The paradoxical existence of overriding public interests in the EU: ClientEarth v the European Commission

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On 1 February 2023 the General Court delivered its judgment in T-354/21 ClientEarth v Commission. The case concerned the Commission’s refusal to allow access to several audit documents on fisheries control systems in Denmark and France. Its refusal was based on a general presumption of non-disclosure for documents related to infringement proceedings that are in preparation or ongoing. ClientEarth unsuccessfully argued that an overriding public interest nonetheless justified their disclosure, and asked for an annulment of the Commission’s decision. The General Court found in favour of the Commission and dismissed the case, yet again illustrating the deficiencies in the EU’s access to documents regime laid down in the Transparency Regulation, and leaving ClientEarth to appeal the case to the Court of Justice.

The EU prides itself on its transparency: the Union institutions are to conduct their work as openly as possible (Art. 15 TFEU, see also Art. 10(3) TEU). Participation of civil society in Union governance is channelled through the access to document regime and is essential for a functioning democracy. As illustrated by the judgment, the effectiveness of the regime is hampered both by the institutions and the laissez-faire approach of the Union courts. Particularly problematic are the general presumptions of non-disclosure for certain categories of documents, and the (non-)assessment of overriding public interests, which would nonetheless mandate disclosure. The combined effect of the two is to completely shield certain documents from access,
shrouding parts of Union administration under a veil of secrecy. Crucially, the General Court’s ruling exemplifies the CJEU’s unwillingness to engage with the concept of the OPID and what it means concretely. These issues should be taken up the Court of Justice in its future judgment on the appeal.

Background

ClientEarth, the appellant, is an environmental NGO following the drawn out legislative process of revising the Fisheries Control Regulation, whose aim is to ensure sustainable fishing practices by adequately controlling fishing activities and their compliance with the Common Fisheries Policy. On 31 May the EU legislators reached a provisional agreement on the revised Regulation, and the formal endorsement of the European Parliament and Council is expected over the coming months to mark the end of a five year long legislative process. Far from running smoothly, the process was marked by a strong push by industry lobbyists to weaken key catch registration provisions, and the starting position of the Commission, Member States and industry was considerably stronger and better informed than that of Members of Parliament and civil society. To begin to correct these asymmetries, ClientEarth availed itself of the possibility to request access to documents held by the Commission, and requested certain audit reports related to fisheries in France and Denmark, as these would allow it to better gauge deficiencies in the Fisheries Control Regulation and potential illegalities, as indicated by the soon opened infringement procedure against France by the Commission.

This possibility is laid down in the Transparency Regulation. While the premise is access that is ‘as open as possible’, the Regulation nonetheless recognizes a number of exceptions (article 4) to attain a balance with competing interests. Notably, Commission documents relating to inspections, investigations, and audits fall under this provision (‘investigations exception’). In theory, such documents must still be made available when an OPID is found following individual examination of the documents. However, the CJEU has in its case-law recognized a general presumption of non-disclosure for certain categories of documents the institutions can rely on from the outset to protect documents, without having to individually examine each to assess the risk posed by potential disclosure. Documents relating to infringement proceedings is one of the categories that benefit from this presumption. Nonetheless, again in theory, the existence of an OPID can rebut the presumption. In cases where the OPID argument is raised, the EU institution must make the assessment between
the risk and interest in disclosure. If the interest weighs heavier, the document must be disclosed. To be successful, the applicant must demonstrate specific circumstances, which are not general, that justify disclosure. This is an extremely high burden, because it seems to require knowledge of the document's contents, as transparency lawyers have argued.

**The judgment under appeal**

ClientEarth sought the annulment of the Commission's decision to deny access to several audit documents on the fisheries control systems in Denmark and France. According to ClientEarth's arguments, the information contained in the requested documents would have allowed NGOs more effective participation in the ongoing legislative debate on the Control Regulation revision (para 84). As the Commission proposal for the revised control system aimed to improve catch registration in Member States, audit reports on, *inter alia*, catch registration were instrumental in assessing the functioning of the earlier system and the demands of industry lobbyists. ClientEarth relied on two pleas: misapplication of the investigations exception in the Transparency Regulation (Art. 4(2)(iii)) and the Commission's incorrect conclusion that no OPID existed. It also requested the General Court to procure the requested documents and assess the OPID itself. The General Court dismissed both pleas, and refused the request. With an eye to the appeal, the focus here is on the part of the ruling on the OPID.

*Convincing yet insufficient arguments*

The court arguably stumbled in assessing the second plea: though it found the applicant's arguments convincing, it nonetheless found no OPID, nor did it much search for one. It acknowledged that the OPID can override the presumption of non-disclosure, and explained that a "weighing of the opposing interests" is in order (para 93). Where the public interest weighs heavier, the Commission ought to disclose the documents even where they form part of investigations linked to a pre-infringement procedure file. The applicant must demonstrate 'specific circumstances justifying the disclosure of the documents concerned' (para 92) which in many cases, requires knowledge of their content. Transparency lawyers have long hoped that the CJEU would recognize the backwards logic of this equation and relax the requirements.

