THE RE-USE OF PUBLIC SPATIAL DATA IN THE LIGHT OF GERMAN LAW

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Abstract

The article characterizes public spatial data and discusses the principles of its use on the example of German law. It presents the cross relationships of access and re-use of public spatial data, with particular emphasis on data referred to in the INSPIRE Directive.

Keywords: spatial data, public information, re-use

Public data

Public data is data processed in connection with the implementation of tasks of public administration bodies, regardless of their legal name, i.e. regardless of whether the subject of access is referred to as data or information. In the context of German law, the public data category should primarily include public information (German *amtliche Informationen*, IFG § 2 point 1), information concerning environment (German *Umweltinformationen*, UIG § 2 para. 3 UIG), consumer information (German Verbraucherinformationen, VIG § 2 para. 1), as well as spatial data to which access is regulated by the INSPIRE Directive (Article 3 point 2).

Therefore, it is possible to distinguish public data from private data in relation to the type of activity of entities that process data (their disposers), taking into account the type of access to it. If there is a public legal claim (request) for access to particular type of data, then surely what is meant is public data.

However, with regard to German regulations, due to the federal nature of the legal system and the recognition of the so-called "law of information " among the individual competences of federal states, it can not be assumed that if there is no claim to provide certain data, then this data is not automatically public data. The principle of access to general public data (public record) can only be discussed with reference to the public authorities of federation and federal states that have passed relevant laws. The provisions of the German Constitutional Law (Article 5 (1) GG) guarantee only the freedom of access to data, and not the right of access (OVG (NRW), 2014*;* WIEBE, AHNEFELD, 2015). Regulations on general access to public information are currently in force in Baden-Württemberg (LIFG (BW)), Berlin (IFG (BE)), Brandenburg (AIG (BB)), Bremen (BremifG), Hamburg (HmbTG), Mecklenburg-Vorpommern (IFG MV), North Rhine-Westphalia (IFG NRW), Rhineland-Pallatinate (LTranspG (RP)), Schleswig-Holstein (IZG-SH), Saarland (SIFG), Saxony-Anhalt (IZG LSA) and the Free State of Thuringia (ThürIFG). In other federal states there is only a presumption of access to data regulated on the federation level as well as belonging to the properties of federal states, to which access has been defined by European Union law. An example of data belonging to the first group is consumer information. It is recognized that the competence to enact the provisions on access to them is derived from the law of the federation (see Art. 74 para. 1, No. 1 and 20 in connection with Art. 72 (2) of the GG; BT-Drs.16/1408). The second category, that is public data, access to which has been determined by the EU law, includes primarily environmental information and spatial data to which access is regulated by the INSPIRE Directive.

Public spatial data

The definition of spatial data contained in art. 3 point 2 of the INSPIRE Directive, as any data with a direct or indirect reference to a specific location or geographic area, should be treated as widely accepted in both German literature, jurisprudence and legislation (cf. § 3 Abs.1 GeoZG; Article 3 para. 1 BayGDIG; § 3 para. 1 BbgGDIG; § 3 para. 1 LGeoZG (BW); § 3 para. 1 GeoZG Bln; § 3 para. 1 BremGeoZG; § 2 para. 1

GeoVermG MV; § 4 point 4 HmbGDIG; § 3 para. 1 NGDIG; § 3 para. 1 GeoZG NRW; § 3 para. 1 LGDIG (RP); § 3 para. 1 GDIG (SH); § 3 para. 1 SGDIG; § 2 para. 1 SächsGDIG; § 3 para. 1 GDIG LSA; § 3 para. 1 ThürGDIG). In Germany, only HVGG § 31 para. 1 defines spatial data as spatial information. In literature, there are rare attempts to move away from defining the concept of spatial data as particular data, describing it as phenomena (German *Phänomene*, e.g. TWAROCH, 2011). However, this does not affect the meaning of the concept itself.

