Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 12 December 2017[1]

Case C-15/16

Bundesanstalt für Finanzdienstleistungsaufsicht
v
Ewald Baumeister

(Request for a preliminary ruling
from the Bundesverwaltungsgericht (Federal Administrative Court, Germany))

(Reference for a preliminary ruling — Approximation of laws — Markets in financial instruments — Access to information held by the financial markets supervisory authority concerning a supervised undertaking — Directive 2004/39/EC — Article 54(1) — Concepts of 'professional secrecy' and 'confidential information')

I. Introduction

1. In the present case, the Court is asked to rule on the interpretation of Article 54(1) of Directive 2004/39/EC,[2] as regards the scope of the obligation of professional secrecy which is imposed on national financial markets supervisory authorities and the concept of 'confidential information', which will require the Court to supplement its case-law beginning with the judgment of 12 November 2014, *Altmann and Others*.[3]

2. That request has been made in proceedings between Mr Ewald Baumeister and the Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Office for the Supervision of Financial Services, 'the BaFin'), concerning the latter's decision refusing to grant the applicant in the main proceedings access to certain documents regarding Phoenix Kapitaldienst GmbH ('Phoenix').

3. At the end of my analysis, I shall propose that the Court, in view of the specific nature of the supervision of the financial markets, should give as broad a scope as possible to the concepts of 'confidential information' and 'professional secrecy', by ruling that all information, including correspondence and statements, relating to a supervised undertaking and received or drawn up by a national financial markets supervisory authority is included, without any other requirement, in the concept of 'confidential information' within the meaning of the second sentence of Article 54(1) of Directive 2004/39 and is, therefore, protected by the obligation of professional secrecy pursuant to the first sentence of Article 54(1) of that directive.

1 Original language: French.

2 Directive of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1). That directive was repealed, with effect from 3 January 2017, by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349). Article 76 of Directive 2014/65 was replaced by Article 54 of Directive 2004/39.

3 C-140/13, EU:C:2014:2362.

II. Legal framework

A. EU law

4. Recitals 2, 63 and 71 of Directive 2004/39 are worded as follows:

‘2. … It is necessary to provide for the degree of harmonisation needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Community, being a Single Market, on the basis of home country supervision. …

…

(63) … Due to increasing cross-border activity, competent authorities should provide each other with the relevant information for the exercise of their functions, so as to ensure the effective enforcement of this Directive, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. In the exchange of information, strict professional secrecy is needed to ensure the smooth transmission of that information and the protection of particular rights.

…

(71) The objective of creating an integrated financial market, in which investors are effectively protected and the efficiency and integrity of the overall market are safeguarded, requires the establishment of common regulatory requirements relating to investment firms wherever they are authorised in the Community and governing the functioning of regulated markets and other trading systems so as to prevent opacity or disruption on one market from undermining the efficient operation of the European financial system as a whole. …’

5. Article 17 of that directive, entitled ‘General obligation in respect of on-going supervision’, provides, in paragraph 1:

‘Member States shall ensure that the competent authorities monitor the activities of investment firms so as to assess compliance with the operating conditions provided for in this Directive. Member States shall ensure that the appropriate measures are in place to enable the competent authorities to obtain the information needed to assess the compliance of investment firms with those obligations.’

6. Article 54 of that directive, entitled ‘Professional secrecy’, provides:

‘1. Member States shall ensure that competent authorities, all persons who work or who have worked for the competent authorities or entities to whom tasks are delegated pursuant to Article 48(2), as well as auditors and experts instructed by the competent authorities, are bound by the obligation of professional secrecy. No confidential information which they may receive in the course of their duties may be divulged to any person or authority whatsoever, save in summary or aggregate form such that individual investment firms, market operators, regulated markets or any other person cannot be identified, without prejudice to cases covered by criminal law or the other provisions of this Directive.

2. Where an investment firm, market operator or regulated market has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties may be divulged in civil or commercial proceedings if necessary for carrying out the proceeding.

3. Without prejudice to cases covered by criminal law, the competent authorities, bodies or natural or legal persons other than competent authorities which receive confidential information pursuant to this Directive may use it only in the performance of their duties and for the exercise of their functions, in the case of the competent authorities, within the scope of this Directive or, in the case of other authorities, bodies or natural or legal persons, for the purpose for which such information was provided to them and/or in the context of administrative or judicial proceedings specifically related to the exercise of those functions. However, where the competent authority or other authority, body or person communicating information consents thereto, the authority receiving the information may use it for other purposes.

4. Any confidential information received, exchanged or transmitted pursuant to this Directive shall be subject to the conditions of professional secrecy laid down in this Article. Nevertheless, this Article shall not prevent the competent authorities from exchanging or transmitting confidential information in accordance with this Directive and with other Directives applicable to investment firms, credit institutions, pension funds, [undertakings for collective investment in transferable securities (UCITS)], insurance and reinsurance intermediaries, insurance undertakings regulated markets or market operators or otherwise with the consent of the competent authority or other authority or body or natural or legal person that communicated the information.

