance of recovering all costs of water services might conceal that some such services, even if non-economically viable when only internal costs are calculated, become sustainable as soon as the costs of environmental externalities are factored in.¹⁷⁴ That is, State aid is sometimes necessary to avoid negative externalities that would not be redressed through market mechanisms alone.¹⁷⁵ Even though these cases do exist, the hard task lies in assessing whether a given environmental purpose can be better attained by unleashing market forces or by relying on State intervention. It is up to the EC to choose, as the ECJ can only step in, in a limited role, to evaluate the Commission's decisions.¹⁷⁶

2. State Aid for Infrastructure

The EU directly contributes to the construction of waterworks through, for example, the European Regional Development Fund and the Cohesion Fund.¹⁷⁷ As for national financing measures, investments in the creation and improvement of water-related infrastructure may be permissible under State aid legislation—provided that some conditions are fulfilled.¹⁷⁸ In particular, the abovementioned guidelines on State aid for agriculture and forestry allow public support, *inter alia*, for investment pursuing agri-environment-climate goals.¹⁷⁹ They also allow “the creation and improvement of infrastructure related to the development, adaptation and modernization of agriculture, including . . . the supply and saving of . . . water.”¹⁸⁰ Whenever investments in irrigation are the object of State aid, a number of conditions must be met. These conditions include that a river basin

it because it is consonant with what is required by Article 191(3) of the TFEU. JULIAN NOWAG, ENVIRONMENTAL INTEGRATION IN COMPETITION AND FREE-MOVEMENT LAWS 195–96 (2006).

173. Guidelines on State Aid for Environmental Protection and Energy 2014–2020, *supra* note 160, ¶¶ 27(d), 49 *passim*.

174. For instance, a Spanish case-study demonstrated that some wastewater treatment plants could not finance themselves only through the sale of regenerated water, but that, as soon as the value of the prevention of the eutrophication of water bodies is considered, the sum of costs and gains turns positive. See Maria Molinos-Senante et al., *Cost-Benefit Analysis of Water-Reuse Projects for Environmental Purposes: A Case Study for Spanish Wastewater Treatment Plants*, 92 J. ENVTL. MGMT. 3091, 3096 (2011).

175. More specifically, on the three forms of integrating the PPP in Article 107(3) of the TFEU, see NOWAG, *supra* note 172, at 199–200.

176. See *infra* Part V.

177. See *supra* Part III.A.2. For instance, in Romania, the EU funded no less than six water-related infrastructures during the 2014–2020 programming period of the Large Infrastructure Operational Programme. More information can be retrieved at EUROPEAN COMM'N, PROJECTS, http://ec.europa.eu/regional_policy/en/projects (last visited Nov. 26, 2018).

178. Though a mere working document and not an official position, see *Infrastructure Analytical Grid for Water Infrastructure*, EUROPEAN COMM'N, http://ec.europa.eu/competition/state_aid/modernisation/grid_water_en.pdf (last visited Oct. 28, 2018).

179. European Union Guidelines for State Aid in the Agricultural and Forestry Sectors and in Rural Areas 2014 to 2020, *supra* note 164, ¶ 143(d).

180. *Id.* ¶ 143(c).

management plan for the area where the investment takes place has been issued,¹⁸¹ water metering is set up, a degree of water saving is ensured, no adverse environmental impact is caused by an expansion of the irrigated land,¹⁸² and, most importantly for this article, compliance with Article 9 of the WFD is guaranteed.¹⁸³ In addition, respect for the principle of phasing out environmentally harmful subsidies is demanded whenever State aid is meant to fund large projects having repercussions on more than one country, such as a dam along an international river.¹⁸⁴

The legality of these subsidies under Article 9 can also be analyzed. Operational and maintenance costs arising from the provision of water services are generally recovered—at least in part—as required by Article 9. However, making users pay for the construction and extension of the necessary waterworks is not typical practice. As noted by two authors who write about irrigation headworks and analogous facilities, “[t]oday, countries where such infrastructure is paid for by water users rather than taxpayers are rare,”¹⁸⁵ and the same is true for infrastructure enlargement, which, historically, has been paid by the public purse.¹⁸⁶ This is not regrettable per se, and there are reasons that may justify such an approach. “The rationale for such undercharging is based on the consideration that these works are both strategic and multi-purpose.”¹⁸⁷ Moreover, the partial or total coverage of the expenses through the public budget can be required when “financial effort is huge and concentrated in time, and technical priorities are straightforward enough.”¹⁸⁸

Here, the fundamental question concerning the nature of Article 9—whether it is a means to reach some environmental goal or it is an end, so that it must be complied with irrespective of anything else—emerges once again. The massive development of irrigation in Southern Europe during the last decades was mainly due to public support for water storage, transport, and supply networks.¹⁸⁹ Should a more environmentally- and economically-sound use of water be attainable

181. Even though I have not illustrated them, such plans are an obligation under the WFD, more specifically, Article 13.

182. All such requirements are in the European Union Guidelines for State Aid in the Agricultural and Forestry Sectors and in Rural Areas 2014 to 2020, *supra* note 164, ¶ 149.

183. *See id.* ¶ 151. The formulation of the requirement is unusual because this source states that “aid can be paid only by Member States which ensure . . . a contribution of the different water uses to the recovery of the costs of water services by the agricultural sector.” *Id.* ¶ 151. I am not sure how the words I italicized should be interpreted. Strangely enough, this requirement only entered into force starting January 1, 2017.

184. Communication from the Commission—Criteria for the Analysis of the Compatibility with the Internal Market of State Aid to Promote the Execution of Important Projects of Common European Interest, ¶ 19, 2014 O.J. (C 188) 4.

185. Tardieu & Préfol, *supra* note 111, at 99.

186. Molle & Berkoff, *supra* note 68, at 43.

187. Tardieu & Préfol, *supra* note 111, at 99.

188. Massarutto, *supra* note 29, at 610.

189. Massarutto, *supra* note 7, at 101.

thanks to some of the measures cited in the paragraphs above (such as linking the concession of funds to the adoption of water-saving technologies or the previous achievement of a good ecological status of the river basin), could water pricing be put aside, at least in regard to the costs for new infrastructure projects? The answer depends first on what the correct interpretation of Article 9 is deemed to be, but it also depends on how State aid rules are designed. They sometimes try to preserve a role for Article 9. As seen above, investments in irrigation are made contingent on compliance with the provision. The EC also warns that, “[r]egarding the possible advantage for end-users in case of waste water infrastructure, the polluter pays principle should be taken into account when determining user fees (if users are undertakings).”¹⁹⁰ However, the open-ended text of Article 9, together with the EC’s prudent language (“should be taken into account”), may result in the State aid regime outweighing FCR.

3. Services of General Economic Interest

Services of general economic interest (“SGEIs”) is another relevant class of subsidy recipients under EU law. SGEIs find their basis in Articles 14 and 106(2) of the TFEU, the latter explaining that the undertakings entrusted with the operation of services of general economic interest “shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.”¹⁹¹ Put simply, such undertakings may receive compensation by the State for discharging the important duties set forth in an entrustment act because the corresponding services could only be provided with public financial support (or at least, without such support, they would be provided less fully). If such compensation complies with the requirements¹⁹² laid down in a series of EU regulations,¹⁹³ it is automatically lawful. Otherwise, it must undergo scrutiny against the parameters of Article 107 of the TFEU.

190. EUROPEAN COMM’N, *supra* note 178, at 7 (commenting on compatibility with Article 107 of the TFEU).

191. Consolidated Version of the Treaty on the Functioning of the European Union, art. 106(2), May 9, 2008, 2008 O.J. (C 115) 47; *see id.* art. 14.

192. These are substantially the same requirements established by the ECJ in the *Altmark* case (a . . . landmark case). *See* Case C-280/00, *Altmark Trans GmbH v. Nahverkehrsgesellschaft Altmark GmbH*, 2003 E.C.R. I-7810.

193. Commission Decision 2012/21, 2012 O.J. (L 7) 3 (EC) on the Application of Article 106(2) of the Treaty on the Functioning of the European Union to State Aid in the Form of Public Service Compensation Granted to Certain Undertakings Entrusted with the Operation of Services of General Economic Interest; Communication from the Commission on the Application of the European Union State Aid Rules to Compensation Granted for the Provision of Services of General Economic Interest, 2012 O.J. (C 8) 4 (EC) [hereinafter Communication 2012/C 8/02]; Communication from the Commission—European Union Framework for State Aid in the Form of Public Service Compensation, 2012 O.J. (C 8) 15 (EC) [hereinafter Communication 2012/C 8/03]; *see also* Commission Regulation No. 360/2012, 2012 O.J. (L 114) 8 (EC) on the application of Articles 107 and 108 of the Treaty on the

Can water services be considered SGEIs? Yes, as States are free to decide which services fall under that category. The EC can only oppose the choice of a Member State if such choice is accompanied by a manifest error.¹⁹⁴ Moreover, although the ECJ has never expressed itself on this issue,¹⁹⁵ the EC has been convinced that the water sector belongs to the SGEI class since well before it first legislated on the matter in 2005.¹⁹⁶ As a consequence, the interplay between the notion of SGEIs and water services is beginning to draw the attention of scholars.¹⁹⁷ Even though, until some years ago, no notification had been issued to the EC by Member States willing to operate water services (or have them run) as SGEIs,¹⁹⁸ now, the situation is changing and there is at least one country (Germany) that has moved in this direction.¹⁹⁹ In any case, if most States have not included water services among the SGEIs they entrust, the reason is that there are other ways to accord financial support to a service provider. These methods include relying on Article 107(3) of the TFEU or defining a water-related task as a service of general interest that is non-economic in character—that is, a kind of service that falls outside the scope of EU competition law.²⁰⁰

Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest.

194. Commission Decision 2012/21, *supra* note 193, at pmb. recital 8; Communication 2012/C 8/02, *supra* note 193, ¶¶ 46, 48; Communication 2012/C 8/03, *supra* note 193, ¶ 13.

195. Some years ago, then Advocate General Ruiz Jarabo Colomer affirmed that the ECJ had ruled on water distribution being a SGEI, and quoted Case C-96/82, *NV IAZ Int'l Belgium v. Comm'n*, 1983 E.C.R. 3369 as a legal reference. *See* Case C-265/08, *Federutility v. Autorità per l'energia elettrica e il gas*, 2009 E.C.R. I-3377, ¶ 53. Interestingly, the same view had been taken before, and the same judgment (mis)quoted, by the EC. *See* European Commission, *Services of General Economic Interest and State Aid*, ¶ 20 (Nov. 12, 2002), available at http://ec.europa.eu/competition/state_aid/reform/archive_docs/1759_sieg_en.pdf. Even earlier, the same had been stated by Advocate General Van Gerven in Case C-179/90, *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*, 1991 E.C.R. I-5889, ¶ 27. However—and notwithstanding that water services are within the SGEI category for sure—this risks being a historical forgery, because in *IAZ v. Commission* the supply of water was said to be a SGEI by both the applicants and the defendant (the EC), not by the ECJ, which preferred not to pronounce on the matter. *NV IAZ Int'l Belgium*, 1983 E.C.R. I-3369, 3383, 3403.

196. *See, e.g.*, European Commission on Services of General Interest in Europe, ¶ 69, 1996 O.J. (C 281) 3. An earlier reference can be found in the preceding footnote, whereas a later one is European Commission, *Green Paper on Services of General Interest*, at 10, COM (2003) 270 final (May 21, 2003). Article 9 of the WFD is also quoted therein. *Id.* at 25.

