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Deliveries and taxes on critical raw materials
as an effective protection
for industrial required resources

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Abstract

The European Commission’s report “Critical raw materials for the EU” (2010, p. 1 ff.) identifies that Antimony, Beryllium, Cobalt, Fluorspar, Gallium, Germanium, Graphite, Indium, Magnesium, Niobium, PGMs (Platinum Group Metals), Rare earths, Tantalum and Tungsten are the 14 most important and most necessary resources with a high risk of supply shortages in the EU.

In consideration of protecting these critical raw materials new instruments are needed. In a timely manner, they ought to be created due to the fact that there is no effective protection given so far.

The idea behind my presentation is to introduce an effective protection for industrial required resources by delivery or by tax on critical raw materials. As a market-based approach these methods shall result in an indirect control to minimise the consumption and to maximise the recycling.

At first, the ”Ecological Valuable Material Act”, a bill which was introduced by the Green Party in 2008 (BT-Drs. 16/8537) for the German Parliament should have served as an exemplary function. However, the mentioned act did not come into force.

A second example is the German Waste Oil Levy. Between 1968 and 1989 every acquirer of crude oil products had to pay a delivery parallel to the tax on oil, to finance a subsidy system to build and save a reserve fund. This fund serves to finance waste oil elimination without pollutant (Sacksofsky 2000, p. 32 f.).

The model of a delivery of critical raw materials looks as follows:

The aim of creating a delivery is to save raw materials on the one hand and to finance ecological innovations of enterprises in the production of products on the other hand. This method shall introduce a levy of resources. The quantity of the delivery shall be determined as a graduation by the kind, the amount of the raw materials used for the products and components of recycling ability. That is why

- the quantity of the occurrence of a material in the waste,
- the consumption of primary raw materials in the manufactured product and
- an environmental-incriminating recycling ability

always affects an increase of delivery.

Beside the financing of an agency for the protection of resources the proceeds of the delivery should serve the financing of efficient recycling.

The arrangement of a raw material delivery poses various juridical problems:

In my contribution I will examine the introduced model with the help of the German constitutional law and the European Community Law.
I. Introduction

The model that has been examined by me follows both mentioned models, the Waste Oil Levy and the ‘Ecological Valuable Material Order Act’s Bill’, based on the 14 critical raw materials which are mentioned in the European Commission’s report.

1. Background

National economies of industrial nations are dependent on raw materials. Needed in this nations, naturally occurring raw materials are considered to run short soon.

A sufficient quantity of the required prospectively resources is a particular concern of industries to ensure a stable economic growth in the ideal case. In turns, the governments of the industrial states have the responsibility to their producing industries to ensure a future-proofed supply of the required raw materials and primary products in sufficient quantities at appropriate prices- the so-called "Doppelziel der Versorgung" (Double aim of the supply) (Pelikahn 1990, p. 80).

To pursue their duty the European Commission for the European Union ("The raw materials initiative – meeting our critical needs for growth and jobs in Europe", EU-Raw Material Initiative 2008) as well as Germany’s Federal Government ("Elementen einer Rohstoffstrategie der Bundesregierung", German raw material strategy 2007) had developed independently from one another, their first raw material strategies during the years 2007 and 2008. Since then they were extrapolated in irregular intervals.¹

With the guideline of a “sustainable raw material economy” (so German raw material strategy 2007, p. 11 and German-Raw material strategy 2010, p. 4) both political concepts pursue similar aims. Beside a fair and anti-discriminatory supply of the required raw materials to global markets ("EU-Raw Material Initiative 2008, p. 5 ff./EU-Raw Material Initiative 2011, p. 14 ff. as pillar 1 of the initiative and German-Raw material strategy 2007, p. 4 ff./German-Raw material strategy 2010, p. 4), the sustainable use, the resource efficiency and recycling are the central points of both strategies (EU-Raw Material Initiative 2008, p. 9 ff./EU-Raw Material Initiative 2011, p. 17 ff., as pillar 2 and 3; German-Raw material strategy 2007, p. 8 ff. and German-Raw material strategy 2010, p. 6 ff.).

The deliberate improvements of the raw material use should be implemented through

1. the replacement by less rare materials (substitution),
2. a better recycling ability,
3. the preference of renewable resources and
4. – if available – the consumption of indigenous occurring raw materials.

In addition, on the basis of the European Commission’s report "Critical raw materials for the EU" (2010, p. 1 ff.) in both current updatings, the need to define raw materials which are worth to be protected and secured, so-called "critical raw materials" are recognised.

With a feared supply shortfall, the 14 rare metallic mineral substances which are mentioned in the report have been considered and identified by the EU-Raw Material Initiative 2011 as the European Union’s critical raw materials and have been taken over (EU-Raw Material Initiative 2011, p. 12). For the Federal Republic of Germany such an ascertainment is still pending.

The present aim of the resource politics is defined clearly by the development of a sustainable raw material economy. The implementation of an improved use of the available resources as well as the increase of the material efficiency have top priority on the national and the European level.

Still to be determined are the tangible political and also juridical measures which will be tackled to achieve an implementation of the aims to be addressed. The question about which instruments are needed in future to ensure a security of supply regarding the industry with its required raw materials, is also still to be decided.

The advancement of already existing mechanisms as well as the development of new political and juridical aid or also a combination of both seems to be conceivable in this context.

2. Objectives of this Paper

The aim of the contribution is the introduction of a specific instrument of a raw material levy, regarding an effective protection of critical raw materials, then again to examine this instrument for its juridical feasibility in Germany.

Moreover, it is necessary to identify the juridical conditions for a resource protection levy in Germany and the European Union. Additionally, it is to examine whether the developed model meets the requirements.

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2 Antimony, Beryllium, Cobalt, Fluorspar, Gallium, Germanium, Graphite, Indium, Magnesium, Niobium, PGMs (Platinum Group Metals), Rare earths, Tantalum and Tungsten.
3. Structure of this Paper

At first the contribution compromises the creation of a resource protection’s model by indirect behavioural price increase with the help of a raw material levy on “critical materials”. For this purpose a short overview about resource protection by levies in Germany is given as an introduction to the problem.

