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Handle with Care? The Treatment of Confidential Information Under EU Law Following Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister
by S. Askaryar and E. Adler

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Handle with Care? The Treatment of Confidential Information Under EU Law Following *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*

Sohra Askaryar and Ella Adler*

Abstract

The judgment of the European Court of Justice (“CJEU”) in Case C-15/16 Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister clarifies the definition of “confidential information” within the context of the Directive on markets in financial instruments (“MiFID”). Specifically, the case sets out a list of criteria that national financial regulators must consider to determine whether the information they hold regarding the entities they supervise may be disclosed to third parties. This judgment has implications beyond the financial sector, because national and European regulators, including the Agency for the Cooperation of Energy Regulators (“ACER”), share information on a regular and oftentimes extensive basis.

This article describes the powers of national financial regulators to request information under MiFID, and the protection MiFID grants from disclosure of this information to third parties. It then critiques the judgment of the CJEU, in particular on the basis that the CJEU ought to have considered analogous provisions in Regulation 1049/2001, which concerns confidential information held by European regulators. The fact that national financial regulators, on the one hand, and European financial regulators, on the other, may handle confidential information differently creates significant legal uncertainty. The issue becomes even more complex when one considers information-sharing between regulators of different sectors. For example, ACER is expressly required to share information with not only national energy regulators, but also national financial regulators, national competition authorities, the European Securities and Markets Authority, and “other relevant authorities.” The article concludes with practical advice to regulated entities that must navigate this uncertainty.

I. Introduction

The recent judgment of the European Court of Justice (“CJEU”) in Case C-15/16 *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*¹ clarifies the definition of “confidential information” within the context of the Markets in financial instruments Directive (“MiFID”).² Specifically, the case sets out a list of criteria that national financial

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¹ Case C-15/16 *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, 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 (“MiFID”). MiFID was replaced 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 (“MiFID II”) with effect from in January 2018. However, the MiFID provisions discussed in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister* are replicated in MiFID II. Any comments in this article pertaining to MiFID therefore apply to MiFID II as well.

regulators (“NFRs”) must consider to determine whether the information they hold regarding the entities they supervise may be disclosed to third parties.

As will be discussed, NFRs have sweeping powers to request information from companies, and are thereby privy to a range of commercially or otherwise sensitive information. This case has important practical implications for these companies with regard to the type of information they can expect will remain confidential, and, conversely the type of information that may be disclosed.

The relevant provisions of MiFID are discussed in Section II, followed by an analysis of the Opinion of the Advocate General and the judgment itself in Section III. Additional issues raised by the judgment, as well as the implications beyond the financial sector, are discussed in Section IV. Finally, Section V offers practical advice for companies to mitigate risks when sharing information with regulators.

II. Legal and Factual Background

A. Factual Background

Mr. Baumeister was the victim of a Ponzi scheme operated by a company called Phoenix. He requested access to documents concerning Phoenix that were held by the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) (“BaFin”). The documents requested included a special audit report, other reports prepared by the auditors, and internal documents, reports and correspondence received or sent by the BaFin as part of its supervision of Phoenix.

The BaFin rejected Mr Baumeister’s request. Following a series of appeals, the Federal Administrative Court (*Bundesverwaltungsgericht*) (the “referring court”) sought guidance from the CJEU as to the interpretation of the confidential treatment provisions in MiFID, the over-arching EU law.

Specifically, the referring court asked whether MiFID imposes an absolute duty of confidentiality on NFRs, such that an NFR cannot grant access to any of the documents it holds in relation to a particular entity. If, however, the NFR can grant access to certain documents (and not others), the referring court also asked what criteria should be applied to determine which documents can be disclosed.

B. Information Provided to NFRs

In essence, *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister* concerns the flow of information between NFRs and third parties. By way of background, this section therefore discusses (i) the NFRs’ powers to request information; (ii) the type of information concerned; and (iii) the protection from disclosure of this information to third parties.

1. NFRs’ Powers to Request Information

MiFID and MiFID II grant NFRs sweeping powers to request information from the entities they supervise. Indeed, Member States must equip NFRs with all “*supervisory and*

investigatory powers that are necessary for the exercise of their functions.”³ These powers must include the rights to “have access to any document in any form and to receive a copy of it,” and “demand information from any person and if necessary to summon and question a person with a view to obtaining information.”⁴

Importantly, NFRs may also obtain information in the course of an investigation. MiFID sets out a list of investigatory powers such as access to documents, on-site inspections and access to telephone and data traffic records.⁵

Finally, NFRs may receive information from an NFR in another Member State, or from the European Securities and Markets Authority (“ESMA”). For example, national regulators “shall exchange information and cooperate in any investigation or supervisory activities.”⁶ Similarly, NFRs “shall, without undue delay, provide ESMA with all information necessary to carry out its duties.”⁷ In addition, NFRs may receive information from other non-financial regulators, such as national or European competition authorities.

