

An extract in the form of questions and answers of a meeting between Our Water group and Matthias Kelly Q.C.S.C on 17/05/2018.

Question 1: Can Ireland still avail of the Established Practice i.e. funding domestic water through general taxation and what is the Government's commitment to retaining this Irish Exemption.

SC: The short answer to that is yes. In my opinion Ireland still has Established Practice by funding water through general taxation. It is my view that nearly everyone in the Oireachtas Committee accepted the arguments that I put forward on Established Practice and the objectives of the Water Framework Directive.

One has to look at the overall objective of the WFD as a whole. The WFD is primarily dealing with pollution and the quality of our water, rivers and seas. It is about sustainable water resource. The Government and EU Commission tried argue that it was about full cost recovery and emphasised paragraph 9 of the WFD. However, I believe they were wrong in their assumptions and I have laid my points out in my submissions. The Government may have tried to change Ireland's Established Practice, however, this was not accepted by the Irish people and they had to change their stance on the issue of charging for water. Recent legislation may have amended the water charging regime re allowances and caps but fundamentally the fact is that domestic water is paid through general taxation. This has always been the way that Ireland funded its domestic water and as such it continues its tradition of funding from central funds. In my view the Established Practice is very much there and it will remain so until it is superseded.

Question 2 : What kind of commitment has the Irish Government, both in the short and long term to Ireland's Established Practice.

SC: CRU's report to the Minister: Review of Demand for Water Services' in accordance with' I would point out, Section 53A of the Water Services Act 2007, as amended by Section 8 of the Water Services Act 2017. This is a very important section in legislation and it is indeed vague but points to future amendments to the present regime. It could have potential implications to the question of Established Practice.

This legislation just says that CRU must submit periodic reviews or supplementary reports and present it to the minister who then must act on it. There is also reference in the RBMP section 9.6.2 that says

"CRU is empowered to carry out regular reviews to calculate average consumption, and provision is made that the multiplier of 1.7 may be reduced in time but not within the first 5 years, and not without a positive resolution of the Oireachtas."

However, there is nothing that says this will not happen tomorrow. For political reasons, I believe that the government will probably stick to the 5 years as described in the RBMP but thereafter who knows what they will come up with.

Question 3: Are there any legal avenues open to us to force the Government to explicitly state whether they are invoking the Established Practice. Their position on the Establish Practice is unclear.

SC: The short answer is no, there are avenues in which you could have challenged in the past but in my opinion it is too late now. Suppose at the time of the introduction of Water Charges, say, it could have been argued that it was unlawful, you would have had to use the Constitution and say e.g. under personal rights. Now it would be exceptionally difficult to get a court to say that a citizen had a right to a free supply of water. It would be well nigh impossible to get an Irish court to say that now. There is also in my opinion no way that you could get it before the ECJ because that could only be got either if the parliament refers a directive to the court for an advisory opinion. It is rarely used simply because it requires a parliamentary majority. To get something like that in the EU parliament is pretty difficult. And the ECJ would not say now that this can not be changed because it is simply a directive. All they will do is advise whether the directive is permitted under the variety of treaties that established the EU. So I think that is an avenue that is not realistically open.

In Ireland the only way which you can write something in stone is by putting it into the constitution. Laws can be passed but they can be changed, all you need is a parliamentary majority. It is there, it is written in law in the Act but one parliament can not bind another parliament. In other words if one parliament today legislates for A, another parliament can legislate for B.

Question 4: We would contend that the way the RBMP including it's consultation process was a complete breach of the Aarhus Convention. There is a process in place where you can make a complaint to the Aarhus Convention Compliance. We believe that important submissions were ignored in the consultation process of the RBMP. Would that not be an avenue we could go?

SC: No. The consultation process has now been completed and legislation is in place. It would be too late to make a complaint based upon in effect a failure to really consult. Anyway you will find that the Government have covered themselves in that regard. What consultation means in law is you present the plans in general, set out the principles, give it to the interested parties with sufficient detail for them to understand precisely; then give people a reasonable opportunity to respond and finally the responses are conscientiously taken account, that's called The Gunning Principles.

