

Case C-619/19

Request for a preliminary ruling

Date lodged:

19 August 2019

Referring court:

Bundesverwaltungsgericht (Germany)

Date of the decision to refer:

8 May 2019

Applicant and respondent on a point of law:

D.R.

Defendant and appellant on a point of law:

Land Baden-Württemberg

Bundesverwaltungsgericht

DECISION

[...]

In the administrative-law case

of Mr D.R.,

.....

Applicant, appellant

and respondent on a point of law,

[...]

Land Baden-Württemberg,

[...]

Defendant, respondent and
appellant on a point of law:

[Or. 2]

[...]

Joined party:

Deutsche Bahn AG.

[...] Berlin,

Appellant on point of law,

[...],

Other party:

The representative of the federal interest
at the Bundesverwaltungsgericht,

[...],

the 7th Chamber of the Bundesverwaltungsgericht

[...]

made the following order on 8 May 2019:

The proceedings before the Bundesverwaltungsgericht (Federal Administrative Court) are stayed.

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Is point (e) of the first subparagraph of Article 4(1) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive

- 90/313/EEC (the Environmental Information Directive) to be interpreted as meaning **[Or. 3]** that the term ‘internal communications’ covers all communications which do not leave the internal sphere of an authority which is required to provide information?
2. Is the temporal scope of the protection of ‘internal communications’ under point (e) of the first subparagraph of Article 4(1) of the Environmental Information Directive unlimited?
 3. If Question 2 is answered in the negative: Does the protection of ‘internal communications’ under point (e) of the first subparagraph of Article 4(1) of the Environmental Information Directive apply only until the authority required to provide information has taken a decision or completed any other administrative process?

G r o u n d s:

I

- 1 The applicant seeks from the Staatsministerium Baden- Württemberg (Baden- Württemberg State Ministry) access to documents relating to tree felling for the ‘Stuttgart 21’ transport and urban development project in Stuttgart’s Schlossgarten park in October 2010.
- 2 For the purpose of the questions referred to the Court of Justice of the European Union (‘the Court’), those documents concern information held by the executive committee of the State Ministry relating to the committee of inquiry ‘Follow-up to the police operation on 30 September 2010 in Stuttgart’s Schlossgarten park’ and memoranda held by the State Ministry relating to a conciliation procedure conducted on 10 and 23 November 2010 in connection with the ‘Stuttgart 21’ project.
- 3 The Verwaltungsgericht (Administrative Court) dismissed the action brought following an unsuccessful request relating to those documents. On appeal by the applicant, the Verwaltungsgerichtshof (Higher Administrative Court) ordered the defendant to make the documents available to the applicant. Those documents concern environmental information. There are no grounds for refusing to make that information available. The State Ministry’s documents concerning the information held by the executive committee and the conciliation procedure are not protected as internal communications since such protection exists only, *ratione temporis*, for the duration of a public authority’s decision-making process. **[Or. 4]**
- 4 By its appeal on a point of law, the defendant seeks to have the judgment at first instance reinstated.

II

- 5 The legal proceedings are stayed. A preliminary ruling on the questions set out in the operative part of the decision is to be obtained from the Court (Art. 267 TFEU).
- 6 1. The relevant provisions of EU law are set out in point (e) of the first subparagraph of Article 4(1) and the first and second sentences of the second subparagraph of Article 4(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26) — the Environmental Information Directive.
- 7 2. The relevant provision of national law is the second indent of Paragraph 28(2) of the Umweltverwaltungsgesetz Baden-Württemberg (Baden-Württemberg Environmental Administration Act, ‘the UVwG BW’) of 25 November 2014 [...], as last amended by Article 1 of the Act of 28 November 2018 [...].

The second indent of Paragraph 28(2) of the UVwG BW reads as follows:

Where a request relates to internal communications of authorities required to provide information within the meaning of Paragraph 23(1), it shall be refused unless it is outweighed by the public interest in disclosure.

III

- 8 The questions referred are relevant. Depending on how the questions referred are answered, the appeal on a point of law will either be dismissed on legal grounds or the matter will need to be referred back to the Verwaltungsgerichtshof (Administrative Court) as judges of fact for a new hearing and judgment.
- 9 The documents sought by the applicant concern environmental information within the meaning of Article 2(1)(c) of the Environmental Information Directive. The defendant is an authority required to provide information within the meaning of Article 2(2)(a) of the Environmental Information Directive. **[Or. 5]**

IV

- 10 The questions referred need to be clarified by the Court, as they have not been clarified in its case-law and there are no obvious answers.
- 11 The following considerations are relevant to the individual questions referred:
- 12 1. Question 1:

The first question that arises is how the term ‘internal communications’ within the meaning of point (e) of the first subparagraph of Article 4(1) of the Environmental Information Directive is to be interpreted. The Environmental Information Directive does not contain a definition of that term.

