Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 8 December 2011 [1]

Case C-477/10 P

European Commissionv

Agrofert Holding, a.s.

((Appeal — Access to documents of the institutions — Refusal — Exception based on the protection of commercial interests — Regulation (EC) No 1049/2001 — Article 4(2) and (3) — Documents relating to merger control procedures — Regulation (EC) No 139/2004 — Procedures which have already been concluded))

1. This appeal has been brought by the Commission against the judgment of the General Court of 7 July 2010 in *Agrofert Holding* v *Commission*,[2] by which the General Court annulled the Commission's Decision of 13 February 2007 refusing a request for access to documents pursuant to Regulation 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] More specifically, the request sought access to all the documents which had been generated in a merger control procedure initiated under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the Merger Regulation').[4]

2. This case will thus enable the Court of Justice, in particular, to determine the exact scope of the exception relating to the protection of commercial interests in the specific context of a procedure for the preliminary review of mergers between undertakings which have a European dimension. As such, it raises a very specific question not previously addressed in the existing case-law of the Court of Justice concerning the right of access to documents of the institutions guaranteed in Article 15(3) TFEU and in Article 42 CFREU.[5]

1 — Original language: Spanish.

2 — Case T-111/07.

3 — OJ 2001 L 145, p 43.

4 — OJ 2004 L 24, p 1.

5 — The authors who have highlighted the significance of this case as a new step in the process of establishing a body of case-law that began with the judgments in Case C-139/07 P *Technische Glaswerke Ilmenau* [2010] ECR I-5885 and Case C-28/08 P *Bavarian Lager* [2010] ECR I-6055 include, for example, Idot, L., 'Le règlement n° 10 doit-il s'appliquer aux "procédures concurrence"? — À propos des affaires Technische Glaswerke Ilmenau, Odile Jacob et Agrofert' in *Europe* No 10, October 2010, study 11, and Goddin, G., 'Recent Judgments Regarding Transparency and Access in the Field of Competition Law: Where Does the Court of Justice of the EU Strike the Balance?', in *Journal of European Competition Law & Practice*, 2011, vol. 2, No 1, pp. 10-23.

I – Legal context

3. Article 2(1) and (3) of Regulation No 1049/2001 provides:

‘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’.

4. Article 4 of Regulation No 1049/2001 provides for the following exceptions in this regard:

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

(a) the public interest as regards:

— public security,

— defence and military matters,

— international relations,

— the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

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

— commercial interests of a natural or legal person, including intellectual property,

— 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.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

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

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period'.

5. Recital 34 in the preamble to Regulation No 139/2004 provides as follows:

'To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. Notification should also be possible where the undertakings concerned satisfy the Commission of their intention to enter into an agreement for a proposed concentration and demonstrate to the Commission that their plan for that proposed concentration is sufficiently concrete, for example on the basis of an agreement in principle, a memorandum of understanding, or a letter of intent signed by all undertakings concerned, or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension. The implementation of concentrations should be suspended until a final decision of the Commission has been taken. However, it should be possible to derogate from this suspension at the request of the undertakings concerned, where appropriate. In deciding whether or not to grant a derogation, the Commission should take account of all pertinent factors, such as the nature and gravity of damage to the undertakings concerned or to third parties, and the threat to competition posed by the concentration. In the interest of legal certainty, the validity of transactions must nevertheless be protected as much as necessary.'

6. Pursuant to recital 38 of the Merger Regulation:

'In order properly to appraise concentrations, the Commission should have the right to request all necessary information and to conduct all necessary inspections throughout the Community. To that end, and with a view to protecting competition effectively, the Commission's powers of investigation need to be expanded. The Commission should, in particular, have the right to interview any persons who may be in possession of useful information and to record the statements made.'

7. Article 11 of the Merger Regulation lays down the rules governing requests for information by the Commission in a concentration procedure.

8. Article 13 of the Merger Regulation establishes the Commission's powers of inspection.

9. Articles 14 and 15 of the Merger Regulation define the system of fines applicable in cases of failure to comply with the duty to cooperate.

10. Under Article 17 of Regulation No 139/2004:

'1. Information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Article 4(3), Articles 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings."

II – Background

11. For a more detailed description of the background to the dispute, reference is made to the statement of facts contained in the judgment under appeal (paragraphs 1 to 30). In short, by decision of 20 April 2005, the Commission authorised the acquisition, by way of purchase of shares, of the Czech company Unipetrol by the Polish company Polski Koncern Naftowy Orlen ('PKN Orlen').

