Protecting the Strong? Case T-188/12 and the decision on costs

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Blog by Eljalill Tauschinsky

Recently, the CJEU published a judgment and a corresponding press release which will probably delight many users of the access to documents provisions of the EU – of which me and my fellow academics rank supreme – namely the judgment in Case T-188/12. Yet it does not only contain reason for delight – but also some reason for concern.

In this case a German politician of the Pirate Party (Patrick Breyer) has tried to get access to the documents referring to Austria’s non-implementation of the data retention directive – mainly because he had heard rumours of Austria criticizing the directive in these documents and, being likewise opposed, wanted to see Austria’s arguments. The Commission had refused access arguing that the documents were actually documents of the Court of Justice, to whom the transparency regulation only applies to a very restricted extent.

The Court disagreed, arguing that the documents in question were just as other documents on the hands of the Commission, and thus in principle within the application of the transparency regulation. So far so good (or even great).

Interestingly, however, the Court also held something else, namely that it was not permissible for a party to the proceedings to publish the documentation pertaining to it (well, it had held that before), and that commenting on the documents and making them available for public comment on the internet aggravated the offense of publication. For some reason, the Court put stock in the fact that the publication on Mr. Breyers website had resulted in some comments by those frequenting his website which were not at all favourable to the Commission.

The comments appear to have been removed from the internet (since the case is closed now, the publication of documents should not be problematic anymore, as per this judgement), so that it is difficult to get a clear picture of what the Court is talking about here. So my remarks have to refer exclusively to what is actually in the judgement.

As mentioned this case is not the first one in which a party has published documents pertaining to ongoing proceedings. However, it develops that ‘strand of case law’ further in some regards.

Under the rules of procedure of the CJEU, no third party should have access to the documents pertaining to a case (well, there is a procedure to allow access, but we’ll skip that now). In the case mentioned, in 1998,
the Court held that publishing the documents pertaining to a case was basically the same as "inciting criticism on the part of the public in relation to arguments raised by other parties in the case". The Court found it obvious that the documents had been published with the goal of putting pressure on the Commission and on their Agents specifically. This last point came from the fact that the documents published included the names and addresses of those being responsible for them, a fact which the Court found especially problematic.

The first remark is that the Court took offence (if that is the right word), even though Patrick Breyer did not commit what the Court had found specifically objectionable in an earlier case. In the 1998 case the Court had found fault mainly with the fact that the published documents included the names and addresses of the drafters with a more or less implicit call to contact them on behalf of the plaintiff. Mr. Breyer, in contrast blacked out the names and addresses of those responsible for the documents, so that they could not be contacted and be put under pressure individually.

The second remark is that it appears that the Court puts significant weight on the critical attitude of the friends and followers of Patrick Breyer towards the Commission, and the fact that Mr. Breyer enabled them to voice this attitude in reference to the documents in question (namely those which concerned the ongoing proceedings in this case).

Of course I whole-heartedly agree with the supposition that ongoing proceedings must be protected – and yet I cannot help but feel uneasy by the view expressed by the Court. I support the proposition that it might endanger the integrity (for want of a better word) of Court proceedings if those taking part in it would have to face a public backlash because of their positions taken in Court. But does that justify taking such a protective stance towards the Commission, which arguably is the stronger (in terms of resources and power) party in this case?

There is a dilemma here. Either the Court is too lenient on those publishing documents relating to Court proceedings. The consequence would be to make it unattractive for people (or institutions) to bring Court proceedings, as they might have to fear to be subject of public debate and public pressure. This is very much to be avoided, especially as Court proceedings also sometimes provide protection for individuals and minorities against the public opinion. Or, if the Court is too restrictive, it is rather too protective of those already having the greater leverage. Like in this case, where the Commission is neither an individual, not in a minority position – but rather in a position of power.

Yet, the Court does not appear to realise this dilemma and the fact that it needs to tread a fine line. Nowhere in its argumentation does it acknowledge the democratic desirability – well even necessity – of criticising those who take the (political) decisions. The Court might also acknowledge the value in being critical towards the Commission, instead of seeing this as an aggravating circumstance.

It has been remarked before on this blog that the Court appears to sometimes decide as if it was afraid – of the Member States and the citizens and for the institutions. And I cannot help but wonder whether the current decision is again a show of that attitude – resulting in a rather heavy handed reaction: in this case it ‘punished’ Mr. Breyer with half of his costs, whereas in 1998 it had ‘punished’ those in a similar situation with only a third.

And this brings me to a last and only somewhat related remark: In the earlier case where the Court condemned the publication of documents of on-going proceedings, the offending party appeared repentant and – having won on the other points – did not go into appeal. In this case, there is no such repenting attitude perceivable. It will be very interesting to see whether there will be an appeal to this case. And then there might again be reason for me and my colleagues to rejoice over food for thought and discussion: If
both parties appeal – maybe this will be the first case of cross appeals before the CJEU.

Author: acelg

Case law, Policy developments, Research, transparency

Comments

1. slickrascal says:
   March 23, 2015 at 6:53 am
   Dear Eljalill,
I disagree with the proposition that it might endanger the integrity of Court proceedings if those taking part in it would have to face a public backlash because of their positions taken in Court. First of all, a summary of all actions filed is published by the Court anyway. Any party filing an action therefore may face public criticism. The public later learns from the Opinion of the Advocate General the gist of the parties arguments. In the hearing the case is publicly debated. The ruling summarizes the arguments, and the documents exchanged must generally be published once the case is closed. Therefore, the publicity of proceedings already exposes the parties to public debate where their arguments give rise to criticism.

