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The Private Sector's Environmental Information Duty According to the Aarhus Convention

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Abstract

This article focuses on individual information claims based on the Aarhus Convention and its implementing Environmental Information Directive. The author examines whether and - if applicable - which private actors can be qualified as public authority in the sense of the Convention. This problem is not only of academic interest, but vital for the practical use of the right to access environmental information: Only if applicants know who the right addressee for such request is, are they able to submit it. All the more important are the concrete national implementing laws on which applicants can rely. Here, the author presents Germany´s multiple federal- and regional implementation laws as examples. One of the reasons for this choice: Many German citizens are unaware that environmental information requests may also be addressed to certain private entities.

**The expressed personal opinions of the author do not reflect the views of the Ministry or the State of Brandenburg.*

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1 Introduction

At first glance the Aarhus Convention (AC)[1] solemnly obliges states and administrations to disclose environmental information. This view may be too restricted. It is indeed true that literally only the "*public authority*" (Art. 2(2) AC) is subject to the ACs direct information duty. This term, however, covers more than administrative units in the narrow sense. The focus on private entities reflects a paradigm shift. At the end of the last and in the first decade of our century many European countries privatised state tasks.[2] Citizens reacted increasingly sceptically and since 2010 a trend of re-municipalisation in sectors like water, electricity and gas or public transport can be observed.[3] With that in mind, the interpretation of Art. 2(2)c) of the Environmental Information Directive (EID)[4] and its implementation are all the more significant to ensure gapless access to environmental information. The explicit inclusion of certain private undertakings in the AC aims first of all at preventing an 'escape' of the administration into private law through the privatisation of public tasks.[5]

Up to now, the private sector´s information duty according to the AC was not in the research focus, particularly with regard to Germany. Exceptions are Elfeld´s thesis[6], mainly concentrating on the Federal Environmental Information Law (UIG)[7], and a whole series of articles by Schomerus (and co-authors) from the last 15 years about private companies´ obligations under the AC as well as European and national implementation laws.[8] In the meantime, the German Federal Administrative Court (BVerwG) has affirmed the obligation to provide environmental information from a subcontractor of the state-owned railway (Deutsche Bahn).[9] Apart from this judgment there is no significant German case law. This might hint at a certain reluctance in German society to demand environmental information not only from administrative but also from private bodies. This hypothesis is somehow confirmed by the institute UFU[10], according to which few applicants request information access from private bodies fulfilling public tasks.[11]

The just-mentioned report was published simultaneously with the drafting of this article. It was commissioned by the German Environment Agency, an agency of the Federal Ministry for the Environment, and released as an "*evaluation"* of the UIG. In a separate attachment to the study, Schomerus legally analyses the Federal UIG as a whole, provision by provision, also including those on private undertakings. He concludes that their ambiguous role is an unresolved aspect of the UIG which so far has been inadequately acknowledged by case law and literature.[12] The present article dives deeper into this problem by targeting not only federal but also selected state-level UIGs and transparency laws. The significance of the German states should not be underestimated, as most relevant private public-sector institutions like hospitals, schools or water supply systems are regulated on a regional basis.

2 International and European level

2.1 Starting Point: The AC and EID

The AC is based on the 1992 Rio Declaration, specifically Principle 10 on the Environment. The Declaration´s wording does not include private undertakings but only the administration, which is in all its sectors and levels also the main thrust of the AC´s obligations. The AC differs in that it also pertains to certain private bodies performing public administrative functions as part of the "*public authority"*. This concept is defined in Art. 2(2) AC. Its core elements are underlined for better understanding:

"(a) government or other public administration, including public advisory bodies, at national, regional or local level;(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
(c) any natural or legal person having public