The use of the terms spatial data and infrastructure of "spatial data", and not "spatial information" is conscious and deliberate, because, on the one hand, infrastructure refers to spatial data which is defined in the directive itself and acts implementing it. On the other hand, the use of the concept of data allows to move away from using the concept of information. Information as a transferable good that reduces uncertainty (SZPOR, 2016) is a subjective concept, i.e. it depends on the recipient's cognitive abilities, and should not be used as a legal term in such sense (BADOWSKI, 2015). Nevertheless, in legal acts, jurisprudence and literature on the subject, the concepts of spatial data and spatial information are used interchangeably as synonyms (BERNARD et al., 2005). Such action should, however, be criticized in relation to the aforementioned postulate of abandoning the use of the notion of information as a legal term with reference to public data, as well as in connection with defining the already legal scope of spatial data as "data". Using different concepts to designate the same subject is inconsistent with the principles of good legislation (BMJ, 2008).

Spatial data is data that can be displayed on a map; hence, their most important characteristic feature is spatial reference (SEIFERT, 2008). This reference can be expressed in a variety of ways, e.g. as coordinates, place names or postal addresses (BBG, 2006; ÖROK,2002; TWAROCH, 2011). In this sense, spatial data is "comprehensive data", which can take the form of various other named types of data, in particular, public information, environmental information, consumer information, but also personal data and all named types of secrecy.

There is also the possibility of accepting only the element combining specific data, e.g. public information with a specific location, as spatial data. Such a conjunction of data on a specific location and additional data would always be a combination of two types of data: spatial data with a different type of data, in the given example public information. Spatial data would therefore only be an element connecting other data with a particular location. This assumption would actually create a new data category in the form of spatial data. Spatial data could not at the same time be any other type of data; it would only be a designation of a location, devoid of other cognitive elements. Thus understood spatial data would only answer the question "where", while other types of data would answer the question "what" (is located). Such interpretation of the spatial data concept would, on the one hand, result in the alignment of spatial data, e.g. with coordinates, and, on the other hand, it would not give any cognitive effect. Therefore, the distinction of spatial data as a connector in the form of spatial reference only seems to be pointless.

Accordingly to the law in force, public spatial data are spatial data processed in connection with the implementation of tasks of public administration bodies. The processing itself should be interpreted broadly (Article 4 (2) of the GDPR) as any operation or set of operations which is performed on data, unless specific provisions state otherwise. At the same time, the specification of the concept of processing, e.g. spatial data, and paying particular attention to the correlation (combination) of data and spatial data services as an element of processing (cf. § 3 para. 9 GDIG (SH)) do not seem to be necessary. The exegesis of the concept of "processing" indicates an extremely wide scope of meaning, and in the case of doubts allows its expansive interpretation. Therefore, it is unnecessary to additionally emphasize that the correlation between data and spatial services is processing because combining all kinds of data, not only items of spatial data, already meets the defining criteria for processing. This technique was used, for instance, in Hamburg (cf. HmbGDIG § 10 para. 2) while referring directly only to the provisions on personal data protection (BADOWSKI, 2016).

From among all public spatial data, it is necessary to distinguish the specific type of public spatial data regulated by the INSPIRE directive: "INSPIRE spatial data", access to which is defined by the said directive and acts implementing it to the legal systems of the Member States of the European Union. This includes broadly understood

- thematic data (themes included in Annexes I-III of the INSPIRE Directive were literally transferred to all acts transposing this directive into the German legal order), which contains references to a specific location or area,
- and which characterizes a given type of access in the form of spatial data services (in relation to the characteristics of spatial data services in Germany, see BADOWSKI, 2014).
- Thematic data is available through the geo-portal (Article 3 point 8 of the INSPIRE Directive), that is to say, a point of access to the data on the spatial data infrastructure (Article 3 point 1 of the INSPIRE Directive).

The data to which access can be obtained in the described way must meet the criteria specified in individual statutes as to the electronic form and must also be at the disposal of public administration bodies (Article 4 point 1 of the INSPIRE Directive). At the same time, public administration body (German *Behörde*) within the meaning of Article 3 point 9 of the INSPIRE Directive should be interpreted broadly. This term is synonymous to the public administration body referred to, e.g. Article 2 point 2 of Directive 2003/4 /EC and to the authority obliged to provide information (German *informationspflichtige Stelle*) within the meaning of § 2 point 1 of the German Federal act on environmental information (UIG, see also HOFFMANN, SCHULZ, 2014; BT-Drs. 15/3406).

