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I.

Magnus Schmauch, Luxembourg*

The Preliminary Ruling Procedure and the Right to a Fair Trial – Strasbourg Demands Reasoned Decisions from National Courts when They Refuse to Refer a Case to the ECJ

(Ullens de Schooten and Rezabek ⁄. Belgium, ECtHR, Judgment of 20 September 2011, Applications 3989/07 and 38353/07)

In the judgment Ullens de Schooten and Rezabek ⁄. Belgium, the European Court of Human Rights in Strasbourg provides a very important piece in the puzzle that protects procedural rights. The judgment clarifies the procedural requirements under the European Convention of Human Rights for national courts when they refuse to refer a case where an interpretation of Union law might be necessary to the European Court of Justice in Luxembourg. The ECtHR accepts the Cilfit case-law of the ECJ but makes clear that the right to a fair trial enshrined in Article 6 of the ECHR requires that national courts deliver a reasoned decision applying this case-law when they deny a request to refer the case to Luxembourg. The ECtHR emphasizes the fact that the obligation to refer allows only a strict set of well-defined exceptions. A fair trial is achieved only when a decision is not arbitrary; hence the obligation to reason the decision not to refer.

(1) Background and Facts

The ***protection against arbitrary refusals to refer a case to the ECJ*** is the central concern of this judgment. The case has its origins in Belgium, where the two applicants, Ullens de Schooten and Rezabek, were indicted in 1989 for unlawfully operating a laboratory connected to the national health system. The ***case covers two applications***, 3989/07 and 38353/07, linked to this. The indictment was based on Article 3 in the Royal Decision no. 143 of 30 December 1982. This Decision regulated the and the particular article provided that only laboratories operated by doctors, ***right to operate laboratories in Belgium*** pharmacists or persons holding a scientific degree in chemistry could offer services that would be reimbursed under the national health care system. As will be explained further below, this provision was abrogated in 2005. As a consequence of the indictment, the operations of the laboratory were suspended.

(a) Application 3989/07

The ***first application***, 3989/07, concerns M. Ullens de Schooten. In 1989 his ***laboratory was denounced*** and in 1996 his case was sent in front of the *Tribunal de première instance de Bruxelles* (sitting in formation for penal matters) for trial. The trial started on 20 June 1997. A number of mutual insurance companies joined the trial as third parties in the civil part of the trial, demanding damages of 19 908 531 euros for the insurance paid to the laboratory between 1990 and 1992. Judgment was delivered on 30 October 1998 and the defendants were ***condemned to prison and fined for operating the laboratory illegally***. As for the ***civil law suit***, the *Tribunal* ordered the ***payment of «one euro»*** [*sic*] on the ground that the applicants had not been able to provide sufficient evidence for the damage they claimed to have suffered.

The *Cour d'appel de Bruxelles*, on appeal, confirmed the judgment from the *Tribunal*. Before this court Ullens de Schooten and Rezabek claimed that Article 143 of the Royal Decision was ***incompatible with EC law*** since it mounted to an unlawful discrimination and requested that the court ***refer the case*** to the European Court of Justice in Luxembourg to have this question assessed by it. However, the *Cour d'appel* concluded that the law was compatible with EC law and refused to do so. The civil law suit was declared inadmissible.

Finally, on 14 February 2001, the *Cour de Cassation* in Belgium dismissed the appeal of Ullens de Schooten and Rezabek and confirmed the conviction against them. The Court, in particular, found that it was not necessary to refer the case to the ECJ. As far as the civil lawsuits were concerned, the *Cour de Cassation* annulled the judgments and sent the case back to the *Cour d'appel* in Mons.

Meanwhile, after the applicants had notified the Commission of the European Communities of the Belgian legislation, the ***Commission decided to open infringement proceedings*** under ex Article 226 EC against Belgium. After negotiations, on 24 May 2005, Belgium abrogated Article 3 in the Royal Decision no. 143 of 30 December 1982.

In the meantime the civil procedure before the *Cour d'appel* in Mons commenced. During this procedure

the applicants maintained their position that the Belgian legislation was unlawful under EC law. They argued that Article 3 in the Royal Decision no. 143 of 30 December 1982 did not have any legal effect since it was contrary to EC law. Therefore, the *Cour d'appel* should not take into account the convictions based on this provision.

In its judgment of 23 November 2005, the *Cour d'appel* dismissed the arguments of the applicants and ordered them to pay the sum of 1 859 200 euros. Concerning the EC law issues, the court concluded that the infringement procedure had ended after the reasoned opinion which did not have binding legal effect. Moreover, the *Cour d'appel* in Brussels had confirmed that the provision in question was compatible with EC law. Finally, the court concluded that in order to take its decision it was ***not necessary for it to refer the case to the ECJ***.

The applicants appealed to the *Cour de cassation*. In its judgment of 14 June 2006, the court dismissed the appeal. It referred, in particular, to the fact that the judgment in the penal procedure had become final and that it was impossible to reverse it in a civil procedure that followed. The court also decided ***not to refer the case to the ECJ*** as it considered the question of the finality of judgment to have been made sufficiently clear in the case-law of the ECJ.

(b) Application 38353/07
The ***second application*** finds its origins in the ***administrative sanctions*** that followed the indictment described above.

On 18 March 1999 the Belgian Ministry of Health declared the ***licence of the laboratory in question suspended*** for a period of twelve months. The appeal against the decision was unsuccessful and the suspension was by the authorities confirmed on 9 July 1999. On 8 June 2000 the suspension was prolonged by twelve months. On 24 July 2000 the suspension was again confirmed. According to the authorities, the continued suspension was justified since the applicants had continued to run the laboratory. This was a violation of Article 3 in the Royal Decision no. 143 of 30 December 1982.

On 13 September 1999 and 21 September 2000, the company that owned the laboratory ***appealed the two decisions*** to suspend the licence. The *Conseil d'État* rejected the appeal in two judgments of 21 February 2007. In the proceedings the applicants (which intervened on behalf of the company in the proceedings), claimed that Article 3 in the Royal Decision no. 143 of 30 December 1982 ***violated EC law***.

The *Conseil d'État* concluded that the Belgian legislation did not violate EC law. Also, the court concluded that it was ***not necessary to request a preliminary ruling*** from the ECJ. It motivated the refusal with reference to the judgment *Cilfit* of the ECJ and the criteria this judgment sets out for the courts against whose decisions there is no judicial remedy under national law. It concluded, in particular, that there was no doubt as to the applicability of EC law and that the questions proposed by the parties did not have any connection with the case before it. The parties had also invoked the prohibition against discrimination, but this was found to be a new argument and was declared inadmissible. The case was ***finally dismissed*** by the *Cour de cassation* on 10 September and 22 December 2008.

(2) **The Judgment of the ECtHR**
Before the ECtHR, the applicants claimed that the *Cour d'appel* in Mons had violated their ***right to a fair trial*** («*procès equitable*») when it did not take into account the ***violation of EC law***. They also claimed that the *Cour de cassation* violated the right to a fair trial when it concluded that since the first judgment had become final, this barred the ***primacy of EC law***. Finally, they claimed that the ***lack of a preliminary ruling*** to the ECJ to answer the question whether the first judgment actually had this effect, violated the right to a fair trial. The applicants invoked ***Articles 6 and 13 of the ECHR***.

The ECtHR first concluded that if Article 6 ECHR is applicable, there is no need to assess the national procedure in the light of Article 13 ECHR, since that provision is subsidiary to the former.[1]

At the outset, the ECtHR recalled that under Article 19 ECHR, its task is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. In particular, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.[2] It is for the national courts and authorities to interpret and apply the national legislation, where necessary in compliance with EC law. The ***role of the ECtHR*** is therefore limited to verify that the ***effects of their decisions*** are ***in conformity with the Convention***.[3]

The ECtHR noted that the relevant question at issue was whether the ***refusal of the Conseil d'État***

to refer the case to the ECJ constituted a violation of the Convention.[4]

In this regard the ECtHR noted that the obligation to refer a case to the ECJ is regulated in Article 234 EC (now Article 267 TFEU). Under Article 234 EC, paragraph 3, when a question of EC law is raised before a court or tribunal of a member state against whose decisions there is ***no judicial remedy under national law***, that court or tribunal ***shall*** bring the matter before the ECJ. However, the ECtHR notes that this obligation is ***not absolute***. It follows from the judgment *Cilfit*[5] of the ECJ that such a court or tribunal can determine whether it is ***necessary*** to refer a case to the ECJ. Moreover, the *Cilfit* case-law states that these courts and tribunals are not under an obligation to refer if the question is ***hypothetical***, if the question has ***already been answered*** in the case-law of the ECJ (*acte éclairé*) or if there is ***no reasonable doubt*** as to the interpretation of the EC legislation at issue (*acte claire*).[6]

The ECtHR confirms its earlier case-law, that a ***referral to another jurisdiction*** – be it national or international – for preliminary assessments is not guaranteed by the Convention itself. It also follows that the courts or tribunals that are under an obligation to refer a question on certain conditions, make an assessment whether these conditions are fulfilled before taking such a decision of referral.[7] This, according to the ECtHR, does not mean that ***Article 6 ECHR*** is not applicable, since it provides that «[in] the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... impartial tribunal established by law». This is particularly important in the context of EU law, since the preliminary ruling procedure has the objective of ensuring a uniform application of EU law in the Member States.[8]

In this context, the ECtHR refers of the case-law concerning the preliminary reference procedures in the Union or internal procedures in the Member States.[9] Amongst others, it refers to the cases *Predil Anstalt S.A. against Italy*[10], *Herma against Germany*[11], *Société Divagsa against Spain*[12], in which it concluded that the ECHR does not exclude that if there is a mechanism for preliminary rulings, the refusal of a national judge to refer a case ***might have an impact on the fairness of the procedure***, even when the case is pending before a lower jurisdiction.[13] This is the case if the refusal is ***arbitrary***, that is if the referral of the question is unconditional because the applicable legislation does not allow for any exceptions, if the refusal is based on ***other grounds*** than the ones provided for in these norms, and if the decision is ***not sufficiently motivated*** in this regard.[14]

This means that national courts under Article 6 EHCR have an ***obligation to state the reasons*** for a refusal to refer a case to the ECJ, especially since EU law only in exceptional cases makes an exception for the duty to refer the case to the ECJ.[15]

The task of the ECtHR is to ensure that the decision of the national courts or tribunals which are subject of the application are ***duly reasoned*** in this regard. While this appreciation has to be strict, it does not entail an obligation of the ECtHR to make an assessment as to the possible errors in law that the national court in question might have committed when interpreting or applying the relevant legislation.[16]

In the specific context of Article 234 EC (now Article 267 TFEU), this means that when a question of EU law is raised before a court or tribunal of a member state against whose decisions there is no judicial remedy under national law, and that court is not referring the case to the ECJ, that court or tribunal shall reason their refusal to refer the case according to the criteria established in the *Cilfit* case-law.[17]

The ECtHR concluded that the obligation to reason the refusal to refer was fulfilled in the present case. The national judgment in question contained ***sufficient reasoning*** for the parties to be able to deduct why the court decided not to refer the cases to the ECJ.[18]

As concerns the ***length of the procedure*** before the national courts, the ECtHR notes that the damage had already been repaired to a certain extent. It also notes that the relative speed of the national authorities and the complexity of the case, the ECtHR dismisses this alleged violation of Article 6 ECHR as manifestly unfounded.[19]

Finally, concerning the ***violation of the prohibition of discrimination***, the ECtHR notes that this action was time-barred already before the national courts. Therefore it is not competent to assess that question. It is therefore rejected.[20]

The ECtHR thus concluded that there was ***no violation of Article 6 ECHR*** in the present case.

(3) **Comment**

The judgment has implications for the ***relation between the courts in Luxembourg and***

the national courts. Two aspects of the judgment will be discussed below: i) the relationship between ***national courts and the ECJ*** in Luxembourg under the preliminary ruling procedure; ii) the relationship between national courts and the EFTA Court in Luxembourg under the advisory opinion procedure.

(a) The Preliminary Ruling Procedure before the ECJ

The preliminary ruling procedure constitutes an important forum for cooperation between the ***national courts and the ECJ***. The main purpose of the procedure is to ensure a uniform application of Union law throughout the Union, but it also aims at ensuring that individuals can enjoy those rights which derive from Union law.[21]

It is important to distinguish the two tasks of the ECJ in the preliminary ruling procedure. The first of these, according to Article 267, first paragraph, (a), TFEU, is to interpret the Treaties. The second, according to Article 267, paragraph 1, (b), TFEU is to interpret and control the validity of the acts of the institutions and other bodies of the EU. The ECJ has sole right to declare an act of the EU invalid and the preliminary ruling procedure gains a particular importance when the invalidity of such an act has been invoked before the national court.

In the judgment the ECtHR only mentions preliminary rulings concerning the ***interpretation*** of EU law, but remains silent when it comes to the question of the ***validity*** of EU legal acts.[22] Therefore the following comment only concerns those preliminary rulings which concern the interpretation of Union law.[23]

In the system of cooperation instituted by Article 267 TFEU, only the highest courts have an obligation to refer cases to the ECJ. The only exceptions to this obligations (lack of pertinence, *acte éclairé* and *acte clair*) follow from the well-established *Cilfit* case-law. The requirement to give a full reasoning on these criteria when refusing to refer might have ***consequences in the internal legal order of some Member States***. One clear example is Sweden, where there is an ongoing debate about the lack of preliminary rulings from the supreme jurisdictions and the lack of reasoning for leave of appeal in cases where a question of Union law has been raised.[24]

The present judgment also touches on an interesting but potentially problematic aspect of the application of the Charter of Fundamental Rights; ***the relationship between the Charter and the ECHR***.

The Charter is ***applicable only*** when Union law is implemented. The exact scope of the word «implement» in Article 51 of the Charter, which determines the scope of the applicability of the Charter is not entirely clear, although the first cases concerning this notion have already been referred to the ECJ.[25] To this should be added that according to Article 52(3) of the Charter – which deals with the scope and interpretation of rights and principles – the ***rights of the Charter which correspond to rights guaranteed by the ECHR shall have the same meaning and scope*** as those laid down by the ECHR. However, the Union can provide more extensive protection.

The right to a fair trial, Article 6 ECHR, has its corresponding provision in Article 47 of the Charter, which ensures the right to an effective remedy and to a fair trial. In the light of the principle of identical interpretation, ***the behaviour of a national court which violates Article 6 ECHR when it applies Article 267 TFEU, probably also violates Article 47 of the Charter***. In this respect it is important to note that a violation of a provision in the Charter does not constitute a violation of a Treaty provision *per se*. It is rather the application of the provision in question which is conducted in an unlawful manner. A violation of the duty to reason a decision not to refer under Article 47 of the Charter is therefore not a violation of Article 267 TFEU, even if the latter of course has been applied in an unlawful way. It is this kind of situation – amongst others, linked to the application of secondary legislation such as regulations – which speaks for a wide interpretation of the notion «implementing» in Article 51(1) of the Charter.

In this light it could be argued that when a national court does not reason a refusal to refer a case to the ECJ – or applies criteria which are not part of EU law – ***this might also be a violation of EU law***. In the present judgment the ECtHR reminds that if a case is not referred to the ECJ, this might have an impact on the fairness of the procedure. In order to ensure a fair trial, it is therefore necessary that the non-referring court motivates clearly why it considers that there is no need to refer the case to the ECJ. This is the only way in which arbitrary justice can be prevented and a fair trial ensured.

The practical consequences of this might be limited. However, it brings a ***new light to the Köbler case-law from the ECJ according to which the lack of a preliminary ruling from a supreme court might lead to state***

liability if the violation of Union law is manifest.[26] ***It also raises the question whether the lack of reasoning in itself can be a manifest violation of EU law***. It is presently unclear whether the case-law of the ECtHR can be invoked to show that there has been a manifest violation of a corresponding provision of the Charter.

For an applicant suffering from a violation there are now ***two possible ways to ask for a remedy***; state liability under EU law before the national courts or the traditional way through Strasbourg. In the first case, ***State liability***, the applicant who is denied leave of appeal on meagre grounds would seek damages from the EU Member State and invoke a manifest breach of a Union law obligation under the Charter. If this is possible – something that remains to be determined – it would mean that certain provisions of the ECHR indirectly might have received ***direct effect*** through the Charter if the violation has taken place in the application of Union law. If it is a violation under national law only, the Charter does not apply and this situation would therefore not arise. The other possibility is the ***traditional route through Strasbourg***. In a number of recent judgments the ECtHR has made clear that even when national courts apply Union law, they still have to respect the rights in the ECHR.[27] A party who claims a violation can therefore also seek damages before the court in Strasbourg, regardless of whether the national court in question applied national or Union law. While the ECtHR has longer procedures, a person might be more comfortable in getting an assessment by an external court and the ECHR, rather than a national court under the State liability regime.

(b) The Advisory Opinion Procedure before the EFTA Court

The present judgment might be of relevance to another legal order, the European Economic Area. The EEA has instituted a separate legal order since its conception in 1994 as a parallel to the EU. The role of the EFTA Court in the EEA system corresponds mainly to that of the ECJ in the EU.[28] However there are some minor differences that might be relevant for the assessment of the impact of this judgment in the EEA.

It could, at the very least, be argued that if ***the refusal to refer the case to the EFTA Court had an impact on the fairness of the procedure because the national court acted in an arbitrary way, there might be a violation of Article 6 ECHR***.

