

The applicability of the "HOLZ VON HIER" label in procurement procedures

Legal opinion

on behalf of the

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A. Initial situation and question

The Holz von Hier gGmbH is the holder of a scientifically elaborated system for the certification of wood products in order to demonstrate their particular climate compatibility. In focus are besides the sustainable production, relying on forest management certificates of established forestry certification systems (FSC and PEFC), the material flows and transportation distances of wood along the chain of custody.

On the basis of the knowledge that, according to the origin of the wood used the environmental impacts associated with transports account for a considerable part of the overall environmental impact, this label, which fulfils the requirements for an eco-label type 1 according to ISO 14024, serves to indicate wood, which has been transported below-average along the entire processing chain (from the tree in the forest to the finished product).

In doing so the upper limits for transportation, which are below the average of typical transport distances of corresponding wood products, for products certified according to HOLZ VON HIER are set individually for any product or sortiment. The respective upper limit is related to the structure, the occurrence, the density of certain tree species or Production branches and the degree of processing. The actual range lies between 50 and 400 km. Due to this, the certification is not per se restricted to wood from Germany¹. In so far two cases, the certificate was given according to the client's specifications for producers from France and Austria respectively.

Against the background of the law reform in 2016, the question arises how far the HOLZ VON HIER label can be used in procurement procedures.

B. Legal framework since the reform of the procurement law (2016)

In accordance with Art. 43 RL 2014/24 / EU², § 34 VgV regulates the procedure of furnishing proof through environmental labels. These are, according to the Legal definition of Article 2 section 1 No. 23 RL 2014/24/EU, which is non-transposed, but is to be regarded within the frame of the interpretation compliant to european law, "a document, testimony or certificate with which is confirmed that a particular structure, a particular product, a specific service, a particular process meets specific agreed requirements".

1. Specification of proof by sign

According to § 34 section 1 VgV, a contracting authority may "request a label ... as a prove, that a delivery or service matches specific features, specified in the specification for tenders", provided that they comply with the standardized criteria for the quality of labels according to § 34 section 2 VgV (label requirements in the sense of Article 2 section 1 no. 24 Directive 2014/24/EU).

Thus the amended procurement law adopts a positive attitude towards the use of labels in the procurement procedure, in so far as the latter does provide proof of conformity with the requirements of the procurement object.

According to the wording of Article 43 section 1 of the directive 2014/24/EU "a specific label can be namely demanded as a proof"³.

¹ See <http://www.holz-von-hier.de/ueber-holz-von-hier/das-umweltzeichen/> as well as <http://www.holz-von-hier.de/wp-content/uploads/2015/12/Transportgrenzen.pdf>.

² EU 2014 L 94/65.

³ Parallel see also consid. 75 RL 2014/24/EU; BR-press. 87/16, p.187.

With this regulation the EU legislature has withdrawn the foundation of the EuGH jurisdiction⁴ of the case law 'Max Havelaar' (saying that is an inadmissible technical specification, if the agency has stipulated in the contract that the products to be delivered are accompanied by a specific eco-label, instead of the detailed specifications laid down for this environmental label), a judgement which has been issued according to the former regulation Article 23 section 6 directive 2004/18/EG⁵.

This jurisdiction directly corresponded with the wording of article 23 section 6 subsection 1 of the directive 2004/18/EG. This article determined, that public procurers with respect to specification of technical requirements may use detailed specifications, or at least parts of them, which are defined by environmental labels.

The actual reference, now provided by Article 43 section 1 Directive 2014/24/EU stands in contrast to the former regulation by the designated reference to a named specific environmental label. This change in wording is fundamental and has a direct effect on the content of the standard. It can not be interpreted in another way than as an intended rejection of the former obsolete regulation model. The systematic common interpretation confirms this conclusion.

Unlike in Directive 2004/18/EG and their execution through VOB/A and VOL/A the regulations on environmental labels (Article 43 RL 2014/24/EU, § 34 VgV) are now separated from the regulations regarding technical specifications (Article 42 of Directive 2014/24/EU, Section 32 VgV).

Notwithstanding the factual connection, in the opinion of the legislators on European and national level, this is a independent and discrete control complex. As far as labels refer to technical specifications, the rules and provisions regarding the use of labels precede the more specific ones on technical specifications and their (regulations regarding labels) prescriptions must at the same time be viewed as final⁶.