The concept of spatial data is a basic term for determining the thematic scope of the so-called "spatial data infrastructure law" distinguished in Germany. The separation of such an area could be indicated, for example, by the title of the monograph "Spatial data infrastructure law in federations and federal states" (VON JANOWSKY, 2010). "Spatial data infrastructure law", however, should not be treated as a separate branch of law, although the basic elements characterizing these provisions are noticed in the German doctrine (MARTINI, DAMM, 2013) against other types of public data. In fact, spatial data stands out, above all, due to its value and versatile possibilities of use. It is estimated that, on average, about 80% of all decisions made in private and professional life, but also by public administration, are characterized by reference to a specific point or geographic area (LANDSBERG, 2004; IMAGI, 2010; SPIER, 2010; KLAR, 2012). However, this is not enough to recognize spatial data, whether public or private, for constituting a new branch of law.

The use of public spatial data

By re-use (German *Weiterverwendung*) of "information" at the disposal (German *vorhanden*) of public administration bodies one should understand any use (German *Nutzung*) of data for commercial and non-commercial purposes that exceeds the use associated with the performance of public tasks. Taking note of information and making use (German *Verwertung*) of knowledge acquired in this way do not constitute a re-use in accordance with § 2 point 3 of the IWG- Federal act on the re-use of information of public administration bodies transposing the REUSE directive into the German legal system.

Despite the existence of definitions of legal access and re-use of public data, the relationship between the two concepts has not yet been sufficiently explained in literature (SCHULZ, 2014), and seems to be necessary (DREIER et al., 2016), if only due to the fact that the legislator used different terms to define them. It should therefore be assumed that they have different scopes of meaning (BMJ, 2008). There are differences in the legal consequences of using these powers (DREIER et al., 2016), although their purpose might also be identical (STEFANOWICZ, 2011).

However, the German legislator explicitly wanted to separate these two concepts due to the fact that the acts on access to public data do not sufficiently regulate the rules of their use (BR-Drs. 358/06). Therefore, the principle of re-use of unconditionally released public data was also introduced (§ 2a IWG; see also BT-Drs.18/4614). This principle, although already confirmed in earlier judicial decisions (see, for example, OVG (NRW), 2014), was clearly regulated only in the IWG amendment of 2013 through the introduction of § 1 point 2a IWG (see also FUHRMANN et al., 2014; MARTINI, DAMM, 2013).

Theoretically, there should be no common areas for access and re-use of public data (DREIER et al., 2016). However, there are interdependencies between these powers, because the very principle of re-using public data is not unconditional. The right to re-use certain data depends on the existence of the right to unconditional access. If the right to access does not exist, requires a legal or factual interest or is a discretionary decision of the public administration body, the right of unconditional re-use of data does not exist. Such data cannot be unconditionally re-used - even if as a consequence access will be granted (see, for example, § 3 point 2 VIG regarding consumer information).

Powers to re-use of public data are therefore dependent on criteria both limiting and excluding access to this data (WIEBE, AHNEFELD, 2015a). As a consequence, it can be considered that access to public data and its re-use are the successive elements of one process. The unconditional right to re-use public data access itself is not, however, the decisive factor, but rather it is the existence of the right to unconditional access (SCHULZ, 2014). If data is made accessible in a pro-active way by public administration bodies, that is, published without request and made available to an unspecified public, there is also an unconditional right to process such data (BT-Drs.18/4614), unless specific provisions regulate this matter differently. For example, general provisions on the re-use of public data do not relate to information concerning environment and "spatial data". The German federal act on the re-use of public sector information contains a clear subject exclusion and does not apply to information on the environment and spatial data (so explicitly § 1 point 2 no. 8 IWG). At the same time, it should be noted that the German legislator, when

writing about spatial data, incorrectly identifies it with spatial data to which access is regulated by the INSPIRE Directive, and to which he refers de facto in the said paragraph.

IWG is *lex generalis* in relation to specific laws on access to public data that regulate the re-use of this data. Such acts include the aforementioned laws regulating access to information concerning environment (UIG) and INSPIRE spatial data (e.g. GeoZG, cf. BT-Drs.18/4614). For this reason, the provisions on the use of this particular public data are directly regulated by these special laws. It seems, therefore, that the provision of § 1 point 2 no. 8 of the IWG is unnecessary, because the common conflict-of-law rules exclude the application of general IWG principles to special laws that regulate the re-use of this data. In addition, the aims of the REUSE directive are to complement, for instance, the objectives of the INSPIRE Directive (point 8 of the preamble to the INSPIRE Directive). Hence, where only the data form permits this spatial data can be used freely (Article 14 point 3 of the INSPIRE Directive).

