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Professional secrecy of supervisory authorities under MiFID: no longer sacred?*

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In the Baumeister *judgment of 19 June 2018, the Court of Justice of the European Union (the "Court") examines the meaning of "confidential information" from the point of view of MiFID. In answering questions referred for a preliminary ruling, the Court examines the criteria for the confidentiality of data. In addition, the Court states that information relating to a supervised entity and provided to a competent authority by such entity itself, does not necessarily qualify as confidential if a period of five years has elapsed. What is the consequence of this judgment for market participants that are subject to financial supervision?*

1. Judgment C-15/16

On 19 June 2018, the Court delivered a judgment under a preliminary ruling procedure from the *Bundesverwaltungsgericht*, the highest federal German administrative court.[1] This judgment *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister* concerned the request for the interpretation of article 54 (1) of Directive 2004/39/EC on markets in financial instruments ("MiFID").[2] More specifically, an analysis is made of the obligation of regulatory authorities on financial market to keep confidential information confidential. Both the professional secrecy of these authorities and the concept of confidential information are explained by the Court.

1.1. Confidentiality under MiFID

MiFID arose from the desire to protect investors. The directive is used as a tool to achieve harmonization, so that (i) a high level of protection is offered to investors; and (ii) investment firms are able to provide services throughout the European Union on the basis of home country supervision.[3] MiFID states that the increasing cross-border activities of market players require the competent authorities to be able to exchange data for the performance of their duties in situations of infringement of MiFID in two or more Member States. Member States are then responsible for ensuring that these competent authorities monitor activities of market participants[4] and that appropriate measures are in place to enable competent authorities to obtain the information needed to assess the compliance of market participants with the relevant obligations.[5] Furthermore, MiFID states in article 54 – which is the central article in the Baumeister judgment – that competent authorities and all persons who work there are bound by the obligation of professional secrecy. All information provided on the basis of MiFID is in principle covered by the obligation of professional secrecy. However, article 54 does not prevent competent authorities of different member states to cooperate, exchange and transfer confidential information to other national authorities if necessary for the performance of their duties.[6]

1.2. Facts

Ewald Baumeister was one of the investors who suffered loss due to the activities of Phoenix Kapitaldienst GmbH ("Phoenix"), a company with a fraudulent pyramid construction as the basis for its financing model. In 2005, insolvency proceedings were initiated against Phoenix. On the basis of the German Law Governing Access to Information, Baumeister has sought access to documents concerning Phoenix, such as audit reports, internal documents, reports and correspondence as received by the German supervisory authority (the Bundesanstalt für Finanzdienstleistungaufsicht) as part of its supervision of Phoenix. After the authority rejected this request, Baumeister unsuccessfully filed an informal complaint and subsequently brought an action against the refusal before the Verwaltungsgericht Frankfurt am Main, the administrative court of first instance. This court ordered the authority to grant access to the requested documents with the exception of business and commercial secrets. On appeal, the administrative court of the Land of Hesse ruled that Baumeiser should indeed have had access to the requested documents, with the exception of those containing trade or business secrets.

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After the appeal, the higher administrative court held that access to the documents at issue could be refused solely if they relate to trade or business secrets, which had to be identified in the same way as the personal data of third parties. In addition, the court stated that no other approach would be consistent with EU law. The authority then brought an action before the Bundesverwaltungsgericht, which, in its capacity as federal administrative court, in turn referred questions to the Court for a preliminary ruling.

1.3. Preliminary questions

The Bundesverwaltungsgericht states that the German law to which reference was made in the proceedings, is designed to give general protection to all information of which the supervised entity, a third party or even a supervisory authority have a legitimate interest in maintaining confidential. This includes information which has an economic value, irrespective of whether the information strictly concerns trade or business secrets. It is noteworthy that the Bundesverwaltungsgericht states the specific characteristics of monitoring financial markets may justify that the confidentiality obligation is interpreted particularly broad. The following questions are referred to the Court for a preliminary ruling: (1) Is all business information communicated to the supervisory authority by the supervised entity and all statements of the supervisory authority, including its correspondence with other bodies, covered by the term "confidential information" within the meaning of article 54 of MiFID and therefore subject to the obligation of professional secrecy without any further conditions? (2) Must the term "confidential information" be interpreted as meaning that for business information the only relevant factor is the date of communication to the supervisory authority? (3) Regarding the question whether business information is to be protected as a business secret and subject to the obligation of professional secrecy, must a time limit – of for example five years – be assumed, following the expiry of which there will be a rebuttable presumption that the information has lost its economic value?