12. On 28 June 2006, Agrofert Holding ('Agrofert'), a minority shareholder in Unipetrol, requested the Commission, on the basis of Regulation No 1049/2001, to grant it access to all unpublished documents concerning the notification and pre-notification procedure in respect of the acquisition of Unipetrol by PKN Orlen.

13. By decision of 2 August 2006, the Commission refused to grant that request, on the ground that the request was general in nature and that the exceptions laid down in Article 4(2) and (3) of Regulation No 1049/2001 were applicable. The Commission also stated that the disclosure of documents originating from the parties would be contrary to the obligation of professional secrecy (Article 339 TFEU and Article 17(1) and (2) of Regulation No 139/2004), and that partial access to the documents was impossible given that no evidence had been adduced of the existence of an overriding public interest in disclosure.

14. After the Commission confirmed the refusal by decision of 13 February 2007, Agrofert brought an action before the General Court for the annulment of the decision.

15. By judgment of 7 July 2010, the General Court, making direct reference to the third head of claim, upheld the application for annulment, on the ground, essentially, that, although the documents might be covered by the exceptions in question, the Commission had failed to demonstrate in a concrete and individual manner that the documents in question would actually affect the interests protected by the aforementioned exceptions.

III – The appeal

16. The Commission bases its appeal against the judgment of the General Court on two grounds of appeal. By the first ground of appeal, the Commission claims that the General Court gave judgment on Agrofert's application without taking account of certain provisions of the Merger Regulation. The second ground of appeal alleges misinterpretation of Article 4(2) and (3) of Regulation No 1049/2001, that is to say the provisions laying down the exceptions that may be relied on as against requests for access to documents. The Commission therefore claims that the Court should set aside the judgment under appeal, give final judgment on the matters that are the subject of this appeal and order Agrofert to pay the costs.

17. The Commission maintained before the General Court that various exceptions provided for in Article 4 of Regulation No 1049/2001 were applicable to the following sets of documents requested by Agrofert:

— Documents exchanged between the Commission, the parties involved in the merger procedure and third parties. The Commission submits that these are covered by the exceptions provided for in the first and third indents of Article 4(2) of Regulation No 1049/2001, since their disclosure would 'undermine the protection of … commercial interests of a natural or legal person, including intellectual property, [and] the purpose of inspections, investigations and audits'.

— Legal opinions. The Commission maintains that the exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001 was applicable, since the disclosure of those documents was capable of undermining the protection of 'legal advice'.

— Internal Commission documents, which, it claims, fall within the exception in Article 4(3) of Regulation No 1049/2001, which precludes access to such documents. [6]

18. The General Court starts from the premise that the Commission's submissions call in any event for a detailed examination of each document that had been requested. This, ultimately, is where the real question of substance lies, since the General Court accepts, in the light of the foregoing, that the reasons employed by the Commission can be relied on on a case-by-case basis to refuse access to (each) document (actually examined).

19. The Commission considers that the General Court did not correctly interpret, in the circumstances of the case, some of the exceptions contained in Article 4(2) and (3) of Regulation No 1049/2001. These are, in particular, exceptions which prohibit access to documents 'where disclosure would undermine the protection of commercial interests of a natural or legal person …, court proceedings and legal advice [and] the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure' (paragraph 2), and, in addition, those which prohibit access to documents drawn up 'by an institution for internal use or received by an institution, which relate to a matter where the decision has not been taken by the institution [or, in the case of a document containing opinions for internal use as part of deliberations and preliminary consultations, 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' (paragraph 3).

IV – Procedure before the Court of Justice

20. Agrofert maintains that the judgment under appeal is sound and is supported in its view by the Kingdom of Sweden, the Government of which points out that the fact that a number of specific regulations contain different rules on access cannot mean that those rules constitute exceptions which take precedence over those specifically permitted in Regulation No 1049/2001, which would otherwise be rendered devoid of substance. Taking the same view, the Kingdom of Denmark submitted at the hearing that, in a situation where the general principle of transparency is subject to a number of permitted exceptions, those exceptions cannot under any circumstances encompass certain areas in their entirety, thus excluding them *in toto* from the application of that principle.

21. PKN Orlen, on the other hand, supports the Commission's appeal, and submits that its cooperation in the merger procedure rested on its trust in the confidentiality of the documents supplied, which trust was based on Regulation No 139/2004.

22. At the hearing on 8 September 2011, which was attended by counsel for Agrofert, PKN Orlen, the Kingdom of Denmark, the Kingdom of Sweden and the Commission respectively, the arguments summarised above were largely reiterated.