Conclusions

The main criterion for the division of spatial data is the distinction between spatial private and public data. Distinguishing public spatial data from private spatial data is possible in relation to the type of activity of entities that administer this data, taking into account the type of access to them. If there is a public-law claim (request) for access to data of a specific type, it is referred to as public spatial data, although the lack of such a claim or the denial of access do not cause the loss of the "public" attribute of certain data.

Public spatial data is not only the data access to which is regulated by the INSPIRE Directive. It can also correspond to all types of named public data, in particular public information, environmental information and consumer information.

The right to use public data unconditionally depends on the existence of an unconditional right to access this data. As a consequence, it can be considered that access to public data and its re-use are the successive elements of one process.

Regulations on the re-use of public data are *lex genarlis* in relation to the provisions on the use of public data contained in the Access Acts, e.g. in relation to the INSPIRE spatial data. It results from common conflict-of-law rules, so there is no need for special regulation in this respect.

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BayGDIG – Bayerisches Geodateninfrastrukturgesetz (BayGDIG) vom 22.7.2008 (GVBl.2008, 453, zuletzt geändert:GVBl.2014, 286) (Bavarian act on spatial data infrastructure)

BbgGDIG – Gesetz über die Geodateninfrastruktur im Brandenburg (Brandenburgisches Geodateninfrastrukturgesetz- BbgGDIG) vom 13.4.2010 (GVBl.I 2010, Nr.17) (Act on spatial data infrastructure in the Federal State of Brandenburg)

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BremIFG – Gesetz über die Freiheit des Zugangs zu Informationen für das Land Bremen (Bremer Informationsfreiheitsgesetz- BremifG) vom 16.5.2006 (Brem.GBl.2006, S. 263, zuletzt geändert:Brem.GBl.2015, S. 274) (Act on freedom of access to information in the Federal State of Bremen)