1.4. Judgment

In answering the questions referred, the Court refers to the Altmann judgment.[7] In this judgment, the Court emphasizes the obligation for supervisory authorities to exchange data in the case of cross-border activities of market participants and the control function of Member States for these obligations. Also, the importance is stressed that both the supervised entities and supervisory authorities can have confidence that confidential information provided will, in principle, remain confidential. The absence of such confidence is liable to compromise smooth transmission of confidential information that is necessary for monitoring. Altmann clarifies that the obligation of professional secrecy under article 54 MiFID is not only in the specific interest of market participants, but also the public interest in the normal functioning of the markets in financial instruments of the European Union. Now that Altmann provides the framework for the question whether confidential information can be made public, Baumeister addresses the question which information actually qualifies as confidential. The Court reflects that neither article 54 MiFID, nor the objectives of the directive lead to the conclusion that all information provided by market participants to supervisory authorities is by definition confidential and therefore subject to the obligation of professional secrecy.[8] So, what qualifies then as confidential information? The Court reflects that this must be information which is not public and the disclosure of which is likely to adversely affect the interest of the person or entity who provided that information, third parties or the proper functioning of the system for monitoring activities established by MiFID. Next, it appears that – as an answer to the second question referred for a preliminary ruling – the confidentiality of information must be assessed at the time of examination of a request for disclosure, irrespective of how that information was classified at the time when it was communicated to those authorities. Information which is not confidential in first instance may become confidential over time and vice versa. The Court continues by referring to a recent judgment and by emphasizing that information which could constitute business secrets and is at least five years old, that information must – as a rule – on account of the passage of time be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite of its age, that information still constitutes an essential element of its commercial position.[9] This rationale would also be applicable to the interpretation of article 54 of MiFID. As a general rule, the Court assumes that confidential information held by supervisory authorities that could constitute business secrets, but is at least five years old, must, as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature. Such confidential qualification does not expire if the party relying on that nature shows that the information still continues to be an essential element of its commercial position. As a concluding remark, the Court states that these considerations are irrelevant if confidentiality is justified for other reasons than the commercial position of the provider of the information. The objective of article 54 of MiFID is – as a general rule – to ensure secrecy of confidential information and Member States have the freedom to determine that information should be protected for a longer period of time.

1.5. Opinion Advocate General

In the Baumeister judgment, the Court deviates from the Advocate General's opinion. He proposed that the Court should interpret the concepts "confidential information" and "professional secrecy" as broad as possible without imposing any other requirements. The Advocate General refers to the specific nature of supervision of financial markets. The information necessary for supervisors must be provided by market participants knowing that the obligation of professional secrecy applies to supervisory authorities and its officials. The internationalization of financial markets requires the exchange of information between supervisory authorities to effectively monitor cross-border transactions within the internal market. In view of this development, the obligation of supervisors to respect professional secrecy has become more important. The Advocate General states that 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, where the principle of transparency is prevailing.[10] As a conclusion, it is considered that professional secrecy as laid down in article 54 of MiFID cannot be varied according to the nature of the information held by the supervisory authorities.[11]