6 — For these purposes, those documents were: an inter-service consultation note enclosing a draft decision on the notification (Document 2); a reply from the Legal Service relating to the aforementioned note (Document 3); an exchange of e-mails between the competent service and the Legal Service on that draft decision (Document 4); and the replies to the above consultation note from other services concerned (Document 5).

V – Analysis

A – *Preliminary remark*

23. I should begin by pointing out that, when the Commission adopted its original decision authorising PKN Orlen to acquire Unipetrol, in accordance with Regulation No 139/2004, Agrofert, a minority shareholder in Unipetrol, made no attempt to participate in the merger control procedure as an interested party. It is apparent from the facts described in the proceedings at first instance that, after the authorisation procedure had been concluded, Agrofert sought access to certain documents relating to that procedure with a view to using them in arbitration proceedings instituted at national level against PKN Orlen in order to substantiate a claim seeking the imposition of contractual penalties on grounds of alleged unfair competition in the Czech Republic. However, there is nothing in the foregoing which makes it possible to shift the subject-matter of the dispute from the sphere of general access to European Union documents to the field of merger control procedures.

24. Consequently, unlike the situation in *Technische Glaswerke Ilmenau* and *MyTravel,*[7] in these proceedings, the person seeking the documents to which the Commission has refused access is a 'third party' whose interest does not lie, as it did in the first case, in the classification of an item of State aid by which it is affected or, as it did in the second case, in the outcome of a merger under scrutiny by the Commission. Agrofert is not seeking access to documents in order to dispute the lawfulness of the merger procedure or its outcome, but only in order to initiate completely separate proceedings against PKN Orlen.

25. This means that Agrofert's interest in the 'internal workings' of the merger procedure itself is instrumental only in relation to the nub of its primary concern, which is the commercial activities of PKN Orlen.

26. Consequently, this case has to do above all with transparency rather than mergers, inasmuch as it appears *prima facie* that Regulation No 1049/2001 is being relied on by a person seeking access to documents not in its capacity as a party with an interest in a merger procedure but as a party entitled to seek such access by Regulation No 1049/2001. It is therefore primarily in the light of Regulation No 1049/2001 that we must address the resolution of this case.

27. Accordingly, I shall begin my examination of this appeal by considering the second and final ground of appeal.

B – *The second ground of appeal: the alleged misinterpretation of Article 4(2) and (3) of Regulation No 1049/2001*

28. According to recital 4 in the preamble to Regulation No 1049/2001, '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'.[8] That regulation thus seeks, as recital 1 in its preamble states, to put into practice the intention, expressed in Article 1 TEU, 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'.[9]

7 — Case C-506/08 P *Kingdom of Sweden* v *MyTravel and Commission* [2011] ECR I-6237.

8 — Now Article 15 TFEU.

9 — See in this regard *Sweden* v *MyTravel*, paragraph 72.

29. Recital 2 in the preamble to that regulation states that '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'. In short, 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'. [10]

30. The principal purpose pursued by Regulation No 1049/2001 has given rise to specific legislative provisions. Thus, Article 2(1) confers on '[a]ny citizen of the Union … a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation', which, pursuant to paragraph 3 of the same article, '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'.

31. In so far as access is its general principle, Regulation No 1049/2001 sets out the only possible exceptions to it, in accordance with the spirit of that regulation. After all, to the extent that the purpose of that regulation is 'to define the principles, conditions and limits on grounds of public or private interest governing the right of access' to documents of the European Union institutions [Article 1(a)], Article 4 expressly laid down the exceptions which may be relied on as against that right, which is, in principle, general.

32. It is immediately clear from examining the content of those exceptions that they are prompted by a wide range of considerations. Some of them relate directly to specific fundamental rights (privacy and the integrity of the individual (Article 4(1)(b)) which are now recognised in the Charter. I would point out in passing that, as a result, they do not readily lend themselves to interpretative criteria based on the maxim that the exception proves the rule. On the contrary, it is precisely because the exceptions are ultimately intended to apply to conditions of access laid down in a regulation which, like the Merger Regulation, allows the Commission to obtain highly sensitive documents relating to the rights and interests of undertakings that those conditions cannot be interpreted strictly but must be given as broad an interpretation as is necessary to ensure that those rights and interests are suitably protected.

33. In other cases (military matters, international relations, financial policy (Article 4(1)(a)), the exceptions serve interests which are strategic, vital or in any event undeniably important to the life of the political community. None of the situations listed so far is relevant here.