In the second part, the juridical conditions for resource protection levies in Germany are worked out. Concerning this, an investigation of the German and the European law is required.

The interpretation of the legal norms is based on the text of the legal norm, as the expressed objectivised will of the legislator, how it arises from the text within the general use and after the special usage of the concerning regulation as well as from the context of meaning (So already BVerfGE 1, 312; BVerfGE 11, 130 f.). In case of need the interpretation has to occur after the approved juridical interpretation method – systematically, historically and teleologic and purpose – (So constant administration of justice see only BVerfGE 11, 129 ff.; BGH 1967, p. 346).3

The last segment analyses legally whether the introduced resource levy corresponds to requirements. Critical points have to be determined and if it is necessary solution attempts for the removal of juridical problems will be suggested.

II. Approach of Raw material levies in Germany

Even if the waste law with its reinforced ex-post-focus on the quality as "waste" which has to be removed after its use is too narrow and too simple (so for example Brandt 2009, p. 56 ff.; Klett 2009, p. 284, when they demand an own raw material law beside the waste law), till the present the German law of the raw material economy belongs furthermore to this legal area.4

The fees law and contributions law take a considerable part of the waste law. The fees and contributions that the citizens, in particular at municipal level have to pay for their waste disposal, serve less the penetration of a political steering system purpose, than the guarantee of financing the existence precaution “waste disposal” by the community.5

Recently at the federal state level and in individual local authority districts there were attempts to install special waste levies (for example a special litter levy and municipal packaging tax) with special levy facts. They contained a certain steering system function in the behaviour of the causes of the suitable litter. However, they were declared for unconstitutional by the Federal Constitutional Court, with the remark that the waste law is carried by the cooperation principle and due to legislation competence. These competence lies according to Article 74 I No. 24 GG within the scope of the concurrent legislative powers at the Bund – not at the federal states – who filled these competence totally (BVerfGE 98, 83 ff.; BVerfGE 98, 106 ff.)


4 Valid furthermore with the Circular Flow Economy Act (Kreislaufwirtschaftsgesetz - KrWG) since 1/6/2012.

5 Maybe a stronger waste avoidance if the calculation of the fees was not determined by the filling volumes of the provided waste containers any more, but by citizens’ produced waste, so for example Dahmen 1995, p. 209.
1. German Waste Oil Levy

A considerable exception in Germany of a steering system levy on litter shows the Waste Oil Levy.

It was introduced in 1968 by the Waste Oil Act (BGBl. I 1968, p. 1419 ff.) and it has been established a transfer to a reserve fund to finance waste oils disposal. Coupled with the tax on oil, the acquirers of lubricating oils and gas oils had to pay a levy within the scope of a levy-subsidy-system, which was financed through the reserve fund. The fund should be used for waste oil elimination. In reality there were rather economic-supporting aspects in the foreground to support mostly the middle-class enterprises, that eliminated the waste oils, than an environment-protecting criteria (so Kreft 1986, p. 402/Sacksofsky 2000, p. 32 f.).

Putting down the purchase of lubricating oils and gas oils, the waste oil levy became due with the acquisition of a certain product. That is why it is a so-called ‘product levy’ and not a levy of an issue, which becomes due when emitting or dumping of certain substances, like the sewage levy (Kloepfer 2004, § 5 En. 238).


2. Bills of behaviour-steering waste levies in the 1990s

At the beginning and in the mid 90s there were a few attempts to introduce a waste levy by the Bund to avoid waste and indirectly to economise raw materials by an indirect behavioural control. At last all these attempts were not followed up:

The government’s bill of 19916 as well as the Bundesrat’s initiative of the government of the federate state Baden-Wuerttemberg of 1995 (BR-Drs. 510/95) did not become federal law:

Both attempts aimed at the decrease of the initial production of waste by a steering levy. Whilst the bill of the Federal Government placed special emphasis on the reduction of the dump-destitute waste and contained no resource-protecting components (Arndt 1991, p. 12), the objectives and intentions of the Circular Flow Economy and Waste in the Bundesrat’s bill are clearly recognisable. So the Bundesrat’s bill was also designed to serve at least as a bill of a recycling process of reusable materials (BR-Drs. 510/95, p. 33).

Nevertheless, both bills were abandoned in the respective federal committees before an adoption of resolution: The government bill was abandoned in favour of a prospective regulation to a dump levy also the bill of the land’s chamber was pulled back by the Baden-Wuerttemberg government without closer grounds (BR-Drs. 181/97) it may be assumed on account of the sinking political interest in the area of the waste economic policy in the end of the 1990s.

3. Green Party’s bill of an Ecological Valuable Material Act

The only appreciable attempt at the national level with an indirect steering system levy to introduce a minimised consumption of raw material, was in the 16th legislative period of the German Bundestag. It concerned the area of the packaging waste. For the first time in 2008 the attempt of an Ecological Valuable Material Act, the licence levy of the Packaging Order should be substituted by a resource levy (BT-Drs. 16/8537).

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6 In extracts publishes into the Abfallwirtschaftsjournal 1991, p. 614 ff.
In the centre of the bill was the definition of valuable materials and the respective definition of recycling rates for certain materials.

A resource levy should be introduced by the circulatory commercial law's product responsibility. The aim was to create an economic appeal that on the one hand saves raw materials and on the other hand rewards ecological innovations in enterprises' production.

Besides, the value of the resource levy was not to be exclusively determined as a graduation by the kind and the amount of the raw materials used for the product. Rather the components like effective use of raw materials and recyclability after a certain use has to be given priority. Therefore

- the quantity of occurrence of a material in litter,
- the use of primary raw materials in the manufactured product and
- a bad and environmental-incriminating recyclability

always lead to an increasing levy.

