JUDGMENT OF THE COURT (First Chamber)

21 July 2011 *

In Case C-506/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 14 November 2008,

Kingdom of Sweden, represented by K. Petkovska and A. Falk, acting as Agents,

applicant,

supported by:

Kingdom of Denmark, represented by B. Weis Fogh and V. Pasternak Jørgensen, acting as Agents,

Kingdom of the Netherlands, represented by C. Wissels and J. Langer, acting as Agents,

* Language of the case: English

Republic of Finland, represented by J. Heliskoski, acting as Agent,

interveners in the appeal,

the other parties to the proceedings being:

MyTravel Group plc, established in Rochdale (United Kingdom),

applicant at first instance,

European Commission, represented by X. Lewis, P. Costa de Oliveira and C. O'Reilly, acting as Agents,

defendant at first instance,

supported by:

Federal Republic of Germany, represented by M. Lumma and B. Klein, acting as Agents,

French Republic, represented by E. Belliard, G. de Bergues and A. Adam, acting as Agents,

United Kingdom of Great Britain and Northern Ireland, represented by E. Jenkinson and S. Ossowski, acting as Agents,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, M. Ilešič, M. Safjan and M. Berger, Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 October 2010,

after hearing the Opinion of the Advocate General at the sitting on 3 March 2011,

gives the following

Judgment

1 By its appeal, the Kingdom of Sweden seeks to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 9 September 2008 in Case T-403/05 *MyTravel* v *Commission* [2008] ECR II-2027 ('the judgment under appeal'), whereby the General Court dismissed the action brought by MyTravel Group plc ('MyTravel') against Commission Decision D(2005) 8461 of 5 September 2005 ('the first contested decision') and Commission Decision D(2005) 9763 of 12 October 2005 ('the second contested decision'), partially rejecting MyTravel's request for access to certain preparatory documents of the Commission concerning the control of concentrations (hereinafter collectively referred to as 'the contested decisions').

Legal context

2 Recitals 2, 4 and 11 of 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), read as follows:

'(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for

fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

…

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

…

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.'

3 Article 1 of that regulation provides:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

(b) to establish rules ensuring the easiest possible exercise of this right, and

(c) to promote good administrative practice on access to documents.'

4 According to Article 2(1) and (3) of the same regulation:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

...

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.'

5 Article 4(2), (3) and (6) of Regulation No 1049/2001 provide:

'2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

— ...

— ... court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

…

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.'

6 According to Article 7(2) of that regulation:

'In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.'

Background to the dispute

7 By judgment of 6 June 2002 in Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585, the General Court annulled 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; 'the Airtours decision'). That decision concerned the concentration operation between the British tour operator Airtours plc, which subsequently became MyTravel, and its competitor First Choice plc ('First Choice').

8 Following the *Airtours* v *Commission* judgment, the Commission 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 the procedures for the control of concentrations or in other areas. The report of the working group was presented to the Member of the Commission responsible for competition on 25 July 2002, that is to say, prior to the expiry of the period allowed for bringing an appeal.

9 By letter of 23 May 2005, MyTravel made a request to the Commission, pursuant to Regulation No 1049/2001, for access to the report, to the documents relating to its preparation ('the working papers') and the documents contained in the file relating to the Airtours/First Choice case on which the report was based or which were referred to in it ('the other internal documents').

10 In view of the number of documents requested, MyTravel and the Commission agreed that the latter would give separate treatment to, on the one hand, the report and working papers and, on the other, the remaining internal documents.

11 The Commission having initially refused, at least partially, access to all those documents by two letters of 12 July and 1 August 2005, MyTravel brought two confirmatory applications, pursuant to Article 7(2) of Regulation No 1049/2001, to which the Commission replied by adopting the contested decisions.

12 By the first contested decision, the Commission refused in particular to communicate to MyTravel the report and the working papers, taking the view, first, that the latter were covered by at least one of the exceptions to the right of access set out in Article 4(2), second and third indents, and Article 4(3), second subparagraph, of Regulation No 1049/2001, concerning, respectively, the protection of court proceedings and legal advice, the purpose of inspections, investigations and the decision-making process, and, secondly, that there was no overriding public interest in disclosure.

13 By the second contested decision, the Commission similarly refused access to some of the remaining internal documents. It took the view that the exceptions set out in Article 4(2), third indent, and Article 4(3), second subparagraph, of that regulation, concerning protection of the purpose of inspections, investigations and of the decision-making process, applied in particular to:

— the notes from the Director General of DG Competition to the Member of the Commission responsible for competition ('the notes to the Commissioner');

— five notes from DG Competition to other Commission services, including the legal service, which supplied and asked for the advice of the addressees on certain draft texts ('the notes to the other services'), and

— the notes from other Commission services supplied in reply to the five notes from DG Competition referred to above, setting out the views of the services concerned of the draft texts ('the notes in reply from the services other than the legal service').

14 As regards the five notes from the legal service in reply to the five notes from DG Competition referred to above ('the notes in reply from the legal service'), the Commission invoked in support of its refusal of access the second indent of Article 4(2) of Regulation No 1049/2001, concerning the protection of court proceedings and legal advice.

15 In addition, the Commission referred to the special situation of certain internal documents, to which partial or total access was refused. These included, in particular, the report of the Hearing Officer, a note from DG Competition to the Advisory Committee, and a note to file on a site visit to First Choice.

16 Finally, the Commission emphasised that MyTravel had not submitted any argument capable of establishing an overriding public interest to justify the documents to which access was sought being disclosed in any event.

The judgment under appeal

17 On 15 November 2005, MyTravel brought an action for annulment of the contested decisions.

18 In support of its action, MyTravel relied on a series of pleas designed to show that, by the contested decisions, the Commission had made an erroneous assessment of the second and third indents of Article 4(2) and the second subparagraph of Article 4(3) of Regulation No 1049/2001, concerning the exceptions to the right of access for protecting court proceedings and legal advice, inspections, investigations and audits, and the decision-making process.

The exception for protecting the decision-making process

19 The General Court first verified whether, in the contested decisions, the Commission had properly applied the exception concerning the protection of the decision-making process, contained in the second subparagraph of Article 4(3) of Regulation No 1049/2001.