34. Others serve objectives of special interest to the European Union, such as the protection of inspection activities.

35. Or, finally, and most importantly in this case, they relate to the protection of commercial interests (Article 4(2)). In my view, the most relevant of the exceptions relied on in this case is that relating to the protection of those interests, on which the Court of Justice has not had occasion to give a detailed ruling. It is on that exception, therefore, that this Opinion must focus.

36. Consequently, I shall look separately at the exception based on the protection of commercial interests.

10 — A point made in *Bavarian Lager*, paragraph 54.

1. The exception based on the protection of commercial interests in the case of documents obtained from undertakings in the course of a merger control procedure

37. I should like to point out first of all that commercial interests are already afforded moderately enhanced protection in Regulation No 1049/2001, to the extent that, in addition to establishing them as legitimate grounds for refusing access to a document where this is appropriate (Article 4(2)), that regulation provides for the possibility that the protection of those interests may exceptionally be extended beyond the period of 30 years laid down in Article 4(7) of the Regulation. [11]

38. That said, for the purposes of this case, I should say here and now that the exception based on the protection of commercial interests takes on a complexion all of its own when it comes to documents obtained from undertakings in connection with and during the course of a procedure for the preliminary review (authorisation) of mergers between undertakings. It must be pointed out in this regard that that circumstance has a defining influence on the nature of the exception at issue here. In other words, the way in which Regulation No 139/2004 deals with the Commission's role in this context represents an unavoidable tool for arriving at a proper interpretation of the scope of the exception provided for in Regulation No 1049/2001. It is therefore appropriate, from this point onwards, to give consideration both to the scope of the Commission's competence to make such an exception and to the powers conferred on it to that end, as well as, finally, to the guarantees which the proper exercise of those powers inevitably creates for those subject to them.

a) The scope of the Commission's competence in the concentration procedure

39. First, with respect to the scope of this competence, which derives from the legal basis of the current Article 103 TFEU, the Merger Regulation seeks first and foremost to establish a 'specific legal instrument … to permit effective control of concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations' (recital 6).

40. It goes without saying that, in themselves, reorganisations of undertakings 'are [to] be welcomed to the extent that they are in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community' (recital 4).

41. It is simply necessary, therefore, to 'ensure that the process of reorganisation does not result in lasting damage to competition' and, to that end, to regulate 'those concentrations which may significantly impede effective competition in the common market or in a substantial part of it' (recital 5).

42. The control required to ensure that that result is achieved must therefore be selective, in the sense that it must guarantee effective competition where mergers impede it, while not acting as a disincentive to those that further it. In the final analysis, its objective is to prevent only those mergers which are incompatible with the common market (Article 2 of Regulation No 139/2004). [12]

11 — Which provision is applicable only to commercial interests, privacy and 'sensitive documents'.

12 — For a substantive assessment of mergers from the point of view of their compatibility with the common market, see Bellamy and Child, *European Community Law of Competition*, 6th ed., Oxford University Press, 2008, 8.183 et seq.

b) The Commission's powers of inspection in the merger control procedure

43. Secondly, such control is possible only by giving the Commission extensive powers to obtain information from undertakings and to perform inspections (recitals 34 and 38). At the same time, however, care must be taken to ensure that the exercise of such powers does not give rise to a control regime that is so intrusive as to be capable of discouraging mergers that might be conducive to dynamic competition.

44. The exercise of the powers conferred on the Commission does not under any circumstances fall outside the principle of transparency, under which 'all decisions of the Commission which are not merely procedural in nature should be widely publicised' (recital 42). However, recognising that it is necessary to preserve 'the rights of defence of the undertakings concerned, in particular the right of access to the file', recital 42 states that 'it is essential that business secrets be protected' and that 'the confidentiality of information exchanged in the network [13] and with the competent authorities of third countries should likewise be safeguarded'.

45. On the basis of those general principles, the Merger Regulation lays down rules for reviewing merger transactions under which the Commission must assess all mergers which have a Community dimension 'with a view to establishing whether or not they are compatible with the common market' (Article 2(1)), taking into account for that purpose, '(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community' and '(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition' (Article 2(1)).

46. With a view to making that assessment, which it must in order to be able to declare that the merger is compatible with the common market, the Commission may require the persons, undertakings and associations of undertakings concerned to provide 'all necessary information' (Article 11(1), and may request the competent authorities of the Member States to undertake 'the inspections which the Commission considers to be necessary' (Article 12(1)) or perform them itself, Article 13(2) of the Merger Regulation making it clear that Commission officials 'shall have the power …; (b) to examine the books and other records related to the business …; (c) to take or obtain in any form copies of or extracts from such books or records; … [and] (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers'.