1 Aarhus Convention on the Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998.
2 Becker, 2007, p. 2.
3 Cumbers and Becker, 2018, p. 504.
4 Directive 2003/4/EC of the European Parliament and Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.
5 With reference to the German UIG: Schiller, 2017, Legal Tribunal Online.
6 Elfeld, 2014.
7 Umweltinformationsgesetz in der Fassung der Bekanntmachung vom 27. Oktober 2014 (BGBl. I S. 1643), das zuletzt durch Artikel 2 des Gesetzes vom 25. Februar 2021 (BGBl. I S. 306) geändert worden ist (Umweltinformationsgesetz, short: UIG).
8 Schomerus and Bünger, 2011; Schomerus and Scheel, 2010; Schomerus and Tolkmitt, 2007; Schomerus and Clausen, 2005.
9 Bundesverwaltungsgericht (Federal Administrative Court), Urteil vom 23.02.2017 - BVerwG 7 C 31.15.
10 Unabhängiges Institut für Umweltfragen.
11 UBA, 2020, p. 61.
12 Schomerus, UBA, p. 59.

responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)."

This rather wide definition probably intends to compensate for the missing overall inclusion of private subjects.[13] The crucial factor for the classification of the hybrid "*information-obligating body"* is not its organisational structure but function.[14] This makes the AC "*surprisingly resilient"* to privatisation trends.[15]

Art. 106(2) TFEU refers to "*[...] undertakings entrusted with the operation of services of general economic interest [...]*" in the context of competition law. This provision may help to clarify which private bodies are considered "*public authorities"* in the sense of Art. 2(2) EID. Particular caution is recommended here, as the scope is not congruent: Under Art. 106(2) TFEU, Member States designate the companies in question by legislative act. Under Art. 2(2) EID, however, they cannot evade their information obligation through the privatisation of public tasks.[16] Against this backdrop, one has to admit that the term public authority has not been fully clarified, as the just-quoted defining criteria themselves require further interpretation and definition. Unfortunately, the EU did not use the implementation process for a specification of its own. This led to the practically identical wording of Art. 2(2) EID.

Remarkably, the Commission had initially considered going beyond the AC in its definition of "*public authority"*.[17] Its proposal was rejected by the European Parliament already in the first reading, against the resistance of the Green party.[18] As the Commission did not insist[19], implementation and enforcement of the provision leave room for further defining features by the Member States. The scope of the presented Art. 2(2) AC can be specified and also widened in the implementing laws. States are explicitly entitled to introduce a higher protection standard as clarified in Art. 3(5) AC and Art. 193 TFEU. For example, Norway prescribes an environmental information duty for the whole private sector.[20]

2.2 Clarification through the Aarhus Convention Compliance Committee (ACCC) and the Shirley Case

According to my research, the ACCC has not yet dealt directly with any case relating to the information obligations of private entities under Art. 2(2)c) AC. The guide urges the parties to improve the implementation through clarification of which entities are covered by sub-paragraph b). It recommends categories or lists made available to the public,[21] but neither Germany nor any other party have followed this request.[22] The guide further implies that more and more public services are being privatised, hereby adding a layer of complexity to the notion of public authority. According to its authors, Art. 2(2)c) AC reflects this trend in particular.[23]

The whole issue of privatisation is highly political. Due to the lack of consensus about the character, scope and financing of public services, it is dubious whether it should be regulated by case-to-case decisions of the courts.[24] This applies even to the highest-ranking verdicts like the Emily Shirley case of 2013.[25] The facts are the following: Mrs. Shirley and an NGO demanded access to environmental information from several UK water companies under private law. These did not consider themselves public authorities for the purpose of EID. Therefore, the Upper Tribunal requested a preliminary ruling with reference to this definition of Art. 2 EID. Its questions concerned:

- the role of national law for the classification in Art. 2(2)b);
- the definition of "*control"* in the sense of Art. 2(2)c) EID;
- the possibility of interpreting the two sub-paragraphs in the sense that a single body may fall under their scope with respect to one part of its activities, while the other is privately operated.