197. *See, e.g.*, Panagiotis Delimatsis, *The Regulation of Water Services in the European Union Internal Market*, in *THE REGULATION OF THE GLOBAL WATER SERVICES MARKET* 263, 271 *passim* (Julien Chaisse ed., 2017).

198. European Commission, *Commission Staff Working Paper on the Application of EU State Aid Rules on Services of General Economic Interest Since 2005 and the Outcome of the Public Consultation*, at 17, SEC (2011) 397 (March 23, 2011) [hereinafter Commission Working Paper].

199. *See* *Communication from the Federal Government of the Federal Republic of Germany to the European Commission*, at 14–15 (June 23, 2016), http://ec.europa.eu/competition/state_aid/public_services/2015_2016/germany_en.pdf (water supply services entrusted as a SGEI).

200. For example, in the Flanders, subsidies to construct sewer systems and small-scale water treatment plants, as well as regional contributions to polders and water boards for certain management operations, are considered non-economic, whereas regional contributions to grey water suppliers are deemed to be exempted by virtue of Article 107(3) of the TFEU. ANNEX: SGEI REPORTING SHEETS—

The classification of a water service as an SGEI allows a State to cover some or all of the costs resulting from public service obligations,²⁰¹ plus a reasonable profit. Such profit is calculated by making allowance, among other things, for “the rate of return on capital that would be required by a typical undertaking considering whether or not to provide the service of general economic interest for the whole period of entrustment.”²⁰² Also, account can be taken of “incentive criteria relating, in particular, to the quality of service provided and gains in productive efficiency.”²⁰³ It is likely that such criteria can also take the form of parameters relating to water-saving and environment-friendly accomplishments. After all, if the SGEI is assigned through a tendering procedure, the awarding criteria may also comprise environmental and social considerations.²⁰⁴ Therefore, the obligations stemming from the WFD can be passed on to the entity providing the service through performance duties or incentives contained in the concession contract.

What is less evident, however, is the relationship between SGEIs and the FCR principle. The EC, when commenting on water-related SGEIs, noted the validity of the PPP in this area.²⁰⁵ It also clarified that when concession obligations are discharged by public undertakings, “increases in share capital or other financial contributions by the public authorities/shareholders . . . constitute a *de facto* SGEI compensation.”²⁰⁶ Apparently, such compensation would be legitimate even if the purpose of Article 9 would end up being frustrated. The EC also specified that whenever water supply services are remunerated by end-user charges so as “to cover the costs of services provision together with a regulated, or even pre-determined, profit . . . , there may be no further SGEI compensation to the service supplier in addition to the revenues from user charges.”²⁰⁷ Still, public financial support might remain a viable option, provided that, when it is added to users’ charges and levies, the total does not exceed the FCR, together with a small profit. Whether Article 9 is breached—and it might not be should the public subsidy be confined within the same user sector (household, agriculture, and industry)²⁰⁸—the subsidy’s contribution to a more responsible water use is cancelled out.

June 2016 33–34 (June 2016), available at http://ec.europa.eu/competition/state_aid/public_services/2015_2016/belgium_nl_en.pdf.

201. Commission Working Paper, *supra* note 198, at 18.

202. Commission Decision 2012/21, *supra* note 193, art. 5(5).

203. *Id.* art. 5(6).

204. Communication 2012/C 8/02, *supra* note 193, ¶ 67.

205. Commission Working Paper, *supra* note 198, at 17 (where the PPP seems to be equated to the FCR principle!).

206. *Id.* at 18 (unless it meets the conditions of the market investor principle).

207. *Id.*

208. François et al., *supra* note 94, at 139.

4. The Relationship Between State Aid Rules and Article 9 in the Practice of the EC

In the previous sections, we have seen that there are many opportunities to receive public funds. In most cases, some conditions must be met, but they are usually not very demanding. Therefore, it is not surprising that even after 2000, the year the WFD was promulgated, the EC allowed for a large number of support measures in the field of water services, either in the form of soft loans and non-reimbursable loans, or in the form of tax reductions and tax exemptions. Although such financial aid had been granted earlier²⁰⁹ when the EU legal landscape was different, since the inception of the new millennium, the EC has repeatedly authorized States to destine part of their revenues (or to renounce to collect them) to the benefit of several environmental causes. These include objectives such as the financing of undertakings to improve the environmental performance of industrial facilities and to reduce the discharge of wastewater,²¹⁰ even when the projects go beyond EU environmental standards;²¹¹ the promotion of water savings and water re-use, as well as the substitution of groundwater with surface water;²¹² the protection of vulnerable zones as defined by the Nitrate Directive;²¹³ the reduction of the environmental impact of inland waterway transportation;²¹⁴ and—though this pertains to saltwater instead of freshwater—a discharge

209. See, e.g., European Commission Press Release 1P/95/1236, Decisions on State Aid Schemes in the Agricultural Sector (November 15, 1995), http://europa.eu/rapid/press-release_IP-95-1236_en.htm (“*envisag[ing] aid for investment intended for making savings in the water used for irrigation as well as for the installation of irrigation facilities*”).

210. *European Commission on “State Aid SA.36556 (2013/N)—The Netherlands”*, C (2013) 6628 final (Oct. 16, 2013), http://ec.europa.eu/competition/state_aid/cases/249372/249372_1486195_132_2.pdf; *European Commission on “State Aid N 670/2007—Czech Republic”*, C (2008) 2599 (June 5, 2008), http://ec.europa.eu/competition/state_aid/cases/222898/222898_827818_22_1.pdf; *European Commission on “State Aid N 812/06—Germany”*, C (2007) 2154 (May 14, 2007), http://ec.europa.eu/competition/state_aid/cases/217797/217797_678700_7_1.pdf [hereinafter *State Aid N812/06*]; *European Commission on “Aide d’État N 497/2002—France”*, C (2003) 379 final (Feb. 5, 2003), http://ec.europa.eu/competition/state_aid/cases/138302/138302_458050_22_2.pdf; *European Commission on “Aide d’État N 496/2002—France”*, C (2002) 4686 (Dec. 17, 2002), http://ec.europa.eu/competition/state_aid/cases/138303/138303_458027_16_2.pdf; *European Commission on “Ayuda de Estado N 106/02—Cataluña (España)”*, C (2002) 1670 (May 31, 2002), http://ec.europa.eu/competition/state_aid/cases/135679/135679_446924_17_2.pdf. The last case is discussed by Phedon Nicolaides, *In Search of Economically Rational Environmental State Aid: The Case of Exemption from Environmental Taxes*, 10 EUROPEAN COMPETITION J. 155, 160–61 (2014).

211. *European Commission on “State Aid N 445/2008—Austria”*, C (2008) 8538 (Dec. 11, 2008), http://ec.europa.eu/competition/state_aid/cases/227331/227331_920262_30_1.pdf.

212. *European Commission on “Aide d’État N 493/02—France”*, C (2003) 93 (Feb. 4, 2003), http://ec.europa.eu/competition/state_aid/cases/138306/138306_457987_23_2.pdf.

213. *European Commission on “Aide d’État—Belgique (Flandre) N 561/2009”*, C (2009) 10078 (Dec. 11, 2009), http://ec.europa.eu/competition/state_aid/cases/233471/233471_1034809_19_2.pdf.

214. *European Commission on “State Aid SA.43080—Czech Republic”*, C (2016) 2855 final (May 17, 2016), http://ec.europa.eu/competition/state_aid/cases/260429/260429_1837217_158_2.pdf.

allowance trading scheme for offshore oil installations.²¹⁵ Other funding measures, however, have pursued water-related objectives that are not environmental in character, like relief from different kinds of taxes (such as the wastewater tax,²¹⁶ the pollution tax,²¹⁷ and the water tax²¹⁸). This is especially the case if relieved are those sectors that would suffer the greatest loss of competitiveness,²¹⁹ even if this amounts to benefitting sectors that generate particularly large quantities of wastewater.²²⁰ But other, non-environmental measures supported by the EU are the redress of farmers for the costs they incur due to the implementation of the WFD²²¹ and an excise duty exemption for the fuel used by companies in inland waterway transportation.²²²

In all such decisions, references to the WFD or to obligations stemming from it are scant to say the least. Sometimes, an explicit reference to the WFD would not even be necessary because the rules on State aid, as complemented by EC guidelines, try to incorporate the main principles underlying Article 9. For instance, in its decisions, the EC has taken into account that investments covering the operating costs of wastewater facilities are not eligible for aid,²²³ whereas the invocation of the PPP—which is a general principle of the EU legal order—will more easily convince the EC that a given aid scheme is lawful.²²⁴ Nonetheless, open allusions to the directive and Article 9 are sometimes made, as the EC demonstrated by reminding a State that its own authorization “is without prejudice to

215. *European Commission on “State Aid N 47/2006–United Kingdom”*, C (2006) 3194 final (July 19, 2006), http://ec.europa.eu/competition/state_aid/cases/203609/203609_589192_27_2.pdf.

216. See State Aid NN 30/A-C/01 in Authorisation for State Aid Pursuant to Articles 87 and 88 of the EC Treaty Cases Where the Commission Raises No Objections, 2002 O.J. (C 292) 1, 2.

217. *European Commission on “Steunmaatregel nr. N 157/2002–Nederland”*, C (2002) 1797 final (July 17, 2002), http://ec.europa.eu/competition/state_aid/cases/135985/135985_448215_24_2.pdf [hereinafter N157/2002].

218. *European Commission on “State Aid Case NN 1/2005–Denmark”*, C (2005) 2701 (July 20, 2005), http://ec.europa.eu/competition/state_aid/cases/197460/197460_509544_20_1.pdf [hereinafter NN 1/2005].

219. *European Commission on “Statsstøttesag SA.33316 (2011/N)–Danmark”*, C (2014) 2166 final (April 9, 2014), http://ec.europa.eu/competition/state_aid/cases/241302/241302_1537968_138_4.pdf.

220. *European Commission on “State Aid N 586/2007–Denmark”*, C (2007) 6336 (Dec. 7, 2007), http://ec.europa.eu/competition/state_aid/cases/222336/222336_759130_15_1.pdf.

221. *European Commission on “Aide d’État SA.35982 (2012/N)–France”*, C (2014) 1775 final (Mar. 27, 2014), http://ec.europa.eu/competition/state_aid/cases/247210/247210_1554774_110_2.pdf.

222. *European Commission on “State Aid SA.46046 (2016/NN)–Slovakia”*, C (2017) 2877 final (May 3, 2017), http://ec.europa.eu/competition/state_aid/cases/266732/266732_1904651_80_2.pdf.

223. State Aid N812/06, *supra* note 210 (the assessment was conducted against the 2001 environmental guidelines, *supra* note 158, now no longer in force). It should be noted that operating aid can exceptionally be admitted by virtue of the EU *Guidelines on Regional State Aid for 2014–2020*, 2013 O.J. (C 209) 1 (EC) (the preceding version, covering 2007 to 2013, was used by the EC in the case cited *infra* note 227 to assess whether the paper mill was benefitting from operating aid in the form of reduced waste water treatment charges).