47. In order to ensure that undertakings cooperate with the Commission, Articles 14 and 15 of the Merger Regulation provide for the imposition of fines and periodic penalty payments on undertakings which refuse to submit to an inspection or to provide information or which supply incorrect or misleading information.

13 — This is 'a network of public authorities' comprising the Commission and the competent authorities of the Member States 'applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority' (recital 14 of the Merger Regulation).

c) Guarantees with respect to the exercise of powers of inspection

48. It is plain to see that the rights conferred on the Commission in the manner described above constitute a set of arguably excessive powers which put the undertakings concerned in an extremely vulnerable position inasmuch as they are openly exposed to inspections into the internal workings of their management which they are unable to avoid without incurring serious liabilities. It should be noted here, as the Commission points out, that, unlike in the case of public bids, when it comes to concentrations, the undertakings concerned do not have the freedom to choose whether or not to submit to the established procedures; they may be obliged to submit to them, however reluctantly.

49. I would add to this that, unlike the controls used to combat anti-competitive practices, the control procedure at issue in this case is preliminary, and, therefore, carried out without the foundation of previous allegedly unlawful conduct.

50. Such extensive and consequential powers of inspection are acceptable only to the extent that they are necessary for the purposes of achieving the legitimate objective pursued by the Commission. Consequently, the information acquired from undertakings must be available for use only to serve the objective of a proper assessment of the merger under examination, the whole aim of which, ultimately, is to determine whether or not the merger is compatible with the common market. The link between the information obtained, on the one hand, and the objective the attainment of which justifies the obligation incumbent on undertakings to provide all the information required, on the other hand, must be unbreakable. Any other arrangement would impose on undertakings in other circumstances a duty of transparency which may be incompatible with the continuation of their very existence as entities engaged in the competing economic activity, without ensuring that their private life is not adversely affected as a result, in so far as that term is applicable to the commercial activities of legal persons pursuant to the case-law of the European Court of Human Rights relating to Article 8 of the ECHR. [14]

51. That, of course, is the position adopted by the Merger Regulation itself, Article 17(1) of which provides that 'information acquired as a result of the application of this Regulation shall be used only for the purposes of the relevant request, investigation or hearing'.

52. Article 17(2) provides that, '[w]ithout prejudice to Article 4(3), Articles 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy', although, pursuant to Article 17(3), this 'shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings'.

53. Consequently, the information obtained by the Commission is inextricably linked to the aims of the merger assessment and its disclosure is subject to a principle of confidentiality.

14 — See, for example, *Amann v. Switzerland*, no. 27798/95, § 65, ECHR 2000-II.

54. In my view, the provision contained in Article 17(1) of the Merger Regulation can to some extent be regarded as effectively redundant, since the prohibition of misuse of powers would in itself be a sufficient indication that information acquired in this way may be used only for the strict purpose for which it was intended, and not in the service of any other interests. [15] The judicial interception of communications for the purpose of prosecuting a specific offence may, *mutatis mutandis*, serve as a good illustration here.

55. In the light of all the foregoing, I am now in a position to respond to the Commission's objections relating to the error which the General Court is alleged to have committed in requiring an individual justification for the refusal to grant access to each document the publication of which is capable of damaging the commercial interests of PKN Orlen.

2. Justification for the exception based on the protection of commercial interests

56. From the various judgments delivered by the Court of Justice in this field it is now possible to infer a body of case-law on the exceptions to the right of access and the due justification for them. [16]

57. First, it is important to note here the Court's case-law to the effect that it is possible to make *general presumptions* in respect of certain categories of documents, [17] more specifically those documents which, because of the procedure to which they relate, are governed by special accessibility arrangements. The existence of those arrangements supports the presumption that the disclosure of such documents could in principle adversely affect the purpose served by that procedure. In particular, the Court held in *Commission* v *Technische Glaswerke Ilmenau* (paragraphs 55 to 61), that a general presumption of this kind may arise from the legislation governing State aid review procedures. [18]

58. After all, even though that legislation confers the right to consult the documents in the administrative file only on the Member State responsible for granting the aid, the Court concluded that that fact has to be taken into account 'for the purposes of interpreting the exception laid down in Article 4(2), third indent, of Regulation No 1049/2001' because, if interested parties other than the Member State 'were able to obtain access, on the basis of Regulation No 1049/2001, to the documents in the Commission's administrative file, the system for the review of State aid would be called into question'. [19]

15 — An act is vitiated by misuse of powers where it has been taken 'with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case' (Case C-310/04 *Spain* v *Council* [2006] ECR I-7285, paragraph 69). The same is true, in my view, where an act is legitimately adopted for the purpose of achieving one end but is later used to achieve a different end which, much as it may also be legitimate, is justified on different grounds.