Such a hybrid assessment was definitely rejected by the ECJ: On one hand it would "*[...] give rise to significant uncertainty and practical problems".*[26] On the other, it would contradict the ACs and EIDs inner systematic. Once an entity has been classified as a public authority in the general part of these laws, this cannot be modified in the application of specific laws.[27] In contrast, the AC implementation guide insists - even in its current 2014 edition, which appeared after this general finding - that it is at least

13 Elfeld, 2014, p. 47.
14 Karg, 2020, UIG § 2, pp. 6-7.
15 Ebberson, 2011, p. 74.
16 Schomerus and Bünger, 2011, p. 67.
17 COM(2000) 402 final, 2000/0169(COD), June 2000.
18 Neither in the EP´s nor the competent committee's opinion the change of definition was further clarified. COM(2000) 402 – C5-0352/2000 – 2000/0169(COD), opinion EP first reading, pp. 14-16.
19 Krämer, 2003, p. 13.
20 J. Madrid, 2017, p. 44 refers to: Act No. 31 of 9 May 2003 relating to the Right to Environmental Information and Public Participation in Decision-Making Processes Relating to the Environment, Norway, accessible here (latest access: 28 December 2020).
21 AC implementation guide, 2014, p. 48.
22 Schomerus, UBA, p. 40.
23 AC implementation guide, 2014, pp. 46-47.
24 Davis, 2015, p. 1672.
25 ECJ, C-279/12, Judgement of the Court (Grand Chamber), 19 December 2013. Fish Legal and Emily Shirley v Information Commissioner and Others (cited as: Shirley).
26 ECJ 2013, C-279/12, Shirley, r. 76.
27 ECJ 2013, C-279/12, Shirley, r. 78.

"*reasonable"* to apply the Convention only to the one sphere of action that falls under its definition.[28] Furthermore, the ECJ dwelt on the term "*control"* in the sense of Art. 2 (2)c) EID. Hereby it applied a negative definition. According to that, private entities are under public control if "*[...] they do not determine in a genuinely autonomous manner the way in which they provide their services [...]"* in relation to the environment.

At the same time the ECJ missed the chance to identify in general which private entities fall under the scope of Art. 2 EID.[29] This applied even to the water supply sector which had been the area of Mrs. Shirley´s claim. Hereby the court seems to insist on a case-by-case approach, although the implementation guide mentions just this sector as an example for a potential public utility or quasi-governmental body under Art. 2 (2)b) AC.[30]

The ECJ, however, followed the structure of Art. 2(2)b) EID by demanding a two-step test. Firstly, the private entity had to perform a public function on the basis of national law. Secondly, it had to be legally vested with special powers *"[...] beyond those which result from the normal rules applicable in relations between persons governed by private law"*.[31]

The ambiguity of the judgment is just one more piece of proof of the difficult balance between two factors. On one side, Member States possess implementing discretion under the EID. On the other, by committing themselves to the aims of AC and EID they guarantee wide access to environmental information. The Court´s decision ensured this protective standard by ruling out an escape into private law.[32] At the same time it outlined the contours of a both common and flexible European public service. Now, it is up to the Member States to implement this guidance on site.

3 German implementation

Germany has a comparatively restrictive attitude towards information rights in general, and environmental issues in particular.[33] This reluctance has historic roots: According to the so-called *Arkan* tradition, state-held information remains generally secret if access is not explicitly granted.[34] From this angle, the implementation of the AC in the UIGs was a shift away from the era of legalised secrecy in favour of more openness. Taking into account that this shift was followed up by a variety of freedom of information laws, the literature diagnosed a "*transformative spill-over effect".*[35]

Unlike in most other the Member States, the competence for implementing the Directive is not centralised. Germany has a multi-level administration: The Federation, the *Länder* (regional level), and the *Gemeinden* (local level). In a report concerning the appropriateness of an assessment framework on environmental governance[36], the Commission named such "*division"* as "*[…] one of several factors which has the potential to make it more complex for ordinary citizens to identify who is responsible for which decision affecting their environment […]".*[37] This caveat applies undoubtedly to Germany, whose information laws are divided by various legislative competences and partly also by the type of information the applicant requires and by the institution he addresses. And what´s more: Certain claims can be reached through several laws at once, while in the case of others a certain information law needs to be prioritised.

