

TRADE AND BUSINESS SECRET VERSUS ACCESS TO ENVIRONMENTAL INFORMATION IN THE PRACTICE OF FEDERAL ADMINISTRATIVE COURT OF GERMANY

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Abstrakt v rodném jazyce

Liberalizace přístupu k informacím o životním prostředí v důsledku přijetí směrnice 2003/4/ES, která nahradila do té doby platnou směrnicí 90/313/EHS, a její následná transpozice do národních právních řádů členských států Evropské unie, rozvířila ve Spolkové republice Německo debatu o tom, do jaké míry budou ušetřeny přístupu skutečnosti, které mají zůstat veřejnosti utajeny, jako např. obchodní tajemství. Článek si klade za cíl přiblížit ve zkratce tuto problematiku a na základě relevantní právní úpravy a soudní praxe německého Spolkového správního soudu zhodnotit současný stav v této zemi.

Klíčová slova v rodném jazyce

Směrnice 2003/4/ES, přístup k informacím, obchodní tajemství, Spolková republika Německo.

Abstract

Directive 2003/4/EC repealing Directive 90/313/EEC has liberalized an access to environmental information. A debate concerning the access to information intended to be kept secret, i.e. excluded from the public access, as e.g. trade secrets, has arisen in the Federal Republic of Germany as consequence of transposition of the Directives in the national legal orders of the European Union member states. This article intends to briefly focus on this dilemma and evaluate the current situation in this country based on the relevant laws as well as practice of the German Federal Administrative Court.

Key words

Directive 2003/4/EC, access to information, trade secret, Federal Republic of Germany.

1. INTRODUCTION

The main purpose of former European Economic Community (EEC) as indicates its name itself was of an economic nature, i.e. orientated on the support of economic co-operation among the member states. As results thereof, the environmental issues have not even been subject to the EEC Treaty¹ until Single European Act came into force in the year 1987. Since that time, the EEC has been authorized to undertake specific actions in order to contribute to environmental protection. The last word, however, have kept the member states.

The Commission of the EEC, despite these restrictions, adopted² already three years later, i.e. in the year 1990, Directive 90/313/EEC on the freedom of access to information on the

¹ However, the EEC has been involved in environmental matters before the Single European Act came into force due to a plenty of legally unbinding action programs as of the years 1973, 1977 and 1983. See Official Journal (OJ) EC No. C 112 of 20.12.1973, p. 1, OJ EC No. C 139 of 13.6.1977, p. 1 and OJ EC No. C 46 of 17.2.1983, p.1.

² Art. 130s EEC Treaty (art. 175 of the European Community (EC) Treaty) has been used as legal basis.

environment.³ This Directive constituted on the community level a legal basis for free access to available environmental information which should be granted to natural as well as legal persons.⁴ The member states were obliged to bring their national legal regulations in compliance with the Directive by 31.12.1992 at the latest. However, many of the member states have failed to transpose Directive provisions in an appropriate manner⁵ so that its purpose has not been fully met. As shows a proposal for a new directive dealing with the access to environmental information, which was elaborated by the Commission in the year 2000, one of its aims⁶ was a necessary revision of Directive 90/313/EEC.⁷ This new directive should also pave the way towards the ratification by the European Community (EC) of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25.6.1998 (Aarhus-Convention) through the alignment of the proposal to the relevant provisions of the Aarhus-Convention. The third aim was to adapt Directive 90/313/EEC to developments in information technologies so as to make a “second-generation” directive which will reflect the changes in the way information is created, collected, stored and transmitted.⁸ This proposal was subsequently adopted by the European Parliament and by the Council as Directive 2003/4/EC of 28.1.2003, on public access to environmental information and repealing Council Directive 90/313/EEC.⁹

2. TRANSPOSITION OF DIRECTIVES IN GERMANY

2.1 ENVIRONMENTAL INFORMATION ACT

The basic idea of the Directive 90/313/EEC, i.e. ensuring that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest, was transposed into German national legal order one and half year after the transposition period has elapsed by the Environmental Information Act (Umweltinformationsgesetz – UIG) of 8.7.1994,¹⁰ which came into force on 16.7.1994.¹¹

³ OJ EC No. L 158 of 23.6.1990, p. 56-58.

⁴ Kružíková, E., Adamová, E., Komárek, J.: *Právo životního prostředí Evropských společenství : praktický průvodce*, Praha: Linde, 2003, p. 86.

⁵ European Court of Justice (ECJ), C-217/97 (Commission / Germany), judgment of 9.9.1999, Rep. 1999, I-5087, ECJ, C-233/00 (Commission / France), judgment of 26.6.2003, Rep. 2003, I-6625.

