Case C-57/16P ClientEarth v Commission

Citizen's participation in EU decision-making and the Commission's right of initiative

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Publication date
2018

Document Version
Final published version

EUROPEAN LAW BLOG

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OCTOBER 22, 2018

CASE C-57/16P CLIENTEARTH V COMMISSION: CITIZEN'S PARTICIPATION IN EU DECISION-MAKING AND THE COMMISSION'S RIGHT OF INITIATIVE

By Laurens Ankersmit

In a Grand Chamber ruling of 4 September 2018, the European Court of Justice annulled two decisions of the Commission to refuse access to documents on impact assessment reports in environmental matters. The decision is an important precedent to ensure greater transparency of the EU institutions at the early stages of legislative action – arguably

the key stage of influence – and therefore a resounding win for those arguing for greater participation and influence of citizens in the EU legislative process. The judgment's explicit recognition of this key constitutional EU value of greater participation of its citizens in the EU decision-making process in an access to documents case is therefore without doubt the most notable aspect of the ruling. It marks a major step forward for the utility for citizens of Regulation 1049/2001, especially considering the extensive restrictive case-law (in terms of transparency) in relation to other powers of the Commission under the Treaties. For transparency lawyers specifically, the finding of the ECJ that there is no general presumption of confidentiality to documents drafted in the context of a legislative initiative is significant, as is the role of the Aarhus Regulation in access to documents cases.

Background

In early 2014, environmental organisation ClientEarth requested from the Commission access to documents relating to two key environmental regulatory projects of the EU: EU-wide rules on access to justice in environmental matters at the Member State level and EU rules on environmental inspections. ClientEarth specifically requested access to the two environmental impact assessment reports related to those projects as well as an opinion of the Impact Assessment Board on the former project.

The aims of both these regulatory initiatives were to significantly strengthen environmental protection in Europe. However, they also have a long and unfortunate history because of resistance within governments of Member States. Previously, the access to justice project had resulted in a 2003 proposal for a Directive that never came into force. Ultimately, both projects would result in mere guidance documents adopted by the Commission in 2017 and 2018 respectively, instead of binding legislation at EU level.

At the time of the request, ClientEarth was aware that the Commission had conducted impact assessments for both projects, but was in the dark as to why no proposal had been published. It requested the documents with a view to participating more effectively in the Commission's decision-making process and to argue for stringent rules at EU level. Indeed, as it turned out, these documents set out in unambivalent terms the urgent need and importance of EU legislation for both access to justice in environmental matters in Member States and environmental inspections.

However, the Commission refused ClientEarth access to these documents. The Commission invoked article 4(3) first subparagraph ('the ongoing decision-making process exception') to refuse

ClientEarth's general right under that Regulation to all documents held by the Commission. The Commission essentially argued that disclosure of impact assessment reports with the view to adopting legislative initiatives would undermine the decision-making process as it would restrict its room for manoeuvre and affect its independence and role in pursuing the general interest (invoking article 17 (1) and (3) TEU in the process).

These arguments are of course rather ironic considering the fact that it was the influence of the Member States that led the Commission to go against the findings of its own impact assessments and abandon the legislative initiatives in favour of guidance documents. Keeping those impact assessments secret was therefore simply concealing the fact that the Commission was *not* acting independently but was being led by positions within governments of the Member States.

In any event, in the subsequent litigation that followed, the General Court sided with the Commission. A key aspect of the General Court's ruling was to apply a general presumption of confidentiality to documents drafted in the context of legislative initiatives. For lawyers familiar with EU transparency law this was met with dismay as it would result in yet another extension of the case-law on general presumptions. Regulation 1049/2001 reflects core constitutional values (Art. 1 and 10 (3) TEU, Art. 15 (1) TFEU) of open decision-making as close as possible to citizens. It seeks to confer on citizens as wide a right of access as possible to documents of the EU institutions. Such a right is subject to exceptions (art. 4 of the Regulation) that are to be interpreted strictly.

However, the case-law of the EU courts has nonetheless made it possible for EU institutions to rely on general presumptions of confidentiality which apply to certain categories of documents. Currently, the Commission enjoys the right to apply this general presumption to almost all of its key powers: the five categories are:

- documents relating to State aid procedures;
- the submissions lodged in pending proceedings before the EU courts;
- the documents in merger control proceedings;
- the documents relating to proceedings under Article 101 TFEU;
- the documents relating to an infringement procedure during its pre-litigation stage, including pilot procedures.

