

**Case C-707/22****Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

17 November 2022

**Referring court:**

Raad van State (Netherlands)

**Date of the decision to refer:**

16 November 2022

**Appellant:**

Minister van Infrastructuur en Waterstaat (Minister for Infrastructure and Water Management)

**Respondent:**

AVROTROS

**Subject matter of the main proceedings**

The dispute concerns a request for access by AVROTOS, a news organisation, to various documents on air traffic safety at Schiphol Airport.

**Subject matter and legal basis of the request**

The request made concerns the question of the extent to which a news organisation may, under a national disclosure regime, receive information from a database covered by Regulation No 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation<sup>1</sup> ('the Occurrence Reporting Regulation'), and, if so, in what form. Specifically, the referring court doubts

<sup>1</sup> Regulation (EU) No 376/2014 of the European Parliament and of the Council of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation, amending Regulation (EU) No 996/2010 of the European Parliament and of the Council and repealing Directive 2003/42/EC of the European Parliament and of the Council and Commission Regulations (EC) No 1321/2007 and (EC) No 1330/2007 (OJ 2014 L 122, p. 18).

whether the absolute prohibition on disclosing such information laid down in national law is compatible with Article 15 of the Occurrence Reporting Regulation and with the right to freedom of expression and information laid down in Article 11 of the Charter of Fundamental Rights of the European Union ('EU Charter') and Article 10 ECHR.

### **Questions referred for a preliminary ruling**

1a. What is to be understood by 'details of occurrences' and 'appropriate confidentiality' as referred to in Article 15(1) of the Occurrence Reporting Regulation and in the light of the right to freedom of expression and information enshrined in Article 11 of the EU Charter and Article 10 ECHR?

1b. Does aggregated information fall under 'details of occurrences' as referred to in Article 15(1) of the Occurrence Reporting Regulation?

2a. Is Article 15(1) of the Occurrence Reporting Regulation, in the light of the right to freedom of expression and information enshrined in Article 11 of the EU Charter and Article 10 ECHR, to be interpreted as being compatible with a national rule, such as that at issue in the main proceedings, by virtue of which no information received from reported occurrences may be disclosed?

2b. Does this also apply to aggregated data on reported occurrences?

3. If the answers to questions 2a and 2b are in the negative: is the competent national authority permitted to apply a general national rule on disclosure by virtue of which information is not disclosed if disclosure would be outweighed by the interests concerned with, for example, relations with other States and international organisations, with inspection, control and monitoring by administrative authorities, with respect for privacy and with preventing natural and legal persons from being disproportionately advantaged and disadvantaged?

### **Provisions of European Union law and national law relied on**

International law:

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 10 (Freedom of expression)

EU law:

- Charter of Fundamental Rights of the European Union, Article 10 (freedom of thought, conscience and religion) and Article 11 (freedom of expression and information);
- Regulation (EU) No 376/2014 of the European Parliament and of the Council of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil

aviation, recitals 32, 33 and 45, and Articles 13 (occurrence analysis and follow-up at national level), 15 (confidentiality and appropriate use of information) and 16 (protection of the information source).

Netherlands law (as applicable on 3 December 2018, the date on which the Minister issued the second partial decision):

- Wet luchtvaart (Law on aviation), Articles 1.1, 7.1 and 7.2
- Wet openbaarheid van bestuur (Law on government information (public access)), Article 2(1), Article 3, Article 7(1), Article 10(2), Article 11(1)
- Rijkswet Onderzoeksraad voor veiligheid (Law on the Dutch safety board), Article 59(5).

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 Following a critical report by the Onderzoeksraad voor Veiligheid (Dutch Safety Board, Netherlands) on 6 April 2017, AVROTOS, a public broadcaster, wanted to obtain a number of documents on air traffic safety at Schiphol from the Netherlands government. On 15 February 2018, it submitted a request to that effect under the terms of the Law on government information (public access).
- 2 Because this request involved many documents, the competent minister processed it in three partial decisions. He disclosed some of the documents, but refused to disclose (in part) 4 164 documents, in particular on the basis of the *lex specialis* effect of Article 59(5) of the Law on the Dutch safety board (non-disclosure of investigations) or the introductory wording of Article 10(2) as well as Article 10(2)(e) and/or (g) of the Law on government information (public access) (non-disclosure out of respect for privacy or to prevent disproportionately advantageous or disadvantageous treatment) and/or Article 11(1) of that Law (non-disclosure of personal opinions on policy).
- 3 The Minister refused to disclose document No 75.4 in the second partial decision because of the *lex specialis* effect of the Occurrence Reporting Regulation and pursuant to the introductory wording of Article 10(2) and to Article 10(2)(e) and (g) of the Law on government information (public access) (non-disclosure out of respect for privacy or to prevent disproportionately advantageous or disadvantageous treatment).
- 4 Following an administrative appeal, the Minister maintained his refusal in respect of part of the request.
- 5 The rechtbank (District Court) upheld AVROTOS's appeal in that regard.
- 6 In the interim ruling of 30 September 2021, the District Court ruled that the reasons given for the three decisions on the administrative appeal were