2. Practice

By this judgment, the Court interprets and explains the concept of confidential information, although it is not clear whether the Court might have merely intended to provide an example of which type of information qualifies as confidential. The Court states that there are two criteria on the basis of which information is deemed confidential, namely: (i) the information may not be public; and (ii) the disclosure of the data threatens to prejudice the interests of the natural or legal person who provided the data, the interests of third parties or the proper functioning of the monitoring system of financial markets as imposed by MiFID. The Court reflects in Baumeister that these two criteria stems from previous case law.[12] In addition, the Court states that for information of a commercial nature that on the basis of these two criteria qualify as confidential, the label "confidential" will in principle expire after five years. This consideration does not apply to information which is deemed confidential for other reasons, such as supervisory methods or strategies applied by supervisory authorities.[13] In this judgment, the Court goes a step further than in the Altmann judgment by interpreting the concept "confidentiality". As a result, information which does not qualify as such is no longer subject to the obligation of professional secrecy. The Court refers to the objective of article 54 MiFID and emphasizes that Member States are free to decide to expand the protection against disclosure to the entire contents of the files of supervisory authorities or, conversely, to permit access to information that is in the possession of these authorities which is not confidential information within the meaning of MiFID.[14] The question is what this judgment will mean in practice. Both European and national supervisors on financial market are affected by this judgment because they receive a continuous flow of information from market participants, either confidential or not, and must determine how far the obligation of professional secrecy reaches. Now that Member States may apply stricter rules when disclosing information of a confidential nature and as a consequence impose the obligation for supervisory authorities to retain other information confidential, the effect of the judgment may also vary from one Member State to another. But what effect can this have on market participants? And the cooperation – and exchange of information – between supervisors?

2.1. Effect on market participants

2.1.1. Disclosure of information

The financial markets supervisory authorities have an essential mission of supervising and monitoring market participants operating in the financial markets. In order to fulfil that mission effectively, those authorities must have access to information concerning the entities which they monitor and their activities. Such information may be collected either through the powers of coercion conferred on those authorities under national legislation or by voluntary transmission from the supervised entities, bearing in mind that that second method of cooperation between those entities and the supervisory authorities is privileged.[15] 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 entities to the competent authorities without reluctance or even resistance.[16] On the basis of MiFID II[17], market participants have the obligation to report details of their transactions in financial instruments. This information reaches national regulators via trading platforms and includes information on prices, personal data, trading positions and more commercially sensitive details. The participation of market participants in the disclosure of such information is essential for supervisory authorities to form a picture of the activities subject to such supervision. Supervisory activities receive from market participants specific, commercially interesting information which is not publicly available. The disclosure of such information by the supervisory authority may have a direct effect on the commercial position of a market participant and can also cause damage in multiple other ways. Examples can be found in damages to brand reputation or a repelling effect on potential investors and employees. When disclosing confidential information, market participants must be able to rely on the supervisory authorities that information will not be made available to competitors or other interested parties. For the proper functioning of financial markets, a supervisory authority does not have the luxury to be unclear about the legal protection of market participants involved or confidential information which relates to them. Such lack of clarity could emerge in a discussion about the qualification of information as being confidential and therefore about the level to which supervisory authorities are obliged to keep this information secret in order to protect the disclosing market participant. One of the effects of this judgment is that the obligation of professional secrecy of supervisory authorities is no longer taken for granted.

2.1.2. Commercial character of information

Not only information which relates to or is based on market shares or data (such as prices, competitors and volumes) can cause damage if disclosed publicly. Disclosure of information that initially does not appear to be sensitive can also be detrimental to those involved. Think of business strategies that now seem outdated. Precisely this type of information would no longer qualify as confidential if disclosed more than five years ago according to Baumeister. However, business strategies do not stand alone and companies take previous strategies as a lessons-learned tool or as a basis for new future direction. Information that initially appears to be insignificant from a commercial perspective, can therefore ultimately be essential

in the context of the proper functioning of the financial markets and for the market participants involved.[18] Now that the Court has reasoned that not all information can by definition be classified as confidential, market participants may be more reluctant to provide regulators with sensitive information. This could lead to legal uncertainty and a weakening of the supervision of the financial markets.[19]