First of all, under Article 34 SCA, there is no obligation for the highest courts to refer a question to the EFTA Court. In addition, the Advisory Opinion procedure does not bring any direct binding effects on the contracting parties of the EEA. However, it is generally considered that it follows from the duty of cooperation in the EEA Agreement that a Contracting Party ***must follow a judgment*** from the EFTA Court, unless it wishes to face an infringement procedure from the EFTA Surveillance Authority. Contracting Parties generally comply with the rulings from the EFTA Court. Moreover, in some states, the decisions of the EFTA Court receive a special status. In Norway, the Supreme Court has acknowledged the importance of the judgments of the EFTA Court for the application of EEA law in Norway. According to established case-law from the Norwegian Supreme Court, the case-law of the EFTA Court must be given «pre-eminent weight» when Norwegian courts apply EEA law.[29]

It is important to note that there are ***some differences regarding the protection of fundamental rights in the EEA and the EU***. Whereas the EU has its Charter of fundamental rights, the EEA does not have an established rights document of similar nature. However, fundamental rights play an important role in the jurisprudence of the EFTA Court, which has established that the ECHR is an important source for determining the scope of fundamental rights in EEA law.[30] Moreover, the EFTA Court has ***recently referred to the Charter of Fundamental Rights of the EU***.[31] Through these references, fundamental rights protection gains certain weight in the EEA legal order. Under the principle of homogeneity it is difficult to see how the EEA could provide a lower level of protection for fundamental rights than the EU, especially since the EEA States are all Contracting Parties to the ECHR.

It is true that the non-binding character of the Advisory Opinion procedure means that there is a larger margin of appreciation for the national courts within the EEA. It is also true that the ***discretion of national courts is no longer absolute***. While it follows from the mandatory nature of the preliminary ruling procedure in EU law that the highest courts reason any refusal to refer a case to the ECJ, it is possible that a refusal by a national court in the EEA to refer a case to the EFTA Court or to reason a refusal to refer might constitute a similar fundamental rights violation.

(c) Conclusion

As one observer has noted, the ECtHR case-law shows ***increased substantive discretion granted to national courts and authorities if they have followed adequate procedures***. This domestic discretion flows from the proceduralization of the review of the ECtHR, which focuses on the procedure in those matters where the substance lies under the margin of manoeuvre or full competence of the Contracting Parties.[32] The same can be said about the present judgment. The ECtHR notes the different aspects of the preliminary ruling procedure under Union law, including the *Cilfit* criteria, and proceeds to a verification whether the application of these has been made in a non-arbitrary manner.

This way the ECHR ensures a transparent and non-arbitrary application of relevant Union law through procedural safe-guards which apply in the national courts. ***In cases where Union law is raised, any decision not to refer must state sufficient reasons so as not to be arbitrary***. If a case where Union law has been raised is brought before the Strasbourg court, the lack of a preliminary ruling (or an arbitrary refusal to refer) constitutes a violation of the procedural safeguards under the ECHR, something which might make it unnecessary for the ECtHR to make an assessment of the substantive rules in Union law.

From the procedural perspective the judgment revives the *Köbler* case-law. The question whether a decision which violates the ECHR is also a violation of the Charter and if this is to be seen as a manifest violation of Union law remains to be determined. There is no question that fundamental rights protection will be a dynamic field of Union law in the near future.

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1 Judgment, para. 52.

2 Judgment, para. 54.

3 Judgment, para. 54.

4 Judgment, para. 55.

5 ECJ [1982] ECR 3415 *Srl CILFIT and Lanificio di Gavardo SpA ⁄ Ministry of Health*.

6 Judgment, para. 56.

7 Judgment, para. 57. The ECtHR refers to ECtHR *Coëme et autres ⁄ Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96; ECtHR *Wynen ⁄ Belgium*, no. 32576/96; and ECtHR *Ernst and others ⁄ Belgium*, nos. 33400/96.

8 Judgment, para. 58.

9 Judgment, para. 59.

10 Application no. 31996/96.

11 Application no. 54193/07.

12 Application no. 20631/92.

13 Judgment, para. 59.

14 Judgment, para. 59.

15 Judgment, para. 60.

16 Judgment, para. 61.

17 Judgment, para. 62.

18 Judgment, paras. 63-67.

19 Judgment, paras. 71-78.

20 Judgment, paras. 79-80.

21 ECJ [2002] ECR I-4839 *Criminal proceedings against Kenny Roland Lyckeskog*.

22 Judgment, para. 62.

23 It can be noted that the so-called co-respondent mechanism in the draft EU-ECHR accession agreement (CDDH-UE [2011] 16) only covers cases concerning the validity of a Union legislative act in relation to the ECHR. If the ECtHR intended to cover also cases concerning the validity of EU law, this would have far-reaching consequences. It would render the co-respondent mechanism close to meaningless.

24 *Ulf Bernitz*, Preliminary References and Swedish Courts: What explains the Continuing Restrictive Attitude?, in: Constitutionalising the EU Judicial System – Essays in Honour of Pernilla Lindh (forthcoming); *Martin Johansson/Sara Ahmed*, De högsta domstolsinstansernas motiveringsskyldighet vid beslut att inhämta förhandsavgörande från EU-domstolen – en papperstiger, Europarättslig Tidskrift [2009] 769.

25 ECJ of 21 December 2011, Joined cases C-411/10 and C-493/10 *N. S. ⁄ Secretary of State for the Home Department and Others*; and ECJ, Reference of 27 December 2010, C-617/10 *Åklagaren ⁄ Hans Åkerberg Fransson*.

26 ECJ [2003] ECR I-10239 *Gerhard Köbler ⁄ Republik Österreich*.

27 ECtHR *M.S.S. ⁄ Belgium and Greece*, no. 3096/09; ECtHR *Agrati and others ⁄ Italy*, nos. 43549/08, 6107/09 and 5087/09; ECtHR *Sneersone and Kampanella ⁄ Italy*, no. 14737/09; and ECtHR *Menarini Diagnostics S.R.L. ⁄ Italy*, no. 43509/08. All judgments rendered between January and September 2011.

28 *Carl Baudenbacher*, The EFTA Court in Action, German Law Publishers, 2010, p. 49 ff.

29 *H. H. Fredriksen*, One Market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area, Nordic Journal of International Law [2010] 481, 488. The first case was the *Finanger I* judgment from the *Höyesteret*, Rt. 2000, 1811 (1820).

30 EFTA Court [2003] EFTA Court Report *Ákæruvaldið (The Public Prosecutor) ⁄ Ásgeir Logi Ásgeirsson and Others*, 185.

31 EFTA Court of 26 July 2011, E-4/11 *Arnulf Clauder*.

32 *Jonas Christoffersen*, Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights, Martinus Nijhoff Publishers, 2009, p. 501.

II.

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The Concept of State Aid in National Tax Regimes: The Court of Justice Upholds GC's Ruling on France Telecom's Illegal State Aid

(France Télécom SA ⁄. European Commission, Court of Justice (Third Chamber), Judgment of 8 December 2011, C-81/10 P)

The Court's recent ruling confirmed that the special tax regime applied to the fourth largest telecoms operator in Europe, France Télécom, constituted unlawful state aid and had to be recovered. This ruling is another important step on the road to countering unfair competition within the European Union. By confirming a wide concept of advantage, its effects-based approach as well as a broad notion of the principle of limitation, the Court guarantees the powers to strictly supervise State aid. In addition, the Court also confirmed a narrow interpretation of the principle of legitimate expectations as an incentive to strengthen the State's notification obligation.

(1) Facts and Procedure

In 1991, the French Republic introduced by law a system of taxes applicable to France Télécom (hereinafter FT) which was never notified to the Commission under the State aid rules.

After undertaking an investigation, the Commission concluded that the fourth largest telecoms operator in Europe had been exempted from business tax for about eleven years, which the Commission found to include two distinct periods.

The ***first period*** (so-called «transitional regime»), which was applied from 1991 to 1993, provided for an exemption from the general tax regime, *inter alia* from business tax. In exchange for such exemption, FT was subject to a fixed levy established annually by law and which was limited to a maximum amount. During the second period (the «definitive regime»), applied from 1994 to 2002, FT was subject to the general tax system but exempted from direct local taxes such as business tax. By decision of 2 August 2004, the Commission found that only the latter period constituted illegal State aid, a conclusion which was also upheld by the General Court (GC).[1]

In this ***second period***, FT was subject to a particular framework as to the calculation and application of taxes. First, taxes for other undertakings were charged and voted by each of the municipalities in which they pursued activities, whereas FT was only subject to tax in its principal place of business. Second, the method of calculation was different in that FT's tax was based on a national weighted average rate, whereas other undertakings' taxes were based on a rate annually defined by each of the municipalities. Third, regarding management costs,[2] FT also benefited from a more favorable rate as it was subject to a 1.9% instead of the usual 8% rate. The Commission found that this period of under-taxation constituted a selective measure granting an advantage to FT. The advantage granted was considered to be the differential between the tax which FT should have paid under the general law and the amount of business tax effectively paid under the special regime. Consequently, the Commission ordered its recovery.

On appeal, the GC upheld the Commission's decision in its entirety. FT further appealed the GC's judgment to the Court of Justice.

By its first plea, FT contested the ***classification as State aid*** of the measure allegedly granting it an advantage by arguing that such advantage did not depend on the specific features of the tax regime but rather on external factors, such as the different rates of business tax defined annually by the different municipalities.

With its second plea, FT claimed that the Commission and the GC had failed to undertake a ***comprehensive examination*** of all the provisions which created derogations from the general law, namely the regime applied from 1991 (the first period). Consequently, it claimed the GC had failed to take into account the over-taxation to which FT had been subject during the first period and which would allegedly compensate the under-taxation of the second period.

FT further claimed that it was entitled to deem the aid lawful, namely due to the ***particular circumstances*** of the tax system which only enabled identification of an advantage *a posteriori*. In addition, it alleged that the *La Poste* Commission decision[3] constituted enough grounds to expect the special tax regime at stake to be legitimate.

By its fourth plea, FT claimed that, in any case, the amount could not be recovered because the ***limitation period*** had expired given that the tax regime at issue had been introduced more than 10 years ago.[4]

Finally, by its fifth plea, FT alleged the violation of the principle of ***legal certainty***. It relied on the fact that the Commission had not quantified the amount of aid, which would remain hypothetical and therefore impossible to establish.

(2) **Judgment**

By judgment of 8 December 2011, the Court dismissed all the above mentioned pleas and fully confirmed the GC's judgment.

(a) Concept of Advantage

After recalling the broad and objective ***concept of State aid*** that goes beyond the concept of positive measures such as a mere subsidy,[5] the Court further reinforced the effect based approach to classify a measure as aid, regardless of the nature of the objectives or justifications of the authorities granting it. Consequently, it concluded that the second period under consideration, namely during the years from 1994 to 2002, constituted an exception to the general law regime.[6] In addition, and following AG *Jääskinen's* opinion,[7] the Court quickly came to the conclusion that the advantage granted was ***composed both of a variable and a fixed element***. The fixed element was considered to be the benefit deriving from being subject to a special tax regime as opposed to the general tax regime applied to other undertakings. The variable element was the difference between the fixed tax paid by FT and the tax paid by other undertakings, which was voted and set each year by the different municipalities. Since the latter tax was established annually, the Court noted that the amount of aid would not only be dependent on external factors but it would also vary each year.[8] According to the Court, however, this variable component did not prevent the measure from being categorized as an ***advantage deriving directly from*** the particular characteristics of ***the special tax regime***. Finally, the Court upheld the GC's conclusion that FT had been granted an advantage regarding management costs, where it benefited from a rate of 1.9% as opposed to the normal rate of 8%.

(b) Assessment of the Overall Regime

By examining the second plea based on the ***alleged failure to carry out a comprehensive examination of the entire regime***, through which the appellant argued that the ***overall taxation*** during the first period would offset the advantage granted by the second period, the Court upheld the GC's conclusion that the two regimes were not related. In particular, the Court noted that the two regimes were based on different legal models and parameters. The fixed levy was determined by «different parameters from those applied with effect from 1994».[9] The special tax regime was found rather to be a derogation to the general tax law. As the GC had concluded, the Commission's obligation to take into account all the effects of the measure on the beneficiary does not mean it should take into account the effects of another unrelated measure. Finally, the Court noted that this conclusion was not precluded by the fact that both regimes had been created by the same law.[10]

(c) The Principle of Legitimate Expectations

With regard to the third plea, the Court quickly came to the conclusion that the principle of legitimate expectations was not applicable in the present case. The Court first based its observations on the principle of the ***mandatory nature of the review of State aid***, which, *in casus*, had not been notified. Classifying the obligation to notify as «one of the fundamental features of the system of control put in place by the Treaty in the field of State aid»,[11] the Court noted that «neither the purported complexity of the tax regime at issue nor the periodic nature of the aid measure can release the Member State from its obligation to notify or give rise to any legitimate expectations on the part of the company receiving aid».[12] With that background in mind, the Court restated that undertakings are not entitled to have a legitimate expectation regarding the lawfulness of the aid unless the latter has been notified, or if they prove exceptional circumstances. In this context, it clearly dismissed the appellant's argument that the particular characteristics of the measure, where the existence of ***advantage could only be determined*** **a posteriori**, would constitute exceptional circumstances.[13] In addition, in the present case, it confirmed the GC's finding that there was nothing of relevance in the *La Poste* decision which could have led to the legitimate assumption that the tax regime applied to FT would be lawful.[14]

(d) Limitation Period

As to the fourth plea, the Court dismissed the allegation that the limitation period had expired. It restated that the correct interpretation of Article 15(2) of Regulation 659/1999 implied that the ***limitation period starts when the aid*** is in fact granted, that is, when it ***is received by the***

beneficiary, as opposed to when the aid scheme was adopted.[15] In the present case, given that the establishment of the existence of aid depended on the different rates applicable in each municipality annually, the Court upheld the establishment of the ***existence of the aid on an annual basis***.[16] Interestingly, the Court further concluded that the GC had not failed to take into account the obligation to state reasons regarding the principle of limitation. Indeed, it clearly stated that the court is not required to point out all the reasoning of the parties. It is sufficient to reason in an implicit way, provided that such reasoning grants the review court sufficient material for it to exercise its powers.[17]

(e) Principle of Legal Certainty
Finally, as to the principle of legal certainty, the Court relied on previous case-law[18] to confirm that the ***Commission is not required to determine the exact amount of the aid to be recovered***. In the present case, the Court considered that the GC was right in finding that the Commission's fixing of an indicative minimum and maximum range was clear and precise enough for the French authorities to be able to fix the exact amount without «too much difficulty».[19]

(3) **Comment**
(a) The Classification of the Second Period as State Aid: The Concept of Advantage
It seems obvious that the second period, during which FT was subject to a special regime where it was under-taxed, amounts to State aid. The Court applied the existing case-law on the issue. The regime had singled out FT, providing it with a clear-cut exception to the general tax regime applied to all other undertakings in a comparable legal and factual situation.

The Court rightly dismissed the appellant's argument that the exception would be justified by the ***internal logic of the tax system*** and by its aims. The clear rejection of FT's proposal to interpret the measure in the light of the recent liberalization period and to take into account that its objective was «merely» preventing these resources from being transferred from the State to local authorities, should be supported wholeheartedly. For those who claimed that the ***effects-based approach*** had been slightly set aside by the *Gibraltar* judgment,[20] the present case further confirms the way forward. First, it is noteworthy that, in the author's view, the case-law never departed from its effects-based approach. Even if it recognized that the regime in Gibraltar was specially designed to benefit a certain category of companies, the Court defined the existence of aid because the tax measures would have the effect of lightening such offshore companies' burden as against companies in a comparable legal and factual situation. Second, regardless of the interpretation given to *Gibraltar*, the present case affirms the objectiveness of the concept of advantage by clearly restating that ***the nature of the aims pursued by the State, or its motives, are completely irrelevant*** to the classification of the measure as aid.[21]

Indeed, in the present case, FT's liability to tax was, *de facto*, lower. In this respect, the Court further showed a strong approach by finding that an ***advantage can be granted regardless of the particular characteristics of the tax regime***, which is definitely noteworthy upholding. It correctly rejected the appellant's arguments that the concept of advantage could not apply to such a complex system, which depended on external factors and which, at the time of its adoption, did not allow to determine whether FT would benefit from an advantage. Indeed, since the municipalities voted the business tax rate annually, not only did the ***advantage depend on external factors***, but it was also only after such a vote that one could determine whether such tax rate would be lower than the tax applied to FT. However, the Court understandably clarified that the precise amount of the aid, its annual variability as well as the fact that it can only be determined *a posteriori*, is irrelevant to qualifying the measure as granting an advantage. In addition, by stating that an advantage may derive directly from the special tax regime although it is determined by variable and external factors, the Court further confirmed the wide concept of advantage.

(b) The Non-Classification of the First Period as State Aid
A potentially interesting analysis relates to the reasoning behind the Commission's conclusion that the first period, where FT was only subject to duties and taxes as actually borne by the State and therefore also exempted from business tax, did not amount to State aid. It is clear that in the present case this reasoning is not applicable on the facts given that there was no advantage. Indeed, there was no mitigation of charges, since the fixed levy imposed on FT the obligation to pay a significant amount of money to the French State, much higher than the business tax that it would have paid.

Nevertheless, for the future, it might be interesting to consider whether the Commission's argument that ***the fixed levy had «replaced» business***

tax would be applied taking into account the specificities of such a levy. Indeed, the levy was composed of two different contributions, namely taxes and the participation risk of the State. However, it seems a bit dubious how the part of the contribution corresponding to the ***participation risk*** of the State, which ***relates to the State's position as stakeholder*** and can therefore hardly be considered equivalent to tax, could «replace» business tax. The question remains open whether, in a future case where a fixed levy would grant under-taxation, and therefore a potential advantage, the Commission will adopt the same approach and include the participation risk as part of an amount capable of compensating business tax.