20 Concerning the report, after finding, in paragraphs 42 to 46 of the judgment under appeal that this was a document which was capable of falling within the scope of that exception, and that the latter could be invoked 'even after the decision has been taken', the Court noted, in paragraph 47 of the judgment, that the Commission had taken the view that disclosure of the report would have posed a serious threat to its decision-making process, as the freedom of its authors to express their views would have been called into question.

21 The General Court further held, in paragraphs 48 to 53 of the judgment, that the report fell within the purely administrative functions of the Commission. The interest of the public in obtaining access to a document pursuant to the principle of transparency did not carry the same weight in the case of a document drawn up in an administrative procedure as in the case of a document relating to a procedure in which the Community institution acts in its capacity as legislator.

22 Disclosure of the report would thus carry the risk that the possibly critical opinions of Commission officials might be made public, and that the content of the report could be compared with the decisions ultimately taken. Furthermore, the authors might be led to practise self-censorship and to cease putting forward any views that might involve the addressee of the report being exposed to risk. That would risk seriously undermining the decision-making freedom of the Commission, whose Members must, in the general interest of the Union, be completely independent in the performance of their duties. Similarly, the Commission could no longer benefit from the frankly-expressed and complete views required of its agents and officials.

23 The General Court further held, in paragraph 54 of the judgment under appeal, that the risk of the decision-making process being seriously undermined was reasonably foreseeable and not purely hypothetical. It appeared probable that the Member of the Commission responsible for competition would be induced to cease making requests for the written, and potentially critical, views of his advisers, if documents such as that in question were to be disclosed.

24 With regard to the working papers, the General Court held, in paragraph 59 of the judgment, that, since the report was protected under the second subparagraph of Article 4(3) of Regulation No 1049/2001, the documents which enabled it to be produced and which comprised preparatory assessments or provisional conclusions for internal use also came within that exception.

25 With regard to the remaining internal documents, namely the notes to the Commissioner, the notes to the other services and the notes in reply from the services other than the legal service, the General Court held, in paragraphs 94 to 100 of the judgment under appeal, that the Commission was right to submit that the partial or total disclosure of those various documents would reduce the ability of its services to express their point of view and risked seriously undermining its decision-making process in the field of the control of concentrations.

26 Those preparatory documents might indicate the opinions, the doubts or the changes of mind of the Commission services, which – at the end of the decision-making process in question – may no longer appear in the final versions of the decisions. Moreover, disclosure of those documents would mean that their authors would take that risk of disclosure into account in the future, to the point where they might be led to practise self-censorship and to cease putting forward any views that might involve the addressee of the document in question being exposed to risk.

27 The General Court further took the view that the Commission assessed the risk of a serious undermining of the decision-making process in an individual and specific way, particularly where it considered that disclosure of the documents risked undermining its assessment of similar concentrations which might arise between the parties concerned or in the same sector.

28 Finally, the General Court held, in paragraph 100 of the judgment under appeal, that the risk of the decision-making process being seriously undermined in the event of those documents being disclosed was reasonably foreseeable and not purely hypothetical. It was reasonable to believe that such documents could be used, even though they did not necessarily represent the Commission's definitive position, to influence the position of its services in the examination of similar cases involving the same sector of activities or the same economic concepts.

29 With regard to the report of the Hearing Officer, the General Court took the view, in paragraphs 104 to 106 of the judgment under appeal, that, in the same way as with the remaining internal documents, the Commission could refuse access to them given that, since that report contained the opinions of the Hearing Officer on the substance and the procedural aspects of the concentration operation at issue, its disclosure would be likely to imperil the latter's freedom to express his views. That would seriously undermine the Commission's decision-making process in the area of concentrations, since it could no longer rely in the future on the frankly-expressed and complete opinions of hearing officers.

30 Regarding the note from DG Competition to the Advisory Committee, the General Court held that its disclosure would seriously undermine the decision-making process of the Commission, since consultation with the Advisory Committee also forms part of the internal decision-making process in the control of concentrations. Even though the Advisory Committee is composed of representatives of the Member States, and is therefore separate from the Commission for that reason, the fact that the latter is obliged to transmit internal documents to that committee in order that the committee may reach a view permits the inference that the note in question remains an internal Commission document.

31 The General Court also held that disclosure of the file note concerning a site visit to First Choice would seriously undermine the Commission's decision-making process because, for certain parties, that document reflected the views of the officials of DG Competition during the visit.

32 The General Court also ruled on the question whether, in this case, an overriding public interest, within the meaning of the last sentence of the second subparagraph of Regulation No 1049/2001, justified the documents in question being disclosed in any event. In that respect, it noted, in paragraph 61 of the judgment under appeal, that MyTravel had claimed that 'the need to understand what took place and what was done by the Commission, as well as the need to ensure the sound administration of justice' constituted overriding public interests justifying disclosure of the documents.

33 The General Court essentially took the view, in paragraphs 61 to 67 and 118 of the judgment under appeal, that those arguments did not allow the overriding public interest required by Regulation No 1049/2001 to be established to the requisite legal standard, or allow it to be ascertained whether, on setting that alleged overriding public interest against the interest in maintaining the confidentiality of the documents as regards the public under the exceptions to the right of access, the Commission ought to have reached the conclusion that those documents should none the less be disclosed. The Court further found that the private interest of MyTravel in obtaining the

documents in question in order better to put forward its arguments in the context of the action which it had brought for compensation for the loss it had allegedly suffered by reason of the Commission's management and assessment of the operation which formed the subject-matter of the Airtours decision could not, as a purely private interest, be relevant to assessing the balance of public interests.

34 The General Court therefore concluded that the Commission had not made any error of assessment in taking the view that disclosure of the abovementioned documents would have seriously undermined its decision-making process and that there was no overriding public interest capable of justifying their disclosure nevertheless.

The exception concerning the protection of legal advice

35 Secondly, the General Court verified whether, in the second contested decision, the Commission had correctly applied to the notes in reply from the legal service the exception contained in the second indent of Article 4(2) of Regulation No 1049/2001.