In order to successfully invoke the confidentiality of disclosed information and consequential obligations regarding professional secrecy, market participants must argue on the basis of Baumeister that the information they disclosed is still of commercial interest, even after a period of five years has lapsed, or if there is perhaps another reason other than its own commercial interest why confidentiality must be guaranteed. Contrary to the judgment, the Advocate-General concludes that no concessions must be made to the qualification of information that market participants disclose to regulators and that all information is by definition confidential. Because the Court states that market participants themselves must demonstrate that the disclosed information is of commercial interest to successfully rely on professional secrecy obligations, the burden of proof lies with these market participants. One of the challenges here is to make it plausible that the information provided is of commercial interest without providing new commercially sensitive information. How can you convince a judge of such commercial relevance without arguments that reveal new sensitive information? And can the confidentiality of these new arguments be guaranteed in – perhaps public – proceedings? This field of tension also raises new issues. For example, is it possible for a competitor of the market participants to join proceedings and gain access to commercially sensitive information of the other claimant? And how do the various Member States see this issue according to their national administrative laws? These questions must be answered at a national level. The opportunity for Member States to interpret the criteria of confidentiality more strictly than given in Baumeister, contradicts the idea behind uniform supervision of cross-border trade activities within a single internal market. Specific national procedural law could stand in the way of the confidential nature of information from market participants, the applicable obligation of professional secrecy and thereby the effectiveness of financial supervision.

2.2. Cooperation between supervisory authorities

2.2.1. European and national level

Supervisory authorities cooperate at both a European and national level. For example in the field of energy. The supervision of the trade in financial products on the wholesale energy markets is carried out by the energy regulator, the Agency for the Cooperation of Energy Regulators ("ACER") and in addition the financial regulator European Securities and Markets Authority ("ESMA"). The coordinated approach between these two supervisory agencies means in practice that they work together in the field of market consultations and the exchange of information. [20] This exchange plays a role in the field of detecting and demonstrating market abuse, the collection of data based on MiFID and an attempt to monitor market activities more efficiently and effectively. [21] In addition to this horizontal cooperation at European level, ACER and ESMA have the opportunity to exchange information in a vertical way, with national energy market regulators and financial market- and competition authorities. In order to do so, ESMA has set up a so-called enforcement network to give officials at national supervisors the opportunity to exchange experiences, information and working methods.[22] ACER in its turn, underlines that communication with national supervisors is a crucial element for its functioning.[23] Another form of horizontal cooperation between supervisory authorities is that between national authorities. One of the reasons for such cooperation is that surveillance of cross-border trading activities is too broad for the expertise of a national regulator alone. For the supervision on energy markets, this could mean, for example, that the help of a national competition authorities and financial supervisory authorities could be called upon. [24]

2.2.2. Exchange of information

The cooperation between supervisory authorities at national and European level requires the exchange of information. Effective market surveillance of financial markets with cross-border activities cannot exist without cooperation and exchange of information between supervisory authorities. The exchange of information contributes to monitoring market activities and the risk of corruption is reduced by supervisors being confronted with a higher level of transparency.[25] To achieve this goal, market participant's trust in supervisory authorities is an essential success factor. Market participants must be able to assume that disclosed information is processed in an appropriate and proportionate manner and that it is clear in advance with whom such information can and will be shared. By sharing information between supervisory authorities themselves on the one hand and between market participants and supervisors on the other, inspections can provide a much more accurate and up-to-date picture of the risk level of each market participant, without having to spend additional resources and duplicate work.[26] Information sharing can also be a tool to centralize supervisory tasks at European level and to maintain a cost-effective structure of supervision at national level.[27] To guarantee the confidence of market participants in supervisory authorities, it must be set out clearly which type of information qualifies as confidential and which information regulators can exchange with each other without obligation of professional secrecy. Only then, the risk can be estimated in advance in which way a supervisory authority will treat (confidential) information and whether the information will be covered by the obligation of professional secrecy. This is of great importance for cross-border trading activities, as different authorities can play a role in cross-border supervision. Moreover, there must also be a level of confidence among national supervisory authorities that the principle of professional secrecy will be respected. It is precisely in the mutual exchange of information which they obtain and hold within the context of their supervisory tasks that confidentiality must be guaranteed.[28] When receiving information from market participants, supervisory authorities must comply