(c) The Leaving Out of Account of the First Period which Would Offset the Under-Taxation during the Second Period

Regarding this plea, the Court showed a traditional approach and based its conclusion on the finding that the ***two periods were not related***, and therefore the period of over-taxation was irrelevant in the determination of an advantage during the second period. The Court sensibly confirmed that the objective characteristics of the fixed levy and the different parameters of the two regimes led to them being distinct and unrelated. Indeed, the differences seem clear. As mentioned above, during the first period, the levy was determined with reference to the earnings paid to the state by the entity from 1989 to 1990. On the other hand, during the second period FT was actually required to pay all taxes despite them being calculated differently.

To such reasoning one may add a further argument which might have been at the heart of the Commission's decision. Based on the characteristics mentioned above, it is clear that it would also be practically impossible to compare the two regimes. Indeed, given that the regimes entailed different methods of calculation of the potential advantage, it would not be possible to undertake and convincingly uphold an analysis to determine whether the latter would be offset by the first.

Overall, it is true that one cannot ignore that the ***need to take into account the overall system*** is particularly important in cases of liberalization. However, it is clear that such an overall analysis would only cover the first period if the Commission had classified it as State aid *ab initio*. Since it only defined the second regime as State aid, the obligation to undertake an overall assessment is limited to such period. That is, and by means of example, only if in one (or more) of the years covered by the second period, FT would have paid more than it would have under the general business tax regime, would that over-taxation be weighted against the other years of under-taxation to come to the conclusion whether one would offset the other.

(d) The Remaining Pleas

Also noteworthy is the Court's answer to the application of the principle of legitimate expectations. The Court confirmed a considerable ***narrow interpretation of exceptional circumstances***, which certainly are not met for the mere fact that a tax regime is complex. This is yet another step towards limiting the application of the principle of legitimate expectations when the measure had not been notified, which undoubtedly concomitantly sends a message of ***strengthening the obligation of notification***.

Regarding the limitation period, the desire to ensure the possibility of reviewing complex tax systems, applied over a long period of time, is understandable. Confirming that the limitation period starts to run on the date the aid is effectively granted to the beneficiary is the appropriate answer to deal with complex regimes where the date between the approval of the aid by legislation and the effective granting of aid can be very wide apart. In addition, finding that where the aid and its amount are determined each year ***the limitation period resets each time*** is no more than a practical and coherent approach.

Finally, the Court has once again confirmed the possibility of recovering aid of an indefinite amount without violating the principle of legal certainty. In this case it seems rather clear that a decision which establishes the ***minimum and maximum amounts to be recovered gives enough guidance*** for national authorities. Indeed, in this author's opinion, demanding more than guidance would impose too high of a burden upon the Commission, especially taking into account that the relevant data to specifically determine the amount is held by the State's authorities. This approach was also proposed by the AG, who interestingly also underlined that, even if the guidance given by the Commission was enough to determine the amount of aid to be recovered, this was ***unrelated to FT's possibility of contesting the amount and even its payment*** before the French Authorities. It seems an understandable approach not to

impose over burdensome tasks on the Commission and protect its investigative powers, while giving the responsibility of dealing with subsequent steps to the State which implemented the aid regime.

In conclusion, even if national tax regimes are a sensitive issue, it is clear that the case law has not been reluctant in classifying tax advantages as State aid and demanding its recovery. In this case, the Court took once again a robust approach to advantages granted through tax regimes, even in the context of liberalization. It is, undoubtedly, another step on the road to countering unfair competition within the European Union.

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[1] Decision of 2 August 2004, 2005/709/EC. GC judgment of 30 November 2009, T-427/04 and T-17/05 *France ⁄ Commission*.

[2] The additional sum levied by the State to offset expenses incurred by tax authorities.

[3] NN 135/92 OJ 1995 C 262, p.11.

[4] Article 15(1) of Regulation No. 659/1999.

[5] Judgment at para. 16. See also ECJ of 15 December 2005, C-66/02 *Italy ⁄ Commission*, para. 77; and ECJ of 8 September 2011, C-78/08 to C-80/08 *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate ⁄ Paint Graphos and Others*, para. 45.

[6] Judgment, para. 18.

[7] Opinion of Advocate General *Jääskinen*, delivered on 8 September 2011.

[8] Judgment, paras. 21 and 23.

[9] Judgment, para. 45.

[10] Judgment, para. 48.

[11] Judgment, para. 58.

[12] Judgment, para. 62.

[13] Judgment, para. 64.

[14] Judgment, para. 73.

[15] Judgment, paras. 80 and 81.

[16] Judgment, paras. 85, 86.

[17] Judgment, para. 88. See also ECJ of 21 September 2006, C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Electrotechnisch Gebied ⁄ Commission*, para. 72.

[18] See ECJ of 12 October 2000, C-480/98 *Spain ⁄ Commission*, para. 25; and ECJ of 12 May 2005, C-415/03 *Commission ⁄ Greece*, para. 39.

[19] Judgment, para. 103.

[20] ECJ of 15 November 2011, C-106/09 P and C-107/09 P *Commission and Spain ⁄ Government of Gibraltar and United Kingdom*.

[21] Judgment, para. 117.

III.

Bruno Mestre, Porto/Florence*

Comparators and Indirect Discrimination: An Illustration of the Difficulties

(Waltraud Brachner ⁄ Pensionsversicherungsanstalt, ECJ (Fourth Chamber), Judgment of 20 October 2011, C-123/10)

The judgment deals with indirect discrimination of women on matters of social security. The main contribution of the ruling consists in the methodology applied to determine the appropriate comparator used to expose the impact of a particular impact of a measure on a distinct group. Furthermore, this ruling also provided the ECJ with the opportunity to restate and clarify its previous case-law on the material scope of Directive 79/7/EEC and the possible justifications for indirect discrimination.

(1) Facts and Procedure

This case concerns indirect ***discrimination on grounds of sex in matters of social security***. It arose when a woman contested the application of a certain adjustment factor to her pension – destined to offset inflation – and demanded the increase established for pensions of a higher amount. She claimed that the adjustment factor determined for her pension indirectly discriminated against women.

The Austrian social security system provides that pensions are to be increased each year through the application of a certain ***adjustment factor*** destined to offset the increase in consumer prices (section 108(5) ASVG). The factor for 2008 was set at 1.017. However, in 2007, the Austrian State provided for an ***exceptional increase in pensions in 2008***, after a legislative change to implement an agreement with the organisations representing the relevant stakeholders of the system (section 634(10) ASVG). This agreement provided that pensions between € 746.99 and € 1050 would be increased by a lump-sum of € 21. In addition, Austrian legislation provided that if the value of one's pension was so low that it was ***below the subsistence level***, that

person would be entitled to a ***compensatory supplement***. However, the income of the spouse living with the pensioner would be taken into consideration in order to determine whether the pensioner would be entitled to the compensatory supplement (section 293 ASVG). Following the legislative change of 2007, an ***exceptional increase*** was made to the compensatory supplement of € 21 for pensioners living alone and of € 28.86 for pensioners living with spouses in a common household.

Mrs Brachner lived with her husband in Austria. She received an ***old-age pension*** which amounted, in 2007, to € 386.16 per month. She was not entitled to receive the compensatory supplement because her spouse received a monthly pension of € 1340.33 which, when added to her income, ***exceeded*** the amount provided for by the standard rate for that supplement. The Austrian Pension Authority (*Pensionsversicherungsanstalt*) applied the adjustment factor of 1.017 to Mrs Brachner's pension for 2008, resulting in an increase of € 6.26 in her monthly pension. Mrs Brachner initiated legal proceedings demanding an increase in her pension of € 21, in line with the increase set for pensions between € 746.99 and € 1050. In support of her action, she claimed, *inter alia*, that the adjustment factor set by the Austrian legislature for 2008 for her pension amounted to ***unlawful indirect discrimination against women***, contrary to Article 4 of Directive 79/7/EEC («the Directive»). The Austrian Constitutional Court considered that the legal provisions were compatible with the Austrian Constitution. However, it had ***severe doubts as to the compatibility*** of Austrian law with the Directive, observing that the percentage of women disadvantaged by the adjustment was approximately 2.3 times higher than the percentage of men.[1] However, the Supreme Court also noted that the unequal treatment could ***potentially be objectively justified*** for a number of reasons. Firstly, because women contributed for a shorter period than men as they retired sooner; secondly, because women received pensions for a longer period than men as they typically live longer; and thirdly because the increase in the compensatory supplement standard rate was increased by € 21 for pensioners living alone and € 29 for pensioners living with another.

In its referral to the Court of Justice, the Supreme Court made some additional comments as to the potential justifications of the unequal treatment. It began by taking the view that the justification related to the shorter period of contributions by women should be rejected because the annual adjustment sought to maintain the purchasing power of pension holders had no relationship whatsoever to the period of contributions. The Supreme Court observed that ***EU case-law opposed the justification of the differential*** treatment in question on the basis of womens' longer life expectancy. However, the referring court noted that a significantly larger number of women than men did not receive any compensatory supplement and – therefore – could not benefit from any increase in the standard rate applicable to that supplement. The court accepted that this could be due to the fact that the ***income of the spouse was taken into consideration*** when determining the entitlement to the supplementary amount; however the legitimacy of this consideration could be questioned as the ***purpose*** of the adjustment (to maintain purchasing power) is ***entirely different*** from the compensatory supplement (to ensure a minimum level of subsistence). This led the referring court to doubt whether the increase in the compensatory supplement standard rate could justify a lower increase in the adjustment factor. Furthermore, if the Austrian State could reasonably take into account the income of the spouse when assessing the entitlement to the compensatory supplement, which was to the disadvantage of a significantly larger number of women than men, whereas holders of higher pensions received higher increases without any regard to the income of their spouses.

This led the Austrian Supreme Court to ***refer three questions*** to the ECJ. It asked, firstly, whether the annual pension adjustment scheme came within the ***prohibition of discrimination*** provided for in Article 4 of Directive 79/7/EEC; secondly, whether Article 4 of the Directive ***precluded a national provision*** concerning an annual pension adjustment scheme which ***adversely affected 25% of male pensioners and 57% of female pensioners*** by providing a potentially smaller increase for a particular category of pensioners; and thirdly, whether the ***disadvantage of female pensioners could be justified*** by (1) the earlier age at which they become entitled to a pension; (2) the longer period during which they receive an pension and (3) by the fact that the standard rate for the compensatory supplement was disproportionately increased, as the compensatory supplement required account to be taken of the spouse's income living in the same household while for other pensioners the increase occurred without any regard to the pensioner's or spouse's income.

(2) **Judgment**

Concerning the first question referred, the ECJ considered that the annual pension adjustment scheme came within the ***scope of Directive 79/7/EEC*** and was subject to the ***prohibition against discrimination*** laid down in Article 4(1) of the Directive. However, this depended on an elaborate reasoning because the ***ECJ had to draw the (thin) line*** between the benefits related to the risks covered by the Directive and other benefits not covered by the Directive even if indirectly related to the risks protected. The ECJ considered that the pension paid to Mrs Brachner and the annual adjustment ***fell within the scope of Article 3 of the Directive*** because it was a benefit granted by a statutory scheme directly linked to old age. The ECJ proceeded to observe that this type of benefit (the adjustment) was not the same as ***other benefits*** which had no relationship whatsoever with old age or any of the grounds provided for in Article 3(1) and – consequently – fell ***outside the scope*** of the prohibition of discrimination entailed in Article 4 of the Directive. These latter benefits are fundamentally related to the sufficiency of means to meet one's needs and consequently fall outside the scope the Directive even though they are indirectly related to the risks provided for by Article 3. The ECJ decided that the ***annual adjustment*** should be qualified as one of the ***benefits covered by the Directive*** and, therefore, was subject to the prohibition of discrimination set out in the Directive.

Although the ECJ decided that the referring court should give the definitive answer to the ***second question***, it stated that, in accordance with the statistical data produced by the referring court and in the absence of evidence to the contrary, it would accept that ***Article 4 of the Directive could preclude a national arrangement*** which could lead to the exclusion of a significantly higher number of female than male pensioners from an exceptional pension increase. The ECJ began by framing the question within the prohibition of indirect discrimination as the national arrangement applied without distinction to men and women. It noted that people such as Mrs Brachner had suffered a disadvantage as they were excluded from the exceptional increase granted to those in receipt of higher pensions and because they are entitled only to a smaller increase. The ***ECJ then used the statistical data produced by the referring court*** to conclude that (1) 75% of male pensioners were liable to benefit from the exceptional increase in pensions whereas that was the case for only 43% of female pensioners, (2) 57% of female pensioners were in receipt of a minimum pension, in contrast to only 25% of male pensioners and (3) 82% of women in receipt of a minimum pension do not receive a supplement by reason of the aggregation of income whereas that is the case for only 58% of men. This led the ECJ to conclude that the ***disparity between men and women affected*** by the measure was such to underpin the conclusion that the ***national arrangement could be indirectly discriminatory*** although it left the final responsibility for that decision to the referring court.

Turning to the ***third question*** referred, the ECJ rejected the suggested justifications given by the referring court. The ECJ restated its previous case-law as to the possible justifications of indirect discrimination and ***analysed each justification*** presented. The ECJ considered that ***women could not be excluded from the adjustment scheme*** because they were ***entitled to a pension at an earlier age*** or because the adjustment was ***not a benefit granted in consideration of the contributions paid***. Similarly, the ECJ considered that women could not be excluded from the scheme based on their ***longer life-expectancy*** because the adjustment scheme sought to maintain the purchasing power of pensions. This objective was unrelated to the one on which the ground of justification referred to is based, which aims at maintaining a balance between the contributions paid and the benefits received. Finally, the ECJ also denied that the ***exceptional increase*** determined for the compensatory supplement – destined to complement minimum pensions – could justify a smaller increase in the amount of minimum pensions. Since the entitlement to the compensatory supplement was subject to the condition of aggregation of incomes, it was denied to approximately 82% of female pensioners, in contrast to only 58% of male pensioners. This meant that a very large majority of women in receipt of a minimum pension would receive neither the exceptional increase in pensions nor the increase in the compensatory supplement because of the aggregation of incomes with their spouse. This led the ECJ to conclude that, if the referring court considered that the statistical evidence produced could underpin the allegation of indirect discrimination against women, it ***should also deny validity to these justifications*** to indirectly discriminatory treatment.

(3) **Comment**

This ruling belongs to a line of cases in which the ECJ had to make very difficult decisions regarding the compatibility of national social security provisions with Directive 79/7/EEC. As a preliminary comment, it should be noted that ***indirect discrimination poses a considerable challenge*** to any court because indirect discrimination analyses the objective impact of certain indistinctly applicable rules or measures in certain groups vis-à-vis the dominant group. This places the court in a position ***more akin to a lawmaker*** in the sense that it will have to analyse if and to what extent a certain group is particularly affected by an apparently neutral measure and if their detriment may be justified by broader policy considerations. This task becomes particularly difficult in social security issues: firstly, because national systems of social protection are constantly under the strains of financial imbalances and – therefore – courts and political decision-makers need to be wary of any decision in these issues, and secondly, because Directive 79/7 provides for the progressive (as opposed to immediate) implementation of the principle of equal treatment, permitting in Article 7 a considerable number of exceptions to this principle. The ECJ's judgment at hand is a ***very courageous ruling*** mainly because of the ***sophisticated selection of a comparator*** in indirect discrimination, which obliged it to make a number of sub-divisions of the relevant pool in order to illustrate the particular impact of the measure on a certain group. In addition, the ECJ had the opportunity to restate the material scope of the Directive and the justifications under it.

(a) Integrating the Benefit in Directive 79/7/EEC

The ECJ began by determining if the ***benefit at stake*** (the pension adjustment scheme) fell within the ***scope of protection of the Directive***. This question is more complex than it seems because the Court fundamentally had to determine whether the protection afforded against old age also extended to the adjustment of pensions. It must be noted that the ECJ has previously determined the ***material scope of the Directive*** by distinguishing between the benefits connected to the materialisation of a certain risk provided for in the Directive and the benefits eventually granted in the context of that risk although meant to protect against other circumstances. The ECJ made this particularly evident in *Smithson*,[2] where it considered that a housing benefit paid to people whose real income (composed of invalidity or old age benefits) was lower than a notional income, did not fall within the scope of the Directive. This finding was based on the purpose of the measure which was to ensure a minimum level of subsistence and not to compensate for a risk provided for in the Directive. In other words, the benefit fell outside the scope of the Directive because the protected risk was poverty as such, and not old age or invalidity even if poverty could occur during old age or invalidity, despite the reception of benefits. This reasoning was subsequently developed in *Jackson and Creswell*,[3] in which the ECJ decided that the Directive did not apply to a supplementary allowance or income support paid to those whose means were insufficient to meet their financial needs as defined by statute because these benefits were paid in consideration for risks not covered by the Directive (i.e. poverty). Further, in *Hover and Zachow*,[4] the ECJ held that child-raising allowances paid to unemployed or those employed part-time employed were also not risks covered by the Directive.

In contrast, the ECJ appears to have been ***more socially sensitive in other cases*** and provided the Directive with a wider interpretation. In *Drake*,[5] the ECJ considered that the protection against invalidity extended to a benefit paid to a third person who had given up work to care for her invalid mother because she was a member of the working population whose work had been interrupted by her mother's invalidity. In *Richardson*,[6] the Court held that the exemption from prescriptions charges to several categories of persons – including old age pensioners – was included in the risks covered by the Directive because they were paid when people became sick. Similarly, in *Taylor*,[7] the ECJ considered that winter fuel payments were integrated in the protection against old age on the basis that the benefit at stake was granted to all those who had reached pensionable age, independently of any financial or material difficulties. The Court's ***distinction*** between the latter cases (*Richardson* and *Taylor*) presented and the former ones appears to be made in consideration of what the benefit is paid for: if the benefit (even in kind) is paid directly ***in consideration of any of the risks covered by Article 3 of the Directive***, even if in conjunction with other payments, then it will be covered by the Directive. However, if the benefit is destined to compensate for ***any other risk*** (such as poverty per se or child-raising), even in the factual context of a risk covered by the Directive (e.g: risk of poverty during the receipt of unemployment benefits), then it will fall outside of

the scope of the protection against discrimination.