A high market value of a secondary raw material, gained from a discarded product contributes to a levy's reduction.

The aforesaid levy has to go with the home producers as well as on foreign products. For foreign products the levy is raised with the importers to avoid distortions of competition.

With the model of the „Ecological Valuable Material Order“ an independent state resource agency should be created, that is determined the criteria of the valuable material levy as well as is responsible for the advertising of the collection and utilisation of valuable materials after ecological and social standards.

The levy proceed of the resource levy should serve the financing of the introduced resource agency and the payment of the very efficient recycling disposal enterprises.

Up to now, at the end of the 16th legislative period the bill has not been also followed up again perceptibly.

### III. New model of a raw material levy

My examined model follows the both models, the Waste Oil Levy and the Ecological Valuable Material Order, based on the European Commission’s determined critical materials.

Without wanting to number specifically every component of the levy, the amount of levy should be determined according to the following formula:

\[ L = C \times F_{\text{Material}} \times Q \]

- **L** = Levy’s height
- **C** = Collection rate (in German: ‘Hebesatz’)
- **F_{\text{Material}}** = Factor specific for material
- **Q** = Material’s quantity
The amount of a critical materials’ levy should depend accordingly on three factors:

1. A Collection rate that is determined by the public authority to adapt the amount of the levy to the topical circumstances and changes.
2. A factor specific for material which reflects on the one hand the rarity of the raw material at the raw material markets and on the other hand its recycling ability as well as the recycling expenditure to the production as a secondary raw material.
3. Consumption amount of the material in the production.

The latter should emphasise the fact that the possession of the material is not relevant, but rather its usability for the industry, that reduces by its consumption.

The use of the levy proceeds should lead to a “double steering system effect” of the levy. The effect lies in the fact that on the one side the levy should promote an attraction to reduce the use of the raw material and on the other side a support of the recycling and substitution of the critical materials.

Moreover the levy proceed must be used as follows:

At first it requires a recreated or an existing public authority, that has the duty to enter, administrate the levies, to supervise the levy debtors and to pay out the money to the recycling enterprises and the enterprises, that have found substitution possibilities.

The administrative costs of the public authority, the development into the actual use, the financial support for recycling, and the substitution of critical raw materials are covered by the levy.

IV. Legal Opinion

The juridical feasibility of a raw material levy in Germany is to be judged primarily by the national constitutional and the European law.

Other international-law aspects are also interesting due to the global dimension of such a levy. However, they are not the object of this paper. Hence, they remain disregarded. First, it should be checked whether such a levy is possible by direct application right in Germany.

As constitutional-juridical requirements at national level, there are at first the conditions of the so-called Finance Constitution (Article 104a -109 GG) and secondly the Charter of Fundamental Rights (Article 1 – 19 GG).

As European Community Law’s problems of such a levy, there are the Aids Granted by States (Article 107 ff. TFEU), Native’s Discrimination (Article 18 TFEU) and Article 401 Council Directive 2006/112/EC on the common system of value added tax (OJEU 2006, L 347/1 ff.), that forbids purchase taxes equal levies.

1. German Finance Constitutional Law

The regulation of the financial issues and income of the state as well as the matching competence distribution between the Bund and the federal states are regulated in the Basic Law for the Federal Republic of Germany in the Articles 104a to 109 GG. They build the so-called Finance Constitution in the constitutional-juridical system of the Basic Law.

As a state source of income for the responsibilities of public administration the finance constitution knows exclusively the collection of taxes. The result is the “principle of the tax state”.

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That means that other – non-tax – possibilities to achieve a state’s income have to be subsidiary against the tax (BVerfGE 78, 266 ff.) and the legislator has no franchise between taxes or non-tax levies to levy levies (BVerfGE 55, 300/BVerfGE 67, 282).

The "tax" is not legal-defined in the basic law. The concept attaches to the traditional, now in § 3 I AO described definition (BVerfGE 67, 282): Taxes are payments of money, other than payments made in consideration of the performance of a particular activity which are collected by a public body for the purpose of raising revenue and imposed by the body on all persons for whom the characteristics on which the law bases liability for payment apply; the raising of revenue may be a secondary objective. The achievement of income can also be a secondary aim only.

The state authorities’ competence to levy non-tax levies arises from the Article 70 ff. GG. From the subsidiarity of other levy types compared with the tax’s levy, suitable levies have to be different from the taxes.

There exist further levy types which are different from taxes and ‘Vorzugslasten’ (fees and contribution)\(^7\). These ones differ in special qualities from the taxes, as well as from the fees and contributions. On the one hand, without other differentiation, they are partly categorised as "special levies" (so still the 2\(^{nd}\) Senate of the Federal Constitutional Court, BVerfGE 55, 297). With this classification they serve as a sort of a catchall element (so for example Schmidt 1991, p. 36).

On the other hand the Federal Constitutional Court catches those “special levies” call ones more narrowly and sees beside the taxes, the ‘Vorzugslasten’ and as well as the special levies

\(^7\) Consideration is significant.
Space for more (other) constitutional levies (BVerfGE 75, 147/BVerfGE 108, 219). The Federal Constitutional Court’s administration of justice leads to the fact that the special levy needs a strict positive definition to be able to separate them exactly towards levies sui generis.

a) Constitutional-juridical demands for special levies

On the basis of the tax as the Basic Law’s only option to demand benefits by the state of its citizens, the Federal Constitutional Court has developed criteria to determine the admissibility of special levies. The aim was to counteract the erosion of the Finance Constitutional Law’s duties for special levies (so Köck 1991, p. 77).