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The INSPIRE Directive	–	Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE), Official Journal *L 108, 25.4.2007, p. 1-14*
REUSE directive	–	Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, Official Journal *L 345, 31.12.2003, p. 90–96*
GDIG (SH)	–	Geodateninfrastrukturgesetz für das Land Schleswig-Holstein (GDIG) vom 15.12.2010 (GVOBl.2010, S. 717, zuletzt geändert: GVOBl.2017, S. 218) (Act on spatial data infrastructure in the Federal State of Schleswig-Holstein)
GDIG LSA	–	Geodateninfrastrukturgesetz für das Land Sachsen-Anhalt (GDIG LSA) vom 14.7.2009 (GVBl.LSA 2009, 368) (Act on spatial data infrastructure in the Federal State of Saxony-Anhalt)
GeoVermG MV	–	Gesetz über das amtliche Geoinformations- und Vermessungswesen (Geoinformations- und Vermessungsgesetz- GeoVermG MV) vom 16.12.2010 (GVOBl.MV 2010, S. 713) (Act on official geoinformation and geodesy in Mecklenburg-Vorpommern)
GeoZG	–	Gesetz über den Zugang zu digitalen Geodaten vom 10.2.2009 (BGBl.2009 I S. 278, zuletzt geändert: BGBl.2012 I S. 2289) (Federal Act on Access to Digital Spatial Data)
GeoZG Bln	–	Gesetz über den Zugang zu digitalen Geodaten im Land Berlin (Geodatenzugangsgesetz Berlin- GeoZG Bln) vom 3.12.2009 (GVBl.2009, 682, zuletzt geändert: GVBl.2016, 100) (Act on access to digital spatial data in the Federal State of Berlin)
GeoZG	–	Gesetz über den Zugang zu digitalen Geodaten Nordrhein-Westfalen (Geodatenzugangsgesetz-GeoZG NRW) vom 17.2.2009 (GV.NRW.2009, 84) (Act on access to digital spatial data in North Rhine-Westphalia)
GG	–	Grundgesetz für die Bundesrepublik Deutschland vom 23.5.1949 (BGBl.1949, S. 1, zuletzt geändert: BGBl.2017 I, S. 2347) (Basic Law for the Federal Republic of Germany)
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IFG MV	–	Gesetz zur Regelung des Zugangs zu Informationen für das Land Mecklenburg-Vorpommern (Informationsfreiheitsgesetz- IFG MV) vom 10.7.2006 (GVOBl.MV 2006, S. 556, zuletzt geändert: GVOBl.MV 2011, S. 277) (Act regulating access to information in the Federal State of Mecklenburg-Vorpommern)
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IZG LSA	–	Informationszugangsgesetz Sachsen-Anhalt (IZG LSA) vom 19.6.2008 (GVBl.LSA 2008, S. 242, zuletzt geändert: GVBl.LSA 2018, S. 10, 12) (Act on access to information in Saxony-Anhalt)
IZG-SH	–	Informationszugangsgesetz für das Land Schleswig-Holstein (IZG-SH) vom 19.1.2012 (GVOBl.2012, S. 89, zuletzt geändert GVOBl.2017, S. 279, ber.S. 509) (Act on access to information in the Federal State of Schleswig-Holstein)
LGDIG (RP)	–	Landesgeodateninfrastrukturgesetz (LGDIG) vom 23.12.2010 (GVBl.2010, S. 548, zuletzt geändert: GVBl. 2011, S. 427, 428) (*Rheinland-Pfalz*) (Domestic act on spatial data infrastructure in Rhineland-Palatinate)
LGeoZG (BW)	–	Gesetz über den Zugang zu digitalen Geodaten für Baden-Württemberg (Landesgeodatenzugangsgesetz - LGeoZG) vom 17.12.2009 (GBl.2009, S. 802, zuletzt geändert: GBI.2017 S. 99, S. 105) (Act on access to digital spatial data in Baden-Württemberg)
LIFG (BW)	–	Gesetz zur Regelung des Zugangs zu Informationen in Baden-Württemberg (Landesinformationsfreiheitsgesetz- LIFG) vom 17.12.2015 (GBl.2015, S. 1201) (Act regulating access to information in Baden-Württemberg)
LTranspG (RP)	–	Landestransparenzgesetz (LTranspG, Rheinland-Pfalz) vom 27/11/2015 (GVBl.2015, S. 383) (Domestic transparency act for Rhineland-Palatinate)
NGDIG	–	Niedersächsisches Geodateninfrastrukturgesetz (NGDIG) vom 17/12/2010 (Nds.GVBl.2010, S. 624) (Act on spatial data infrastructure in Lower Saxony)
SächsGDIG	–	Sächsisches Geodateninfrastrukturgesetz vom 19.5.2010 (SächsGVBl.2010, S. 134, zuletzt geändert:SächsGVBl.2016, S. 507, 508) (Saxon act on spatial data infrastructure)
SGDIG	–	Saarländisches Geodateninfrastrukturgesetz (SGDIG) vom 1.7.2009 (ABl.2009 I S. 1426, zuletzt geändert:ABI.2015 I S. 790) (Act on spatial data infrastructure in Saarland)
SIFG	–	Gesetz Nr.1596 Saarländisches Informationsfreiheitsgesetz (SIFG) vom 12.7.2006 (ABl.2006 I S. 1624, zuletzt geändert: ABI.2015 and S. 790) (Act no. 1596 on freedom of information in Saarland)
ThürGDIG	–	Thüringer Geodateninfrastrukturgesetz (ThürGDIG) vom 8.7.2009 (GVBl.2009, S. 574, zuletzt geändert: GVBl.2016, S. 525) (Act on spatial data infrastructure in Thuringia)
ThürIFG	–	Thüringer Informationsfreiheitsgesetz (ThürIFG) vom 14/12/2012 (GVBl.2012, S. 464, zuletzt geändert: GVBl.2014, S. 529, 544) (Act on freedom of information in Thuringia)
UIG	–	Umweltinformationsgesetz vom 22.12.2004 (BGBl.2014 I S. 1643, zuletzt geändert: BGBl.2017 and S. 2808) (Federal act on environmental information)
VIG	–	Verbraucherinformationsgesetz vom 5.11.2007 (BGBl.2012 I S. 2166, 2725, zuletzt geändert: BGBl.2013 I S. 3154) (Federal act on consumer information)