Having this in mind, the question referred to the ECJ becomes easier to understand: is the pension adjustment scheme a benefit paid in consideration for old age or for another risk not covered by the Directive (e.g. poverty arising from the deterioration of the purchasing power of pensions)? The response to this question though is more complex than it seems in the light of the case-law illustrated above.

The ***ECJ followed Advocate General Trstenjak's Opinion***[8] that it would be extremely limited to apply the prohibition against discrimination only to the initial calculation of a certain benefit, and thus curtailing the Directive's objective. This appears to be a teleological argument destined to limit the potential impact of the interpretation of the Directive as was given in *Smithson* and *Jackson and Creswell*. The Directive appears to demand a ***strong link*** between the risk and the benefit paid. It is only by means of extremely artificial and formalistic reasoning that one may claim that the protection against old age by a pension does not encapsulate the adjustment of the pension to inflation. The ***protection against old age naturally includes adjusting pension levels to inflation*** because that is simply the normal outcome of such a statutory scheme of protection. Nevertheless, this raises some ***doubts concerning the incorporation of the compensatory supplement*** in the material scope of the Directive. It suffices to say at this point that the integration of the increase in the compensatory supplement in the material scope of the protection against old age is not unquestionable. Nevertheless, the Republic of Ireland adroitly raised this point during the hearing because that seems to have been the natural outcome of *Smithson* and *Richardson*. The ECJ appears to have provided additional clarification in this ruling as to the natural scope of protection of the norm.[9]

(b) Establishing Discrimination: The (Arbitrary) Choice of a Comparator

The ECJ then proceeded to determine whether the national measure indirectly discriminated against women. This is perhaps the ***most interesting part of the ruling*** because it was for the first time that the ECJ ***clarified the methodology*** used to determine the existence of indirect discrimination. In other rulings, the ECJ never reproduced the data presented by the Member States and simply relied on the finding that «a considerably smaller proportion of women than of men»[10] were affected by the contested measures – and similar expressions – to conclude that the measures were indirectly discriminatory.

The choice of an ***adequate comparator*** in indirect discrimination cases may prove to be a daunting task because the fundamental problem relates to the representation of the relevant group within a larger pool. This raises the question of determining the relative proportion of the group who is able to comply with the disputed measure vis-à-vis those who are unable to comply, which implies two distinct comparisons, between the qualifiers (those who are to comply with the disputed measure) and non-qualifiers (those who are unable to do so).[11] In addition, one also has to determine in whom to place the focus in order to establish detrimental effect: in the compliers or in the non-compliers? These difficulties are exemplarily illustrated in paragraphs 58-68 of the ruling.

The ***ECJ separately analysed the impact of the two contested measures*** (the exceptional increase and the increase in the compensatory supplement). Concerning the ***exceptional increase***, the comparison was made between the relative percentage of women and men in receipt of minimum pensions in proportion to their gender and the entitlement to benefit from the exceptional increase. This led the court to conclude that the national measure was indirectly discriminatory against women because 75% of all male pensioners could benefit from the exceptional increase in pensions because they were not in receipt of a minimum pension whereas that was the case for only 43% of all female pensioners. As regards the conditions set for the receipt of the ***increase in the compensatory supplement***, the Court concluded that 82% of women in receipt of a minimum pension did not receive a compensatory supplement (and consequently could not benefit from the increase) due to the rules on the aggregation of incomes, in contrast to only 58% of men.

This methodology illustrates the ***difficulties*** described above. Firstly, regarding the ***choice of the comparator***, it is worthwhile mentioning that the comparison was not made between the ***relative proportions*** of women and men in receipt of minimum pensions in relation to the whole pool of pensioners but separately in relation to the pool of female/male pensioners. This division might have had an illustrative purpose because it appears to have better demonstrated the particular impact of the measure in each

group. If the ECJ had compared the relative proportions of women and men in receipt of a minimum pension in relation to the whole pool of pensioners (roughly 31% of women and 11% of men[12]), one could also have reached similar results. However, this does not appear to be so illustrative of the particular impact of the measure on women because it does not highlight that more than half of women were in receipt of minimum pensions and – therefore – excluded from exceptional increases, while this was the case for only 25% of men. In other words, although the number of women in receipt of minimum pensions and therefore unable to benefit from the exceptional increase was 31% of all pensioners, and three times higher than male pensioners, the impact of the measure is nonetheless more profound because these 30% amount to 57% of all female pensioners, whereas the 11% of male pensioners receiving minimum pensions amount to only 25% of all male pensioners. This elucidates the particular focus used in the rest of the ruling.

Secondly, the ECJ used both, the ***focus on the disadvantaged and on the advantaged group***, in order to demonstrate the impact of the measure. As regards the ***exceptional increase***, the ECJ placed the focus on the ***advantaged group*** (i.e: those who could comply) in order to show that a far greater proportion of men than women could receive the exceptional increase. Considering that the exceptional increase was granted to pensions above a certain minimum, 75% of male pensioners could receive it because only 25% received a minimum pension. By contrast, if the focus had been placed on those who were ***excluded from the exceptional increase***, one could have reached the same conclusion: 57% of women were excluded from the benefit, in contrast to 25% of men. However, this would not have indicated the particular advantage that the measure brought to men (75% of male pensioners benefited from the exceptional increase, in contrast to 43% of women).

However, as regards the ***increase in the compensatory supplement***, the focus was placed on the ***disadvantaged group***. The Court compared the number of pensioners in receipt of a compensatory supplement in proportion to the number of pensioners of either sex receiving a minimum pension. The Court concluded that 82% of female pensioners were excluded due to the rule on the aggregation of incomes in contrast to 58% of male pensioners. If the focus had been put on those in receipt of the compensatory supplement, the relative proportions would have been 18% of women and 42% of men. While such a calculation reveals that men were particularly advantaged, it doesn't expose the particular impact of the exclusion.[13] However, if a comparison had been made between the ***total number*** of female/male pensioners, one would note that 10% of women and 11% of men receive the compensatory supplements, which would fail to highlight the particular impact of the measure on women as it would not point out the relative proportion of women who receive the minimum pension (57% of all female pensioners).

Once again, this illustrates that the ***choice of the comparator influences the perception*** of the disparate impact of the measure on certain groups. The ECJ appears to have compared the ***number of pensioners affected in proportion to each sex*** in order to exemplify the particular impact of the measure in that particular sex because there appears to be a disproportionate number of women in receipt of minimum pensions and unable to claim the compensatory supplement. It is evident that the relevant pool of comparators must be carefully selected in order to demonstrate the particular impact of a measure. Placing the focus on the advantaged group in the analysis is quite unusual as attention is usually focused on the disadvantaged group. The English rulings, *Barry ⁄. Midland Bank Plc*[14] and *London Underground Ltd ⁄. Edwards*,[15] illustrate the potential advantages of this methodology in certain cases in a manner even understandable for lawyers. The intention appears to have been to demonstrate that a certain group was disproportionately excluded because a considerably higher number of people in the comparator group had access to that same advantage. This leads to the conclusion that the outcome of an indirect discrimination case fundamentally depends on the comparator used.

(c) Analysing Justifications

The last part of the ruling analysed the justifications offered by the Member State. The ECJ seems to have used the ***traditional approach*** from its extensive case law on Article 157 TFEU (formerly Article 141 TEU). As regards this article the Court had recognised a broad margin of discretion in the pursuit of legitimate social-policy objectives where the ECJ limited itself to controlling the ***legitimacy and proportionality of the measure***. The referring court presented ***three possible justifications*** to the indirectly discriminatory effect of the measure, all of which were refuted by the ECJ.

The first two arguments made by the referring court (which should be analysed together) lay with the fact that ***women were entitled to pensions at an earlier age*** (having contributed less) and that they had a ***longer life expectancy*** (and consequently received disproportionate benefits in relation to their contribution). The ECJ quickly ***refuted these arguments*** on the basis of the ***material scope*** of the Directive. The exceptional increase to the pensions was not in consideration for the contributions paid nor a means of maintaining the financial balance of the system. It was simply an exceptional benefit granted on the basis of the materialisation of a certain risk (old age). As seen above, the Directive appears to demand a strong link between the risk and the benefit paid, in the sense that the ***benefit may be integrated within the natural scope of protection of the norm***. The argument from the ECJ provides further support to this statement. What is at stake is ensuring the subsistence of the material scope of the Directive (i.e. the benefits paid in consideration of the risk and not linked to contributions) irrespective of sex; since the benefit (i.e. the exceptional increase) is granted strictly on the basis of old age, in order to maintain the purchasing power of pensions independent of contributions made, the argument for the exclusion of the holders of minimum pensions cannot prevail. Additionally, the fact that the exceptional increase also increased with the value of the pensions[16] does not undermine the ECJ's argument because pensions of a higher amount also need greater increases in order to maintain their purchasing power. The problem lay in ***determining what the benefit was paid for*** and the arguments put forward by the referring court seem to have integrated the benefit in the materialisation of the risk of old age and not in consideration of the contributions to the system. Nonetheless it appears to be undeniable that the contributions made might have influenced the value of the increase even if there is no direct causal link between the two; the ECJ seems not to have considered this argument and relied instead on the material scope of the risk.

The referring court then argued that the exclusion of minimum pensions from the exceptional increase could be justified by the entitlement to the compensatory supplement. This is where the reasoning of the ECJ became more complex. There are two distinct parts to it. Firstly, the ECJ stated that the exceptional increase decided for the compensatory supplement could not be substituted for the exceptional increase decided for pensions above the minimum level. This was because the purposes of the benefits were different: while the compensatory supplement was destined to ensure a minimum level of subsistence, the exceptional increase was destined to ensure the purchasing power of pensions. The ECJ made this distinction categorically in paragraphs 96-98 of the ruling when it stated that the ***compensatory supplement could not compensate for the exclusion*** from the maintenance of the purchasing power of pensions. Secondly, the ECJ used the data provided earlier in the ruling when it stated that 82% of women in receipt of a minimum pension were excluded from the compensatory supplement due to the rule on the aggregation of incomes, in contrast to only 58% of men, to conclude that this rule was indirectly discriminatory on grounds of sex because it benefited men to a great extent. In other words: 82% of women in receipt of a minimum pension did not receive either the exceptional increase or the compensatory supplement due to the rule on the aggregation of incomes.

This reasoning deserves further considerations. It could be argued on the basis of *Smithson*, *Jackson and Creswell* and *Hover and Zachow*[17] that the ***compensatory supplement laid outside the material scope of the Directive*** because the purpose of the measure is not to protect against old age but against poverty even if it occurs during old age. However, the ECJ preferred to follow the reasoning adopted in *Drake*, *Teuling* and *Commission ⁄. Belgium*[18] of ***integrating these benefits into the material scope of the Directive*** because they appear to provide protection against old age to those with dependent households and not against poverty as such. Once again, the borders of the material scope of the Directive are extremely gray and open to arbitrary interpretation. The ECJ concluded that the ***compensatory supplement could not be a substitute for the exceptional increase in pensions*** because the purpose of the measures is distinct: one is to provide protection to those with dependent households and the other is to compensate for the loss of purchasing power.

But the most important part of the ruling seems to have been the second purpose of the measure. If we accept the ***validity of the rule on the aggregation of incomes*** to exclude entitlement to the compensatory supplement (because the combined income of the spouses would be sufficient) then 82% of women in receipt of a minimum pension would be placed in a very delicate position because they would

not receive either the compensatory supplement or the exceptional increase. Furthermore, this is even more serious considering that we are dealing with persons receiving the lowest pensions and men are disproportionately less affected because «only» 58% would be left without both of these benefits. This appears to have been the «***Leitmotiv***» ***behind the ECJ's decision***: poor women receiving minimum pensions would be ***disproportionately affected*** by this national arrangement because they would be left without either the compensatory supplement or the exceptional increase. This appears to be clearly a measure having a disproportionate impact on a certain group and may stand as a paramount example of indirect discrimination.

(d) Conclusion

This is not the first occasion in which the ECJ held that a national social security arrangement could be indirectly discriminatory. The main contribution of this ruling is the ***sophisticated use of*** the ***figures*** provided by the referring court in order to determine the relevant comparator in indirect discrimination. Considering that the purpose of this form of discrimination is to expose the particular impact of apparently neutral measures in certain groups, there may be a need to make a considerable number of sub-divisions in order to isolate the affected group vis-à-vis the reference group and expose the particular impact suffered by it. Further, although the focus of the ***analysis is usually placed on the disadvantaged group***, this ruling also illustrated that an ***advantage-led comparison*** might also be useful in certain circumstances. Finally, this ruling also helped to clarify the material scope of the Directive and the subsistence of the justifications offered for indirectly discriminatory treatments. The driving force behind this decision appears to have been that a disproportionate number of women in receipt of minimum pensions (82%) neither received the exceptional increase nor the compensatory supplement, which resulted in a further marginalisation of this group.

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[1] The ECJ indicated the following data in paragraph 28 of the ruling: there are 1,325,762 people in receipt of a retirement pension on the basis of their professional activity of whom 614,293 are men and 711,649 are women. There are 562,463 people in receipt of a pension of € 750/month or less, of whom 408,910 are women and 153,553 are men. The ECJ added in paragraph 33 that there are 136,771 people who received the compensatory supplement, of whom 64,166 were men and 72,605 were women.

[2] ECJ of 4 February 1992, C-243/90 *The Queen ⁄ Secretary of State for Social Security ex parte Florence Rose Smithson*.

[3] ECJ of 16 July 1992, C-63/91 and C-64/91 *Sonia Jackson and Patricia Creswell ⁄ Chief Adjudication Officer*.

[4] ECJ of 10 October 1996, C-245/94 and C-312/94 *Ingrid Hover and Iris Zachow ⁄ Land Nordrhein-Westfalen*.

[5] ECJ of 24 June 1986, 150/85 *Jacqueline Drake ⁄ The Chief Adjudication Officer*;

[6] ECJ of 19 October 1995, C-137/94 *The Queen ⁄ Secretary of State for Health, ex parte Cyril Richardson*.

[7] ECJ of 16 December 1999, C-382/98 *The Queen ⁄ Secretary of State for Social Security ex parte John Henry Taylor*.

[8] Opinion, points 58-59.

[9] For an interesting analysis of the case law, see *Craig/de Burca,* EU Law, 4th edition (2007), pp. 936-939.

[10] ECJ of 11 June 1987, C-30/85 *J.W. Teuling ⁄ Bestuur van de Bedrijfsvereniging vor de Chemische Industrie*.

[11] See the exemplary studies of *Schiek*, in: *Schiek, Waddington and Bell*, Cases, Materials and Text on National, Supranational and International Non-Discrimination Law (2007) pp. 323-475; *McColgan*, Discrimination Law: Text, Cases and Materials (2005) pp. 77-127.

[12] Judgment, para. 28.

[13] Using the data provided in paragraph 33 of the Judgment.

[14] House of Lords [1999] All ER (D) 847 *Barry ⁄ Midland Bank Plc*.

[15] Court of Appeal [1998] All ER (D) 231 *London Underground Ltd ⁄ Edwards*. Both English cases taken from *Schiek, Waddington and Bell*, Cases, Materials and Text on National, Supranational and International Non-Discrimination Law (2007) p. 410 *et seq*.

[16] Judgment, para. 11.

[17] See above footnotes 3, 4 and 5.

[18] ECJ of 24 June 1986, 150/85 *Jacqueline Drake ⁄ The Chief Adjudication Officer*; ECJ of 11 June 1987, C-30/85 *J.W. Teuling ⁄ Bestuur van de Bedrijfsvereniging vor de Chemische Industrie*; and ECJ of 7 May 1991, C-229/89 *Commission ⁄ Kingdom of Belgium.*

IV.

Marc Steiner, Bern*

Sekundärziele im öffentlichen Beschaffungswesen: In welche Richtung schwingt das rechtspolitische Pendel? Ein Blick nach Europa und zurück in die Schweiz

Am 25. Oktober 2011 hat das Europäische Parlament eine Entschliessung verabschiedet zur Modernisierung des Vergaberechts, welche einige Hinweise zur Frage enthält, in welche Richtung die Reise – namentlich in Bezug auf die Berücksichtigung sogenannter Sekundärziele – gehen könnte. Im Beitrag soll untersucht werden, welche Trends auszumachen sind und was das für die Totalrevision des (schweizerischen) Beschaffungsrechts auf Bundesebene und allenfalls parallel dazu auf (inter-) kantonaler Ebene bedeuten könnte.

(1) Kurze Einleitung

Die ***politische Steuerung*** im Rahmen des Vergaberechts ***im Sinne der Verfolgung von sogenannten Sekundärzielen*** («*secondary policies*»/«*secondary policy goals*») ist als Thema ein rechtsdogmatischer und rechtspolitischer Dauerbrenner. Klar ist jedenfalls, dass die ***primären Ziele des Vergaberechts*** gemäss Art. 1 des Bundesgesetzes über das öffentliche Beschaffungswesen (BöB), als da sind Transparenz, Stärkung des Anbieterwettbewerbs, wirtschaftlicher Einsatz der öffentlichen Mittel und die Gleichbehandlung aller Anbieter, durch die Berücksichtigung von Sekundärzielen nicht vereitelt werden dürfen. Das ***geltende Vergaberecht*** atmet subjektiv-historisch verstanden – soweit es sich nicht in einer Regelung von Vergabestellen für Vergabestellen erschöpft –, vor allem im Rahmen der Umsetzung des GPA den ***Zeitgeist der 1990er***, der geprägt war von den Maximen der Liberalisierung und Globalisierung. Die Frage, ***welchen Geist das neue Vergaberecht – sowohl in der EU als auch in der Schweiz – atmen soll***, ist derzeit Gegenstand von Debatten, denen auch aus Sicht der juristischen Fachwelt eine gewisse Bedeutung zukommen muss.