The Federal Constitutional Court is considered the competence to levy special levies, under two conditions:

On the one hand, the levies collected public authority needs in any particular case, the constitutional authority for the mandate for the levies ("Competence-Annex"⁸, so Selmer 1996, page 33). On the other hand, the appropriate levy has to have a sufficient distance to the taxes referred into the Finance Constitution ("Finance Constitution’s Distance"⁹, so Selmer 1996, page 33)

(1) The starting point for the so-called Competence-Annex is set in the financially constitutional stipulation of the Articles 104a to 109 GG, that the financial expenditures of the federal government and the countries have to fund exclusively by the collection of general taxation. It is constitutionally forbidden to serve for the general financial requirements of a public good concerning public authority levies that are no taxes within the meaning of financial constitution. In addition to this it is prohibited that such levies are funding general government expenditure (BVerfGE 55, 298/BVerfGE 67, 275).

Therefore, the collection and use of the revenue from special levies have to pursue more than the simple fundraising efforts.

The legal power to levy parafiscal levies has to justify from the provisions of the Articles 70 ff. GG.

However, in order to justify levies under Article 70 ff. GG, they have to develop necessarily a creative effect (BVerfGE 55, 304/BVerfGE 67, 275).

(2) Problem Finance Constitution’s Distance: Both taxes and special deliveries are levied without consideration individually attributable.

Even when the Federal Constitutional Court - despite of their similarity - assumes from the essential difference between taxes and special levies (BVerfGE 55, 298/BVerfGE 67, 275), both are very similar by law. That is why any special levy is inevitably in competition with the constitutionally regulated comprehensively of institute of the tax (BVerfGE 55, 298).

(a) The qualification of a levy depends on its actual configuration and not to its classification in the legislative act. Otherwise, the respective legislators could even determine whether the levy has to assess according to the standards of Finance Condition, even if it lacks this fact to

⁸ In German “Sachkompetenz-Annexität”.
⁹ In German “Steuerverfassungsferne”.

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the property tax (BVerfGE 55, 304 f.). Consequently, objective measures considered in the classification of levies.

(b) First promising qualifications for special levies, the Federal Constitutional Court represented in its Professional training’s levy’s decision of 10th December 1980 (BVerfGE 55, 274 ff.). They are a kind of basic stock of the still held ideas.

On its original conception, the 2nd Senate (BVerfGE 55, 305 ff.) saw all special levies only on admissible, if

- the debtor in the legal system or in the societal reality, or the special common characteristics of the community interests prescribed a homogeneous group (group homogeneity);
- the specific relationship between the circle of the levy’s payer and and the group charged with the levy of the objectives of the levying of duties purpose is evident in more detail than any other group or the general taxpayer (special group responsibility);
- the tax beyond the exposure of members of a group is justified by the fact that between the loads and the benefits that brings the special levy exists a proper link by the levy’s revenue will be used in the interest of the levy payers’ group (group using levy revenue) and
- the legislature’s constitutional obligations prolonged levying of levy and enforcement periodically verifies that its original decision should be maintained for the use of special levy (recurrent legitimacy requirement).

On the basis of criteria in recent years the Federal Constitutional Court supplemented the audit and adjustment duties of the legislature by parliament’s budgetary legal information (Budgetary legal documentation requirements - BVerfGE 108, 218 f.).

Owing to the requirement of the group homogeneity the legislators are not allowed to form of special exposed persons communities as he wishes to burden them further non-tax payment obligations. Only considerations which in the legal system or in the social reality determine a group and appear understandable, may serve a particular community as new debtors of the
group from the general taxpayers, who have to pay other extraordinary payment in the form of special levies.

Moreover, the element of a homogeneous group is essential to justify the demanded special group responsibility for the special levy. Such a fact can only be determined when the special levy for the debtors as a group of persons are adequately defined and previously classified accurately (BVerfGE 113, 150).

As an expression of the general principle of equality (Article 3 I GG) in its command of the burden equality is to demand that the special levy's charged group has to stand nearer to the levy’s purpose than the generality of the taxpayer or any other of these persons adequately created group (BVerfGE 55, 314).

Therefore it requires a "factual closeness" between the debtors and the special levy on the debtors funded task. It arises regularly from the fact that the fulfilment of the said, financing need object of the of special levy-exposed group also brings tangible or intangible benefits. Accordingly, the special charge is often referred as a "forced self-help" for the exposed group (BVerfGE 55, 306).

From such a factual closeness arises the special group responsibility of the people, who are charged with the special levy to funding that pursued specifically aim (BVerfGE 55, 306/BVerfGE 67, 276/BVerfGE 82, 180). The purpose to be fulfilled with the financial revenue of the special levy has to be predominantly in the property and responsibility of the exposed group and is not the complete responsibility of the state. As a result of the cumulative property of the factual closeness and the special responsibility taken in the selected group, it exists a funding responsibility of those who are debited with the special levy (BVerfGE 113, 150 f.).

The described feature of the "special group responsibility" expresses mainly the justifiable idea, that (special) public expense should assigned by the responsibility (von Stockhausen 2007, p. 171).

The requirement of group using levy revenue reflects a Fundamental Law's justification particularly from the guarantee of property (Article 14 I GG). Benefit of others financial services are demanded by the citizens only if they can clearly justified by reasons of the nature of their use in favour of other interests (BVerfGE 55, 307/BVerfGE 82, 180).

In the absence of duly justified special loads of other benefits, the use of special levies be regularly arranged in the interests of their payers. Such a duty of group using levy revenue should not be construed as false as that the submission must be used for specific interests of each individual levy's payer; it is sufficient if the use is in the overriding interest of the whole group (BVerfGE 55, 307 f./BVerfGE 67, 277 f./BVerfGE 82, 180 f.).

This leads to the conclusion that the group using levy revenue is a bid for the allocation of levies: With the chosen group, its special responsibility and constitutionally justified use in the overriding interest of the debtor, the legislature and the executive is obliged to use the special charge resulting financial volume for very specific public responsibilities.

