



*Directorate-General for Library,  
Research and Documentation*

## **RESEARCH NOTE**

### **Access to information held by national financial supervisory authorities**

[...]

**Subject:** Examination of whether the national authorities responsible for the supervision of markets in financial instruments are bound by an obligation of professional secrecy and, where relevant, the scope of that obligation

[...]

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## SUMMARY

1. The purpose of this research note is to examine the main features of the legislation in the Member States applicable to requests for access to information held by the national competent authorities under Directive 2004/39,<sup>1</sup> in relation to the authorities' supervision of markets in financial instruments and their decision-making practice, and to set out any related case-law, where it exists.
2. The research was carried out in two stages. First, a brief overview was given of the situation in the different Member States, with particular emphasis on the scope of the obligation of professional secrecy and the categories of information considered to be confidential. On the basis of that research, a number of legal systems which were representative of the range of existing or planned solutions under their national laws<sup>2</sup> were selected. Those legal systems<sup>3</sup> were used for a more comprehensive study and were the subject of the national submissions set out after this summary, which provides an overview of their contents.
3. In order to carry out their task of prudential supervision effectively, the competent authorities must have access to information concerning the entities whose activities they are required to monitor. That information may be collected by those authorities in the course of their duties using the powers conferred on them by law. It may

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<sup>1</sup> 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).

<sup>2</sup> In the first instance, a brief overview of the national laws of 26 Member States was given. The legal systems selected for the comprehensive study are those in respect of which that overview brought to light, in particular, relevant case-law on the interpretation of the concept of confidential information and on the position taken by the German financial supervisory authority (BaFin).

<sup>3</sup> German, Austrian, Estonian, Finnish, French, Netherlands, Polish, Portuguese, United Kingdom and Czech laws have been the subject of a comprehensive study.

also be transmitted voluntarily by the various players operating in the financial markets. However the information is communicated, it is essential that there is a relationship of trust between the entities concerned and the competent authorities, hence the need to impose an obligation of professional secrecy on those authorities.

4. The obligation of professional secrecy has gained in importance with the internationalisation of financial activities and the need to facilitate the exchange of information between States in order to carry out consolidated supervision of the transactions of cross-border financial groups. In order to ensure that the monitoring authorities are subject to only minimal restrictions on the transmission of information to their counterparts in other countries, it is necessary that information is communicated in conditions which preserve the confidentiality of the information in question and ensure that it is used only for specific purposes.
5. It is for that reason that, since the First Banking Coordination Directive (77/780),<sup>4</sup> the EU legislature has been concerned about the obligation of professional secrecy to which the supervisory authorities are subject. Under that directive, and given its objective to encourage effective cooperation between the Member States' supervisory authorities, the concept of professional secrecy, hitherto governed solely by national law, has been harmonised in the context of banking supervision. That approach was extended to the investment services sector by Directive 93/22,<sup>5</sup> which permitted the provision of such services in the securities field in another Member State subject to the granting of an authorisation and to monitoring by the service provider's home Member State.
6. Although the framework thus established was fundamentally reformed by Directive 2004/39, the scope of the obligation of professional secrecy provided for in Article 54 of that directive remains, in substance, largely unchanged.
7. As regards the detailed rules for access to information held by the supervisory authorities, it is not, however, sufficient to take into account only the rules which enshrine the obligation of professional secrecy incumbent on those authorities under national law. All the Member States concerned by the present study have adopted

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<sup>4</sup> First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ 1977 L 322, p. 30).

<sup>5</sup> Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ 1993 L 141, p. 27).

regimes on public access to documents held by public bodies, including the supervisory authorities.

8. The processing of a request for access addressed to a supervisory authority therefore rests on the interaction between those two sets of rules, the main features of which are outlined below. [...] Particular consideration will be given to the categories of information regarded as confidential [...], and to the handling of business and prudential secrecy. The question of protecting the confidentiality of information over time will also be examined.