Question 5: Then there is another avenue. When they were negotiating the RBMP they should have involved all interested bodies, like organic farmers, farmers, domestic water users etc. This wasn't done. Could this be an avenue we could pursue?

SC No I don't think so. What I am looking at is; would it have found a successful action because there isn't much point saving limited circumstances bringing a case which it isn't likely to succeed. The limited circumstances where it would be justified is where you are running as part of a wider campaign and recognise that everybody else was against you, then you are entitled to run a case, you may not win but you want everybody to know about it. But now that the Act has gone through if you were to bring a case e.g. in Ireland, I don't think you would get off first base.

Question 6: About the consultation process the response that one attendee got during a public meeting was that the Government will put into the plan whatever it wants. They were told that as an answer to one of their consultations. So it seems the public consultations were a box ticking exercise.

SC: That was when you should have brought a challenge. You will find that a case like that would be hard to prove. The individuals involved would only say that they did not say that.

Question 7: How could we have challenged the RBMP when we did not know what the final document was going to be?

SC I understand the logic but what a court would say would be that nobody knows what a genuine consultation, nobody knows what the outcome is going to be. You know and I know that Governments consult in order to be seen simply to go through the moves. In England this is called Wilsonian Consultation, called after Harold Wilson whose view on this was yes we'll consult on this, that is we will make our proposals, put it out for consultation and we will do what we were going to do anyway.

Question 8: Did Government specifically invoke our Established Practice in its 2nd RBMP? With reference to your submission to the Oireachtas Committee where you stated: "If the derogation is to continue to be availed of, Ireland must explicitly include the derogation in its next River Basin Management Plan and state the reasons for it availing of the exception."
It is debatable whether the government explicitly invoked Article 9.4 in the RBMP? It made reference to it generally but did not specifically state that Ireland was invoking Established Practice.

SC: You are absolutely right, it does not say that. What I would have preferred, and I think that I said this to various groups, was that it should be clearly articulated in the second plan, that Ireland was relying upon its established practice. In my view it is not actually fatal that they haven't specifically done that because Established Practice will only come into play if the European Commission challenges Ireland's regime and initiated infringement proceedings. At that point what Ireland's defence would be, would be to say that (referring to the 2007 Act), No, we are not in breach of the WFD because we have an established practice, here is what it is and here is how it falls in within the WFD. We are passed that stage. So even if the Commission says that it does not like what Ireland now, it would still have to go through infringement proceedings and it would still be open to Ireland to rely on it at that stage and say that there is an Established Practice whereby domestic water is funded from general taxation. But I completely agree, it would have been so much more helpful if it were explicitly included in the RBMP.

Question 9: We are now going to have to rely on the Irish Government to now defend our Established Practice and from what we see so far they have not instilled confidence that they will. By not explicitly including the Established Practice, the Government is relying on Brussels not to pull them up on it. It could turn out that that the Commission would say that it was not good enough and the Government might have the excuse to capitulate. If the Government is not fully applying Article 9 as stated in paragraph 9.4, has the Government a legal obligation under the WFD to give their reasons?

SC: Full cost recovery is the shorthand for it. That's my point that the original analysis by the Irish Government was wrong in their interpretation of the WFD. Because what the WFD related to the fundamental objectives of the directive which was to protect inland surface waters, transitional water, coastal water and ground waters etc what I was speaking about earlier and the overriding principle was polluter pays. The Irish Government quite mistakenly or deliberately or whatever had chosen to say that section 9 related to 'full cost recovery'. It didn't. Full cost recovery within the directive is merely a subsidiary method by which the primary objective can be obtained or attained which is the conservation and improvement of water supplies. That is what I argued all along that the directive is not about cost recovery. Cost recovery was just a means to it.

Question 10: If Ireland went away from individually charging for water and chose to fund water through general taxation, should the government have had to invoke section 9.4 in their RBMP?

