JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

9 September 2008 *

In Case T-403/05,

MyTravel Group plc, established in Rochdale, Lancashire (United Kingdom), represented by D. Pannick, QC, A. Lewis, Barrister, M. Nicholson, S. Cardell and B. McKenna, Solicitors,

applicant,

v

Commission of the European Communities, represented initially by P. Hellström and P. Costa de Oliveira, and subsequently by X. Lewis and P. Costa de Oliveira, acting as Agents,

defendant,

ACTION for the annulment of the decisions of the Commission of 5 September 2005 (D(2005) 8461) and 12 October 2005 (D(2005) 9763) rejecting a request by the applicant for access to certain preparatory documents relating to Commission Decision 2000/276/EC of 22 September 1999 declaring a concentration to be incompatible with the common market and the EEA Agreement (Case IV/M.1524 — Airtours/First Choice) (OJ 2000 L 93, p. 1) and to documents drawn up by the Commission's

* Language of the case: English.

services following the annulment of that decision by the judgment of the Court of First Instance in Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber, Extended Composition),

composed of J. Azizi, President, J.D. Cooke, E. Cremona, I. Labucka and S. Frimodt Nielsen (Rapporteur), Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing of 29 April 2008,

gives the following

Judgment

Legal framework

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) defines the principles, conditions and limits for the right of access to the documents of those institutions laid down by Article 255 EC.

2 Article 2(1) of that regulation provides:

‘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 Article 4(2) and (3) of Regulation No 1049/2001 states:

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

— …,

— 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 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.'

Facts

1. *The Airtours/First Choice concentration following the Airtours judgment*

4 On 29 April 1999, the applicant, the United Kingdom travel company Airtours plc, which has since been renamed MyTravel Group plc, announced its intention to acquire the whole of the issued share capital of First Choice plc, one of its competitors in the United Kingdom, on the stock market. On the same date, Airtours notified the proposed concentration to the Commission with a view to obtaining a approval decision on the basis of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrected version OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1).

5 By Decision 2000/276/EC of 22 September 1999 (Case IV/M.1524 — Airtours/First Choice) (OJ 2000 L 93, p. 1) ('the Airtours decision'), the Commission declared that concentration incompatible with the common market and with the Agreement on the European Economic Area by virtue of Article 8(3) of Regulation No 4064/89. Airtours brought proceedings for the annulment of that decision.

6 By judgment of 6 June 2002 in Case T-342/99 *Airtours* v *Commission* [2002] ECR II-2585 ('the *Airtours* judgment'), the Court of First Instance annulled the Airtours decision.

7 Following the *Airtours* judgment, the Commission established a working group comprising officials of the Directorate-General (DG) for Competition and the legal service in order to consider whether it was appropriate to bring an appeal against that judgment and to assess the implications of that judgment on the procedures for the control of concentrations or in other areas. The report of the working group was presented to the Member of the Commission responsible for competition on 25 July 2002, that is to say, prior to the expiry of the period allowed for bringing an appeal.

8 On 18 June 2003, the applicant brought an action for damages seeking compensation for the loss suffered by it by reason of the Commission's handling and assessment of the concentration between Airtours and First Choice (Case T-212/03 *MyTravel* v *Commission*) ('the action for damages').

2. *The request for access to documents*

9 By letter of 23 May 2005, the applicant made a request to the Commission for access to a number of documents pursuant to Regulation No 1049/2001. The documents referred to were the report of the working group ('the report'), the documents relating to the preparation of that report ('the working papers') and the documents contained in the file relating to the Airtours/First Choice case on which the report was based or which were referred to in it ('the other internal documents').

10 In view of the number of documents requested, the Commission conferred with the applicant with a view to finding a fair solution in accordance with Article 6(3) of Regulation No 1049/2001. That solution involved separate treatment being given to, on the one hand, the report and working papers and, on the other, to the remaining internal documents.