3.1 The Federal UIG

For many *Länder* the Federal UIG is the direct legal reference or at least role model for their own implementation. I will first provide a brief summary on private bodies´ status in the UIG. Mirroring their different functions access can be relevant in three different ways: 1) Private undertakings can be applicants[38]; 2) As third parties they could be affected if their interests are violated through the disclosure of certain information[39]; And last but not least, the focus of my article: 3) They could be obliged to give immediate access to such information themselves.[40] Federal legislators did not use their opportunity to specify the EID's scope. Thus, the UIG follows substantively the EID's definition of "*public authority"* but at least states explicitly that private bodies might fall under it. Only two of three elements in Art. 2(2)c) EID reappear in the UIG, namely public functions and public services. Not included are public responsibilities *(Zuständigkeiten).* In accordance with Schomerus, who addressed this aspect in detail[41], I do not consider this a reduction of the EID's scope. Anyhow it would be difficult to separate the three alternatives clearly. "*Public functions"* and "*services"* inevitably include "*responsibilities".* Hence the

28 AC implementation guide, 2014, p. 48.
29 Even more critical: Schomerus, UBA, p. 42.
30 AC implementation guide, 2014, pp. 46-47.
31 ECJ 2013, C-279/12, Shirley, r. 85 (finding 1).
32 Stüer and Buchsteiner, 2015, p. 228.
33 Hellriegel, 2012, p. 556.
34 Wegener, 2006, p. 19.
35 Sommermann, 2017, pp. 333 – 335.
36 Nesbit at al., European Commission 2019.
37 Nesbit et al., European Commission 2019, p. 31.
38 These three functions mirror the structure of the German Federal UIG (as also observed by Elfeld). According to Section 3 (1) UIG every person is entitled to get access to environmental information. This includes legal persons of private law.
39 Section 9 UIG protects the interests of third parties which voluntarily transferred environmental information.
40 Some private actors falling under Section 2 (1) Nr.2 UIG have an environmental information duty.
41 Schomerus and Bünger, 2011, p. 76.

omission could just be the result of editorial neglect. This assumption is sustained by the following fact: Art. 2(2) UIG not only deletes but also adds an element to the EID's definition: Included are *"in particular"* these bodies under private law that fulfil "*[…] services of general interest relating to the environment" (umweltbezogene Daseinsvorsorge).*

The German unicum *Daseinsvorsorge*, which dates from 1938, cannot be translated literally. Its founder, the later famous Ernst Forsthoff, thereby held the view that the State had not only a preventive task as *Polizeistaat* but also a providing and caring duty (*Fürsorge*). In this sense it had to ensure vital functions like postal service or social insurance.[42] To this day the term is not conclusively defined in German law. Some sectors like water supply, healthcare and transport are undoubtedly seen as part of it. Contested are possible transformative implications of the concept, as is illustrated by demands for a public internet and information structure under the headline "*(electronic)-Daseinsvorsorge".*[43] This does not mean that only the State is entitled to perform public tasks[44], hereby excluding private undertakings. In this sense the public-service criterion of the EID and UIG has principally a technical function. It excludes a right to information from those private companies that pursue only private interests.[45] Moreover, the addition of the defining feature *Daseinsvorsorge* in the Federal UIG is useful at least for obvious sectors like energy and transport. As this nationwide category is also part of most *Länder* UIGs, it contributes to ensuring the coherence of the German legal order.

This assessment leads back to the UIG, whose further requirements in Section 2(1) no. 2 correspond to Art. 2(2)c) EID. First and foremost, the service in question has to be environment related. This relationship can be loose but not merely accidental.[46] The second requirement concerns the control by an (here: Federal!) administrative body in the classical sense. In Section 2(2) UIG, Germany seized the opportunity to further define the notion of state control. To this end, no. 1 of this section refers to the characteristics of the private body itself, which either needs to be:

- subject to special obligations as regards third parties.
- or has special rights, in particular where there is an obligation to contract or an obligation to connect and to use.

