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Cutting-in On the Dance: The Federal Constitutional Court Rejects a Motion for a Temporary Injunction from Berlin's *Love Parade*

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Rave: verb: ***1a:*** *to talk irrationally in or as if in delirium* ***b:*** *to speak out wildly* ***c:*** *to talk with extreme enthusiasm* ***2:*** *to move or advance violently .* (1)

At a rave, the DJ is a shaman, a priest, a channeller of energy, . . . (2)

[1] To characterize the administrative lead-up to the 12th Annual *Love Parade* in Berlin it might be more appropriate to invoke the violent, thrashing *mosh pits* of the grunge scene from a decade ago rather than the pulsing, rhythmic harmony expected of a *rave*, of which the *Love Parade* may be the world's largest and most celebrated. Held on July 14 each year since 1989, the *Love Parade* in recent years has drawn more than a million people for a day-long dance/party/festival all set to the distinctive drive of techno-music. The *Love Parade* has become so popular that in 1997 it spawned an alternative, opposition festival called the *Fuck Parade*, which has been held each year on the same day at another location in Berlin, promising a more authentic, less commercialized *rave*. (3)

[2] Both festivals, though well organized, and in the case of the *Love Parade* the subject of considerable commercial interest and investment, got caught out of step when the Berlin Police Department refused to issue the permits needed for the gatherings to be held on July 14, 2001. After appealing the Berlin Police Department's decision through the various levels of the administrative courts without success, and with the July 14 date fast approaching, both organizing groups asked the Federal Constitutional Court to cut-in and issue a temporary injunction against the administrative decision prohibiting the festivals. In a decision addressing both cases, the First Chamber of the First Senate rejected the Article 32 motions. (4)

For the Uninitiated – A *Rave* Primer

[3] *Raving* has come to describe a sub-cultural lifestyle centered on the post-yuppie demographic known as Generation-X and characterized by its pronounced relativism, as demonstrated by its passivity, technological assimilation (and attending blase) and careless pursuit of extreme sports. (5) *Raving*, suited to a class weaned on deconstruction and multi-cultural relativism, itself deliberately resists definition. One *rave*-commentator explains: "*Raves* are, if anything, the ultimate subjective experience." (6) There are, however, sufficient common elements to permit a glimpse into the heart of *raving*. "In general practice, a '*rave*' usually refers to a party, usually all night long, open to the general public, where loud 'techno' music is mostly played and many people partake in a number of different chemicals, though the latter is far from necessary." (7) It is a party, by another name, and not terribly original. What does appear to be unique about *raving* is the emphasis placed on the experience that can be attained/achieved in the practice of the art. The pulsing, redundant nature of the purely electronic "techno" music and prolonged bouts of uninhibited dancing, often in combination with drugs (now predominantly Ecstasy) are thought to induce a trance-like bliss that some liken to a meditative-state. One *raver* described the spirituality of the experience in Buddhist terms: "relaxed and close to, if not at, [a] non-thinking state." "Techno" music plays a fundamentally important role with respect to this objective. Of course, *ravers* resist assigning a strict definition to "techno" music as well. It consists of styles ranging from "House," "Breakbeat," "Ambient" and "Trance." "Overall, techno music is denoted by its slavish devotion to the beat, the use of rhythm as a hypnotic tool. It is also distinguished by being primarily, and in most cases, entirely, created by electronic means." (8) Most techno music is assembled from pieces or "samples" of other recordings by a DJ, who usurps the role played by a live musician and who orchestrates turntables and mixing boards rather than instruments. (9)

The Decision of the Federal Constitutional Court

[4] Since 1996 (its 8th year) the *Love Parade* has proceeded down *Strasse des 17. Juni*, (10) which splits Berlin's central *Tiergarten*, ending at a stages near the Brandenburg Gate from which DJ's play "techno" music and the parade converts itself into a rave more than a million people strong. The damaging effects of the *Love Parade* to the vast, lushly green *Tiergarten* are all too easy to imagine. Concerned with this damage, an organization calling itself *Tiergarten gehört allen Berlinern* (The Tiergarten Belongs to All Berliners) out maneuvered the *Love Parade* and obtained a permit for a public gathering on July 14, 2001, on *Strasse des 17. Juni* and the surrounding *Tiergarten*. The Berlin Police Department rejected the *Love Parade's* subsequent request for a permit (11) because of the conflict with the *Tiergarten* gathering. (12) The Berlin Police Department decision also concluded that the denial of the permit did not constitute a violation of the constitutional right to freely assemble because the *Love Parade* did not qualify as a protected public gathering, lacking as it does the objective of developing and expressing opinions. (13) The Berlin

Verwaltungsgericht (Regional Administrative Court) and the *Oberverwaltungsgericht* (Higher Regional Administrative Court) upheld the decision of the Berlin Police Department, both concluding that the *Love Parade* did not merit Article 8 protection because it lacked, as a central element of the gathering, the development and expression of opinion. (14) The *Oberverwaltungsgericht* explained that these aims could not be established by mere dancing and music, without more. To so hold, the *Oberverwaltungsgericht* concluded, would be to devalue the important opinion-building role of the right to freely assemble secured by Article 8 of the Basic Law. (15)

[5] With its Article 32 motion to the Federal Constitutional Court for a temporary injunction, the *Love Parade* asserted that the denial of the permit threatened a serious detriment of its constitutional right to freely assemble. The Court summarized the *Love Parade's* argument in the following way:

The challenged decisions [of the lower courts] represent wide-ranging meaning for the right to freely assemble because the courts relied upon a too narrow concept of what qualifies as a protected assembly. For an assembly it is sufficient if several people meet together and their togetherness is based upon a shared will or belief. Political demonstrations with the objective of expressing opinion are an important, but in no way exclusive, example of an Article 8 protected assembly. (16)

[6] The Court deferred to the factual and legal findings of the lower courts in denying the *Love Parade's* motion. The Court reasserted the standard of review it applies is such cases, which are heavily dependent on an analysis of the facts (as the central question in the case is whether the *Love Parade* develops or expresses opinion to a sufficient degree as to qualify for Article 8 protection) and which come to the Court with very little time to explore the factual basis of the matter. The Court explained that, in these circumstances, it does not disturb the factual or legal findings of the lower courts except when they are obviously flawed or unsupportable. (17)

[7] The Court found the factual findings and legal reasoning of the lower courts to meet this threshold standard, especially with respect to the characterization of the concept of a protected assembly. (18) The Court affirmed the high-ranking status of the right to freely assemble in the life of Germany's democratic order, explaining that the right to freely assemble plays a central role in the formation of public opinion. (19) The Court explained, however, that simply because a group of people are bound together by a shared goal or perspective, the assembly of those people does not alone involve the formation and expression of an opinion. (20) The Court expressed its comfort with the standards applied by the administrative authorities in drawing these distinctions because the importance of the public interests served by Sections 14 and 15 of the *Versammlungsgesetz* and because the administrative authorities are under clear directives to give priority to the protections secured by Article 8 of the Basic Law. (21) In light of these considerations, the Court found no cause to take issue with the findings and reasoning of the lower courts, especially their insistence on judging the opinion-forming nature of the *Love Parade* by evaluating the event as a whole and not distinct or isolated elements thereof. The Court agreed with the conclusion of the lower courts that, taken as a whole, the Love Parade constitutes a mass-spectacle or party with its main focus being entertainment (particularly its primary commercial objective, which its organizers conceded) and not the development and expression of opinion.

[8] The *Love Parade*, after losing its motion for a temporary injunction from the Federal Constitutional Court, applied for and received permission to march and assemble along *Strasse 17. Juni* on July 21, 2001. The last-minute change led to the withdrawal of a number of sponsors and considerable confusion and inconvenience for thousands of ravers who had planned to make the pilgrimage the week before (many of whom, unwittingly, still came to Berlin on July 14). (22) Attendance at this year's *Love Parade* was estimated at 800,000 (considerably fewer than recent years). (23) The organizers have reported losses of over DM 2.5 million. (24) The event closed, as is its tradition, with a speech from its co-founder Dr. Motte:

We are the largest demonstration for peace in the world: we will go on, dancing to our music in the streets, thereby demonstrating our ideals. The music is our life. (25)

The organizers of the *Love Parade* plan to press the underlying, substantive constitutional challenge seeking to clarify the event's status as a protected, Article 8 assembly, in a complaint to the Constitutional Court.