36 In that regard, it took the view, in paragraphs 124 to 126 of the judgment under appeal, that disclosure of those notes 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 assessment of the compatibility of the Airtours/First Choice concentration with the common market. In such circumstances, the risk of undermining the protection of legal advice was not purely hypothetical, since disclosure of that advice would risk putting the Commission in the difficult position in which its legal service might find itself required to defend a position before the Court which was not the same as the position which it had argued for internally. Such a risk would be liable to have a considerable effect both on the freedom of the legal service to express its views and its ability effectively to defend the Commission's definitive

position before the Community judicature, on an equal footing with the other legal representatives of the various parties to legal proceedings.

37 For the same reasons as those referred to in relation to the application of the exception for protecting the decision-making process, in paragraphs 32 and 33 of this judgment, the General Court took the view, in paragraph 129 of the judgment under appeal, that there was no overriding public interest in the disclosure of those notes within the meaning of the final part of the sentence in Article 4(2) of Regulation No 1049/2001.

The conclusions of the judgment under appeal

38 Regarding the first contested decision, the General Court, in paragraphs 80 and 81 of the judgment under appeal, allowed the action of MyTravel only in relation to the part of that decision refusing access to one of the working papers, namely working paper 15, solely on the basis of the exception for protecting inspections, investigations and audits, contained in the third indent of Article 4(2) of Regulation No 1049/2001. That part of the judgment under appeal does not form part of the subject-matter of this appeal.

39 As to the remainder, the General Court took the view, first, in paragraph 79 of the judgment under appeal, that, by the first contested decision, the Commission did not commit an error of assessment in refusing access to all the other documents it had been requested to communicate, on the basis of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

40 Secondly, it held, in paragraph 130 of the judgment under appeal, that neither did the Commission commit any error of assessment in relying on the second subparagraph of Article 4(3) or the second indent of Article 4(2) of Regulation No 1049/2001 as a basis for refusing disclosure of the various internal documents and legal advice with respect to which those exceptions were invoked by the Commission.

41 As a result, the General Court did not find it necessary, in the interest of procedural economy, to examine the other complaints by MyTravel directed against the contested decisions.

42 In particular, with regard to the first contested decision, the General Court did not examine the complaints concerning the other exceptions which the Commission had invoked in refusing disclosure of one or other part of the report or the working papers, namely the exceptions contained in the second and third indents of Article 4(2) and concerning, respectively, the protection of court proceedings and legal advice and the purpose of inspections, investigations and audits.

43 With regard to the second contested decision, the General Court also refrained from examining the complaints concerning the exception for protecting the purpose of inspections, investigations and audits, in conjunction with the exception for protecting the decision-making process, relied on by the Commission in refusing to disclose some of the remaining internal documents.

44 Having regard to those considerations and having partially annulled the first contested decision, the General Court dismissed the remainder of the action in paragraph 2 of the operative part of the judgment under appeal.

Procedure before the Court of Justice and forms of order sought

45 By order of 2 June 2009, the President of the Court of Justice granted the Kingdom of Denmark, the Kingdom of the Netherlands and the Republic of Finland leave to intervene in support of the forms of order sought by the Kingdom of Sweden and granted the Federal Republic of Germany, the French Republic and the United Kingdom of Great Britain and Northern Ireland leave to intervene in support of the forms of order sought by the Commission.

46 The Kingdom of Sweden and the Kingdom of the Netherlands claim that the Court should:

— set aside paragraph 2 of the judgment under appeal;

— annul the first contested decision, in accordance with the form of order sought by MyTravel before the General Court, in so far as concerns the refusal of access to the Commission's report and other working documents;

— annul the second contested decision, in accordance with the form of order sought by MyTravel before the General Court, in so far as concerns the refusal of access to the Commission's other internal documents; and

— order the Commission to pay the costs in relation to the appeal proceedings.

47 The Kingdom of Denmark and the Republic of Finland claim that the Court should annul paragraph 2 of the operative part of the judgment under appeal and the two contested decisions.

48 The Commission, the Federal Republic of Germany, the French Republic and the United Kingdom of Great Britain and Northern Ireland claim that the Court should dismiss the appeal and order the Kingdom of Sweden to pay the costs.

The appeal

49 In its appeal, the Kingdom of Sweden makes, essentially, three pleas in law claiming infringement of, respectively, the second subparagraph of Article 4(3) of Regulation No 1049/2001, the second indent of Article 4(2) of Regulation No 1049/2001, and the final parts of Article 4(2) and the second subparagraph of Article 4(3) of Regulation No 1049/2001.

The first plea, claiming infringement of the second subparagraph of Article 4(3) of Regulation No 1049/2001

Arguments of the parties

50 By its first plea, the Kingdom of Sweden, supported by the Kingdom of Denmark, the Kingdom of the Netherlands and the Republic of Finland, argues that the General Court misinterpreted the exception concerning the protection of the decision-making process inasmuch as in took the view that the Commission could, without making a specific and individual assessment of the documents in question, hold that their disclosure would seriously undermine the decision-making process of that institution.

51 As a preliminary observation, the Kingdom of Sweden points out, first, that, according to paragraph 66 of the judgment in Case C-64/05 P *Sweden* v *Commission* [2007] ECR I-11389, any exception to the principle of transparency must be strictly interpreted and its application requires an examination of the content of the document specifically concerned. Next, the principle of transparency applies to all activities within the Union, without a distinction being made between the administrative or legislative nature of the procedure to which the document concerned by a request for access refers. Finally, the presumption in favour of disclosure is stronger, as in this instance, in the case of a matter that has been closed. As the Kingdom of Denmark also maintains, the institutions must take account of the chronology of a case.

52 According to the Kingdom of Sweden, and the three Member States which have intervened in its support, the case-law, and in particular the judgment in Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, requires that, where an institution refuses access to a document in reliance on one of the exceptions laid down in Regulation No 1049/2001, it must in particular examine whether disclosure of that document would specifically undermine the interest protected by the exception in question. In this case, even if the Commission has, to some extent, made an assessment of the confidentiality of the documents requested, that assessment was not as complete as required by the regulation, since the Commission based the application of the exceptions on an abstract reasoning concerning the freedom of opinion of officials and free internal communication, and not on the content of the documents which were the subject-matter of the request for access.

