VG 10 A 215.04

Verwaltungsgericht Berlin

ORDER

(Beschluss)

In the Administrative Law Dispute

1. Bund für Umwelt und Naturschutz Deutschland e.V. , represented by the Board, Dr. Angelika Zahrnt, Am Köllnischen Park 1, 10179 Berlin

2. Germanwatch e.V. , represented by the Board, Klaus Milke, Haakestraße 83, 21075 Hamburg

Applicants

Counsel:

Rechtsanwalt Dr. Wilhelm Mecklenburg, Häschenkamp 7, 25421 Pinneberg

against

the Federal Republic of Germany, represented by the (Federal Ministry of Economics and Labour (BMWA), Scharnhorststraße 34-37, 10115 Berlin

Defendant

Counsel:

Rechtsanwälte Redeker, Sellner, Dahs & Widmaier, Kurfürstendamm 218, 10719 Berlin

the 10th chamber of the Administrative Court Berlin (Verwaltungsgericht) has, through Judge Gaudernack, decided on 10th January 2006 as follows:

The following settlement is proposed to the Parties to the dispute to fully and entirely resolve the dispute:

Without prejudice to the different opinions on the legal obligation, and without setting a legal precedent, the following settlement is approved:

1. The defendant agrees to make the following information available to the applicants:

a) A list of projects in the field of energy production beginning with a value of € 15 Mio and a duration of more than 2 years, for which the defendant has granted export credit support /guarantees since January 1st 2003.

"Project" is deemed to mean the supply of installations/plants or parts of installations/plants.

b) This list is to be arranged according to the kind of respective sources of energy: coal, oil, gas, nuclear, sun, water, terrestrial heat, wind.

c) For each item in the list described in a) above the total sum of credit supported by the defendant's export credit support/guarantee is to be supplied.

d) The projects in the list referred to in a) which have been subject to the "Screening" exercise are to be categorized into the pertinent categories of relevance to the environment A, B, or C.

e) In as far as such information is held, the list referred to in a) is to be complemented on a project basis with the following information:

- the kind of fuel,

- the origin of the fuel,

- the fuel input per year in tons; with mixed combustion, if necessary classification by the kinds of fuel used and their origin,

- the output in kilowatt-hours per year,

- the efficiency of the plant in percent (when necessary given new conditions),

- the installed capacity in megawatts,

- the degree of capacity utilization in percentages,

- the projected period of operation by the plant.

f) Names and other details of the operators of the projects must be made unreadable.

2. Of the costs of this settlement, the applicants bear 1/3, defendant 2/3.

Reasons:

This proposal is complemented by an Annex which contains the deliberations of the Court of 21st July 2005. To avoid duplication, this Annex is herewith referred to.

This proposal has the legal status of a court settlement in the sense of § 106 2nd sentence of the Administrative Court Procedural Statute (Verwaltungsgerichtsordnung) if both Parties accept it by way of written consent, delivered to the Administrative Court Berlin, by 31st January 2006. [This written consent was duly submitted by the parties.]

Signature: Gaudernack

Annex

In the oral hearing on 29th June 2005, Parties and the court discussed the legal and factual issues involved in this dispute in depth. The Parties both wished for the court to develop a written proposal for a settlement, which should be based on and contain the court's preliminary assessment of the legal situation and rights. After deliberations of the chamber the settlement proposal is based on the following legal opinion:

1. Applicable Law

For the purposes of a preliminary assessment, the chamber assumes that the German Access to Environmental Information Act "UIG" (Umweltinformationsgesetz) in the version of December 22, 2004 as amended on February 14, 2005 applies to the dispute. This is based on the consideration that according to the settled case law of the Federal Administrative Court (Bundesverwaltungsgericht) , the substantive law alone determines which rules are applicable and form the basis of a legal claim. In the case of a judicial review asking the Government to undertake a specific action (Verpflichtungsklage) the pertinent point in time for the determination of the applicable law is usually the time of the last oral hearing. The court is not convinced by the defendant's argument that it was not the intention of the amendment to the UIG to allow for a re-assessment of old claims for access to information that were legally declined under the old Act. On the one hand, the denial of access to information to the applicants by the defendant has not become legally binding [because it was challenged by commencing the law suit, comment by the translator]. On the other hand, the new UIG is based on an EU directive that consciously expands access to environmental information. Since the new Act lacks any provision relating to its transitional application to "old" claims, it may be assumed that the pending "old cases" are to be judged in accordance with the new substantive law, i.e. the new UIG.