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(1) Merriam-Webster Collegiate Dictionary (Online) http://m-w.com/cgi-bin/dictionary
(2) Chris Hilker, The Official alt.rave FAQ (visited July 31, 2001) http://www.hyperreal.org/raves/altraveFAQ.html.
(4) The Federal Constitutional Court denied a motion for a temporary injunction from the Fuck Parade in the same decision, applying the same reasoning to both applications. For the sake of expedience, this report focus only on the application of the Love Parade.
(5) *See above, in this issue,*, *The Federal Constitutional Court's Emergency Power to Intervene: Provisional*

Measures Pursuant to Article 32 of the Federal Constitutional Court Act.
(6) Dave Eggers bestseller from a year-ago, A HEARTBREAKING WORK OF STAGGERING GENIUS, has been promoted by some as a Generation-X manifesto. It portrays a sarcasm, cynicism beyond its author's years. It begins with the dedication page ("I am tired. I am true of heart!") and the bitingly ironic "Rules and Suggestions for Enjoyment of this Book" and the tone runs strongly through the Preface and Acknowledgements: "Further, this edition reflects the omission of a number of sentences, paragraphs, and passages. Among them: . . ." and ""the author wishes first and foremost to acknowledge his friends at NASA and the United States Marine Corps, . . ."
(7) Chris Hilker, The Official alt.rave FAQ (visited July 31, 2001) http://www.hyperreal.org/raves/altraveFAQ.html.
(8) *Id.*
(9) *Id.*
(10) The use of samples of other recordings to create "techno" music has generated its own line of legal issues as the holder of the rights to sampled recordings fight to preserve those rights from takings by DJ's.
(3) The main thoroughfare running east-west through Berlin's central Tiergarten and the Brandenburg Tur, the street was named in honor of the uprising in East Berlin and throughout East Germany on June 17, 1953. The movement was put down by the occupying Soviet forces.
(11) The right to freely assemble is protected by Article 8(1) of the German Basic Law: "All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission." This right is qualified by Article 8(2) with respect to "outdoor assemblies," which "may be restricted pursuant to a law." The law governing assemblies is Germany's *Gesetz über Versammlungen und Aufzüge (Versammlungsgesetz) vom. 24. Juli 1953* (Assembly and March Act of 1953). The Act provides for registration of an outdoor assembly or march in Sections 14 and 15.
(12) BVerfG, 1 BvQ 28/01 vom 12.7.2001, Para. 7 http://www.bverfg.de.
(13) *Id.*
(14) *Id.* at Para. 8.
(15) *Id.*
(16) *Id.* at Para. 10.
(17) *Id.* at Para. 13, *citing* BVerfGE 34, 211, 216; BVerfGE 36, 37, 40; BVerfG 1. Kammer des Ersten Senats, NJW 2001, p. 1411.
(18) BVerfG, 1 BvQ 28/01 vom 12.7.2001, Para. 15 http://www.bverfg.de.
(19) *Id.* at Para. 16; *see* Donald P. Kommers, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 395 (1989).
(20) BVerfG, 1 BvQ 28/01 vom 12.7.2001, Para. 16 http://www.bverfg.de.
(21) *Id.* at Para. 18 http://www.bverfg.de.
(22) *Interview with Dr. Andreas Scheuermann*, Max Magazine July 19, 2001 (visited at the Love Parade website July 31, 2001, http://www.loveparade.de).
(23) Bilanz der Love Parade, N-TV Online (visited July 31, 2001) http://de.news.yahoo.com.
(24) *Id.*
(25) *Id.*

Federal Constitutional Court Issues Temporary Injunction in the NPD Party Ban Case

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I. Introduction

[1] German Law Journal reported last November on the German Government's plans to take the extraordinary move of seeking a constitutional ban of the extreme right-wing National Democratic Party of Germany. (1) At the end of January, 2001, the Federal Government filed its motion for a ban of the NPD with the Federal Constitutional Court in Karlsruhe. At the end of March, 2001, the *Bundestag* (Federal Parliament) and the *Bundesrat* (Federal Legislative Chamber of the States) followed with separate motions. The Federal Constitutional Court now has before it three separate actions, raising distinct claims and presenting distinct evidence, seeking the constitutional excommunication of the NPD. The motions present a unified front from every political sector of the German constitutional order: the executive, the legislature and the *Länder* (federal states). This lock-step approach to the effort to ban the NPD was part of the master-scheme of Federal Interior Minister Otto Schily, who pressed hard to gain support for the move to seek a ban from all mainstream political parties and all the *Länder*, at least in part to limit the political fall-out in the case that the Constitutional Court finds against the motions. (2)

[2] Justice Hans-Joachim Jentsch of the Constitutional Court's Second Senate will serve as the *Berichterstaater*(Reporting Judge – Case Manager).

[3] As noted in the previous *GLJ* report, the coalition building effort of Interior Minister Schily of the *SPD* (Social Democratic Party of Germany) had already required him to reconcile himself to a political alliance with the Bavarian Interior Minister Günther Beckstein of the opposition's Bavarian sister party, the *CSU* (Christian Social Union). (3) Now, with the motions pending before the Federal Constitutional Court, Schily finds himself confronted with the task of reconciling his past. Representing the NPD in the proceedings will be Berlin attorney Horst Mahler, a former left-wing comrade and client of Otto Schily. The personal histories of Schily and Mahler are dramatically symbolic of the tumultuous generation that came into its own in the 1970s, known in Germany as the "68ers." The party-ban proceedings, representing, as they necessarily do, an epic, self-conscious struggle for the modern identity of Germany, take on even greater historical resonance when the Schily-Mahler confrontation is added to the mix. The party-ban proceedings will serve as a definitive moment for post-war Germany; addressing at one time the meaning for modern Germany of the stubborn sub-text of Germany's Nazi history and the scars left behind by the riots and terrorism of the 1970s and 1980s.

[4] Recent events are suggestive of the edginess one would expect from such a high-stakes drama. While girding itself to consider the motions seeking a ban of the NPD, the Federal Constitutional Court was recently asked by the attorney representing the NPD to issue a temporary injunction pursuant to Article 32 of the *BVerfGG* (Federal Constitutional Court Act) following the confiscation by the Berlin Prosecuting Attorney's Office of all of his computer equipment and computer data-files (from his home, personal office and his office at the headquarters of the NPD).

II. Horst Mahler: A Radical Biography (4)

[5] Horst Mahler's strongly held and controversial beliefs have kept him at odds with the Berlin Prosecuting Attorney's Office for the length of his career. However, the most recent clash, which led to the confiscation of his computer equipment on July 11, 2001, represents the first such confrontation since his dramatic conversion from a leader of Germany's radical left-wing movement in the 1970s to a leader of Germany's radical right-wing movement today.

[6] Few had such solid radical left-wing credentials as Horst Mahler. He emerged as a central figure in the revolutionary movement in 1968, when he took part in the violent demonstrations against the Springer Publishing House in response to the assassination of Rudi Dutschke. Convicted and sentenced to a short jail term for his participation in the demonstrations, Mahler fled Germany with other members of the Rote-Armee-Fraktion (RAF) for revolutionary training in Jordan. Upon his return to Germany, Mahler was arrested and charged with planning and participating in the violent escape from prison of his RAF comrade Andreas Baader. *Otto Schily* represented Mahler in the criminal trial on these charges and won Mahler an acquittal. In 1973, Mahler was convicted of aggravated robbery and sentenced to 12 years in prison for his role in RAF-backed bank robberies. When all other charges against Mahler were finally settled, he faced a total of 14 years in prison. In 1974 his license to practice law was revoked.

[7] Evidence of the shift taking place in Mahler's ideology came in 1977, in a commentary he wrote from prison in which he described "that he was being internally freed from the dogmatic revolutionary theory of Marxism-Lenninism."

In spite of his changing world view, Mahler continued to receive support from young German leftists, including his attorney throughout this period, *Gerhard Schroeder*. Mahler was released on parole after 10 years in prison. In 1988, his motion for reinstatement to the practice of law was rejected by the local authorities but that decision was reversed on appeal by the Bundesgerichtshof (Federal Court of Justice), which noted a sincere change in Mahler. It was not until late in the 1990s, however, that the extreme and improbable nature of Mahler's change began to earn him public attention. In an interview with the weekly newspaper *Die Zeit*, Mahler explained that the roots of his ideological shift lie in the disillusioning extremism of his experience in Jordan in 1970. Since the late-1990s Mahler has published extensively, especially in the internet, in support of xenophobic and nationalistic ideology. During this period, Mahler also came to be associated with the extreme right-wing National Democratic Party of Germany (NPD), eventually assuming the role of the party's lead counsel in the party-ban proceedings before the Federal Constitutional Court. Of his writings, the essays "Flugschrift an die Deutschen" and more recently "Deutschen Kollegs," were ethnically inflammatory. In "Deutschen Kollegs" and a number of other publications Mahler expressed extreme hostility for Jews and joined the call for a ban on the Jewish community in Germany. Mahler's writings led to the seizures of his computer equipment and data in early July, 2001, as part of the Berlin Prosecuting Attorney's criminal investigation of Mahler for violation of Germany's hate-speech law (*Volksverhetzung*, StGB § 130). (5)

III. The Motion for a Temporary Injunction and the Court's Judgement

[8] Mahler brought his Article 32 BVerfGG (Federal Constitutional Court Act) motion seeking a temporary injunction against the seizure (on June 11, 2001) of his computer equipment and data within the framework of the on-going NPD party-ban process before the Court. (7) In this sense, the motions concern him in his capacity as lead counsel for the NPD in the party-ban proceedings and not in his capacity as an alleged violator of Germany's hate-speech law. Mahler asserted the following urgent needs to avert "serious detriment" in his motions: (a) that the seizure made it impossible for Mahler and the team representing the NPD in the party-ban proceedings to meet the June 19, 2001, deadline for filing the responsive pleadings to the party-ban motion sponsored by the *Bundesrat* and to otherwise proceed with their preparations; (b) that the seizure was conducted under the pretext of the long out-standing hate-speech investigation but was truly aimed at discovering the NPD's party-ban strategy, especially in light of the fact that Mahler had acceded his responsibility for the articles at issue in the criminal allegations; and (c) that the warrants, pursuant to which the seizure was carried out, contained flaws that amounted to a possible constitutional violation and/or human rights violation.