5. This Article shall not prevent the competent authorities from exchanging or transmitting in accordance with national law, confidential information that has not been received from a competent authority of another Member State.'

7. Article 56 of Directive 2004/39, entitled, 'Obligation to cooperate', provides, in paragraph 1:

'Competent authorities of different Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties under this Directive, making use of their powers whether set out in this Directive or in national law.

Competent authorities shall render assistance to competent authorities of the other Member States. In particular, they shall exchange information and cooperate in any investigation or supervisory activities.

…'

B. German law

8. The relevant provisions of German law are contained in the Informationsfreiheitsgesetz (Law on freedom of information) of 5 September 2005,[4] as amended by the Law of 7 August 2013[5] ('the IFG'), and the Kreditwesengesetz (Law on the activities of credit institutions) of 9 September 1998,[6] as amended by the Law of 4 July 2013[7] ('the KWG').

9. Paragraph 1(1) of the IFG provides:

'Everyone is entitled to official information from the authorities of the Federal Government in accordance with the provisions of this Law.'

4 BGB1. 2005 I, p. 2722.
5 BGB1. 2013 I, p. 3154.
6 BGB1. 1998 I, p. 2776.
7 BGB1. 2013 I, p. 1981.

10. According to Paragraph 3 of the IFG, entitled 'Protection of special public interests':

'The right of access to information shall not apply

1. where communication of the information may have adverse effects on

…

(d) the monitoring and supervisory tasks of the tax authorities, the competition authorities or the regulatory authorities,

…

4. where the information is subject to an obligation to observe secrecy or confidentiality by virtue of a statutory regulation or the general administrative regulation on the material and organisational protection of classified information, or where the information is subject to professional or special official secrecy.'

11. Paragraph 5 of the IFG guarantees the 'protection of personal data', whereas Paragraph 6 of that law covers the 'protection of intellectual property and trade secrets and business secrets'.

12. Paragraph 9(1) of the KWG, entitled 'Obligation of secrecy', provides:

'Persons employed by the [BaFin], in so far as their work serves to implement this Law, may not divulge or use without authorisation facts which have come to their notice in the course of their duties and which are to be kept secret in the interests of the credit institution or a third party, in particular business and trade secrets, even after they have left such employment or their duties have ended. The provisions of the [Bundesdatenschutzgesetz (Federal Law on data protection) of 20 December 1990] [8] which must be complied with by credit institutions and supervised undertakings are not affected by this provision …'

III. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

13. Mr Baumeister is one of the investors who suffered loss as a result of fraudulent conduct by Phoenix. In 2005, insolvency proceedings were commenced against Phoenix after it emerged that its funding model was based on a fraudulent Ponzi scheme.

14. Mr Baumeister made a request, under Paragraph 1 of the IFG, for access to certain documents concerning Phoenix, namely the special audit report, reports prepared by the auditors, internal documents, reports and correspondence, received or drawn up by the BaFin in the context of its monitoring of that company. The BaFin denied that request.

15. On 12 March 2008, the Verwaltungsgericht (Administrative Court, Germany) ordered the BaFin to grant access to the documents requested, insofar as those documents did not contain trade or business secrets.

16. On 28 April 2010, in appeal proceedings, the Verwaltungsgerichtshof (Higher Administrative Court, Germany) ordered the submission of the files in order to examine the merits of the grounds for refusal put forward by the BaFin. On 26 July 2010, the Bundesministerium der Finanzen (Federal Ministry of Finance, Germany), as the supervisory authority, refused to send the requested documents.

8 BGB1. 1990 I, p. 2954.

17. On 12 January 2012, the Verwaltungsgerichtshof (Higher Administrative Court) held that that refusal was unlawful. By order of 5 April 2013, the Specialist Senate of the Bundesverwaltungsgericht (Federal Administrative Court, Germany) dismissed the actions brought against the order of 12 January 2012 by the defendant and the Federal Ministry of Finance. In parallel proceedings, during which the Federal Ministry of Finance submitted, on 24 October 2011, a more detailed declaration of refusal which referred to the various elements in the file, the Specialist Senate of the Bundesverwaltungsgericht (Federal Administrative Court), by order of 5 April 2013 and in response to the action brought by the applicant in those parallel proceedings, varied the order of 9 March 2012 of the Specialist Senate of the Verwaltungsgerichtshof (Higher Administrative Court) and held that the refusal to submit the file was unlawful not in its entirety but only in part.

18. On 29 November 2013, the Verwaltungsgerichtshof (Higher Administrative Court) ruled that Mr Baumeister had a right of access to the documents he was requesting, under Paragraph 1(1) of the IFG. Contrary to the BaFin's submissions, access was not to be generally refused under Paragraph 3(4) of the IFG read in conjunction with Paragraph 9 of the KWG. According to the Verwaltungsgerichtshof (Higher Administrative Court), only trade and business secrets, identified individually and specifically, and the personal data of third parties, within the meaning of Paragraph 5(1) of the IFG, were worthy of protection. However, the BaFin had failed to adduce sufficient evidence, in the present case, that the data at issue were worthy of protection, since it merely made a general assertion that this was so.