224. As read in N157/2002, *supra* note 217, at 2–3, the Netherlands justified the reduction of the wastewater tax for certain large-scale polluters as a necessary move to attain an appropriate cost-sharing among different categories of users and a more rational and equitable application of the PPP.

the compatibility [of the water tax relief] with Directive 2000/60/EC.”²²⁵

One may think it is a pity that the EC has too often relinquished its role as promoter of compliance with the whole of EU law. For instance, it has rarely spoken on how to best reconcile State aid regulations with the WFD obligations, despite their obvious interconnections and potential contradictions.²²⁶ However, this is a mere consequence of the segmentation of its scope of action when it is judging Member States’ abidance by EU law. Absent explicit legislative requirements, the EC will hardly harmonize different policies when playing its role as law enforcer. This is shown by a recent decision where Article 9 was explicitly declared extraneous to the legal regime on State aid.²²⁷ The complainant alleged that a new wastewater treatment plant built with the financial support of Germany near a paper mill was intended to serve exclusively the mill. Therefore, it should qualify as State aid favoring the mill. The EC, having established that the wastewater treatment facility was in fact open to all, moved to evaluate the allegation of the complainant. It considered the fees paid by the paper mill to use the treatment plant, in order to determine whether they were financially sensible or not and, thus, whether an undue economic advantage had been accorded to the mill relative to its competitors. This part of the decision is worth quoting *in extenso*:

(176) Given the absence of reliable market benchmarks, the Commission takes the view that the fact that a transaction is in line with market conditions can be established on the basis of another generally accepted, standard assessment methodology. The Commission considers that, for infrastructure which is open to all and not dedicated to a specific user, the market investor/operator test is satisfied if the users of the infrastructure incrementally contribute, from an ex ante viewpoint, to the profitability of the operator.

(177) This is the case where the operator’s commercial arrangement with the individual user allows the operator to cover all costs stemming from this arrangement with a reasonable profit margin on the basis of sound medium-term prospects.

(178) This assessment should moreover take into account all revenue and all expected incremental costs incurred by the operator in relation to the activity of the specific user.

225. NN1/2005, *supra* note 218, at 4 (Article 9 is expressly quoted).

226. The Commission worries about such contradictions only when it promotes studies and issues reports—although in those cases, it is also sometimes hard to discern a clear course of action. On water-related subsidies, see the following analysis made for and in consultation with the EC. S. WITHANA ET AL., INST. EUROPEAN ENVTL. POL’Y, STUDY SUPPORTING THE PHASING OUT OF ENVIRONMENTALLY HARMFUL SUBSIDIES 2 (Oct. 2012), available at http://ec.europa.eu/environment/enveco/taxation/pdf/report_phasing_out_env_harmful_subsidies.pdf.

227. Commission Decision 2015/508, 2015 O.J. (L 89) 72 (EC).

(179) Such incremental costs encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs, arising from the presence of the user. In contrast, costs which the operator would have to incur anyway, independently of the arrangement with the user, should not be taken into account.²²⁸

Germany argued that the paper mill was paying the full cost of the service provided by the treatment plant because the subsidies it had granted to the plant had not passed on to the paper mill as reduced fees. These fees covered the full cost of the water service provided by the plant. If only a small percentage of the interest on the capital invested by the plant was covered, the reason was that recovery of a fictitious interest on the subsidies received by the State would not be justified because the plant did not incur such costs. According to the defendant, “[n]either the ‘polluter pays’ principle nor the EU Water Framework Directive obliges the authorities to include subsidies in the calculation of interest on capital invested.”²²⁹ The Commission completely disregarded Germany’s defense and although it eventually ruled in favor of the defendant, it made clear that

the existence of State aid has to be established irrespective of: (1) whether or not the EU Water Framework Directive and German legislation implementing the directive require the recovery of full costs of the provision of waste water treatment services; and (2) whether the fees comply with the provisions of these laws.²³⁰

This creates a fissure between the WFD and the State aid regime—one that is acceptable only insofar as the user-related costs the water service provider must recover under the directive can be factored into those “arising from the presence of the user” (those against which the ECJ assesses the existence of an aid). Otherwise, both legal regimes would be circumvented: the State aid obligations, because part of the additional costs borne by the provider and related to the user would become a hidden subsidy; and the WFD, because the middle ring (the provider) of the productive chain, instead of the end ring (the user) would bear the environmental and resource costs.

This lack of communication between Article 9 and any other EU policy sector works in both directions. When adjudicating State aid cases, the legal benchmark against which Member States’ measures are to be assessed is the one protecting the free market and competition. Conversely, in a case about compliance with the WFD, breach of State aid rules would not matter. With that said, it cannot be overlooked that, under EU law, incorporation of environmental objectives into all EU policies is expressly demanded by Article 11 of the TFEU. According to this provision, “[e]nvironmental protection requirements must be integrated into the

228. *Id.* ¶¶ 176–79 (footnotes omitted).

229. *Id.* ¶ 107.

230. *Id.* ¶ 167.

definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."²³¹ The scientific literature on the actual range of this provision is large and expanding.²³²

It appears, however, that the integration principle does not require the EC to assess the compatibility of State aid with EU secondary law, such as the WFD.²³³ The EC reviews only compliance with primary law. Of potential relevance here is Article 191 of the TFEU, which establishes that the EU policy on the environment will contribute to the pursuit of some objectives. In particular, the EU policy will aim at "preserving, protecting and improving the quality of the environment;" "protecting human health;" and attaining a "prudent and rational utilisation of natural resources."²³⁴ Such a policy shall also "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."²³⁵ It is notable that all the goals of Article 9, as discussed in Part I, are quoted (albeit just one of the two means—the PPP—is cited: FCR is absent). State aid granted to improve the ecological status of a water body is not part of the EU policy on the environment. Even if it were, the only parameter the EC can use to evaluate the legality of an aid measure is the law regulating the internal market,²³⁶ to which Article 191 does not belong.

The conclusions reached by the ECJ as to the limits of the Commission's power of review of State aid measures are somewhat surprising, as the different sets of guidelines quoted above stress the importance of States complying with EU environmental law. However, such instruments cannot trump primary law. Instead, it is the latter that sheds light on the meaning of the former. One can also speculate about whether the most recent version of the guidelines less strongly emphasizes the need to integrate environmental considerations into State aid law.

231. Treaty on the Functioning of the European Union (TFEU), art. 11, Dec. 13, 2007, 2008 O.J. (C 115) 47, 53.

232. So far, the most complete and systematic essay is NOWAG, *supra* note 172. Other useful works are: THE GREENING OF EUROPEAN BUSINESS UNDER EU LAW: TAKING ARTICLE 11 TFEU SERIOUSLY (Beate Sjaafjell & Ania Wiesbrock eds., 2015); Susana Borràs Pentinat, *The Process of Integration of Environmental Protection into Other European Union Policies*, in STRENGTHENING EUROPEAN ENVIRONMENTAL LAW IN AN ENLARGED UNION (Christoph Holtwisch et al. eds., 2004); NELE DOHNDT, INTEGRATION OF ENVIRONMENTAL PROTECTION INTO OTHER EC POLICIES—LEGAL THEORY AND PRACTICE (2003); Martin Wasmeier, *The Integration of Environmental Protection as a General Rule for Interpreting Community Law*, 38 COMMON MKT. L. REV. 159, 159–160 (2001); *see generally* Jørgen K. Knudsen & William M. Lafferty, *Environmental Policy Integration: The Importance of Balance and Trade-offs*, in RESEARCH HANDBOOK ON FUNDAMENTAL CONCEPTS OF ENVIRONMENTAL LAW 337 (Douglas Fischer ed., 2016); Andrea Nollkaemper, *Three Conceptions of the Integration Principle in International Environmental Law*, in ENVIRONMENTAL POLICY INTEGRATION: GREENING SECTORAL POLICIES IN EUROPE 22 (Andrea Lenschow ed., 2002).

233. This was stated by the ECJ itself. *See* NOWAG, *supra* note 172, at 266–67.

234. TFEU, *supra* note 231, art. 191(1).

235. *Id.* art. 191(2).

236. *Id.*

The 2008 guidelines openly quoted Articles 11 and 191 of the TFEU.²³⁷ The 2014 guidelines delete the references but affirm that “[t]o avoid that State aid measures lead to environmental harm, . . . Member States must . . . ensure compliance with Union environmental legislation.”²³⁸ The guidelines relating to aid in the sectors of agriculture and forestry add a non-binding procedural requirement: “State aid notifications should provide information demonstrating that the aid measure will not result in an infringement of applicable Union environmental protection legislation.”²³⁹ The WFD is expressly mentioned.²⁴⁰

That the EC requires Member States to state in their notifications whether they comply with the EU environmental obligations appears at odds with its decision in the case involving Germany, quoted above.²⁴¹ There, the implementation of Article 9 was said to be outside the scope of the EC’s consideration, and observance of State aid rules unaffected by compliance, or non-compliance, with the WFD. The Commission, which is the primary enforcer of EU law, should take a less ambiguous stance on how the WFD interacts with other EU legal regimes, such as State aid policy, and should pursue better integration of different legal regimes.

C. THE OVERALL EFFECT OF SURROUNDING LEGISLATION ON ARTICLE 9

Water management is a vast field, and many policies bear on it directly or indirectly. In this Part, I have focused on those policies that, in principle, are more likely to be on a collision course with the principles expressed by Article 9 of the WFD. I do not mean that the goals pursued by such other legal fields are contrary to or substantially different from the objectives Article 9 strives to reach. Although these legal fields may have a primary purpose that is different from those aspired to by Article 9, they may also have a secondary objective which overlaps with one of Article 9’s objectives. The problem is that, despite this partial commonality of purposes, these policies are usually achieved through means which are different and even irreconcilable with Article 9. More specifically, Article 9 aims to make users and polluters *pay* through implementation of the FCR principle and the PPP, whereas rules such as the Common Agricultural Policy and the State aid regime can cause the same users and polluters to be *paid* to preserve the quality and quantity of water.

This does not necessarily lead to a legal contradiction. Article 9 explicitly allows “the funding of particular preventive or remedial measures in order to

237. See Community Guidelines on State Aid for Environmental Protection, *supra* note 159, ¶ 18.

238. Guidelines on State Aid for Environmental Protection and Energy 2014–2020, *supra* note 160, ¶ 7.

239. European Union Guidelines for State Aid in the Agricultural and Forestry Sectors and in Rural Areas 2014 to 2020, *supra* note 164, ¶ 52. This requirement is exemplified by the case of an aid scheme for investments that involve an increased use of scarce resources or an increase in pollution.

240. *Id.* at 20 n. 42 (which also lists other water-related directives).

241. See Commission Decision 2015/508, *supra* note 227.

achieve the objectives of this Directive”²⁴²—and rightly so, in my opinion. Similarly, some of the rules and guidelines analyzed in the previous sections reference the WFD, stating that their application should not result in a breach of the directive or that compliance with Article 9 is a precondition for being granted European or State funds. Ironically, the joint reading of these clauses might result in their annulment. If the norms governing public financing must not infringe upon Article 9, but this provision permits the funding of preventive or remedial measures, then there is no way CAP or State aid rules can breach Article 9!

Moreover, even if one abstains from such a literal combination of the provisions, there are reasons to think that Article 9 and the abovementioned legal regimes have not always been implemented harmoniously. There are various instances of State aid being approved without a serious assessment of compliance with Article 9, or even seemingly in breach of it. This is potentially aggravated by the stance taken by the EC, whose policy of separation of the WFD from the State aid sector, if wrongly understood and carried on, might end up detracting from the effectiveness of both legal regimes. Thus, overall, one may get the feeling that all references to Article 9 by the CAP or the State aid rules just pay lip service to the objectives of cost recovery and the PPP.