Obtaining yet another presumption for documents drafted in the context of legislative initiatives would have eroded citizen's right to a wide access to documents of the EU even further. It was no surprise

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therefore that ClientEarth decided to appeal.

The judgment

Before deciding on whether a general presumption of confidentiality could be applied to the documents requested, the Court first looked at both the context and the content of the documents. This was important because if these documents were to be found to be drafted by institutions acting ***in a legislative capacity***, Regulation 1049/2001 specifies that wider access should be granted to such documents (context). Here of course the key issue was whether the Commission was acting in such a capacity when considering using its right of initiative. Moreover, these documents arguably were 'environmental information' in the sense of the Aarhus Regulation (content). Again, this would highlight the additional need for transparency from the EU institutions.

The context and content of the documents

First, the Court looked at the context and content of the documents. The Court noted that wider access should be granted to documents in cases where the EU institutions are acting in their legislative capacity. For the Court, the 'possibility for citizens to scrutinise and be made aware of all the information forming the basis for EU legislative action is a precondition for the effective exercise of their democratic rights as recognised, in particular, in Article 10(3) TEU'. The exercise of those rights 'presupposes not only that those citizens have access to the information at issue so that they may understand the choices made by the EU institutions within the framework of the legislative process, but also that they may have access to that information in good time, at a point that enables them effectively to make their views known regarding those choices.' (para. 84)

The Court found that the Commission is 'a key player in the legislative process' due to its right of initiative (paras. 87-88). The Court then found that impact assessment reports and accompanying opinions of the Impact Assessment Board contain information 'constituting important elements of the EU legislative process, forming part of the basis for legislative action of the European Union.' (para. 91). As such,

> "the disclosure of those documents is likely to increase the transparency and openness of the legislative process as a whole, in particular the preparatory steps of that process, and, thus, to enhance the democratic nature of the European Union by enabling its citizens to scrutinise that information and to attempt to influence that process. As is asserted, in essence, by ClientEarth, **such a disclosure, at**

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> **a time when the Commission's decision-making process is still ongoing, enables citizens to understand the options envisaged and the choices made by that institution and, thus, to be aware of the considerations underlying the legislative action of the European Union. In addition, that disclosure puts those citizens in a position effectively to make their views known regarding those choices before those choices have been definitively adopted, so far as both the Commission's decision to submit a legislative proposal and the content of that proposal, on which the legislative action of the European Union depends, are concerned.**" (para. 92) ❞

In addition, the documents at issue were not only drafted in the context of a legislative procedure but they were also to be considered 'environmental information' in the sense of the Aarhus Regulation (paras. 99-100). Taken together therefore, the Court came to the conclusion that the exception relied upon by the Commission 'must be interpreted and applied all the more strictly' in light of their context and content (para. 101).

The general presumption

Having found that the content and the context in which they were drafted required the application of the exceptions of Regulation 1049/2001 to be interpreted all the more strictly, the Court went on to assess whether in such a context a general presumption of confidentiality could be applied to documents drafted in the context of an impact assessment as long as the Commission had not taken a decision on a potential proposal.

Here, the Court forcefully rebutted the arguments of the Commission that its specific role under Article 17 TEU (to act in an independent manner and exclusively in the general interest) allowed it to rely on such a general presumption of confidentiality. The Court pointed out that both the content and context of the documents were not as such to preclude transparency. Moreover, it pointed out that transparency increases the legitimacy of the Commission's decision-making process noting that '**it is rather a lack of public information and debate which is likely to give rise to doubts as to whether that institutions has fulfilled its tasks in a fully independent manner and exclusively in the general interest**' (para 104). In addition, the Court pointed out that disclosure of information does not require the Commission to respond on the merits and in each individual case to the remarks it may receive following disclosure of documents (paras.

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It therefore concluded that 'although the Commission must be able to enjoy a space for deliberation in order to be able to decide as to the policy choices to be made and the potential proposals to be submitted [the Regulation could not be interpreted so] that the protection of the Commission's power of initiative and the preservation of that institution's ability to exercise that power in a fully independent manner and exclusively in the general interest required, in principle, that documents drawn up in the context of an impact assessment may, generally, remain confidential until that institution has made such a decision' (para. 109).