19. Moreover, the Verwaltungsgerichtshof (Higher Administrative Court) held that no other conclusion was apparent from EU law, since EU law does not impose on the supervisory authority an absolute duty of confidentiality which in every case precludes the obligation to grant access to the documents. Nor did the applicant's right conflict with any of the rights of Phoenix, as the insolvency debtor, or of the insolvency administrator joined to the proceedings as a third party.

20. The BaFin appealed on a point of law against that judgment before the Bundesverwaltungsgericht (Federal Administrative Court), the referring court. That court considers that its forthcoming decision will depend on the examination of several questions concerning the interpretation of Directive 2004/39 that were not examined by the Court in its judgment of 12 November 2014, *Altmann and Others*.[9]

21. In that regard, the Bundesverwaltungsgericht (Federal Administrative Court) notes that the scope which the Verwaltungsgerichtshof (Higher Administrative Court) attributed to the protection conferred by Paragraph 9(1) of the KWG is overly restrictive in two respects.

22. On the one hand, Paragraph 9(1) of the KWG applies not only to trade and business secrets, which are referred to only as examples, and to personal data, but applies, in a general way, to all facts which are not common knowledge, to which a restricted group of people has access and which the supervised undertaking or a third party has an interest in keeping confidential. This is the case not only with trade and business secrets the disclosure of which may negatively affect the competitive position of an undertaking active on the market, but also, in particular, with information concerning an insolvent institution (such as information regarding distribution channels and customer data) having an asset value which could be realised for the benefit of creditors.

23. On the other hand, Paragraph 9(1) of the KWG also protects, quite apart from its wording, statements and information which only the BaFin has a legitimate interest in keeping confidential. This follows from the objective pursued by Directive 2004/39 of establishing effective supervision of the activities of investment undertakings. Professional secrecy as provided for in Article 54(1) of Directive 2004/39 should therefore extend to documents subject to 'prudential' secrecy.

9 C-140/13, EU:C:2014:2362.

24. According to the referring court, the interpretation of Article 54(1) of Directive 2004/39 also raises other issues which it is important to examine.

25. First of all, that court seeks to ascertain whether Paragraph 9(1) of the KWG should be interpreted in accordance with EU law, in a manner which confers a broad scope on the obligation of confidentiality and permits the elements of the file to be classified as either 'confidential' or 'non-confidential' on the basis of purely formal features.

26. The case-law on the concept of 'professional secrecy' in EU law provides no basis for an understanding of confidential information and professional secrecy which renders of decisive importance the origin of the information and which is subject to no other assessment or no other classification of the business information in the light of its content and the effects, particularly the economic effects, of its disclosure. The referring court refers, in that regard, to the three requirements laid down by the General Court of the European Union in competition-law cases for information to be able to benefit from the protection of professional secrecy. However, in the light of the particular nature of the supervision of financial markets, in which cooperation in complete confidence between the supervised credit institutions and the supervisory authorities is necessary, it may be possible, according to the referring court, to waive the requirements that harm results from the disclosure and that there is an interest objectively worthy of protection.

27. Next, if such general criteria for determining which elements of the file are covered by the obligation of professional secrecy are not compatible with Directive 2004/39, it is necessary to clarify the requirements laid down by that directive for establishing the existence of a professional secret.

28. In particular, having regard to the Court's case-law concerning Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents,[10] the referring court inquires, first, whether it must be credibly shown that, in the specific case, disclosure of the information could undermine an interest worthy of protection and, secondly, whether there exists, in the field of the supervision of the financial sector, a presumption equivalent to that laid down in the context of Regulation No 1049/2001, according to which the disclosure of documents exchanged between the European Commission and undertakings undermines, in principle, both the protection of the objectives pursued by investigation activities and the protection of the commercial interests of the undertakings concerned.

29. Finally, the question arises of how long information should remain covered by the obligation of professional secrecy. According to the referring court, the extent to which confidential information is worthy of protection should diminish over time. However, the particular nature of the supervision of financial markets may justify a different assessment, based solely on the initial classification of the information as a 'business secret', that is to say, at the time it was communicated to the supervisory authority.

30. If, on the other hand, account must be taken of changes in circumstances resulting from the passage of time, the referring court inquires whether it may after a certain period be assumed that an item of information has lost the relevance which provided it with the economic value it had in a competitive market. It refers, in that regard, to the Commission notice on the rules for access to the file in competition law cases,[11] which was approved by the case-law of the General Court. It follows that information which dates from five or more years ago and must for that reason be considered historical cannot be regarded as confidential, unless the person concerned shows that, in spite of its age, that information still constitutes an essential element of its commercial position or that of a third party.

10 OJ 2001 L 145, p. 43.

11 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty [now Articles 101 and 102 TFEU], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7).