[9] With little analysis, the Court's Second Senate unanimously granted the motion for a temporary injunction, ordering the immediate return of Mahler's computer equipment and the immediate return of the seized computer data, after it has been copied by an independent agent and left under seal with the Berlin Magistrate's Court. (8) The Second Senate concluded that a threat to the integrity of the underlying party-ban proceedings appeared possible in these circumstances, such as to qualify for protection against the kind of imminent detriment with which Article 32 is concerned. The Senate especially expressed concern for a possible violation of the right to a fair process:

Also in party-ban proceedings, the concerned party has the right to a fair process. This right can be impaired through the confiscation of data and work resources, as well as through the exposure of the trial strategy of one of the parties. (9)

[10] The Senate resolved the conflict in the case between the Prosecuting authority's obligation to develop a criminal investigation and the NPD's rights to a fair process in the party-ban proceedings in favor of the fairness of the party-ban proceedings. The Senate explained that, in such circumstances, "a weighing in favor of the undisturbed preparation of the [party-ban] proceeding" is required. (10)

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(1) *Government Commits to Seeking a Ban of the Extreme Right-Wing National Democratic Party of Germany*, 1 GERM. L. J. 2 (November 1, 2000) http://www.germanlawjournal.com
(2) Only the Free Democratic Party (FDP or Liberals) refused to throw its support behind the motions seeking a ban.
(3) *Government Commits to Seeking a Ban of the Extreme Right-Wing National Democratic Party of Germany*, 1 GERM. L. J. 2, Para. 1 (November 1, 2000) http://www.germanlawjournal.com
(4) Information about Mahler, expressing both support and criticism, is in abundance in the Internet (in German). The short biographical-sketch presented here was drawn exclusively from information on the web-sites of: (a) the *Deutsches Historisches Museum* (German Historical Museum), http://www.dhm.de/lemo/html/biografien/MahlerHorst/; and (b) *Informationsdienst gegen Rechtsextremismus* (Information Service Against Right-Wing Extremism), http://www.idgr.de/lexicon/bio/m/mahler-horst/mahler.html.
(5) For a discussion of the German hate-speech law, *see Federal Court of Justice (BGH) Convicts Foreigner for Internet Posted Incitement to Racial Hatred*, 2 GERMAN L. J. 8 (May 1, 2001) http://www.germanlawjournal.com;

Federal Constitutional Court Reverses the Hate-Speech Conviction of Journalist Who, For an Article About a Local Political Candidate, Penned the Headline: "Culture: A Jew?", 1 GERM. L. J. 3 (November 15, 2000) http://www.germanlawjournal.com.

(6) For a brief introduction to this procedural device, *see* the article *The Federal Constitutional Court's Emergency Power to Intervene: Provisional Measures Pursuant to Article 32 of the Federal Constitutional Court Act*, also in this issue, under Public Sector.

(7) Thus fulfilling the requirement that such motions for an injunction arise out of proceedings before the Court: Article 32(1) states "In a dispute . . ." This has been interpreted to mean a dispute over which the Federal Constitutional Court would have jurisdiction. *See* BVerfGG Kommentar, Berkemann, p. 578-579.

(8) NPD Parteiverbot Verfahren, 2 BvB 1/01 vom 3.7.2001, http://www.bverfg.de/.

(9) *Id*. at Paragraph 25.

(10) *Id.*.

Federal Court of Justice and Expert Liability Towards Third Parties: Public Safeguard and Private Interest

By Bernd Kannowski
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[1] On June 26, 2001 the *Bundesgerichtshof* (Federal Court of Justice) handed down a new decision regarding the liability of experts towards third parties (Reg. No. X ZR 231/99). While the Court appeared to have taken a somewhat new direction, the latest judgement must be considered in the context of a steadily evolving jurisprudence related to the effect on third parties of contracts involving the transfer of expertise, especially in light of a third party's reliance on this expertise. Parties contracting for expert testimony or evaluation regularly do not, at least not explicitly, take a third party into consideration in their contractual dispositions. Problems arise, however, when in the performance of the contract a third party, often the buyer or a bank seeking an evaluation of a client's creditworthiness, substantially relies on this expert evaluation produced pursuant to the contract. Where the seller defaults, the bank (in this example) may attempt to directly sue the expert.

[2] In the case recently decided by the FCJ, the plaintiff was a majority shareholder of a banking corporation which applied to the responsible *Bundesaufsichtsamt für das Kreditwesen* (BAK -- Federal Securities Supervisory Authority) for the authorisation of a *Vollbankerlaubnis* (Right to Conduct Full Banking Activities). After the corporation had applied for this licence in 1992, the BAK stipulated that before granting the licence, a separate examination under Section 44 of the *Kreditwesengesetz* (German Banking Act) (1) would have to take place. For this purpose the BAK commissioned the defendant auditor. The defendant was engaged, among other things, to assess the plaintiff's investment policy plan. The report presented by the auditor contained substantial errors, which, upon plaintiff's objections, were partially corrected, but the full banking licence has not yet been granted.

[3] The plaintiff argued that, due to the defendant's serious mistakes (primarily the failure to present a valid report), the plaintiff had incurred major economic losses. The plaintiff's claim was denied by both the lower courts. The Federal Court of Justice, in its decision, affirmed the judgements of the lower courts.

[4] The Court rejected the plaintiff's claims, holding that the contract concluded between the commissioning banking authority and the expert did not extend to the plaintiff. As in the typical constellation of expertise contracts, the third party relying on the expert testimony is not directly a party to the contractual agreement concluded between the commissioner and the expert. Under a number of specific conditions, a third party can, however, benefit from these contractual terms. The Court held, however, that this was not the case here. The Court did not support the plaintiff's view that he was entitled to sue for damages based on the relationship established by the contract between the bank and the auditor because the agreement did not assume a protective character towards the plaintiff as a third party. Therefore, the plaintiff was not, in the Court's view, covered by the contract drawn up between the commissioning authority and the auditor.

[5] The Court has developed a long line of case law with regard to third-party effect of bilateral contracts. This tightly woven jurisprudence includes a line of case law concerning *expert liability*. While engaging in an interpretation of the parties' will as expressed both in the terms of contract and the context in which it was concluded, there is a strong trend in the Court's reasoning to consider the nature of the contractual transaction as such. By taking into account the outcome for which the parties aimed when entering into the contract, and in the light of the overall implications following from the agreement, the Court lends itself, in some respect, to an *objectivation* of the parties' will. The interpretation of the contract thus becomes a reconstruction of the subjective ideas the contracting parties had in mind, set against a whole number of standards which are *usually* applied to contracts of that sort. The standards of negligence and consequently the level of liability are established in light of the concrete market segment in which the transaction involving the expertise is embedded. In cases where expert consultation is involved, the question will regularly arise: who can rely on the expertise. In other words, to whom will the expert be held liable for his or her evaluation: (a) only to the (contractual) party by whom he or she was commissioned to render the evaluation, or (b) to third parties as well? The Court, in a number of cases, has held that the expert can be liable to a third party for his or her evaluation if this party holds a protected interest in the expert's consultation. Therefore, where the *expert quality* of a person or a corporation can be established in light of the services the person or firm renders, the first and decisive step is taken towards extending the negligence standards that govern the expertise contract between the expert and the contractor to a third party. (2) Classic cases establishing this third-party liability have dealt with, *e.g.* the (misguided or wrongful) expert evaluation of the quality of a building or property which led to a purchase of the property. (3)

[6] The development of the jurisprudence concerning a contract's protective effect towards more remote third parties

did not, from the beginning, suggest this possibility. The first cases regularly involved constellations where one contracting party had particular, especially personal ties, to the third party. For cases where relatives (*minors*) of contracting party (A) were harmed or else incurred damages by the other contracting party (B), the Court applied a "care" standard between A and his minor or another close person in order to extend the contractual obligations owed to A by B to the third person. (4) In even earlier cases, the *Reichsgericht* held that a tenant was protected by the contract concluded between the landlord and a craftsman if the tenant incurred any damages from this contract. (5) The basis for this jurisprudence was the existence of particular ties of a personalised nature between the contracting party and a third party, *e.g.* family, employment or landlord-tenant relations. To prevent, however, an unlimited extension of contractual rights to third parties, the Court regularly required that the third party be "in proximity" to the specific contract, meaning that it would be in the nature of the contract that a third party could in some way be affected by it. Later, the Court built on these considerations requiring that the protection of the third party could be identified as being in the interest of one of the contracting parties and that it was the parties' will to extend the contract's reach to the third party. (6)

[7] In its most recent decision, the Court seemed to indicate an alteration of this track. The Court's emphasis in the field of expert liability had so far been on the market expectations, always under somewhat objectified conditions. In the Court's view, when a person with specialized, state recognized expert knowledge is commissioned by another to draw up a report, an assessment or an evaluation and the expert knows or must expect that his or her evaluation will be communicated to a third party, there can be a direct claim for the third party against the expert. In most cases, parties that had incurred damages had been persons who, in trusting in the reports or assessments, had taken substantial financial decisions.