2. Legal Basis for the Claim

§ 3 paragraph 1 of the UIG may be used as the basis of claim for the plaintiff's right to have access to information. In contrast, relying on the Emissions Trading Directive

(2003/87/EC), in particular article 17 that allows for public availability of decisions relating to the allocation of allowances and to the reports of emissions, does not seem a promising approach. These emissions reports, whose required content is set out in addendum 2, section 2 of the German Greenhouse Gas Emission Trading Act (Treibhausgas-Emissionshandelsgesetz, TEHG), only concern purely national (i.e. German) facts and data in connection with the allocation of emission permits to industrial installations on the basis of the national allocation plans.

§ 3.1 of the UIG stipulates that it is the right of every person, in accordance with the provisions of the UIG, to have free access to environmental information held by or for public authorities ("the obliged entity"). On the basis of the amended UIG § 2.1, the Ministry of Economic Affairs and Labour, BMWA, seems generally to be an obliged entity and obliged to make available information requested on the basis of the UIG as a section of the German Federal Government.

3. Environmental Information

The main issue in dispute between the parties to these proceedings is whether the information requested constitutes "environmental information" within the meaning of § 2.3 of the UIG, particularly under subparagraph 3 a) and/or b).

a) Environmental Information in the sense of § 2.3 subparagraph 3 a):

According to UIG § 2.3 subparagraph 3 a), environmental information is

> "independently of the form in which it is stored or kept, all information and data about measures and activities that affect, or likely affect, elements of the environment, as referred to in subparagraph 1 (i.e. air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms) or factors as referred to in subparagraph 2 (such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in Nr. 1)".

In its preliminary assessment, the chamber assumes that the granting of export credits in the area of energy production, at least in part, constitutes measures or activities that are likely to affect elements of the environment. It cannot be disputed that the supported projects themselves can potentially affect elements of the environment, such as the atmosphere. This general assumption is shared by the defendant, as shown in the defendant's own publication (see p. 28 of the 2004 Annual Report: "Environmental Effects of Projects" or Jahresbericht 2004: "Umweltauswirkungen von Projekten").

It is also the preliminary opinion of the chamber that granting or denying export credit support/guarantees will positively or negatively affect the implementation of a project and therewith will, with some probability, also affect the environment. This assessment is evidently shared by the OECD, which states in their guideline "Common Approaches":

"Noting that OECD Ministers in 2001 have recognized that export credit policy can contribute positively to sustainable development and should be coherent with its objectives." (Recommendation on common approaches on environment and officially supported export credits, TD/ECG (2005) 3, February 25, 2005)

Considering that extensive/sympathetic interpretation of domestic law is generally necessary to fully and adequately implement European law, it seems sufficient that a state activity tends generally to compromise the environment (see on the general potential of environmental protection in the context of the old UIG BVerwGE 108, 369 et seq.). Even if a situation should arise where a project is carried out with the assistance of another country, regardless of the policy of the defendant, this would not change this general assessment because, based on a first assessment by the chamber, the wording of the UIG does not necessarily require direct causation without intermediate steps. In this respect, it goes without saying that the main responsibility for a project and its environmental effects rests on the operator of a project and not the defendant. However, already for the old version of UIG § 2.3 subparagraph 3 a), the Federal Administrative Court ruled that this provision did not include a requirement of "immediateness" (Unmittelbarkeit) (BVerwGE 108, 369 et seq.). This interpretation may be transferable to the new version of UIG § 2.3 subparagraph 3 a).

The above reasoning may apply where export credit support is granted for the construction or provision of entire energy production plants. However, the plaintiff's claim for information about every support provided for mere plant components seems problematic in this context because, where the smallest components are supplied, the effects on the environment do not seem evident. If every small component were to be covered by the right to information, this would lead to inadequate extension of the causation chain criterion as well as of the intention of the UIG – even when interpreted broadly. Yet, it is difficult to delineate exactly in which cases an effect on the environment could be assumed.

b) Environmental Information in terms of § 2 paragraph 3 subparagraph 3 b):