- 13 As regards Paragraph 8(2)(2) of the Environmental Information Act (Umweltinformationsgesetz, 'the UIG') in the version published on 27 October 2014 [...], as last amended by Article 2(17) of the Act of 20 July 2017 [...], which transposes point (e) of the first subparagraph of Article 4(1) of the Environmental Information Directive into Federal law and corresponds to the relevant provision of the law of the Länder, that is the second indent of Paragraph 28(2) of the UVwG BW, taking into account the intention of the legislator [...] the Senate decided with regard to the term 'internal' that the ground for refusal only covers communications that do not leave the internal sphere of an authority required to provide information [...]. Accordingly, communications which have not (yet) left, but are intended to leave the internal sphere of an authority which is required to provide information, cannot also be considered to be 'internal'.
- 14 In that context, it is necessary to clarify what constitutes a 'communication' within the meaning of point (e) of the first subparagraph of Article 4(1) of the Environmental Information Directive. The question arises in particular whether documents or information have to be of a certain quality in order to be considered to be 'communications' within the meaning of the Environmental Information Directive. The term 'communications' at least suggests that the relevant information must (also) be addressed to a third party. **[Or. 6]**
- 15 The determination of the content of the term 'communications' should moreover be defined because the first sentence of the second subparagraph of Article 4(2) of the Environmental Information Directive requires that the grounds for refusal referred to in paragraphs 1 and 2 be interpreted in a restrictive way. This requirement is reflected in the second subparagraph of Article 4(4) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters — the Aarhus Convention — of 25 June 1998.
- 16 In that context, not every document that is communicated internally necessarily constitutes an 'internal communication'.
- 17 The Implementation Guide to the Aarhus Convention contains guidance on a teleological reduction of the term 'communications'. As regards Article 4(3)(c) of the Aarhus Convention ('internal communications of public authorities'), the Implementation Guide to the Aarhus Convention states that, in some Member States, the internal communications exception is intended to protect the personal opinions of government staff. In that context, the exception does not usually apply to factual materials (see United Nations Economic Commission for Europe, The Aarhus Convention, An Implementation Guide, 2nd edition 2014, p. 85).
- 18 The representative of the interests of the Federal Government before the Bundesverwaltungsgericht proposes that the term 'internal communications' within the meaning of point (e) of the first subparagraph of Article 4(1) of the Environmental Information Directive cover only significant documents that concern internal information and that are relevant to the decisions and actions that

a public authority takes. However, this raises the further question of what constitutes ‘significant documents’.

19 2. Question 2:

The temporal scope of point (e) of the first subparagraph of Article 4(1) of the Environmental Information Directive also needs to be clarified.

- 20 The wording of that provision — like the wording of point (c) of Article 4(3) of the Aarhus Convention — does not provide an indication of a strict temporal limitation of the scope of point (e) of the first subparagraph of Article 4(1) of the Environmental Information Directive. A clear indication is also not provided by the legislative history [**Or. 7**]. The Commission’s original proposal for a Directive of 29 June 2000 provided, in point (c) of the first subparagraph of Article 4(1) of the Environmental Information Directive, for a ground for refusal for ‘information in the course of completion or internal communications. In each such case, the public interest served by the disclosure shall be taken into account’. At the first and second reading, the European Parliament called for the ground for refusal for ‘internal communications’ to be deleted (see report of 28 February 2001, A5/2001/74, amendment 20, and report of 24 April 2002, A5/2002/136, amendment 27). This was rejected by the Commission (amended proposal of 6 June 2001, COM (2001) 303 final, OJ C 240 E/289, p. 293; Commission Opinion of 5 September 2002, COM (2002) 498 final, p. 8) and the Council (Council Common Position No 24/2002 of 28 January 2002, OJ C 113 E/1, p. 11) with reference to the Aarhus Convention. An agreement on the final proposal for a Directive was reached in the Conciliation Committee. In that context, the ground for refusal for ‘internal communications’ was settled in point (e) of the first subparagraph of Article 4(1) of the Environmental Information Directive, and since then makes no link any more to the grounds for refusal limited in time of point (d) of the first subparagraph of Article 4(1) of the Environmental Information Directive.
- 21 The Implementation Guide to the Aarhus Convention also does not provide any indications that the temporal scope of Article 4(3)(c) of the Aarhus Convention is limited. The practice of the Aarhus Convention Compliance Committee (ACCC) also appears to acknowledge — implicitly — that the temporal scope of Article 4(3)(c) of the Aarhus Convention is not limited (see ACCC/C/2010/51 (Romania) and ACCC/C/2013/93 (Norway)).
- 22 From a systematic perspective, it must be taken into account that the Environmental Information Directive formulates grounds for refusal whose temporal scope is correspondingly limited. Accordingly, point (d) of the first subparagraph of Article 4(1) of the Environmental Information Directive provides for a ground for refusal for ‘material in the course of completion’ and for ‘unfinished ... data’. [**Or. 10**]