#### I. SUPERVISORY AUTHORITIES AND THE RIGHT TO ACCESS INFORMATION HELD BY PUBLIC BODIES

9. In each Member State concerned by the present study, a regime on free access to public information exists. However, since the right of access is not absolute,<sup>6</sup> some limitations are provided for in order to restrict access under certain conditions. Those limitations make it possible, inter alia, to take into account the provisions of other laws with regard to certain information. Accordingly, as regards information held by supervisory authorities, the national regimes generally include mechanisms whereby it is possible to protect the confidential nature of that information.
10. In its simplest form, such a mechanism consists in disapplying the general regime on access to documents where a specific access regime has been established concerning the field in question, which is therefore applicable as a *lex specialis*. This is the case for two Member States in which the law governing the supervisory authority's activity also contains provisions relating to access to information held by that entity (**Estonia, Netherlands**).
11. In the other Member States, the obligation of professional secrecy incumbent on supervisory authorities is taken into account through the application of absolute exceptions to the right of public access, whereby the documents held by those authorities fall outside the scope of the obligation to disclose their content.

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<sup>6</sup> In general, in regimes on access to documents held by public bodies, exceptions to the right of access fall into two categories: so-called 'absolute' exceptions, concerning cases where access is automatically refused, and so-called 'relative' exceptions, concerning cases where access cannot be refused if there is an overriding public interest in disclosure.

12. In that regard, three approaches can be identified. First, the application of an exception setting out in general terms that documents the disclosure of which is not permitted by law are non-communicable (**Austria, Finland, France, Poland, Czech Republic, United Kingdom**). Secondly, the establishment of an exception targeted specifically at documents held by supervisory authorities (**Portugal**). Lastly, the adoption of a hybrid approach combining elements of the two approaches above, that is to say the coexistence of two exceptions: one precluding the right of access where the information in question is covered by an obligation of secrecy protected by law, and the other providing that documents may not be communicated if their disclosure could have detrimental consequences for the monitoring or supervisory duties of the financial, competition or regulatory authorities (**Germany**).
13. In addition, it cannot be ruled out, at least in so far as concerns certain Member States, that a refusal to disclose documents held by a supervisory authority may also be based on other exceptions provided for by the national regime on public access to documents. That is the case, for example, under **French and United Kingdom law**, which, like the regime established by Regulation No 1049/2001,<sup>7</sup> provide for exceptions relating to the protection of privacy and of commercial and industrial confidentiality. On the basis of those exceptions, the refusal to communicate information held by a supervisory authority could potentially be justified both by the exception relating to secrecy protected by law and by the exception relating to commercial and industrial confidentiality. It is also possible that an exception, such as that relating to the protection of privacy, could be invoked by itself where documents fall outside the scope of the obligation of professional secrecy incumbent on the supervisory authorities. This will be revisited in Part III below.
14. Moreover, in two Member States, other mechanisms enable access to information held by the supervisory authorities. Accordingly, under **Czech law**, third parties may obtain access to files created by public bodies in an administrative procedure if they can establish a legal interest therein or put forward another serious reason for doing so, provided that such access does not adversely affect the rights of the parties to the procedure or undermine the public interest. However, that right of access does not

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<sup>7</sup> 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).

cover documents in a file containing information which is classified or subject to an obligation of confidentiality provided for by law. **Austrian** law also establishes an obligation for public bodies to provide, on request, information on operations falling within their scope of activity, with the exception of information covered by an obligation of confidentiality provided for by law.

15. It is apparent from the foregoing that, for all Member States, the ability to access information under the regime on access to documents held by public bodies depends largely on how the information in question is categorised under the rules on the professional secrecy of the supervisory authorities. In so far as information is not considered to be confidential, the exceptions to the right of access provided for in the general regime may still apply.

## **II. THE SUPERVISORY AUTHORITIES AND THE SPECIFIC LEGAL FRAMEWORK RELATING TO INFORMATION HELD BY THEM**

16. Each of the Member States under analysis, without exception, has laid down an obligation of professional secrecy specifically intended for the financial supervision authorities and provided for in a text governing the activities of those authorities.

### **A. OBLIGATION OF PROFESSIONAL SECRECY**

17. Since such an exception exists in all the Member States, a comparative examination of the approaches adopted reveals that there is some disparity in how the obligation of professional secrecy is worded.
18. The obligation of professional secrecy is to apply, generally, to all supervisory authority staff and to persons employed by that authority to carry out its duties. They are required not to disclose information which has come to their knowledge in the performance of their duties or in the course of their activities, and that obligation must continue to apply after the end of their employment (**Austria, France, Poland, Portugal, Czech Republic, United Kingdom**). In the event of failure to fulfil the obligation, the offender is liable to a criminal penalty (**France, United Kingdom**).