According to UIG § 2 paragraph 3 subparagraph 3 b), environmental information is

> "independently of the form in which it is stored or kept, all information and data about measures and activities designed to protect elements of the environment referred to in Nr. 1 (see above), including policies, legislation (statutory and administrative regulations), treaties, environmental agreements, plans and programmes. "

The chamber recognizes that the primary purpose of export credit support/guarantees is to support the German economy and not environmental protection. However, in line with its preliminary assessment, the chamber is of the opinion that, at least for those supported projects where an environmental assessment is carried out, these also constitute measures and activities that aim to protect the environment. This finding is based on the following considerations:

The wording of the UIG fundamentally corresponds to Directive 2003/4/EC and is – due to its relatively vague formulations – subject to interpretation. To enable the most effective implementation of European law, such an interpretation must be broad. Therefore, measures and activities, whose primary purpose is not the protection of the environment, may also fall under UIG § 2.3 subparagraph 3 b) because they nevertheless follow an important secondary or intermediate purpose. According to the defendant's own statements found in many of its publications, as well as in the international agreements on the granting of export credits, environmental aspects do play a notable

role in the process of granting export credit support/guarantees. In the defendant's own words, environmental aspects constitute a "definite component of the decision process" (2003 Annual Report, p. 26) and are "responsibly tested and accounted for" (2004 Annual Report, p.28) in the context of a decision on the granting of an export credit guarantee. In one report to the OECD, the defendant even speaks of the central importance of environmental aspects ("central importance", OECD-Paper TD/ECG (2004)3/FINAL, p. 35).

With respect to the need for a chain of causation or "immediateness criterion", the reasoning under 3 a) above is applicable.

As a preliminary assessment, the chamber is also of the opinion that a comparison with the old UIG judgments on subsidies pertaining to the environment (see BVerwGE 108, 369 et seq.) with export credit guarantees is not far fetched. As well as in this case, these cases assumed that the final responsibility for environmental effects of an operation is vested with the operating firms, however the courts considered the contributions granted by state subsidies sufficient in terms of the UIG. This is also due to the fact that economic instruments of environmental protection continuously gain in importance compared to the classic instruments of command and control.

This reasoning applies, however – after a first assessment by the chamber –only for those projects for which an environmental assessment is conducted, based on the OECD "Common Approaches" transposed by the German "Guidelines for the consideration of ecological, social and development matters" (Leitlinien für die Berücksichtigung von ökologischen, sozialen und entwicklungspolitischen Gesichtspunkten"). In respect of export credit support for less than € 15 Million and of less than 2 years duration, the duty of the state with respect to the environment seems not to go beyond the general duty of the state to make sustainable decisions. It seems therefore questionable whether information relating to projects that do not require an environmental impact assessment can qualify as environmental information in terms of § 2.3 subparagraph 3 b).

4. Environmental Information "Held" by an authority

There is disagreement between the parties as to whether the defendant "holds" (possesses) the information requested. According to UIG § 2.4 this is the case if the information is available through the public authorities or held ready for them.

In its preliminary assessment, the chamber assumes that, at minimum, the following information must be disclosed by the defendants and Euler Hermes AG:

- a list of projects, in the field of energy production, for which export credit support/ guarantees have been granted and for which an environmental impact assessment (EIA) was conducted. This is based on the fact that in the 2003 annual report (see p. 27) as well as the 2004 annual report (see p. 28) a figure for all projects with an EIA is given. From these totals of 152 projects in 2003 and 123 projects in 2004, it must be possible to select the projects in the field of energy production,

- the energy source for these projects should be easily identified from the application documents,

- the guarantee limit (erhobene Deckungssumme), which is reported for statistical reasons anyway, may likewise be obtained from existing documentation without any problems,

- this is also the case because of the international reporting commitment to the OECD for the categorizing of the projects.

However, the availability of the information requested under Nr. 3.) of the present claim, which pertains to details of projects using fossil fuels, seems problematic. In the opinion of the chamber, there is no specific obligation on the defendant to hold or request this type of information from the private operators. However, should such information be available in the submitted Environmental Impact Assessment Reports or otherwise in the files, it would fall within the obligation to be released.

