



**All the information in the file of a financial supervision authority is not necessarily confidential**

*Information which might constitute business secrets loses, generally, its secrecy when it is at least five years old*

Mr Ewald Baumeister is one of the investors who suffered loss due to the activities of the German company Phoenix Kapitaldienst, whose business model took the form of a Ponzi scheme. Insolvency proceedings having been initiated against Phoenix in the course of 2005 that company has been dissolved and is now in judicial liquidation.

Mr Baumeister submitted to the Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Financial Supervisory Authority, Germany) a request for access to certain documents concerning Phoenix, such as a special audit report, reports prepared by the auditors, and internal documents, reports and correspondence received or sent out by that authority as part of its supervision of Phoenix. Since the Bundesanstalt refused to grant him access to those documents, Mr Baumeister brought proceedings before the German courts.

The Bundesverwaltungsgericht (Federal Administrative Court, Germany) against that background asks the Court of Justice to clarify the scope of the directive on markets in financial instruments,<sup>1</sup> which provides that the competent authorities are subject to an obligation of professional secrecy and may not, other than in the situations exhaustively listed in the directive, disclose confidential information that they have received.

In today's judgment, the Court holds, first, that **all information relating to the supervised undertaking** and communicated by it to the competent authority, and all statements of that authority in its supervision file, including its correspondence with other bodies, **does not constitute, unconditionally, confidential information that is covered**, consequently, by the obligation to maintain **professional secrecy**.

Information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of investment firms established by the directive must be so classified.

The Court then adds that **information that could constitute business secrets loses, generally, its secret nature when it is at least five years old**. Exceptionally, that may not be the case where party relying on its secrecy shows that, despite its age, that information still constitutes an essential element of its commercial position or that of interested third parties. The Court observes however that such considerations have no bearing in relation to information the confidentiality of which might be justified for reasons other than the importance of that information with respect to the commercial position of the undertakings concerned, such as information relating to prudential supervision methodology and strategy.

<sup>1</sup> This request for a preliminary ruling concerns the interpretation 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 (OJ 2004 L 145, p. 1)

Further, the Court holds that the general prohibition on disclosing confidential information laid down in the directive applies to information that must be classified as 'confidential' at the time of an examination of a request for disclosure, irrespective of how that information was classified at the time moment when it was communicated to the competent authorities.

Last, the Court further states that **the Member States remain free to decide to extend the protection against disclosure to the entire contents of the supervision files of the competent authorities** or, conversely, to permit access to information that is in the possession of the competent authorities which is not confidential information within the meaning of the directive. The sole aim of the directive is to impose on the competent authorities the obligation to refuse, as a general rule, to disclose confidential information.

In this case, it is for the Bundesverwaltungsgericht to determine whether the information held by the Bundesanstalt, whose disclosure has been requested by Mr Baumeister, is covered by the obligation of professional secrecy which is binding on that authority under the directive.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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