[8] The Court, in its decision of June 26, explicitly acknowledged the particularity of applying the doctrine of third party effect of a contract to the case before it. Here, the Court held, the plaintiff had not relied on the commissioned report for further financial decisions but, instead, the report was to serve as the basis for further action to be taken by the banking authority (BAK). In the Court's view the BAK is executing its supervisory function solely in the public interest, in accordance with Section 6 of the German Banking Act. It was in the context of this federal supervisory function that the BAK commissioned the auditor, pursuant to Section 8 of the German Banking Act. The Court concluded that the report must be seen as part of the duties laid upon the BAK, even if it is drawn up by a private auditor. It is against this background that the Court declared this case's concrete constellation to be falling into none of the categories developed earlier with regard to third-party effect of contracts dealing with expert testimony. The Court then, nevertheless, proceeded to go through the examination steps it generally applies in third-party effect cases and finds, not surprisingly at this point, that they do not apply. It is this particular public nature of the auditor's commissioning by the BAK that prohibits the application of the standards governing the third-party effect of contracts to the case at hand.

[9] The Court laid out the reasons why it did not choose to apply the third-party effect doctrine in this case. But are the reasons entirely convincing? The Court underlined that it had been a coincidence that the BAK commissioned an outside auditor instead of drawing up the report itself. If it had chosen to do so, plaintiff would not have been able to bring a claim in contract but, if at all, only in tort by a public agent pursuant to Section 839 of the *Bürgerliches Gesetzbuch* (German Civil Code) in connection with Article 34 of the *Grundgesetz* (German Basic Law). In the Court's view, the fact that the BAK commissioned a private auditor on a contractual basis did not give rise to the contractual claim asserted by the plaintiff pursuant to the third-party effect doctrine because plaintiff had not relied on the report in ways comparable to the constellations established by the Court's precedent. The Court emphasised at this point that plaintiff had no reason to "trust" in the auditor's work because his commissioning had not taken place in the interest of the plaintiff but solely in the general public interest as protected by the Banking authority itself. In this line of reasoning the Court also rejected a particular need for protection of the plaintiff. This seems almost circular as the Court stressed the fact that the BAK's commissioning was a coincidence and that, had the BAK drawn up the report itself, the plaintiff would be restricted to possible tort claims. This is, however, purely hypothetical because the report was, in fact, commissioned to an outside auditor and it is hard to understand why this should result in the detriment of the plaintiff. It is not convincing to deny a claim in contract, even in the particular case of third-party effect, with the argument that there would not be a claim if the outside commissioning had never taken place. The basis for this argument, then, can only be the public nature of the report in the first place. Nevertheless, to recognise that plaintiff was left without a claim should have led the Court to extend the protective reach of the contract to the plaintiff. What the Court did, in fact, was deny the plaintiff's need for protection with reference to the hypothetical case that the BAK could have drawn up the report itself. But it did not. The Court held that the plaintiff could not be protected only because the BAK had commissioned an outside auditor for a genuinely public task. This, however, privileges the defendant auditor. After all, whether by contracting-out the report or by, in the hypothetical case, doing it itself, the fault lies with the auditor and the damage with the plaintiff.

[10] The court did not enter into a thorough examination of eventual tort liability of the BAK holding that, in absence of a damage recognized by German tort law (Section 823 German Civil Code) there is no claim in tort, whatsoever. It

rejects the argument that the deficient report constituted an *Eingriff in den eingerichteten und ausgeübten Gewerbebetrieb* (infringement of plaintiff's rights with regard to his protected business interests). (7) The Court denies a direct effect upon the plaintiff's business resulted from the false report. The Court, in concluding, also denied other eventual claims in tort, holding that the auditor had not, in any recognisable manner, acted in bad faith with respect to the plaintiff's interests.

[11] Until this decision, the Federal Court of Justice has been assuming liability only when it could be established that the report or evaluation was actually presented to the third party and when the report had a clear effect on the third party when reaching a financial decision. The particularity of the June 26, 2001 decision might lie in the Court's express holding that a line must be drawn between those contracts between private parties for an explicit private purpose and those where the requirement of expertise is expected by law with regard to protection of the public's interest. While this might, at first sight, seem convincing, the difficulty here clearly lies in the alleged possibility to legitimately distinguish both. The Court seems to suggest that where the law, *i.e.* written law in the form of rules and regulations, requires the execution of an evaluation for the purposes of control and public scrutiny, the liability standard shall be a different one than that which the Court has been developing in a series of breathtaking decisions. (8) How such a separation can aptly be made, however, remains doubtful since the Court's jurisprudence in the field of expert liability towards third parties is motivated by the same set of rationales. The protection of the consumer or user of an expert evaluation, whether in direct contractual relationship or in indirect reliance, does not seem to be different than the interests at stake in the protection of the public interests secured by regulation. At least some doubt might be cast on the Court's allusion to a clear separation of private use and public safeguards and the paradoxical scepticism inherent in this jurisprudence with regard to the role of case law in relation to (other) written law. If it had been a private party commissioning the report the case surely would have been decided differently. The fact that the BAK contracted the auditor, however, leads to an overall privilege of the defendant.

For more information:

Decision of the Bundesgerichtshof (Federal Court of Justice - FCJ), 26 June 2001 - X ZR 231/99, not yet published.

Banking Act of the Federal Republic of Germany (Kreditwesengesetz) of 1961, revised in 1998: http://www.redmark.de/redmark/f/FKWG1.html (German edition) and http://www.iuscomp.org/gla/statutes/KWG.htm (English edition)

The German Basic Law on-line: http://www.uni-wuerzburg.de/law/gm00000_.html

The German Civil Code (excerpts) on-line: http://www.iuscomp.org/gla/
(1) Gesetz über das Kreditwesen: Banking Act of the Federal Republic of Germany (http://www.iuscomp.org/gla/statutes/KWG.htm)
(2) *See* the comprehensive treatise by Heribert Hirte, EXPERTENHAFTUNG, Munich 1996.
(3) *See Bundesgerichtshof* (Federal Court of Justice - FCJ), Decision of 2 April 1998, published in: 138 BGHZ (Official Collection of FCJ Cases), p. 257; *see also* FCJ, Decision of 10 November 1994 - III ZR 50/94, in: 127 BGHZ p. 378, at 381; FCJ, published in: NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2001, p. 514, at 516; FCJ, in: NJW 1998, 1948, at 1949; FCJ, in: NJW 1987, 1758, at 1759; FCJ, in: NJW 1984, 355, at 356; FCJ, in: NJW 1973, 321; FCJ, in: NJW 1970, p. 1737.
(4) *See* in particular *Bundesgerichtshof*, Decision of 28 January 1976 - VIII ZR 246/74, published in: 66 BGHZ p. 51.
(5) *See Reichsgericht*, published in: 91 RGZ p. 21, *at* 24.
(6) *See Bundesgerichtshof*, Decision of 2 April 1998 - III ZR 245/96, published in: 138 BGHZ p. 257.
(7)*See, hereto, Bundesgerichtshof*, published in 138 BGHZ p. 311; Bundesgerichtshof, Decision of 29 January 1985 - VI ZR 130/85, published in NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1985, p. 1620; *see also* the article by Rudolf Wiethölter, Zur politischen Funktion des Rechts am eingerichteten und ausgeübten Gewerbetrieb, in: KRITISCHE JUSTIZ (KJ) 1970, p. 121.
(8) *See*, most recently, *Bundesgerichtshof* (Federal Court of Justice), Decision of December 12, 1999 - IX ZR 415/98, published in: JURISTENZEITUNG 2000, p. 469; *cf.*Peer Zumbansen, *Drittschützende Wirkung eines Anwaltvertrages und verdeckte Sacheinlage*, *ibid.* at 442.