Section 2(2) no. 2 UIG stipulates an irrefutable assumption of state dominance[47] in the sense of no. 1 for the following three variants: The state either holds (a) the majority of subscribed capital, (b) voting rights associated with the shares or (c) provides more than half of the members in an "*administrative, management or supervisory body"*. Some voices worry that these requirements could limit the EID's scope by narrowing the negative definition in the Shirley case.[48] Following up on this I would like to point out that every additional defining feature in a national implementation law has the side effect of narrowing the original term. One has to bear in mind that Section 2(2) no. 2 UIG is by no means the exhaustive definition of state control, as there is still a fall-back option in Section 2(2) no. 1 UIG with reference to the body's obligation.

The UIG's scope is followed by a range of private undertakings that are potentially covered. But beforehand I will highlight two German concepts of administrative law that are alien to European law: The administrative assistant *(Verwaltungshelfer*) and the loaned company *(Beliehener),* which are both subsumed in Section 2 UIG. Administrative assistants like towing companies only act on behalf of and according to the instructions of an administrative authority. By contrast, *Beliehene* are natural or legal persons under private law, to whom sovereign tasks are assigned through a legal act.[49] They perform autonomously in their own name. An example is the chimney sweep, who carries out inspections in accordance with the Emission Control Act (BImSchG)[50].

Despite being private enterprises, *Beliehene* act as administrative units (*Behörde)* in the sense of Section 1(4) Federal Administrative Procedure Act (VwVfG). And as such they are at the same time perceived as genuine *[…] body of public administration […]* in the sense of Section 2(1) no. 1 UIG[51]. Accordingly, the Bavarian Administrative High Court judged that administrative bodies are subject to an environmental information duty, irrespective of whether they themselves carry out environmental tasks and whether they act under private or public law.[52] Unlike *Beliehene,* administrative assistants are not administrative bodies but rather subordinates. Thus, they may only fall under Section 2(1) no. 2 UIG if they meet other requirements of this paragraph.[53]

42 Pilow, 2006, p. 692.
43 Luch and Schulz, 2009, pp. 19-24.
44 Korioth, GG Art. 30, p. 14.
45 Bundestag Wissenschaftlicher Dienst, WD 7 - 3000 – 255/18, 2019, p. 7.
46 Bundesverwaltungsgericht (Federal Administrative Court), Urteil vom 23.02.2017 - BVerwG 7 C 31.15, s. 47.
47 Reidt and Schiller, 2020, UIG section 2 p. 28a.
48 Guckelberger, 2018, p. 3.
49 Herdegen, GG, Art. 1 (3), p. 115.
50 Bundesimmissionsschutzgesetz.
51 Schomerus, UBA, p. 43; Guckelberger, 2018, p. 5.
52 Bayerischer Verwaltungsgerichtshof München (Regional Administrative Court), Bayerischer VGH, Urteil vom 24.05.2011 - 22 B 10.1875, (openJur 2012, 115990).
53 Schomerus, UBA, p. 28.

3.2 Deutsche Bahn and other potential candidates under Section 2(1) no. 2 UIG

Are there further private actors that fall under this provision? The sparse judgements on this matter address solely railway organisations, namely subsidiaries of the *Deutsche Bahn AG*. Thus in 2011 the rail network management subsidiary *DB Netz AG* was ruled to be subject to the UIG by the Administrative Court of Frankfurt.[54] In a landmark judgement of 2017, the Federal Administrative Court (BVerwG) affirmed such duty for another *DB AG* subsidiary, namely the *DB Projektbau GmbH*.[55] The court underlined that all requirements of Section 2(1) no. 2 UIG have to be interpreted widely in light of the EID.[56] This applies to the relation between public service and environment as well as to the control element: According to the court, the *DB Projektbau GmbH* is under complete control of the Federation, which is the only shareholder. Schomerus doubts that the corporate roof *Deutsche Bahn AG* is subject to an environmental information duty: Not the AG as such, but exclusively its subsidiary companies directly fulfil public tasks, e.g., through the transport of people and goods and the construction of the railway network.[57]