with the two criteria from the Baumeister judgment and assess whether the information is confidential, even if the five-year period has expired. If this qualification is not given, then the information can be shared with other supervisory authorities. As soon as an authority concludes that the information is indeed confidential, both the providing and receiving supervisory authorities are subject to professional secrecy when processing this information. Regarding sharing of information with the public or a third party stakeholder, it should be considered that it is not the task of a financial supervisory authority to communicate and they are not required to respond favorably to a request for access to public information, but they should supervise market participants trading in those financial market and thus contribute to stability and regulation of these undertakings.[29] Now that it is clear that there are different flows of information exchange between European and national financial supervisory authorities, the professional secrecy of the regulator – and its self-evident character – becomes more important. Simply because more information is being exchanged.

3. Future

The effect of this judgment is that it will be less obvious that all information disclosed by market participants to supervisory authorities is classified as confidential. This also affects the self-evidence of professional secrecy. This judgment lays down further criteria for the confidential character of information and adjusts professional secrecy according to the nature of the information held by the supervisory authority. Because these criteria did not exist in the past, professional secrecy is subject to a stricter interpretation. On 13 September 2018, the Court ruled on the disclosure of confidential data within the context of civil- and commercial proceedings and underlined an exception to the professional secrecy of supervisory authorities.[30] The Advocate General concluded in this Buccioni judgment that the disclosure of confidential data to enable access to documents for those who intend to bring an action to protect their private interests will indirectly help to protect the public interest in supervising the activities of supervisory authorities.[31] In Buccioni, the Court refers to Baumeister when assessing the scope of the professional secrecy of supervisory authorities.[32] The Court follows the Advocate General's opinion and highlights the possibility to deviate from the obligation on professional secrecy, in case individuals request the disclosure of confidential data for the purpose of initiating civil- or commercial proceedings to protect property rights harmed by the need to liquidate a credit institution on the basis of a court decision. The supervisory authorities must weigh the applicant's interest against the importance of safeguarding the confidentiality of information covered by the obligation of professional secrecy. The judgments Baumeister and Buccioni are the first in which the Court ruled on the scope and interpretation of "confidential information" within the context of the system of supervision of financial markets and therefore making a direct connection to the obligation of professional secrecy of supervisory authorities. The Court clarifies the scope of professional secrecy given in Baumeister within the framework of the context of financial markets, by allowing an exception to that professional secrecy in the Buccioni judgment if the information can be used in civil or commercial proceedings to protect property rights of individuals harmed by the liquidation of a credit institution. Now that these two judgments have been delivered, market participants are waiting to see how Member States give substance to the concept of confidential information and to the value of professional secrecy in the exchange between market participants and supervisors on the one hand and between supervisors on the other. The delicate equilibrium between the role of supervisory authorities, the information which is essential for supervision and the private interest of market participants whom are required to provide such information may become unbalanced by this judgment. Should this be the case, the Advocate General's opinion in Baumeister with regard to market participants' confidence in the regulators, their credibility and the weakening in the supervisory system seems to have a predictive effect. It remains to be seen what the consequences will be for effective supervision and the proper functioning of financial markets. ■

Notes

1 Judgment of 19 June 2018, *Baumeister* (C-15/16, EU:C:2018:464).
2 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.
3 Recital 2 MiFID.
4 In this article, the concept of market participants covers all parties subjected to financial supervision, including licensed investment firms, but also non-licensed (energy) companies trading in financial instruments such as commodity derivatives.
5 Article 17 MiFID.
6 Article 56 MiFID.
7 Judgment of 12 November 2014, *Altmann and Others* (C-140/13, EU:C:2014:2362).
8 Judgment of 19 June 2018, *Baumeister* (C-15/16, EU:C:2018:464), para 46.
9 Judgment of 14 March 2017, Evonik Degussa v Commission (C-162/15 P, EU:C:2017:205), para 64 and Judgment of 19 June 2018, *Baumeister* (C-15/16, EU:C:2018:464), para 54 and 55.
10 Opinion of Advocate General Bot in *Baumeister* (C-15/16, EU:C:2017:958, point 41) and with respect to the general right of access to documents of European institutions the judgment of 13 January 2017, *Deza* v *ECHA* (T-189/14, EU:T:2017:4, para 55 and the case law cited there (judgment of 15 December 2011, *CDC Hydrogene Peroxide/Commission,* T-437/08, para 44 of 9 September 2014, *MasterCard and Others/Commission,* T-516/11, para 81).
11 Opinion of Advocate General Bot in Baumeister (C-15/16, EU:C:2017:958, point 54).