Is the Price Right: The European Competition Law Dispute over National Systems of Fixed Book Prices

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I. Introduction

[1] On July 19, 2001, the European Commission announced that it had reopened proceedings regarding the German system of fixed book prices, asserting anti-competitive effects on cross-border Internet bookselling. (1) The Commission's announcement constitutes a new chapter in a long-running dispute over the legality of the so-called *Sammelrevers* system that dominates the book trade in Germany and, *mutatis mutandis*, other European states. The trigger in the present occasion was certain practices alleged of German publishers and book wholesalers regarding the application of the *Sammelrevers* to direct cross-border sales of books to final consumers. The ongoing integration of the continent's economy and the constant introduction of new technologies and ways of distribution have led many commentators to speak in terms of the German book trade vainly "struggling to hold back the tide of unfettered competition." (2)

[2] Although the dispute has undeniably reached a new phase, it is not clear to me that the latest development necessarily represents the beginning of the end of the *Buchpreisbindung* (fixed book price). National systems of fixed book prices are widespread, and there remains considerable political support for the protection of national heritage across Europe. This support may lead to a fettering of competition through the introduction of new EC rules and not the opposite. Moreover, business realities suggest that change, if and when it comes, will come at a slower pace than expected. Incumbent book firms, who still dominate the book trade, are unlikely to give up their market position without a real fight - legal or illegal. The Commission's recent announcement that it has reopened proceedings regarding the German system and the reaction of the firms concerned appear to confirm this view. Accordingly, a new dispute between the German book trade and the Commission over fixed book prices may, practically speaking, 'lead to nothing', as the CEO of the media concern Bertelsmann predicted last year. (3)

II. Background Reading

[3] The provision underlying the *Sammelrevers* in Germany stands out as an anomaly in German competition law. *Buchpreisbindung* is the only such form of vertical restraint permitted in the national *Gesetz gegen Wettbewerbsbeschraenkungen* (GWB – Law against Restraints on Competition). In exemption from the strict ban provided for in sec. 14 GWB, fixed prices may be set for *Verlagserzeugnisse* (a broadly interpreted term of art meaning products from publishers) per sec. 15 GWB. The following provision, sec. 16, is intended to prevent abuse of the exemption. The exemption is allowed merely for vertical fixed prices; horizontal restraints, such as price cartels, remain subject to the sec. 1 ban, as they represent agreements between would-be market competitors. (4)

[4] The fixed retail price for books came into being in the late nineteenth century with the whole system of sales and settlement of the trade. By means of the *Bindungsvertrag* (fixed contract) publishers oblige purchasers of their products to resell them at a certain price or to impose the same terms on other intermediaries until the products reach their final consumer. The individual fixed contracts are combined in a framework agreement (*Sammelrevers*) in order to organize them and render them more effective. The administration of the system is the responsibility of *Preisbindungstreuhaender* (fixed price trustees).

[5] The supporting legislative provisions have been closely bound to the goal of the maintenance of a good assortment of such products in terms of quality and quantity. (5) Book prices are agreed on such that popular, high-volume books are overpriced to compensate for the artifically lower prices set for less popular, lower-volume books. To what degree permitting *Buchpreisbindung* actually fulfils its intended goal has been the subject of much academic debate, apparently inconclusive. (6). Nonetheless, the policy enjoys cross-party support in the German Parliament, as displayed most recently during the last round of GWB reforms in 1998. (7)

[6] In contrast, European competition law makes no provision for fixed book prices, let alone a formal distinction between vertical and horizontal restraints corresponding to the German. General rules regarding collusion apply. Art. 81 I of the European Community Treaty prohibits and declares automatically void all agreements and concerted practices that may in object or effect prevent, restrict, or distort trade in the internal market, such as price-fixing agreements (Art. 81 I a). Associations of undertakings as well as undertakings themselves may be the subject to this provision; their decisions may have the effect of coordinating anti-competitive behavior among undertakings without any need for actual agreement. Art. 81 III regulates exemptions from the preceding through block exemptions of

whole categories of agreements and concerted practices or through individual Commission decisions granting exemptions.

[7] Broadly speaking, EU Competition policy is committed to the ideal of an European economy without internal barriers. The Commission, which conducts the policy, regards such agreements and concerted practices as serious violations of Art. 81. It has in past often placed this ideal of a fully liberalized market before national interests and above national objections. As it stated bluntly in its announcement, "the Commission cannot tolerate restrictive practices which have effects on trade between Member States." (8)

[8] Specifically, the Commission views the national systems of fixed book prices with real suspicion. It has alone or in conjunction with private parties instituted proceedings against them on several occasions, enjoying mixed success. (9) Two of the most significant jurisprudential developments may be usefully cited. First, the European Court of Justice stated in the *Vlaamse Boekwezen* case that the establishment and the enforcement of a similar *Preisbindung* system through publishers, book dealers, and their associations constituted an inadmissible fixing of prices per the then Art. 85 I a. (10) The treaty requirement that the system affect trade between member states was affirmed as regards Buchpreisbindung agreements in cross-border language areas summarily (Ibid.). The Court did not in the *Vlaamse Boekwezen* case or in other relevant cases rule out, as has the Commission, the possibility of an exemption for *Buchpreisbindung* under Art. 81 III.

[9] Second, the Court held in the Leclerc/SARL case that French legislation that obliged publishers and importers to hold to a national retail book price is permitted by EC law as long as the rules concerning the free movement of goods and services between member states and the respective caselaw are respected. (11) Such national provisions regulated selling arrangements, not requirements to be met by products, and applied to all traders equally. An exception for re-imports of books was deemed permissible if it could be proven that the purpose of the export and re-import was to evade the national fixed book price. Otherwise, such legislation constitutes, according to the Court, an absolutely unjustifiable measure having equivalent effect to a quantitative restriction on imports. (To be accurate, it should be noted that the French system obliges the book trade to fix book prices, while the German system merely permits the book trade to engage in such pricing. Proceedings against France were brought under what is today Art. 28, which regulates state restrictions on imports, rather than Art. 81 I, which regulates enterprise conduct. In the final analysis, while the means in EC law to control national systems of fixed book prices may themselves vary, their end is the same, that is to effect full economic integration in the EC.) In sum, as one commentator speculated, perhaps in recognition of its widespread existence in the Community, the Court has not rejected the idea of national systems of fixed book prices out of hand. It has demonstrated, however, that *Buchpreisbindung* can, whether implemented by private or public means, violate EC law. (12)

III. A New Chapter

[10] In February 2000, the Commission reached an understanding with German publishers and book wholesalers on the future application of the *Sammelrevers*. The understanding is, in the words of the Commission, "aimed at bringing the '*Sammelrevers*' in line with Community law by ensuring that its application has no appreciable effects on trade between Member States leading to an infringement of the competition rules of the EC Treaty." (13) The understanding represents a compromise between the Commission and the German book trade. The Commission originally sought to abolish price fixing outright; the book trade sought an individual exemption for a system of fixed book prices agreed upon in 1993 by the book trade in Germany, Austria, and non-EU member state Switzerland. (The so-called "*Drei-Laender-Revers*" was modeled on the *Sammelrevers* and fixed uniform prices on national and cross-border book sales in the three German-speaking states.) The understanding is based on the principle that national systems of fixed book prices that are based on agreements between undertakings will not be contested by the Commission as long as they have no appreciable effects on trade between member states.

[11] Specifically, the new *Sammelrevers* no longer includes publishers from other EU member states than Germany. Likewise, it limits the application of the fixed book prices to Germany. As of 1 July 2000, books produced by German publishers but re-imported from Austria (or other member states) are generally not to be subject to Germany's fixed pricing law. Re-imports of German books can be the subject of the fixed book prices only if it can be proven that the whole transaction is solely intended to evade the *Buchpreisbindung*. According to the text of the new *Sammelrevers*, the fixed book prices can no longer be imposed on direct cross-border sales by retailers to final consumers. This means, in the opinion of the Commission, that the *Buchpreisbindung* does not apply to such sales via the Internet.

[12] The Commission's decision to reopen proceedings regarding *Buchpreisbindung* against German publishers and book wholesalers is based on a preliminary conclusion that the *Sammelrevers* has not been correctly applied. The decision is tied to the experiences of an Austrian wholesale book chain, Libro, and of a Belgian Internet Bookseller, Proxis. Libro asserts that with the coming into force of the understanding it started selling books to German final consumers through its Internet subsidiary (Lion.cc) at discounts of up to 20 per cent on bestsellers. Soon thereafter,

German publishers and book wholesalers declared a supply boycott against Libro and other Internet book dealers not abiding by the *Sammelrevers* system. The German firms cancelled their boycott at the end of July 2000 after Libro announced that it would stop offering rebates to German consumers. For its part, Proxis asserts that when it sought to start selling German books worldwide at discounted prices from Belgium, the main German book wholesalers refused to do business with it.

[13] At the time, the Commission argued that as cross-border book sales to final consumers over the Internet are not governed by the *Buchpreisbindung*, Libro was acting lawfully in pursuing an aggressive price policy and that the German firms were acting unlawfully in declaring the supply boycott. (14) A year later, the Commission has confirmed this opinion: "contrary to the aforementioned understanding, direct cross-border sales of books to final consumers via the Internet at a price other than the fixed book price for Germany have been systematically regarded as a circumvention of the system." (15) The Commission has also come to the preliminary conclusion that the refusals by the German firms concerned to supply Internet booksellers established outside Germany were based on illegal collusion and therefore infringe the EC's competition rules as well.

IV. The Other Side of the Story

[14] The Commission has formally moved against the publishers participating in the *Sammelrevers*, the Börsenverein des Deutschen Buchhandels as the German association for the book trade, the Verlagsgruppe Random House GmbH as the publishing branch of the Bertelsmann group and Koch, Neff & Oetinger & Co. GmbH as the biggest German book wholesaler. The reopening of proceedings gives the German firms and trade association concerned the right to reply to the preliminary conclusions within three months and to have a hearing, likely in autumn. If it is proven that the firms agreed to the supply boycott, they would be faced with heavy fines, even if the restrictive practices have since ended.