The report and the working papers (the first decision)

11 By letter of 12 July 2005, the Commission informed the applicant that the report and the working papers could not be communicated to it, because they were covered by the exceptions to the public's right of access to Commission documents laid down in the second and third indents of Article 4(2) and in the second subparagraph of Article 4(3) of Regulation No 1049/2001, there being no overriding public interest in their disclosure.

12 By letter of 19 July 2005, the applicant made a confirmatory application in terms of Article 7(2) of Regulation No 1049/2001.

13 By letter of 5 September 2005 (D(2005) 8461) ('the first decision'), the Commission granted full access to three documents (the work plan, the work calendar and the mandate of the working group) and partial access to two other documents (documents 13 and 16). As to the remainder of the documents requested, the letter refused to furnish the report and the other working papers, and confirmed the reasons previously given.

14 In the first decision, the Commission invoked the second subparagraph of Article 4(3) of Regulation No 1049/2001 as a basis for its refusal to grant access to the whole of the report and to certain of the working papers (points I.3 and II and the annex entitled 'Inventory of the "Working Papers"'). It stated that the report was an internal document which reflected the assessment of its services of the possibility of bringing an appeal against the *Airtours* judgment and of reviewing its investigation procedures in the area of concentrations. According to the Commission, disclosure of the report to the public would seriously undermine its decision-making process, since the freedom of the authors of such documents would be threatened if, when drafting them, they had to take into account the possibility of their opinions being disclosed to the public, even after a decision had been taken on the basis of their assessments.

15 The Commission also relied on the second indent of Article 4(2) of Regulation No 1049/2001 as a basis for its refusal to grant access to sections B and F.1 of the report and to certain working papers (points I.1 and II of the first decision and the annex entitled 'Inventory of the "Working Papers"' to that decision). According to the Commission, those sections contained an assessment of the possibility of bringing an appeal against the *Airtours* judgment, at a time when the applicant had brought an action for damages which covered the Commission's findings in the Airtours decision. Disclosure of those sections at that stage of the action for damages could therefore harm the Commission's right to argue its case before the Court in a serene atmosphere and free from all external influences. In reply to an argument put forward by the applicant in the confirmatory application, the Commission stated that sections B and F.1 of the report were indeed drawn up 'solely for the purposes of specific court proceedings', namely the proceedings in the *Airtours* case, to adopt the formula laid down in Case T-92/98 *Interporc* v *Commission* [1999] ECR II-3521.

16 The Commission also relied on the third indent of Article 4(2) of Regulation No 1049/2001 in order to justify the refusal to grant access to sections C, D, E and F.2 of the report and certain of the working papers (points I.2 and II of the first decision and the annex entitled 'Inventory of the "Working Papers"' to that decision). According to the Commission, those sections were the result of an internal audit of the existing procedures concerning merger investigations, carried out in order to put forward recommendations intended to improve those procedures and to reorganise the Commission's services. The Commission stated that disclosure of such information would hamper its ability to adopt reforms in the competition sector and that those recommendations could not have been formulated if it had not been not possible to conduct that audit in an independent way. It pointed out that that exception remained applicable after the audit had been completed, since it protected both the conduct of the audit and its purpose.

17 The Commission also stated that the exceptions referred to above applied unless there was an overriding public interest in disclosure of the document (point IV of the first decision). It stated that that overriding public interest had to outweigh the interest protected by the exception to the right of access. According to the Commission, the applicant had not put forward any argument that would substantiate such an overriding public interest. On the contrary, its interest in using the documents in question concerned the exercise of its legal rights in the action for damages pending before the Court of First Instance, which fell instead to be classified as an interest

of a private nature. Consequently, the specific interests invoked by the Commission outweighed the general interest in the disclosure of the documents.

The other internal documents (the second decision)

18 By letter of 1 August 2005, the Commission replied to the request for access to the other internal documents. Some of those documents were disclosed in part, while access to other documents was refused on the grounds set out in points II.1 to II.9 of that letter.

19 By letter of 5 August 2005, the applicant made a confirmatory application pursuant to Article 7(2) of Regulation No 1049/2001.