2. Type of Information Concerned

Given the broad nature of these provisions, an NFR may hold information regarding a company’s profit margins, customers, structure, liquidity, plans to expand, and other similar information. Naturally, this commercially sensitive information is potentially of great value to the company’s customers, shareholders, investors and/or competitors.

As discussed in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, the NFR’s file may also include internal documents from the NFR, as well as correspondence with, or statements from, other national or European authorities.

It should also be noted that the company itself may not necessarily be aware of the entire content of the NFR’s file related to that company. Moreover, the company may not have any control over the type of information it transmits to the NFR, particularly if it is obtained in the context of an investigation. With this in mind, the circumstances in which this information can be disclosed to third parties is therefore of utmost importance.

3. Protection from Disclosure to Third Parties

Having set out the type of information regulators are likely to receive, and on what legal basis they are likely to obtain this information, this section discusses the protection from disclosure MiFID and MiFID II provide for information so obtained.

As discussed, NFRs are privy to sensitive information they receive from the entities they supervise, the disclosure of which may entail serious consequences for the entity concerned. On the other hand, as NFRs are public bodies, and in the interests of transparency and good governance, it is reasonable to expect that some of this information would be shared with third parties, in appropriate circumstances.

³ Article 50 (1) MiFID, which corresponds to Article 72 (1) MiFID II.

⁴ Article 50 (2) MiFID, which corresponds to Article 80 (1) Subsection (2) MiFID II.

⁵ Article 50 (2) MiFID, which corresponds to Article 80 (1) Subsection (2) MiFID II.

⁶ Article 56 (1) Subsection (2) MiFID, which corresponds to Article 79 (1) Subsection (3) MiFID II.

⁷ Article 62a) (2) MiFID, which corresponds to Article 87 (2) MiFID II.

Indeed, the Treaty of Lisbon created a right for all Union citizens, and legal or natural persons residing or registered in the EU to access the documents of the Union institutions, bodies, offices and agencies.⁸ Precise rules regarding the operation of this provision are set out in Regulation 1049/2001.⁹ It is important to note that the right of access to documents held by ESMA, a European institution, is governed by this Regulation 1049/2001, not MiFID.

As for national (rather than European) institutions, bodies and agencies, the extent to which they can or cannot disclose certain information is typically determined by national law. However, in certain sectors, European law may also impose obligations in this regard, as is the case with MiFID.

The most relevant provision and the focus of the judgment in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister* is Article 54 (1) of MiFID. Article 54 (1) MiFID, which corresponds to Article 76 (1) MiFID II, requires Member States to 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.

In particular,

*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.*¹⁰

Article 54 MiFID also includes exceptions to this general rule against non-disclosure. First, the operation of the article is “*without prejudice to cases covered by criminal law.*”¹¹ Second, confidential information can be divulged where it is necessary to carry out civil or commercial bankruptcy or winding up proceedings, and where it does not concern third parties.¹² In a previous decision in *Altmann and Others*, which the CJEU refers to in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*¹³, the CJEU clarified that the exceptions included in Article 54 MiFID are the only exceptions to the general prohibition on divulging confidential information.¹⁴ In particular, the fact that the investment firm to which the information relates has engaged in large-scale fraud does not impact the NFR’s obligation of professional secrecy.

⁸ See Article 15 of the Treaty on the Functioning of the European Union (“TFEU”). Article 42 of the Charter of Fundamental Rights also creates a right of access to documents.

⁹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council on public access to European Parliament, Council and Commission documents.

¹⁰ Article 54 (1) MiFID, which corresponds to Article 76 (1) MiFID II.

¹¹ Article 54 (3) MiFID, which corresponds to Article 76 (3) MiFID II.

¹² Article 54 (2) MiFID, which corresponds to Article 76 (2) MiFID II.

¹³ *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, para. 38.

¹⁴ Case C-140/13 *Altmann and Others*, EU:C:2014:2362, para. 35.

The judgment in *Altmann and Others* also sets out general principles regarding the purpose of Article 54 MiFID, which were reiterated by the CJEU in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*. The CJEU noted that the supervisory role of competent authorities, achieved in part through the exchange of information between the authorities of different Member States, relies on the fact that “both the firms monitored, and the competent authorities can be sure that the confidential information provided will, in principle, remain confidential.”¹⁵ The CJEU also noted that the obligation to maintain professional secrecy is also necessary to protect the “normal functioning of the markets in financial instruments of the European Union.”¹⁶

III. Decision in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*

While *Altmann and Others* concerned the exceptions to the prohibition on divulging confidential information, *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister* provided the CJEU with the opportunity to define the concept of confidential information.