16 — For a survey of the Court's case-law in this field, see, for example, Guichot, E., *Transparencia y acceso a la información en el Derecho europeo*, Cuadernos Universitarios de Derecho Administrativo, Seville, 2011.

17 — *Sweden and Turco* v *Council,* paragraph 50; *Commission* v *Technische Glaswerke Ilmenau,* paragraph 54; *Sweden and Others* v *API and Commission*, paragraph 74.

18 — Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

19 — *Commission* v *Technische Glaswerke Ilmenau*, paragraph 58. A different basis (the right of access under Regulation No 1049/2001) would then achieve the same objective in practice as a specific basis (the right of limited access under Regulation No 659/1999), which grants access only to a specific interested party (the Member State responsible for granting aid). That outcome would not only undermine the consistency of the whole legislative system of the European Union but would also fail to take into account the fact that the spirit of openness which informs Regulation No 1049/2001 comes into its own in 'cases where the Community institutions act in the capacity of a legislature', whereas 'documents relating to procedures for reviewing State aid … fall within the framework of administrative functions specifically allocated to the said institutions by Article 88 EC' (*Commission* v *Technische Glaswerke Ilmenau*, paragraph 60).

59. A general presumption of the same kind has also been permitted — on the same basis and with the same consequences with respect to the interpretation of Regulation No 1049/2001 — in relation to procedural documents submitted to the Court of Justice in the context of judicial proceedings. [20]

60. This is not by any means a presumption *iuris et de iure* since 'that general presumption does not exclude the right of [the] interested parties' (that is to say those who do not have a right of access to documents in the review procedure) 'to demonstrate that a given document … is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document'. [21]

61. Consequently, the presumption does not automatically exclude access to the document to which it relates. It simply allows the institution to refuse access for reasons of principle which follow from the existence of special arrangements applicable to the type of document concerned. It also increases the degree of justification required of a request for access, which must necessarily be based on a higher public interest and not only on a mere private interest.

62. In any event, the classification of a document as falling within a category covered by the presumption also requires specific justification. As the Court has stated, it is incumbent on the institution 'to establish in each case whether the general considerations normally applicable to a particular type of document are in fact applicable to a specific document which it has been asked to disclose'. [22] In other words, it must be established whether that document actually comes under the general category of documents to which that general presumption relates. For the purposes of this case, therefore, the question is whether the document concerned is contained in a file governed by specific rules of access under specific regulations.

63. In my opinion, that case-law can readily be transposed to the exception based on the protection of commercial interests, and certainly in the specific case of documents generated in the course of merger procedures. [23]

64. As Regulation No 659/1999 does in the context of State aid, Regulation No 139/2004 establishes in relation to mergers between undertakings an administrative review procedure which pursues an objective of fundamental importance to the European Union, that is to say to ensure competition in the internal market.

65. The fact that the legal basis for both regulations is Chapter I ('Rules on Competition) of Title VII ('Common Rules on Competition, Taxation and Approximation Laws') of the TFEU makes it clear that they serve a common purpose shared by Regulation No 1/2003, [24] which is specifically to facilitate the attainment of one of the objectives underpinning the existence of the European Union. It should not be forgotten that, while the European Union is based on the values set out in Article 2 TFEU, it is also bound by the aims and objectives listed in Article 3 TEU, the most important of which for our purposes here is the establishment of an internal market and the 'sustainable development of Europe based … on a highly competitive social market economy …' (Article 3 TEU). To secure the

20 — *Sweden and Others* v *API and Commission*, paragraphs 94 to 100. The Court's ultimate objective in all such cases is precisely to maintain the balance sought by the EU legislature in enacting Regulation No 1049/2001 and all other regulations which specifically govern access to documents contained in administrative files. Another example of that concern on the part of the Court can be found in the ruling it gave in *Commission* v *Bavarian Lager*, which called for a balanced interpretation of Regulation No 1049/2001 in conjunction with the provisions of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).

21 — *Commission* v *Technische Glaswerke Ilmenau*, paragraph 62.