insufficient in respect of 22 documents. In particular, for document No 75.4, it was not clear which information the Minister believed fell under the Occurrence Reporting Regulation and which under the introductory wording of Article 10(2) and Article 10(2)(g) of the Law on government information (public access). The District Court gave the Minister the opportunity to remedy those deficiencies within six weeks. The Minister did not do so within that time.

- 7 In its final judgment, the District Court set aside the three decisions on the administrative appeal, annulled the three partial decisions, and ruled that the Minister should disclose the documents and passages mentioned, including document No 75.4.
- 8 The Minister brought a further appeal against both the interlocutory and final judgments before the Raad van State (Council of State), the referring court.
- 9 Document No 75.4 comprises 22 pages. Following the District Court's ruling, the Minister has fully disclosed 9 pages of that document, but does not wish to disclose the remaining 13 pages. Whether the Minister's refusal to disclose those 13 pages is justified is the subject of the further appeal.

#### **The essential arguments of the parties in the main proceedings**

- 10 The Minister argues that Article 15(1) of the Occurrence Reporting Regulation applies to the 13 undisclosed pages of document No 75.4. Under Article 2 of the Law on government information (public access), this special rule, or *lex specialis*, takes precedence. Thus, according to the Minister, the Law on government information (public access) does not apply to those 13 pages of document No 75.4. The Minister points also to the explanatory memorandum regarding the amendments made to the Law on aviation in order to implement the Occurrence Reporting Regulation. Confidentiality and protection are seen in that memorandum as essential prerequisites for making reported information available. The mere fact that the Minister did not, in good time, take up the opportunity offered by the District Court to remedy deficiencies cannot, in his opinion, justify ignoring this special rule under which disclosure is not permitted.
- 11 AVROTOS argues that document No 75.4 concerns aggregated information on occurrences collected by parties in the sector. Because aggregated information does not contain specifics or details, Article 15(1) of the Occurrence Reporting Regulation does not apply. Indeed, the preamble to the Occurrence Reporting Regulation encourages disclosure of such aggregated information: it gives an insight into aviation safety at and around Schiphol, and the public has a right to know about it.

**Succinct presentation of the reasoning in the request for a preliminary ruling**

- 12 The present reference for a preliminary ruling has strong parallels with Case C-451/22 (the referring court seeks a joinder with that case). It poses the same questions as in C-451/22, but adds two more sub-questions on aggregated information. The difference from C-451/22 is that, in the present case, the Minister wishes to keep the aggregated information confidential.
- 13 The question arises whether the Law on aviation is a *lex specialis* in relation to the Law on government information (public access), and/or whether the Law on aviation implements the directly applicable Occurrence Reporting Regulation. The referring court doubts, just as in C-451/22, whether the Occurrence Reporting Regulation requires all information on occurrences to be kept out of the public domain.

The precise scope of the concept of ‘details of occurrences’ is not clear. Nor is it clear what is to be understood by ‘appropriate confidentiality’ with respect to aggregated information.

The 13 pages of document No 75.4 that are still undisclosed may, according to the referring court, be considered ‘aggregated information’. That court wishes to learn specifically what elements of aggregated information are relevant for the purpose of determining whether details of occurrences exist and how appropriate confidentiality can be ensured for them.

- 14 It is possible that the Court of Justice will rule that Article 15(1) of the Occurrence Reporting Regulation precludes application of the provision contained in Articles 7.1 and 7.2 of the Law on aviation to the effect that no information at all from reports may be disclosed. In that case, the regime of the Law on aviation that derogates from the Law on government information (public access) would not be applicable, and the question is whether the Minister erred in not examining the case under the Law on government information (public access). The question then is whether the competent national authority is permitted to apply a general national rule on disclosure.