



The Court of Justice partially sets aside the judgment of the General Court and partially annuls the decisions of the Commission refusing access to certain of its internal documents relating to a closed merger procedure

In order to justify its refusal, the Commission must set out the specific reasons supporting the conclusion that their disclosure would seriously undermine the decision-making process of the institution and the protection of legal advice

The Access to Documents Regulation¹ confers on the public a wide right of access to documents of the institutions of the European Union. However, it provides for a system of exceptions authorising the institutions to refuse access to a document in cases where its disclosure would undermine, in particular, the decision-making process and the protection of legal opinions, unless there is an overriding public interest in disclosure.

The present case forms part of a dispute originating in 1999, when MyTravel (then called Airtours), a UK tour operator, informed the Commission of a planned merger with its competitor First Choice in order to obtain a decision authorising that operation. Authorisation was refused² on the ground that it was incompatible with the common market. Following the action brought by MyTravel, the Commission's decision was annulled by a judgment of the General Court of 6 June 2002³.

The Commission then established a working group comprising officials of the Directorate-General for Competition ('DG Competition') and the legal service in order to consider whether it was appropriate to bring an appeal against that judgment and to assess the implications of that judgment for merger control procedures or in other areas. The report of the working group was presented to the Commissioner responsible for competition prior to the expiry of the period allowed for bringing an appeal against the judgment of the General Court.

MyTravel made a request to the Commission for access to the report, to the documents relating to its preparation and the documents contained in the file relating to the merger, on which the report was based.

By two separate decisions⁴, the Commission refused to communicate those documents on the ground that, first, their disclosure would undermine, in particular, the decision-making process and the protection of legal opinions and, secondly, there was no overriding public interest in disclosure.

By judgment of 9 September 2008⁵, the General Court dismissed the action by MyTravel against those decisions on the ground that the Commission was entitled to refuse access to the documents requested in so far as their communication could have undermined the protection of the decision-making process of the institution and the protection of legal advice. Subsequently, Sweden decided to apply to the Court of Justice to have that judgment of the General Court set aside.

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43)

² Commission Decision 2000/276/EC of 22 September 1999 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case IV/M.1524 – Airtours/First Choice) (OJ 2000 L 93, p. 1)

³ Case [T-342/99 Airtours v Commission](#) (see also Press Release [50/02](#))

⁴ Commission Decision D(2005) 8461 of 5 September 2005 and Commission Decision D(2005) 9763 of 12 October 2005

⁵ Case [T-403/05 MyTravel v Commission](#)

First of all, the Court states that some of the documents concerned fall within the context of the administrative functions of the Commission. That administrative activity does not require as extensive an access to documents as that concerning the legislative activity of an institution of the Union. However, that does not in any way mean that such an activity escapes the rules laid down by the access to documents legislation.

That legislation provides for exceptions which derogate from the principle that the public should have the widest possible access to documents, and those exceptions must therefore be interpreted and applied strictly. The Court considers that, where an institution decides to refuse access to a document which it has been requested to communicate, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the protected interest – in particular protection of the decision-making process of the institution and the protection of legal advice – upon which it is relying in the particular case.

With regard to the exception **for protecting the decision-making process of the institution**, the Court notes that MyTravel introduced its request for access after the expiry of the time-limit for appealing against the judgment of the General Court which had annulled the Commission decision concerning the merger in question. **The Court of Justice** analyses all of the documents concerned and **concludes, in particular, that the General Court should have required the Commission to indicate the specific reasons why it considered that the disclosure of certain documents at issue would seriously undermine the decision-making process of that institution, even though the procedure to which those documents related was closed.**

Concerning the exception for protecting legal advice, the General Court took the view, in particular, that the disclosure of internal notes of the Commission's legal service would risk communicating to the public information on the state of internal discussions between DG Competition and the legal service on the lawfulness of the 1999 decision declaring the concentration operation in question incompatible with the common market, which could call into question the lawfulness of future decisions in the same sector. The Court of Justice holds, in this respect, that openness contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated.

The Court of Justice therefore concludes that, in its decisions, the Commission misapplied both the exception for protecting its decision-making process and the exception for protecting legal advice. It has therefore decided to set aside the judgment of the General Court and annul the two decisions of the Commission on those points.

Since some of the arguments relied on by the Commission in refusing to disclose certain other internal documents – in particular those relating to the other exceptions concerning protection of the purpose of inspections, investigations and audits – were not examined by the General Court, the Court of Justice considers that it is not in a position to rule on those arguments and has decided to refer the matter back to the General Court for a new judgment.

Unofficial document for media use, not binding on the Court of Justice.

The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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