22 — *Sweden and Turco* v *Council*, paragraph 50.

23 — See to this effect, inter alia, Godin, G. 'Recent Judgments …', pp. 22-23, and Idot, L., 'Le règlement n° 1049/2001 …', *passim*.

24 — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [81] and [82] of the Treaty (OJ 2003 L 1, p 1). On the procedure governed by that regulation, see Wils, W .P. J., 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights', in *Concurrences*, May 2011, and in *World Competition*, Vol. 34, No 2, June 2011. Accessible at http://ssm.com/author=456087.

achievement of those aims, Article 3(1)(a) TFEU gives the European Union exclusive competence to 'establish … the competition rules necessary for the functioning of the internal market', and it was precisely with a view to enabling mergers to be effectively reviewed from the point of view of competition that the legal instrument enshrined in the Merger Regulation was devised.

66. Consequently, the reasons why, in the case of State aid, it is appropriate to combine the exceptions in Article 4 of Regulation No 1049/2001 with the specific conditions governing access to documents laid down in Regulation No 659/1999 are equally applicable to the Merger Regulation, the conditions of access laid down in which must also be taken into account in giving effect to that provision.

67. As I see it, therefore, the protection of commercial interests as a basis for the exception to access provided for in Regulation No 1049/2001 must be interpreted in the light of the Merger Regulation, and must therefore support the general presumption that disclosure of the documents supplied by an undertaking to the Commission in the course of a merger procedure is capable of adversely affecting its commercial interests.

68. That presumption must be extended to all the documents generated during that procedure, in so far as they may contain sensitive information from the point of view of the activities and commercial interests of the undertaking subject to the procedure, but only, of course, to those documents where this is the case.

69. The Commission is therefore right in its submission that the General Court incorrectly interpreted the exception relating to the protection of commercial interests.

3. The remaining exceptions

70. With regard, first, to the disclosure of legal opinions, the Court of Justice has already held that Regulation No 1049/2001 'imposes, in principle, an obligation to disclose the opinions of the Council's legal service relating to a legislative process',[25] although this does not rule out the possibility of refusing to disclose opinions 'of a particularly sensitive nature' or 'having a particularly wide scope that goes beyond the context of the legislative process in question', in which case 'it is incumbent on the institution concerned to give a detailed statement of reasons for such a refusal'.[26]

71. With regard to legal opinions given in administrative proceedings, the Court ruled in the same spirit in *Sweden* v *MyTravel and Commission,* paragraphs 109 to 119.

72. In the present case, where, as I have already said, the nub of the issue is the protection of commercial interests, the determining factor is not so much the form or the legal classification of each of the documents requested, but rather whether, materially or substantively, they contain information which is important from the point of view of those interests. It is therefore for the General Court, when ruling on the facts, to determine to what extent the administrative documents generated in the course of the merger procedure include information which is sensitive from the point of view of the commercial interests of the undertaking concerned.

4. Lastly, the protection of commercial interests with specific respect to procedures which have already been concluded

73. Is the foregoing in any way affected by the fact that the merger procedure has already been concluded?

25 — *Sweden and Turco* v *Council*, paragraph 68.
26 — *Sweden and Turco* v *Council*, paragraph 69.

74. In *MyTravel*, the Court ruled on the question whether the fact that the procedure to which the document at issue related had or had not been concluded in the form of the adoption of the relevant decision was capable of affecting the outcome of a request for access. The Court took the view that the fact that the procedure had been concluded did not per se mean that the document had to be disclosed, although there had to be special grounds for refusing disclosure in such circumstances.[27]

75. That position might support the view that the answer to the question I have just raised should be in the affirmative, albeit, in my view, only in the case of documents the very purpose of which is to form the basis of the decision towards which the procedure is geared. Once the procedure is closed, access to the documents which were produced during the course of that procedure with a view to progressing it towards the adoption of a final and definitive decision cannot then, by definition, jeopardise the outcome of the procedure or, therefore, the decision in which that procedure has culminated. It is from this perspective, therefore, that the legal opinions and internal documents to which access was refused by the Commission must be considered.

76. There is, however, a very important difference in the case of the commercial interests the protection of which formed the basis of the refusal to grant access to the remaining documents requested by Agrofert.

77. By their very nature, the documents supplied for the purposes of the procedure will always contain information relating to the state of an undertaking's business activities at the time relevant to the Commission's decision on the compatibility of the merger in question with the common market. It is therefore information which, in principle, is bound to 'become outdated' but which may none the less remain 'current' for longer than information contained in documents which are strictly administrative or internal to the procedure.