31. In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1)

(a) Is all business information communicated to the supervisory authority by the supervised entity covered by the term “confidential information” within the meaning of the second sentence of Article 54(1) of Directive [2004/39], and therefore the obligation of professional secrecy in accordance with the first sentence of Article 54(1) of [that] Directive …, independently of any further conditions?

(b) Does “prudential secrecy”, as a component of professional secrecy within the meaning of the first sentence of Article 54(1) of Directive 2004/39, independently of any further conditions, cover all statements by the supervisory authority contained in the files, including its correspondence with other entities?

If questions (a) or (b) are answered in the negative:

(c) Must the provision on professional secrecy in Article 54(1) of Directive 2004/39 be interpreted as meaning that, as regards classification of information as confidential,

(i) the relevant factor is whether the information is by its nature covered by the obligation of professional secrecy or access to the information could actually and specifically undermine the interest served by confidentiality, or

(ii) account must be taken of other circumstances under which the information is covered by the obligation of professional secrecy, or

(iii) in respect of business information of the [supervised undertaking] held in its files and related documentation of its own, the supervisory authority may rely on a rebuttable presumption that this information concerns business or prudential secrets?

(2) Must the term “confidential information” within the meaning of the second sentence of Article 54(1) of Directive 2004/39 be interpreted as meaning that for business information communicated by the supervisory authority to be classified as a business secret meriting protection or as information otherwise meriting protection, the relevant factor is solely the date of communication to the supervisory authority?

If the second question is answered in the negative:

(3) Regarding the question of whether an item of business information is to be protected as a business secret regardless of changes in the economic climate and is therefore subject to the obligation of professional secrecy in accordance with the second sentence of Article 54(1) of Directive 2004/39, must, in a general manner, a time limit — of five years, say — be assumed, following expiry of which it will be rebuttably presumed that the information has lost its economic value? Do analogous considerations apply as regards prudential secrecy?’

IV. My analysis

32. As a preliminary point, it should be observed that certain legislative acts of the European Union other than the one under consideration contain provisions relating to the obligation of professional secrecy similar to Article 54 of Directive 2004/39. They include, in particular, in so far as the supervisory authorities of the Member States are concerned, Article 102 of Directive 2009/65/EC[12] and Article 53 of Directive 2013/36/EU,[13] and, in so far as the European supervisory authorities are concerned, Article 70 of Regulation (EU) No 1093/2010[14] and Article 70 of Regulation (EU) No 1095/2010.[15]

33. However, the Court has never ruled on the actual definition of professional secrecy or on the scope of the concept of 'confidential information' in the context of the system of supervision of the financial markets.[16]

34. Nevertheless, it has had the opportunity, as the Bundesverwaltungsgericht (Federal Administrative Court) notes in its order for reference, to rule on the right of access to the administrative documents of the EU institutions and on the right of access to the documents produced in the context of competition law.

35. As regards, for example, the right of access to documents held by the Commission in the context of competition proceedings, the Court was able to specify in particular that the disclosure of information relating to proceedings for infringement of Articles 101 and 102 TFEU was the principle[17] and that, even if the undertaking concerned objected, that information could nevertheless be disclosed if it did not constitute a business secret[18] or other confidential information, where an overriding interest made that disclosure necessary[19] or where that information was not, by its very nature, protected by the obligation of professional secrecy. However, that interpretation has neither the object nor the effect of prohibiting the Commission from publishing information relating to the elements constituting an infringement of Article 101 TFEU which does not enjoy protection against publication on another ground. Similarly, the Court stated that, in the context of leniency programmes, the principle was the publication of infringement decisions, unless that undermined the protection of inspections and investigations.[20]

12 Directive of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32).

13 Directive of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338).

14 Regulation of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ 2010 L 331, p. 12).

15 Regulation of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ 2010 L 331, p. 84).

16 A relatively similar request for a preliminary ruling in *Buccioni* (C-594/16) is currently before the Court.

17 Judgments of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376, paragraph 51), and of 13 January 2017, *Deza* v *ECHA* (T-189/14, EU:T:2017:4, paragraphs 49 and 55 and the case-law cited).

18 As regards the protection of trade secrets, see judgment of 24 June 1986, *AKZO Chemie and AKZO Chemie UK* v *Commission* (53/85, EU:C:1986:256, paragraph 28).

19 Judgment of 14 March 2017, *Evonik Degussa* v *Commission* (C-162/15 P, EU:C:2017:205, paragraphs 42 and 45). That appeal was aimed at challenging the judgment of 28 January 2015, *Evonik Degussa* v *Commission* (T-341/12, EU:T:2015:51), which, in paragraph 94, set out three conditions for the non-disclosure of information held by the Commission in proceedings for infringement of competition law, namely, first, that the information must be known only to a limited number of persons, secondly, that the requested disclosure must be likely to cause serious prejudice to the person who provided the information or to third parties and, thirdly, that the interests liable to be harmed by that disclosure must, objectively, be worthy of protection. Although those three conditions are not expressly reproduced by the Court in its judgment, nor are they contradicted therein.