A statement on the admissibility of specific requirements by means of a label however is not connected with the above. The (wide) boundaries of the procurement law with regard to the determination of the object of procurement as well as the requirements of the award criteria of § 97 GWB are also to be taken into account when specifying a verification of the requirements through a label. Thus, § 34 section 1 VgV is to be interpreted in a way, that the regulation allows the proof of conformity of the offered service with the permissibly required criteria through a specific environmental label, if they for their part fulfil certain requirements.

2. Alternative proofs

For reasons of non-discrimination and competition, public procurers are obliged according to § 34 section 4 VgV to "accept other labels, which contain similar specifications or criteria to the service". This also counteracts the monopoly of certain labels, and "is particular valid for labels issued in another Member State of the European Union"⁷.

⁴ EUGH, v.10.5.2012 -C-368/10, ECLI: EU: C: 2012: 284 marginal note 70 -Max Havelaar.

⁵ AB |. EC 2004 L 134/114.

⁶ On the *lex specialis* principle, see only *Larenz/Canaris* the methodology of the jurisprudence, 3, p. Aufl.1995, p. 88 f.

⁷ BR-pressure. 87/16, p.188.

In addition, pursuant to § 34 section 5 VgV under the condition that "a company for reasons, which can not be attributed to him, verifiably had no chance to obtain the label, required by the procurer nor a similar one within a reasonable deadline ... the public procurer has to accept alternative proofs of conformity, as far as the company demonstrates that the service he will provide, meets the criteria of the required label or the criteria defined by the procurer itself". A general release from the provision of proof by a required or equivalent label and therefore a reference to the European Court of Justice's case-law *Max Havelaar* and the underlying legal situation is not to be seen in it.

This is also indicated through § 34 VgV, as well as Article 43 of Directive 2014/24/EU, does not contain any more a formulation like Art. 23 section 6 subsection 2 RL/2004/18EG, according to which contracting authorities has to accept "any other appropriate proof, such as the manufacturer 's technical documentation, or inspection reports of recognized bodies". Thus § 34 section 5 VgV is concerned only an exception linked to specific conditions, which as such has to be interpreted in narrow boundaries and whose relevance has to be demonstrated by the company, which appeals to it. According to the reasoning of the regulation, "a pure self declaration by the tenderer just containing the (not further documented) insurance, that the offered service would meet the criteria of the label" is not considered sufficient⁸. If the tenderer is not able to prove, that it was impossible to obtain the label itself or a similar one, the offer is not eligible, as it does not meet the criteria of the service description. Whether the prerequisites are in place, is to be judged by the division of procurement itself; whose decision is, however, in full scope of control by the verifying authorities.

C. Requirements for the Holz von Hier label as prerequisite for its legal applicability in procurement procedures

The usability of the Holz von Hier-Label in contracting authorities according to § 34 section 1 VgV presumes its compliance with the conditions set out in § 34 section 2 VgV.

Requirements for the label as such arise from No. 2 to 5, which are closely related. They are all aimed to preempt arbitrariness at the issuance of the label.

I. § 34 section 2 no. 2 VgV

According to § 34 section 2 no. 2 VgV, "the requirements of the label must be based on objectively verifiable and non-discriminatory criteria". The regulation refers to the requirements for issuing the label. These must be non discriminatory and comprehensible for everyone. The requirement of objective verifiability also implicates transparency of the criteria and their determinateness⁹.

For environmental labels hence the necessity of a clear, scientific approach underlying the conditions for granting is obligatory. This can be various parameters relating to the environmental characteristics of a product or of its production process or the environmental behavior of a company. At the same time, these parameters must be applied unrestricted to ensure freedom of discrimination. For example, a reference to national or regional origin as such is not allowed as as such it is with regard to the environmental characteristics is not meaningful.

⁸ BR-pressure. 87/16, p. 188; agreeing Prieß/Simonis, in: Kulartz/Kus/Marx/Portz/Prieß (edit.) VgV, § 34 Rn. 9

⁹ See EUGH, v.10.5.2012 -C-368/10, ECLI: EU: C: 2012: 284 Rn. 98 ff. -Max Havelaar.