IV. THE GUARDED APPROACH OF THE GUARDIAN: THE NARROW INTERPRETATION OF THE SCOPE OF ARTICLE 9 BY THE EU JUDICIARY

A weak provision needs a strong enforcer, and Article 9 is a rule that would benefit from a resolved approach by the ECJ. Indeed, the analysis of Article 9 conducted above is not very complimentary. Article 9 emerges as a redundant and somewhat chaotic provision that despite its wordy formulation—or perhaps because of it—does not provide clear guidance to the policy-maker. Perhaps the only thing that is relatively clear about Article 9 is that its demanding obligations can be avoided in full or in part by appealing to one of the derogation options it makes available. Does this mean that Article 9 is so inherently flawed that it is useless? I think not. Article 9’s limited impact is, to a great extent, a problem of enforcement. A more concerted effort by European institutions would significantly contribute to the effectiveness of the provision, or at least would promote its implementation in a way that is not merely nominal. In particular, the ECJ could dispel some doubts about its interpretation²⁴³ and strictly scrutinize the invocation of exceptions and other justifications on the part of Member States. The court, however, has taken a different path.

So far, Article 9 has been interpreted by the ECJ in three different cases: in two infringement procedures initiated by the Commission against Germany²⁴⁴ and

242. Council Directive 2000/60, *supra* note 1, art. 9(3).

243. Several of these interpretive problems are illustrated *supra* Part I.

244. Case C-525/12, *Comm’n v. Germany*, 2014 E.C.R. I-2202.

Poland,²⁴⁵ and in a request for a preliminary ruling raised by a Croatian court.²⁴⁶ Unfortunately, despite the EC's victory against Poland,²⁴⁷ the other two judgments have significantly watered-down the requirements of the provision.

In the German and Croatian cases, the ECJ gave a reductive account of the aim of the WFD, which is described as fundamentally environmental in nature. Put simply, a reduction in water usage and a more efficient allocation of the resource can be understood as an unnecessary by-product of the attainment of a "good" status of European waters. In the words of the ECJ, the "purpose is primarily concerned with the quality of the waters concerned. Control of quantity is an ancillary element in securing good water quality."²⁴⁸ The clear phrasing of the sentence leaves little doubt as to the prioritization among the objectives identified in Part I. The ECJ affirmed that measures on water quantity should be established because they serve the objective of ensuring good water quality.²⁴⁹ From "should be established *because* they serve" to "should be established *insofar as* they serve" is only a short logical step, but if made, would render measures on quantity utterly unnecessary if good water quality could be attained without pricing strategies, or if it had already been attained. Pricing policies would have a date of birth (2010) as well as a scheduled date of demise (2027); that is, the year set as the final deadline for meeting the environmental objectives of the WFD.

Evidently, this is a narrow way of construing Article 9, one that dramatically affects its status as well as scope. It is hard to say whether the ECJ meant to inflict a mortal wound to the provision or whether its interpretation should be classified as involuntary manslaughter instead of murder (or even just a serious but non-deadly wound). In the latter case, the quoted sentence could be deemed a mere *lapsus calami* and ignored. Based on the context of the opinions, the second characterization is perhaps preferable—though no conclusive evidence can be found. Adjudicating on the infringement action brought against Germany, the ECJ found

245. Case C-648/13, *Comm'n v. Poland* (June 30, 2016), <http://curia.europa.eu/juris/liste.jsf?language=GA&num=C-648/13#>.

246. Case C-686/15, *Vodoposkrba i odvodnja d.o.o. v. Željka Klafurić*, 2016 E.C.R. I-927.

247. The court underlined that "[t]he mere statement that an obligation provided for by a directive results from the overall set of provisions in the legal order of the Member State concerned does not fulfil th[e] requirement" of legal certainty and its features (that is, "specificity, precision and clarity"). However, the judges ultimately decided that the EC's claim was well-founded on account of a formal motive—because the regulation transposing Article 9 "was adopted after expiry of the time limit laid down in the reasoned opinion" of the EC. *Poland*, *supra* note 245, ¶¶ 120, 122.

248. *Germany*, 2014 E.C.R. I-2202, ¶ 51; *Vodoposkrba*, 2016 E.C.R. I-927, ¶ 19. This is a way to give relevance to the word "thereby" in the part of Article 9 that speaks of "adequate incentives for users to use water resources efficiently and thereby contribute to the environmental objectives of Directive 2000/60"—but such reading is, in my opinion, untenable.

249. *Germany*, 2014 E.C.R. I-2202, ¶ 51 (the term "should," instead of "must," was used by the ECJ). This far-from-imperative tone finds confirmation in the German case (*id.* ¶ 55) as well as the Croatian one (*Vodoposkrba*, 2016 E.C.R. I-927, ¶ 21), where cost recovery—*tout court*, or based on the quantity consumed—was said to be just "one of the" instruments or methods to achieve a rational or efficient use of water.

that there is no violation of Article 9 so long as the Member State's behavior "does not compromise the purposes and the achievement of the objectives of th[e] directive"²⁵⁰—the objective of clean water. However, that good water quality is truly the only objective is doubtful²⁵¹—despite the clarity of the ECJ's words and the overall tone of the pronouncement—because of a sentence appearing in the other judgment where the court said that the "purpose is primarily concerned with the quality of the waters concerned."²⁵² Two years later, in a preliminary ruling rendered upon request of the municipal court of the Croatian city of Velika Gorica, governmental authorities were said to be free to decide how to design water tariffs, "[p]rovided that they fulfil the obligation to recover the costs of services connected with water use, including the environmental and resource costs."²⁵³ Although this is little ground on which to affirm that cost recovery is a duty,²⁵⁴ this language provides a reason for arguing that FCR is not a mere option—that it is not an ancillary measure which *may* be used to ensure good water quality.

It should be apparent from Part I that the issue of the different objectives of Article 9 is not a trivial one. The chosen goal or goals of a cost recovery regulation has a direct bearing on the composition of the price of water. Thus, for instance, compliance with the PPP requires some environmental costs to be factored into the final price, just as an efficient use of water demands that its scarcity—through resource costs—be considered. A reduction in the total consumption of water, in turn, rests not just on an increase in price, but also on price being made contingent on the quantity consumed. In the court's view, however, all such measures are up to Member States to decide. If, in *Commission v. Germany*, the ECJ seemed to make Article 9 an optional provision, at least if water quality is not in danger, in the *Vodoopskrba* case, it recognized the obligatory nature of the article but relegated its core purpose to the realm of the

250. *Germany*, 2014 E.C.R. I-2202, ¶ 57.

251. That this is unclear also to the ECJ is demonstrated, in my view, by the court's idea that the "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." *Id.* ¶ 55. Put differently, they would be an optional tool for the attainment of an environmental ("qualitative") goal, which, in turn, serves the purpose of rational water use. An objective that is not merely environmental in character and is best reached through water pricing measures (though bans and licenses are effective solutions, too). Moreover, if, in paragraph 51, the ECJ traces Article 9's meaning back to a single purpose (water quality, because water quantity "serv[es] the objective of ensuring good quality"), it subsequently refers to "objectives" in the plural (*id.* ¶¶ 56, 57), as if there were more than one.

252. *Vodoopskrba*, 2016 E.C.R. I-927, ¶ 19.

253. *Id.* ¶ 23.

254. Doubts are hard to be dispelled, though. Paragraph 23, just quoted, refers to paragraph 20, which, in turn, reproduces—as paragraph 44 in *Germany*, 2014 E.C.R. I-2202, had already done—basically the whole first paragraph of Article 9. This is the part that speaks of environmental and resources costs, the PPP, and efficiency in the use of resources. However, paragraph 20 is to be read "in th[e] perspective" of paragraph 19, which is where the court maintains that the directive's "purpose is primarily concerned with the quality of the waters concerned."

unambitious. “Member States may adopt other water-pricing methods which enable recovery of, *inter alia*, the costs borne by water distribution services in making it available to users in sufficient quantity and of sufficient quality, irrespective of their actual consumption of that water.”²⁵⁵ As a consequence, the ECJ likely would deem acceptable a water price that includes no variable component based on usage,²⁵⁶ or a decreasing price structure,²⁵⁷ as long as the costs of operating water provision services are covered. Disincentivizing superfluous water consumption is not a purpose of Article 9, the court said.

The undermining action of the ECJ towards Article 9 does not stop here, however. It is also present in what is still the court’s best-known pronouncement on the subject. In *Commission v. Germany*, the European judge had to decide whether limiting the category of water services to embrace only water supply and wastewater disposal, when these services are provided by independent suppliers, was a breach of the WFD.²⁵⁸ The EC claimed that self-abstraction for personal, irrigation, and industrial purposes, as well as impoundment, storage, and treatment of water for uses related to navigation, hydroelectric power generation, and flood protection were also within the scope of Article 9.²⁵⁹ Thus, the ECJ had to choose between the narrow interpretation of water services underlying the transposition of the WFD by the German authorities, and the broad interpretation advocated by the EC. The court opted for the narrower interpretation advocated by Germany, with the only caveat being that a strict reading of the notion of water services must “not compromise the purposes and the achievement of the objectives of that directive.” Because Germany brought many more activities beyond the reach of Article 9 than it put within its scope,²⁶⁰ greatly curbing the category of services whose costs must be recovered, the ECJ’s condition that the purposes of Article 9 not be undermined can only be met by narrowly interpreting these

255. *Vodoopskrba*, 2016 E.C.R. I-927, ¶ 22. The reference to the quality of water does not cover the whole spectrum of the PPP and the addition of an “*inter alia*” is, in the rationale of the judgment, negligible. The ECJ’s sentence is even more striking as the plaintiff who originated the controversy disputed his owing the fixed component of the water price, not the variable component, which she agreed was due.

256. As it was the case in 2015 for the consumption of 200 cubic meters of water in Bergen and Vancouver (in these two cities, no variable quota was applied, although significant environmental tariffs were charged). See *Total Changes for 160 Cities in 2016*, INT’L WATER ASSOC., <http://178.62.228.131/graph/18> (last visited Oct. 28, 2018).

257. A method whereby the more water you use, the less you pay per liter. This was the situation in Glasgow in 2011. Niall Conroy, *Domestic Water Charges in Europe*, PUBLICPOLICY.IE, <http://www.publicpolicy.ie/wp-content/uploads/Water-Charges-300413.pdf> (last visited Oct. 28, 2018).

258. *Germany*, 2014 E.C.R. I-2202, ¶ 1.

259. *Id.* ¶¶ 29–35.

260. By the way, does the ECJ know that energy production is the leading use in the industry and manufactory sectors in Europe? See Jürgen Förster, *Cooling for Electricity Production Dominates Water Use in Industry*, EUROSTAT (last modified Sept. 17, 2017), http://ec.europa.eu/eurostat/statistics-explained/index.php/Archive:Water_use_in_industry.

purposes. Indeed, the more ambitious the potential objective is, the less likely it will be attainable despite a narrow classification of water services.