53 More specifically, concerning the report, the Kingdom of Sweden maintains, first, that, even without knowing its content, it is reasonable to assume that it contains not only confidential information but also parts which do not constitute sensitive elements, such as, for example, a reminder of the Airtours decision and the *Airtours* v *Commission* judgment, or general statements, which can and must be disclosed, in

particular pursuant to Article 4(6) of Regulation No 1049/2001, which provides for the possibility of partial access.

54 Next, the Kingdom of Sweden complains that the General Court confirmed the argument of the Commission that officials would not freely express their opinion if there were a possibility that what they wrote might be published. In fact, the question whether one of the exceptions contained in Article 4 of Regulation No 1049/2001 may apply must be determined from the content of the report and not by means of a general reasoning concerning the freedom of opinion of its authors and a possible fear linked to the consequences of publication. The Republic of Finland adds in this respect that, since Article 4(3) of Regulation No 1049/2001 requires the existence of a risk that the decision-making process be seriously undermined, the requirement concerning the burden of proof to be borne by the institution is particularly high.

55 Finally, as for the risk that the disclosure of the opinions of officials might cause the latter to practice self-censorship, the Kingdom of Sweden points out that officials are required to perform the obligations arising from their function in an objective and impartial manner and in compliance with their duty of loyalty towards the Union. The fact that the public has a right to be informed about the activities of the institutions cannot constitute an acceptable reason for not performing those obligations. In any event, officials of the institutions must be aware of that right to be informed, without being legitimately entitled to expect that the protection of the confidentiality of the documents held by the Commission will go beyond what is provided by Regulation No 1049/2001.

56 As regards the working papers, the Kingdom of Sweden argues that the reasoning of the General Court, according to which access to those documents may be refused since the report itself was protected by the exception contained in the second subparagraph of Article 4(3) of Regulation No 1049/2001, is too general and unduly extends the scope of the exception in question.

57 Concerning the notes to the Commissioner, the notes to the other services and the notes in reply from services other than the legal service, the Kingdom of Sweden considers that the General Court also pursued a general and hypothetical line of reasoning, basing its reasoning on the fear of preventing free communication between the various Commission services.

58 Concerning the report of the Hearing Officer, the Kingdom of Sweden argues that Article 16(3) of Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162, p. 21), requires that that report be published at the same time as the Commission decision in the case concerning which that report was drawn up. Consequently, it is even doubtful whether that report falls within the expression 'opinions for internal use' within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001. It is true that, in this case, the matter was closed in 1999, namely before the adoption of the said decision. However, even if, with regard to the regime applicable in 1999, the report was capable of benefiting from the exception concerning the said concept, it would still have been necessary to prove the actual existence of confidentiality.

59 Concerning the note of DG Competition addressed to the Advisory Committee, the Kingdom of Sweden does not accept that the latter may fall within the Commission's decision-making process on the control of concentrations, given that that committee is independent of the Commission, so that the exception at issue is not even applicable. Moreover, Article 19(7) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1) lays down for the Advisory Committee publication rules similar to those governing the report of the Hearing Officer. Similarly, according to Article 19(7) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 13), the Advisory Committee may recommend to the Commission that its opinion be published. In those circumstances, according to the Kingdom of Sweden, before being able to classify a note addressed to the

Advisory Committee on the subject of its mission as sensitive, a detailed examination of the content of that note was necessary.

60 Finally, the Kingdom of Sweden argues that the circumstances surrounding the note on the file concerning a visit to the site of First Choice are not clear from the judgment under appeal. If, as MyTravel had stated, that note concerned oral observations of First Choice, it is not even certain that it actually contains an opinion for internal use within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001. It was therefore necessary to clarify what the content of the said note was in order to determine whether the exception contained in that provision is applicable to it.

61 The Commission, supported by the Federal Republic of Germany, the French Republic, and the United Kingdom, counters that the appeal of the Kingdom of Sweden is entirely unfounded, inasmuch as the General Court did not in any way imply that an analysis document by document was devoid of purpose.

62 Those parties argue, first, that the Kingdom of Sweden has not challenged the statement of the General Court, contained in paragraph 49 of the judgment under appeal, that the public interest in obtaining communication of a document does not have the same weight in relation to a document falling within an administrative procedure concerning, for example, competition law, as it does in relation to a document concerning a legislative procedure. The parties argue that the difference in treatment between those documents is justified in particular having regard to the control of legality which is exercised over administrative acts.

63 Moreover, the United Kingdom argues that the approach set out by the Kingdom of Sweden is likely to hinder the realisation of the aim of the Union legislature to preserve a 'space for reflection' within the institution, as is apparent from the preparatory papers for Regulation No 1049/2001.

64 The Federal Republic of Germany argues in that respect that the interests protected by Regulation No 1049/2001 are different from the interests of the parties to an administrative procedure. The protection of the latter is assured by Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 (OJ 2004 L 133, p. 1), applicable in this case. Moreover, in paragraph 22 of its order of 29 January 2009 in Case C-9/08 *Donnici* v *Parliament*, the Court of Justice already indicated that the intention to use internal documents in the context of individual court proceedings against an institution of the Union, as declared by MyTravel, is an indicator of a purely individual interest.

65 Next, the Commission and the Member States intervening in its support argue that, in the contested decisions, it specifically examined each of the documents to which access had been requested, as confirmed moreover by the fact that it had agreed to communicate some of the latter to MyTravel. The Federal Republic of Germany adds in that respect that the relationship between the degree of importance of the reasoning for the refusal and the individual case depends directly on the specific situation at issue. As regards competition cases, the divergences of opinion arising between services during an administrative procedure, which are concretised in the internal opinions of the legal service or other Commission services, cannot fail to be exploited. The Commission would thus risk facing divergent previous internal opinions raised against it in future administrative or court proceedings.

66 Finally, the Commission considers that the argument of the Kingdom of Sweden that an official is required to perform his functions with impartiality and objectivity is irrelevant in this case.

67 Concerning the various documents at issue, the Commission considers that the arguments of the Kingdom of Sweden to the effect that it would be reasonable to assume, even without becoming aware of the fact, that the report contains parts that are not

of a sensitive nature, and which are therefore capable of partial disclosure, are unjustified. In any event, partial access cannot be considered where one of the parts of the document cannot be separated from the others.