As the Holz von Hier-Label as a product-related quality label incorporates the forest-related sustainability criteria of the FSC and PEFC without modification by requiring a FM certificate for the raw wood, it attaches to recognized standards, which are without doubt satisfying the requirements of § 34 section 2 no. 2 VgV. Its central statement of the shortness of the transport routes as evidence of particular environmental friendliness is also based on scientific studies. The differentiation between various product categories or assortments, referring to average transport distances of these assortments seems to contradict the recognition of the requirements for issuance "at first sight." A maximized reduction of complexity however § 34 section 2 no. 2 VgV does not require. For the individual assortments the requirements for the granting of a license is displayed on the website of Holz von Hier¹⁰ by means of a corresponding document.

However, it is questionable whether these transport limitations have discriminatory effects. It is obvious that vendors from timber from areas far away from the place of use are not be able to obtain the label. This places them at a disadvantage compared to local providers. However this does not implicate a discrimination regarding european law because of nationality (see Article 43 section 1 b of directive 2014/24/EU) as the transport routes in regions close to the border from neighbouring european countries may be lower than those in half of the Federal Republic of Germany or even individual federal states. To this extent is to be noted that the label neither uses a statement about the national origin of the used wood nor excludes a certification of non-German wood in any way.

There is therefore no direct discrimination. However it may be stated, that to german offerers in total the fulfillment of the requirements is more easily possible than offerers of wood(products) from abroad. This circumstance prompts the assumption of indirectly discriminatory effects. These are in principle also inadmissible under european law and are therefore subject to the prohibition of § 34 section 2 no. 2 VgV; however a prohibited indirect discrimination is there only if the unequal treatment is not objectively justified¹¹. Since environmental protection is accepted and demanded under european law, (comp. article 3 section 3 subsection 1 EUV, art. 4 section 2 lit. e, art. 11, 191 et seq. AEUV, it can serve as a justification reason. Since in the case of the Holz von Hier label there is no indication that the criteria for granting and, in particular, the definition of specific transport distances related to the assortments would not actually serve the protection of the environment¹², but the preference of national providers, this is ultimately to be classified as non discriminatory, so that the prerequisites of § 34 section 2 no. 2 VgV are fulfilled.

II. § 34 section 2 no. 3 VgV.

§ 34 section 2 no. 3 VgV requires that "the label ... has been developed within an open and transparent procedure, in which all interested parties are able to participate". The regulation refers to the process of developing the label to ensure that the general public has an influence on the formation of the awarding criteria and the latter are not the result of intransparent action by individuals (potentially interested in specific results). Process openness and transparency require the accessibility of the procedure to all relevant stakeholders such as: public bodies, consumers, social partners, manufacturers, traders and NGO¹³ and the possibility of their active participation. A final selection of the participants is

¹⁰ <http://www.holz-von-hier.de/ueber-holz-von-hier/das-umweltzeichen> under "Transportation"

¹¹ In the overview, see Epiney, in: Calliess/Ruffert (eds.), EUV/AEUV, 5th edition 2016, Art.18 AEUV Rn. 12 ff., 37 f; on the peculiarities of regional markets, see also Kingreen ibid., Art. 34-36 AEUV Rn. 182.

¹² Comp. EuGH, case law fr. 5.10.2000 - C-376/98 and C-74/99, Slg. 2000, I-8419 Rn 76 follow.

¹³ BR-pressure. 87/16, p. 187

therefore excluded as well as a lack of publicity of the procedure, the premises and deliberations and their results.

The Holz von Hier Label was developed in a several year process, under integration of a variety of stakeholders on a scientific basis. As well in the course of the implementation a continuous stakeholder participation is ensured. The qualification as an eco-label ISO type 1 ensures a conformity with the requirements of § 34 section 2 no. 3 VgV. It is not in the opinion of the EU legislature or the legislator to judge this established standard as inadequate.

III. § 34 section 2 no. 4 VgV

Pursuant to § 34 section 2 no. 4 VgV, "all concerned companies must have access to The label". On the one hand, this targets on the transparency of the label and its criteria, which may be ensured by publishing the requirements at the web¹⁴. Furthermore, the regulation demands, that any market participant, who or whose product or service fulfil the conditions of the label, can obtain it. It is therefore necessary that the label will be issued without regard to the person, their conduct, etc., solely on the basis of the application of the criteria laid down.