20 Judgment of 14 March 2017, *Evonik Degussa* v *Commission* (C-162/15 P, EU:C:2017:205, paragraphs 95 and 96).

36. That case-law implies that, in the context of proceedings in respect of the application of competition rules, the principle is the publication of information and therefore its widened accessibility, unless it can be shown that such information enjoys protection based on the obligation of professional secrecy. That same logic was adopted with regard to the right of access to documents of the EU institutions. [21]

37. Although such an interpretation is perfectly valid in the field of the right of access to certain documents of the EU institutions or of competition law, it cannot be applied in the specific field of the system of supervision of the financial markets. It is necessary to take into account the specific nature of the rules governing the supervision of the financial markets, which, in my view, prevents any analogy with other rules provided for by EU law, contrary to what the Commission, in particular, argues in its written observations. It is appropriate here to take into account the particular features of supervision of the financial markets and the content of Article 54 of Directive 2004/39, which sets out the principle of professional secrecy and the practical consequences that the granting of the right of access to documents held by the supervisory authorities of the Member States would have on the system of supervision of the financial markets. In that context, it is indeed impossible to draw parallels with other areas of EU law, since the information gathered in the context of the system of supervision of the financial markets is entirely different from that held by the EU institutions in other matters, whether in terms of its volume, potential uses, possible consequences and purposes.

38. The financial markets supervisory authorities have, as their name indicates, an essential mission of supervising and monitoring undertakings operating in the financial markets. In order to fulfil that mission effectively, those authorities must have access to information concerning the undertakings which they monitor. That information may be collected either through the powers of coercion conferred on those authorities under national legislation or by voluntary transmission from the supervised undertakings, bearing in mind that that second method of cooperation between those undertakings and the supervisory authorities is privileged. That necessary collaboration between the supervised entities and the competent authorities justifies the existence of an obligation of professional secrecy placed on those authorities because, without that obligation, the information necessary for the supervision of the financial markets would not be communicated by the supervised undertakings to the competent authorities without reluctance or even resistance. [22]

39. That obligation of professional secrecy has historically gained in importance with the internationalisation of financial activities and the need to facilitate the exchange of information between the competent authorities of the different Member States in order effectively to monitor cross-border transactions within the internal market. [23] In order to do so, as from First Directive 77/780/EEC [24] the EU legislature took up the matter of the requirements linked to the confidentiality of the information exchanged, by laying down the principle of professional secrecy, which until then had been governed solely by national laws. Although the legal framework thus established was modified by Directive 2004/39 and then by the subsequent legislation, the obligations of professional secrecy and confidentiality laid down in Article 54 thereof have, nevertheless, remained largely unchanged. [25]

21 See, to that effect, in particular the judgment of 1 July 2008, *Sweden and Turco* v *Council* (C-39/05 P and C-52/05 P, EU:C:2008:374), concerning application of the exceptions to the right of access to the documents of the EU institutions provided for by the provisions of Regulation No 1049/2001. See, more recently, my Opinion in *ClientEarth* v *Commission* (C-57/16 P, EU:C:2017:909, point 52 et seq.).

22 See, to that effect, the Opinion of Advocate General Jääskinen in *Altmann and Others* (C-140/13, EU:C:2014:2168, point 37).

23 See, to that effect, in particular recital 63 of Directive 2004/39.

24 First Council Directive of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ 1977 L 322, p. 30).

25 See, to that effect, the provisions of Directive 2014/65 (in particular recital 153 and Article 76), which recast Directive 2004/39.

40. Thus, the whole question lies in determining the extent of the range of the information which is to be classified as 'confidential' and which must be protected by professional secrecy in the particular context of the system of supervision of the financial markets, even though Article 54 of Directive 2004/39 establishes a general obligation of professional secrecy, while at the same time expressly and exhaustively providing for exceptions to that obligation. [26]

41. The logic thus adopted by the EU legislature in the matter under consideration is therefore that of a prohibition on disclosure in principle, contrary to what is provided for in competition law or in relation to access to documents of the EU institutions, since in both those cases the right of access to documents, subject to exceptions, prevails. [27] Therefore, the reasoning followed by the EU legislature in matters of financial markets supervision is diametrically opposed to that chosen in the context of the right of access to administrative documents of the EU institutions and of competition law, [28] where the principle is that of transparency. For the purpose of resolving the dispute in the main proceedings, it is therefore possible to take the view that the EU legislature relegated the principle of transparency to a position of secondary importance, in favour of the requirement for the proper functioning of the financial markets.