68 Concerning the working papers, the Commission maintains that it refused access after a specific examination concerning each of them. Those documents were drafted in order to prepare the report and are often literally reproduced therein. Therefore, they could not be disclosed for the same reasons as those invoked in relation to the report itself.

69 Concerning the report of the Hearing Officer, the Commission argues that, during an investigation concerning concentrations, the Hearing Officer draws up two reports, namely an intermediate report, which is purely internal, and a final report, which is intended for publication, in accordance with Article 16(3) of Decision 2001/462. The report at issue in this case is an intermediate report, drafted for the attention of the Member of the Commission with responsibility for competition matters. The General Court set out, in paragraphs 104 to 106 of the judgment under appeal, the reasons why that report should not be disclosed. In any event, the Commission states that the regime prior to the said decision, applicable ratione temporis in this case, did not make provision for publication of the report of the Hearing Officer.

70 Concerning the internal note from DG Competition to the Advisory Committee, the Commission and the United Kingdom consider that the fact that the opinion of that committee is public is not relevant in this case. The note in question, in which DG Competition summarised its draft decision, had a totally different content from that of the latter, and should therefore be regarded as an internal document.

71 The Commission observes finally that the note on the file concerning a site visit to First Choice reflected the impressions of officials of DG Competition during the visit. To give further details on the content of that document would amount to depriving the exception in question of its useful effect.

Findings of the Court

72 As a preliminary observation, it should be noted that, in accordance with the first recital of Regulation No 1049/2001, that regulation reflects the intention expressed in the second paragraph of Article 1 EU - inserted by the Treaty of Amsterdam - of marking a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As is stated in recital 2 in the preamble to Regulation No 1049/2001, the right of public access to documents of the institutions is related to the democratic nature of those institutions (*Sweden and Turco* v *Council*, paragraph 34; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I-8533, paragraph 68).

73 To that end, Regulation No 1049/2001 is intended, as is apparent from recital 4 in its preamble and from Article 1, to give the fullest possible effect to the right of public access to documents of the institutions (*Sweden and Turco* v *Council*, paragraph 33; Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5885, paragraph 51; *Sweden and Others* v *API and Commission*, paragraph 69).

74 However, that right is none the less subject to certain limitations based on grounds of public or private interest. More specifically, and in reflection of recital 11 in the preamble thereto, Article 4 of Regulation No 1049/2001 provides that the institutions are

to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (see, to that effect, Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 62; *Sweden and Others* v *API and Commission*, paragraphs 70 and 71).

75 However, since they derogate from the principle of the widest possible public access to documents, those exceptions must be interpreted and applied strictly (*Sison* v *Council*, paragraph 63; *Sweden and Turco* v *Council*, paragraph 36; *Sweden and Others* v *API and Commission*, paragraph 73).

76 Thus, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the exception – among those provided for in Article 4 of Regulation No 1049/2001 – upon which it is relying (*Sweden and Others* v *API and Commission*, paragraph 72 and case-law cited). Moreover, the risk of that undermining must be reasonably foreseeable and not purely hypothetical (*Sweden and Turco* v *Council*, paragraph 43).

77 Concerning the exception for protecting the decision-making process contained in Article 4(3) of Regulation No 1049/2001, it needs to be verified whether, as the Kingdom of Denmark and the Kingdom of Sweden argue, the fact that the documents concerned by that provision concern an administrative procedure that has already been closed is relevant for the specific application of the exception in question. Contrary to the facts at issue in *Commission* v *Technische Glaswerke Ilmenau* (paragraph 18), mentioned by the Kingdom of Sweden at the hearing, and as is apparent from paragraph 9 of this judgment, MyTravel made its request for access to the documents concerning the procedure which lead to the Airtours decision on 23 May 2005, that

is to say at a time when that decision, which is dated 22 September 1999 had not only already been adopted but had also been annulled by the judgment of the General Court in *Airtours* v *Commission*, against which the time-limit for lodging an appeal had, moreover, already expired.

78 In that respect, it should be noted that the said Article 4(3) draws a clear distinction precisely by reference to whether a procedure has been closed or not. Thus, first, according to the first subparagraph of that provision, any document drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution falls within the scope of the exception for protecting the decision-making process. Secondly, the second subparagraph of that provision provides that, after the decision has been taken, the exception at issue covers only documents containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned.

79 It is thus only for part of the documents for internal use, namely those containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned, that the second subparagraph of Article 4(3) allows access to be refused even after the decision has been taken, where their disclosure would seriously undermine the decision-making process of that institution.

80 It follows that the Union legislature took the view that, once the decision is adopted, the requirements for protecting the decision-making process are less acute, so that disclosure of any document other than those mentioned in the second subparagraph of Article 4(3) of Regulation No 1049/2001 can never undermine that process and that refusal of access to such a document cannot be permitted, even if its disclosure would have seriously undermined that process if it had taken place before the adoption of the decision in question.

81 It is true that, as the General Court essentially stated in paragraph 45 of the judgment under appeal, the mere possibility of using the exception in question to refuse access to documents containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned is not in any way affected by the fact that the decision has been adopted. That does not, however, mean that the assessment which the institution concerned is called upon to make in order to establish whether or not the disclosure of one of those documents is likely seriously to undermine its decision-making process must not take account of the fact that the administrative procedure to which those documents relate has been closed.

82 The reasons invoked by an institution and capable of justifying refusal of access to such a document of which communication has been requested before the closure of the administrative procedure might not be sufficient for refusing disclosure of the same document after the adoption of the decision, without that institution explaining the specific reasons why is considers that the closure of the procedure does not exclude the possibility that that refusal of access may remain justified having regard to the risk of a serious undermining of its decision-making process (see, by analogy with the second indent of Article 4(2) of Regulation No 1049/2001, *Sweden and Others* v *API and Commission*, paragraphs 132 to 134).

83 It is in the light of those principles that the Court must examine the first plea raised by the Kingdom of Sweden in support of its appeal.