(2) Eine vorläufige Standortbestimmung zum EU-Vergaberecht

Im Folgenden sollen kurz einige Hinweise insbesondere zur ***Grünbuchkonsultation der EU-Kommission*** und der ***Entschliessung des Europäischen Parlaments zur Modernisierung des Vergaberechts*** gegeben werden, damit dann anschliessend die ***Ausgangslage für die Schweiz*** skizziert werden kann. Die genannten strategischen Initiativen basieren wiederum auf der Evaluation der geltenden Richtlinien.[1] In der Zusammenfassung der Bewertung des Status quo[2] wird unter Punkt 9.4 zum Thema «Kohärenz mit anderen Politikbereichen» festgehalten, dass es die EU-Vergaberichtlinien den öffentlichen Auftraggebern gestatten, bei der Festlegung des gewünschten Vergabeergebnisses eine Reihe «anderer politischer Erwägungen» zu berücksichtigen.[3] In diesem Rahmen wird auf die von den Mitgliedstaaten erlassenen nationalen Aktionspläne für ein ökologisches oder nachhaltiges öffentliches Beschaffungswesen hingewiesen. Der Schwerpunkt liegt dabei auf der umweltbewussten Beschaffung, z.B. durch Aufnahme der *Green Public Procurement* (GPP)-Kriterien der EU[4] und Berücksichtigung aller innerhalb eines Lebenszyklus (eines Produkts) anfallenden Kosten. Politische Vorgaben für eine sozial verantwortungsvolle öffentliche Beschaffung oder Innovation seien – so die Zusammenfassung – von wenigen Mitgliedstaaten festgelegt worden. Ausserdem wird festgestellt, dass zu «unterschiedliche nationale Anforderungen» bezüglich umwelt- oder sozialpolitischer Standards für den Binnenmarkt nicht förderlich sind.[5]

(a) Das Grünbuch über die Modernisierung der europäischen Politik im Bereich des öffentlichen Auftragswesens

Die Kommission hat mit dem Grünbuch vom 27. Januar 2011[6] zunächst bekräftigt, dass die Politik auf dem Gebiet des öffentlichen Auftragswesens ***die wirtschaftlichste Nutzung*** («*most efficient use*») öffentlicher Gelder gewährleisten muss. Ausserdem sollen die ***Beschaffungsmärkte EU-weit zugänglich*** («*open*») sein.[7] Die Ausgangslage in Bezug auf die Berücksichtigung von Sekundärzwecken wird wie folgt beschrieben: «Ein weiteres zusätzliches Ziel besteht darin, den Auftraggebern eine bessere Nutzung der öffentlichen Auftragsvergabe im Sinne ***gemeinsamer gesellschaftlicher Ziele*** zu ermöglichen: Dazu zählen der Umweltschutz, eine höhere Ressourcen- und Energieeffizienz und die Bekämpfung des Klimawandels sowie

die Förderung von Innovationen und sozialer Eingliederung und auch die Gewährleistung der bestmöglichen Bedingungen für die Erbringung öffentlicher Dienstleistungen von hoher Qualität. Die Verfolgung dieses Ziels kann auch die Verwirklichung des erstgenannten Ziels einer effizienteren langfristigen Nutzung öffentlicher Gelder unterstützen, indem z.B. der Schwerpunkt vom niedrigsten Anfangspreis auf die niedrigsten Lebenszykluskosten verlagert wird.»[8]

Der Teil 4 des Grünbuchs befasst sich ausführlich mit der ***«strategischen Nutzung»*** der öffentlichen Auftragsvergabe. Dabei werden die im Rahmen der Konsultation gestellten Fragen den Kategorien des Vergaberechts zugeordnet. Besonders hervorgehoben seien hier vier willkürlich ausgewählte Themen: Nach europäischem Richtlinienvergaberecht besteht die Wahl zwischen der Vergabe an das wirtschaftlich günstigste Angebot und der Vergabe nach dem niedrigsten Preis.[9] Die Kommission will in diesem Zusammenhang unter anderem wissen (Frage 70), ob die Vergabe nach dem niedrigsten Preis als Variante eliminiert werden soll. Ausserdem wird die Frage aufgeworfen, ob sich die Klauseln für die Auftragsausführung («*conditions for perfomance of contracts*») im Sinne von Art. 26 der Richtlinie 2004/18/EG[10] – eine Kategorie, die das schweizerische Vergaberecht nicht kennt[11] – am besten eignen, um soziale Überlegungen hinsichtlich Beschäftigung und Arbeitsbedingungen[12] zu berücksichtigen (Frage 74). Zudem hält die Kommission fest, dass teilweise vorgeschlagen wird, die obligatorische Verknüpfung der Anforderungen des öffentlichen Auftraggebers an den Auftragsgegenstand abzuschwächen oder sogar ganz fallen zu lassen. Dazu wird im Rahmen der Konsultation ebenfalls um Meinungsäusserung gebeten (insb. Frage 79). Schliesslich wird auf die Tendenz hingewiesen, dass europäisches Richtlinienrecht neuerdings nicht nur vorschreibt, wie eingekauft werden soll – das entspricht dem klassischen Ansatz im Vergaberecht («*how to buy*») –, sondern auch Vorgaben macht zum Beschaffungsgegenstand («*what to buy*»).[13] Auch hier wird die Frage gestellt, ob dieser Trend begrüsst oder kritisch beobachtet wird (insb. Frage 83).

Nun zu den Antworten auf die gestellten Fragen: In der «*synthesis of replies*»[14] wird zum Thema ***«strategic use of public procurement»*** zunächst generell festgehalten, dass die Akteure geteilter Meinung sind. Während die Unternehmen eher zurückhaltend sind in Bezug auf die ***Berücksichtigung ökologischer oder sozialer Zielsetzungen*** im Vergaberecht, befürworten vor allem Nichtregierungsorganisationen eine radikale Änderung der Beschaffungspolitik im Sinne sozialer und ökologischer Ziele.[15] Eine relativ breite Unterstützung geniesst die Tendenz, ***Lebenszykluskosten*** im Rahmen der Ermittlung des wirtschaftlich günstigsten Angebots zu berücksichtigen,[16] was zugleich impliziert, dass die Vergabe nur nach dem niedrigsten Preis zurückgedrängt werden soll. Dies entspricht im Übrigen dem geltenden schweizerischen Vergaberecht, wenn Art. 21 Abs. 1 i. V. m. Art. 21 Abs. 3 BöB richtig dahin gehend verstanden wird, dass die Vergabe normalerweise die Suche nach dem besten Verhältnis von Preis und Leistung ist und nur ausnahmsweise bei standardisierten Produkten allein der Preis massgebend sein kann.[17] Auf die Frage 74 betreffend die ***sozialen Standards*** findet sich eine Teilantwort im schweizerischen Beschaffungsrecht, indem Art. 7 Abs. 2 der Verordnung über das öffentliche Beschaffungswesen (VöB) in der seit dem 1. Januar 2010 geltenden Fassung im Sinne eines Ausschlussgrundes vorschreibt, dass die Anbieterin zumindest die Einhaltung der Kernübereinkommen der Internationalen Arbeitsorganisation[18] zu gewährleisten hat, wenn die Leistung im Ausland erbracht wird.[19] Das würde übersetzt auf europäisches Richtlinienrecht bedeuten, dass ein fakultativer Ausschlussgrund im Sinne von Art. 45 der Richtlinie 2004/18/EG geschaffen würde.[20] Zur Frage nach der ***Lockerung des Auftragsbezuges*** wird in der Synthese der Antworten festgehalten, dass seitens der Zivilgesellschaft, aber teilweise auch von öffentlichen Auftraggeberinnen der Wunsch geäussert wird, etwa «*corporate social responsibility policies … or other social involvement*» berücksichtigen zu können.[21] Indessen werde mehrheitlich – und vor allem auch von Rechtsexperten – die Ansicht vertreten, dass der Auftragsbezug als Erfordernis für die Zulässigkeit der gestellten Anforderungen nicht aufgegeben werden dürfe.[22] In Bezug auf ***«what to buy»-Vorschriften***, namentlich die Verpflichtung zum Kauf ökologischer Produkte, hält die Kommission fest, die meisten Rückmeldungen im Rahmen der Konsultation seien diesbezüglich skeptisch; lediglich Nichtregierungsorganisationen würden derartige Vorgaben begrüssen.[23] Zusammenfassend gibt es nach den Vorarbeiten der Kommission einen erkennbaren Trend hin zur ***weiteren Ökologisierung des Beschaffungswesens***,[24] wobei zugleich sorgfältig auf die ***Aufrechterhaltung der***

dogmatischen Konzeption des europäischen Vergaberechts geachtet wird. Dies wirkt sich insbesondere im Sinne einer Skepsis gegenüber der weitgehenden Integration sozialer Aspekte aus.[25]

(b) Die Binnenmarktakte vom 13. April 2011
Ein im Vergleich zu Grünbuchkonsultation und Entschliessung zur Modernisierung des öffentlichen Auftragswesens weitaus ambitionierteres strategisches Papier hat die Kommission mit der Binnenmarktakte[26] vorgelegt. Auch hier ging aufbauend auf der Mitteilung «Auf dem Weg zu einer Binnenmarktakte» vom 27. Oktober 2010[27] eine Konsultation voraus. Von der Verkehrspolitik (Vorschlag Nr. 7) bis zur Überarbeitung der Energiebesteuerungsrichtlinie (Vorschlag Nr. 8) wird hier eine breite Palette von Themen abgedeckt. Für das Vergabewesen interessant ist auch die Betonung der ***«Vorfahrt für KMU»*** (Vorschlag Nr. 13). Der eigentliche ***Kern*** wird aber im Vorschlag Nr. 17 angesprochen, welcher namentlich die ***«stärkere Nutzung des öffentlichen Vergabewesens für die Unterstützung anderer Politiken»*** zum Gegenstand hat. In diesem Zusammenhang wird zunächst das primäre Ziel des europäischen Vergaberechts betont, nämlich einen ***offenen, wettbewerbsorientierten gesamteuropäischen Markt*** für grössere öffentliche Aufträge zu schaffen, was dem Steuerzahler Einsparungen in Höhe von mehreren Milliarden Euro jährlich beschere.[28] Gleichzeitig – so die Kommission – «kann die öffentliche Auftragsvergabe als ***wichtiger Hebel beispielsweise für Innovation, Umweltschutz oder Beschäftigung fungieren***».[29] Ebenfalls interessant ist der Vorschlag Nr. 18 zur Regulierung der Vergabe von Dienstleistungskonzessionen. Im Rahmen des Vorschlags Nr. 36 wird der Zusammenhang zwischen der Förderung sozialen Unternehmertums und dem öffentlichen Auftragswesen erwähnt.

Im Rahmen der ***«Overview of responses to the public consultation»***[30] zeigt sich ein *mutatis mutandis* ***vergleichbarer Trend wie im Rahmen der Konsultation zum Grünbuch***, nämlich dass es vor allem den Nichtregierungsorganisationen ein Anliegen ist, dass sich das Vergaberecht ***nicht zulasten von Qualitäts- und sozialen Standards*** auswirken sollte. Ausserdem wird in diesem Zusammenhang von einigen Akteuren das Potenzial des Beschaffungswesens zur ***Erreichung ökologischer und gesellschaftlicher Ziele*** («*societal goals*») betont.[31] Mindestens ebenso ausgeprägt ist aufgrund der Rückmeldungen in dieser Konsultation die Unterstützung für die ***Förderung der Anliegen von KMU***, insbesondere unter den Mitgliedstaaten.[32] Folgerichtig wird in der Binnenmarktakte der Vorschlag Nr. 17 modifiziert und neu zur Leitaktion 19 mit folgendem Inhalt: «Überarbeitung und Modernisierung des rechtlichen Rahmens für das öffentliche Auftragswesen mit dem Ziel, eine ausgewogene Politik zu erreichen, die die Nachfrage nach umweltfreundlichen, sozial verantwortungsvollen und innovativen Waren, Dienstleistungen und Bauleistungen stützt. Diese Überarbeitung muss den Vergabebehörden einfachere flexiblere Verfahren bringen und den Zugang für Unternehmen, insbesondere KMU, erleichtern».[33] Diese Leitaktion ist ein Teilgehalt der Strategie «Europa 2020»,[34] mit welcher ehrgeizige Ziele für ein intelligentes, nachhaltiges und integratives Wachstum gesetzt werden.[35]

(c) die Entschliessung des Europäischen Parlaments vom 25. Oktober 2011 zur Modernisierung des öffentlichen Auftragswesens
Auch die Entschliessung des Europäischen Parlaments vom 25. Oktober 2011[36] hat eine interessante Vorgeschichte, wenn auch nicht in Form einer Konsultation. In gewisser Weise schliesst sie an den Bericht über Neue Entwicklungen im öffentlichen Auftragswesen des Ausschusses für Binnenmarkt und Verbraucherschutz vom 10. Mai 2010[37] und die Entschliessung dazu vom 18. Mai 2010[38] an. Mit dieser Entschliessung stellt das Europäische Parlament etwa fest, dass die KMU um den Zugang zum Markt der öffentlichen Beschaffung gekämpft haben und dass die ***Entwicklung einer «KMU-Strategie»*** intensiver betrieben werden müsste.[39] Ausserdem wird auf die grosse Bedeutung des öffentlichen Beschaffungswesens für ***Klima- und Umweltschutz, Energieeffizienz, Innovation und Förderung des Wettbewerbs*** hingewiesen. Entsprechend wird bekräftigt, dass die öffentlichen Verwaltungen ermutigt und in die Lage versetzt werden sollen, bei der Vergabe öffentlicher Aufträge ökologische, soziale und andere Kriterien zugrunde zu legen.[40] Schliesslich wird die Kommission aufgefordert, die öffentlichen Verwaltungen darin zu bestärken, in ihren öffentlichen Ausschreibungen und ihrer Beschaffungspolitik Kriterien für den fairen Handel zu berücksichtigen.[41]

Mit der Entschliessung vom 25. Oktober 2011 entwickelt das Europäische Parlament das im Mai 2010 formulierte Konzept weiter, indem es die – in der Schweiz geltendem Recht

entsprechende – Ansicht vertritt, dass das ***Kriterium des niedrigsten Preises*** nicht mehr das ausschlaggebende Kriterium bei der öffentlichen Auftragsvergabe sein sollte, damit das volle Potenzial der öffentlichen Auftragsvergabe ausgeschöpft werden kann. Die Fixierung auf den Preis soll allgemein durch das ***Kriterium des wirtschaftlich günstigsten Angebots*** in Bezug auf die wirtschaftlichen, sozialen und ökologischen Vorzüge ersetzt werden; dies unter Einbeziehung der gesamten Lebenszykluskosten für die jeweiligen Waren, Dienstleistungen und Arbeiten.[42] In diesem Zusammenhang wird zugleich – wie hierzulande im Rahmen von Art. 21 Abs. 3 BöB – unterstrichen, dass der ***niedrigste Preis*** als ausschlaggebendes Kriterium im Falle von ***in höchstem Masse standardisierten Waren oder Dienstleistungen*** nicht ausgeschlossen werden soll.[43] Daran anschliessend wird die Kommission aufgefordert, Regierungen und Vergabebehörden dazu anzuhalten, den Rückgriff auf ein nachhaltiges öffentliches Beschaffungswesen zu intensivieren. Ausserdem sei zu prüfen, wie das öffentliche Beschaffungswesen zur Verwirklichung der übergeordneten Ziele der EU beigetragen hat, und darzulegen, was unternommen werden sollte, um die Verwirklichung dieser Zielvorgaben in Zukunft zu verbessern.[44] Des Weiteren wird – wie schon im Bericht des Ausschusses für Binnenmarkt und Verbraucherschutz vom 5. Oktober 2011[45] – darauf hingewiesen, dass zwar nicht nur ***ökologische***, sondern auch ***soziale Herstellungsbedingungen*** berücksichtigt werden sollten, aber dabei das ***Erfordernis der «Verknüpfung mit dem Gegenstand des Auftrags»*** nicht geschwächt werden dürfe («*not to weaken the necessary link to the subject matter of the contract*»).[46] Schliesslich betont das Parlament die Notwendigkeit, die ***Dimension der Nachhaltigkeit*** im öffentlichen Beschaffungswesen zu stärken, indem gestattet wird, dass diese Dimension in jede Stufe des Beschaffungsprozesses integriert wird (z.B. Befähigungstest,[47] technische Spezifikationen, Klauseln betreffend die Vertragserfüllung[48]).

