

Case C-451/22

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:

7 July 2022

Referring court:

Raad van State (Netherlands)

Date of the decision to refer:

29 June 2022

Applicants:

RTL Nederland BV

RTL Nieuws BV

(hereinafter jointly referred to as: ‘RTL’)

Subject matter of the main proceedings

The proceedings concern a request by RTL, a news organisation, for access to various documents relating to the downing of flight MH17 over Ukraine on 17 July 2014, including all reports by the ‘European Coordination Centre for Accident and Incident Reporting Systems’ (‘Eccairs’) relating to Ukraine for 2014.

Subject matter and legal basis of the request for a preliminary ruling

The request concerns the extent to which a news organisation can receive information from a database covered by Regulation No 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation¹ (‘the Occurrences

¹ 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).

Regulation’), and if so, in what form. Specifically, the referring court doubts whether the absolute prohibition on the disclosure of such information laid down in national law is compatible with Article 15 of the Occurrences Regulation and with the right to freedom of expression and information enshrined in Article 11 of the Charter of Fundamental Rights of the European Union and in Article 10 of the ECHR.

Article 267 TFEU

Questions referred for a preliminary ruling

- ‘1. What should be understood by details of ‘occurrences’ and ‘appropriate confidentiality’ as referred to in Article 15(1) of the Occurrences 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 of the ECHR?
2. Is Article 15(1) of the Occurrences Regulation, in the light of the right to freedom of expression and information enshrined in Article 11 of the EU Charter and Article 10 of the 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?
3. If the answer to Question 2 is 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?
4. When the general national rule on disclosure is applied, does it make any difference whether the information in question is contained in the national database or is information from or about reports contained in other documents, for example, policy documents?’

Provisions of EU 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, 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), recitals 33 and 45 of the preamble, and Articles 15 (Confidentiality and appropriate use of information) and 16 (Protection of the information source).

Netherlands law (as applicable on 17 April 2019, the date on which the Minister rejected RTL's request by decision):

- Wet luchtvaart (Law on Aviation), Article 1(1) and Articles 7(1) and 7(2).
- Wet openbaarheid van bestuur (Law on Government Information (Public Access)), Article 2(1), Article 3, Article 7(1), and Article 10(2).

Succinct presentation of the facts and procedure in the main proceedings

- 1 As RTL wishes to ascertain what the Netherlands authorities knew about occurrences surrounding the disaster involving flight MH17, it requested the minister van Justitie en Veiligheid (Minister for Justice and Security) by letter of 10 January 2018, pursuant to the Wet openbaarheid van bestuur ('Wob'), to provide various documents relating to the downing of this flight over Ukraine on 17 July 2014, including the 'Eccairs reports of 2014 relating to Ukraine', which are relevant to the main proceedings.
- 2 The competent minister rejected RTL's request by decision of 17 April 2018. According to the Minister, in view of Article 10 of the Occurrences Regulation, the information in Eccairs may only be provided to the categories of interested parties listed in Annex II to the Occurrences Regulation. These are persons and organisations from the aviation sector and persons and organisations who investigate aviation safety. RTL does not belong to these categories.
- 3 The Minister upheld the rejection of the request on appeal. The Minister added to the reasons for the rejection that Article 7(2) of the Wet luchtvaart also precludes the provision of the requested information.
- 4 The Rechtbank (District Court) dismissed RTL's appeal against that ruling as unfounded, considering that a special regime applies to Eccairs reports – namely, the secrecy of the information requested as regulated by Article 7(2) of the Wet luchtvaart and Article 15 of the Occurrences Regulation – which is a *lex specialis* in relation to the Wob. According to the Rechtbank, RTL's attempt to rely on Article 10 of the ECHR does not succeed either. In the case of the latter, intervention is prescribed by law. Furthermore, RTL has not shown that very special circumstances exist that would render such intervention unjustified.

- 5 RTL lodged an appeal against that judgment with the referring court, the Raad van State (Council of State, the Netherlands).

The essential arguments of the parties in the main proceedings

- 6 RTL argues that the Minister may not base the refusal of information simply on the Occurrences Regulation and the Wet luchtvaart as *lex specialis* in relation to the Wob.
- 7 After all, the Occurrences Regulation does not contain an outright prohibition on disclosure. According to RTL, the strict disclosure regime of Article 15 of the Occurrences Regulation is mainly aimed at protecting the reporters and the persons who are mentioned in the occurrence reports. RTL deduces this from the term ‘details’ (the details of occurrences must be treated confidentially), from the prohibition on using the information to establish blame or liability and from the protection regime for certain persons in Article 16 of this Regulation.
- 8 RTL also states that it wants to use the information requested in order to be able to verify whether the Netherlands has taken (in)sufficient (rapid) action after safety warnings had been issued. RTL maintains that it thereby fulfils the purpose of Article 15(2) of the Occurrences Regulation, namely, the maintenance or improvement of aviation safety.
- 9 According to RTL, if a *lex specialis* situation must be considered to exist, this only applies to the integral version of a document. According to RTL, the limited provision of information is thus still possible. RTL relies mainly on Article 10 of the ECHR in this respect.

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

- 10 According to Article 15(1) of the Occurrences Regulation, the Member States must take the necessary measures to ensure appropriate confidentiality of the details of occurrences which they have received.

Articles 7(1) and 7(2) of the Wet luchtvaart serve to implement the Occurrences Regulation. It follows from these articles that *no information* relating to occurrences reported to the Minister may be disclosed. The law in question is a *lex specialis* in relation to the Wob. The referring court doubts whether the Wet luchtvaart correctly implements the provisions on the confidentiality of information set out in the Occurrences Regulation. It is of the view that it is not clear from the wording of the Occurrences Regulation whether it imposes an obligation to keep *all information* about occurrences out of the public domain. It refers in that regard to the judgment of the Court of Justice of 30 March 2017 in the *Lingurár* case, ECLI:EU:C:2017:244, in which the Court held in paragraph 18 that Member States may adopt implementing measures for a regulation provided that they do not thereby obstruct its direct applicability or conceal its nature as an

act of EU law; that they specify that they are acting in exercise of a discretion conferred on them under that regulation; and that they adhere to the parameters laid down thereunder.

- 11 Article 16(8) of the Occurrences Regulation does allow Member States to establish a higher level of protection for reporters or for persons mentioned in occurrence reports. The referring court wonders how far that higher level may extend and whether paragraph 8 may be used as a pretext for not disclosing any information at all. In that regard, the referring court points out that Article 15 of the Occurrences Regulation must be interpreted in the light of the freedom of expression and information protected by Article 10 of the ECHR and Article 11 of the EU Charter. RTL, as a so-called public watchdog (see in that regard the judgment of the European Court of Human Rights of 8 November 2016, ECLI:CE:ECHR:2016:1108JUD001 803011, *Magyar Helsinki Bizottság v. Hungary*), wishes to inform the public about the disaster involving flight MH17. Whereas Article 10 of the ECHR does not require that all information be made public, an absolute prohibition on disclosure could, according to the referring court, be at odds with freedom of expression and information.
- 12 It is against that background that the referring court sees cause to refer the first and second questions for a preliminary ruling.
- 13 If the answer to the second question referred is in the negative and it is held that Article 15(1) of the Occurrences Regulation precludes the rules laid down in Articles 7(1) and 7(2) of the Wet luchtvaart, the referring court takes the view that it was not the Wet luchtvaart but rather, the Wob that was applicable, in particular the general national rules on disclosure. In that case, it questions how general national rules on disclosure are to be applied in the present situation. That is the subject of the third and fourth questions referred for a preliminary ruling.