- 23 A systematic comparison with the second subparagraph of Article 4(3) of 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 (OJ 2001 L 145, p. 43) — the Transparency Regulation — reveals that, according to the European legislator's intention, the disclosure of internal documents can undermine an institution's decision-making process even after it has been concluded. Where the European Union has, in Article 6 of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, p. 13) — the Aarhus Regulation — partly amended the provisions of the Transparency Regulation, the temporal scope of the ground for refusal for internal documents is not affected by this. Therefore, the European Union clearly assumes that the Aarhus Convention does not require that the ground for refusal for 'internal communications' be limited, *ratione temporis*, to the conclusion of the decision-making process. There do not appear to be any indications that EU law intended to impose stricter requirements on Member States for the disclosure of environmental information as regards internal communications than for the disclosure of environmental information held by the EU institutions.
- 24 With regard to the protection of the confidentiality of the proceedings of public authorities under point (a) of the first subparagraph of Article 4(2) of the Environmental Information Directive, for which indications of a strict temporal limitation are also lacking, the Court assumes, in principle, that this ground for refusal may be relevant where a legislative procedure and the related proceedings have already been concluded (see judgement of the Court of 14 February 2012, C-204/09, ECLI:EU:C:2012:71, *Flachglas Torgau*, paragraph 57; see, to that effect, BVerwG judgment of 2 August 2012 — 7 C 7.12 — *Buchholz 406.252*, second indent of Paragraph 2 UIG, paragraph 28). The case-law cited appears, in principle, to be transferable to point (e) of the first subparagraph of Article 4(1) of the Environmental Information Directive. **[Or. 9]**
- 25 However, the requirement of the first sentence of the second subparagraph of Article 4(2) of the Environmental Information Directive that the grounds for refusal mentioned in paragraphs 1 and 2 be interpreted in a restrictive way should also apply to their temporal scope. This suggests that the temporal scope of point (e) of the first subparagraph of Article 4(1) of the Environmental Information Directive is at least not completely unlimited. A temporal limitation of the ground for refusal may result not only from a restrictive interpretation of the term 'internal communications', but also from the case-by-case assessment required under point (e) of the first subparagraph of Article 4(1) and the second sentence of the second subparagraph of Article 4(2) of the Environmental Information Directive. In any event, the interest in confidentiality will, over time, usually become less important than the interest in a disclosure of the relevant information.

26 3. Question 3:

If the temporal scope of the protection of ‘internal communications’ under point (e) of the first subparagraph of Article 4(1) of the Environmental Information Directive is not unlimited, up to what specific point in time does that protection apply?

27 In that regard, the first-instance court [...] considered that, under point (e) of the first subparagraph of Article 4(1) of the Environmental Information Directive, access to internal communications is excluded only for the duration of a decision-making process of a public authority. In the first-instance court’s point of view, the drafting history of that provision supports this, namely that is the direct regulatory connection, originally provided for by the draft Environmental Information Directive, between that provision and the exception for ‘material in the course of completion’ (see point (d) of the first subparagraph of Article 4(1) of the Environmental Information Directive), the requirement that the grounds for refusal be interpreted in a restrictive way (first sentence of the second subparagraph of Article 4(2) of the Environmental Information Directive) and the systematic consideration that the further ground for refusal concerning the confidentiality of the proceedings of public authorities (point (a) of the first subparagraph of Article 4(2) of the Environmental Information Directive) would otherwise be meaningless.

28 A temporal limitation of the ground for refusal under point (e) of the first subparagraph of Article 4(1) [Or. 10] of the Environmental Information Directive, which is exclusively linked to the duration of a public authority’s decision-making process, would not take into account the fact that not every instance of a public authority required to provide information dealing with environmental information leads to a (formal) decision. In that regard, the (internal) completion of the relevant administrative process could be considered a relevant point in time.

[...]