[12] Judgment of 19 June 2018, *Baumeister* (C-15/16, EU: C:2018:464), para 35 where reference is made to Judgment of 12 November 2014, *Altmann and Others*, C-140/13, para 26–33.
[13] Judgment of 19 June 2018, *Baumeister* (C-15/16, EU: C:2018:464), para 56.
[14] Judgment of 19 June 2018, *Baumeister* (C-15/16, EU: C:2018:464), point 44.
[15] Opinion of Advocate General Bot in *Baumeister* (C-15/16, EU: C:2017:958, point 38).
[16] Opinion of Advocate General Jääskinen in *Altmann and Others* (C-140/13, EU:C:2014:2168, point 37).
[17] On 3 January 2018, MiFID has been replaced by MiFID II (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).
[18] Opinion of Advocate General Bot in *Baumeister* (C-15/16, EU: C:2017:958, point 51).
[19] Opinion of Advocate General Bot in *Baumeister* (C-15/16, EU: C:2017:958, point 52).
[20] Annual Activity Report of the Agency for the Cooperation of Energy Regulators (ACER) 2016, 15 June 2017, page 41. https://acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/ACER%20Annual%20Activity%20Report%20for%20the%20year%202016.pdf.
[21] Multilateral Memorandum of Understanding between the Agency for the Cooperation of Energy Regulators and National Regulatory Authorities and market monitoring bodies concerning cooperation and coordination of market monitoring under Regulation (EU) No. 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency ("REMIT"), 23 August 2013 (https://www.acer.europa.eu/en/remit/Documents/MoU%20with%20NRAs.pdf).
[22] ESMA Annual Report 2017, 15 June 2018, p. 25 https://www.esma.europa.eu/press-news/esma-news/esma-publishes-2017-annual-report.
[23] ACER: Revised Programming Document 2017–2019, 16 March 2017, p. 105 https://www.acer.europa.eu/en/The_agency/Mission_and_Objectives/Documents/ACER%20Programming%20Document%202017-Revised-.
[24] PD Cameron and RJ Heffron, *Legal Aspects of EU Energy Regulation. The Consolidation of Energy Law Across Europe* (Oxford: Oxford University Press, 2016), 57.
[25] JR Barth et al.: "Corruption in Bank Lending to Firms: Cross-country Micro Evidence on the Beneficial Role of Competition and Information Sharing" (2009) 91 *Journal of Financial Economics* 361–388.
[26] L Lorenzoni, "Principles for ensuring an effective regulatory enforcement and inspections", *Publicum Network Review*, March 2016 https://www.academia.edu/29782733/Principles_for_ensuring_an_effective_regulatory_enforcement_and_inspections.
[27] D-U Galetta, HCH Hofmann and J-P Schneider, "Information Exchange in the European Administrative Union: An Introduction", (2014) (1) *European Public Law 2014* 65–70, 68.
[28] Opinion of Advocate General Bot in *Baumeister* (C-15/16, EU: C:2017:958, point 49).
[29] Opinion of Advocate General Bot in *Baumeister* (C-15/16, EU: C:2017:958, point 53).
[30] Judgment of 13 September 2018, *Buccioni,* (C-594-16, EU: C:2018:717).
[31] Opinion of Advocate General Bobek in *Buccioni* (C-594/16, EU: C:2018:425, point 88).
[32] Judgment of 13 September 2018, *Buccioni,* (C-594-16, EU: C:2018:717), para 27-30.