



C-506/08 P Sweden v Commission and MyTravel Group plc, judgment of 21 July 2011

The Commission must explain the specific reasons for which it is opposed to the communication of its internal documents, including legal advice, at the end of a closed administrative procedure.

The Kingdom of Sweden asked the Court of Justice to set aside a General Court judgment rejecting the appeal of MyTravel against refusal of access to certain internal documents of the Commission on the control of concentrations, with a view to using them under an action for compensation. These documents were, on the one hand, a report and the documents relating to its preparation, drawn up following the annulment by the General Court of the decision prohibiting the merger, and, on the other hand, advice from the Legal Service, for which the Commission had invoked two of the exceptions provided for in Article 4(2) and (3) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents: the protection of legal advice and the undermining of the Commission's decision-making process.

The Court first recalls that the right of public access to documents of the institutions is related to the democratic nature of those institutions, and that any exception to this right must be interpreted and applied strictly. In this context, it is for the institution concerned to explain how disclosure of a document could specifically and effectively undermine the interest invoked. It adds that the risk of that undermining must be reasonably foreseeable and not purely hypothetical.

Concerning firstly the exception for protecting the decision-making process, the Court emphasises that even if 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, that does not mean that such an activity falls outside the scope of Regulation (EC) No 1049/2001. It also draws a distinction between cases where the decision-making process is in progress and those where it is closed. In the latter case, the requirements for protecting the decision-making process are less acute and communication can be refused only of documents containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned. The refusal must be based on specific reasons, having regard to the actual content of the documents to which access is sought and to the risk of the decision-making process of the Commission being seriously undermined by their disclosure even though this process is closed.

In this context, the Court considers that the Commission has not supplied specific reasons why it considered that refusal of access to the internal documents in question was in this case justified having regard to the risk of the decision-making process being seriously undermined, when this process was closed.

Secondly, concerning the exception for protecting legal advice, and on the plea that disclosure of an opinion of the Legal Service could lead to doubts as to the lawfulness of the final decision, the Court replies that it is openness 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. Moreover, it considers that the General Court did not verify whether the argument that the Legal Service would be liable to be led to display reticence and caution, was supported by concrete and detailed evidence. Finally, the fact that the Legal Service might find itself obliged to defend before the judicature the legality of a



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decision in relation to which it had issued a negative opinion is, in its opinion, an argument of a general nature which cannot justify an exception to the transparency required by Regulation (EC) No 1049/2001. The Court points out that, in this case, no further action concerning the legality of the decision to which the legal advice in question related could be envisaged before the Union judicature.

Consequently, the Court sets aside the judgment of the General Court and annuls the Commission's decisions to refuse access to MyTravel.