Really the public financial management is alone transmitted to the Parliament, which also determines the direction of the total tax and levy revenue. From the legislature and especially the administration linked use of funds fulfils indirectly the budgetary principles. In contrast
to the tax revenue the levies originally did not set in the budget, rather already in the law with which the special delivery levied. This side effect led to the consideration consisted of group using levy revenue, to an indirect parliamentary control of the relevant funds. This led to, that the fears of critics that the special levies of the executive public funds were available, similar to the "slush funds" may be used according to their liking (so Kirchhof 1999, § 88 En. 224), was counteracted by it (So von Stockhausen 2007, 205).

The recurrent legitimacy requirement is the levy’s formal justification in regular intervals in the form of a review and adjustment required by the parliament.

On constitutional reasons, the review will be required if the levy revenue is created for a longer term. The special levy needs such a review requires on constitutional considerations because of their exceptional nature compared to the taxes.

With this control, the authority is obliged to check if the special levy’s use is still justified since the last examination. This is an existing requirement for an objective assessment of each current circumstance from constitutional considerations. The legislature has to assess whether her original decision to use the legislative means "special levy" is to maintain or to change because of changed circumstances, in particular if the purpose of financing or achievement has been dropped.

Exists after the duly made review a sufficient justification for the continuation of the levy, the legislative requirement is satisfied up to the end of time to the next periodically check.

A regulation, when or how often a check up has to be done, does not exist. The Constitutional Court considers general statements in this area for inappropriate: The periodic inspection requirement of actual special levy is to be seen strictly in its underlying conditions. That is why it is necessary to consider individually each control cycle (BVerfGE 108, 231).

In addition to leading the review and adjustment duties of the legislature, in 2003 the Federal Constitutional Court introduced as an another formal requirement in the field of special levies a so-called budgetary legal documentation requirement (BVerfGE 108, 218 f. – 2nd Senate). This assumption is valid for all special levies since 2004 (BVerfGE 110, 393).

With the requirement the particular legislation is abandoned to capture the various levied deliveries in quantity and in current stock, that has to list in an annex of the budget authority (BVerfGE 108, 219).

The aim pursued of this measure is twofold:

On the one hand, based on the models of budgetary reporting standards, the so-called volatile public budget funding for the Parliament should be understandable concretely; only then the legislative budget authorization as the owner of the right to access adequate information in order to carry out the planning, approval, enforcement and control of all public funds properly will be reality.

On the other hand on the public availability of budget plans and their annexes follows an understandable and from the principle of public budget (Heintzen 2003, Article 110 En. 26) offered, transparency possibility for everyone to know how and in what amount the public authorities collects levies from its citizens (BVerfGE 108, 218).
The Federal Constitutional Court considers both the results from the documentation requirements as the contents of the bid of effective parliamentary scrutiny and democratic legitimacy as justified and constitutionally required, also outside of the immediate scope of the budgetary principles (BVerfGE 108, 219).

c) The First Senate of the Federal Constitutional Court follows the eligibility criteria for special levies of the Second Senate limited only:

Following the First Senate Special levies are further to differentiate into those with funding purposes and without funding purposes:

The First Senate considers only for special levies whose financial volume serves primarily to finance the act manifested purpose - special levies with financing purpose – the established conditions of the Second Senate of proximity with the resulting special group responsible to fulfil a group using, by a special, non-tax levy (BVerfGE 57, 167).

If the levy does not have such special purpose funding, then the convergence of the Second Senate assumptions developed of the special group responsibility and the group using levy revenue are not apply.

That is why so-called special levies with operating or equalization function are legal and possible: The levies with operating function should lead or direct the debtor to avoid or reduce a levy by a desired behaviour. The levies with a compensation function lies in a redistribution of the financial revenue from those who do not behave as required by the act to them, who according with those standard (BVerfGE 57, 167).

d) The Second Senate follows the statement of the First Senate to the extent that he accepts special levies without any purpose of financing. He also considers that such levies are not bound by all of his criteria (BVerfGE 67, 278). But all his criteria have to dispose too, even if the financing function of the special levy would be an absolute secondary purpose (BVerfGE 67, 278).

As a result the Second Senate holds his criteria for special levies. Only then the special levy can consider a sufficiently distinguished from the tax and risk of violating the Finance Constitutional Law prevent successfully (BVerfGE 67, 278).

e) At least the choice of words – in this connection Henseler writes something about Babylonian linguistic confusion (1985, p. 401) – on the question of purpose of financing’s intensity of the special levy there is still a disagreement between the Federal Constitutional Court’s First and Second Senate. While the Second Senate special levies with any financing purpose strictly binds to his requirements, the First Senate decides that the strict requirements shall only apply, if the finance function the main objective of the levy.

Expressly no special levies provides the Second Senate in the decatation of special benefits, that develop by a misdirection of government subsidies or other monetary benefits recovered from the flawed beneficiaries - so-called decantation levy – (BVerfGE 78, 266). Thus such levies are not subject to the strict conditions of the Federal Constitutional Court’s jurisprudence. But as parafiscal obligation in favour of the government the legislature need the competence according to Article 70 ff. GG of the levy’s legislator for the area of life (BVerfGE 78, 269).
b) Summary - Groups of special levies after the terminology by the Federal Constitutional Court

The Federal Constitutional Court distinguishes "special levies in the strict sense" of other, constitutional para-fiscal levies, which are often still referred to by the term "special levy".

Due to the differentiation in the field of special levies the demarcation of the para-fiscal monetary payment obligations that are no ‘Vorzugslasten’ are to be carried on positive features.

Both senates of the Federal Constitutional Court divide the special levies in the strict sense again into those with and those without financing purposes.

All para-fiscal levies are in common that the authority’s competence has to derive from a subject area according to Article 70 ff. GG.

For the special levies with a finance’s purpose apply Second Senate’s strict eligibility requirements of

- the group homogeneity,
- the special group responsibility,
- the group using levy revenue,
- the recurrent legitimacy requirement,
- the budgetary legitimacy requirement and
- the budgetary legal documentation requirement.