19. However, given that the obligation of secrecy must not be absolute to the point of preventing communication which is justified in the general interest, each Member State has established exceptions the basic aim of which is to facilitate the free exchange of information necessary for the performance of the supervisory authorities' duties and to ensure the proper administration of justice. To that end, the national legislation specifies exhaustively the entities to which and persons to whom the supervisory authority is authorised to transmit confidential information. By way of illustration, such information may be disclosed to judicial authorities acting in bankruptcy proceedings or in criminal proceedings (**Germany, Estonia, France, Netherlands, Poland, Portugal, Czech Republic, United Kingdom**).

#### B. CONCEPT OF CONFIDENTIAL INFORMATION

20. As regards the question of which information is covered by professional secrecy, an examination of the national laws reveals a multitude of approaches. This may not be surprising given the lack of a specific definition of the concept of confidential information in Directive 2004/39.
21. In that regard, although most legal systems have adopted legislation that makes it possible to determine, with varying degrees of precision, which information must be regarded as confidential (**Germany, Estonia, Finland, Poland, Portugal, United Kingdom**) or that, at the very least, indicates a solution to this issue (**Austria**), others contain absolutely no mention of that concept (**France, Netherlands, Czech Republic**). For the latter three Member States, it has nevertheless been possible, on the basis of the case-law or the competent authority's internal documents, to find some indications as to how the concept of confidential information is to be interpreted.
22. The overall picture that emerges from examining the national laws is that the Member States fall into one of three categories depending on the way in which they address the issue of confidentiality of information. Accordingly, the first group of Member States articulates the concept of confidential information using categories of secrecy protected by law (**Germany, Finland, Netherlands, Poland, Portugal**), whilst a second group favours an approach based on the principle that information entrusted to the supervisory authority in the performance of its duties must, by its nature, be protected (**Estonia, France, Czech Republic, United Kingdom**). Lastly, in one case, confidentiality of information is assessed by considering whether the

obligation of professional discretion incumbent on the supervisory authority precludes communication of the information (**Austria**).

23. Coming back to the States in the first group, **Finnish** and **Portuguese** law provides that it is necessary to check whether the information requested is covered by commercial secrecy, business secrecy or prudential secrecy. Under **Portuguese** law, such information is accessible to the public only with the authorisation of the competent authority. In that group still, **German** law cites information protected by those types of secrecy as examples of confidential information.
24. Similarly, it is clear from **Netherlands** case-law that information must be categorised as confidential if its disclosure could have a significant effect on the competitive position of the undertaking concerned, or would be capable of disproportionately interfering with the private life of a person. Likewise, under **Polish** law, information is categorised as confidential if its disclosure would undermine the legally protected interests of the supervisory authority or of operators in the field of financial instruments trading. That Member State gives particular consideration to the information contained in contracts or legal acts, providing that any personal or property data contained therein must not be communicated.
25. In the second group of Member States, **Estonian** and **French** law adopts a very broad interpretation of the concept of confidential information, in so far as, unlike in the case of commercial secrecy for example, it is not the specific characteristics of the content of a document which justifies it not being communicated, but simply the fact that it has been entrusted to the supervisory authority. Accordingly, under **Estonian** law, all information gathered by that authority during the supervision procedure, on any media, is categorised as confidential, whereas **French** law provides for the non-communicability of all facts, acts and information which may have come to the knowledge of supervisory authority staff as a result of their duties in connection with monitoring or investigation tasks.
26. **United Kingdom** and **Czech** law also follows that approach, but in a more tempered manner. Although, under **Czech** law, the information transmitted to the supervisory authority in the context of its supervision activity is subject to an obligation of absolute confidentiality, it follows from the case-law that that authority must assess, in each case, whether it is in the interest of the administrative authorities or other persons that the information remains confidential. In the **United Kingdom**, the mere

receipt of information by the supervisory authority in the performance of its duties is not sufficient either for it to be categorised as confidential. Again, there must be a connecting link between that information and the commercial activity or the affairs of a person. That link must not be indirect or incidental.

27. **Austrian** national law takes a somewhat different approach in so far as the legislation does not stipulate any categories of confidential information, but focuses on the existence of an obligation of discretion on the part of supervisory authority staff which precludes the disclosure of the information in question. That obligation arises when this is in the public interest or in the preponderant interest of a person, including, *inter alia*, the economic interest of a public body, the interest relating to the preparation of a decision or the interest of parties to the procedure. The supervisory authority must verify, in each case, whether the obligation of discretion precludes the disclosure of the information sought and, where appropriate, it must give reasons for its decision.