78. In my opinion, the fact that a document remains 'sensitive' for longer is a fundamental element in the architecture of the system of exceptions already established in Article 4 of Regulation No 1049/2001. Thus, documents which have been drawn up for internal use in a procedure (paragraph 3) are protected until the procedure is concluded, but only those documents which contain opinions continue to be protected even after the procedure has come to an end. In the latter case, the exception will apply, in common with all the exceptions contained in Article 4, 'for the period during which protection is justified on the basis of the content of the document' (paragraph 7). In accordance with Article 4(7), that period may be extended for a maximum of 30 years. However, that maximum period may be extended, 'if necessary', for three types of documents: those 'covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents' (paragraph 7).

79. Commercial interests therefore warrant greater protection *ratione temporis* under the rules of access set out in Regulation No 1049/2001. In this case, then, the fact that the merger procedure has been concluded does not necessarily represent, for the documents in that procedure, the turning point with respect to access that it does, on the other hand, for other types of document, in particular legal opinions for internal use.

80. With regard to documents relating to legal advice and those drawn up by the Commission as part of deliberations and consultations in connection with the procedure (Article 4(2), second indent, and (3) of Regulation No 1049/2001), the ruling given by the Court in *Sweden* v *MyTravel and Commission* is readily applicable to this case.

81. I therefore take the view that, once the administrative merger procedure has been concluded, the presumption as to the damage that might be done to the objective pursued by that procedure in granting access to the strictly administrative documents so generated outside the framework of the Merger Regulation itself no longer holds good.

27 — *Sweden* v *MyTravel and Commission*, paragraphs 113 to 119.

82. Of course, such damage may indeed arise in isolated cases even after the procedure has been concluded, but it cannot simply be taken as a foregone conclusion and must therefore be demonstrated on a case-by-case basis, that is to say without recourse to a general presumption founded on the nature and aims of an administrative procedure which has already been concluded.

83. In the light of all the foregoing, I consider that the second ground of appeal alleging that the General Court did not correctly interpret the system of exceptions laid down in Regulation No 1049/2001 must be upheld in part.

C – *The first ground of appeal: the alleged misinterpretation of Regulation No 139/2004*

84. The first ground of appeal was based, in essence, on an incorrect interpretation of Regulation No 139/2004 which had consequences for the interpretation of the exception based on the protection of commercial interests. As I have already proposed that the second ground of appeal should be upheld specifically on the grounds of an incorrect interpretation of the exception relating to the protection of commercial interests, I do not consider it necessary to examine the first ground of appeal in any further detail.

VI – Final judgment on the dispute by the Court of Justice

85. Under Article 61 of the Statute of the Court of Justice, 'if the appeal is well founded, the Court of Justice shall quash the decision of the General Court', but 'may itself give final judgment in the matter where the state of the proceedings so permits'.

86. In my opinion, this is a situation in which it is proper for the Court of Justice to give final judgment in the matter. In the light of the basis on which I propose that the appeal should be allowed, it is appropriate to annul the Commission's decision contested before the General Court in so far as it fails to provide concrete and individual justification for refusing to grant access to all those legal and internal documents which, by virtue of their content, are not covered by the exception based on the protection of commercial interests contained in Regulation No 1049/2001.

VII – Costs

87. In accordance with Article 69(3) and (4) of the Rules of Procedure, I suggest to the Court of Justice that, in the light of the basis on which I propose that the appeal should be allowed, the parties and their interveners should each bear their own costs.

VIII – Conclusion

88. In the light of the foregoing considerations, I propose that the Court should:

Allow the appeal in part by upholding the second ground of appeal alleging misinterpretation of Article 4(2) of Regulation No 1049/2001 in relation to the protection of commercial interests and, consequently:

(1) set aside the judgment of the General Court of 7 July 2010 in Case T-111/07 *Agrofert Holding* v *Commission* annulling the Commission's Decision of 13 February 2007 refusing access to the documents contained in the file relating to a merger control procedure pursuant to Regulation (EC) No 139/2004;

(2) annul the Commission's Decision of 13 February 2007 refusing access to the documents contained in the file relating to a merger control procedure pursuant to Regulation No 139/2004, in so far as it fails to provide concrete and individual justification for the refusal to grant access to all the legal and internal documents which, by virtue of their content, are not covered by the exception based on the protection of commercial interests provided for in Regulation No 1049/2001;

(3) order the parties and the interveners to bear their own costs.