Furthermore, the court clarified the link between public service and environment prescribed by Section 2(2) no. 1 UIG: It is sufficient if the private party's public task not *"[...] only incidentally, but typically touches environmental concerns"*.[58] And again this seemingly unequivocal definition can lead into a grey zone. This applies first and foremost to services with an only indirect environmental link.[59] In this sense the impact of water supply companies and airport operators as well as sewage and waste disposal institutions on the environment is clear. This is not so in the cases of energy supply, private take-back systems, export credit insurers, telecommunications service providers and postal organisations.

Schomerus sees the *Telekom AG* as a model for the UIG's scope: Its fixed network runs via cables in the ground and its mobile network requires radiation-emitting towers. Both interfere with environmental goods.[60] Surprisingly, the status of energy supply companies is not unambiguous: Schomerus contemplates whether Section 2(1) no. 2 UIG covers only branches such as grid network operators, which are subject to special controls. Conversely undoubted is the inclusion of basic energy suppliers, which according to Section 36 *Energiewirtschaftsgesetz* (Energy Industry Act) are subject to a compulsory contracting.[61]

The variety of potentially obliged private players is illuminated by the following query to the scientific service of the Bundestag: Even such an unlikely candidate as the private 'National Laboratory for Wolf Genetics' could fall under Section 2(1) no. 2 UIG.[62]

3.3 Selected Länder UIGs

Up to now the Federal UIG was the main reference point of my review. Henceforth we turn to the question: How is the environmental information duty of private actors shaped under the *Länder*- UIGs or other respective information laws? Does their classification change? This is unlikely because almost all *Länder* laws define their scope in regard to the inclusion of private undertakings synonymously: They either refer to Section 2(1)-(2) Federal UIG or contain a comparable clause. Only Bavaria regulates the control element otherwise by doing without a legal definition.[63] Strikingly, none of the *Länder* UIGs alter or specify which private undertakings are obliged under the respective laws. Through their competence, *Länder* legislators would have been entitled to a definition independent from the Federal UIG, as long as it stays within their EID implementation margin.

The mentioned reference technique is common in all kinds of legal domains. The 'Manual of Legislative Style' by the Federal Ministry of Justice holds that legal referencing is suitable to keep texts concise and straightforward; however, excessive referencing is likely to destroy the flow of reading and to tear apart the context.[64] While some *Länder* abstain from referencing, others rely heavily on this method. Thus, the IFG Bln regulates the whole environmental information right in just one reference. The Bavarian UIG in turn does not refer at all. Instead, it contains various provisions with a similar wording as the Federal UIG. A both efficient and user-friendly compromise is offered by the Brandenburg UIG: It regulates scope, legal remedies and costs on its own but refers to the Federal UIG for the grounds of refusal and remaining issues (Section 1 Bbg UIG).

Most *Länder* have special UIGs apart from their IFGs. Berlin, Rhineland-Palatinate and Schleswig-Holstein step out of this line with integrated information or rather transparency laws.[65] Such all-inclusive

54 Regional Administrative Court Frankfurt am Main, VG Frankfurt am Main, Beschluss vom 07.06.2011 - 7 K 634/10.F, (openJur 2012, 34666).