In contrast, special levies without a finance’s purpose do not require the group using levy revenue.

c) The raw material levy as a special levy

If the German public authority wants to introduce a raw material levy, on the one hand it has to have the competence according to Article 70 ff. GG and the levy has to be characteristic different form a tax. That is why, that it is in the meaning of § 3 I AO no payments of money for a public community, without compensation for a special service and for generating revenues only.

In addition, beside the two formal requirements of special levies, consisting of it’s periodically investigating legitimacy and it’s budgetary documentation requirements, the the levy would need in particular, a homogeneous group that has special group responsibility for subject of that group, the levy’s revenue could used.

(1) First and foremost, the model of raw materials levy for critical raw materials should used for steering, as the relevant raw materials are used less, recycle more and if possible to replace them by less scarce raw materials (substitution). Because of a para-fiscal levy could definitely have a secondary purpose as a financial function, it is possible to design them as a special levy.

The competence’s title of the raw material levy is in Article 74 I No. 11 (Law Relating to economic matters) and No. 24 (waste disposal) GG is listed in the context of the Concurrent legislative power. The federal states only have the competence to make such a an appropriate raw materials’ levy as the federal government does not use its competence in the area.
(2) The presented raw materials levy improved with the financing of the recycling, the substitution of critical raw materials and to cover the cost of a funds to manage the authority financing function.

As a result, beside the two formal requirements of special levies, consisting of it’s periodically investigating legitimacy and it’s budgetary documentation requirements, the levy would need in particular, a homogeneous group that has special group responsibility for subject of that group, the levy’s revenue could used.

(a) The group homogeneity of the levy burdened of this raw material levy results from the fact that only those are burdened with the levy, who consume critical skilled resources in their production processes, that the resource is contained in the products and is no longer, or at least not without a recycling scheme for a production useable. The group of critical materials for the production’s users is one in accordance with the requirements for the collection of special levies required homogeneous group.

(b) The homogeneous group of critical materials’ users hits a special group responsibility, because they are responsible for ensuring that the levy charged raw materials after its use is no longer available as a resource for the production of others; So they are factually responsible for ensuring that the critical raw materials as ressource is less available. They are objective responsible for the the materials’ rarity and have to do something against. Because they do not provide for recycling or substitution of substances themselves, they are at least responsible to finance the appropriate action.

(c) The resources’ security of the critical raw materials is in the interest of those who use and need it for their production. They are the ones who use these substances for their industry and their needs. So it is in their interest to find ways dwindling natural resources and rare raw materials for the future to recycle to a secondary or a reusable raw material or to replace the critical raw materials by less rare ones (substitution). For the group the levy’s objectives are useful, too.

According to the German finance constitutional law’s requirements of the Basic Law a levy on critical raw materials is principly possible.

2. German Constitutional Law – Fundamental Right

As a steering levy the critical raw materials’ levy has submit to the fundamental rights. In addition to the dispensing fairness (Article 3 I GG) are next to possible violations of the freedom of Property Protection (Article 14 I GG) and the Occupational Freedom (Article 12 I GG). An examination of the fundamental right of the general freedom of action (Article 2 I GG) is unnecessary. The view that Article 2 I GG also includes "an economic activity" is obsolet. As a mere collection of fundamental rights of freedom rights allow the special rights of freedom of occupation (Article 12 I GG) and the right of property (Article 14 I GG), there is no room for further consideration of Article 2 I GG (so in total Meßerschmidt 1986, p. 134).
a) Proprietary Protection (Article 14 I GG)

Article 14 GG contains no limitations on the protected group of persons. That is why it is a basic right for everyone.

In determining the scope of protection of property it has to be noted that Article 14 GG is especially "embossed standard". That means, the legislature establishes, what falls under the protection of the fundamental right "to property".

The concept of property includes everything that defines the basic rights at that time as property. Property is not natural, but a legal term that can be determined only by the legal system in more detail (BVerfGE 58, 336).

Previously there was a legal opinion that the public levy could not be bothered by fundamental right under Article 14 I GG, because the "wealth as such" is not protected by the Basic Law (BVerfGE 4, 17). Today, the Federal Constitutional Court accepted that there exists an intervention in the scope of Article. 14 GG by levies, that is justified constitutionally (BVerfGE 115, 110).

The intrusion into the protected area is to distinguish in two different types; first, the law justified content and limits and the expropriation.

Content and limits and so the interference with Article 14 I GG exists, if the powers of the affected property will be limited compared to the previous law or in abstract and general way for the future, new duties are justified.

Expropriation (Article 14 III GG) is any specific individual's final withdrawal of legal ownership positions to use for public purposes.

The levy on critical raw materials is used for the protection of resources, although approaches a "social function of property rights", if it demands a financial sacrifice for the use of special raw materials to protect and secure scarce resources.

This is a content-determination and limits of property under Article 14 I 2 GG, that can be demanded by the law of the debtor. The border is there, where the levy effect "choking", that it jeopardizing objectively the debtor's financial existence.

That applies to the amount of levy to be considered.

b) Occupational Freedom (Article 12 I GG)

"Profession" is the central concept in Article 12 I GG. Profession is any activity that is permanent and is used to create and sustain a basis of life (BVerfGE 7, 397).

Article 12 I 1 GG guarantees the free choice of the profession, as may Article 12 I 2 GG regulated the professional conduct. Article 12 I GG is considered as a single fundamental right of occupation’s freedom, which fully safeguards the choice and the exercise of the profession.

Under Article 19 III GG (including domestic, civil) legal persons are protected in their fundamental right under Article 12 I 1 GG (BVerfGE 115, 229).
With the exercise of "the profession" (the business) the protection of Article 12 I GG is affected by the raw materials levy, which will be impacted by the financial sacrifices for those companies.

Interference with the freedom to pursue professional activity must be justified. Each state action that fall within the scope of the fundamental right requires a justification (BVerfGE 70, 214).