A. Opinion of the Advocate General

Advocate General Yves Bot, who opined in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, concluded that confidential information and professional secrecy should be interpreted broadly. Specifically, he concluded that the concept of confidential information should include “*all information, including correspondence and statements, relating to a supervised undertaking and received or drawn up by a national financial markets supervisory authority.*”¹⁷

While he noted that other EU laws are more permissive in terms of allowing disclosure, the “*specific nature*” of “*the rules governing the supervision of the financial markets...prevents any analogy*” with other legal frameworks of the EU.¹⁸ According to the Advocate General, the information held by financial supervisors “*is entirely different from that held by the EU institutions in other matters, whether in terms of its volume, potential uses, possible consequences, and purpose.*”¹⁹

In sum, the Advocate General concluded that professional secrecy “*cannot be varied according to the nature of the information held by the supervisory authorities.*” Accordingly, “*all the information available to those authorities must be regarded as confidential.*”²⁰

¹⁵ *Altmann and Others*, para. 31.

¹⁶ *Altmann and Others*, para. 33.

¹⁷ Advocate General Opinion in Case C-15/16 *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, EU:C:2017:958, para. 3 (emphasis added).

¹⁸ AG Opinion in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, para. 37. In particular, AG Bot distinguished the more open right of access to documents in competition law proceedings, and the general case-law on access to documents of the EU institutions.

¹⁹ AG Opinion in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, para. 37.

²⁰ AG Opinion in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, para. 54.

B. Judgment of the CJEU

The CJEU did not opt to follow the reasoning of the Advocate General, and instead enumerated a list of criteria NFRs must apply to determine whether the information they possess is “confidential”, or whether it can be disclosed to a third party following a request for access to the file.

While the Advocate General emphasised the over-arching principle of non-disclosure underlying MiFID, the CJEU noted that Article 54 MiFID refers to “confidential” information, and not just “information.” This implies that NFRs are permitted to disclose certain information.²¹ The CJEU reiterated the importance of trust between the supervisor and the supervised, citing *Altmann and Others*, but did not thereby conclude that all information relating to a supervised entity in an NFR’s file is confidential.

Rather, the CJEU concluded that “confidential” information, for the purposes of Article 54 MiFID, refers to information,

- i. which is not public; and
- ii. the disclosure of which is likely to adversely affect
 - a. the interests of the natural or legal person who provided that information, or the interests of third parties; or
 - b. the proper functioning of the system for monitoring the activities of investment firms established under MiFID.²²

The CJEU, like the Advocate General, contrasted the right of access to documents under MiFID with the broader access under Regulation 1049/2001.²³ The CJEU clarified that the test above is “*without prejudice to other provisions of EU law that are intended to ensure stricter protection of the confidentiality of certain information.*”²⁴ The CJEU also highlighted that Member States are nonetheless free to impose greater restrictions on access to documents.

In response to additional questions from the referring court, the CJEU clarified that confidentiality must be assessed at the time the request for the information is received, rather than at the time the information itself was received.²⁵ The CJEU also reiterated that information that could constitute business secrets loses this “status” after five years.

IV. Discussion and Analysis

While the practical implications of the judgment in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister* remain to be seen, as a preliminary observation, the criteria chosen by the CJEU are vague and leave significant discretion to each NFR. For example, while the requirement that the information is “not public” is clear, it is much less certain how an NFR will or should interpret the criterion that the disclosure is

²¹ *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, para. 25.

²² *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, para. 35.

²³ *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, paras. 41-43.

²⁴ *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, para. 36.

²⁵ *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, para. 51.

likely to adversely affect the interests of the natural or legal person who provided that information, or the interests of third parties.

For example, it is foreseeable that a party like Mr. Baumeister, who considers that they have been wronged by a particular entity, would seek information regarding that entity from an NFR. However, it is not clear, based on the criteria set out by the CJEU, whether “adverse effects” for the entity who provided the information would include the entity being sued on the basis of the information disclosed by the NFR, such that the NFR would treat that information as “confidential”. Indeed, even if this is the type of “adverse effect” the CJEU envisaged, it is unlikely that the NFR would be in a position to anticipate such effects. It is important to recall that the judgment does not give guidance as to who may request such information; it only purports to describe the type of information that can or cannot be disclosed to third parties.

