Matthias Kelly QC

Essex Chambers

12th July 2016

**Summary**

Member States were free to determine, on the basis of an economic analysis, the measures to be adopted for the purposes of the application of the principle of recovery of costs.

How the Directive was to be implemented was left to the Member State, so long as the steps taken did not impede or compromise the objectives of the Directive.

There is a wide margin of appreciation. The Directive explicitly states that a Member State may have regard to its own economic and social considerations in deciding upon costs recovery under Article 9: *“****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*”**

If the derogation is to be availed of, Ireland must explicity include the derogation in its next River Basin Management Plan and state the reasons for it availing of the exception.

The Commission will examine the RBMP and evaluate whether, in its view, the derogation compromises the purpose and objectives of the Directive.

Only if it concludes that it does so compromise the purpose and objectives of the Directive will the Commission consider infringement proceedings.

Before any such proceedings Commission would attempt to informally resolve the issue. If that did not succeed then the Commission would have to:

1. Set out fully its position,
2. Notify Ireland,
3. Take account of Ireland’s response,
4. Be satisfied that the failure impeded or compromise the Directive’s purpose and objectives and
5. Was, in fact, in breach.

Even then, the Commission would have to refer the matter, assuming Ireland contended it was not in breach, to the CJEU.

It is by no means certain that those infringement proceedings would be successful, particularly where the Member State concerned, in this case Ireland, showed that the application of the derogation did not compromise the purposes and the achievement of the objectives of the directive.

***Excerpts from Advice:***

“the Council of the European Union made clear that it is for the Member States to determine, on the basis of an economic analysis, the measures to be adopted for the purposes of the principle of recovery.”

“In Appendix 1, I set out the objectives as recorded in article 1 of the Directive itself. Those include the protection and enhancement of the status of aquatic ecosystems, terrestrial ecosystems and wetlands directly depending on the aquatic. They also include the reduction of discharges into waterways, the reduction of pollution, the mitigation of flooding and the supply of good quality ground surface water. These are objectives, which I believe Ireland shares and thus will continue taking steps to achieve. Set against this, and such a commitment, it is likely, in my view, that Ireland will be able to show that it is taking steps to attain these objectives without the need for individual direct water charging.”

In relation to the Court Ruling Case C-525/12 European Commission v Federal Republic of Germany 11 September 2014.

“The Court, somewhat surprisingly, did not resolve the difference of interpretation with regard to the definition of “water services”. Instead, the Court engaged in a purposive and contextual analysis of the Directive as a whole, focussing on the fact that

1. the legislative history makes it clear that there is no requirement for total recovery of costs,
2. the Directive does not seek to achieve complete harmonisation of the rules of Member States concerning water,
3. the Directive envisages that Member States would use a range of solutions to meet the aims of the Directive and that decisions taken as close to the places of use and degradation of water, and
4. Article 9(4) permits derogation from article 9 in certain circumstances

The Court concluded that, while the aditional activities referred to by the Commission are liable to undermine the achievement of the objectives of the Directive, it cannot be inferred from this that the absence of pricing for such activities will necessairly jeopardise the attainment of those objectives, and the fact that Germany does not make some of these activities subject to that principle does not establish in the absence of any other ground of complaint that Member States have thereby failed to fulfil their obligations pursuant to the Directive.”

“…It held that the failure to put in place a pricing policy on a specific matter, absent any complaint that this resulted in a failure to meet the objectives of section 9(1) or of the Directive as a whole, was not sufficient to establish a breach of Germany’s obligations.”

“In the circumstances, it is difficult to see why a Member State could not alter a measure in place between RBMPs, so long as the measure is replaced with other measures that meet the requirements of the Directive. Once the obligations are complied with, a change in how that compliance is achieved does not seem to me to constitute a breach of the Directive. The key thing is that Member States must still have in place measures to attain the objectives, and Member States are permitted to have regard to *“****the social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions affected*”**

**Meetings with the EU Water Unit 13th July 2016:**

I posed the question that Ireland could make a submission in its next RBMP which allows for collection of the cost of water through general taxation with an incentive for citizens to conserve water based on the Scottish model (which is a public education campaign) and given that the Commission are satisfied that Scotland is in compliance with the WFD.

“we would need to see what you purpose and then our lawyers would decide”

Irelands RBMP is due to be submitted late 2017, the EU Commssion confirmed in my meeting that they would then take months to assess this plan for its compliance with the objectives of the WFD. If following that legal assesment they felt Ireland was not in compliance, it would take upwards of 5 years for a case to be taken as there are other steps which must be fulfilled before the ECJ would even consider hearing the case.

***The Water Framework Directive is due to be revised in 2019, during which Ireland could further copperfasten its position on paying for water through general taxation***

**Objectives of the Water Framework Directive:**

**Appendix 1**

**Article 1**

**Purpose**

The purpose of this Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which:

(a) prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems;

(b) promotes sustainable water use based on a long-term protection of available water resources;

(c) aims at enhanced protection and improvement of the aquatic environment, inter alia, through specific measures for the progressive reduction of discharges, emissions and losses of priority substances and the cessation or phasing-out of discharges, emissions and losses of the priority hazardous substances;

(d) ensures the progressive reduction of pollution of groundwater and prevents its further pollution, and

(e) contributes to mitigating the effects of floods and droughts

and thereby contributes to:

— the provision of the sufficient supply of good quality surface water and groundwater as needed for sustainable, balanced and equitable water use,

— a significant reduction in pollution of groundwater,

— the protection of territorial and marine waters, and

— achieving the objectives of relevant international agreements, including those which aim to prevent and eliminate pollution of the marine environment, by Community action under Article 16(3) to cease or phase out discharges, emissions and losses of priority hazardous substances, with the ultimate aim of achieving concentrations in the marine environment near background values for naturally occurring substances and close to zero for man-made synthetic substances.