In other words, the Commission's special role under Article 17 TEU did not give it any additional privileges under Regulation 1049/2001 to apply a general presumption to documents drafted in the context of its right of initiative. To the contrary, this context made wider access even more necessary because it meant that the documents were drafted when it was acting in a legislative capacity. **Thus, the Court came to the complete opposite conclusion than the Commission: where the Commission thought that is could act in an even more secretive manner because of its special role under the Treaties, the Court found that its special role required it to be even more open.**

Comment

It is to be hoped that the Commission takes due note of the Court's reasoning and how it actually should understand its role under the Treaties, because this case is exemplary of the levels of confusion within the Commission as to its role in the Treaties and its relationship with EU citizens in particular.

In any event, the Court's Grand Chamber ruling is likely to be of significant help as a strong precedent in the coming years for citizens and civil society organisations seeking access to documents from the European Commission in particular. There are several statements of principle that will hopefully also guide the Commission to be more open towards the general public.

First of all, the Court put a stop to the practice of granting the Commission general presumptions of confidentiality to certain categories of documents and ruled against extending such a presumption for documents drafted in the context of arguably the Commission's most important power: its right of initiative.

Secondly, the Court underlined the importance of citizen participation

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at the early stages of the legislative process in the EU and the key role transparency plays therein. The emphasis of the Commission's role as a 'key player' in the legislative process is an important recognition that also at the early stages of preparing proposals the EU should act as openly and as closely as possible to EU citizens.

Thirdly, the recognition of the role of the Aarhus Regulation in finding against a general presumption of confidentiality is also noteworthy and may assist environmental organisations in obtaining environmental information from the EU institutions more easily.

The author is a former employee of ClientEarth. He has not worked on this case, but congratulates his former colleagues Anais Berthier and Anne Friel as well as ClientEarth's legal counsel with the result.

Written by Laurens Ankersmit — Posted in Environmental Law, Institutional law, Transparency and access to documents — Tagged with Aarhus Regulation, Access to justice in environmental matters, Article 17 TEU, Case C-57/16P ClientEarth v Commission, impact assessment report, ongoing decision-making process exception, regulation 1049/2001

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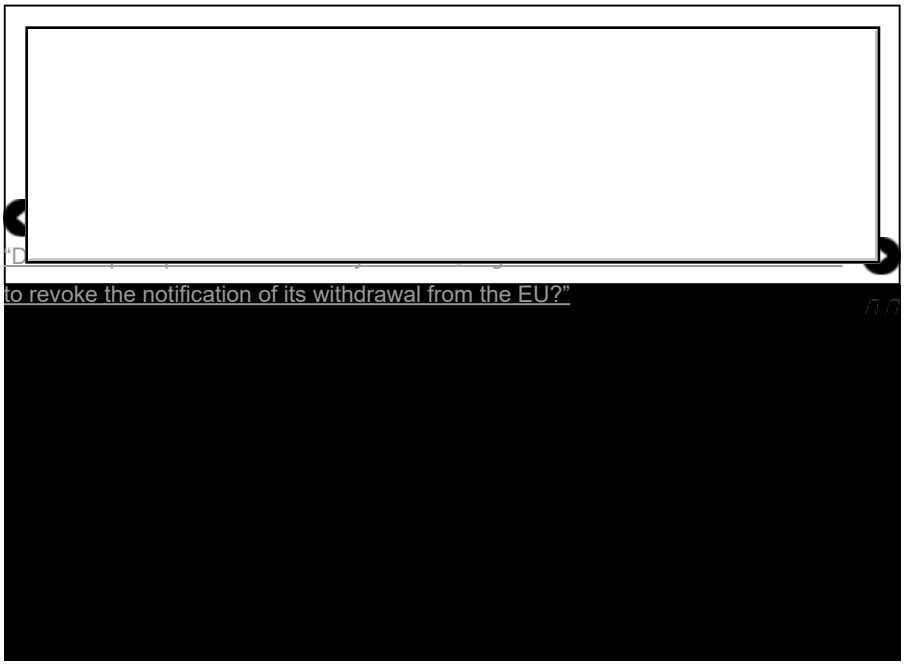

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