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Working group meeting « Independence and Efficiency »

"Access to information held by public institutions and processing of (secret) informations in administrative courts procedure"

QUESTIONNAIRE

15 and 16 June, 2017

Bundesverwaltungsgericht - Federal Administrative Court,

Simsonplatz 1, 04107 Leipzig, Germany

A. Access to information held by public authorities :

The law of the European Union has a twofold approach with regard to access to public sector information: addressees are the Member States on the one and the EU institutions on the other hand. The later are addressed by art. 42 of the Fundamental Rights Charter and art. 15 par. 3 TFEU, which establish a right to access to documents of the European Parliament, the Council and the Commission as well as of Union's institutions, bodies, offices and agencies subject to the principles and the conditions defined in accordance with this paragraph. Hence regulation 1049/2001/EC of 30 May 2001 provides for public access to European Parliament, Council and Commission documents.

In the law of the administration of the EU (by Member State institutions) only sectorial limited provisions exist. The principle of conferral under art. 5 par. 1 and 2 TEU prohibits to establish a comprehensive and coherent legal framework for the national right to freedom of information. Hence secondary law provides only for public access to environmental information under directive 2003/4/EC and for the re-use of public sector information under directive 2003/98/EC of 17 November 2003, amended by directive 2013/37/EU of 26 June 2013. Both are implemented under the framework of the directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of

such data. Moreover Directive 2007/2/EC of 14 March 2007 establishes an Infrastructure for Spatial Information in the EU (INSPIRE).

QUESTIONS

1. Whether the Members States exceed the minimum standard of the right of freedom of information under the secondary EU law ? If so, to what extend? In which fields?

According to the art. 1 section 19 of the Environmental Protection Law environmental information is information regarding:

a) the state of the environment, including the air and atmosphere, water, soil, subterranean depths, landscape, nature, including wetlands, coastal and marine areas, biological diversity and components thereof, also genetically modified organisms, and interaction among these elements of the environment,

b) factors affecting the environment (for example, the emission of chemical substances, energy, odours, noise, radiation or waste and release of other types of pollution into the environment),

c) measures, also policy planning documents and other plans, programmes, agreements in the environmental field, laws and regulations and activities affecting or likely to affect the elements and factors of the environment affecting the environment or the objective of which is to protect the environment, as well as regarding the cost-benefit analysis and other economic analyses and assumptions, which are used in relation to the referred to measures and activities,

d) statements and reports regarding environmental protection, also regarding the implementation of laws and regulations,

e) the state of human health and security, the living conditions thereof and cultural objects and buildings insofar as the state of the environment, factors affecting the environment or the referred to measures affecting or likely to affect them.

According to the art. 7 of the Environmental Protection Law the public has the right to receive environmental information. The applicant that requests environmental information shall not have to justify for what purposes this information is necessary.

According to the art. 17 of the Freedom of Information Law an institution, without restricting competition, may provide for conditions for re-use [in any field].

2. How broad is an access to information held by public authorities under national law established by national law?

    2.1. Who can apply for an access to information (only natural or also judicial persons, private or also public – e. g. municipalities when performing matters of self-administration?)

Freedom of Information Law ensures that the public has access to information, which is at the disposal of institutions or which an institution in conformity with its competence has a duty to create. According to the Freedom of Information Law public information is classified as generally accessible information and restricted access information (art. 3). Generally accessible information shall be provided upon request by

a private person. Such information shall be provided to anyone who wishes to receive it, subject to the equal rights of persons to obtain information (art. 10 par. 3).

2.2. Does everybody has access to any kind of information?

As mentioned before generally accessible information is provided to anyone who wishes to receive it, subject to the equal rights of persons to obtain information. Generally accessible information is information other than classified as restricted access information.

Restricted access information is such information as intended for a restricted group of persons in relation to the performance of their work or official duties and the disclosure or loss of which, due to the nature and contents of such information, hinders or may hinder the activities of the institution, or causes or may cause harm to the legal interests of persons (art. 5 par. 1 of the Freedom of Information Law).

When requesting restricted access information, a person shall provide grounds for his or her request and indicate the purpose for which the information will be used. If restricted access information is provided, the recipient shall undertake the obligations to use this information exclusively for the purposes it was requested for (art. 11 par. 4 of the Freedom of Information Law).

According to the art. 9 par. 1 of the law On Official Secrets access to official secrets shall only be permitted to those persons who in accordance with the official (service) duties or a specific work (service) task are required to perform work related to the use or protection of official secrets and who in accordance with this Law have received special permits. An investigation of the person shall be performed before the commencement of employment (service) relations.

3. Which institutions, authorities and legal bodies are obliged to provide access ?

Every institution, and also persons who implement administration [public authority] functions and tasks if such person in the circulation of information is associated with the implementation of the relevant functions and tasks is obliged to provide access to generally accessible information or restricted access information (art. 1 par. 4 and art. 10 par. 1 of the Freedom of Information Law).