Legal regulations of professional conduct are admissible and remain within the framework of the legislature by Article 12 I 2 GG granted regulatory powers, if they are justified by sufficient reasons for the common good, if the means chosen appropriate to achieving the objective are pursued and necessary and if there is in an overall balance between the severity of surgery and the weight of it justifiable still preserved reasons for the limits of reasonableness (BVerfGE 81, 188).

The objectives pursued by the proposed raw materials levy, are in the resource protection and the resource conservation. So there are reasons of public interest justifying the levy.

The long-term resource protection is a community interest of a high level (for the security of the energy supply for example BVerfGE 30, 323 f.).

c) Equality Principle (Article 3 I GG)

Following the principle of equality of Article 3 I GG a public authority is constitutionally prohibited, the same or substantially equal to arbitrarily and treat unequals equally arbitrary.

Article 3 I GG is only violated if the unequal treatment of substantial equal, if there is no reasonable, from the nature of things consequential or otherwise factually plausible reason for the statutory distinction, if the determination can be called arbitrarily (BVerfGE 1, 52).

In relation to the levy the arbitrariness of the general principle of equality developed in the principle of "levy fairness". Levy fairness reflects two things:

1. The tax refund must be strictly enforced against all persons (§ 85 AO). Statutory exceptions to the rule exist only under very strict conditions, for example due to the adoption of the remission (§ 227 AO) and deferment (§ 222 AO) of levy claims.

2. The levy burden must be distributed equitably among the payers (the principle of equal loading). What distribution scale is appropriate depends on the type of levy or tax (Saxon Ministry of the Interior 2011, p. 9 f.)

The former is considered only in the enforcement of levy, while the latter is to be considered in the design of the levy.

The delivery levied on the users of critical raw materials is not arbitrary, because the used resources are rare and require a greater protection and security for the future.

The debtors as consumers of the critical raw materials stand nearer to the levy’s purpose than the generality of the taxpayer or any other of these persons adequately created group, to the intended purpose of charging duty obviously be better than the generality of the taxpayer or any other of these persons adequately educated group (BVerfGE 55, 314), because on the one hand their consumption dues to a further decrease of the available resources and on
the other hand they require the resources to continue the species for their production in the future.

Thus such a levy would not violate the principle of equality under Article 3 I GG in the expression of the principle of levy’s fairness and equality of burden.

3. European Community Law

On the European level an introduced raw materials levy have comply with regulations of the European Community’s Primary Legislation (especially the treaties of the European Union) and its Secondary Legislation; according to Article 288 I TFEU, these are the regulations, directives, decisions, recommendations and opinions.

Possible problems with a levy on critical raw materials, that is used governmental revenues for recycling activities and for the substitution of rare materials, could arise from aid granted by a Member State’s regulation (Article 107 ff. TFEU) or the forbidden discrimination against national producersthus of Article 18 TFEU by primary legislation, and under secondary legislation from the Article 401 CD 2006/112/EC, that does not allow to implement new levies that have the characteristic of another VAT (value added tax).

a) Aids Granted by States (Article 107 ff. TFEU)

The key definition of the material State aid law can be found in article 107 I TFEU.

According to it, “any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

That means that State aids are basically prohibited. Nevertheless it is not the priority aim of the legal control to prohibit, abolish or eliminate the State aid ipso jure simply. It is more about a preventive prohibition which includes exceptional reserves (Koenig/Kühling 2000, p. 1065). Correspondingly the article 107 II TFEU already includes a catalogue of legal exceptions. The article 107 III TFEU defines discretionary exceptions which could be granted by the European Commission only in individual cases.

Due to this that the system’s primary goal of the article 107 TFEU might be to ensure a permanent verification and control of the State aid by the European Commission in cooperation with the Member States in order to abolish and transform the appropriate favouring according to article 108 II 1 TFEU concerning certain companies or producion branches which does not represent an exceptional fact and which is illegal according article 107 I TFEU.

(1) According to the article 107 I TFEU, the wording “State aid” is interpreted very widely, as the regulation is talking of an aid ’in any form” (for example Streinz 2005, En. 1016).

The European Court of Justice discribes aids granted by states as all “interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertak ing and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect” (Col. 1961, 19).
Both, the positive sovereign a power as well as the exemption of the relief of the liabilities of the states is included (Streinz 2005, En. 1017). In this regard it does not depend on the purpose of favoring but to its beneficial effect (Col. 1987, 923 f. - En. 7 f.).

The origin of the economical advantage has to be attributable to the public authority- federation, state or even community or region. It is sufficient that the advantage of sovereign arrangements are based on public authority orders which can cause selectively to a favor of certain companies or particular branches of production. Thus the advantage may lie in the fact that a competitor has a public duty to make or benefits from such a public duty from which a particular company or a particular production branch is spared. (For example Commission Decision 85/380/EEC, OJEU 1985 L 217, p. 21 f./ Commission Decision 92/316/EEC, OJEU 1992 L 170, p. 35).

In addition, in the state-granted aid must be distorted competition or at least a threat to it. The condition is fulfilled when the public authority’s support is reflected in a position’s improvement of beneficiaries against its competitors on a given market (Col. 1980, 2689 - En. 11). The simple possibility is sufficient (Koenig/Kühling 2000, p. 1069).

The said competition distortion must also be an significant harm on the internal market’s trade. That is generally the case when the state aid favored commercial line is in competition with the same or similar businesses on the own market or on the markets in other Member States (Commission Decision 1999/365/EC, OJEU 1999 L 142, p. 33 ff.).

With the introduction of the so-called de minimis rules in 1992 the European Commission created an indicator to identify which state aid is significant for the European internal market. Till the end of 2013 it excludes state grants, which do not exceed an amount of 200,000 EUR per company over a period of three years of the Article 107 I TFEU’s regulations (Article 2 II Regulation 1998/2006/EC - OJEU 2006 L 379, p. 5 ff.); in argumentum e contrario that means that every state grants that is crossing this de-minimis-border has the indicative effect of a significant effect on trade.