55 Bundesverwaltungsgericht (Federal Administrative Court,), Urteil vom 23.02.2017 - BVerwG 7 C 31.15.

56 Federal Administrative Court, 2017, Az. 7 C 16.15 and 7 C 31.15, p. 48.

57 Schomerus, UBA, 2020, p. 44.

58 Reidt and Schiller UIG § 2 s. 23; Administrative Court Berlin 2012 - VG 2 K 167.11.

59 Schiller, 2017, Legal Tribune Online.

60 Schomerus, UBA, 2020, p. 55.

61 Schomerus, UBA, 2020, p. 50.

62 Wissenschaftlicher Dienst des deutschen Bundestages, (2019), WD 7 - 3000 – 255/18, pp. 1, 4-5.

63 Bayerisches Umweltinformationsgesetz (BayUIG) vom 8. Dezember 2006 (GVBl. S. 933, BayRS 2129-1-4-U), das zuletzt durch Art. 9a Abs. 15 des Gesetzes vom 22. Dezember 2015 geändert worden ist. Art. 2 BayUIG does not specify the element of state control.

64 Bundesjustizministerium (Federal Ministry of Justice), 2008, pp. 77, 225-227.

65 Gesetz zur Förderung der Informationsfreiheit im Land Berlin (Berliner Informationsfreiheitsgesetz - IFG) vom 15. Oktober 1999;

regulation of information freedom undoubtedly has its advantages. Precisely these advantages could however compromise the application to a specific information sector like environment: The UIGs avoid this dilemma by appreciating the environment through a separate codification. The state of Baden-Württemberg chose a third possible solution with its *UVwG (Umwelt-Verwaltungs-Gesetz* = Environmental Administrative Act). This collection bundles several environmental law instruments, namely the strategic, impact and environmental assessments in a single codification. Its third part consists of the access to environmental information.

4 Practicability Challenge

The legal analysis of the different UIGs is followed by a survey of their benefits and acceptance. The lack of relevant case law hints at the result of a very recent study by the German Environment Agency UBA: When addressing private actors in the sense of Section 2(1) UIG, information applicants use their right to access only sporadically, and significantly less than in regard to public bodies.[66] One reason: Many citizens are not aware of their right.[67] Those who are mostly consult the internet before submitting a request.[68] Due to the missing clarification by case law, any applicant is forced from the outset to determine which private bodies fall under Section 2(1) no. 2 UIG.[69] Such a lack of knowledge and uncertainty is by no means confined to the applicants. In a preliminary decision, the authors of the just mentioned UBA study chose 39 companies under "*the control"* of the federation.[70] Only eight of them answered their online questionnaire, such that the results are not representative. Five of the companies that complied acknowledged an information obligation. The remaining three had already answered requests falling under the UIG without acknowledging such duty.[71] As a whole, the survey is an indicator for the companies' lacking willingness to cooperate.

In a field test I decided to request myself environmental information from private actors fulfilling public services. My choice fell on the hospital groups *Vivantes* and *Helios*. Both of their headquarters are located in my hometown Berlin, which at the same time is a *Land.* While Berlin is the exclusive shareholder of *Vivantes*, the *Helios GmbH* is in private hands. My identical request was as follows: How many face masks did you use during the last year in the Humboldt Clinic (*Vivantes*) and Berlin-Buch (*Helios*)? As the used masks are industrial waste the environmental reference point was obvious. Less obvious was the companies' obligation to answer.

How can an applicant find out? First of all, one has to identify the suitable legislative act. In accordance with the companies' headquarters and their place of performance he has to rely on the *Länder* (state) law of Berlin. And here again the general Information Freedom Law (IFG Bln) is the correct choice, due to the lack of a separate UIG. The provisions for environmental information access are hidden in Section 18a IFG Bln, that is to say in the last part of the law. Remarkably, Section 1 IFG Bln, which presents the law's purpose, omits the environment completely. At least Section 2(2) IFG Bln quotes Section 18 a IFG Bln as basis for environmental information claims.