#### C. CONFIDENTIALITY OF INFORMATION OVER TIME

28. The majority of the national laws examined do not provide for a temporal limitation in respect of the confidentiality of information held by the supervisory authorities. On the contrary, in some laws, it is apparent from the legislation or the case-law that the confidentiality of that information, in principle, is without limitation in time (**Estonia, United Kingdom**).
29. In that regard, only **Portuguese** national law takes into consideration, for the purposes of determining whether information may be communicated, the length of the period during which that information has been held by the supervisory authority. That law provides that, in respect of information which may affect the effectiveness of monitoring and supervision activities — for a period which is strictly necessary in order to safeguard other legitimate interests protected by law — the authorisation of the competent authority must be obtained.
30. Moreover, it may be noted that, under the general regime on access to information held by public bodies established under **French** law, documents covered by commercial and industrial confidentiality may be communicated upon the expiry of a period of twenty-five years from the date on the document or on the most recent document included in the file.

### III. THE SUPERVISORY AUTHORITIES AND PROCEDURES FOR HANDLING SECRECY

31. In order to illustrate more clearly how the rules applicable to information held by supervisory authorities are applied in practice, it is necessary to examine specifically how requests for access to information which may be covered by business secrecy, prudential secrecy or another type of secrecy are handled.

#### A. BUSINESS SECRECY

32. In some Member States, information held by the supervisory authorities which contains commercial data is, in any event, covered by the obligation of professional secrecy incumbent on those authorities and may not, therefore, be communicated (**Estonia, France, Poland, Portugal**). The prohibition on communicating such information is absolute, meaning that there is no need to examine whether disclosure could undermine any interests. Moreover, in **French** law, such information is protected both by professional secrecy and by commercial and industrial confidentiality.

33. **Czech** law arrives at the same conclusion, but on the basis of different reasoning. Information containing commercial data is accorded the absolute protection of business secrecy, which is independent of the protection conferred by the obligation of professional secrecy. Thus, since the obligation of confidentiality exhibits the characteristics of public law, it does not extend, by definition, to business secrecy. Czech law adopts a concept of business secrecy which is based on the competitive significance of the information in question, whether it is identifiable and measurable and whether it is inaccessible to the public.

34. The other national laws require also that information must have certain characteristics or attributes in order to be protected by business secrecy. As a result, they adopt an approach based on examining individually each document that is requested in order to determine whether it falls within the scope of business secrecy.

35. This is also the case under **German** law, which, as already stated, requires that the information is not made available to the public, is not obvious and has some value in that, for example, its disclosure could benefit a competitor. In the same vein, under

**Finnish** law, the application of business secrecy is subject to the undertaking concerned demonstrating a legitimate interest in keeping the information in question confidential. However, that does not mean that that information has any economic value. That rationale is also reflected in **Netherlands** law, which emphasises that the information must be capable of having a significant effect on the competitive position, and in **Austrian** law, under which the information must be such as to adversely affect the interests of the undertaking concerned.

36. As regards **United Kingdom** law, information containing commercial data which falls outside the scope of the supervisory authority's obligation of professional secrecy may be excluded from the right of public access. In that regard, three conditions must be met: damage must exist as a result of the commercial interests of the person seeking to prevent the disclosure being undermined, there must be a causal link between the communication of information and the alleged damage and the damage that may result from the disclosure must be vested and current.

#### B. PRUDENTIAL SECRECY

37. Only two Member States formalise prudential secrecy as a right or privilege which is protected by law and may be relied on in order to prevent the communication of information held by the supervisory authority.

38. Under **Finnish** law, the law on the publicity of the activities of public authorities establishes a derogation to the right of public access relating to the effectiveness of investigations and supervision carried out by public authorities. Information which is subject to prudential secrecy concerns, inter alia, the methods of supervision adopted by the competent authority, communications and transmissions of information between the various competent authorities, and between the monitoring authority and the supervised entities.<sup>8</sup>

39. That information is subject to prudential secrecy only if disclosure of the information in question is capable of undermining the supervision activity or is liable to cause damage, without valid reason, to the undertaking concerned. This is therefore a relative exception, which requires the demonstration that there is a risk of undermining the protected interest. That authority must therefore credibly show that, in the case at hand, disclosure of the document requested could actually undermine

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<sup>8</sup> That approach to the concept of prudential secrecy was adopted by Advocate General Jääskinen in his Opinion in *Altmann and Others*, C-140/13, EU:C:2014:2168, point 38.

the protected interest. The Finnish legislation also provides that the information contained in the supervisory authority's reports on the state of financial markets and supervised entities is also subject to prudential secrecy, provided that disclosure is capable of undermining the functioning of the financial system.