42. That particular rationale is justified by the fact that the purpose of Directive 2004/39, as stated in recital 2 thereof, is to establish an integrated and harmonised financial market, offering investors a high level of protection and allowing them to provide services throughout the European Union. [29]

43. Article 54 of Directive 2004/39 thus ensures the smooth exchange of information, which means that both the supervised undertakings and the competent authorities can be certain that the confidential information they exchange will remain confidential. [30]

44. The absence of a uniform interpretation of the cases in which information may be divulged to third parties would undermine that objective, which would be contrary to recital 2 of Directive 2004/39. [31] That is why Article 54(1) of that directive requires supervisory authorities to prohibit the disclosure of information held by them, except in a summary or aggregated form, preventing any identification. [32] The Court has also had the opportunity to highlight that principle in the judgment of 12 November 2014, *Altmann and Others*. [33]

45. However, even if the background to the dispute in the main proceedings is identical to that giving rise to the judgment in *Altmann and Others*, [34] that case concerned only the scope of the exemptions from the obligation of professional secrecy provided for in Article 54(1) and (2) of Directive 2004/39, where the confidential information relates to an undertaking placed in judicial liquidation, whose

26 Judgment of 12 November 2014, *Altmann and Others* (C-140/13, EU:C:2014:2362, paragraphs 34 and 35).

27 Judgment of 13 January 2017, *Deza* v *ECHA* (T-189/14, EU:T:2017:4, paragraph 55 and the case-law cited). The general principle is to confer on the public the widest possible access to documents held by the EU institutions. Exceptions to that principle must be interpreted strictly, meaning that non-disclosure can be justified only by the fact that such access is likely specifically and actually to undermine the protected interest and that the risk of that interest being undermined is reasonably foreseeable and not purely hypothetical (paragraphs 51 and 52 of that judgment and the case-law cited).

28 In that regard, the Communication from the EFTA Surveillance Authority Notice on the rules for access to the EFTA Surveillance Authority file in Cases pursuant to Articles 53, 54 and 57 of the EEA Agreement (OJ 2007 C 250, p. 16) provides for access rules and establishes the principle of the right of access in competition matters (paragraphs 19 to 21). The same is true in the judgment of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau* (C-139/07 P, EU:C:2010:376, paragraph 51 et seq.), although the Court provides for exceptions to that principle of the right of access, which are made after a concrete, individual examination of the application (paragraph 63).

29 See judgment of 12 November 2014, *Altmann and Others* (C-140/13, EU:C:2014:2362, paragraph 26), and recitals 31, 44 and 71 of Directive 2004/39.

30 Judgments of 11 December 1985, *Hillenius* (110/84, EU:C:1985:495, paragraph 27), and of 12 November 2014, *Altmann and Others* (C-140/13, EU:C:2014:2362, paragraphs 31 and 32), and recitals 44 and 63 of Directive 2004/39.

31 Opinion of Advocate General Kokott in *UBS Europe and Others* (C-358/16, EU:C:2017:606, point 37).

32 Opinion of Advocate General Kokott in *UBS Europe and Others* (C-358/16, EU:C:2017:606, point 30).

33 C-140/13, EU:C:2014:2362.

34 C-140/13, EU:C:2014:2362. Both cases are concerned with challenging the BaFin's rejection of a request for access to certain documents relating to Phoenix (in this instance, the special audit report, the reports prepared by auditors, internal documents, reports and correspondence) submitted on the basis of Paragraph 1(1) of the IFG.

activity was fraudulent and several responsible executives of which were given custodial sentences. In the case in the main proceedings, the Court is asked to carry out, in the same context, an unprecedented analysis of the classification of 'confidential information' and of the scope of professional secrecy within the meaning of Article 54(1) of Directive 2004/39.

46. In that context, it should be pointed out that the financial markets supervisory authorities fulfil a supervisory task in the general interest. To do so, they must have documents providing substantive information on the situation, development and sustainability of the supervised undertaking.

47. Therefore, that information must be collected and exchanged in confidence to the extent that this is necessary and directly related to the supervisory activity. The supervisory authorities need to have complete, honest and reliable information, in order properly to carry out their mission. For the supervisory activity to be effective and efficient, the supervised undertakings should be fully transparent with regard to the competent authorities. That entails confidential treatment of information relating to those undertakings, so as not to render ineffective the provisions relating to professional secrecy. Those reasons may, accordingly, justify a legitimate restriction of the fundamental right of access to documents [35] held by the competent authorities, for the purpose of ensuring the proper functioning and stability of the system of supervision of the financial markets. Accordingly, the characteristics, functions and roles of those authorities must have an effect on the accessibility of the documents and information which they hold.

48. In the context of the system of supervision of the financial markets, national supervisory authorities must, in order best to perform their supervisory tasks, enjoy the confidence of the supervised undertakings. [36] It should be remembered that the latter will more readily provide reliable and honest information to the supervisory authorities if they know that that information will be protected in accordance with a principle of confidentiality.

49. Moreover, the same requirement of trust exists between the national supervisory authorities themselves, since the EU legislature has provided that they are to operate as a network. [37] This means that the exchange of information between them must be reinforced by the guarantee of confidentiality attaching to the information which they obtain and hold in the context of their supervisory tasks.