Similarly, the judgment only concerns the transmission of information from NFRs to third parties, and does not concern the transmission of information between NFRs, or between NFRs and other national or European agencies. This is perhaps the most significant blind spot in the CJEU’s reasoning. While both the Advocate General and the CJEU contrasted the stricter right of access to documents under MiFID with the broader right of access under Regulation 1049/2001, neither the Opinion nor the judgment mentioned that ESMA, a *European* financial regulator, is subject to Regulation 1049/2001, and not Article 54 MiFID.²⁶

While it would be beyond the powers of the CJEU to extend the application of Regulation 1049/2001 to NFRs, it is appropriate to expect that the CJEU would have taken Regulation 1049/2001 into greater consideration. There is no evident reason why information held by ESMA should be considered any more or less sensitive than information held by NFRs. Indeed, in some instances ESMA and NFRs will hold the same information about a particular entity, due to the information sharing provisions described above.

Furthermore, it is important to clarify whether the disclosure of data which an NFR shares with ESMA is governed by Article 54 MiFID, or by Regulation 1049/2001. Article 54 (4) MiFID²⁷ specifies that any information “*received, exchanged, or transmitted*” pursuant to MiFID shall be subject to MiFID’s professional secrecy provisions. Such information may nonetheless be transferred “*with the consent of the [NFR] or other body or natural or legal person that communicated the information.*”²⁸ These provisions imply that information transmitted by an NFR to ESMA should be treated by ESMA as “confidential” by reference to MiFID and the criteria set out in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*.

From a practical perspective, however, it is potentially difficult for ESMA to keep track of the source of each piece of information in its files. From a transparency perspective, it is likely impossible for (i) the person requesting the information, and (ii) the entity to whom the information relates, to know what standards ESMA is supposed to apply to the disclosure of

²⁶ See Article 72 (1) of Regulation (EU) No 1095/2010 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, which stipulates that “Regulation (EC) No 1049/2001 shall apply to documents held by the Authority.”

²⁷ See also Article 76 MiFID II.

²⁸ Article 54 (4) MiFID, which corresponds to Article 76 (4) MiFID II.

each piece of information. The same issues apply when one considers the transmission of information from ESMA to NFRs.

These issues extend beyond the financial sector. Indeed, the CJEU arguably overstated the *sui generis* nature of financial regulation in this regard. A particularly pertinent example is the European legal framework which governs electricity and gas markets, including LNG. Under the Regulation on wholesale energy market integrity and transparency (“**Remit**”)²⁹, market participants are required to provide the Agency for the Cooperation of Energy Regulators (“**ACER**”) with a record of wholesale energy market transactions, including orders to trade with the precise identification of the wholesale energy products bought and sold, the price and quantity agreed, the dates and times of execution, the parties to the transaction and the beneficiaries of the transaction, and any other relevant information.³⁰

As a result, ACER is, like NFRs and ESMA, privy to significant volumes of commercially sensitive information. As a European agency, ACER is subject to Regulation 1049/2001, because Remit simply requires ACER to “*ensure the confidentiality, integrity and protection of the information received [...]*”, and “*take all necessary measures to prevent any misuse of, and unauthorised access to, the information maintained in its systems.*”³¹ ACER is also expressly required to share information not only with national energy regulators, but also NFRs, national competition authorities, ESMA, and “*other relevant authorities.*”³²

This potentially extensive flow of information between regulators, each of whom may be subject to a slightly different regime of professional secrecy, may render it impossible for the party requesting the information, the party to whom the information relates, and potentially even the regulator itself, to know what standards of confidentiality ought to apply.

V. Conclusion

As mentioned by the CJEU in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister*, regulators rely on the entities they supervise to transmit reliable information. Companies are only willing to transmit such information where they can be assured that it will, where appropriate, be treated confidentially.

The judgment in *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister* specifies the conditions under which information received by NFRs must be considered as confidential. However, NFRs are also required to share information with ESMA, which raises the question as to whether the judgment will affect information held by ESMA. Moving beyond the financial sector, information sharing among national and European regulators more generally is beset by the same uncertainty regarding the applicable professional secrecy provisions.

Nevertheless, and despite the complexity and uncertainty created by parallel confidentiality regimes, many companies are required by law to provide sensitive information to regulators. Companies should be aware that this information can be shared with regulators in different sectors, and in different jurisdictions, and draft their submissions accordingly. Entities will

²⁹ Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (“**Remit**”).

³⁰ Article 8 (1) Remit.

³¹ Article 12 (1) Remit.

³² Article 10 (1) Remit.

typically not be notified when their information has been shared with other regulators, and may also not be notified where the regulator has shared the information with a third party.

Particular attention should be given to the fact that the information may be shared with national or European competition authorities. Companies can mitigate the uncertainty of the legal regime by specifying in as much detail as possible why certain information should be treated confidentially, particularly where its commercial or other sensitivity is not obvious. This would reduce the chance that the regulator would underestimate any adverse effects the company would suffer should the information be disclosed.