(2) Paragraphs 2 and 3 of Article 107 TFEU provide a definitive list of exceptions to the prohibition of state aids.

Legal exceptions are the aid having a social character, granted to individual consumers (lit. a), aid to make good the damage caused by natural disasters or exceptional occurrences (lit. b) and aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany (lit. c).

More Legal exceptions arise in particular from Article 106 II TFEU for public companies, whom are transferred special duties and from Article 93 TFEU as a lex specialis of it for the public transport and for certain, the public service related services.

At the discretion of exceptions, it is the responsibility of the European Commission, aid of the paragraph 3 lit. a to lit. d listed areas to declare them compatible with the common market. In addition, Article 107 III lit. e TFEU provides a legal basis for the European Council by proposal from the European Commission to declare an aid to be compatible with the common market. That declaration needs a qualified majority.

(3) The procedure for State aid control regulates Article 108 TFEU in primary legislation. State aid control is in principle a competence of the European Commission. According to Ar-
ticle 109 TFEU the European Council, on a proposal from the European Commission and
after consulting the European Parliament, may make any appropriate regulations for the ap-
plication of Articles 107 and 108 TFEU and may in particular determine the conditions in
which Article 108 III shall apply and the categories of aid exempted from this procedure.

(4) The grants, that should flow from raw material levy to recycling companies or research
institutions in order to investigate it, the substitution of critical raw materials are, at least aid
to this enterprises in the meaning of Article 107 I TFEU. Therefore it needs an approved by
the European Commission.

The European Commission may approve them to promote projects of common European in-
terest in accordance with Article 107 III lit. b TFEU.

The discretion should be bounded to approve the state grant, because of the aim the European
Union to protect the critical raw materials especially. Exception would be the awarding of
research contracts and recycling violates against the principles of award and transparency of
the European Union.

b) Native’s Discrimination (Article 18 TFEU)

Article 18 TFEU normalized a comprehensive prohibition of discrimination based on nation-
ality. That regulates, that all EU citizens are concern to same government measures. This also
applies for levies. However, differences in treatment between nationals and other EU citizens
are not classified as a prohibited discrimination, if there is a factual basis and the discrimina-
tion is proportionated (Col. 1994, I-479 - En. 16 f./Col. 1997, I-307 f. - En. 19 ff.).

An objective reason to exclude non-German EU citizens from the levy for critical raw materi-
als is not visible. Therefore, the levy must be so designed, that all EU citizens (inclusive
Germans) who fulfil the levyable event in Germany affected by the levy.

No further concerns seem to be feared from the prohibition of discrimination in Article 18
TFEU.

c) No value added tax (Article 401 CD 2006/112/EC)

According to Article 401 CD 2006/112/EC, Member States it is forbidden to implement new
levies that have the characteristic of another value added tax (blocking effect of harmoniza-
tion).

The European Court of Justice decided, that of this regulation a Member States’ implemented
a tax or levy may not fulfill cumulatively the following four conditions (Col. 1992, I-2970 - En.
12):

- applying generally to transactions relating to goods or services;
- proportional to the price of those goods or services;
- Charged at each stage of the production and distribution process and
- it is imposed on the added value of goods and services, since the tax payable on a
transaction is calculated after deduction of the tax paid on the previous transaction.

Even the general applicability to virtually all goods and services is not fulfilled, because the
levy of critical raw materials is limited to significant group of persons to pay that special sac-
rifice. Thus, this levy could not classify as tax in the meaning of Article 401 CD 2006/112/EC. That is why this levy does not violate against Article 401 CD 2006/112/EC.

V. Summary

The proposed model of a levy on raw materials has to hold several conditions of the German Constitutional Law and the law of the European Community.

Designed as a special levy it seems to introduce that such a special levy is possible by the German and European law.

The grants from the presented levy of the recycling and development of substitution possibilities of critical raw materials required as State aid is to approve by the European Commission.

The Commission’s discretion should be bound to approve the state grant, because of the aim the European Union to protect the critical raw materials especially. Exception would be the awarding of research contracts and recycling violates against the principles of award and transparency of the European Union.

As a result, the formulation of a special levy on critical raw materials for the legal system of the Federal Republic of Germany under national and European law seems possible and legally.

Thus, the proposed model is may be a potential instrument for indirect behavioural control in favour of the protection of critical raw materials.
List of Abbreviations

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<tr>
<td>AbfallR</td>
<td>Zeitschrift für das Recht der Abfallwirtschaft (Journal)</td>
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<td>AbfG</td>
<td>Waste Act</td>
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<td>AltölG</td>
<td>Waste Oil Act</td>
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<td>AltölAbgSenkV</td>
<td>Waste Oil Levy Sinking Order</td>
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<td>AO</td>
<td>Fiscal Code</td>
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<td>art.</td>
<td>Article</td>
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<td>BB</td>
<td>Betriebsberater (Journal)</td>
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<td>BBGI.</td>
<td>Federal Law Gazette (Germany)</td>
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<td>BGH</td>
<td>Federal Court of Justice (Bundesgerichtshof)</td>
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<td>BR-Drs.</td>
<td>Federal Council of Germany’s Printed Matter</td>
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<td>BT-Drs.</td>
<td>German Federal Parliament Printed Matter</td>
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<td>BVerfGE</td>
<td>Decisive collection of the Federal Constitutional Court</td>
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<td>Col.</td>
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<td>En.</td>
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<td>GG</td>
<td>Basic Law for the Federal Republic of Germany (Journal)</td>
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<td>GGK</td>
<td>Grundgesetz-Kommentar / Basic Law Commentary</td>
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<tr>
<td>HbStR</td>
<td>Handbuch des Staatsrechts (Book)</td>
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<td>NdsVBl.</td>
<td>Niedersächsische Verwaltungsblätter</td>
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<td>OJEU</td>
<td>Official Journal of the European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>ZJS</td>
<td>Zeitschrift für das Juristische Studium (Journal)</td>
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