⁶ See Report from the Commission to the Council and the European Parliament on the experience gained in the application of Council Directive 90/313/EEC of 7.6.1990, on freedom of access to information on the environment, dated 29.6.2000, COM(2000) 400 final, (www.eur-lex.europa.eu), last visited 8.11.2008.

⁷ Gassner, U., Pisani, Ch.: *Umweltinformationsanspruch und Geheimnisschutz – Zukunftsperspektiven*, in: *Natur und Recht* 2001, pp. 506-512.

⁸ Lit. 1.1 of justification of the new directive proposal, COM(2000) 402 final, OJ EC No. C 337E of 28.11.2000, pp. 156-162.

⁹ OJ EU No. L 41 of 14.2.2003, pp. 26-32.

¹⁰ *Bundesgesetzblatt (BGBl.)* 1994, Volume I, p. 1490.

¹¹ Some UIG provisions and definitions were not in compliance with the Directive 90/313/EEC, so that the ECJ must be involved – see ECJ, C-321/96 (Mecklenburg / Kreis Pinneberg), judgment of 17.6.1998 (www.curia.europa.eu), last visited 8.11.2008, ECJ, C-217/97 (Commission / Germany), judgment of 9.9.1999, Rep. 1999, I-5087.

Free access to information on the environment should be pursuant to sec. 4 of UIG granted to everybody. The right to information became therewith a personal subject right. This was a fundamental change of the whole German conception of the access to information. The former German “information law” has been based on a strict principle of document confidentiality, whereas the right to information itself has been guaranteed only as a procedural right. The documents and information contained therein could be made public in an administrative procedure and only to the participants thereto provided that the inspection of documents might help them to set up their claim or to defend themselves.¹² The access to information was therewith not generally excluded. The applicant, however, had to prove his legal interest.

The access to environmental information was not unlimited. Sec. 3 par. 2 of Directive 90/313/EEC has enabled the member states to set up certain access restrictions. In addition to public interests, such as public security, national defense, the entitlement of access to information might be refused also in cases which embodied typical issues of private sphere, e.g. personal data and/or files and its confidentiality, commercial and industrial confidentiality or intellectual property.

The UIG has adopted these exceptions nearly authentically, whereas it has made clear difference between the exclusion from disclosing information to protect public (sec. 7 UIG) and private interests (sec. 8 UIG). The circumstances under which facts identified as trade and/or business secrets could be made accessible were scheduled in sec. 8 par. 1 UIG. The access to trade and business secrets might not be granted without authorization. Moreover, the people concerned should be heard¹³ before the decision on disclosure of information, which might be potentially in the position to affect the protected trade and business secrets, was taken. The UIG has constructed also a legal presumption that the third party might be affected by the decision provided that he has identified transmitted information as trade and business secrets. However, pure identification of facts as trade and business secrets by the affected person (subjective element) was not enough sufficient for denying making them public. The person should demonstrate before the respective authority in each single case in detail that it was a case of trade and business secret (objective element).

2.2 TRADE AND BUSINESS SECRET

Unlike in the Czech Republic, where the trade secret is legally defined as “*commercial, manufacturing and technological facts relating to the enterprise which have actual or potential material or nonmaterial value, are not commonly available in the business circles in question, and are to be kept confidential at the discretion of the entrepreneur, who ensures that his enterprise's secrets are protected in a suitable manner*”¹⁴, there is no such legal definition in Germany. However, as many times before, especially in community law, also this shortcoming has been solved upon a practice of courts,¹⁵ which has been subsequently

¹² Sec. 29 of German Administrative Procedures Act (Verwaltungsverfahrensgesetz - VwVfG) of 25.5.1976, BGBl. 1976, Volume I, p. 1253.

¹³ The right of audience is generally stipulated in sec. 28 VwVfG, *ibid*.

¹⁴ Sec. 17 of the Act. No. 513/1991 Coll., Czech Commercial Code.

¹⁵ Federal Court of Justice (Bundesgerichtshof – BGH), I ZR 111/53 (Möbelpaste), decision of 15.03.1955, Zeitschrift der Deutschen Vereinigung für gewerblichen Rechtsschutz und Urheberrecht (GRUR) 1955, p. 424, 425, BGH, I ZR 72/59 (Wurftaubenpresse), decision of 01.07.1960, GRUR 1961, p. 43, BGH, I ZR 64/00 (Präzisionsmessgeräte), decision of 7.11.2002, GRUR 2003, p. 358.

accepted by expert public and literature.¹⁶ The German conception differentiates between trade and business secret. The first of both terms concerns especially facts and information connected with an enterprise and its subject (e.g. construction and manufacturing methods) whereas the business secret relates to the economic activity of the enterprise itself (e.g. price lists or lists of consumers). A fact is considered a business and/or trade secret, if it is:

- a. relating to an enterprise,
- b. known only to a limited number of persons and
- c. to be kept confidential at the discretion of the entrepreneur whereas
- d. an entrepreneur has a justifiable (economic) interest of keeping it secret.