SC: I look at it somewhat differently. I think that it is the attainment of the overall objective, call it clean water, water conservation, that it's that. Cost recovery was seen as a way in which you could attain those policy objectives, that is you had a funding stream that enabled you to have a structure to deliver this. Cost recovery also related to the polluter pays principle. Within that I never saw an obligation for any member state to decide to fund water out of general taxation. It's just that historically Ireland was the only one that really had done that. But if you could obtain the overriding objectives through general taxation then I don't see how the Commission would have any case at all. You have to stand back and ask yourself what this directive all about, what is it seeking to achieve.

Question 11: Is the Government in effect using established practice in so far as they are funding domestic water through taxation? If it is the case does the Government have a duty under 9.4 to explicitly invoke the establish practice principle and if they did not do this then is that against the WFD or against the law in some way.

SC: No, if we could deal with it this way. It would have been highly desirable if it had included it and it would have been desirable to have included it in the first RBMP. In fact is they didn't. Read out section 9.

"1. Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis conducted according to Annex III, and in accordance in particular with the polluter pays principle.

Member States shall ensure by 2010

- that water-pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of this Directive,"

That is classic Euro speak. What it means is take account of, it doesn't mean fully bound by it, that is have regard to or bear in mind and so on.

Then in 9.4 it states;

"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."

There is a perfectly credible case that the system as in place now does that because water pricing policies provide adequate incentives for users. If you look at it from the perspective of the Commission, just suppose for argument sake, that the Commission are determined to get every person in Ireland paying through the nose for water, I don't think they would get to first base at the ECJ on this. I think they would be slapped down and that's despite the fact that Ireland did not invoke it in the first or second RBMP. It is desirable that it would be included but it is not essential.

Just to go on "member states shall not report the reasons for not fully applying para1, second sentence in the RBMP". That's saying if you are not applying water pricing policies to provide adequate incentive for users, you should put it in. That's the way from your perspective I would interpret that. From your perspective it could all look doom and gloom if Ireland hasn't put it into the first and particularly the second RBMP, given what's happened. From your perspective that's effectively lost but I'm saying that there's another way to look at this where you still get the benefit of 9.4 because you say well actually it would have been wise if they had included it but it's not essential because what 9.4 says is that member states shall report the reasons for not fully applying paragraph 1, second sentence, in the RBMP

" water-pricing policies provide adequate incentives for users to use water resources efficiently, and thereby contribute to the environmental objectives of this Directive,"

So what you're saying there is hang on we have still got establish practice of tax payers paying for domestic water and yes we do have adequate incentives. That is what I argue. In other words it is recognising that its not in there but it's saying that it did not have to be in there.

That is what I have argued all along that it would be desirable if it were explicit in both plans but it not essential. It is not fatal if it is not.

Question 12: In future can Europe or Government say that look we haven't availed of established practice in RBMP and we have to introduce what charges, can that happy. Our understanding is that it could not happen because the WFD is implying that we have to have a mechanism for funding our water and the Government is still funding the water through taxation. So it actually means that we haven't introduced water charges, the established practice is still in place. We are availing of the 9.4.

SC: That's correct, that's the way your campaign must present it, that the establish practice remains. Domestic water is paid for out of central taxation. That has never changed and has to be your central argument.

Question13: They have introduced an incentive that if you go over 1.7 time what they have defined to be the average use, then they are going to hit you with charges in which they could reduce the 1.7 down to 1.0 or reduce the average use.

SC: Yes. There is another way you can approach that. Watch closely the regulator. The first time they come out with a report that tries to reduce it you come straight in with a litigation then and say this is an attempt to encroach upon the established rights. Attack it at that stage.

Question 14: Has the Government not done this already, that's what they have it in there and it's in legislation that regulator can reduce the 1.7 in future.