Even though there are those who have taken a different view,²⁶¹ commentators have commonly sided with the EC, and sometimes harshly criticized the ECJ's judgment for rendering Article 9 "as a practically voluntary tool" that, even when applied, offers Member States "a huge margin of appreciation."²⁶² I think that there are good reasons to support this opinion. But there is also some evidence supporting the argument that the ruling reflects greater concerns about violations of Article 9 than may first appear. Although dismissing the abstract and theoretical claims of a violation made by the EC, the ECJ did not rule out the possibility of a concrete infringement of the WFD on the part of Germany. Such a potential specific violation was not at issue in the case under discussion, so that, "in the absence of any other ground of complaint,"²⁶³ the court had to turn down the action of the EC (*non ultra petita*²⁶⁴). However, had the EC brought data to buttress the thesis of an actual breach of Germany's duty to recover the costs of water services, then the outcome might have been different. From this perspective, the ECJ may be seen as having urged renewed action by the EC—the filing of a new infringement claim on different grounds (substantive instead of procedural)—to demonstrate that Germany did compromise the achievement of the objectives of the WFD.²⁶⁵

This seeming contradiction—the principled dismissal²⁶⁶ of the EC's arguments for the breach of the WFD and the idea that a new action might succeed if substantiated with proper information—is explained by the fact that the ECJ addressed and conflated two distinct issues. On the one hand, it said that the European "legislature" did not want Member States to apply cost recovery to

261. For example, according to Delimatsis, *supra* note 197, at 296, the EC argued "unconvincingly" for a broad definition of water services.

262. Petra E. Lindhout & Helena Francisca Maria Wilhelmina van Rijswijk, *The Effectiveness of the Principle of Recovery of the Costs of Water Services Jeopardized by the European Court of Justice—Annotations on the Judgment in C-525/12*, 12 J. EUROPEAN ENVTL. & PLANNING L. 80, 87 (2015).

263. *Germany*, 2014 E.C.R I-2202, ¶ 59.

264. Although the principle was not explicitly mentioned by the ECJ in that particular case, it is now a well-settled rule of conduct in EU law. For a couple of recent rulings where the ECJ invoked it during an infringement procedure, see Case C-552/15, *Comm'n v. Ireland*, ¶ 38 (Sept. 19, 2017), <http://curia.europa.eu/juris/liste.jsf?td=ALL&language=en&jur=C,T,F&num=c-552/15> (it is "necessary for the essential points of fact and of law on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order sought to be set out unambiguously so that the Court does not rule *ultra petita* or fail to rule on a complaint"); Case C-488/15, *Comm'n v. Bulgaria*, ¶ 81 (April 5, 2017), <http://curia.europa.eu/juris/liste.jsf?num=C-488/15>.

265. GAWEL, *supra* note 36, at 27–28. The same is expressed in Erik Gawel, *ECJ on Cost Recovery for Water Services under Article 9 of the Water Framework Directive: Camera Locuta Causa non Finita*, 12 J. EUROPEAN ENVTL. & PLANNING L. 71 (2015).

266. The ECJ's reasoning is "principled" because in its view, "the Commission's action is based on an incorrect overall approach with regard to Directive 60/2000," one that assumes, in an allegedly wrong way, the non-dispensable nature of Article 9. *Germany*, 2014 E.C.R I-2202, ¶ 36. The quoted words sum up Germany's position, with which the ECJ agrees.

each and every water service. Only those whose exclusion would prevent the objectives of the WFD from being met are to be considered (this is why the claim by the Commission was rejected). On the other hand, the court left the door open for a new claim should the EC be able to demonstrate that Germany's exclusion of certain services would have the effect of preventing the WFD's objectives from being realized. Unfortunately, the court failed to answer the question the EC had raised. Indeed, the Commission has never proposed a binding and across-the-board application of cost recovery. "Instead the ECJ was asked to establish whether the 'activities' in question must, in principle, be included in the Member States' deliberations on appropriate cost recovery policies or whether, in terms of legal criteria, they are a priori outside the sphere of obligations reserved for 'services.'"²⁶⁷ Simply put, the EC argued for a *procedural* duty of Member States to consider all water services when deciding which services must have their costs recovered, not for a *substantive* duty to recover the costs of all water services. So, if a State, based on the economic analysis due under Article 5 of the WFD, concludes that the omission of a particular service from its cost recovery policy does not impede the attainment of the objectives of the directive (whichever they are!), the State is not in breach of EU law. However, this is conditional upon the economic analysis being scrupulously conducted, which entails surveying all services and deriving correct and consistent decisions from the data. If the ECJ had espoused this understanding of Article 9, Germany would have lost the case.

One might say that the ECJ's approach has narrowed the door but not locked it because the EC can still initiate an infringement action if in possession of sufficient evidence that the exclusion of certain services makes it impossible for a State to recover the costs to the extent required by Article 9. Even if true, this risks underestimating the practical impact of the court's interpretation. Without the possibility of relying on a complete economic analysis carried out by the States concerned, the EC lacks fundamental data to demonstrate a violation of the WFD. Whether EU substantive and procedural law can offset this problem must therefore be considered. This is done in the next Part as part of a broader discussion on the role of the judiciary in ensuring an adequate implementation of Article 9.

V. ON WHETHER THE BENCH SHOULD BE WATERPROOF: THE ECJ'S ROLE IN REVIEWING ALLEGED ARTICLE 9 VIOLATIONS

Overall, the case law of the ECJ on the implementation of Article 9 is not only scant, but it is also disappointing. The court downplays the importance of the provision and does not take advantage of the chances it was offered to pursue a more effective application of the FCR principle. In this Part, I propose my views on what the ECJ should do from a procedural as well as a substantive perspective to

267. GAWEL, *supra* note 36, at 27 (quoting other authors who put forward this observation).

restore Article 9's role as a core provision of the WFD. These suggestions stand even after the features of the ambit of water management are considered.

A. THE EC'S RIGHT TO DATA ESSENTIAL TO ENFORCEMENT OF ARTICLE 9

The EC's stance should have prevailed in the courtroom and Germany should have been condemned for unduly restricting the notion of water services, which determines the scope of the duty to provide data to the EC. The WFD is clear: Article 13 requires that river basin management plans be published that "include the information contained in Annex VII."²⁶⁸ According to section (A)(6) of this Annex, the management plans shall contain "a summary of the economic analysis of water use as required by Article 5 and Annex III."²⁶⁹ A summary is not a partial reproduction. It is a complete synopsis of the economic analysis, which "shall contain enough information in sufficient detail" for a State to "make the relevant calculations necessary for taking into account under Article 9 the principle of recovery of the costs of water services."²⁷⁰ The summary must also allow the State to "make judgements about the most cost-effective combination of measures in respect of water uses to be included in the programme of measures under Article 11."²⁷¹ This is exactly the position of the EC: Member States are free to decide the design of cost recovery measures, but the dataset against which such a choice is made must be communicated, at least in a summed-up form, to the EC, so that it can assess the correctness and internal coherence of the States' decisions.

Member States' duty to make information available follows from the joint application of the quoted provisions of the WFD, as well as, more broadly, from Article 4(3) of the Treaty on European Union, which provides for the principle of sincere cooperation between the Union and its Member States. Though the article is phrased in general terms, it entails "a duty to provide the Commission with the information necessary in order for it to monitor whether Union law is being complied with"²⁷²—a duty which is undoubtedly strengthened whenever it is also based on an express obligation to provide information,²⁷³ as with the WFD. Reticence by Member States in providing information that is essential for a reasonable evaluation of laws and measures enacted by the Member States amounts to a breach of the duty of cooperation because it makes it hard or outright impossible for the EC to supervise those States' compliance with EU law.²⁷⁴

268. See Council Directive 2000/60, *supra* note 1, art. 13(4).

269. *Id.* at annex VII(A)(6).

270. *Id.* at annex III(A); pmb1.

271. *Id.* at annex III(B).

272. KOEN LENAERTS ET AL., EU PROCEDURAL LAW 765 (Janek Tomasz Nowak ed., 2014).

273. *Id.* at 200–01.

274. Although a violation of Article 4(3) alone could occur for an infringement action to be initiated, *id.* at 162, "[t]he Commission has traditionally been unwilling to bring a general non-compliance action solely based on" that provision. Laurence W. Gormley, *Infringement Proceedings*, in *THE ENFORCEMENT OF EU LAW AND VALUES: ENSURING MEMBER STATES' COMPLIANCE* 65, 67 (András Jakab & Dimitry Kochenov eds., 2017).

If this is correct, the ECJ erred because there is a twofold legal basis for determining that the duty to perform an economic analysis extends to all water services. The EC is still allowed to gather this information in litigation. Even though, in documenting allegations of a breach of EU law, the primary burden of proof rests with the Commission,²⁷⁵ “a party not having to discharge [it] may nevertheless be obliged to release information to which only it has access, in order to enable its opponent to provide the necessary evidence.”²⁷⁶ This serves the purpose of balancing the inequality between the parties as to their capacity to prove facts because the concealment of some crucial information might shield a party from what would otherwise be a successful infringement action by the EC. Even more importantly, “the Union judicature is obliged to order measures of inquiry where this is necessary in order to be able to rule on whether a plea is well-founded.”²⁷⁷ Although this is a rule of judicial procedure, a parallel can be drawn between an appellant’s request to the ECJ for a measure of inquiry forcing her opponent to disclose essential information and the EC’s request for the ECJ to recognize the duty of its opponent (the Member State allegedly in breach of EU law) to disclose the same kind of information. If the ECJ has an obligation to order the release of such evidence in the former case, why should it be allowed to dismiss a claim to the same end in the latter case?²⁷⁸ In other words, the ECJ should treat all requests for information the same way, irrespective of their origin. After all, the ECJ seemingly construes as a legitimate exception to the *non ultra petita* principle its own duty to raise *motu proprio* pleas on the need for the EC to provide reasons for its acts,²⁷⁹ and this witnesses the importance that the European judge attaches to the justification of decisions. Therefore, Members States should also be

275. LENAERTS ET AL., *supra* note 272, at 198–99.

276. *Id.* at 765; *see also* PAOLO BIAVATI, DIRITTO PROCESSUALE DELL’UNIONE EUROPEA 218 (5th ed. 2015).

277. LENAERTS ET AL., *supra* note 272, at 766–67; *see also* BIAVATI, *supra* note 276, at 220. Both texts cite the *Ufex* case. Case C-119/97 P, *Union Française de l’Express (Ufex) v. Comm’n*, 1999 E.C.R. I-1371. Paragraph 111 of this ruling is particularly pertinent: the European judge cannot “simply reject the parties’ allegations on the ground of insufficient evidence, when it [is] up to the Court, by granting the appellants’ request to order production of documents, to remove any uncertainty there might be as to the correctness of those allegations.” *Id.* ¶ 111.

278. My whole argument is based on the assumption that restricting greatly the notion of water services makes the EC unable to ascertain the existence of a violation of the WFD. In other words, that the information concerning all types of services can be classified as necessary information. I think this can hardly be disputed: only the Member State can effectively gather information on the actual uses of a river basin, as well as the impact of such uses on the quality of its waters. A sound implementation of the cost recovery obligation cannot do without such data.