[15] To date, the German firms and trade association concerned have reacted angrily to the Commission's allegations. They have variously called them incomprehensible; accused the Commission of pursuing a vendetta against German publishers; and claimed that each German publisher has thereby been unfairly branded a lawbreaker. According to the trade association, it has always sought to conduct its affairs in accordance with the EC competition rules. The trade association believes that the dispute has put *Buchpreisbindung* itself again in question and has committed itself to *Buchpreisbindung's* defense on behalf of the over 1700 mostly small and mid-sized publishers affected by the allegations. As long as *Buchpreisbindung* exists, it must also apply to the Internet, argues the trade association. It will not agree to the abolition of *Buchpreisbindung*, as it is indispensable to the maintenance of a good assortment of books in the German market. Likewise, it will not agree to supply any and every foreign retailer with books. The latter requirement would violate the principle of freedom of contract and discriminate against publishers in relation to all other enterprises, argues the trade association. (16) For its part, the German government declared itself astonished. It stated that plans for new legislation regarding *Buchpreisbindung* will be carried out regardless of the outcome of the Commission proceedings. (17)

V. The Next Plot Turns?

[16] As noted, according to the text of the new *Sammelrevers*, the fixed book prices for Germany can no longer be imposed on direct cross-border sales by retailers to final consumers. The statement by the Commission that the *Buchpreisbindung* does not therefore apply to such sales via the Internet is, however, an inference. The text of the understanding makes no explicit provision in this regard. Whether or not Internet book sales would be exempted from *Preisbindung* was to the bitter end of the negotiations between the Commission and the German book trade disputed. (18) Ultimately, such a provision was not included in the understanding.

[17] The Commission believes that if the *Sammelrevers* is correctly applied, it does not have appreciable effects on trade between member states and would not infringe EC competition rules. "Therefore, the Commission could accept the '*Sammelrevers*' for the future if the above-mentioned practices are definitely discontinued and a lawful application of the '*Sammelrevers*' is guaranteed by the publishers and booksellers." (19) As for the new *Buchpreisbindung* legislation that the German government is planning, the Commission could tolerate it as long as the rules concerning the free movement of goods and services between Member States and the respective case-law (particularly the ruling in "Leclerc") are respected. (20)

[18] If EU competition law is enforced as the Commission envisages, say commentators, the mid-term sustainability of any system of *Buchpreisbindung* comparable to that currently existent is highly unlikely. (21) The traditional book trade in Germany is already under considerable pressure. If *Buchpreisbindung* does not apply to cross-border Internet sales, so the prevailing opinion goes, the system will no longer be effective. A large hole will have been breached in its coverage, which will be profitably exploited by innovative firms pursuing an aggressive pricing policy across Europe. Specifically, it is argued that the new technologies and ways of distribution that are being constantly

introduced do not respect national borders or authorities. The primary concern of the businesses behind these innovations is competitive advantage not cultural heritage. Lastly, consumers will choose to enjoy the resultant cost advantages. Despite the fact that Internet book sales are still negligible (comprising in early 2000 a German market share of merely 1.2% (22)), the free interplay of these three dynamics are claimed to ensure the beginning of the end of national systems of fixed book prices in Europe. (And, as one especially fatalistic commentator would add, the falling of the last bulwark against the pervasive trend to monoculture. (23))

[19] To prevent such a development coming about, supporters of fixed book prices have striven to influence EU policymaking. They believe that with increasing economic integration, the limited jurisdictional scope of national regulatory activity such as *Buchpreisbindung* is diverging ever more widely from the expanding geographical scope of markets. A community framework for the book trade is therefore required to ensure legal security for the book trade. (24) Supporters of policymaking at the EU level sought first to obtain a group exemption for Buchpreisbindung. Having failed to obtain an individual exemption for the *Drei-Länder-Revers*, they are now seeking to preserve *Buchpreisbindung* through the introduction of new EC rules. Various legal instruments have been proposed, taking the form of either a regulation, guideline, or treaty reform per Art. 83 II c EC Treaty or Art. 48 EU Treaty. The possibility of recourse to Art. 87 III d EC Treaty, which allows for state aid to promote culture, is doubtful, as "such aid [is] not to affect trading conditions and competition in the Community to an extent that is contrary to the common interest."

[20] Ultimately, whether new EC rules favorable to *Buchpreisbindung* are introduced is a matter of political will. There is nothing in the rationale behind the European project generally or in EC competition law specifically that would prevent books being prioritized as a *Kulturgut* (cultural item) rather than as a *Wirtschaftsgut* (business item). The constitutive treaties offer member states considerable leeway in economic policymaking, as EC competition policy already manifests, balancing as it does the pursuit of competition with wider goals (such as the protection of small and mid-sized enterprises). The fact that political consensus exists in Germany over the legitimacy of *Buchpreisbindung* and that systems of fixed book prices of various designs still exist in member states Austria, Belgium, Denmark, France, Italy, Luxembourg, and the Netherlands give supporters of fixed book prices at the EU level hope.

VI. An Alternative Interpretation

[21] Although relating to books, the on-going dispute over *Buchpreisbindung* is anything but bookish. The way in which the dispute is settled will have drastic ramifications for all the firms concerned as well as for the trade itself. Taking a business perspective on the recent developments presents them in a different light. Indeed, it makes one wonder whether it is business realities rather than EU or national law that is determining and will continue to determine how the situation develops.

[22] Most immediately, the success of the Commission's proceedings against the German firms and trade association concerned will go a long way to determining the success of the pending restructuring of Libro. The Austrian firm has suffered severe financial difficulties in the last year, unable to put into effect its ambitious expansion plans in Germany and the Internet. (25) In addition to filing complaints with the Commission, Libro has filed some 17 suits for damages against the German publishers. (26) It has already succeeded in obtaining a ruling from regional courts in Berlin and Munich that it was boycotted by the firms. (27) Art. 81 I EC treaty together with sec. 823 2 of the *Buergerliches Gesetzbuch* (BGB -- German Civil Code) could support a claim for compensatory damages and, arguably, a claim for future supply of product. All may come, however, too little and too late.

[23] The inability of Libro to realize its vision of an unregulated book market is in large part the result of the stance taken by the German book trade. As noted, Libro stopped offering rebates to German consumers in the face of their boycott. It negotiated instead a compromise with the German firms, with which it at once competes and on which it is heavily dependent, to ensure the continued supply of books. Last July, this withdrawal may have seemed "tactical" and "clever": "[i]n view of the rising importance of electronic retailing, [Libro] can do this without jeopardizing [its] objective of total liberalization of the book trade." (28) The withdrawal has since been revealed to have been a recognition of its position of weakness.

[24] It may well prove to be the case that the new technologies and ways of distribution bring about the end of *Buchpreisbindung*. However, it should be remembered that the Internet is merely a tool that may be used by future competitors of the incumbent firms to revolutionize the book trade; it is not a competitor itself. Would-be competitors like Libro must profitably exploit its commercial possibilities. Due to the current control of the market and the stance collectively taken by the incumbent firms, Libro was unable to do so. It is hard to see how the national market will be opened, as long as German publishers and book wholesalers do not supply would-be competitors. (Hence the effort on the part of the trade association to characterize the German firms' refusal to supply foreign retailers such as Libro as non-discriminatory and objectively justified. (29))

[25] Likewise, as long as German publishers and book wholesalers agree to maintain fixed book prices, Buchpreisbindung may well continue indefinitely. As sec. 16 GWB does not oblige but merely permits fixed prices, German firms may lift the controls on the retail price for books. The Net Book Agreement in England, which similarly provided for fixed book prices, collapsed in 1996 after the withdrawal of three large British publishers. Should one of the large German publishers decide to no longer fix prices for some of its products, the end of *Buchpreisbindung* would be in view.

[26] In sum, the real threat to *Buchpreisbindung* and similar national systems of fixed book prices may not come from Brussels as expected, but from 'within', that is to say from the publishers and wholesalers concerned themselves. It is they and not bureaucrats or legislators who may one day bring about its end. (30)

