Abstract of the doctoral thesis of Philipp Overkamp. Submitted by in accordance with § 13 (3) (2) of the Doctoral Degree Regulations of the Bucerius Law School, 16 April 2019

Economic Instruments and Regulatory Law

A Constitutional Assessment based on the National Phase-out of Coal-fired Electricity Generation

The focus of this study is the constitutional relationship between regulatory law - namely prohibitions and orders - and indirect control - above all fiscal instruments. This will be examined with reference to the debate on the coal phase-out. The general legal implications of the national phase-out of coal-fired electricity generation, which are not related to the concrete choice of instruments, will also be considered. This is intended to ensure that the result is not purely academic and also contributes to the practical issue of the "coal phase-out".

Although climate protection poses a global challenge, climate policy solutions at the national level are largely both legally permissible and sensible. In the course of the coal phase-out, however, the steering effect of the European emissions trading scheme must be taken into account. As a result of the recent reform of the trading system, permits freed up by a national scheme in the electricity sector can be cancelled by the Member States, thus solving the original problem of the shifting effects of permits. For the Federal Republic Germany, such an approach would be indispensable to ensure the climate-protecting effect of the national coal phase-out.

Fundamentally, the coal phase-out is in the hands of the legislator. Constitutional law, public international law and EU law only set broad limits. When prohibiting the use of coal to generate electricity, the decisive fundamental right of power plant operators at stake is Article 14 (1) Grundgesetz (Basic Law). The use of power plant property is protected in the form approved under the BImSchG (Federal Immission Control Act). Investments into ownership can also be taken into account. Such a prohibition constitutes a definition of content and limits. The Scoial obligations arising from coal-fired power are comparable to that of nuclear energy. Therefore, parts of the Federal Constitutional Court (BVerfG) ruling on the 13th Amendment to the Atomic Energy Act (AtG) can be transferred (E 143, 246): Excessive burdens on ownership of coal-fired power plants can be offset by compensation payments. However, these are mostly unnecessary. To date, there has been no trust in the amortisation of investments in coal-fired power plants worthy of protection. Due to the overwhelming importance of climate protection, a regulatory phase-out by 2030 is unobjectionable.

The legislator could also choose economic instruments instead of a ban. The effect of economic instruments is less certain than the effect of regulatory law. For companies, this uncertainty is accompanied on the one hand by investment risks, but on the other hand by flexibility and investment opportunities: economic instruments are therefore an *aliud* to regulatory law. However, uncertainty leads to disadvantages for citizens with respect to their legal protection; the BVerfG often has to base its decisions on the politically influenced impact prognosis of the legislator.

The phasing out of coal through economic instruments presupposes a throttling effect in the long term. The constitutional principle of the tax state entails a limited ban on throttling taxes under financial constitutional law. From the perspective of fundamental rights, the concept of throttling has a different connotation. It marks the moment when the burdening effect of an economic instrument achieves an effect equivalent to a ban. Even then, however, a prohibition and economic instruments do not really have the same effect. Throttling does not prohibit actions in an imperative manner. Nevertheless, throttling can - with some restrictions - be seen as leading to a suffocation and, hence, as the equivalent of prohibition. Then the fundamental rights assessment of a prohibition can also be transferred. A suffocation arises when the average private entrepreneur can no longer operate profitably on the market.

From the point of view of companies generating electricity from coal, economic instruments must be measured against Article 12 (1) Grundgesetz. The requirements for justifying an interference in the freedom to choose an occupation under constitutional law do not substantively differ from those of property law. In addition, there exist different requirements under financial constitutional law: For example, a general CO_2 tax for the emission-intensive industry would only be possible if the catalogue of Article 106 Grundgesetz was extended to include the concept of an environmental tax. A resource use fee with a climate protection character would also be unconstitutional. On the other hand, special incentive charges aimed at power plant operators are permissible in various forms: For example, a fund could be set up to buy up emission certificates or finance structural change in coalmining areas. Indirect but non-levy instruments (Renewable Energy Sources Act, participation of Germany in emissions trading, informational control), on the other hand, would only be able to provide a complementary contribution.

For the legislation of the phasing out of coal, a co-existence of different direct or indirect instruments seems promising (instrument mix). The accumulation of burden on the part of the companies generating electricity from coal must be taken into account under fundamental

rights. At the same time, the EU's legal burdens arising from certificate trading must also be taken into account. As a result, the national legislator must remain flexible. If the overall burden reaches a throttling level, a corresponding ban under regulatory law will also serve as a yardstick in this respect.

In the light of the results of this work, the verdict on the proposal of the so-called Coal Commission of January 2019 is mixed: The extensive payment of compensation is not necessary in the light of an exit by 2038. The financing of the phase-out by the taxpayer does not do justice to the polluter-pays principle in climate protection issues. In this case, a fiscal solution or supplement would have been more economical and consistent. However, from the point of view of climate protection, especially in the light of the Paris Climate Convention, it is positive that an exit compromise was reached at all. As a result of its implementation, this compromise should also provide a relatively high degree of legal and investment security.