Where matters of general interest are to be ruled upon (e.g. public access to documents, mass surveillance), the public should have a right to follow developments and arguments in the case. Where the validity of a legal instrument interfering with any citizens fundamental rights is at stake (e.g. data retention directive), the Court really decides on the extent of everybody's fundamental rights and liberties. This is even more so where a democratically controlled administration is party to the case. The sovereign needs to be able to control the power exercised by the administration in court. After all, the submissions and applications of governments or institutions in Court can have major consequences on any citizen.

Finally, the Court in this latest judgement not only bans publication of submissions in verbatim but holds illegal the use of submissions for any purpose other than defending your position in Court. In consequence, parties are prohibited from reporting on the state of their case to the press or anybody else (even without publishing submissions in verbatim). This makes European Court proceedings effectively secret, contradicting the principle of publicity of court proceedings.

I don't know about the Netherlands but in Germany it would be outrageous if anybody tried to ban parties from discussing their litigation with whomever they see fit.

By the way the ECtHR explicitly allows for public access to documents exchanged in pending cases. The ECJ also often acts as a human rights court. A few years ago I filed, without success, a petition for public access to case files: http://www.daten-speicherung.de/index.php/petition-zur-schaffung-eines-akteneinrichtsrechts-bei-dem-eugh/ 

4) Unfortunately I cannot appeal the case: “No appeal shall lie regarding only the amount of the costs or the party ordered to pay them.” (Art 58 of the Court Statute)

The only chance to have the General Court's view reviewed is if the Commission decides to appeal. I hope it will.

Best regards

Patrick Breyer
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unfortunately your comment got held up in our moderating system, which was bogged down by academics wandering in and out… Sorry about that.

Thanks a lot for your extensive reply and raising some issues I had not been aware of. I have to admit that it was your case that first drew my interest into this part of EU law, so I am likely not as practically knowledgeable than you in this. All the more thanks for the input! But of course I have some remarks to your remarks…

ad 1) But first: thanks for the link! I had not found the comments on your website, so I had assumed you took them down – next time I’ll ask you

ad 2) I admittedly skittered over that point rather quickly, because I did not want to get held up with the niceties of EU procedural law, but get to the more political/public policy point of the protective attitude that the Court appears to have towards the Commission; going further than it had been going before.

But to clarify my reading of the relevant provisions: I read Art. 22 in combination with Art. 46 of the rules of proceedings to at least allow the ruling that procedural documents should be restricted to the parties. Art. 22 allows access to procedural documents expressly to the parties of a case, and to all other expressly only to judgements and orders. Even though it contains no prohibition of further access of procedural documents, this can be seen as implied. Art. 46 of the rules of proceeding then speaks of the obligation to use procedural rights only for the purposes for which they were granted. Seeing that the Court in case C-174/95 had held that this purpose is restricted to pursuing one’s own case (para 137), one can infer from that the prohibition to publish such procedural documents. At least if one thinks, as the Court appears to, that such publication is basically per force outside the purpose of pursuing one’s own case in Court (but instead presumably has the purpose of putting pressure on the opposite party). And then of course there is the instructions to the registrar, which say things much more clearly (as you say), but where the external effects is much less clear (as you also say).

Admittedly, my reading is charitable to the argumentation of the Court, and I can see that it would not be the one you would adopt… but I still think it would fit within the interpretative lee way given by the rules of procedure.

But to me even more interesting: I find it very curious that the Chancellor of the Court basically said that there was no law on the issue… given C-174/95 I would have thought differently.

ad 3) The fact that the AG’s opinion and the judgement contains a summary of (most of) the arguments of the parties, is, in my view, not really a reason for (or against) publication. Turned around: Could an AG’s opinion (assumed there was one) and the Court’s summary of the arguments take away your interest in the original submissions by Austria? I would be surprised if it would, and neither do I think it should. Evidently the original submission contains more than the AGs opinion and the Court’s summary.

For the rest, I follow your argumentation with one very important reservation, however. I agree that the Commission should not be afraid to have its argumentation (or more generally actions) publicly discussed and reviewed. That in indeed part of being a public body. And that is also why I find the vehemence of the CJEU in T-188/12 on costs so strange.

On the other hand, the GC (and CJEU) is not only an administrative Court, and its rules make no difference between the identity of the parties. Not all parties before the Court are public bodies, and I have more trouble seeing a general right of the public to review their argumentation and actions at the same level of scrutiny. To be more specific: had the Commission published your files with your
express objection, and if all the big interest groups would then publicly have condemned your argumentation, I would have found that reprehensible. But since the rules are made to be equally applicable to Commission and private individuals I do think there is a balance to strike, which is necessarily to favour publication in all instances.

The point you raise about the narrowness of the Court’s interpretation of ‘purpose’ making ongoing proceedings basically secretive is an interesting thought. One really must wonder where the Court would draw a line here.

Ad 4) It seems like you got your wish, with case C-213/15 P. I for one, and I am sure many of my colleagues, will be interested in how that will play out. In any case, best of luck to you for that!