

Summary

The significance of the “*Akteneinsichtsrecht*” (law granting rights for the inspection of certain documents) for legal protection under public procurement law

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Goals and development of the thesis / Questioning

In this dissertation we will examine whether adequate protection of primary legal rights exists below the thresholds, and the significance of these inspections rights within the scope of this legal protection system. In this context, the question arises whether there is a need – or even a legal requirement on the basis of the constitution and European laws - to create such primary legal protection. There are moves in Germany to institute primary legal protection under the thresholds, although the models for this differ. With the institution of primary legal protection under the thresholds, it needs to be investigated whether effective implementation requires unrestricted inspection rights for the offeror seeking legal protection

Questions arising in this context include:

- Can a claim by the affected parties of rights to document inspection be derived from the European legal order on transparency?
- Does the transparency order work in the interests of the affected parties (rights to inspect documents even without legal provision by European legal principles)?
- Whom does the European transparency order address, and can an offeror claim on it as procedural law?
- The judicature of the European Court of Justice on the “*Akteneinsichtsrecht*”
- The influence of the “*Akteneinsichtsrecht*” on the legal position of an offeror

- Effective limitation by § 111 GWB (German Act against Restraints of Competition) and analogue application to processes below the thresholds?

Since 2005, we have the IFG (German Freedom of Information Act), to make governance more transparent. Can this act be applied – either directly or with appeal to the European transparency order, or Art. 3 GG (Basic Law), or the legal protection guarantees under Art. 19 GG – as a right to inspect documents? Is it of importance, in this regard, whether the procurement procedure is purely on the basis of civil laws, or if it covers elements of administrative law?

Are the existing legal structures and the transparency order derived from the European discrimination law sufficient to guarantee offerors adequate legal protection during a procurement procedure? The procurement files are prescribed only under § 119 GWB as documents that serve the verifiability of the process. In this context, we will examine how and to what extent an offeror must obtain knowledge about the content of documents filed with authorities in order to implement its subjective offeror rights effectively.

As a rule, an affected party is only granted inspection rights to the extent that this is necessary to enforce the individual rights of the affected party in the procurement. **What is not yet regulated** is the legal basis from which the inspection rights are derived, and whether the GWB is able to regulate information claims conclusively.

Rights to procedural transparency results from primary community law, which is expressed through the jurisprudence of the European Court of Justice.

Generally, **Art. 245 AEUV** (European Anti-Competition Law) provides a right for access to the required information. Handling of personal information and data is, on the other hand, an independent, administrative matter.

The document inspection right belongs to the so-called procedure actualization rights. The more complex the administrative procedure, the more complex is the procedure-related commu-

nication. Inherent to these procedures, is that they for the most part involve information acquisition and processing. They are therefore significantly influenced by their information bases. Nevertheless, the acquisition of these information bases is only partially regulated by the relevant laws.

The inspection right is an integral part of the participation options for parties to a procedure that is legally indispensable under the principles of constitutional rule of law.

Inspection rights are a necessary part of the public monitoring of administration under a democracy.

With Art. 3 GG, only injury to the principle of equal treatment, and not injuries to individually protected legal positions, can be prosecuted.

An inspection right in procurements below the thresholds can only be derived from the European legal principle of transparency. The existing inspection right under § 111 GWB is inadequate.

Inspection rights in relation to the creation of a legal protection procedure are not addressed. Although confidentiality claims could be upheld through offeror-specific assignment notes, this could lead to non-transparency in the case of direct legal protection, since the affected offeror has no claim to inspect the further assignment files. Without the establishment of an individual right to inspection prior to initiation of a review procedure, a transparent procedure— hence also effective legal protection, cannot be guaranteed. The question, which restrictions could be admissible in individual cases, is answered by the IFG.

14.11. 2011