279. Even if “[i]t follows from the rules governing proceedings before the EU Courts . . . [that they] cannot adjudicate *ultra petita* . . . [.] certain pleas may, and indeed must, be raised by the courts of their own motion, such as the question whether a statement of reasons for the decision at issue is lacking or is inadequate, which falls within the scope of essential procedural requirements.” Case C-467/15 P, *Comm’n v. Italy*, ¶¶ 14–15 (Oct. 25, 2017), <http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-467/15>.

required to explain how they have come to believe that the way they implement a directive is law-abiding.²⁸⁰

In sum, detailed *information* on *all* uses of the waters of a river basin is essential to the assessment of compliance with Article 9.²⁸¹ Each Member State has a duty to enable the EC to effectively monitor conformity of domestic law with the WFD by providing all relevant information. Whenever this is not done, the EC has a right to obtain such information in court, after submission of an infringement action to the ECJ. Further, even though an infringement action remains available to the EC, voluntary, out-of-court submission of information by Member States remains critical. Should a Member State be unwilling to provide the EC with the information it needs, the Commission would be forced to initiate a burdensome infringement procedure based only on speculation about whether a substantial violation of Article 9 has occurred. The ECJ therefore erred in rejecting the EC's stance in *Commission v. Germany*.

This, however, is just the first half of the problem, the procedural one. The second half is substantive and has to do with the existence of an actual breach of the cost recovery obligation.

B. THE PROPER STANDARD OF REVIEW FOR A FINDING OF AN ARTICLE 9 VIOLATION

Ascertaining the existence of a violation of EU law may be hard, especially in cases involving technical issues of science or economics. Assessing compliance with Article 9 is one such case. However, the ECJ has already developed a case law which can guide it through complex decision-making. It is primarily a matter of setting a standard of review, apportioning responsibility between the executive body and the judiciary. Objective parameters are also useful when dealing with a complex subject.

1. When Technical Issues are Present, the EC's Significant Discretion is Balanced by Careful Substantive and Procedural Review by the ECJ

Complex issues require both sufficient data and a judicial strategy indicating how the judge is supposed to approach and use this data. Thus, recognizing that the EC has the right to receive all information it needs to assess Member States' compliance with Article 9 is just the first step necessary for the ECJ to assume its proper role in reviewing alleged Article 9 violations. The second step concerns the way the ECJ should evaluate the EC's infringement claims. In this section, I will address two issues which relate to the judges' function in defining the objectives of Article 9 and the proper standard of review in appraising the

280. Of course, the *non ultra petita* principle aims at safeguarding the defendant, whereas in my argument it is the claimant (the EC) that benefits from such a duty of release of complete information. Reasons like those that lead the Court to an inversion of the burden of proof apply here.

281. This does not imply full recovery of the costs of all these uses or services.

Commission's claims. I will show that the case law of the court provides guidance on how it should proceed.

It is certainly true that not all costs of all water services must necessarily be recovered under Article 9. Which services may be left out of the list of those whose costs must be recovered, as well as the extent to which these costs are to be recovered, strictly depends on the purpose(s) attached to the provision. As seen in the previous section, in its scant case law on Article 9 the ECJ determined that among the possible goals of Article 9, the primary goal is what is likely the least ambitious one. If the "purpose is primarily concerned with the quality of the waters concerned," then the "measures for the recovery of the costs for water services [become just] one of the instruments available to the Member States for qualitative management of water."²⁸² As a result, Article 9 is susceptible to being essentially ignored whenever, and as soon as, the environmental objectives of the WFD are met by any other means. In such a scenario, even the recovery of plain operational and upkeep expenses for running the service is optional. It is doubtful that the ECJ intended this outcome.

Thus, it is urgent for the court to dispel all uncertainties and take an unambiguous stance as to whether preserving water quality truly is the overriding purpose of Article 9. Such a stance could be akin to that devised in other fields of EU law, according to which "Community institutions enjoy a broad discretion regarding definition of the objectives to be pursued."²⁸³ The task of the ECJ would then be both the judicial specification of the objectives, which is necessary whenever they have been "formulated in general terms" by the legislative branch,²⁸⁴ and the assessment of the adequacy of the means implemented by Member States to fulfil those objectives. The particularity of the case at hand lies in how, when the WFD is at issue, it is hard to establish whether cost recovery measures are to be considered as simple means to a higher objective (good status of water bodies *ex* Article 4) or as means providing for their own autonomous and binding goals (Objectives 1 to 4 as described in Part I).

The second issue is no less crucial. It relates to the role of the European judiciary in deciding who, of the parties before it, is right and who is wrong. Put differently, we must ask the extent to which the ECJ should defer to the EC's judgment regarding such issues. The question is a difficult one and it is not my ambition to provide a thorough answer of theoretical nature. However, a few general considerations are due, which must hinge on the approach consistently taken by the ECJ when dealing with analogous issues. Some direct quotations from the court's case law are appropriate. In 2004, the ECJ stated that:

282. *See supra* notes 248–251 and related text.

283. Case T-13/99, *Pfizer Animal Health SA v. Council*, 2002 E.C.R. II-3318, ¶ 166. In this case the ECJ was referring to the CAP. It is worth noting that both the CAP and the environmental policy belong to the same category of shared competences of the EU. TFEU, *supra* note 231, art. 4(2)(d–e).

284. That this is the case of the WFD (at least, "sometimes") was said by the ECJ in Case C-32/05, *Comm'n v. Luxembourg*, 2006 E.C.R. I-11349, ¶ 43.

Examination by the Community judicature of the complex economic assessments made by the Commission must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.²⁸⁵

The year after, it further detailed its view:

Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, *inter alia*, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.²⁸⁶

The difference between the two quotations is remarkable. In the latter, the ECJ claims for itself the right to establish whether the information on which the infringement action of the EC is based is both complete and capable of buttressing the EC's final decision. Notably, the quantitative aspect of the review standard set out in the second case reinforces our previous conclusions—that in order to declare a breach of EU law the Commission must be able to get the full picture of a Member State's activities by collecting all relevant data. In this regard, it has been noted that the ECJ functions as a sort of “informational catalyst,”²⁸⁷ which ensures that all the required evidence is made available to, and adequately resorted to by, the EC.

This advanced position has been taken multiple times by the ECJ²⁸⁸ and now can be said to be part of the consolidated case law of the court. According to this

285. Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P, and C-219/00 P, *Aalborg Portland A/S v. Comm'n*, 2004 E.C.R. I-403, ¶ 279. This approach dates back at least to the late seventies. “In reviewing the legality of the exercise of such discretion, the Court must examine whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion.” Case C-98/78, *Racke v. Hauptzollamt Mainz*, 1979 E.C.R. 70, 81 ¶ 5.

286. Case C-12/03 P, *Comm'n v. Tetra Laval BV*, 2005 E.C.R. I-1047, ¶ 39.

287. Ellen Vos, *The European Court of Justice in the Face of Scientific Uncertainty and Complexity, in JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE* 142, 153 *passim* (Mark Dawson, Bruno De Witte, & Elise Muir eds., 2013). As the title makes clear, the author analyzes the court's case law in the face of scientific instead of economic complexity. Different cases are studied by Biondi and Harmer, who reach partially different—and more optimistic—conclusions than those expressed by Vos about the soundness of the ECJ's approach. See Andrea Biondi & Katherine Harmer, *Scientific Evidence and the European Judiciary, in SCIENTIFIC EVIDENCE IN EUROPEAN ENVIRONMENTAL RULE-MAKING: THE CASE OF THE LANDFILL AND END-OF-LIFE VEHICLES DIRECTIVES* (Andrea Biondi et al. eds., 2003).

288. See, recently, Case C-61/16 P, *European Bicycle Mfgs. Ass'n v. Giant (China) Co.*, ¶ 69 (Dec. 14, 2017), <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-61/16>; but cf. *id.* ¶ 68, which suggests that the two quotations taken from the judgments cited in footnotes 285 and 286 are not understood by the ECJ as different in scope.

position, European judges do not exceed their power of judicial review by assessing whether evidence is of sufficient quantity,²⁸⁹ sufficient quality,²⁹⁰ and linked to the decision under review by a sound causal relationship.²⁹¹ Doubts may be raised, however, on the material scope of this principle's application. Indeed, two features characterize the cases cited above. The first is that both judgements involve the ECJ reviewing the legitimacy of the EU institutions' actions in the field of the European common market, the ambit where the EU enjoys the largest freedom and Member States' behavior is subject to strict, far-reaching rules. As stated by the ECJ, "in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the EU institutions enjoy broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine"²⁹²—discretion that is not encroached upon by the proactive judicial review described above. One might wonder whether the same broad discretion of the EC, and the same broad judicial review by the ECJ, would apply "by reason of the complexity of the economic, political and legal situations" even outside the sphere of the common commercial policy. In particular, whether they would apply in cases where compliance with Article 9, which has nothing to do with the common market, is to be determined. The answer is likely to be affirmative, as this very allocation of competences among the judicial and executive institutions of the EU has been recognized by the ECJ with regards to the CAP,²⁹³ the protection of public health,²⁹⁴ and even the Common Foreign and Security Policy.²⁹⁵

The second feature runs along the rift between economic and scientific matters. This feature is related to the first but does not completely overlap with it. In the cases quoted above, the ECJ established the existence of wide discretion on the part of the EC, which is balanced by the court's own ample power of judicial review, in complex matters of an economic character. The question is whether this same balance of EC discretion and ECJ review applies to hard scientific issues, such as those posed by Article 9 cases. For instance, the calculation of environmental damage caused by pollution or other human activities is an economic assessment, but it hinges on scientific estimations—such as the rate of recovery of a water body, the composite effects of eutrophication, or the causal relationship between environmental problems and some industrial activities—

289. *Tetra Laval*, 2005 E.C.R. I-1047, ¶ 39 ("all the information which must be taken into account") (emphasis added).

290. *Id.* ("factually accurate, reliable and consistent").

291. *Id.* ("capable of substantiating the conclusions drawn from it").

292. *Id.* ¶ 68. In this case, such a broad discretion had been recognized in relation with the EU rules on concentrations.

293. Case T-13/99, *Pfizer Animal Health SA v. Council*, 2002 E.C.R. II-3318, ¶ 166 (where the Court's phrased the role of the judiciary in the same way as in *Racke*, *supra* note 285).

294. Case T-204/11, *Spain v. Comm'n*, ¶ 30 (Feb. 11, 2015), <http://curia.europa.eu/juris/liste.jsf?num=T-204/11&language=EN>.

295. Case T-85/09, *Kadi v. Comm'n*, 2010 E.C.R. II-5181, ¶ 141.

and these too might be a source of contention in the courtroom. Again, the answer as to whether the balance described above should apply to Article 9 cases is an affirmative one. That the EU judiciary must

establish whether the evidence relied on is factually accurate, reliable and consistent, whether that evidence contains all the information which must be taken into account in order to assess a complex situation, and whether it is capable of substantiating the conclusions drawn from it²⁹⁶

has been affirmed by the court in cases where scientific decisions were at stake, with no limiting specifications regarding the nature of such “complex assessments.”²⁹⁷

This standard of review has become the rule in all cases where highly technical, data-driven decisions are to be made by the Commission. Moreover, notwithstanding the repeated assurances of the ECJ that its own power of judicial review does not encroach upon the wide discretion of the EC to assess complex situations, it is apparent that the court also enjoys remarkable latitude. Examining the adequacy of the information on which the decision of the EC is based, or even determining whether the EC complied with its obligation to take into consideration all the relevant factors and circumstances, “involves much more than carrying out a formal check on whether the correct procedures to reach a decision have been followed.”²⁹⁸ Despite the ECJ’s claims to the contrary,²⁹⁹ this is more a substantive instead of a procedural task. Even the mere determination of whether all relevant information has been considered requires the court to evaluate the relevance of the available information. This can only be done by getting acquainted, to some extent, with the substantive, technical matter at issue.