Trotz allem Enthusiasmus für die nachhaltige Beschaffung meldet das Parlament Vorbehalte an in Bezug auf Vorschriften, mit welchen den Beschaffern durch Richtlinienrecht vorgeschrieben werden soll, was sie kaufen sollen (***«what to buy»***).[49] Vergaberichtlinien sollen Verfahrensrichtlinien sein (***«how to buy»***), die nicht durch Bestimmungen zur Frage, was eingekauft werden soll, zu ergänzen sind.[50] Nicht näher eingegangen werden soll vorliegend auf das dritte zu verfolgende Ziel, welches – in gewisser Weise im Widerspruch zur tendenziellen Erhöhung der Komplexität durch die Integration von Nachhaltigkeitskriterien – ***Entbürokratisierung und Flexibilisierung*** fordert, wobei das Parlament auch den ***Mangel an Sachverstand und Wissen im Bereich der Auftragsvergabe*** beklagt, welchem durch (gerade für die nachhaltige Beschaffung bedeutsame) Professionalisierungsbemühungen entgegengewirkt werden soll.[51] Anschliessend wird als viertes Ziel ***die Verbesserung des Zugangs für kleinere und mittlere Unternehmen (KMU)*** definiert. Dass die Förderung von (regelmässig lokal agierenden) KMU auch eine welthandelsrechtliche Komponente hat, erhellt aus der nicht in die Entschliessung aufgenommenen Ziffer 39 des Entschliessungsentwurfs gemäss dem Bericht vom 5. Oktober 2011. Nach dieser hätte die Kommission aufgefordert werden sollen, die Aufnahme einer Klausel in das Government Procurement Agreement zu veranlassen, durch die die EU bei der Vergabe bestimmter öffentlicher Aufträge europäischen Erzeugern, insbesondere KMU, Vorrang einräumen darf, und zwar nach dem Muster von Klauseln, die bereits von anderen GPA-Vertragsstaaten zur Anwendung gebracht werden.

(d) Eine Zusammenfassung des Gesagten anhand der neuen EU-Strategie (2011–14) für die soziale Verantwortung der Unternehmen

Was dem Verfasser schwer fallen würde, nämlich aus all den beschriebenen Themen in wenigen Zeilen unter Ausblendung allfälliger Zielkonflikte die Summe zu ziehen, schafft die Kommission spielend in der Mitteilung vom 25. Oktober 2011 zu einer neuen EU-Strategie für die soziale Verantwortung der Unternehmen (CSR)[52] mit folgendem Wortlaut: «Die Mitgliedstaaten und Behörden auf allen Ebenen werden dazu aufgefordert, alle Möglichkeiten des derzeitigen Rahmens für das öffentliche Auftragswesen voll auszuschöpfen. Ökologische und soziale Kriterien müssen vor allem so in das öffentliche Auftragswesen einbezogen werden, dass KMU nicht diskriminiert und zugleich die Bestimmungen des EU-Vertrages über Nichtdiskriminierung, Gleichbehandlung und Transparenz eingehalten werden. Die Kommission beabsichtigt, soziale und ökologische Erwägungen im Rahmen der Überarbeitung der Vergaberichtlinien verstärkt in das öffentliche Auftragswesen einfliessen zu lassen, ohne dass dadurch zusätzlicher Verwaltungsaufwand für die Vergabebehörden entsteht und ohne den

Grundsatz der Auftragsvergabe an den Bieter mit dem wirtschaftlich vorteilhaftesten Angebot zu untergraben.»[53] Jedenfalls auch Teil des CSR-Konzepts ist dabei eine Wechselwirkung zwischen Standards in der öffentlichen Beschaffung und Reputationsrisiken für – namentlich grosse – Unternehmen. Oder anders gesagt: Im Zweifel ist davon auszugehen, dass diejenigen Beschaffungspraktiken, welche selbst nach der Beschaffungsstrategie vergaberechtspolitisch vorsichtiger Akteure aus dem Bereich der öffentlichen Hand nicht den Standards entsprechen, für private Unternehmen erhebliche Reputationsrisiken mit sich bringen.[54]

(3) **Haben die neueren Entwicklungen auf europäischer Ebene Auswirkungen auf die Revision des schweizerischen Vergaberechts?**
(a) Die Ausgangslage nach geltendem Bundesrecht
Was die ***Revision der Verordnung über das öffentliche Beschaffungswesen (VöB)***[55] vom 18. November 2009[56] betrifft, ist zunächst in Bezug auf die ***Lehrlingsausbildung*** festzustellen, dass sich der Bundesrat – in der Schweiz bekanntlich die Exekutive – faktisch geweigert hat, diesen vergabefremden Gesichtspunkt zu berücksichtigen. Dies wird im Rahmen des Erläuternden Berichts zur Änderung der Verordnung über das öffentliche Beschaffungswesen vom 18. November 2009[57] denn auch klar gemacht, wenn es dort heisst, die «Berücksichtigung der Anzahl der zur Verfügung gestellten Ausbildungsplätze» eigne sich «weder als Eignungs- noch als Zuschlagskriterium, da ansonsten leistungsbezogene und leistungsfremde Kriterien vermischt würden».[58] Art. 27 Abs. 3 VöB lautet dementsprechend wie folgt: Bei gleichwertigen Angeboten schweizerischer Anbieterinnen berücksichtigt die Auftraggeberin, inwieweit diese Ausbildungsplätze anbieten. In der Lehre ist dazu treffend angemerkt worden, dass eine Evaluation, welche zum Schluss kommt, dass zwei Angebote völlig gleichwertig sind, «im Grunde gar nicht vorkommen» darf, denn wirklich gleichwertige Angebote gebe es höchstens bei der reinen Preisvergabe über Standardgüter. Eine «Pattsituation» nach Bewertung der Angebote aufgrund mehrerer Zuschlagskriterien im Sinne von Art. 21 Abs. 1 BöB deute demgegenüber darauf hin, dass die Vergabestelle ein «untaugliches Bewertungssystem» zugrunde gelegt habe.[59]

Gemäss Art. 27 Abs. 2 VöB in der seit dem 1. Januar 2010 geltenden Fassung können neben den im Gesetz genannten ***Zuschlagskriterien*** insbesondere auch die folgenden verwendet werden: Nachhaltigkeit, Innovationsgehalt, Funktionalität, Servicebereitschaft, Fachkompetenz, Effizienz der Methodik und die während der gesamten Lebensdauer zu erwartenden Kosten. Dazu zunächst einmal ein wichtiger Hinweis: Die Vergabestelle, welche ***«Nachhaltigkeit» als Zuschlagskriterium*** verwenden will, erläutert mit Vorteil, was damit im in Frage stehenden Zusammenhang gemeint ist, denn dieser Begriff ist ***tendenziell*** so ***unbestimmt*** wie derjenige des «wirtschaftlich günstigsten Angebots».[60] *Beyeler* hält zu dieser neuen Bestimmung fest, dass der Nutzen derselben fraglich sei.[61] Aus einer rein rechtlichen Perspektive ist diese Kritik berechtigt, weil der Katalog der Kriterien im Sinne von Art. 21 Abs. 1 BöB ohnehin nicht abschliessend ist und eine Erweiterung des Katalogs der Zuschlagskriterien etwa mit Blick auf soziale Gesichtspunkte einer formell-gesetzlichen Grundlage bedürfte.[62] Rechtspolitisch betrachtet kann man die Lage auch anders beurteilen. Im Erläuternden Bericht zur VöB-Änderung heisst es denn auch im Sinne eines ***Bekenntnisses***, der Bundesrat fördere die nachhaltige Beschaffung. Der Bund wolle Güter, Dienstleistungen und Bauleistungen beschaffen, die über ihren gesamten Lebensweg betrachtet hohen wirtschaftlichen, sozialen und ökologischen Anforderungen genügen.[63] Für einen operativen Beschaffer ist die Ausgangslage nicht dieselbe, wenn er weiss, dass es irgendwo eine Nachhaltigkeitsstrategie des Bundesrates gibt, im Vergleich zur Situation, dass in «seinem eigenen» Erlass – also der VöB – etwas zur Nachhaltigkeit steht. Das gilt erst recht, wenn man berücksichtigt, dass die Beschaffungskommission des Bundes inzwischen unter dem Titel «Nachhaltige Beschaffung» Empfehlungen für die Beschaffungsstellen des Bundes formuliert hat, mit welchen Hinweise gegeben werden, wie die Nachhaltigkeitsziele im Rahmen der öffentlichen Beschaffung umgesetzt werden können.[64]

(b) Die Lehrlingsausbildung als vorgezogenes Revisionsthema
Derzeit beschäftigt sich die Kommission für Wirtschaft und Abgaben des Nationalrates mit der ***parlamentarischen Initiative Ruedi Lustenberger*** mit dem Titel «Öffentliches Auftragswesen. Ausbildung von Lehrlingen als Kriterium».[65] Diese hat folgenden Wortlaut:

«Es sind die nötigen Anpassungen im Gesetz vorzunehmen, damit bei der Vergabe von öffentlichen Aufträgen die Ausbildung von Lehrlingen durch eine Anbieterin positiv gewichtet wird. Beispielsweise könnte Artikel 21 Absatz 4

(neu) des Bundesgesetzes über das öffentliche Beschaffungswesen folgendermassen lauten: «Die Ausbildung von Lehrlingen durch Anbieterinnen ist bei der Beurteilung der Angebote und der Arbeitsvergabe als Positivkriterium zu berücksichtigen.»

Die Kommission für Wirtschaft und Abgaben hat gemäss Medienmitteilung vom 5. Juli 2011 Folgendes beschlossen:

«Der parlamentarischen Initiative Lustenberger. Öffentliches Beschaffungswesen. Ausbildung von Lehrlingen als Kriterium (03.445) wurde bereits 2005 Folge gegeben. In den Jahren 2007 und 2009 wurde jeweils die Frist zur Behandlung verlängert, weil die Totalrevision des Bundesgesetzes über das öffentliche Beschaffungswesen (BöB) hängig war. Nachdem das Projekt einer Totalrevision des BöB vorerst nicht weiterverfolgt wird, hat die WAK-N mit 19 zu 4 Stimmen entschieden, die Umsetzung der parlamentarischen Initiative in Angriff zu nehmen und hat die Verwaltung damit beauftragt, einen entsprechenden Vorentwurf auszuarbeiten.»[66]

Demnach soll in diesem Punkt die Totalrevision BöB nicht abgewartet werden; vielmehr wird eine ***vorgezogene Teilrevision des BöB*** anvisiert. Das in der Initiative Lustenberger formulierte Anliegen entspricht der Rechtslage in einigen Kantonen, welche das ***Zuschlagskriterium «Lehrlingsausbildung»*** gesetzlich verankert haben. Dabei wird immer betont, dass dieses Zuschlagskriterium – selbst soweit es gestützt auf eine formell-gesetzliche Grundlage trotz vergabefremder Natur als rechtlich zulässig zu betrachten ist – nicht zu hoch gewichtet werden darf,[67] um die Zielsetzung der Suche nach dem wirtschaftlich günstigsten Angebot nicht zu konterkarieren.[68] Das Verwaltungsgericht des Kantons Waadt hat ausserdem mit Entscheid vom 15. Juni 2010 festgestellt, dass der Lehrlingsbegriff zu eng ist; aus Gründen der Gleichbehandlung seien ***auch andere Formen der «formation professionnelle»*** im Sinne des Berufsbildungsgesetzes zu berücksichtigen.[69] In diesem Sinne hat auch der Verordnungsgeber in Bezug auf Art. 27 Abs. 3 VöB festgehalten, bei den Ausbildungsplätzen könnten (je nach Branche) neben Lehrlingen etwa auch Praktikanten- und Doktorandenplätze berücksichtigt werden.[70] Ausserdem wird im Rahmen der Erläuterungen zur Verordnungsänderung darauf hingewiesen, dass der heute geltende Art. 27 Abs. 3 VöB nur auf in der Schweiz niedergelassene Anbieterinnen anwendbar ist. Andernfalls bestünde die Gefahr, dass ausländische Anbieterinnen aus einem GPA-Mitgliedstaat oder aus anderen Staaten, mit denen die Schweiz ein internationales Abkommen abgeschlossen hat, diskriminiert würden. Die meisten dieser Staaten kennen keine mit dem schweizerischen Ausbildungswesen vergleichbare Berufsausbildung.[71]

(c) Die Förderung von KMU als vorgezogenes Revisionsthema?

Auch die ***Förderung von KMU*** im Rahmen des öffentlichen Beschaffungswesens ist inzwischen ein ***politisches Thema***. Einer der Ausgangspunkte der Debatte ist im ***Urteil des Bundesverwaltungsgerichts*** B-1470/2010 vom 29. September 2010, mit welchem das Gericht festgehalten hat, die Regelung betreffend die Zulassung von Bietergemeinschaften sei ***nicht*** als KMU-Förderungsartikel zu verstehen.[72] Die Vergabestelle kann zwar Vergaben so gestalten, dass damit in gewissem Umfang KMU-Förderung betrieben wird, ist aber dazu ***vergaberechtlich nicht verpflichtet***. Das Gericht hat dazu weiter ausgeführt, ein justiziabler Rechtsanspruch, wie ihn die Beschwerdeführerinnen behaupten, würde ausserdem im Zweifel eine formell-gesetzliche Grundlage voraussetzen. Soweit zur Förderung von KMU von der Vergabestelle marktunübliches Verhalten verlangt würde, müsste wohl zugleich von einem sogenannten vergabefremden Gesichtspunkt gesprochen werden.[73] Zu diesem Thema stellt Nationalrätin *Sylvia Flückiger-Bäni* – wohl reagierend auf den bereits ähnlich lautenden Zwischenentscheid B-1470/2010 vom 24. März 2010 (E. 4.3) – mit ***Motion vom 8. Juni 2010*** fest, die derzeitige Schweizer Praxis sei «von einer systematischen Diskriminierung der KMU geprägt».[74] Der Bundesrat hält dazu mit Stellungnahme vom 25. August 2008 fest, die Stossrichtung der Motion entspreche bereits heute der verbreiteten Praxis der Auftraggeberinnen des Bundes. Daher erachte der Bundesrat eine Gesetzesrevision auf Bundesebene als nicht zielführend. Der Bundesrat beauftrage daher die Beschaffungskommission des Bundes, entsprechende Instrumente zu erarbeiten, wie beispielsweise ein Merkblatt mit Empfehlungen für die öffentlichen Auftraggeberinnen. Gleichwohl hat der Nationalrat die Motion am 19. September 2011 angenommen; sie ist nunmehr im Zweitrat hängig. Wahrscheinlich schwebt einigen Akteuren bereits eine Norm im Sinne des deutschen § 97 Abs. 3 GWB vor, wonach mittelständische Interessen bei der Vergabe öffentlicher Aufträge vornehmlich zu berücksichtigen sind. Je nachdem wie pointiert dieses Anliegen verfolgt wird, kann

die Zielsetzung der wirtschaftlichen Vergabe ernsthaft strapaziert werden, womit eine genauso intensive politische Steuerung vorliegt wie bei anderen, traditionell nicht aus Gewerbekreisen vorgetragenen Anliegen. Es bleibt abzuwarten, wie sich dieses Thema entwickelt und ob diesbezüglich die Totalrevision des BöB abgewartet wird oder nicht.

(d) ILO Core Labor Standards und Fair Trade-Gesichtspunkte

Gemäss Art. 8 Abs. 1 lit. b BöB vergibt die Auftraggeberin den Auftrag für Leistungen in der Schweiz nur an Anbieterinnen, welche die ***Einhaltung der Arbeitsschutzbestimmungen und der Arbeitsbedingungen für die Arbeitnehmer*** gewährleisten. Diese Bestimmung wird nun durch Art. 7 Abs. 2 VöB in der seit dem 1. Januar 2010 geltenden Fassung dahin gehend ergänzt, dass die Anbieterin zumindest die Einhaltung der ***Kernübereinkommen der Internationalen Arbeitsorganisation*** zu gewährleisten hat, wenn die ***Leistung im Ausland*** erbracht wird. Die acht einschlägigen Übereinkommen, namentlich betreffend die schlimmsten Formen der Kinder- und Zwangsarbeit, werden im neuen Anhang 2a zur VöB aufgeführt. Bei dieser Neuregelung handelt es sich im Ergebnis auch um eine ***vorgezogene Teilrevision des BöB***. Dies erfolgte mit der Begründung, dass die im Rahmen der Totalrevision BöB vorgeschlagene Verankerung der Kernübereinkommen der IAO als Mindeststandards im Rahmen der Vernehmlassung auf einhellige Zustimmung gestossen sei.[75] Tatsächlich sind zum in diesem Zusammenhang einschlägigen Art. 25 Abs. 3 VE BöB kaum kritische Rückmeldungen eingegangen. Besonders bemerkenswert ist die Stellungnahme des Branchenverbandes *Swiss Textiles*, wonach aus der Sicht des Wettbewerbers der ***Grundsatz der gleich langen Spiesse*** massgeblich sei.[76] Das ist präzise die Zielsetzung von Art. 7 UWG, wonach unlauter insbesondere handelt, wer Arbeitsbedingungen nicht einhält, die durch Rechtssatz oder Vertrag auch dem Mitbewerber auferlegt sind. Zum neuen Art. 7 Abs. 2 VöB passt nahtlos der nächste Schritt, nämlich die Empfehlungen der Beschaffungskommission des Bundes zur nachhaltigen Beschaffung. Hier wird insbesondere auf die tatsächliche Durchsetzung der IAO-Kernübereinkommen durch die ganze Liefer- bzw. Handelskette Wert gelegt, indem von der Anbieterin verlangt wird, auch ***Subunternehmer und Lieferanten*** entsprechend zu verpflichten.[77] Die neue Vorgabe ist als Ausschlussgrund konzipiert. Hält eine Anbieterin die Anforderungen der Kernübereinkommen nicht ein, so kann sie die Auftraggeberin ausschliessen oder den Zuschlag widerrufen.[78] Diese Rechtsfolge ist vielleicht für die ***Revision des europäischen Richtlinienvergaberechts*** interessant, weil dort die ILO Kernarbeitsnormen bisher im Rahmen der im Vergleich zum Ausschussgrund weniger griffigen Bedingungen für die Auftragsausführung im Sinne von Art. 26 der Richtlinie 2004/18/EG abgehandelt werden.[79] Dabei ist aus juristischer Sicht auch der Umstand nicht problematisch, dass die Vergabestelle, indem sie etwa Audits in Bangladesch veranlasst, auf die Herstellungsbedingungen im Ausland Einfluss nimmt, weil sie das nicht hoheitlich im Sinne der Regulierung von Produktion oder Handel, sondern in ihrer Rolle als Konsumentin tut. Die *ILO Core Labour Standards* sind ausserdem von ihrer Rechtsquellennatur her ***qualifiziertes Völkerrecht***,[80] womit nach der hier vertretenen Auffassung welthandelsrechtlich nicht argumentiert werden kann, es hafte ihnen der Geruch unzulässiger Diskriminierung an.