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(1) European Commission Press Release, IP/01/1035, 2001-07-19.
(2) FRANKFURTER ALLGEMEINE ZEITUNG (English edition), 31 July 2000 (archived at newspaper website without page citation).
(3) FRANKFURTER ALLGEMEINE ZEITUNG (English edition), 27 July 2000 (archived at newspaper website without page citation).
(4) *See*, Fritz Rittner, WETTBEWERBS- UND KARTELLRECHT, 6. Aufl. Heidelberg 1999, chapter 9.
(5) CD-ROM Case, BGH NJW 1997, 1911, 1912.
(6) *See, e.g.,* Sebastian Jungermann / Klaus Heine, DIE BUCHPREISBINDUNG - ELEKTRONISCHE MEDIEN UND DER MARKT FUER VERLAGSERZEUGNISSE, CR 2000, 526, 535.
(7) Sebastian Jungermann, *Neues zur Buchpreisbindung*, NJW 2000, 2172, 2173.
(8) European Commission Press Release, IP/01/1035, 2001-07-19.
(9) *See generally*, Christiane Huppertz, *Die Buchpreisbindung nach nationalem und europaeischem Wettbewerbsrecht*, GRUR 1998, 988.
(10) EuGH GRUR Int. 1985, 187, 189.
(11) EuGH GRUR Int. 1985, 190 ff. and judgment of 3 October 2000 in case C-9/99 "Echirolles."
(12) Hans-Jürgen Ahrens / Volker M. Jänich, *Der gebundene Preis fuer CD-ROM-Produkte - ein Irrweg der Rechtsprechung,* GRUR 1998, 599, 602.
(13) European Commission Press Release, IP/01/1035, 2001-07-19.
(14) FRANKFURTER ALLGEMEINE ZEITUNG (English edition), 2 August 2000 (archived at newspaper website without page citation).
(15) European Commission Press Release, IP/01/1035, 2001-07-19.
(16) FRANKFURTER ALLGEMEINE ZEITUNG, 21 July 2001, at 14.
(17) FRANKFURTER ALLGEMEINE ZEITUNG, 23 July 2001, at 43.
(18) Sebastian Jungermann / Klaus Heine, *Die Buchpreisbindung - elektronische Medien und der Markt fuer Verlagserzeugnisse*, CR 2000, 526, 533.
(19) European Commission Press Release, IP/01/1035, 2001-07-19.
(20) *Ibid*.
(21) FRANKFURTER ALLGEMEINE ZEITUNG, 16 February 2000, at 19; and 28 February 2000, at 18.
(22) Sebastian Jungermann / Klaus Heine, *Die Buchpreisbindung - elektronische Medien und der Markt fuer Verlagserzeugnisse*, CR 2000, 526, 533.
(23) BADISCHE ZEITUNG, 20 July 2001, at 1.
(24) *See, e.g.*, Karl-Heinz Fezer, *Elektronische Verlagserzeugnissee als Gegenstand der kartellrechtlichen Preisbindung*, NJW 1997, 2150, 2152.
(25) FRANKFURTER ALLGEMEINE ZEITUNG (English edition), 28 June 2001 (archived at newspaper website without page citation).
(26) FRANKFURTER ALLGEMEINE ZEITUNG (English edition), 27 July 2000 (archived at newspaper website without page citation).
(27) FRANKFURTER ALLGEMEINE ZEITUNG, 23 July 2001, at 43.
(28) FRANKFURTER ALLGEMEINE ZEITUNG (English edition), 31 July 2000 (archived at newspaper website without page citation).
(29) FRANKFURTER ALLGEMEINE ZEITUNG, 21 July 2001, at 14.
(30) Sebastian Jungermann / Klaus Heine, *Die Buchpreisbindung - elektronische Medien und der Markt fuer Verlagserzeugnisse*, CR 2000, 526, 535.

Report on Germany by the European Commission against Racism and Intolerance (ECRI)

By Frank Schorkopf
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I. ECRI and Its Work

[1] The Council of Europe on July 3, 2001, released the Second Report on Germany prepared by its European Commission against Racism and Intolerance (ECRI). (1) ECRI is a mechanism to combat racism, xenophobia, antisemitism and intolerance that was established by the Heads of State and Government of the Member States of the Council of Europe at their Summit in Vienna on October 9, 1993, and improved during the Strasbourg Summit held on October 10-11, 1997.

[2] Each Member State of the Council of Europe is entitled to nominate one member to the Commission. (2) They are, in most cases, recruited from the senior ranks of the national Civil Service, from Universities, Politics or NGOs. According to ECRI's mandate, they should be independent and recognised as experts in the field of racism and xenophobia. One of ECRI's tasks is the preparation of country reports. At the end of 1998, ECRI completed a first round of reports, in January 1999 the work on the second stage of country reports began, which will continue until December 2002.

[3] ECRI's reports are first transmitted as a draft to the concerned Member State for a process of confidential dialogue with the national authorities. The content of the report is reviewed in the light of this dialogue. The report is then adopted in its final form and transmitted by ECRI to the government of the Member State concerned, through the intermediary of the Committee of Ministers of the Council of Europe. The report is made public two months after this transmission, unless the government in question is expressly opposed to the publication.

[4] The aim of these second reports within ECRI's country-by-country work is to follow-up the proposals made in the first reports, (3) to update the information contained therein, and to provide a more in-depth analysis of certain issues of particular interest in the country in question.

II. Summary of the Report

[5] The recently published Second Report on Germany comes to the conclusion that Germany is a society in which serious incidents of racially motivated violence occurs. The report deduces from this conclusion that issues of racism, antisemitism, xenophobia and intolerance are yet to be "adequately acknowledged" and confronted. The existing legal framework and policy measures in Germany have not, according to the Report, proven to "be sufficient to effectively deal with" or solve these problems. The ECRI Report expressed its deep concern about the situation of and attitudes towards those who are considered "foreigners" and about Germany's insufficient efforts at promoting integration. The ECRI Report stated that Germany's identity may also be associated with other forms of identity than the traditional. The detailed Report criticises Germany heavily on policy issues.

[6] The implementation of a conclusive response to the criticisms in the ECRI Report would, however, have far reaching consequences for the German constitutional system.

[7] The Report consists of two sections. The first section contains an overview of the situation in Germany, dealing with legal instruments, institutions, the reception and status of non-citizens, refugees and asylum-seekers, foreigner's access to public services, vulnerable groups and the conduct of certain institutions and the media. To emphasise a few of the Report's details:

a) *ECRI recommended, again, that Germany should make a declaration under Article 14 of the Convention for the Elimination of All Forms of Racial Discrimination, recognising the competence of the Committee for the Elimination of Racial Discrimination (CERD) to accept individual complaints.*

b) *Germany should review its opposition to dual nationality. According to the ECRI Report there is a general trend amongst European States to move towards a more flexible approach as regards the issue of dual nationality. This approach is in accord with the European Convention on Nationality. The ECRI Report points out that efforts should be made by public officials to reduce the drama associated with this issue in the public arena. In this respect, the ECRI Report also criticises German Nationality Law that specifies a number of requirements that all individuals applying for naturalisation must meet, e. g. sufficient knowledge of the German language and a commitment to the Basic Law.*

According to the ECRI Report, such criteria, although not in themselves discriminatory, might potentially lend themselves to arbitrary and discriminatory application by German authorities.

c) *Moreover, there is a lack of specific anti-discrimination legislation at the federal level prohibiting racial discrimination in key fields of public life, such as housing, education, health, employment and the provision of goods and services. Although the German constitutional guarantee of equality covers these fields, according to the ECRI Report, this guarantee would be strengthened by supplemental legislation in specific fields. An independent specialised body on combating racism and intolerance could supervise the implementation of such legislation. Finally, Germany still lacks at the national level, a commission or ombudsman with the authority to accept individual complaints and assist victims in pursuing these complaints.*

d) *The ECRI Report expresses concern over reports of deportations of people at risk of human rights violations in their countries of origin, contrary to the principle of non-refoulement (see Article 33 of the Geneva Convention on the Right of Refugees and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms). The ECRI Report draws particular attention to reports of cases of Roma and other minorities from Kosovo who are being forcibly deported despite assurances by the Federal authorities that no minorities will be sent back against their will. The conditions associated with of "pre-field control" (the length of time taken to process asylum applications and the poor living conditions of asylum seekers while their applications are pending) were expressly mentioned as points of critique.*

[8] The second section of the Report draws attention to certain issues of particular concern to Germany, especially the challenge of integration and racist/antisemitic violence and harassment.

[9] Under the heading "Challenges of Integration," the ECRI Report concludes in the second section that Germany does not regard itself as a country of immigration:

ECRI is of the opinion that an increased recognition within German society of its diverse composition and of the positive contribution made by individuals of foreign origin would contribute greatly to solving many of the problems of racism and discrimination and to the richness of German society as a whole. (4)

[10] In this respect, the ECRI Report addresses a major political debate that has occupied Germany for much of the last year, namely the concept of *Leitkultur* (defining culture). This term expresses a homogenous understanding of German identity and an accompanying fear about the effects diversity will have on that homogenous cultural identity. It also reinforces negative stereotypes about other cultures, neglecting the value and important contribution of minority communities within Germany.

[11] The ECRI Report identifies racist and antisemitic violence as one of the most pressing and dangerous expressions of racism and intolerance in Germany. The Commission analyses legislation, its enforcement and especially the climate of opinion. The ECRI Report assumes that, although a relatively small number of individuals perpetrate racist and antisemitic crimes or actively support extremist groups perpetrating such crimes, a much greater number of people may sympathise with certain of the racist, xenophobic and antisemitic ideas. In its report ECRI registers its belief that an increased acknowledgement of modern Germany as one in which various forms of identity can be associated with the traditional German identity would contribute to creating a climate where diversity is appreciated. The ECRI Report observed a tendency amongst German authorities and the media to portray the problem of racist and antisemitic violence and harassment as a special if not exclusive problem of the former East Germany. In this context, the ECRI Report draws attention to the manner in which transition occurred and to problems associated with discrimination of Eastern Germans by Western Germans, e. g. a difference in pay between Eastern and Western *Länder* (Federal States). This has created, amongst some, a sense of injustice which influences East German youth and the general climate of intolerance in the area.

III. Reaction

[12] Attached to the Report is an appendix with 4 pages of observations provided by the German Federal Government. The Government, represented by the Federal Ministry of the Interior, answered ECRI's critique as much too "sweeping and not reflecting the actual situation" in Germany. The Government's response especially took exception to the assertion that Germany's statutory naturalisation criteria might lend themselves to discrimination in their application.