The Holz von Hier Label is extensively transparent¹⁵ and will be issued to every vendor of wood products, if these meet the sustainability and transport path criteria. A general accessibility within the meaning of § 34 section 2 no. 4 VgV is thus given.

IV. § 34 section 2 no. 5 VgV

Finally, § 34 section 2 no. 5 VgV rules that "the requirements .. have been defined by a third party to whom the undertaking, which acquires the label, could not exert any decisive influence" in order to avoid conflicts of interest. The labeling authority must therefore guarantee neutrality and independence of those companies which or their products shall obtain the label. "Company" marks or signs are thus excluded, whereby in this respect also regularly the conditions on the basis of the requirements of § 34 section 2 no. 4 VgV should be missed.

The Holz von Hier gGmbH, which issues the Holz von Hier Label, is a non profit organisation, the shares of which are fully Gabriele Bruckner and Dr. Philipp Strohmeier. According to the information available to me, there are no contractual or other relationships with the wood industry, which could justify their decisive influence on Holz von Hier gGmbH.

The participation of representatives of such companies in the advisory boards, or theoretically stakeholder panel¹⁶ is not suitable for justifying such an influence. The same counts with regard to the costs incurred by companies for the utilization of the non profit services of the Holz von Hier gGmbH, including access to certification to be paid as solidary contribution in the amount of € 190 to € 2000 per year. These do not prompt any influence on the formulation of the criteria of the label and its application in individual cases.

While the neutrality of the former is procedurally guaranteed by the jurisdiction of the stakeholder panel, the latter is an automated process in which the certificate of origin of the (third party controlled) is generated by computer system due to individual product-specific "bookings" of the companies. This does not allow a - even substantial - influence of the companies whose products are certified. In addition to this, the collection of costs is also included in all current labels like FSC and PEFC, without jeopardizing their neutrality.

¹⁴ BR-pressure. 87/16, S, 187.

¹⁵ Comp. www.holz-von-hier.de

¹⁶ <http://neu.holz-von-hier.de/ueber-holz-von-hier/die-initiative/kuratorium>

D. Requirements for the use of the HOLZ VON HIER Label in the award procedure

The qualification of the Holz von Hier label as a label, which complies with the general requirements of procurement law, does not automatically implies its legitimacy in individual cases. For this purpose, the compliance with § 34 section 2 no. 1 VgV need to be considered as well as the authorization of public contracting entities, to define the issue of procurement in accordance with the criteria for granting.

1. § 34 section 2 no. 1 VgV

Pursuant to § 34 section 2 no. 1 VgV a label may be used in a concrete procurement procedure only if "all requirements of the label are suitable for the definition of the characteristics of the service and ... are in relation to the object of the contract according to § 31 section 3". The demand for evidence of certain characteristics through a label is limited to this extent, as a label can not be demanded on a general basis, but must fulfill an instrumental function for the individual object of procurement. The suitability for determining the characteristics provides the the congruence between specific characteristics of the procurement issue and the criteria for the award of the label.

The additionally required connection with the object of the contract requires, that the characteristics, to be proved by the label, are not determined arbitrarily, but serve directly the target of procurement. However the public procurer has a wide scope available based on § 31 section 3 of the VgV.

This illustrates - directly related to the criteria for the award of the contract - § 127 section 3 p. 2 GWB. According to this § a connection of criteria with the object of the contract is already given, if an awarding criterion refers to manufacturing processes, delivery or disposal of the service, to the trade with the service or to another stage in the Lifecycle of the service, even if these factors do not affect the material characteristics of the object of the contract. Only a "general environmental policy" of the contracting authority is not allowed¹⁷.

If not all criteria of a label are to be applied or fulfil the requirements of § 34 section 2 no. 1 VgV, the label must not be demanded. On the contrary, in such a case, the contracting authority has, pursuant to § 34 section 3 VgV to define the relevant requirements.