50. Moreover, that necessary trust also applies in relation to the preventive function of the financial markets supervisory authorities, which presupposes that those authorities possess information covered by professional secrecy and confidentiality. The preventive function performed by the supervisory authorities presupposes that collection and intelligence tasks are carried out in confidence, since any disclosure may, by its very nature, have serious consequences, even in the case of information which may seem at first to be of minimal interest, but which is actually significant for the functioning of both the financial markets and the system of supervision of those markets.

51. Even if the sensitivity of certain information held by the supervisory authorities is sometimes not evident at the outset, its disclosure may disturb the stability of the financial markets. Information received or drawn up by the financial markets supervisory authorities which might, a priori, seem harmless may ultimately prove to be essential in the particular context of the functioning of the financial markets and for undertakings operating in that market and subject to supervision.

35 On that classification as a fundamental right, see the Opinion of Advocate General Léger in *Council* v *Hautala* (C-353/99 P, EU:C:2001:392, points 55 and 77).

36 Judgment of 12 November 2014, *Altmann and Others* (C-140/13, EU:C:2014:2362, paragraph 31).

37 Even within that network, professional secrecy, aimed at protecting the rights of the persons concerned, must prevail in the exchange of information between supervisory authorities. See, to that effect, recital 25 of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1), recital 23 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ 2006 L 177, p. 1), and recital 153 of Directive 2014/65.

52. Therefore, if strict confidentiality of the information thus held by the national supervisory authorities were not guaranteed, there would be a risk of legal uncertainty and of a weakening of the system of supervision of the financial markets.[38] Accordingly, particular caution must be exercised, given the risk of financial catastrophe which would result from a breakdown of confidence in the functioning of the financial market and of its system of on-going supervision.[39] Indeed, anything which might be perceived as a weakness in the protection of information would be detrimental to the supervisory system, since it would undermine confidence, and any failure to protect the confidentiality of information held by the competent authorities could interfere with the proper functioning of that system. The disclosure of such information could destabilise the undertaking concerned and could also have the effect of discrediting the supervisory authorities in the eyes of the players operating in the financial markets who provide such information and thus enable those authorities to perform their duties.

53. It is true that national supervisory authorities may be in possession of information which is of a public nature, in the sense that such information is covered by an obligation of disclosure provided for by EU law, such as that laid down by Articles 2 and 3 of First Directive 68/151/EEC.[40] However, even in that situation, I consider that it is not the role of those authorities to function as a 'one-stop-shop', with the result that, in my view, they are not required to respond favourably to a request for access to public information of that kind.

54. In short, I consider that professional secrecy, the principle of which is laid down in Article 54 of Directive 2004/39, cannot be varied according to the nature of the information held by the supervisory authorities. All the information available to those authorities must be regarded as confidential in that those authorities do not have the function of communicating with the public, but only of monitoring the undertakings operating in the financial markets, thereby contributing towards their stability and their regulation.

55. Moreover, I would point out that, in my view, there is an overlap between the terms 'professional secrecy' and 'confidential information' used in Article 54(1) of Directive 2004/39. Accordingly, the use of those two terms must be regarded as redundant, in as much as they in reality denote a single purpose and the same idea.

56. Moreover, as regards First Directive 77/780, the Court, emphasising the importance of protecting professional secrecy, had already, in the judgment of 11 December 1985 in *Hillenius*, provided a broad definition of the confidentiality of the information held by the national supervisory authorities of credit institutions,[41] thereby concurring with the Opinion of Advocate General Slynn,[42] who argued that there should be no distinction between different types of information and proposed that the Court rule that the obligation of professional secrecy covered, inter alia, testimony.

57. Allowing the authorities to carry out, on a case-by-case basis, a specific and individual assessment of requests for access to the documents they hold could fragment the system of supervision and might result in differences in treatment based on the subjective assessment by a national authority of a request for access to documents. It should be recalled that the requirement of uniform application of Directive 2004/39 and the objective of harmonisation which it pursues support the establishment of uniformity in assessing the confidentiality of information received and drawn up by supervisory

38 Judgment of 12 November 2014, *Altmann and Others* (C-140/13, EU:C:2014:2362, paragraph 33).

39 Article 17 of Directive 2004/39 provides for the on-going supervision of the financial markets, which entails the existence of a continuous flow of information between the supervised undertakings and the supervisory authorities.

40 First Council Directive of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty [which became the second paragraph of Article 48 of the EC Treaty, then the second paragraph of Article 54 TFEU], with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition, 1968(I), p. 41).

41 Judgment of 11 December 1985, *Hillenius* (110/84, EU:C:1985:495, paragraph 26).

42 Opinion of Advocate General Slynn in *Hillenius* (110/84, not published, EU:C:1985:333).

authorities and, accordingly, the existence of a general principle of confidentiality rather than a case-by-case assessment of the application of professional secrecy. In the main proceedings, that general principle must justify non-disclosure of the information sought by Mr Baumeister, so as not to undermine the system of supervision of the financial markets or impair its effectiveness.