84 For that purpose, it is necessary to verify whether the General Court correctly applied the second subparagraph of Article 4(3) of Regulation No 1049/2001 in respect of each of the documents to which MyTravel had been refused access by the contested decisions on the basis of that provision.

85 Concerning the report, it needs to be examined whether the General Court was right, in paragraph 55 of the judgment under appeal, to conclude that disclosure of the whole of the report would have seriously undermined the Commission's decision-making process.

86 In that regard, the General Court first took the view, in paragraph 49 of the judgment under appeal, that the interest of the public in obtaining access to a document under the transparency principle does not carry the same weight in the case of a document drawn up in an administrative procedure intended to apply rules governing the control of concentrations or competition law in general, as in the case of a document relating to a procedure in which the Community institution acts in its capacity as legislator. It then held, in paragraphs 50 to 52 of its judgment, that, in those circumstances, disclosure of a document such as the report to the public would prevent the Commission from obtaining the frankly-expressed and complete views of its own services, given that it would lead the authors of that document to practice self-censorship. Finally, the obligation to disclose such documents would lead the Member of the Commission responsible for competition to cease making requests for the written, and potentially critical, views of his advisers on issues falling within his jurisdiction or that of the Commission, which would cause significant damage to the effectiveness of the Commission's internal decision-making process.

87 First, it is true that, as the Court has already stated, the administrative activity of the Commission does not require as extensive an access to documents as that concerning the legislative activity of a Union institution (*Commission* v *Technische Glaswerke Ilmenau*, paragraph 60; *Sweden and Others* v *Commission*, paragraph 77).

88 However, that does not in any way mean, as the Kingdom of Sweden, the Kingdom of the Netherlands and the Republic of Finland have rightly pointed out, that such an activity falls outside the scope of Regulation No 1049/2001. Suffice it to note in that respect that Article 2(3) of that regulation states that the latter applies to all documents held by an institution, that is to say drawn up or received by it and in its possession, in all areas of Union activity.

89 Secondly, the other considerations mentioned in paragraph 86 of this judgment and taken by the General Court as being sufficient to justify the Commission's refusal of MyTravel's request for access are not in any way supported by detailed evidence, having regard to the actual content of the report, allowing it to be understood why disclosure of the latter would have been likely seriously to undermine the Commission's decision-making process, even if the procedure to which that document relates had already been closed. In other words, the General Court should have required the Commission to indicate, in accordance with the principles set out in particular in paragraphs 81 and 82 of this judgment, the specific reasons why that institution considered that closure of the administrative procedure did not exclude the possibility that refusal of access to the report might remain justified having regard to the risk of the said decision-making process being seriously undermined.

90 It follows that the General Court erred in law by holding that the Commission could, in such circumstances, refuse access to the whole of the report.

91 With regard to the remaining documents, it is necessary first to examine the arguments raised by the Kingdom of Sweden in order to challenge the contention that the report of the Hearing Officer, the note from DG Competition to the Advisory Committee and the note on the file concerning a site visit to First Choice might be regarded, contrary to the assessment of the General Court contained, respectively, in paragraphs 105, 111 and 116 of the judgment under appeal, as opinions for internal use as part of deliberations and preliminary consultations within the institution concerned, within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

92 Concerning, first, the report of the Hearing Officer, this Court finds that, even if the Kingdom of Sweden has doubts as to the possibility of applying the exception in question to such a report, which is subject to the rules laid down by Decision 2001/462, it

itself recognises that, having regard to the regime which actually applied in 1999 to the report of the Hearing Officer to which MyTravel had sought access, the latter falls within the scope of the said second subparagraph of Article 4(3).

93 Concerning, next, the note from DG Competition to the Advisory Committee, it is obvious that, contrary to what the Kingdom of Sweden argues, the fact that a document is likely to be published does not in itself exclude the possibility that that same document might fall within the exception in question. It is apparent from the wording of the second subparagraph of Article 4(3) of Regulation No 1049/2001 that the latter applies to any document containing opinions for internal use as part of deliberations and preliminary consultations within the institution. As the General Court stated in paragraph 111 of the judgment under appeal, without being contradicted on that point by the Kingdom of Sweden or the Member States intervening in its support, what allows the document in question to be regarded as an internal Commission document for the purposes of applying that provision is precisely the fact that the Commission was obliged to send that Advisory Committee internal documents pursuant to Article 19 of Regulation No 4064/89 in order for it to be able to give its opinion in accordance with the procedure requiring its involvement.

94 Finally, concerning the note on the file concerning a site visit to First Choice, it should be noted that the Kingdom of Sweden does not maintain that the General Court distorted the facts when, in paragraph 116 of the judgment under appeal, it found that that document contained internal deliberations of DG Competition concerning the investigation inasmuch as, for certain parties, that document reflected the views of the officials of DG Competition during the visit and not, as MyTravel argued at first instance, oral observations of First Choice. In those circumstances, that assessment of the facts made by the General Court cannot be called into question at the appeal stage.

95 It follows that the General Court did not make any error of law in holding that the report of the Hearing Officer, the note from DG Competition to the Advisory Committee and the file note concerning a site visit to First Choice constituted opinions for

internal use as part of deliberations and preliminary consultations within the Commission, within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

96 However, the Kingdom of Sweden argues that the General Court infringed the second subparagraph of Article 4(3) of Regulation No 1049/2001 when it concluded, in essence, in paragraphs 59, 94, 104, 111 and 115 of the judgment under appeal, that disclosure of the three documents mentioned in paragraph 91 of this judgment and, first, the working papers, and, second, the notes to the Commissioner, the notes to other services and the notes in reply from services other than the legal service would have seriously undermined the Commission's decision-making process.

97 It should first be noted that, as regards the report of the Hearing Officer, the note from DG Competition to the Advisory Committee and the file note concerning a site visit to First Choice, the General Court, in paragraphs 106, 111 and 116 of the judgment under appeal respectively, based the legality of the Commission's refusal of MyTravel's request for disclosure solely on considerations concerning the impact that such disclosure might have had on the freedom of opinion of the Hearing Officer, the internal nature of the documents in question and the fact that the latter reflected the impressions of Commission officials.