With regard to Holz von Hier Label, this means that its use in awarding procedures is relevant and appropriate, in the case that sustainability as well as special climate friendliness is demanded. Where the latter is ensured through below average transportation, the requirements of § 34 section 2 no. 1 VgV are given. The climate friendliness of wood to be procured by short transport routes is both feature-oriented and also shows a direct connection to it. This is - again in accordance with the formulation of § 127 section 3 p. 2 GWB - about a process related to the fabrication, which does not affect the physical characteristics of the object of the contract.

However, a corresponding climate friendliness can also be achieved in other ways, e.g. by compensatory measures. This raises the question of whether a below average transport distance as such and thus a specific measure to ensure the climate friendliness of the procurement object, can be specified. The answer to this question depends on the authorization of public authorities to set requirements for the goods to be procured and thus exceeds the scope of § 34 VgV.

¹⁷ Prieß/Simonis, in: Kulartz/Kus/Marx/Portz/Prieß (Ed.), VgV, § 34 Rn. 3

II. Scope of the public contracting authority for determining environmental characteristics of the subject of procurement.

In the starting point, each contracting authority is free in defining the object to be procured, including the determination of its specific characteristics¹⁸. This is true in principle and since the reformation of procurement law (2016) this specifically applies to environmental characteristics¹⁹. This also includes a climate friendliness of a product to be procured²⁰.

For the definition of such requirements, which are conventionally referred to as "alien to awarding processes"²¹, it further is in force, that these must not allow to carry out an arbitrary competition in favor of domestic suppliers, like referred to the award criteria § 127 section 4 GWB²². But this is in relation to the aim of climate friendliness in the purchasing of wood (products) basically unproblematic. The climate protection is a legitimate goal both in european and national law. In the area of public procurement law climate protection forms one of the "environmental aspects" within the meaning of § 97 section 3 of the GWB and can be considered as such subject to technical specifications within the scope of the service description, awarding criteria and the conditions of the contract, § 127 section 1 p. 3, § 128 section 2 p. 3 GWB, § 31 section 3 VgV.

In so far as any restriction of competition by a (generally) "climate friendly" procurement occurs, this is done solely at the expense of the providers that do not undertake any or little ambitious climate protection measures. Against the backdrop of the recognized value of environmental protection and climate protection this cannot be blamed. Discriminatory effects (in particular against foreign suppliers) herewith are not connected.

However, it is questionable whether these considerations can be transferred to *specific* measures for climate protection. These narrow the scope of action of the concerned companies. In addition, they may be suitable for questioning the freedom of movement and thus of the internal market, to foreigners, if they would typically disadvantage foreign offerers. This is, regardless of the formal neutrality, the case when a below average transport of timber is required. The mere fact that a company based in another (farer) EU member state has the possibility to use short distance wood in its offer, does not change anything. This also applies to wood, which originates from a German or near-German forest as required for processed wood, which additionally has a production facility nearby of the place of supply (and, in doubt, inside of the country). Both factors - in comparison to companies close by - cause burdens on the offerers, which possibly be disadvantageous in the competition.

¹⁸ Traupel, in: Müller-Wrede (Edit.), Compendium of public procurement Law, 2nd ed., 2013, chap. 14 marg. 5 et seq.

¹⁹ See, for example, Zeise/Wiedemann, in: Kulartz/Kus/Portz/Prieß (Hrsg.), § 97 Rn. 78 et seq.

²⁰ More precise Fehns-Böer, in: Müller-Wrede (eds.), GWB Vergaberecht, 2016, § 97 Rn. 81 et seq.

²¹ See, for example, Glaß, in: Kapellmann / Messerschmidt (Eds.), VOB Comment, Part A/B, 5. Aufl. 2015, § 6 EC Rn. 21.

²² See Müller-Wrede, in itself (edit.), GWB Vergaberecht, 2016, § 127 Rn. 155 et seq., 192 et seq.

However, interventions in the free movement of goods can be justified. The EuGH has itself sometimes considered directly discriminatory state measures as justifiable, if they served the protection of the environment²³.