The business and trade secret represent in not recent cases a relevant part of enterprise value or at least an economic advantage towards the potential competitors. It is therefore logical, that an entrepreneur does not have any interest in disclosure of these facts to the public. This is just the point, where a free access to information, even if only to that related to environmental matters, may lead to a conflict between a private and public interest. This sensible issue became yet more discussed after new regulation of access to environmental information, Directive 2003/4/EC, has been adopted.

3. NEW REGULATION OF ACCESS TO INFORMATION

3.1 DIRECTIVE 2003/4/EC

As mentioned above, Directive 2003/4/EC replacing Directive 90/313/EEC should bring the community law in compliance with the Aarhus Convention as well as remedy the deficiencies of former regulation.

Directive 2003/4/EC specified more precisely the conditions under which an access to environmental information shall be granted or on the other hand refused. A disclosure of information became a general rule. Any refusal of a request for environmental information shall be permitted only in specific and clearly defined cases, whereas the grounds for refusal shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal.¹⁷ Unlike Directive 90/313/EEC, the member states may no more categorically refuse the applicant's request, since the refusal/disclosure of information became a subject of obligatory consideration of the respective authority. The authority must prove whether the public interest could not prevail over the private interest of an entrepreneur of keeping the trade and business secrets secret. Any exceptions allowing refusal of an information disclosure must be interpreted strictly restrictively. The member states were obliged to harmonize their national laws by the beginning of the year 2005.

¹⁶ Schomerus, T., Schrader, Ch., Wegener, B.: Umweltinformationsgesetz - Handkommentar, 2. edition, Baden-Baden: Nomos Verlagsgesellschaft, 2002, p. 282. Kuvert, F.-J., Potje, E.: Umweltinformationsgesetz für den Freistaat Sachsen – Kurzkomentar, 1. edition, Dresden: Richard Boorberg Verlag, 2007, pp. 104-105. Piper, H., Ohly, A.: Gesetz gegen unlauteren Wettbewerb – Kommentar, 4. edition, München: C.H.Beck Verlag, 2006, pp. 1090 – 1093.

¹⁷ Point 16 of the preamble in connection with art. 4 par. 2 of the Directive 2003/4/EC.

3.2 NEW UIG

The Federal Republic of Germany has reacted on Directive 2003/4/EC by adopting a new UIG of 22.12.2004 which came into force on 14.02.2005.¹⁸ New UIG extended among others the number of public (and private) authorities which were involved in disclosure of environmental information and reduced the time period in which a request should be answered from two to one month. The leading thought of the Directive 2003/4/EC – information disclosure as a general rule – has been incorporated also by amending the grounds for exclusion and restriction of the entitlement to protect public (sec. 8 UIG) as well as private interest (sec. 9 UIG).

The facts considered a trade and/or business secret shall be in compliance with new sec. 9 UIG made public upon request in case the affected person has agreed or a public interest in disclosure shall prevail. The main question which needs to be answered upon weighting these two interests shall be whether the public making of information is really in a position to contribute to purpose of the whole regulation, i.e. to achieve a better environment.¹⁹ As a border line in this decision making process – following the demand on proportionality between the public and private interest – which should not to be step over may be seen an endangering of the sole existence on an enterprise. This should be the limit for the acceptance of any information disclosure.²⁰ Such case could arise in situation when a trade and/or business secrets represent an essential value of a particular enterprise and a disclosure of relevant facts would cause in fact its serious economical loses and potential subsequent bankruptcy.²¹

Trade and business secret is further generally²² considered a kind of property and therefore as such fall within the scope of art. 14 of the German Basic Law (Grundgesetz) which stipulates that property shall be guaranteed. Any inadequate restrictions of property or actions (especially undertaken by the public authority) which might harm this basic right, are forbidden or a warranty by the existing laws is required.

In respect to above mentioned, a general acceptable answer on questions such as in what extent the free access to environmental information shall be guaranteed, or moreover, whether the community law by wide extension of the information access in environmental matters (even if not intentionally) has not breached the basic right to property,²³ would be surely welcomed. Certain, at least partial answer, may be found in the practice of the German Federal Administrative Court (Bundesverwaltungsgericht - BVerwG).