As in the Federal UIG, the Berlin IFG subjects not only the administration but also "*other public bodies"* to an information obligation. In this context Section 2(1) IFG Bln explicitly mentions public hospitals.[72] Thus, I deemed hospitals obliged to provide environmental information, regardless of being state owned or not. But after submitting my request I realised that under the IFG Bln the legal status of hospitals is more complicated. As described above, for access to environmental information Section 2(2) IFG Bln refers to Section 18a IFG Bln, which for its part refers to the UIG: The Federal law is declared applicable with the exception of certain provisions (Sections 11-14 UIG). This reference replaces the scope of Section 2(1) IFG Bln that, as presented, includes hospitals, with Section 2(1) Federal UIG as lex specialis.[73] This latter paragraph, however, does not explicitly include hospitals.

Consequently, it is by no means unequivocal that Vivantes and Helios must answer my request. Legal basis for an assessment is the following chain of referenced provisions: Section 2(1) IFG Bln - in conjunction with Section 18 a (1) IFG Bln - in conjunction with Section 3(1) Federal UIG. Even so, it is dubious whether the hospitals are affected by the requirements of Section 2(1) no. 2 UIG (again applicable due to the IFG Bln reference chain). As part of the German concept of *Daseinsvorsorge,* health care is undoubtedly a public service. At least in the case of state-owned Vivantes an administrative control in the sense of Section 2(2) no. 2 UIG is evident. Not so clear is the connection between health care and the environment. In my opinion, however, their waste management, including the use and

Informationszugangsgesetz für das Land Schleswig-Holstein (IZG-SH) vom 19. Januar 2012; Landestransparenzgesetz (LTranspG) vom 27. November 2015.)

66 UBA, 2020 p. 155.

67 UBA, 2020, p. 61.

68 UBA, 2020, p. 17.

69 UBA, 2020, p. 19.

70 UBA, 2020, p. 25, The study asked private actors from the following sectors: energy supply, private take-back systems, airport operators, telecommunications service providers and institutions for water, sewage and waste disposal, as well as export credit insurers.

71 UBA, 2020, p. 59.

72 The provision names public hospitals in brackets as an example for a private actor included. („*in particular*").

73 Stollwerck, 2016, p. 2.

disposal of the face masks, is an environmental issue. It is up to the judges to evaluate if such a derived issue expands the UIG's scope of application.

Back to my field test: Whereas the *Helios GmbH* did not answer at all, the *Vivantes* group suspected that I was a journalist. After explaining my objective there was no further reaction. My experience proves in the first instance the hospitals' unconsciousness that already Section 3 IFG Bln in principle obliges them provide information.

5 Conclusion

One may conclude that the Federal UIG and the respective laws on *Länder* level fully implement the criteria of "*public authority"* in the sense of Art. 2(2) AC and EID. Neither alter the sense of this provision worth mentioning. Even the wording is nearly identical. Both, Federal and *Länder* laws define in the same way which private actors must provide access to environmental information. Even though this definition is more of a transformative concept than a clear-cut term, it circumscribes at least the typically covered sectors. However, applicants cannot be sure which private actors are required by the UIGs to provide environmental information. The criteria are vague and thus open to different interpretations. Generally, AC and EID demand an extensive interpretation of the term "*public authority"*, so that the scope covers various private entities. This objective includes the acceptance of a looser relation between a performed public service and the environment. In my eyes this prejudges any case-related assessment. The legislators on Federal and *Länder* level did not seize the opportunity to specify the scope further. They could have named certain sectors, either in the laws themselves or in implementation guides, as the AC implementing guide suggested to do. By refraining from doing so they created a serious obstacle for the acceptance and thus also for the penetrating power of the law. This applies all the more to private actors being part of the "*public authority"*. Considering the complexity of information laws and their level of abstraction the state should adopt a proactive role. Conceivable is for instance an awareness campaign about citizens' rights in specific sectors. Legislators on all levels must never forget that clarity and simplicity are staples of any rule of law.

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, Technische Hochschule Bingen (TH Bingen) and sofia, the Society for Institutional Analysis, located at the Darmstad University of Applied Sciences. The person of contact is Prof. Dr. Roller at TH Bingen.

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The elni Review is an English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review (info@elni.org) in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut, TH Bingen and sofia.

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