40. Under **Portuguese** law, a law adopted in 2016 introduced an exception to the right of access which covers administrative documents containing information which may affect the effectiveness of monitoring and supervision, including the plans, methodologies and strategies for supervision or monitoring. This is an absolute exception which, however, is limited in time in so far as it is valid only if and for so long as its application is strictly necessary for the purposes of safeguarding a legally legitimate interest. On that basis, the supervisory authorities support a broad interpretation of prudential secrecy, claiming, inter alia, that all of the information they hold is confidential and non-communicable. Although there does not yet appear to be any case-law on that subject, it should be noted, however, that the courts are reluctant to lift professional secrecy in respect of documents received from or exchanged with other monitoring or supervisory authorities.
41. Reference must still be had to **German** law, under which, despite the absence of any reference in the legislation to prudential secrecy, the national courts have ruled in favour of recognising such secrecy, based on an interpretation of Article 54 of Directive 2004/39 and the judgment of the Court in *Altmann*.<sup>9</sup> In that regard, the Higher Administrative Court, Kassel, found, on that basis, that there was a general obligation of confidentiality which covered all of the information that the supervised undertaking transmitted to the supervisory authority and that information had to be categorised as confidential, within the meaning of Article 54 of the directive. The Federal Administrative Court also took the view that prudential secrecy existed [...].

#### C. OTHER TYPES OF SECRECY

42. The other types of secrecy which may apply to information held by a supervisory authority include, inter alia, the protection of personal data. In some national laws, information held by those authorities which contains such data is covered, in any event, by professional secrecy (**Estonia, Finland, France, Netherlands, Poland, Portugal**). In others, that information is protected against disclosure under the law on data protection or absolute exceptions to the right of public access to documents

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<sup>9</sup> Judgment of 12 November 2014, *Altmann and Others*, C-140/13, EU:C:2014:2362, paragraph 42.

provided for in the general access regime (**Germany, Czech Republic**). In one case, it is possible that both the supervisory authority's obligation of professional secrecy and an exception to the right of access apply (**France, United Kingdom**).

## CONCLUSION

- I. Since Directive 2004/39 does not specify what is meant by confidential information, the Member States have been allowed a degree of flexibility in order to define the essential scope of a concept around which the obligation of professional secrecy may take shape. The significance of that concept becomes even greater since it has been found that, in all of the Member States, that obligation is linked to the right of the public to access information available to public bodies, including supervisory authorities.
- II. Although the regimes on public access to information established in the different Member States reveal a certain desire for transparency on the part of the administrative authorities, the fact remains that that objective is difficult to reconcile with the importance that the national legislature attaches to the effective functioning of the supervisory authorities and, therefore, with the need to protect the confidentiality of the information communicated to those authorities.
- III. The study of the access rules in force in the Member States has revealed the increased difficulty for the public to access information held by the supervisory authorities. In the majority of the Member States, it would appear from the rules on the professional secrecy of those authorities that the information held by the supervisory authorities enjoys extensive protection against disclosure. In that regard, the obligation of confidentiality to which those authorities are subject results in practice, in a number of national laws, in protection being conferred on all information received by the supervisory authorities in the performance of their duties, irrespective of the nature of that information (**Estonia, Finland, France, Poland, Portugal**). Other Member States have tempered that approach by imposing qualifications on the types of information regarded as confidential (**United Kingdom**) or by requiring that an interest in favour of or against the disclosure of information which is protected by law is demonstrated (**Germany, Austria, Netherlands, Czech Republic**).

- IV. It should be noted, however, that there is very little case-law on that subject. Only one Member State appears to have confirmed a broad interpretation of the concept of the professional secrecy incumbent on supervisory authorities (**Germany**), which is the position of the German supervisory authority, inter alia.
- V. With regard to the possibility of imposing a temporal limitation on the confidentiality of information, only one Member State has adopted provisions to that effect (**Portugal**).

[...]