SC: Yes but that is what I am saying, keep an eye on the Regulator. As soon as the it tries to take it down to 1.5, that's the way they work, incrementally, jump at that point and ask why are they taking it down to 1.5. 1.7 was what people had a vested right to and the reason the regulator arrived at 1.7 was because it was only making an estimate and it recognised that each household has variant demands. You have to ask why it is departing from that principle. You would have to come up with concrete examples. You can't say every household uses the same. Different households objectively would have different needs. They have based their figure on an average household of 4. So if they were proposing to reduce it that's when you would attack and what you would need at that point is a good statistician. That is where you tie officials up. That's the way you would do it, through statistics and say this 1.7 was an attempt to average out over the nation. The regulator attempted to establish, Mr Regulator, what 1 was, i.e. the average household but the Regulator recognised that no household is typical, they are all different, so it went for 1.7. That intellectually would force them to come the regulator and Government to say well no actually what we were doing was we estimated it accurately and we realised there was a political storm so we through in a bit more to buy them off. No government is going to say that.

This is why you would need a good statistician who would look at all the materials and the regulator would have to produce all their figures they have used to estimate the allowance. What with the way they reached their estimates including working on European averages and Western averages, as well as lack of water meters etc that would put them into difficulties. What it will turn out to be that it was no more than a desktop paper exercise that they engaged in.

Question 15: It seems to be a long way from getting Established Practice recognised officially and we don't want to loose it. You are saying that it is still there, we are not losing it. They have modified it, put sanctions on it whatever, that's looking it could be end of the road. Does with the modifications, i.e excessive use and time factor change establish practice.

SC: No I don't believe so. The Established Practice is tax payer funded, central taxation. The charging element i.e excessive use, they would argue, successfully, that they are entitled, as a concept to have it because of the objectives of avoiding wastage of water, polluter pays.

Question 16: The funding aspect of water seems to be the important factor and the litigation that you mention re Regulator attempting to alter the allowances we that would be the time to officially bring up established practice and somehow get the principle made concrete.

SC: Yes if the Regulator showed signs of wanting to reduce this that would be the time to pounce.

Question 17: It is also very much in our interest, say come 2020, 2021 when the government try to change the plan to maybe introduce charges or reduce allowances it is in the interest of the public to resist as they have already done and ensure that establish practice remains in place. And if necessary then they could make it clear in the next River Basin Management Plan that they are availing of the establish practice because the establish practice has not been abolished.

SC: That's right, your options the next time they try to change the system is effectively rerun the campaign again. You can litigate but litigation on it's own should be only subsidiary to a wider campaign. In the meantime there are a number of ways you can try to confirm established practice, e.g get questions asked in the Dail getting the Minister to confirm that the established practice continues.

Question 18: Our view all along is that the goal has been to privatise our water and this is still the target even it takes 5 years or whatever. They will work towards this goal especially when they fix all the leaks and get the infrastructure in place. However, if they want to attain this goal they have to get rid of established practice.

SC: As a barrister and not as political advise, my view is you are probably right. I think that is what they are heading towards, privatisation. I live in England and there the Tories have been madly flogging off every thing whether nailed down or not. That's being going on since 79, all the water companies are all flogged off. I have to pay water rates but to a French company. It's still nationalised but it's just a French company not a British one.

Question 19: Not picking on any country but we have for the past number of years private companies operating treatment plants through private partnership programs. Severn Trent is one of them operating in Letterkenny. That's the way it is going and that's the way it's going for the Government.

SC: You are entitled to try to stop it. As Harold McMillan said once you only flog the family silver once.

Question 20: Unfortunately we have no faith in politicians, they have their own agendas and have been doing so for some time. We have been trying to highlight the established practice principle for some time within the campaign but we are not getting any joy. It was very noticeable since the 15th February Oireachtas debate on Domestic Water Funding where you brought up the question of established practice, that that was the last we heard about it. There was not even a mention of established practice in the their report. From our point of view it seems an uphill struggle to gather support for protecting the Establish Practice Principle.