Mit der Regelung betreffend die Kernarbeitsnormen als Mindeststandard ist das Thema ***Fair Trade*** für das schweizerische Recht *de lege ferenda* ebenso wenig erledigt wie für das europäische. Im Rahmen der Totalrevision BöB ist dazu im erläuternden Bericht quasi – je nach politischer Optik – im Sinne eines diskreten Appetithäppchens oder im Sinne der verpönten Bereitschaft zum ordnungspolitischen Sündenfall festgehalten worden, es stehe der Vergabestelle nach künftigem Vergaberecht grundsätzlich frei, von den Anbieterinnen auf vertraglicher Basis zu verlangen, dass sie weitere Anforderungen erfüllen müssen.[81] Wenn damit wirklich das angedeutet werden sollte, was einige Vernehmlassungsadressaten interpretiert haben, nämlich dass damit ***vergabefremde Aspekte*** *de lege ferenda* nach dem Vorbild von Art. 26 der Richtlinie 2004/18/EG im Rahmen einer separaten Kategorie ausserhalb von Ausschlussgründen, Eignungs- und Zuschlagskriterien – ***«auf vertraglicher Basis»*** – berücksichtigt werden können,[82] dann gehört dieser Satz nicht in die Materialien, sondern aufgrund des anzuwendenden ***Konzepts des materiellen Gesetzesbegriffs*** ins künftige Beschaffungsgesetz selbst. Unabhängig davon, ob der faire Handel etwa nach Schweizer Art als moderat gewichtetes Zuschlagskriterium oder in europäischer Manier als Bedingung für die Auftragsausführung konzipiert wird, wird sich jedenfalls die Frage stellen, ob dieser

Gesichtspunkt berücksichtigt werden soll.[83] Dies namentlich angesichts der Tatsache, dass bereits das geltende europäische Richtlinienvergaberecht, namentlich Art. 26 der Richtlinie 2004/18/EG, in diesem Bereich mehr Möglichkeiten bietet als *de lege lata* das Bundesgesetz über das öffentliche Beschaffungswesen.

(4) **Fazit: Auf dem Weg zu einem Gesamtkonzept zum Thema Sekundärziele im öffentlichen Beschaffungswesen?**

Zusammenfassend ergibt sich zunächst, dass die Aussage von *Jean-Baptiste Zufferey* und *Jacques Dubey* richtig ist, wonach die die Beschaffung beeinflussenden öffentlichen Interessen ein ***dynamisches Konzept*** sind und bleiben müssen, das sich mit der Gesellschaft entwickelt.[84] Wie auch immer die Berücksichtigung von Sekundärzielen rechtspolitisch zu beurteilen ist, so wird doch aufgrund der vorstehenden Ausführungen schnell klar, dass der Gesetzgeber ***nicht tranchenweise*** Spezialbestimmungen für Lehrlinge, wenig später eine Norm betreffend KMU-Förderung und dann wieder ein halbes Jahr später die Förderung des fairen Handels mithilfe des öffentlichen Beschaffungswesens diskutieren sollte. Vielmehr ist eine ***Gesamtsicht auf die Sekundärzwecke*** notwendig. Nur so lässt sich – ganz unabhängig von den rechtspolitischen Vorlieben der betroffenen Akteure – ein tragfähiges Konzept für das Vergaberecht der Zukunft entwickeln. Ein Gesetzgebungsprojekt muss sich demnach richtigerweise – beispielsweise bezogen auf die parlamentarische Initiative *Ruedi Lustenberger* – nicht nur zur Frage äussern, ob der Gesichtspunkt «Lehrlingsausbildung» berücksichtigt werden sollte und wenn ja in Form welcher vergaberechtlichen Kategorie. Vielmehr müssten die verschiedenen strategischen Ziele auch von ihrer Bedeutung her gegeneinander abgewogen und gegebenenfalls priorisiert werden. Schliesslich gilt es auch zu berücksichtigen, dass die Implementierung der erfreulicherweise ausser Streit gestellten ***Standards der nachhaltigen Beschaffung*** gemäss den zitierten Nachhaltigkeitsempfehlungen für die Beschaffungsstellen des Bundes (umweltfreundliche Beschaffung, *ILO Core Labour Standards*) durch Statistik, Monitoring, Reporting und produktkategorienspezifische Empfehlungen[85] mindestens so wichtig ist wie die Erweiterung des Katalogs zu berücksichtigender Gesichtspunkte. Dafür spricht auch der ***«Masterplan Cleantech»***, wenn es dort heisst, es werde in 9 Stellungnahmen die Massnahme des Bundes begrüsst, im öffentlichen Beschaffungswesen von der Möglichkeit Gebrauch zu machen, innovative und ressourcenschonende Technologien zu fördern.[86] So ist die umweltfreundliche Beschaffung nicht nur in vielen Formen ganz unbestrittenermassen rechtlich zulässig, soweit sie überhaupt aufgrund des oft gegebenen Leistungsbezugs als vergabefremd gelten kann.[87] Die Ausnahme, welche sich ergibt, wenn das ökologische Mäntelchen der Tarnung von Protektionismus dient, bestätigt die Regel. Vielmehr ist ***Green Public Procurement*** – in Europa wie in der Schweiz – dank der Schlüsselbegriffe «*Cleantech*» und «Innovation» ganz vorne auf der politischen Agenda. Man darf insbesondere gespannt sein, ob sich der Gesetzgeber bei der Überarbeitung der für das öffentliche Beschaffungswesen geltenden Regeln ***rechtsvergleichender Argumente*** bedient. So oder anders ist die skizzierte Entwicklung auch rechtsdogmatisch bedeutsam, was wiederum zur Folge haben muss, dass sich die Fachwelt ein Bild macht, wohin die Reise gehen könnte. Wenn dieser Text, dessen Halbwertszeit aufgrund der rasanten Entwicklung[88] namentlich auf europäischer Ebene[89] begrenzt sein wird, dazu einen Beitrag leisten kann, ist dessen Zielsetzung erreicht.

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* Der Autor ist Richter am Bundesverwaltungsgericht und als Mitglied der Abteilung II insbesondere mit Wirtschaftsverwaltungsrecht befasst; er äussert seine persönliche Meinung. Besonderer Dank gebührt Gerichtsschreiberin RA MLaw Laura Melusine Baudenbacher für die kritische Durchsicht. Der vorliegende Text wurde zuerst im Jusletter (www.jusletter.ch) vom 16. Januar 2012 veröffentlicht.

1 http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/evaluation/index_de.htm betreffend die Richtlinie 2004/17/EG des Europäischen Parlaments und des Rates vom 31. März 2004 zur Koordinierung der Zuschlagserteilung durch Auftraggeber im Bereich der Wasser-, Energie und Verkehrsversorgung sowie der Postdienste, ABl. vom 30. April 2004, Nr. L 134, S. 1 ff., und die Richtlinie 2004/18/EG des Europäischen Parlaments und des Rates vom 31. März 2004 über die Koordinierung der Verfahren zur Vergabe öffentlicher Bauaufträge, Lieferaufträge und Dienstleistungsaufträge, ABl. vom 30. April 2004, Nr. L134, S. 114 ff.

2 Generaldirektion Binnenmarkt und Dienstleistungen der Europäischen Kommission, Wirkung und Wirksamkeit des EU-Rechts für das öffentliche Auftragswesen: Zeit für Ergebnisse (Zusammenfassung der Bewertung; http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/executive-summary_de.pdf).

3 Zusammenfassung der Bewertung, a.a.O. [Fn. 2], S. 22.

4 http://ec.europa.eu/environment/gpp/index_de.htm.

5 Zusammenfassung der Bewertung, a.a.O. [Fn. 2], S. 22.

6 Grünbuch der Europäischen Kommission vom 27. Januar 2011 über die Modernisierung der europäischen Politik im Bereich des öffentlichen Auftragswesens Wege zu einem

effizienteren europäischen Markt für öffentliche Aufträge (KOM [2011] 15 endgültig; http://ec.europa.eu/internal_market/consultations/2011/public_procure-ment_de.htm; im Folgenden:
Grünbuch).

[7] Grünbuch, a.a.O. [Fn. 6], S. 3.

[8] Grünbuch, a.a.O. [Fn. 6], S. 5.

[9] Vgl. namentlich Art. 53 der Richtlinie 2004/18/EG, a.a.O. [Fn. 1], aber auch Art. XIII Abs. 4 lit. b des Übereinkommens über das öffentliche Beschaffungswesen vom 15. April 1994 (*Government Procurement Agreement*, GPA).

[10] Gemäss Art. 26 der Richtlinie 2004/18/EG, a.a.O. [Fn. 1], können die öffentlichen Auftraggeber zusätzliche Bedingungen für die Ausführung des Auftrags vorschreiben, sofern diese mit dem Gemeinschaftsrecht vereinbar sind und in der Bekanntmachung oder in den Verdingungsunterlagen angegeben werden. Die Bedingungen für die Ausführung eines Auftrags können insbesondere soziale und umweltbezogene Aspekte betreffen.

[11] Vgl. immerhin Art. 6 Abs. 1 VöB, wonach die Auftraggeberin im Vertrag festlegt, dass die Anbieterin die Verfahrensgrundsätze nach Artikel 8 Absatz 1 lit. b und c BöB einhalten muss. Ausserdem soll die Anbieterin Dritte, denen sie Aufträge weitergibt, vertraglich verpflichten, die genannten Verfahrensgrundsätze einzuhalten (Art. 6 Abs. 2 VöB).

[12] Im Erwägungsgrund 33 der Richtlinie 2004/18/EG, a.a.O. [Fn. 1], werden als Bedingungen für die Ausführung des Auftrags ausdrücklich die Einhaltung der Bestimmungen der grundlegenden Übereinkommen der Internationalen Arbeitsorganisation (IAO) genannt für den Fall, dass diese nicht in innerstaatliches Recht umgesetzt sind.

[13] Vgl. dazu etwa die Richtlinie 2009/33/EG des Europäischen Parlaments und des Rates vom 23. April 2009 über die Förderung sauberer und energieeffizienter Strassenfahrzeuge, ABl. vom 15. Mai 2009, Nr. L 120 S. 5 ff., und www.cleanvehicle.eu.

[14] Arbeitsdokument der Generaldirektion Binnenmarkt und Dienstleistungen der Europäischen Kommission (im Folgenden: *Synthesis of replies*) http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/synthesis_document_en.pdf.

[15] *Synthesis of replies*, a.a.O. [Fn. 14], S. 7.

[16] *Synthesis of replies*, a.a.O. [Fn. 14], S. 15.

[17] Vgl. dazu etwa Urteil des Bundesverwaltungsgerichts B-743/2007 vom 16. Dezember 2011, E. 2.2.3.3, sowie den Zwischenentscheid des Bundesverwaltungsgerichts B-3311/2009 vom 16. Juli 2009, insb. E. 6, bei dem namentlich der Ermessensspielraum der Vergabestelle in Bezug auf die Gewichtung des Preises betont wird. Siehe aber auch für das deutsche Vergaberecht etwa *Michael Fehling*, in: *Pünder/Schellenberg* (Hrsg.), Vergaberecht, Baden-Baden 2011, Rz. 180 zu § 97 GWB.

[18] Vgl. zum Ganzen unten den Punkt III/4 zu den *ILO Core Labour Standards* nach schweizerischen Vergaberecht.

[19] Die schweizerische Regelung gemäss Art. 7 Abs. 2 VöB ist (unter anderem) als Teil eines Expertenvotums zur nachhaltigen Beschaffung am 24. Mai 2011 vor dem Ausschuss für Binnenmarkt und Verbraucherschutz des Europäischen Parlaments vorgestellt worden (vgl. dazu die Präsentation http://www.europarl.europa.eu/document/activities/cont/201105/20110527ATT20402/20110527ATT20402EN.pdf).

[20] Vgl. zur Terminologie etwa *Alexander Egger*, Europäisches Vergaberecht, Baden-Baden 2008, S. 268 ff.

[21] *Synthesis of replies*, a.a.O. [Fn. 14], S. 15.

[22] *Synthesis of replies*, a.a.O. [Fn. 14], S. 16.

[23] *Synthesis of replies*, a.a.O. [Fn. 14], S. 15.

[24] Vgl. dazu auch die soeben erschienene zweite Auflage des Kommissionsdokuments «*Buying green! – A handbook on green public procurement*» (http://ec.europa.eu/environment/gpp/pdf/handbook.pdf).

[25] Problemlos in diesem Sinne waren immer schon produktbezogene technische Spezifikationen etwa im Rahmen des behindertengerechten Bauens (vgl. dazu «*Buying social – A Guide to Taking Account of Social Considerations in Public procurement*», Dokument erstellt auf der Grundlage von SEC(2010) 1258 endgültig [http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=978&furtherNews=yes], insb. S. 29).

[26] Mitteilung der Kommission vom 13. April 2011 an das Europäische Parlament, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen; Binnenmarktakte: Zwölf Hebel zur Förderung von Wachstum und Vertrauen «Gemeinsam für neues Wachstum» (im Folgenden: Binnenmarktakte; KOM[2011]206 endgültig).

[27] Mitteilung der Kommission vom 27. Oktober 2010 an das Europäische Parlament, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen; Auf dem Weg zu einer Binnenmarktakte: Für eine in hohem Maße wettbewerbsfähige soziale Marktwirtschaft; 50 Vorschläge, um gemeinsam besser zu arbeiten, zu unternehmen und Handel zu treiben (KOM(2010) 608 endgültig; im Folgenden: Auf dem Weg zu einer Binnenmarktakte).

[28] Auf dem Weg zu einer Binnenmarktakte, a.a.O. [Fn. 27], S. 17.

[29] Auf dem Weg zu einer Binnenmarktakte, a.a.O. [Fn. 27], S. 17 f.

[30] *Overview of responses to the public consultation on the Communication «Towards a Single Market Act» of April 13 2004* (im Folgenden: *Overview*; SEC[2011] 467 final).

[31] *Overview*, a.a.O. [Fn. 30], S. 27.

[32] *Overview*, a.a.O. [Fn. 30], S. 10.

[33] Binnenmarktakte, a.a.O. [Fn. 26], S. 22.

[34] KOM(2010) 2020 endgültig.

[35] Binnenmarktakte, a.a.O. [Fn. 26], S. 3; vgl. dazu auch Grünbuch, a.a.O.[Fn. 6], S. 3.

[36] Entschliessung des Europäischen Parlaments vom 25. Oktober 2011 zu der Modernisierung im Bereich des öffentlichen Auftragswesens (2011/2048(INI); P7_TA(2011)0454; im Folgenden: Entschliessung vom 25. Oktober 2011).

[37] A7-0151/2010 (Berichterstatterin: *Heide Rühle*).

[38] Entschließung des Europäischen Parlaments vom 18. Mai 2010 zu neuen Entwicklungen im öffentlichen Auftragswesen (P7_TA(2010)0173; ABl. 2011, Nr. C 161, S. 38 ff.; im Folgenden: Entschliessung vom 18. Mai 2010).

[39] Entschliessung vom 18. Mai 2010, a.a.O. [Fn. 38], Ziffer 24.

[40] Entschliessung vom 18. Mai 2010, a.a.O. [Fn. 38], Ziffer 28.

[41] Entschliessung vom 18. Mai 2010, a.a.O. [Fn. 38], Ziffer 33.

[42] Vgl. dazu die Frage 70 im Rahmen der Grünbuchkonsultation und oben Fn. 17.

[43] Entschliessung vom 25. Oktober 2011, a.a.O. [Fn. 36], Ziffer 13.

[44] Entschliessung vom 25. Oktober 2011, a.a.O. [Fn. 36], Ziffer 14.

[45] A7-0326/2011 (Berichterstatterin: *Heide Rühle*), insb. Ziffer 18; in diesem Punkt noch weniger deutlich der Entwurf einer Entschliessung des Europäischen Parlaments zu der Modernisierung im Bereich des öffentlichen Auftragswesens vom 29. Juni 2011, insb. Ziffer 10.

[46] Entschliessung vom 25. Oktober 2011, a.a.O. [Fn. 36], Ziffer 18.

[47] Meint: Eignungsprüfung («*ability test*»).

[48] Im Sinne von Art. 26 der Richtlinie 2004/18/EG.

[49] Vgl. dazu die Frage 83 im Rahmen der Grünbuchkonsultation und oben Fn. 13.