[13] After harsh public criticism from the German Minister of the Interior, Otto Schily, and the Vice-President of the Jewish Council in Germany, Michel Friedman, the Vice-General Secretary of the Council of Europe, Hans Christian Krüger, partially retreated from the Report's findings during an interview with a German newspaper. (5) He stated that Germany does, indeed, do quite a lot to combat racism and intolerance and that the ECRI Report did not

acknowledge this adequately. He further stressed that not every single word of the Report should be read as a judgement, but that the most important impact of such a report is that it is apt to spark a much better debate on the issues concerned.

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(1) CRI (2001) 36, http://www.ecri.coe.int/en/08/01/13/CBC%202%20Germany.pdf .
(2) A Members List is avaiable under http://www.ecri.coe.int/en/08/04/01/01.htm.
(3) The first Report on Germany was adopted on February 7, 1997, and published March 1998.
(4) Paragrpah 42.
(5) *Europarat revidiert Rassismus-Vorwurf*, WELT AM SONNTAG, July 8, 2001 http://www.welt.de/daten/2001/07/08/0708de266341.htx.

The Federal Constitutional Court's Emergency Power to Intervene: Provisional Measures Pursuant to Article 32 of the Federal Constitutional Court Act

By Andreas Maurer
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[1] In three high-profile cases the *Bundesverfassungsgericht* (BVerfG -- Federal Constitutional Court) was recently called upon to exercise its authority to issue a temporary injunction in proccedings referred to as *einstweilige Anordnungen* (provisional measures). Article 32(1) of the *Bundesverfassungsgerichtgesetz* (BVerfGG – Federal Constitutional Court Act) provides:

In a dispute the Federal Consitutional Court may deal with a matter provisionally by means of a temporary injunction if this is urgently needed to avert serious detriment, ward off imminent force or for any other important reason for the common good.

[2] This report provides a general introduction to the Court's power to issue a temporary injunction pursuant to Article 32 of the BVerfGG, as a way of providing a context for reports in this issue of the *German Law Journal* concerning: (a) the Court's denial of a requested injunction in the **Lifetime Partnership Act Case** on July 18, 2001 (reported below under *Public Sector*); (b) the Court's grant of a requested injunction in the **NPD Party-Ban Case** on July 3, 2001 (reported below under *Public Sector*); and (c) the Court's denial of a requested injunctions in the **Love Parade / Fuck Parade Cases** on July 12, 2001 (reported below under *Legal Culture*).

[3] A temporary injunction issued prusuant to Article 32 BVerfGG provides preliminary legal protection. It is not part of the substantive proceeding but an autonomous procedure. (1) A temporary injunction can be initiated by the Court itself or by any party to the substantive proceedings. A request for a temporary injunction must, however, be bound to a case potentially or actually under review by the Court as a substantive matter. (2) In this respect, the main purpose of the provisional measures is to protect the Court's jurisdiction from being mooted by empowering the Court to prevent an alleged constitutional harm from taking place before the Court has had the opportunity to determine (in the substantive proceedings before it) whether a constitutional harm will actually result. As the constitution primarily concerns itself with limiting the powers of the State, the potential constitutional violators at the center of substantive proceedings before the Court (and therefore, at the center of a requested temporary injunction) are almost exclusively state actors like the legislature, the executive and the ordinary courts. (3) For this reason, Article 32 provisional measures play an important role in maintaining the checks and balances that are inherent to the separation of powers in the German democracy, by ensuring that the judiciary (the Constitutional Court in this instance) has the opportunity to exercise its jurisdiction to review the acts of the other branches of government at a point in time when such review is most relevant and will be most effective. (4) One comentator has described this protective function of Article 32 in the following way:

A temporary injunction exists in the case that, without the granting of such an injunction, there is the literal danger that the proceedings in the substantive case, in consideration of the facts, will become senseless or even absurd. (5)

[4] The Court has established, in spite of the important role Article 32 can play in maintaining a meaningful separation of powers, that granting such temporary injunctions will remain the exception, reserved for those cases in which the grounds for the application are so severe as to make the Court's intervention inevitable, that is to say, when an application for an injunction is justified by "especially important grounds." (6)

[5] The first level of the Court's austere review of requests for a temporary injunction is the strict application of the controlling procedural requirments. (7) It is, for example, essential, that the Court have jurisdiciton over the underlying, substantive case and that the requested temporary injunction touches upon the matter in dispute in the underlying proceedings. (8) The Court has, however, liberally interpreted the terms of Article 32. The required "serious detriment" or "imminent force" refers only to a "severe disadvantage." (9) The Court has also softened the "public good" requirement so as to extend the range of Article 32 to include cases, the impact of which is seemingly limited to a specific individual. The Court first made this shift in a case concerning the imposition of a criminal sentence, explaining that the broader public's trust in the administration of justice could be at issue in a specific criminal case. (10)

[6] The following are some of the factors the Court takes into consideration when deciding on a requested temporary injunction. A requested injunction is more likely to meet with success if the number of those to be affected by the alleged constitutional violation is large, even if the matter is being raised in the context of a specific individual's case (by establishing a rule controlling the deportation of foreigners or the admission to practice of attorneys, for example).

(11) Fundamental to the Court's consideration of a requested injunction is the political nature of the issue. The Court employs a degree of judicial self-restraint in cases involving law-making or the implementation of the law by executive agencies in order that the provisional measures do not become a tool for the parliamentary opposition to thwart the democratic process. In such cases (as with the injunction requested and denied in the **Lifetime Partnership Act Case**, reported below under Public Sector) the Court applies "an especially strict standard of review," (12) as it considers whether the disadvantages of delaying the entry into force of the law outweigh the disadvantages of allowing a law to enter into force only to have that law later striken as unconstitutional in the underlying, substantive proceedings. (13) Considerations regarding the merits of the underlying, substantive proceedings should not play a role, (14) but the Court often appears to take into consideration the likelihood of success of the underlying, substantive case. In this sense, the Court may base its decision regarding the grant or denial of an injunction on the procedural shortcomings of the underlying case, including its obvious inadmissability or that it is obviously unfounded. (15) The Court may also weigh the success of the underlying case on its merits, in spite of the general legal principle that sharply divides strictly procedural matters (like a request for a temporary injunction) from the merits of a case. Perhaps the best evidence of this anticipation of the merits is the near exact consistency in the Court's decision on requested injunctions and the following decision on the merits of the underlying case. (16)

For More Information

Bundesverfassungsgerichtsgesetz (BVerfGG – Federal Constitutional Court Act) on line (in English) at the German Law Archive: http://www.iuscomp.org/gla

(1) Those proceedings that are permissible to the FCC are enumerated in § 13 Bundesverfassungsgerichtsgesetz (Federal Constitutional Court Act). The most common proceedings are: Verfassungsbeschwerde (constitutional complaint – 126,962 proceedings until 2000), Normenkontrollverfahren (judicial proceedings on the constitutionality of laws – 3,288 proceedings until 2000) and Einstweilige Anordnungen (temporary injunctions – 1,157 proceedings until 2000).

(2) Lechner/Zuck, Bundesverfassungsgerichtsgesetz, 4th ed., 1996, § 32 no. 4.

(3) Jörg Berkemann, Einstweilige Anordnung (oldarticle 32) (Umbach/Clemens, eds., Bundesverfassungsgerichtsgesetz Kommentar (1992)) p. 571.

(4) Id. at 571-572.

(5) Id. at 572. „Eine eAnO setzt voraus, dass ohne ihren Erlass die ernsthafte Gefahr besteht, dass das Verfahren der Hauptsache angesichts vollendeter Tatsachen sinnlos, ja sinnwidrig wird."

(6) Id. at 594 (citing BVerfGE 33, 232 [234]).

(7) The Court grants only about 20% of requested provisional measures. Id. at 570.

(8) Id. at 578-579.

(9) Id. at 592.

(10) Id. at 592-593 (citing BVerfGE 14, 11).

(11) Id. at 594 (citing BVerfGE 63, 332 and BVerfGE 82, 306).

(12) Id. at 596 (citing, inter alia, BVerfGE 6, 1 [4]).

(13) Decision FCC, 91, 320, 326.

(14) This principle only finds an exception in very special cases, e.g. when the injunction would voilate basic rights and this violation would cause very grave damages. In fact, aspects of constitutionality are most probably regularly taken into consideration, even if the FCC denies that (see: Berkemann, Das verdeckte summarische Verfahren des Bundesverfassungsgerichts, JURISTENZEITUNG 1993, p. 161 seq.).

(15) Pursuant to Articles 93a and 93c of the Federal Constitutional Court Act, the Court may summarily dismiss a constitutional complaint, if it lacks „constitutional significance" or if „the issue determining the judgement of the complaint has already been decided upon by the Federal Constitutional Court, . . ." Regarding the role of these rules in Article 32 proceedings, see Robbers, JURISTISCHE SCHULUNG 1994, p. 1031, 1032; Decision FCC, 1 BvQ 23/01, 18 July 2001.

(16) Jörg Berkemann, Einstweilige Anordnung (oldarticle 32) (Umbach/Clemens, eds., Bundesverfassungsgerichtsgesetz Kommentar (1992)) pp. 571 and 601-602.