Additionally the judgements of the European legislator²⁴ have to be considered, which becomes manifest in secondary law documents, as well as the circumstance of a mere partial harmonization of environmental and climate protection law, which forces member states to adopt measures which are inevitably linked to the own territory. In this case, it is essential that § 127 section 3 p. 2 GWB, cited above, find its basis in Article 67 section 3 lit. a RL 2014/24/EU. Thus the European public procurement law itself refers to the specific process of manufacturing" as an awarding criterion. Consideration 96 specifies that, in the context of a life-cycle analysis in relation to a product which is characterized by "its environmental pollution caused through the production process" can be taken into account without limitation. In the same intention, Consid. 104 states this for the conditions of the contract. In temporal order it has to be started from extraction of raw materials, as besides consid. 96 also consid. 97 explains. In this sense, also the transportation of raw materials is part of the production process; the transport pollution is also a climate pollution.

A different valuation in the scope of the directive is prima facie solely based in Article 42 section 4 of Directive 2014/24/EU, according to which technical specifications, shall not refer to a particular manufacture or origin. At least the latter is, in the case of a limitation of transport, questionable. However, this provision is to be interpreted not isolated, but in the context of the of whole EU policies. To this extent, it must be taken into account that the reduction of traffic emissions is also an important (environmental and climate protection) target of the EU²⁵, to which a reduction in transport distances is suitable to contribute. These considerations suggest, that the requirement to take specific climate protection measures on the site of enterprises in the procurement procedures from a European perspective are in principle justified. This applies in any case, as long as this is not done in the purpose of the (hidden) discrimination of foreign suppliers and the restriction of competition.

E. Conclusions

The wood from Hier-Label fulfills the requirements of § 34 section 2 VgV, so that its use in procurement procedures principally comes into consideration. As such, it may be demanded on the part of the procurer. In the individual case, the use of it presumes however, that there is a reference to the object to be procured and that no discrimination of foreign suppliers is intended, but only an above average contribution to climate protection. This must be documented in the award note.

As a product specific indication, the Holz von Hier label may be a part of the service

²³ See, for example, the introduction of a deposit obligation on disposable packaging (with regard to which, however, the absence of an appropriate transitional arrangement has been criticized) EuGH, case law v. 14.12.2004 -C- 309/02 Slg. 2004-I-11794 Rn. 74 et seq.-Radlberger Beverage company; for the limitation of funding systems for the benefit of renewable energies EuGH, case law v. 1.7.2014 - C-573/12, ECLI:EU:C:2014:2037 Rn. 76 et seq.; Ålands Vindkraft; closer *Kingreen*, in: Calliess/Ruffert (eds.), EUV/AEUUV, 5th edition 2016, Art. 34-36 AEUV marg. 214 m.w.N; to the lack of dogmatic clarity unchanged up to date *Heselhaus*, EuZW 2001, 645 et seq.

²⁴ Comp. in the context of disposal law EuGH, case law v. 12.12.2013 -C-292/12, ECLI:EU:C:2013:820 Rn. 44 - Ragn-Sells.

²⁵ https://europa.eu/european-union/file/1254/download_en?token=1 dpGTh5w;
https://europa.eu/rapid/press-release_IP-16-2545_de.htm

description. In this case all offers must be signed with the label (or an equivalent) in order to be worthy of judgment. This can be a particularly effective measure of climate protection in using wood (products) but also significantly restrict competition.

In contrast, a use in connection with suitability criteria seems to be questionable. On the one hand, the underlying European law does not refer to the suitability criteria²⁶, on the other hand, Holz von Hier is just a product related label referring immediately to the object of procurement and not a label related to the company.

It is precisely the skills of the companies participating in the award competition, suitability criteria refer to.

On the other hand again, it is permissible to use it as a component of the award criteria, comp. § 127 section 1 sentence 3, sub section 3 GWB. Depending on the weighting in the evaluation matrix, the meaning of the label may vary. The overall contract award will be less restricted than in the case of use as part of the performance description, as in this case also offers are considered, which are not containing labeled wood. At the same time, the achievement of the climate protection goals is not ensured, if it is not focused to a higher than average degree of climate friendliness, which can be attested, among others, by the Holz von Hier label.

Finally, the use of the Holz von Hier label in suitable procurement processes is eligible as part of the implementing conditions within the meaning of § 128 section 2 GWB. In this case, the tenderer to whom the contract will be awarded must use certified wood; but this has no influence on its selection.

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²⁶ See also Baumann, VergabeR 2015, 367 (372).