5. Disqualifying claim

After a first assessment the chamber considers that no exception such as referred to in §§ 8, 9 UIG is presently applicable. For this assessment, the chamber has taken into account the fact that any grounds for refusal of information must – according to Art. 4.2, 2nd sentence, of Directive 2003/4/EC – be interpreted in a restrictive way. On this basis, the

chamber does not follow the defendant's argument that, by disclosing the information requested by the applicants, international relations in terms of § 8. 1 Nr. 1 UIG could be compromised. A comparison with the other grounds for exceptions contained in § 8.1 Nr. 1 (such as national defence) shows that claimed effects on international relations must reach a certain degree of seriousness. The fact that host countries might themselves be under an obligation to report on greenhouse gas emissions under international treaties seems to be irrelevant for this assessment.

Neither is the information to be denied on the basis of § 8.2 Nr. 1 (request manifestly unreasonable). The applicants do not already have access to the data requested. The internet-presentation [of Hermes] does not seem to be all-encompassing, and does not contain any data on projects where the relevant operators have not consented to publication. The increased effort necessary to make the information available is, as long as the request for information is a serious one, no reason as such to find that the request is manifestly unreasonable. Rather, the effort must be taken into account in calculating the charges due.

Another contentious matter between the parties to this dispute is whether the request can be denied on the grounds of § 9 .1 Nr. 3 UIG because the confidentiality of commercial or industrial information is at stake. In this context it is important to note that the new UIG allows for discretion, i.e. a weighing between the public interest in the disclosure of the information and the effects on confidentiality of commercial or industrial information. It is the opinion of the chamber that § 203 of the Criminal Code (Strafgesetzbuch) is not applicable in this constellation: if the UIG allows for information to be disclosed, its disclosure cannot be "unauthorized" (unbefugt) in the terms of this provision. Overall, the chamber considers that commercial interests (confidentiality, competition) can be sufficiently taken into account by making the names of companies etc. in the disclosed information unreadable.

6. Proposals for an amicable settlement

a) Limitations of the time period for the requested information

The chamber proposes that the starting point for the information to be provided for the past should be moved from 1997 [as requested by the applicants] to 2003. This is based

on the consideration that the Kyoto Protocol was signed in 1997, but only entered into force on 16th February 2005 after the Russian ratification. The applicants have – in the oral hearing – already suggested that they might consent to the later starting date of 2001. This year marks the beginning of environmental assessments by the defendant on the basis of the OECD's Common Approach. However, the chamber is of the opinion that the other relevant date is the entry into force of the new UIG: It is doubtful whether the defendant (BMWA) would have been a possible addressee authority for environmental information in terms of § 3.1, 1st sentence UIG in the old version. Moreover, even if the defendant was generally obliged under the UIG in the old version, the wide obligations of § 7 UIG in the new version definitely would not have applied. Thus, the defendant might not have been obliged to store information of the type requested, and making available the information now might require very intensive efforts.

2003 seems to the chamber to be a good starting point for practical reasons: Since the beginning of 2003 the defendant reports to the OECD on environmentally relevant projects, categories A and B (Nr.19) in the framework of the OECD guidelines. In this context, the defendant must report on all projects in these categories that have received final authorisation for export credit support. Entire energy production plants will in any case fall under category A (see Annex I of the Common Approaches).

b) Limitations regarding the volume of information

Since a settlement must always be characterised by compromise on both sides, a limitation of the scope/volume of information to be provided is justified taking into account the following considerations:

As discussed above under 3. it seems that an obligation to disclose every tiny detail or small part covered by export credit support as environmental information is problematic. Moreover, the defendant might not have been obliged, under the old UIG, to disclose information at all, or at least not as broadly as now foreseen in the new § 7 UIG. Lastly, in the interest of an amicable and full settlement with the objective of providing as much transparency as possible, a practical solution must be found that also takes into account the effort required on the part of the defendant to accumulate and make available the information.

The chamber does not ignore the fact that the effort to make available information on the past is probably quite large. This was also the opinion of the Legislature (BT-Drs. [parliamentary records] 15/3406, p.2). Yet, this effort seems adequate, given the reduced time period and volume suggested. This is even more the case as the number of projects for which a screening was undertaken in 2003 and 2004 only comes to 152 and 123. Of these, the area of energy production is only a small fraction. Moreover, the type of information now to be made available according to the settlement is largely identical to the data that has to be communicated to the OECD. Lastly, the defendant will, under § 7 UIG, be obliged to enable and support the access to this type information in an adequate form, for example by storing it electronically.

Gaudernack

Done / Stamp by the Court