4. What are the limits and exceptions?

As mentioned before access to information held by public authorities is classified also as restricted access information and official secrets. Privat persons without special permit can not access official secrets. Privat persons can access restricted access information only if they provide grounds for his or her request and indicate the purpose for which the information will be used. If restricted access information is provided, the recipient shall undertake the obligations to use this information exclusively for the purposes it was requested for. Restricted information according to the art. 5 par. 2 of the Freedom of Information Law is regarded information:

1) which has been granted such status by law;

2) which is intended and specified for internal use by an institution;

3) which is a commercial secret, except in the case where a purchase contract has been entered into in accordance with the Public Procurement Law or other type of

contract regarding actions with State or local government financial resources and property;

4) which concerns the private life of natural persons;

5) which is related to certifications, examinations, submitted projects (except projects the financing of which is expected to be a guarantee provided by the State), invitations to tender (except invitations to tender, which are associated with procurement for State or local government needs or other type of contract regarding actions with State or local government funds and property) and other assessment processes of a similar nature;

6) which is for official use only;

7) which is the information of the North Atlantic Treaty Organisation or of the European Union, that is designated as "NATO UNCLASSIFIED" or "LIMITE" respectively.

5. Can one claim for an access before the court?

Yes, private persons have an access to an administrative court.

6. Depending on the state of implementation, which are the main topics on access to public sector information discussed in the jurisprudence of the respective Member State's courts?

On 10 February 2017 the Constitutional court of the Republic of Latvia pronounced its judgement in Case No. 2016-06-01. Constitutional court ruled that some norms of the law "On Official Secrets" that establish the procedure for cancelling the special permit for accessing official secrets (norms state that decision by the Prosecutor General on cancelling the special permit is final and not subject to appeal) are incompatible with the Constitution (right to a fair trial).

B. Processing of informations in administrative courts procedure :

According to article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms about the right to a fair trial : « *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice* ».

These principles determine the fundamental rules applicable to proceedings before the administrative courts in Europe. How these principles are applied for the instruction and the judgment of cases brought before these jurisdictions? Are there any special rules or exemptions for cases relating to the protection of public order and public safety? What is happening when "a state of emergency" is implemented?

1. THE INSTRUCTION OF THE CASE

1.1. GENERAL DATA

1.1.1. Preamble: the system of evidence

Are all kinds of evidence admissible? Are the testimonies (opinions of witnesses) admissible?

The court shall accept only such evidence that is relevant to the matter (art. 151 of the Administrative procedure law) and stipulated by law (art. 152 par. 1 of the Administrative procedure law) :

1. **Explanations of participants (also if there are no other evidentiary means or they are not reliable enough, an applicant who is a natural person may confirm his or her explanations under oath) (art. 161) ;**
2. **Testimony of Witnesses (art. 162) ;**
3. **Documentary Evidence (art. 167) ;**
4. **Demonstrative evidence (art. 172) ;**
5. **Expert Opinion (art. 181) ;**
6. **Views of Associations of Persons *(Amicus curiae)* (art. 183).**

The burden of proof: who must prove : the claimant, the administration or the judge?

According to the art. 150 of the Administrative procedure law an institution shall prove the facts upon which it relies as the grounds for its objections and an institution may only refer to those grounds that have been stated in an administrative act.

1.1.2. The role of the parties :

The content of the file and the debate: can the parties freely define what they communicate to the judge?

As long as they refer to the matter.

Can the parties, at any time, introduce new elements into the debate?

As mentioned before an institution [usually] may refer only to those grounds that have been already stated in an administrative act (art. 150 par. 2 of the Administrative procedure law). A participant in the court argument [debate] is also not entitled to refer in their statements to such facts and evidence as have not been examined at the court sitting (art. 241 par. 4 of the Administrative procedure law).

Is a replica always possible? Has the opposing party a minimum duration to answer?

Participants always have a right to one replica each (art. 242 par. 1 of the Administrative procedure law). The court may restrict only the [maximum] length of a reply (art. 242 par. 3 of the Administrative procedure law).

1.1.3. The role of the judge :

Some parties are weak, others are powerful : is this issue taken into account in defining the applicable rules?

Yes. According to the art. 150 par. 3 of the Administrative procedure law an applicant shall participate in collecting evidence, only according to his or her capacity.

Art. 107 par. 4 of the Administrative procedure law also states that in order to determine the true facts of a matter within the limits of the claim and achieve legal and fair adjudication of the matter, the court shall give instructions and make recommendations to the participants in the administrative proceeding, as well as collect evidence on its own initiative (principle of objective investigation).

Does the judge have a purely passive role or can he/she (or should he/she) require the production of information to a party to the dispute?

According to the art. 150 par. 4 of the Administrative procedure law if the evidence submitted by a participant in an administrative proceeding is not sufficient, the court shall collect it on its own initiative.

Can the judge involve third parties in the debate? Do these third parties have the same rights in this debate?

According to the art. 241 par. 3 of the Administrative procedure law third party is allowed to speak in the court argument [debate] and according to the art. 28 par. 4 of the Administrative procedure law third parties have the procedural rights of submitters and of applicants subject to exceptions stipulated in this Law.