¹⁸ BGBl. 2004, Volume I, p. 3704.

¹⁹ Point 1 of the preamble of Directive 2003/4/EC.

²⁰ Cosack, T., Tomerius, S.: Betrieblicher Geheimnisschutz und Interesse des Bürgers an Umweltinformationen bei der Aktenvorlage im Verwaltungsprozess, in: Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2003, p. 845.

²¹ Fluck, J.: Der Schutz von Unternehmensdaten im Umweltinformationsgesetz, in: NVwZ 1994, p. 1055.

²² Engel, R.: Der freie Zugang zu Umweltinformationen nach der Informationsrichtlinie der EG und der Schutz von Rechten Dritter, in: NVwZ 1992, p. 111. Critically Wolff, H. A.: Der verfassungsrechtliche Schutz der Betriebs- und Geschäftsgeheimnisse, in: Neue Juristische Wochenschrift (NJW) 1997, p. 98-101.

²³ Beer, J., Wesseling, A.: Die neue Umweltinformationslinie im Spannungsfeld von europäischer Eigentumsgewährleistung und privatem Informationsinteresse, in: Deutsches Verwaltungsblatt 2006, p. 133-140.

4. BUNDESVERWALTUNGSGERICHT IN PRACTICE

BVerwG is usually concerned with questions regarding the access to environmental information pursuant to UIG in case they are somehow connected with right to access to information granted by Administrative Court Procedures Code (Verwaltungsgerichtsordnung), namely with its sec. 99 par. 1. This provision set up an obligation for administrative authorities to produce document upon request, unless a public interest would be endangered or certain facts, which shall be kept secret by law or with respect to their nature, would be made public. Trade and business secret is one of them.

BVerwG has acknowledged in its practice that the term “environmental information” as defined in art. 2 par. 1 of Directive 2003/4/EC must be interpreted in a broad sense.²⁴ This way of interpretation fully complies with the decision of the European Court of Justice according to which “*a national court, which is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by it [...].*”²⁵ However, this cannot result in a general disclosure of facts, even if they fall within the scope of this term. A confrontation of the interests in conflict, namely disclosure and non-disclosure of information, must be applied in each single case, yet more in such situations in which the affected interest is guaranteed by Basic Law as it is the case by trade and business secret.²⁶ The same process shall also apply during a court procedure if there are documents which are on the one hand necessary for taking the final decision and on the other hand they contain non-public information as trade and/or business secret. In such case the court is indeed entitled to ask for these documents but it is at its obligatory discretion to decide whether they shall be made accessible to the counterparty if requested or not.²⁷

5. CONCLUSION

Directive 90/313/EEC together with Directive 2003/4/EC may be considered a mile stone on the field of the environmental information access. Their concept which ensures everybody free access to information without being obliged to prove an interest, whereas a refusal is merely an exception, has changed the praxis of restrictions in information access. This “liberalization” has affected not only the primarily intended targets – public authorities of the member states, but also certain private individuals and their (economic) interests, among others the entrepreneurs whose positions on the market depend on keeping their business and trade secrets out of competitor’s access. This was also the case of the Federal Republic of Germany which transposed the relevant community provisions by adopting the UIG on the federal level in the year 1994 and subsequently in the year 2004.

²⁴ BVerwG, 4 C 7 13.07 of 21.2.2008 (www.bundesverwaltungsgericht.de), last visited 8.11.2008.

²⁵ ECJ, joint cases C-397/01 to C-403/01 (Bernhard Pfeiffer and Others / Deutsches Rotes Kreuz, Kreisverband Waldshut eV.), judgment of 5.10.2004, (www.curia.europa.eu), last visited 8.11.2008.

²⁶ BVerwG, 20 F 2.07 of 21.2.2008, BVerwG, 20 F 12.04 of 12.1.2006 or BVerwG, 7 C 4.07 of 27.9.2007 (www.bundesverwaltungsgericht.de), last visited 8.11.2008.

²⁷ BVerwG, 20 F 1.06 of 9.1.2007, *ibid.*

As clearly results from the practice of BVerwG, even if the disclosure of information pursuant to national regulation of information access may under certain circumstances affect an (economic) interest of an individual (e.g. by decreasing of a goodwill in consequence of publication of environmental damage caused by pollution and/or waste produced by an enterprise), the sole interest of an affected person on keeping certain facts secret (business and/or trade secrets) is ensured in a sufficient manner by taking his interest into consideration in each single case, unless consent is given, before the disclosure is permitted.

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