In what could be described as an extremely cautious concession, the General Court characterized the public interest grounds put forth by ClientEarth as 'convincing' (para
94). It nonetheless immediately went on to find these ‘insufficient’ for an OPID, raising the ever-green question of what exactly would suffice. Here, the General Court also noted – following the Commission’s argument – that these very same convincing explanations were too general as they could be transposed to any document relevant to participation in legislative debate, and thus render nugatory the general presumption (para 96). Perplexingly, it did not explain what was convincing in ClientEarth’s arguments, what was insufficient, and most importantly what would need to be demonstrated. Logically, there must be some benchmark against which the specificity of arguments is assessed by the CJEU; unfortunately it has remained elusive.

A successful OPID argument

The contradiction in finding the arguments simultaneously convincing and insufficient goes to the core of the problem with the OPID, namely that it seems the Union courts do not know what it concretely means. Looking to earlier case-law offers little guidance. The one case where an OPID was found is that of Pari Pharma, which in many respects constitutes a unique case. The European Medicines Agency (EMA) had decided to release documents detailing the medicinal value of an inhaler to a competitor company in order to ascertain the justification for derogating from market exclusivity of Pari Pharma’s product. While commercial interests may be protected under the Transparency Regulations’ exceptions, an OPID may nonetheless justify disclosure. Unlike in other relevant court cases, where EU institutions have routinely argued against the existence of an OPID, in this case EMA itself identified the existence of an OPID. It argued that information on a medical product is ‘scientific evidence’ on its clinical benefit for its users, and justification for derogating from market exclusivity, and thus met the OPID threshold (paras 143-144). As the court itself noted, these reasons are ‘succinct’. For this reason, it is difficult to apply the test onto other cases, and the aftertaste remains that one indeed needs to be in possession of the document to pass the threshold.

An addition to OPID case-law

The judgment adds to the paradoxical existence of the notion of an overriding public interest within the access to documents regime. While the Union courts have conceded that protection of human health and the environment can theoretically constitute an OPID (para 52), as was ClientEarth’s contention, there is no indication on how to channel these general interests into case- or document-specific arguments; that is, cynically speaking, apart from citing the document itself. The General Court had the
opportunity to suggest a limited departure from this setting by considering the questions raised with regard to the OPID and its interaction with the general presumption of non-disclosure, which it regrettably declined to do. Two broader observations, one relating to the CJEU’s understanding of (overriding) public interests and the other to their combined effect with the general presumptions, are in order.

At the heart of the OPID paradox remains the requirement that an applicant substantiate that specific circumstances, which are not general, justify overturning the presumption of non-disclosure. The resulting burden defeats the purpose of the access request, and has led to the underdevelopment of the OPID in Union law (Wyatt p. 696). It is worrisome that the courts seem so focused on the required specificity that they lose sight of the overall purpose of the Transparency Regulation: to promote public participation in Union democracy. They are in a prime position to do so by deliberating on and developing the concept of the OPID, but for some reason its potential in enhancing transparency has not been seized.

The required specificity reflects also on the wider meaning of ‘public interest’ in the access to documents regime. By posing values such as participation in legislative proceedings, oversight of Union funds, and compliance with Union law as ‘too general’ for the OPID, the quizzical result is that these values simultaneously constitute yet do not constitute ‘valid’ public interest grounds. The requirement to limit the interest relied on to narrow specificities – the content and level of which the court itself seems not to know – is arguably at odds with the concept of ‘public interest’ and its (arguably) general nature. A public interest understood in this sense could be an interest or value held by many in society, or the value that emerges as the result of a balancing exercise (Wyatt p. 689). In the wake of a line of rejected OPID arguments, one may wonder whether we are trying to square the circle here.

The resulting problem is that when combined with general presumptions of non-disclosure, the OPID’s lack of bite allows institutions to shield documents with no proper oversight. In this context it bears mentioning that ClientEarth requested that the General Court make the OPID determination itself, which the court refused to do because of the general presumption (paras 101-102). The growing oversight gap is concerning from a rule of law perspective, as it allows the institutions, and notably, the Commission, to escape accountability. For the courts this is justified by reason of the need to shield the climate of trust between the Commission and Member State concerned in infringement proceedings. However, the very rationale of recognizing an OPID as the product of a balancing process seems to concede that sometimes even considerable harm to the interest protected by way of exception is acceptable. The
perceived sacrosanct nature of Commission-Member State relations in the CJEU’s reasoning in these cases, however, seems to structurally preclude this concession and casts a long shadow on the institutions’ work.

**Where do we go from here?**

In sum, the General Court’s reasoning in T-354/21 seems to mark no departure from the previous stance taken by the CJEU in the exceptions to disclosure case-law. Despite the new opportunity presented to it by the case to find and develop the meaning of the OPID and its relationship with general presumptions of non-disclosure, including a prime venue for the Court to do so by examining the requested documents itself, it declined the opportunity. It did not even signal to the deficiencies in the current approach. Its silence makes one wonder whether it sees the features of the OPID as deficiencies at all. The question that remains is where to go from here?

The existence of the OPID remains a largely theoretical possibility, and closing the door to a measure of inquiry threatens to make it extinct. *Pari Pharma* remains the only indication of the specific context where one might find the OPID. How and why is it that a court refuses to engage in the development of a legal concept that would help crystallize and operationalize the values the Union is built on? We can only surmise that the functional underpinnings of the Union project, which are generally seen to require a certain (wide) room for manoeuvre for the institutions, come to prevail over its democratic ambitions. This preponderance is concerning especially in light of the courts’ unwillingness to challenge it, and a departure from the status quo in the appeal would be more than welcome. Hopefully the Court of Justice will turn the tide and finally engage with the concept of the overriding public interest in earnest.