Can the judge freely decide to ask opinion to an expert?

Art. 178 par. 1 of the Administrative procedure law states that a court shall order expert-examination in a matter in all cases where special knowledge in science, engineering, art or other sectors is necessary for the determining of facts of significance to the matter. Where necessary, a court shall order more than one expert-examination.

1.2. THE PRINCIPLE OF CONTRADICTION AND ITS LIMITS

Can the judge ask to a public authority to provide a secret information ?

According to the art. 108.[1] par. 1 of the Administrative procedure law the judge can ask to a public authority to provide secret information (official secrets) if it is necessary for determining the facts of the matter.

These secret informations provided to a court by public authorities has to be communicated to the parties or not? Can the judge supply documents or other materials produced by a party (or a third party) to the opposing party? How does this mechanism apply ?

According to the art. 108.[1] par. 1 of the Administrative procedure law secret information (official secrets) can be communicated only to the parties who have special permit to access official secrets.

According to the art. 145 par. 1 of the Administrative procedure law parties have the right to become acquainted with materials of the matter, make extracts or copies therefrom and prepare copies thereof.

Is the principle of the adversarial specially adapted in certain areas?

No. As mentioned before art. 107 par. 4 of the Administrative procedure law states that in order to determine the true facts of a matter within the limits of the claim and achieve legal and fair adjudication of the matter, the court shall give instructions and make recommendations to the participants in the administrative proceeding, as well as collect evidence on its own initiative (principle of objective investigation).

Must the judge respect secrets? What are these secrets? The secret of privacy? The secret of business? The secret of defence and public safety?

Law requires the judge to respect secrets. According to the art. 108 par. 2 and 3 of the Administrative procedure law an administrative matter *always is* adjudicated in a closed court sitting to protect State or adoption secrets and *can be* adjudicated in a closed court sitting in order that facts regarding the private lives of the participants or commercial secrets (and other restricted access information) in the administrative proceeding not be disclosed.

2. THE CLOSURE OF THE INSTRUCTION

2.1. How and when does the closing of the instruction of a case takes place: before the hearing, at the time of the hearing or after the hearing?

According to the art. 240 of the Administrative procedure law during the hearing after the evidence submitted has been examined, the court shall ascertain the views of the participants in the administrative proceeding regarding the possibility of terminating the adjudicating of the matter on the merits. If it is not necessary to examine additional evidence, the court shall ascertain whether the applicant is maintaining the claim contained in the application. If the applicant does not withdraw the claim, the court shall declare the adjudicating of the matter on the merits terminated and proceed to the court argument.

2.2. Can the judge reopen the investigations or the debate between parties about a case at any time?

According to the art. 244 of the Administrative procedure law judge can reopen the investigations or the debate between parties about a case at any time until the judgment.

3. THE HEARING

3.1. Possibility of a judicial decision without a hearing?

According to the art. 206 of the Administrative procedure law a court may adjudge a matter without a court sitting (without the presence of the parties) – in written procedure.

3.2. Possibility of an hearing without the presence of the parties?

According to the art. 214 par. 1 of the Administrative procedure law if a participant in an administrative proceeding has failed to attend a court sitting, the court shall commence adjudicating the matter, provided that there are not grounds for adjourning it.

3.3. Possibility of an in camera hearing?

According to the art. 210 of the Administrative procedure law case can be heard using videoconference.

3.4. Possibility of a hearing in a closed court ?

As already mentioned before According to the art. 108 par. 2 and 3 of the Administrative procedure law an administrative matter *always is* adjudicated in a closed court sitting to protect State or adoption secrets and *can be* adjudicated in a closed court sitting in order that facts regarding the private lives of the participants or commercial secrets (and other restricted access information) in the administrative proceeding not be disclosed.

4. THE JUDICIAL DECISION AND THE CONTENT OF THE REQUIREMENT OF MOTIVATION

4.1. To what extent is it possible to use a secret / not public information in the reasoning of a judgment ?

According to the art. 108^{1} of the Administrative procedure law in the reasoning of a judgement should be included only a notice, that court observed facts included in not publicly available documents and evaluated them (take into account).

4.2. Are all judgments pronounced publically published ? Are there some exceptions ?

According to the art. $28.^{2}$ par. 5 of the law On Judicial Power only open court judgments are published.

According to the art. $28.^{2}$ par. 2 of the law On Judicial Power if an administrative matter is adjudicated in a closed court hearing generally accessible information is only introductory section and operative part of the judgment.

C. MANAGEMENT OF INFORMATIONS AND SECRET / OR NOT PUBLIC INFORMATIONS BY ADMINISTRATIVE COURTS DURING THE STATE OF EMERGENCY

Is there a specific national regulation about that?

According to the art. 17 par. 16 of the law On Emergency Situation and State of Exception the Cabinet may determine special procedures for the circulation of information of State authorities depending on the type, intensity and nature of threat to national security.