2. Use of the Precautionary Principle and Objective Parameters Can Mitigate Potential Problems with the Review Standard in Technical Cases

Because judges are neither economists nor scientists, and they often have no training in economic and scientific disciplines, the standard of review set by the ECJ could be problematic. A common strategy adopted when complex and

296. Case T-177/13, *TestBioTech eV v. Comm’n*, ¶ 79 (Dec. 15, 2016), <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-177/13> (expressing the concept with a post-*Tetra Laval* wording). For a *Racke*-like wording, see *Pfizer*, 2002 E.C.R. II-3318, ¶ 169.

297. *TestBioTech*, *supra* note 296, ¶ 77; *Pfizer*, 2002 E.C.R. II-3318, ¶ 168. The contiguity of economic and scientific matters is further demonstrated by how sometimes (such as in *Spain v. Commission*, *supra* note 294) the ECJ, addressing a scientific case, refers to the degree of discretion of EU institutions as settled in economic cases.

298. *Vos*, *supra* note 287, at 152.

299. Case C-691/15 P, *Comm’n v. Bilbaína de Alquitranes*, ¶ 58 (Nov. 22, 2017), <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-691/15> (“the procedural question of determining whether the Commission . . . complied with its obligation to take into consideration all the relevant factors and circumstances”) (emphasis added).

uncertain technical issues are discussed—the precautionary principle³⁰⁰—is able to mitigate this problem. It is true that “a sufficiently well-supported assertion that the alleged pollution or overuse of resources was serious, and might have potentially irreversible consequences, could render that party’s claims eligible to benefit from a reversal of the burden of proof by virtue of the precautionary principle.”³⁰¹ In the case of Article 9, this could lower the Commission’s burden of proof in establishing a *prima facie* violation or even shift the burden to the Member State that allegedly breached the provision by failing to take care of the quantity or quality of its water resources through the setting up of a water pricing system. This would also be in line with the practice of the ECJ of granting a broader discretion to EU institutions than to States.³⁰² However, the problem would still exist as the ECJ would have to assess whether the arguments of the Member State are able to counter the EC’s presumptions. This would still require the court to go into the merits of the technical question, at least to some extent.

A way to reduce the magnitude of this problem, though hardly to solve it, might be to resort to objective parameters and criteria. For instance, when dealing with competition matters, the ECJ frequently faces complex economic issues, where the discretion accorded to the EC and the judicial review of its assessments follow the scheme outlined above. Recently, however, the ECJ invoked the notion of “naked restrictions,” whereby the characterization of a restriction as abusive “depends solely on the capability to restrict competition, and . . . does not therefore require proof of an actual effect on the market or of a causal link.”³⁰³ In addition, the court rejected the argument that “the Commission was required to demonstrate the possibility or probability of foreclosure of competition, rather than refer to the anti-competitive object of the practices.”³⁰⁴ The latter was sufficient to demonstrate their abusive character. Consequently, the ECJ validated the

300. According to the precautionary principle, a decision-maker—be it the legislator or a court—facing a complex issue that appears not to be conclusively settled by current scientific knowledge, may nonetheless resort to the available evidence (albeit incomplete or uncertain) or go against it (because it is incomplete or uncertain) in order to prevent a risk. In the context of the topic of this article for instance, the ECJ could order a State, whose waters are heavily polluted or abstracted at an unsustainable rate, to implement a cost recovery policy, even in the absence of irrefutable evidence that this would solve the problem: here lies the “precaution.” It would then be up to the State to try to convince the court that such a presumption—the presumption that the cost recovery policy is due in order to decrease the risk of pollution or overuse—is not substantiated by theory and facts.

301. CAROLINE E. FOSTER, *SCIENCE AND THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL COURTS AND TRIBUNALS: EXPERT EVIDENCE, BURDEN OF PROOF AND FINALITY* 255 (2011).

302. Patrycja Dąbrowska-Kłosińska, *Risk, Precaution and Scientific Complexity before the Court of Justice of the European Union*, in *DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION* 194, 197 (Lukasz Gruszczynski & Wouter Werner eds., 2014).

303. Case T-286/09, *Intel Corp. v. Comm’n*, ¶ 212 (June 12, 2014), <http://curia.europa.eu/juris/liste.jsf?num=T-286/09>.

304. *Id.* ¶ 210.

possibility of recognizing some breaches of competition law without getting overly mired in economic intricacies.

Another limitation regarding the need to analyze complex scientific data was called for by Advocate General Kokott in a recent environmental case. She affirmed that the reduction in size of a Site of Community Importance³⁰⁵ which has already been accepted by the EC requires the proposing Member State to bring forth conclusive scientific evidence. However, such a size reduction is precluded in any event if “it has not yet been determined that the conservation status of the habitat types and species in question within the [site] concerned is favourable.”³⁰⁶ In other words, in certain instances, the court can resort to objective and relatively easy-to-apply rules to decide technical cases, and thus avoid engaging in a complex substantive analysis that it is not well-equipped to undertake. Such objective criteria could be used in Article 9 cases as well.

In principle, it is certainly possible to identify objective criteria and tests capable of simplifying the ECJ’s decision-making whenever it is asked to adjudicate on a potential violation of Article 9. Use of objective criteria might have consequences beyond those entailed by the application of the precautionary principle. By applying this principle, the court could decide that an imperiled water body (that is, one which is far from attaining “good” status) be protected through a radical FCR policy, leaving to the Member State the burden of demonstrating that such a measure would not engender the desired outcome. The use of objective criteria would lead to an analogous decision by the court; however, such decision would not be based on rebuttable presumptions and the State could not challenge it.

C. ADJUDICATION IN A FACT-DENSE, DATA-DRIVEN SCENARIO: THE HARDLINE APPROACH VERSUS THE MIDDLE-OF-THE-ROAD APPROACH

So far, I have taken for granted that the ECJ should find the best way to pursue an uncompromised implementation of Article 9. This may be disputed. In fact-dense, data-driven cases, it might be that—as the saying goes—perfect is the enemy of good. In other words, a better outcome could stem from a less intransigent application of the rule, at least under those circumstances where the judge cannot avoid considering many non-legal matters.

305. These are sites established in accordance with Council Directive 1992/43, 1992 O.J. (L 206) 7 (EC) on the conservation of natural habitats and of wild fauna and flora, the so-called “Habitats Directive.”

306. Case C-281/16, *Vereniging Hoekschewaards Landschap v. Staatssecretaris van Economische Zaken*, ¶¶ 64–72 (June 15, 2017), <http://curia.europa.eu/juris/liste.jsf?num=C-281/16>. That this qualifies as an exception, however, is not crystal-clear, and the ECJ, though accepting the Advocate General’s background argument, did not refer to what I intend as an objective standard. *See* Case C-281/16, *Vereniging Hoekschewaards Landschap v. Staatssecretaris van Economische Zaken*, ¶ 36 (Oct. 19, 2017), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=195739&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3141982>.

As we have seen in the previous section, competition law and environmental law are two areas whose technical complexity cannot be entirely dismissed by whoever is entrusted with the application of the law. Sure, one could wonder whether the comparison between the implementation of the common market law on the one hand, and the implementation of Article 9 on the other, is fitting. In the paragraphs above, I have drawn such parallels, which are not without some merit. Both legal regimes demand that difficult economic decisions be taken in fields where diverse policy options, corresponding to diverse stances on scientific issues, are available.³⁰⁷

Some factors make the reasoned application of Article 9 an even harder task, making deference by the court to the Commission's appraisal even more appropriate than in competition cases. First, applying the FCR principle and the PPP requires the intermingling of economics and hard sciences (such as hydrology and biology), which increases the chances that tricky technicalities will emerge. Second, even the economic side of Article 9 issues appears to be more complicated than the economics relating to any single issue of competition law. The implementation of Article 9 raises possibly interconnected problems that are due to the multiplicity of water uses, water users, and policy objectives, which cannot always be taken in isolation. Therefore, a policy decision designed to engender a given effect might be ineffective or even cause adverse consequences with respect to another use, user category, or objective.³⁰⁸ The possible nullifications and contradictions, as well as the itinerary to best avoid them, can be, and is, a matter of dispute for economists. A third issue is perhaps more peculiar to the implementation of Article 9 than to other economic ambits. It is that the goals of the provision could be better, or at least more sensibly, achieved by streamlining the implementation process. For example, it has been wisely recommended that water pricing schemes should be simple and transparent for them to function as effective incentives for sustainable water use.³⁰⁹ Water tariffs and fees would not discourage consumption if they were not able to convey the simple message: "who uses it more, pays more." More generally, "[t]he gains in efficiency achieved through a water pricing system should clearly exceed its establishment and management costs."³¹⁰ Even supporters of water pricing policies that link water bills to actual usage agree that sometimes more straightforward pricing methods, such as area pricing for agricultural uses, are more cost-effective solutions and should take priority over more rigorous but less serviceable tools, like

307. For instance, the EU and the US jurisdictional approaches to the economics of competition are different. See DORIS HILDEBRAND, *THE ROLE OF ECONOMIC ANALYSIS IN EU COMPETITION LAW: THE EUROPEAN SCHOOL* (4th ed. 2016).

308. On this, see *supra* Part I.

309. Antti Belinskij, *Recovery of Costs for Water Uses at the Different Levels of Water Law*, in *WATER RESOURCE MANAGEMENT AND THE LAW* 213, 233 (Erkki J. Hollo ed., 2017).

310. *Id.*

volumetric prices.³¹¹ Similarly, the PPP can be made effective not only through the internalization of the costs of pollution into water charges, but also, for example, by means of effluent standards.³¹²

These examples³¹³ help make the point that a pedantic application of Article 9 and a way-too-ambitious plan to take all environmental and resource costs into account and allocate them to the right user or polluter may not optimally serve the purposes of Article 9. They suggest that a better outcome is likely to be engendered through a straightforward implementation of the provision's core ideas. The parabolic history of the application of Article 9 is telling in this regard. At the outset, much trust was placed in the possibility of setting uniform standards for the internalization of costs into the price of water services.³¹⁴ "The early logic of the WFD and associated guidance were fairly clear in terms of what they implied about cost recovery. But subsequent guidance has been watered down as implementing agencies have come to realize the practical implications of following a strict economic interpretation."³¹⁵ Not only would such an interpretation entail the burdensome and expensive task of data collection, it would also walk down what is possibly a dead end street—the internalization of each and every environmental and resource cost into the price of water services. The viability of such enterprise can be doubted. It is worth quoting the following passage where an eminent environmental economist explains what he deems the proper scope of Article 9:

The task of implementing Article 9 is necessarily connected with considerable political-administrative scope for decision-making and this is just as unlikely to be "narrowed" by an internalization concept that is impossible to implement in practice as by ineffectual attempts to replace the assessment with a pragmatic calculation model or derivative concepts that, for instance, simply refer to the costs of measures taken as proof of the allocation of environmental and resource costs. The implementation of water use charges, which place a burden on the "remaining use", i.e. without "cut-off" environmental and resource costs, but operate on the basis of a political settlement might in practice contribute much more to the recovery of costs, to reducing water contamination and to reaching good status than endless, fruitless discussions about "even

311. Yacoz Tsur & Ariel Dinar, *The Relative Efficiency and Implementation Costs of Alternative Methods for Pricing Irrigation Water*, 11 WORLD BANK ECON. REV. 243, 259 (1997).