SC: My point of view, for what it's worth is that you should continue to emphasise that the Established Practice continues. This is that water is continued to be funded out of central taxation. The fact that this continues and it has not been abolished. All that has happened is disincentives to domestic water use have now been introduced. But that does not change the fundamental established practice.

Question 21: The next challenge we will encounter is when bills start coming out next year and if people don't pay the civil debt bill will kick in and that will put manners on people. If they haven't got meters in then they say they will average off district meters. It seems there are a lot of unclear tactics coming down the line and indeed very few answers direction.

SC: If you want to stop privatisation there is also the question of the Oireachtas Committee recommendation that a Constitution referendum be held to rest ownership of water in the Irish people. Certainly if you had that Irish Water could never be flogged off.

Question 22: We can't understand how quiet the political parties especially one aligned with the campaign and we members of the Oireachtas Committee have become quiet over issues like this and the established practice, especially since there remains so many imponderables.

SC: Politicians have come up with a political fix that seems to have satisfied most and that's where you're at. None of these changes wouldn't have come about if so many people didn't pay and so many didn't come out and protests. So the Government panicked and then there was an election where they got slaughtered over it.

Question 23: We believe that the chronology of water regime was something like the Government sent out the applications to become a customers of Irish Water, next it was the bills and if enough people had signed up to that, enough people paid then the majority would have ruled and Government could say well majority wants this way so that defeats Established Practice of how we paid for water. Then they offered the incentives to sign up, the conservation bribe. Then there were the scare tactics if you did not sign up. That would have been their way of getting rid of Established Practice. And because of their difficulties in bringing in water charges they went into special committees and came up with a formula to hold on to Irish Water and bring in charges by the back door, a sort of longer term approach that would incorporate letting go of the Established Practice and bit by bit introduce a charging regime.

SC: That was their argument all along. I don't know how many TDs were constantly coming along and saying that Established Practice doesn't exist anymore because so many people signed up to Irish Water and we abandoned it. You can find it all in the transcripts. It seemed like people were saying that we can't wait until Europe starts beating the hell out of us and that Established Practice was gone. That's what was being said in the committee. It's all on record to be seen.

Question 24: As we mentioned there was no mention of Established Practice in the Oireachtas Committee report, either in the final report or indeed the draft that all signed up to even the politicians aligned to the campaign. All we were told by the Oireachtas Committee secretary was that the final report was agreed by all the Committee members.

SC: Virtually all of those cross party joint committee reports always come as a result of horse trading, that's the nature of it. It's the nature of it in all parliaments and I suspect that is why it isn't in there. It is all compromise that comes out in the end. But I think you are on safe ground saying that the Established Practice has not been abandoned and it remains. The fact that it is not in the plan doesn't matter because as I pointed out about Article 9.4 our Established Practice is not departing from the WFD objectives. We believe in clean rivers, clean beaches and clean water. It's just that we believe it's unjust charging individually for water. Our established Practice is funded by the people through general taxation. I would emphasise the continued existence of the Established Practice and it is argued that it should have been invoked in the RBMP then you would say no because it is only if Ireland was departing from the WFD objectives that we should have explained why and we don't believe we are.

Question 25: We tried at the time to get an FOI on the secret Oireachtas Committee proceedings, but we were turned down and the reason given was that ministers are protected under the Constitution.

SC: Yes you would not get it. You will probably find that they argued that parliamentary papers are exempt from FOI. That's in the Constitution.

Question 26: You were talking about get a parliamentary question on the Established Practice, would the minister have a duty to answer us if we asked him directly.

SC: No, because the parliament works on the same basis as the Oireachtas works that it is the people's representatives who are there accountable to the people. Of course it is open to you to write to any government minister and ask for such an assurance. You will get a letter from the secretary who is directed by the minister to thank you for your letter which is receiving attention. You will never hear a thing.

Question 27: what would you say to the allegation that we received that it was a fools errand for us to be chasing the 9.4 Exemption?

SC: All I can say is that it was the 9.4 Exemption that changed it, that changed the course the Government was set on.

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