98 This Court finds that, contrary to the requirements referred to in paragraphs 81 and 82 of this judgment, the General Court did not in any way verify whether the Commission had supplied specific reasons why such considerations permitted the conclusion that disclosure of those latter documents would have seriously undermined the decision-making process of that institution, even though the administrative procedure to which those documents related had been closed.

99 Next, concerning the working papers, the General Court took the view, in paragraph 59 of the judgment under appeal, that the latter had enabled the report to be produced and comprised preparatory assessments or provisional conclusions for internal use, so that they fell within the exception in question.

100 This Court finds in that respect that, taking account of the fact that, as has been held in paragraph 89 of this judgment, the considerations which led the General Court to conclude that access to the report could be refused were not sufficient, the General Court was not justified either in taking the view, solely on the basis of the fact that those working papers had enabled the report to be produced, that disclosure of the latter would have seriously undermined the decision-making process of the Commission and that, therefore, those documents should not be disclosed.

101 Finally, concerning the notes to the Commissioner, the notes to the other services and the notes in reply from services other than the legal service, the General Court considered by contrast, in paragraphs 98 and 99 of the judgment under appeal, that the Commission had explained that the refusal to disclose those documents was justified even after the adoption of the second contested decision, given that such disclosure risked undermining its assessment of similar concentrations which might arise between the parties concerned or in the same sector, or of 'cases involving the concept of a collective dominant position'. The Commission also referred specifically to an EMI/Time Warner case, in which it refused a request for access under Regulation No 1049/2001 concerning the statement of objections in order to protect the deliberations of its services in the BMG/Sony case, which concerned the same business sector.

102 However, this Court finds that, as the Advocate General has essentially pointed out in points 78 to 84 of her Opinion, such arguments are not in any way supported. In particular, the Commission has not provided, as required by the case-law mentioned in paragraph 76 of this judgment, any evidence that access to the said documents would have had an actual impact on other specific administrative procedures. Moreover,

even supposing the Commission had, in an isolated case, correctly refused a request for access to the statement of objections in order to protect the deliberations of its services in another case concerning the same business sector, that does not in any way demonstrate that any refusal of access to documents on the basis of the exception in question is justified as such.

103 In the light of the above, the first plea raised by the Kingdom of Sweden in support of its appeal must be upheld.

The second plea, claiming infringement of the second indent of Article 4(2) of Regulation No 1049/2001

Arguments of the parties

104 By its second plea, the Kingdom of Sweden, supported by the Kingdom of Denmark, the Kingdom of the Netherlands and the Republic of Finland, argues that the General Court infringed the second indent of Article 4(2) of Regulation No 1049/2001 by holding, contrary to the case-law in *Sweden and Turco* v *Council*, that the Commission had rightly refused access to the notes in reply of the legal service on the basis of the exception for protecting legal advice, without first carrying out an examination of the content of those notes.

105 The fact that the legality of a decision risks being called into question by the disclosure of a document does not, the Kingdom of Sweden argues, constitute a sufficient reason for that document not be disclosed. On the contrary, it is precisely the lack of information which is likely to give rise to doubts as to the legitimacy of the decision-making process within the institutions. That risk would be avoided if, in its decision, the Commission were to indicate clearly the grounds which led it to opt for a solution in respect of which the legal service had issued an unfavourable opinion. Moreover, the statement that, in the event of disclosure, the legal service would be led in future to display reticence and caution was unfounded. Finally, the argument that it would be difficult for the latter to defend a point of view different from its own before the Union judicature was too general to establish the existence of a risk that the interest protected by the said provision might be undermined.

106 The Commission, supported by the Federal Republic of Germany, the French Republic and the United Kingdom, considers that the reasoning of the General Court is in accordance with the case-law in *Sweden and Turco* v *Council*.

107 The document at issue in *Sweden and Turco* v *Council* concerned a legislative procedure, whereas, in this case, the notes in reply from the legal service concern a procedure of an administrative nature. The General Court explained in detail, in paragraphs 123 to 127 of the judgment under appeal, that the risk entailed by disclosure of those notes that the protection of legal advice might be undermined is real and linked to the fact that, if the College of Commissioners were not to follow the opinion of the legal service and adopt a decision different from that envisaged by the latter, disclosure of those opinions would weaken the benefit which the Commission may derive from those opinions.

108 The Federal Republic of Germany adds that the Court has already held, in paragraph 18 of its order in *Donnici* v *Parliament*, that, in the context of court proceedings, the principle of a fair trial is infringed if, for example, the legal service were obliged, in the event of divergence between the opinion it issued and the decision

finally adopted, to defend in proceedings a position opposed to that which it had itself expressed in the past.

Findings of the Court

109 In order to reply to the second plea in the appeal, it is necessary to recall at the outset that, as stated in paragraphs 87 and 88 of this judgment and contrary to what seems to be suggested, in particular, by the Commission, the administrative activity of the institutions does not escape in any way from the scope of Regulation No 1049/2001.

110 Moreover, it should also be noted that, as stated in paragraph 76 of this judgment, where the institution concerned decides to refuse access to a document of which communication has been requested, it is under a duty, in principle, to provide explanations as to how access to that document might actually and specifically undermine the interest protected by an exception contained in Article 4 of Regulation No 1049/2001 upon which that institution relies.

111 Concerning, in this case, the exception for protecting legal advice, contained in the second indent of Article 4(2) of that regulation, it is necessary to verify, as the Kingdom of Sweden and the other Member States which have intervened in its support are requesting, whether the considerations adopted by the General Court were actually sufficient to support the conclusion that the Commission was right to refuse access to the notes in reply from the legal service.

112 For that purpose, it should be recalled that the General Court held, first, in paragraph 124 of the judgment under appeal, that disclosure of those notes 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 assessment of the compatibility of the Airtours/First Choice concentration with the common market, which would, as such, risk affecting decisions which might fall to be made as regards the same parties or in the same sector. Secondly, in paragraph 125 of that judgment, the General Court held that to accept that the notes in question should be disclosed would be liable to lead the legal service to display reticence and caution in the future in the drafting of such notes in order not to affect the Commission's decision-making capacity in areas in which it is involved in its administrative capacity. Thirdly, in paragraph 126 of the judgment, the General Court held that disclosure of those notes would risk putting the Commission in the difficult position in which its legal service might see itself required to defend a position before the Court which was not the same as the position which it had argued for internally in its role as adviser to the services responsible for the file, which it was its duty to perform during the administrative procedure.