20 By letter of 12 October 2005 (D(2005) 9763) ('the second decision'), the Commission granted further partial access to a number of documents referred to in the applicant's request. The Commission confirmed its initial assessment as regards the refusal to grant access to the other documents.

21 In the second decision, the Commission relied on the second subparagraph of Article 4(3) of Regulation No 1049/2001 and the third indent of Article 4(2) of the regulation, as a basis for its refusal to grant access to the following documents:

— the drafts of the decision taken under Article 6(1)(c) of Regulation No 4064/89, the statement of objections and the final decision in the Airtours/First Choice case ('the draft texts') (point II.6 of the second decision and the documents mentioned in section 6 of the first annex to that decision), on the basis that

these were internal documents of a preparatory nature, disclosure of which to the public would adversely affect the decision-making process in the area of the control of concentrations;

— the notes from the Director General of DG Competition to the Member of the Commission responsible for competition matters ('the notes to the Commissioner') (point II.1 of the second decision and documents 1.1 to 1.8 in the first annex to that decision), since those notes contained opinions for internal use in preparation for the Airtours decision and their disclosure to the public would curtail the capacity of DG Competition to express its views and the capacity of the Members of the Commission to adopt a well-reasoned decision. The Commission stated that that analysis was not affected by the fact that the Airtours decision had already been adopted, since disclosure of those documents to the public could still affect the Commission's decision-making process as regards similar cases (for example, the refusal to communicate the statement of objections in the EMI/Time Warner case allowed the Commission not to be subject to external pressures when it had to deal with the BMG/Sony case, which concerned the same sector);

— the notes from DG Competition to other Commission services, including the legal service, which supplied and asked for the advice of the addressees on the draft texts ('the notes to the other services'). The Commission made a distinction, in that regard, between the copies of those notes which were sent to the legal service (documents 2.1 to 2.5) and the copies which were sent to the other Commission services (documents 4.1 to 4.5). As regards the copies sent to the legal service, the Commission stated that those documents were closely connected with the legal advice which was provided on the basis of them and that their disclosure would have the result of revealing essential parts of that advice; such disclosure would seriously undermine the Commission's decision-making process (point II.2 of the second decision). As regards the copies sent to the other Commission services, the Commission stated that those documents were drawn up for the purposes of internal consultations and that they illustrated the collective nature of the decision-making process. The Commission indicated that it was therefore necessary to protect the decision-making process from being seriously undermined, which would be the case if such information were to be disclosed to the public (point II.4 of the second decision);

— the notes from other Commission services supplied in reply to the five notes from DG Competition referred to above, setting out the views of the services concerned of the draft texts ('the notes in reply from the services other than the legal service') (documents 5.1 to 5.10). The Commission stated that those notes formed part of the inter- and intra-service consultation which was indispensable to its decision-making process. It stated that the capacity of those services to express their views was fundamental to the control of concentrations and that that capacity would be curtailed if, when drafting that type of note, the services concerned had to take account of the possibility that their opinions could be disclosed to the public, even after the case had been closed (point II.5 of the second decision).

22 In the second decision, the Commission also invoked the application of the second indent of Article 4(2) of Regulation No 1049/2001 as regards the five notes from the legal service in reply to the five notes from DG Competition referred to above ('the notes in reply from the legal service') (point II.3 and documents 3.1 to 3.5). Access to those documents was refused by the Commission because they set out the advice of the legal service on the draft texts. The Commission stated that disclosure of that legal advice could give rise to uncertainty as regards the lawfulness of decisions in the area of the control of concentrations, which would have a negative effect on the stability of the Community legal order and the proper functioning of the Commission (Case T-84/03 *Turco* v *Council* [2004] ECR II-4061, paragraphs 54 to 59). It stated that each of the notes in reply from the legal service had been subject to individual examination and that the fact that no partial access could be granted did not indicate that the protection of legal advice had been used as a blanket exception.