312. The combinations of both instruments can be and has been successful. "It remains impossible, however, to disentangle the separate effects of charges and emission standards." Michael Faure, *Economic Approaches to Environmental Governance: A Principled Analysis*, in RESEARCH HANDBOOK ON FUNDAMENTAL CONCEPTS OF ENVIRONMENTAL LAW 122 (Douglas Fischer ed., 2016). It is hard to argue "that the significant investments in water treatment facilities [are] due mainly to the charges system and not . . . to the threat of administrative or criminal sanctions or both for a violation of emission standards." *Id.* (such sanctions can be understood as a manifestation of the PPP, but they can hardly be seen as an implementation of Article 9); *see also id.* at 130–31.

313. For a couple of other instances, *see supra* note 37.

314. Guidance materials are listed *supra* note 4.

315. Moran & Dann, *supra* note 70, at 493.

better” internalization concepts, the collection of irrelevant data or a false solution defined on the basis of costs of measures—even if the charge rate is defined “only politically” and not on the basis of full knowledge of environmental and resource costs. Article 9 WFD is open in equal measure to this decisionist approach.³¹⁶

In light of the interpretive concerns raised in Part I, it is likely that Article 9 leaves room for several implementation options, including the “decisionist approach” advocated by Gawel (which might be labeled a “reductionist approach” in that it reduces the complexity of the decision-making process). Whether his stance or other analogous approaches, which emphasize practical enforcement over strict theoretical compliance with Article 9’s requirements, are correct or at least permissible, can only be ultimately upheld by the EU judiciary. As we have seen in Part IV, the ECJ appears to be well-disposed towards a minimalistic, “less-is-more” understanding of the boundaries and requirements set by Article 9. Nonetheless, should the court really be willing to take such an approach, it will have to endeavor to more clearly articulate its approach toward determining compliance with Article 9.

In this regard, a couple of considerations can be put forth that share a somewhat paradoxical nature, one theoretical and the other practical. As to the former, it should be noted that the stance taken by Gawel is just one possible interpretation of Article 9, though an authoritative and highly-qualified one. All difficult questions see experts take different positions, and the proper application of Article 9 is no exception. Proponents of a realistic point of view are opposed by supporters of a hardline application of the provision emphasizing uncompromising adherence to its principles. Therefore, Gawel’s reductionist approach cannot, at least in principle, be validated by the European judges without some analysis of the complex economic and scientific issues that lie behind a thorough and scrupulous implementation of the FCR obligation and the PPP. The choice between hard and soft approaches to the issue is itself a scientific problem, and possibly ought to be framed as such by the ECJ. It could be solved by the court according to its consolidated method of addressing complex technical issues. In this sense, reductionist, middle-of-the-road approaches are not a mere shortcut to avoid recourse to the ECJ’s conventional standard of review, but instead are the pondered outcome of it.

The latter, quasi-paradoxical concern is about the potential practical consequences of taking a reductionist approach. A major simplification and streamlining of the implementation of Article 9, as well as the dismissal of its thorny economic and legal technicalities, is susceptible of becoming a sort of anything-goes policy towards FCR. There is “considerable political-administrative scope

316. Gawel, *supra* note 37, at 267–68. The same call for a “decisionist approach” is expanded in the author’s 2015 monograph. See GAWEL, *supra* note 36.

for decision-making³¹⁷ in Article 9. But for such considerable scope not to turn into an open space with no walls separating the legal from the illegal, the EU judiciary must abandon its loose attitude *vis-à-vis* FCR and take at least some basic steps towards a more serious implementation of the provision.

CONCLUSION

Writing in 2010—the year by which Member States should have ensured compliance with Article 9—a group of scholars hinted at the risk entailed by the anything-goes policy described above:

When the governance approach merely offers a way out for unambitious Member States, the European Commission and the Court of Justice have a difficult task in avoiding abuse of the discretion which the Member States have due to that approach in the WFD. It will take some years before it becomes clear whether a governance approach leads to abuse and how the Court and the Commission deal with this problem.³¹⁸

They were referring to the WFD and its “governance approach” (the ample leeway it grants to implementing countries), but the same worry can be expressed in relation with Article 9. Many years after the publication of their essay, it has become clear that the answer to the question of how the Commission and the court have dealt with the problem is not, at least as far as Article 9 is concerned, reassuring.

The history of Article 9 is remarkable. The provision is embedded in an EU directive, the quasi-legislative instrument that establishes objectives but accords discretion to Member States as to the means to reach them. On the one hand, such discretion is widened due to the ambiguous phrasing of Article 9’s requirements as well as its loosely formulated exception clause.³¹⁹ The open-ended, relatively easy-to-avoid nature of the provision has been confirmed by the ECJ by way of some oscillating considerations it dropped in its case law on the subject.³²⁰ On the other hand, States’ latitude may have been partly curtailed in practice by the EC’s willingness to “provok[e] a fruitful political debate and sharing of views that will lead to the identification of practical steps and development of guidelines for the implementation of the water pricing article of the proposed Water Framework Directive.”³²¹ Though the extent to which these guidelines have actually been followed by Member States is debatable, there is no doubt that the EC meant to limit

317. See Gawel, *supra* note 37, at 267.

318. Andrea M. Keessen et al., *European River Basin Districts: Are They Swimming in the Same Implementation Pool?*, 22 J. ENVTL. L. 197, 221 (2010); see also Olivia O. Green et al., *EU Water Governance: Striking the Right Balance between Regulatory Flexibility and Enforcement?*, 18 ECOLOGY & SOC’Y (2013).

319. See *supra* Parts I, II.

320. See *supra* Part IV.

321. *Communication from the Commission*, *supra* note 31, at 3.

the domestic margin of appreciation in implementing the FCR principle and the PPP. The effects of these efforts have been limited because the ECJ has not given adequate deference to the EC's views regarding the implementation of Article 9 and has interpreted the provision as being fundamentally focused on maintaining water quality. As if this were not enough, it is doubtful that the EC's CAP and State aid policy fully consider the objective of fostering an uncompromised realization of FCR. On the contrary, so far, Article 9 has been deliberately ignored by the EC in its activity as enforcer of competition law.

Thus, it is apparent that the Commission has its own faults, which can be traced back to both law-making—Article 9 is not a “model” provision and some of its flaws are built-in to its text—and implementation. The limited effectiveness of the provision can only be remedied by the EC by amending the regulatory framework (the WFD or other laws impinging on the management of European waters) or by renewing its faith in cost recovery as a solution to a variety of issues in water management. For example, would the EC authorize public funding by Germany for measures to improve the environmental impact of a hydroelectric power plant, knowing that the environmental and resource costs of such a water use were not even reported by that Member State pursuant to the requirements of Article 9?³²² A clear answer from the EC would clarify the role of the provision and would also shed light on the functioning of Article 11 of the TFEU, which demands that environmental objectives be integrated into every policy of the EU. We would learn whether the environmental objective of a measure governed by a primarily non-environmental body of law (such as competition law) trumps or is trumped by the means (FCR) provided for by a piece of legislation having a primary environmental purpose (the WFD).

I am not suggesting a restrictive turn in the State aid policy of the EU. The monetized return of environmental improvements obtained through public spending may well outweigh the expenditure. This too would be a manifestation of economic rationality. Whether the same aim can be pursued more effectively through FCR and the PPP is a question that the very existence of Article 9 makes difficult to dodge. The Commission, however, is a political body, an expression of the legislative and executive powers of the EU, and as such, it has a say in deciding which goals are to be pursued, how, and how resolutely.

Less discretion is given to the other key implementer of Article 9, the European Court of Justice. As the adjudicative branch of the European Union, it is bound to the scrupulous implementation of all EU laws, including the WFD. This is not to say that it has absolutely no interpretive discretion. Article 9 is a complex provision, built upon complex natural and social facts, requiring acquaintance with complex subjects in order to make informed decisions. This complexity forces the judge to decide: Is the purpose of the WFD best attained through a minimalistic or a hardline implementation (the latter being more

322. The reference is, of course, to the main case described *supra* Part IV.

burdensome but not necessarily more effective)? This is a typical question raised by scholars active in the field of economic analysis of environmental law—although they usually refer to policy design instead of the later stage of adjudication. “Pure” lawyers are usually less conversant with these issues, but they are not oblivious to the problem of flexibility. According to some of them, adaptive legal regimes, like those needed to govern environmental matters, should give administrative bodies like the EC and other EU agencies “the power to act quickly by curtailing or streamlining ordinary procedural mechanisms, such as . . . judicial review,”³²³ which should be confined to significant decisions.³²⁴ In a similar vein, the authors quoted at the beginning of this conclusion “suggest that a flexible governance approach is more appropriate for taking measures than for setting goals and the scope of obligations and concepts.”³²⁵ Thus, it seems that even a more flexible approach does not sideline the judiciary, and accords it an interpretive role on important issues. In this article, I illustrated many of the problems affecting Article 9 and maintained that, even though the intricacies of the subject matter might convince the ECJ to adopt a policy of judicial restraint, there are some tasks it should nonetheless carry out.

In sum, the court should do four things: First, it should elucidate the meaning of at least some of the most controversial parts of the provision and clearly spell out its objectives by considering the documents produced by the EC and the consequences of the decision. Were the ECJ to enumerate more than one objective, it should also specify the hierarchy of the objectives. The identification of one or more goals would also help provide an answer to some distinct interpretive questions relating to Article 9 and clarify the scope of its exceptions. The purpose of the provision is decisive in establishing whether a hardline or a minimalist approach to its implementation should be taken. Second, the court should require that Member States provide the information necessary for the EC to determine whether they are compliant with the provision. Data collection is an onerous activity; inflating this requirement and then having the EC be forced to routinely bring infringement actions just to get the information it needs would hardly be a cost-effective and timely solution. However, it should at least be available, and it is disappointing that in the only case where the European judges could have prompted a State to base its decisions on a proper dataset thus far, the ECJ forwent the opportunity to do so. Third, the court should reconcile, as much as is possible by means of interpretation, the WFD with other directives and regulations encroaching upon water management, in order to avoid and clarify conflicts. So far, there have been many instances of public financing authorized under EU law that seem to go against FCR and the PPP. Finally, the court should evaluate

323. Eric Biber & Josh Eagle, *When Does Legal Flexibility Work in Environmental Law?*, 42 *ECOLOGY L. Q.* 787, 800 (2016).

324. *Id.* at 796.

325. Keessen et al., *supra* note 318, at 221.

the possibility of adopting a more rigid stance whenever the water bodies of a European country are in a “poor” or “bad” status. In such cases, the ECJ could require that a strong FCR policy be enacted for a violation of Article 9 not to be found, unless the concerned State could convincingly demonstrate that such measure would not improve the status of the water body. In other words, the court could shift the burden of proof according to the precautionary principle. It could even adopt a draconian version of the principle and assume a violation without offering the State the chance to challenge that decision (the objective criteria approach).

There is a lot that can be done to fast-track the implementation of Article 9, provided there is the political will to do so and the conviction that this is in the interest of both the environment and the populations depending on it. This article shows that, even when dealing with matters that are complex, data-intensive, and not solely legal, institutions and the courts still have an important role to play in ensuring proper implementation.