



The Court defines the scope of the right of access to documents of the EU institutions in the context of merger control proceedings

The Commission may, subject to certain conditions, refuse access to documents relating to merger control proceedings without first carrying out a concrete, individual examination of those documents

The present two cases provide the Court of Justice with the opportunity to examine, for the first time, the relationship between the Access to Documents Regulation¹ and the Merger Regulation². These regulations have different objectives as regards access to information held by the Commission. The first is designed to ensure the greatest possible transparency of the decision-making process of the EU institutions and of the information on which they base their decisions. It is thus designed to facilitate, as far as possible, the exercise of the right of access to documents, and to promote good administrative practices. The second regulation is designed to ensure, *inter alia*, compliance with the duty of professional secrecy in merger control proceedings which have a Community aspect.

These two regulations do not contain provisions which expressly grant one regulation primacy over the other. Accordingly, it is appropriate to ensure that each of those regulations is applied in a manner which is compatible with the application of the other and makes their application coherent.

In accordance with the case-law of the Court of Justice³, although the regulation on access to documents seeks to confer on the public as wide a right of access as possible to documents of the institutions, that right of access is nevertheless subject to certain limits.

In both cases, the Commission refused to disclose documents relating to two sets of merger control proceedings to the French publishing company Odile Jacob⁴ (Case C-404/10 P) and the Czech company Agrofert⁵ (Case C-477/10 P) – both of which were third parties in relation to the mergers which formed the subject-matter of the Commission's controls. To justify its refusal of disclosure, the Commission relied on the exceptions to the right of access laid down in the regulation on access to documents and relating to, *inter alia*, the protection of commercial interests and the protection of the purpose of investigations.

Both companies brought actions against the Commission's decisions before the General Court. By the judgments delivered on 9 June 2010⁶ and 7 July 2010⁷ respectively, the General Court

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

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1). This regulation repealed Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, and corrigendum OJ 1990 L 257, p. 13). The latter regulation, however, remains applicable to mergers occurring before 1 May 2004, which is the position in Case [C-404/10 P](#).

³ Case [C-139/07 P](#) *Commission v Technische Glaswerke Ilmenau*. See also Press Release No [62/10](#).

⁴ Commission Decision D(2005) 3286 of 7 April 2005 dismissing the application of Éditions Odile Jacob SAS for access to documents relating to merger control proceedings COMP/M.2978 – Lagardère/Natexis/VUP.

⁵ Commission Decision D(2007) 1360 of 13 February 2007 refusing access to documents in Case COMP/M.3543 relating to the merger between the Polish company Polski Koncern Naftowy Orlen SA and the Czech company Unipetrol.

⁶ Case [T-237/05](#) *Éditions Odile Jacob v Commission*

annulled the Commission's decisions. The General Court held, essentially, that, even if it were accepted that the documents requested could be covered by the exceptions relied on, the Commission had failed in its obligation to demonstrate, in a concrete and individual manner, that those documents did in fact undermine the interests protected by those exceptions.

The Commission appealed to the Court of Justice against those judgments of the General Court.

In its judgments delivered today, the Court of Justice points out, firstly, that it is common that the documents exchanged between the Commission and the notifying parties or third parties in relation to a merger do in fact relate to an investigation. Furthermore, having regard to the objective of merger control proceedings, which is to ascertain whether or not a merger gives the notifying parties a market power which may significantly affect competition, the Commission gathers, in the context of such proceedings, sensitive commercial information about the commercial strategies of the undertakings concerned, their sales figures, their market shares or their business relations, with the result that access to documents in such control proceedings may undermine the protection of the commercial interests of those undertakings. Accordingly, the exceptions relating to the protection of commercial interests and to the protection of the purpose of investigations are, in the present cases, closely connected.

In that context, the Court of Justice finds that the General Court ought to have acknowledged the **existence of a general presumption** that disclosure of documents exchanged between the Commission and undertakings in the course of merger control proceedings undermines, in principle, both protection of the objectives of investigation activities and that of the commercial interests of the undertakings involved in those proceedings. Generalised access to those documents would jeopardise the balance which the EU legislature sought to ensure, in the merger regulation, between the obligation on the undertakings concerned to send the Commission possibly sensitive commercial information to enable it to assess the compatibility of the proposed merger with the common market, on the one hand, and the guarantee of increased protection, with regard to the requirement of professional secrecy and business secrecy, for the information so provided to the Commission, on the other.

The Court also states that the existence of that general presumption must be acknowledged irrespective of whether the request for access relates to control proceedings which are already closed or to pending proceedings. The publication of sensitive information concerning the economic activities of the undertakings involved is liable to harm their commercial interests, regardless of whether control proceedings are pending. Furthermore, the prospect of such publication after control proceedings have been closed risks adversely affecting the willingness of undertakings to cooperate while such proceedings are pending. The Court further points out that, in accordance with the regulation on access to documents, the exceptions relating to commercial interests or sensitive documents may apply for a period of 30 years and may, if necessary, continue to apply beyond that period.

Consequently, the Court rules that the regulation on access to documents, interpreted in light of the regulation on the control of concentrations between undertakings, entitles the Commission to refuse access to all of the documents at issue relating to the merger control proceedings, exchanged between the Commission and notifying parties and third parties, without first carrying out a concrete, individual examination of those documents.

Documents internal to the Commission, established in connection with control of a merger, are covered by that general presumption for as long as the control proceedings are pending or are likely to be reopened by the Commission following legal proceedings before the EU Courts.

Furthermore, while the general presumption referred to does not exclude the right of the interested party to show that there is an overriding public interest which justifies disclosure of the documents requested, the Court nevertheless finds that, in the two cases, neither Odile Jacob nor Agrofert has

⁷ Judgment in Case [T-111/07](#) *Agrofert Holding v Commission*.

demonstrated any overriding public interest such as to justify disclosure of the documents concerned.

Accordingly, the Court of Justice sets aside the judgments of the General Court in so far as they annul the decisions of the Commission refusing access to those documents.

Consequently, the Court of Justice dismisses the respective actions brought by Odile Jacob and Agrofert before the General Court.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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

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