58. In that regard, it is appropriate to be guided by recital 5 of Directive 2004/39, which promotes the integrity and efficiency of the financial system and implies a principle of confidentiality as regards the system of supervision of the financial markets. That presupposes that a broad definition of confidentiality and professional secrecy may prevail. It is also possible to draw inspiration from recital 8 of Directive (EU) 2016/943,[43] which aims to prevent fragmentation of the internal market[44] and a weakening of the overall deterrent effect of the relevant rules on business secrets in the internal market. Moreover, recital 14 of that directive refers to the existence of a legitimate interest in keeping information confidential in general and stresses the existence of a legitimate expectation that such confidentiality will be preserved by the relevant persons.

59. Accordingly, notwithstanding the written observations of the Netherlands Government and the guidance already set out in the case-law relating to fields other than the supervision of financial markets, it must be emphasised that the uniform application of Directive 2004/39 would be undermined if Member States were afforded discretion in determining the scope of professional secrecy and the scope of the concept of 'confidential information' or if each supervisory authority could subjectively assess what information could be disclosed, by carrying out a specific and individual examination of each request for access to documents, which, moreover, would entail a significant workload for those authorities and require them to weigh up the various interests involved.[45]

60. In that regard, it must be considered that the EU legislature itself weighed up and struck a balance between the various interests potentially involved by establishing, as stated above,[46] the general principle of non-disclosure of information received and drawn up by the financial markets supervisory authorities, and by coupling that principle with exhaustive exceptions[47] which must, as such, be interpreted strictly.

61. In that regard, I consider that it is not for the Court to take the place of the EU legislature by laying down precise criteria and arrangements for determining the characteristic elements of the scope of professional secrecy and nor is it for the financial markets supervisory authorities to seek to strike that delicate balance, which could entail a case-by-case approach, thereby weakening the harmonised system of supervision, even though the logic adopted by the EU legislature leads to a proportionate weighing up of the various interests involved.

62. Finally, to return to the case in the main proceedings, it seems to me clear from the observations submitted to the Court that none of the exceptions provided for in Article 54 of Directive 2004/39 is applicable to Mr Baumeister's current situation. Moreover, although it is apparent from the hearing that the issue in the dispute in the main proceedings seems to be the determination of costs, I am not sure how obtaining confidential information held by the BaFin would be useful in that context.

43 Directive of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1).

44 The system of supervision of the financial markets is closely linked to the establishment of the internal market (see point 39 of this Opinion).

45 It is clear from the case-law on the disclosure of documents of the EU institutions that, if that interpretation were adopted by the Court, each requested authority would have to weigh up the various interests involved. See, in that regard, Opinion of Advocate General Kokott in *Commission* v *Stichting Greenpeace Nederland* (C-673/13 P, EU:C:2016:213, point 54). Thus, by analogy, in the case in the main proceedings, it would be necessary to strike a balance between the protection of the system of supervision of the financial markets and the interests of a contractor harmed by the fraudulent activities of an undertaking, even outside any ongoing proceedings.

46 See point 41 of this Opinion.

47 Opinion of Advocate General Kokott in *UBS Europe and Others* (C-358/16, EU:C:2017:606, points 83 and 84), and judgment of 12 November 2014, *Altmann and Others* (C-140/13, EU:C:2014:2362, paragraphs 34 and 35).

63. In the light of those considerations, the case in the main proceedings cannot give the Court occasion to open a breach in the principle of confidentiality and the obligation of professional secrecy covering all information received and drawn up by national financial markets supervisory authorities.

64. Accordingly, in the particular context of the supervision of financial markets, it is appropriate to adopt a broad definition of the confidential nature of information held by supervisory authorities, thereby making its disclosure possible only in the cases provided for by Article 54 of Directive 2004/39. The general principle laid down by the EU legislature is that of professional secrecy and exceptions to that principle of confidentiality must be interpreted strictly and allowed only when they are expressly provided for by the provisions of Directive 2004/39. Accordingly, except in the cases exhaustively listed by those provisions, the financial markets supervisory authorities are bound by the obligation of professional secrecy for an indefinite period.

65. Having regard to all the foregoing considerations, it must be considered that all information, including correspondence and statements, relating to a supervised undertaking and received or drawn up by a national financial markets supervisory authority is included, without any other requirement, in the concept of 'confidential information' within the meaning of the second sentence of Article 54(1) of Directive 2004/39 and is, therefore, protected by the obligation of professional secrecy pursuant to the first sentence of Article 54(1) of that directive.

V. Conclusion

66. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred for a preliminary ruling by the Bundesverwaltungsgericht (Federal Administrative Court, Germany):

All information, including correspondence and statements, relating to a supervised undertaking and received or drawn up by a national financial markets supervisory authority is included, without any other requirement, in the concept of 'confidential information' within the meaning of the second sentence of Article 54(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC and is, therefore, protected by the obligation of professional secrecy pursuant to the first sentence of Article 54(1) of that directive.