[50] Entschliessung vom 25. Oktober 2011, a.a.O. [Fn. 36], Ziffer 25.
[51] Entschliessung vom 25. Oktober 2011, a.a.O. [Fn. 36], Ziffer 35.
[52] Mitteilung der Kommission vom 25. Oktober 2011 an das Europäische Parlament, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen. Eine neue EU-Strategie (2011-14) für die soziale Verantwortung der Unternehmen (CSR; KOM(2011) 681 endgültig; im Folgenden: CSR-Mitteilung).
[53] CSR-Mitteilung, a.a.O. [Fn. 52], S. 13 Punkt 4.4.2 Öffentliches Auftragswesen.
[54] *Marc Steiner*, Nachhaltige öffentliche Beschaffung – Der Stand der Dinge, in: Beschaffungsmanagement 10/2010, S. 20 f.
[55] Verordnung vom 11. Dezember 1995 (SR 172.056.11).
[56] AS 2009 6149 ff., in Kraft getreten per 1. Januar 2010.
[57] http://www.news.admin.ch/NSBSubscriber/message/attachments/17793.pdf (im Folgenden: Erläuternder Bericht VöB).
[58] Erläuternder Bericht VöB, a.a.O. [Fn. 57], S. 21 zu Art. 27 Abs. 3 VöB; vgl. auch zur Totalrevision BöB den Erläuternden Bericht zur Vernehmlassungsvorlage vom 30. Mai 2008 (http://www.admin.ch/ch/d/gg/pc/documents/1606/Bericht.pdf; im Folgenden: Erläuternder Bericht Totalrevision BöB), S. 55 zu Art. 39 Abs. 5 VE BöB.
[59] *Martin Beyeler*, Die revidierte VöB – ein Kurzkommentar, in: Baurecht 2010, S. 106 ff., insb. S. 111 f.
[60] Vgl. dazu den Erläuternden Bericht VöB, a.a.O. [Fn. 57], S. 21 zu Art. 27 Abs. 2 VöB: «Die Auftraggeberin legt die Kriterien klar und verständlich fest. Sie hat die Kriterien zu umschreiben oder mit Subkriterien zu konkretisieren, sofern diese für deren Überprüfbarkeit notwendig sind».
[61] *Beyeler*, a.a.O. [Fn. 59], S. 111.
[62] *Marc Steiner*, Die Berücksichtigung sozialer Aspekte im Rahmen der öffentlichen Beschaffung, Vergaberechtliches Arbeitspapier erstellt im Auftrag der Interessengemeinschaft Ökologische Beschaffung Schweiz (IGÖB; im Folgenden: Arbeitspapier), 2. Fassung 2010, S. 16 f. und S. 34 f.
[63] Erläuternder Bericht VöB, a.a.O. [Fn. 57], S. 21 zu Art. 27 Abs. 2 VöB; vgl. zum Ganzen Steiner, Arbeitspapier, a.a.O. [Fn. 62], S. 34.
[64] Empfehlungen der Beschaffungskommission des Bundes BKB für die Beschaffungsstellen des Bundes zu einer nachhaltigen Beschaffungspraxis (http://www.bbl.admin.ch/bkb/02617/02632/index.html?lang=de; im Folgenden: Empfehlungen).
[65] Einreichungsdatum: 20. Juni 2003; Curia Vista Geschäftsnummer 03.445 (im Folgenden: Parlamentarische Initiative Lustenberger).
[66] http://www.parlament.ch/d/mm/2011/Seiten/mm-wak-n-2011-07-05.aspx.
[67] « *…pour autant que sa pondération reste modeste*, …» (Urteil des Kantonsgerichts Waadt vom 15. Juni 2010, publiziert in Baurecht 2010, S. 221 [S 71]).
[68] Vgl. zum Ganzen grundlegend – und grundlegend anders als nach europäischem Richtlinienrecht - den Entscheid VB.2002.00255 des Verwaltungsgerichts des Kantons Zürich vom 9. Juli 2003, E. 3d f., sowie *Steiner*, Arbeitspapier, a.a.O. [Fn. 62], S. 17 ff. mit Hinweisen.
[69] Baurecht 2010, S. 221 [S 71] mit zustimmender Anmerkung *Jacques Dubey*.
[70] Erläuternder Bericht VöB, a.a.O. [Fn. 57], S. 21.
[71] Erläuternder Bericht VöB, a.a.O. [Fn. 57], S. 21 f. mit Hinweis auf die Antwort des Bundesrates auf die Motion *Galladé* vom 10. März 2004 (Curia Vista Geschäftsnummer 04.3061); vgl. dazu auch die Beurteilung des Interkantonalen Organs für das öffentliche Beschaffungswesen InöB vom 20. Februar 2005, S. 5 f. Punkt 3.3.
[72] BVGE 2010/58, E.6.2 und Publikationsregeste.
[73] a.a.O., E. 6.2.
[74] Curia Vista Geschäftsnummer 10.3382.
[75] Erläuternder Bericht VöB, a.a.O. [Fn. 57], S. 7.
[76] Vorentwurf zur Totalrevision des Bundesgesetzes über das öffentliche Beschaffungswesen (VE BöB) – Zusammenfassung der Stellungnahmen vom 5. August 2009, S. 155.
[77] Empfehlungen, a.a.O. [Fn. 64], Punkt 2.1.2 Miteinbezug der Subunternehmer und Unterlieferanten.
[78] Erläuternder Bericht VöB, a.a.O. [Fn. 57], S. 7.
[79] Siehe oben Punkt II/1 zum Grünbuch der Kommission.
[80] Vgl. zum Ganzen *Steiner*, Arbeitspapier, a.a.O. [Fn. 62], S. 27 ff.
[81] Erläuternder Bericht Totalrevision BöB, a.a.O. [Fn. 58], S. 44.
[82] Zusammenfassung der Stellungnahmen vom 5. August 2009, a.a.O. [Fn. 76], S. 155.
[83] Vgl. dazu etwa die Anfrage *Bastien Girod* vom 19. März 2009 (Curia Vista Geschäftsnummer 09.1032).
[84] *Jean-Baptiste Zufferey/Jacques Dubey*, Ergänzungsstudie zum Vergaberecht des Bundes und der Kantone betreffend die sogenannten vergabefremden Kriterien, Fribourg 2004, S. 18.
[85] Vgl. dazu als Beispiel die inzwischen nicht mehr ganz aktuellen BKB/KBOB-Empfehlungen zur Beschaffung von zertifiziertem Holz (http://www.bbl.admin.ch/kbob/00457/00460/index.html?lang=de).
[86] Masterplan Cleantech – Eine Strategie des Bundes für Ressourceneffizienz und erneuerbare Energien (Stand: September 2011; www.cleantech.admin.ch), insb. S. 83 und S. 84.
[87] *Marc Steiner*, Die umweltfreundliche Beschaffung – vergaberechtliche Möglichkeiten und Grenzen, Vergaberechtliche Studie erstellt im Auftrag der Beschaffungskommission des Bundes, 2006.
[88] Vgl. dazu etwa den NZZ-Artikel «WTO-Einigung im öffentlichen Beschaffungswesen» vom 16. Dezember 2011.
[89] Vgl. etwa die Schlussanträge der Generalanwältin *Juliane Kokott* vom 15. Dezember 2011 in der Rechtssache C-368/2010 Europäische Kommission gegen Königreich der Niederlande und die Vorschläge der Kommission für die zu revidierenden Richtlinien 2004/17/EG und 2004/18/EG vom 20. Dezember 2011 (http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/index_de.htm).

V.

The ELR Trademark Is a Valid Community Trademark – Radical Brain S.A. Wins Against the European Union

(European Union represented by the European Commission ⁄ Radical Brain S.A., Office for Harmonisation in the Internal Market (Cancellation Division), Decision of 10 August 2011, 4177 C)

«European Emblem»

ELR Trademark/Contested CT

(1) **Facts and Procedure**

On 9 January 2010 the ELR trademark was registered by the Office for Harmonisation in the Internal Market as Community Trademark No 8 285 785 for the following goods and services: Class 16, printed matters, and class 41, education and providing of training. On 10 February 2010, the European Commission, represented by Office Ernest T. Freylinger S.A. in Luxembourg, filed on behalf of the European Union a request for a declaration of invalidity against the ELR trademark in respect of all the goods and services covered by it on the basis of absolute grounds pursuant to Article 52(1)(a) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (CTMR), namely that the mark was registered in breach of Article 7 CTMR, specified according to the applicant's statement of grounds as to Article 7(1)(c) and (h) CTMR. Article 7(1)(h) CTMR states under the heading «Absolute grounds for refusal»:

«The following shall not be registered: …. trade marks which have not been authorized by the competent authorities and are to be refused pursuant to Article 6 *ter* of the Paris Convention».

Article 7(1)(c) CTMR states under the heading «Absolute grounds for refusal»:

«The following shall not be registered: …. trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service;»

The applicant contended that the ELR trademark contains an almost identical reproduction or at least a heraldic imitation of the «European Emblem» as protected by Article 6 *ter*(1)(a) and (b) of the 1883 Paris Convention for the Protection of Industrial Property, as amended. That provision reads as follows:

«(1)

(a) The countries of the Union agree to refuse or to invalidate the registration, and to prohibit by appropriate measures the use, without authorization by the competent authorities, either as trademarks or as elements of trademarks, of armorial bearings, flags, and other State emblems, of the countries of the Union, official signs and hallmarks indicating control and warranty adopted by them, and any imitation from a heraldic point of view.

(b) The provisions of subparagraph (a), above, shall apply equally to armorial bearings, flags, other emblems, abbreviations, and names, of international intergovernmental organizations of which one or more countries of the Union are members, with the exception of armorial bearings, flags, other emblems, abbreviations, and names, that are already the subject of international agreements in force, intended to ensure their protection».

The applicant submitted that the ELR trademark uses the main elements of the European emblem, namely an incomplete circle of stars composed of

five points which do not touch each other. The applicant argued that given that the stars of the European emblem are very well-known, a full circle of stars was not necessary in order to create the connection with it in the mind of the consumer if one took into account that the public is familiar with and used to several logos of other European institutions which also contain incomplete circles. The addition of other verbal elements and of our ***famous balance*** did not in the applicant's view preclude the application of Article 6 *ter* of the Paris Convention. Besides, the use of the term «EUROPEAN» was said to reinforce the connection with the European emblem.

Referring to Article 7(1)(c) CTMR the applicant contended moreover that the use of the incomplete circle of stars combined with the term «EUROPEAN» in the ELR trademark was an attempt to deceive since it let the public believe that the goods and services in question emanate from or are guaranteed by a European institution. And since the European Union is active in the fields of activity to which the goods and services in classes 16 and 41 belong, the public may consider that our CTM constitutes an award or a sign of certified quality conferred by the European Union.

We argued as regards Article 7(1)(h) CTMR that our CTM does not constitute an identical reproduction of the European emblem since it contains ***a half-circle of seven stars which taper upwards*** whereas the European emblem which is protected by Article 6 *ter* of the Paris Convention consists of a circle of twelve stars composed of five points, the points not touching each other. We also made it clear that our CTM does not contain a heraldic imitation of the European emblem, since its heraldic element or heraldic parts are the circle itself and the blue background, not a single star, nor three or five or seven stars. In support of our arguments, we made reference to the case law of the General Court[1], the CJEU[2], the practice of the OHIM's Boards of Appeal[3] and of the Cancellation Division[4] as well as to the *Flaggenball* judgment of the German Federal Patent Court[5]. Of particular relevance were in our view paragraphs 39 – 41 of the General Court's judgment which read as follows:

«39 The aim of Article 6 *ter*(1)(a) of the Paris Convention is to preclude the registration and use of trade marks which are identical to State emblems or which are to a certain degree similar to them. Such registration or use would adversely affect the right of the State to control the use of the symbols of its sovereignty and might, moreover, mislead the public as to the origin of the goods for which such marks are used. By virtue of Article 6 *ter*(1)(b) of the Paris Convention, that protection also covers the armorial bearings, flags, other emblems, abbreviations and names of international intergovernmental organisations.

40 State emblems and emblems of international intergovernmental organisations are protected not only against the registration and use of marks which are identical to them or which incorporate them but also against the inclusion in such marks of any imitation of those emblems from a heraldic point of view.

41 Accordingly, in the present case, the fact that the mark also contains a word element does not, in itself, preclude application of that article, contrary to what the applicant claims. The important question is whether, in the present case, the mark sought contains an element which may be regarded as the European emblem or an imitation thereof from a heraldic point of view. That element need not necessarily be identical to the emblem in question. The fact that the emblem in question is stylised or that only part of the emblem is used does not mean that there is no imitation from a heraldic point of view».[6]

As regards Article 7(1)(c) CTMR, we stated that if our CTM does not contain an imitation of the European emblem, it cannot lead the public to believe that the products sold under it emanate from or are guaranteed by a European institution.

(2) **Decision**

By decision of 10 August 2011 the Cancellation Division of the Office for Harmonization in the Internal Market held that our CTM has not been registered in breach of Article 7(1)(c) CTMR and that the invalidity request was therefore ***unfounded***.

That we do not identically use the European emblem was clear since the ELR mark contains additional word and figurative elements and only an incomplete circle with seven instead of twelve stars, the stars not all being of the same size and the colour combination being different. As far as heraldic imitation within the meaning of Article 6 *ter* (1)(a) and (b) of the Paris Convention is concerned, the Cancellation Division noted that the heraldic description given by the applicant, namely a circle of twelve mullets, their points not touching, on an azure field, was not comprehensive enough. Given the common use of stars in emblems and the relative plain graphical appearance of the «European emblem», it should be added that

the twelve golden (yellow) mullets, each with one spike pointing vertically upwards, are spaced equally according to the hour positions on a clock face and that all the mullets are of the same size. Since the ELR trademark does not reproduce these elements, but only contains seven mullets which do not form a complete circle, a ***heraldic imitation was found to be excluded***. The Cancellation Division emphasized also that in the ELR trademark the mullets taper upwards and are therefore of different sizes and that they are not yellow or gold, but that such colour is not reproduced at all. Contrary to the applicant's statement, the word element «EUROPEAN» does not necessarily refer to the European Union, since it is part of the expression «EUROPEAN LAW REPORTER» which designates a periodical publication on European law. The Cancellation Division thereby assumed that the relevant public consists of the general consumer including professionals to which the publications or training services might be addressed. It added that for none of the goods and services the relevant public will display a low level of attention when selecting the goods and services and perceiving the ELR trademark as the indicator of their commercial origin.

The Cancellation Division finally found that the applicant had misconstrued Article 7(1)(c) CTMR. The deception of the relevant public is not an issue under that provision, but only under Articles 7(1)(g) and 51(1)(c) CMTR which were not invoked by the applicant. In any case, since the ELR trademark does not constitute a heraldic imitation of the «European emblem», it cannot give rise to the impression that the goods and services actually emanate from or are guaranteed by a European institution or an organization controlled by such an institution. The ELR trademark therefore is ***neither of descriptive nor of misleading nature***. Moreover, the Division noted that it is not sufficient that a component is found to be descriptive. Under Article 7(1)(c) CTMR, the mark must consist exclusively of indications designating characteristics of the goods and services. However, the applicant did not present any facts or arguments concerning the alleged descriptiveness of the remaining figurative and word elements of the ELR trademark.

(3) **Comments**

The decision speaks for itself, and having been a party to the proceedings, we don't want to comment in substance. But one remark must be allowed. It is surprising that the European Commission which as the guardian of the treaties is also the protector of citizens and economic operators in the internal market gives free reign to attempts to monopolize any use of stars and of the word «European» in a trademark. Fortunately, the Cancellation Division of the OHMI has put the kybosh on such plans.

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[1] GC [2004] ECR II-1113 *Concept-Anlagen u. Geräte nach „GMP" für Produktion u. Labor GmbH ⁄. OHIM*.

[2] ECJ [2009] ECR I-6933 *American Clothing Associates NV ⁄. OHIM*.

[3] OHIM Second Board of Appeal *EF-CON* No. R-325/2004-2; Fourth Board of Appeal *DJG* (*MostInnovativeProduct*) No. R-1048/2007-4.

[4] OHIM Cancellation Division *ECDL* No. 547 C; *Motorpress-Iberica* (*MASTER-TEST*) No. 1640 C; *IQNet Association* No. 1595 C.

[5] German Federal Patent Court of 9 December 2008 – AZ: 33 W (pat) 32/07.

[6] GC [2004] ECR II-1113 *Concept-Anlagen u. Geräte nach „GMP" für Produktion u. Labor GmbH ⁄. OHIM*, paras. 39-41.

University of St.Gallen

19th St.Gallen International Competition Law Forum

Thursday 07 June 2012

08.45 Welcome — Carl Baudenbacher

09.00 *Frank Montag* presiding

Opening Speech — Joaquín Almunia (tbc)

09.30 Discussion

10.00 Coffee break

10.30 *Vincent Martenet* presiding
Effective and Fair Competition Policy: Which Role for the Authorities and Which Role for the Courts?
William Kovacic (req.)
Marco Bronckers

11.30 Discussion

12.00 Lunch

13.30 *Patrick Sommer* presiding
Current Problems in European Merger Control
Bernd Langeheine
Andreas Weitbrecht

14.30 Discussion

15.00 *Joachim Bornkamm* presiding
The Standard of Judicial Review in Antitrust Matters
David Bjorgvinsson
Stefano Grassani
Marc Steiner
Astrid Waser

16.15 Discussion

16.45 Coffee break

17.00 *Carol Xueref* presiding
The Compliance Defence: A Valid or a Circular Argument?
Reto Jacobs
Bruno Lasserre

17.45 Discussion

18.00 End

19.30 Dinner with special event

Friday 08 June 2012

09.00 *Peter Freeman* presiding
Has Competition Analysis Become too Sophisticated for its own Good?
Ian Forrester
Andreas Mundt
Jacques Steenbergen

10.00 Discussion

10.30 Coffee break

11.00 *Petra Linsmeier* presiding
Parent Company Liability in Antitrust
Nils Wahl
Romina Polley

11.40 Discussion

12.10 Lunch

13.45 *John Temple Lang* presiding
Commonly Accepted Errors and Misunderstandings in Competition Law
Thomas Hoehn
Stefan Bühler

14.30 Discussion

15.00 Coffee break

15.30 *Gerald Brei* presiding
Actions for Damages and Access to Competition Authorities' Files
Christoph Stadler
Carles Esteva Mosso

16.30 Discussion

17.00 Closing remarks — Carl Baudenbacher

17.15 End

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