113 As regards, first, the fear that disclosure of an opinion of the Commission's legal service relating to a draft decision could lead to doubts as to the lawfulness of the final decision, it is, as the Kingdom of Sweden has rightly argued, precisely openness in this regard that 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. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole (*Sweden and Turco* v *Council*, paragraph 59).

114 Furthermore, the risk that doubts might be engendered in the minds of European citizens as regards the lawfulness of an act adopted by an institution because the latter's legal service had given an unfavourable opinion would more often than not fail

to arise if the statement of reasons for that act were reinforced, so as to make it apparent why that unfavourable opinion was not followed (*Sweden and Turco* v *Council*, paragraph 60).

115 Concerning, next, the argument that the legal service would be liable to be led to display reticence and caution, it is sufficient to note that the General Court, without in any way verifying whether that argument was supported by concrete and detailed evidence, based its reasoning solely on general and abstract considerations.

116 Moreover, as regards the argument that the legal service might find itself obliged to defend before the Union judicature the legality of a decision in relation to which it had issued a negative opinion, it should be noted that, as the Kingdom of Sweden maintains, an argument of such a general nature cannot justify an exception to the transparency required by Regulation No 1049/2001 (*Sweden and Turco* v *Council*, paragraph 65).

117 In this case, as stated in paragraph 77 of this judgment, MyTravel's request for access was brought after the Airtours decision had been annulled by the judgment of the General Court in *Airtours* v *Commission* and after the time-limit for appealing against that judgment had expired. In such circumstances, as the Advocate General has, in essence, pointed out in point 96 of her Opinion, there was no possibility of the legal service finding itself in a situation such as that referred to in the preceding paragraph, as no further action concerning the legality of that decision could be envisaged before the Union judicature.

118 Finally, as regards the argument raised by the Federal Republic of Germany on the strength of the order in *Donnici* v *Parliament*, it is sufficient to note that the facts which gave rise to that order are different from those in this case. In the first place, that order concerned not a request for access within the meaning of Regulation

No 1049/2001, but a request that an opinion of the legal service of the Parliament be placed on the file of the procedure before the Court. Secondly, that request had been submitted in the context of a dispute concerning precisely the validity of the decision of the Parliament to which that opinion related. That order cannot therefore be relevant in order to justify the legality of the refusal of access in question in relation to the second indent of Article 4(2) of Regulation No 1049/2001.

119 Having regard to the above, the second plea raised by the Kingdom of Sweden in support of its appeal must also be upheld.

The third plea, claiming infringement of the parts of the sentence at the end of Article 4(2) and of the second subparagraph of Article 4(3) of Regulation No 1049/2001

120 By its third plea, the Kingdom of Sweden complains that the General Court failed to recognise the existence, in this case, of an overriding public interest justifying the disclosure of the documents, even though such disclosure risked undermining the interests protected, respectively, under the second indent of Article 4(2) and the second subparagraph of Article 4(3) of Regulation No 1049/2001.

121 However, given that the Court has upheld the first and second pleas of the Kingdom of Sweden in support of its appeal, there is no need to examine its third plea.

The action and reference back to the General Court

122 According to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the latter may, where the decision of the General Court has been annulled, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

123 In this case, the Court of Justice has the necessary information in order to give final judgment on the pleas raised in support of the action claiming infringement of, first, the second subparagraph of Article 4(3) of Regulation No 1049/2001, directed against the two contested decisions and, second, the second indent of Article 4(2) of that regulation, directed against the second contested decision.

124 In that regard, it is sufficient to note that, for the reasons set out in paragraphs 89, 98, 100 and 102 of this judgment, the Commission, in the contested decisions, did not correctly apply the exception for protecting the decision-making process of that institution. Similarly, having regard to the grounds set out in paragraphs 113 to 117 of this judgment, the Commission also misapplied the exception for protecting legal advice.

125 It follows that, first, the contested decisions must be annulled inasmuch as they are based on the second subparagraph of Article 4(3) of Regulation No 1049/2001 and that, secondly, the second contested decision must also be annulled inasmuch as it is based on the second indent of Article 4(2) of that regulation.

126 However, the Court of Justice is not in a position to rule on the pleas by MyTravel in support of its action, referred to in paragraph 42 of this judgment, directed against the first contested decision and claiming infringement of the second and third indents of Article 4(2) of Regulation No 1049/2001, or on the pleas, referred to in paragraph 43

of this judgment, directed against the second contested decision and concerning the exception for protecting the purpose of inspections, investigations and audits, in conjunction with the exception for protecting the decision-making process.

127 As stated in paragraphs 42 and 43 of this judgment, and as is apparent from paragraphs 79 and 130 of the judgment under appeal, the General Court did not examine those pleas.

128 Therefore, the case must be referred back to the General Court for it to rule on the pleas in the action brought before it by MyTravel on which it did not give a ruling.

Costs

129 Since the case has been referred back to the General Court, the costs relating to the present appeal proceedings must be reserved.

On those grounds, the Court (First Chamber) hereby:

1. **Sets aside point 2 of the operative part of the judgment of the Court of First Instance of the European Communities of 9 September 2008 in Case T-403/05 MyTravel v Commission;**

2. Annuls Commission Decision D(2005) 8461 of 5 September 2005, dismissing the request by MyTravel Group plc for access to certain preparatory documents of the Commission on the control of concentrations inasmuch as it is based on the second subparagraph of Article 4(3) of 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;

3. Annuls Commission Decision D(2005) 9763 of 12 October 2005, partially dismissing the request by MyTravel Group plc for access to certain preparatory documents of the Commission on the control of concentrations inasmuch as it is based on the second indent of Article 4(2) and the second subparagraph of Article 4(3) of Regulation No 1049/2001;

4. Refers the case back to the General Court of the European Union for it to rule on the pleas in the action brought before it by MyTravel Group plc on which it did not give a ruling;

5. Reserves the costs.

[Signatures]