23 In addition, the Commission referred in the second decision to the special situation of certain internal documents, to which partial or total access was refused. These included, in particular, the report of the Hearing Officer in the Airtours/First Choice case, the note from DG Competition to the Advisory Committee and a note to file on a site visit to First Choice.

24 Lastly, the Commission stated that the exceptions referred to above applied unless there was an overriding public interest in the disclosure of the document (point V

of the second decision). It stated that, in the present case, the applicant had not put forward any arguments that would establish an overriding public interest. According to the Commission, the prevailing interest in this case lay instead in protecting its decision-making process in similar cases, as well as its interest in protecting legal advice.

Procedure and forms of order sought

25 By application lodged at the Registry of the Court of First Instance on 15 November 2005, the applicant brought the present action.

26 By decision of 6 December 2007, the case was assigned to a chamber sitting in extended composition.

27 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure.

28 The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 29 April 2008.

29 The applicant claims that the Court should:

— annul the first decision;

— annul the second decision;

— order the Commission to pay the costs.

30 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

1. *Preliminary observations*

31 It is important to note that the right of access to Commission documents exists as a matter of principle and that a decision to refuse access is valid only if it is based on one of the exceptions laid down in Article 4 of Regulation No 1049/2001.

32 In view of the objectives pursued by Regulation No 1049/2001, in particular the fact noted in recital 2 that the public right of access to the documents of the institutions derives from the democratic nature of those institutions and the fact that, as stated in recital 4 and in Article 1, the purpose of the regulation is to give the public the widest possible right of access, the exceptions to that right set out in Article 4 of the regulation must be interpreted and applied strictly (Case C-64/05 P *Sweden* v *Commission and Others* [2007] ECR I-11389, paragraph 66, and Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* [2006] ECR II-2023, paragraph 84).

33 In that regard, it is also apparent from the case-law that the mere fact that a document concerns an interest protected by an exception cannot of itself justify application of that exception. Such application may, in principle, be justified only if the institution has previously assessed, first, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, whether there was no overriding public interest in disclosure. On the other hand, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. That examination must be apparent from the reasons for the decision (Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 69).

34 It is in the light of that case-law that the action should be examined.

2. *The first decision, relating to the report and the working papers*

35 In the first decision, the Commission relied on three exceptions laid down by Regulation No 1049/2001 as the basis for its refusal to grant access to the report and certain documents (see paragraphs 14 to 16 above). The first of these exceptions was based on the second subparagraph of Article 4(3) (exception relating to the protection of the decision-making process), the second on the third indent of Article 4(2) (exception relating to the protection of inspections, investigations and audits), and the third on the second indent of Article 4(2) (exception relating to the protection of court proceedings and legal advice).

The exception relating to the protection of the decision-making process

Arguments of the parties

36 The applicant submits, first of all, that the exception relating to the protection of the decision-making process cannot be applied to the whole of the report without

contradicting the objective of Regulation No 1049/2001, which, subject to certain very limited cases, is to render that process transparent. In that regard, it invokes the principle that the exceptions to the right of access to documents fall to be strictly construed; the fact that the exception at issue applies only where disclosure of the document would 'seriously undermine' the decision-making process; and the principle that the presumption in favour of disclosure is stronger where the decision in question has been adopted (point 3.4.4 of Commission report of 30 January 2004 on the implementation of the principles of Regulation No 1049/2001 (COM(2004) 45 final)) ('the report on the implementation of the regulation'). Having regard to the circumstances of the case and the Commission's decision not to bring an appeal against the *Airtours* judgment, the Commission cannot contend that disclosure of the report would seriously undermine its capacity to take future decisions in similar circumstances. Internal reviews of administrative practices should not be conducted away from the threat of public scrutiny and the independence of that process would not be impaired by the disclosure of its results once the review had been completed. To refuse to grant access to that type of documents suggests that the Commission has not struck a genuine balance between the interest of the citizen in obtaining access to them and its own interest in maintaining the confidentiality of its deliberations.

37 The Commission states that the exception at issue allows it not to divulge documents relating to its internal consultations and deliberations where that is necessary in order to safeguard its ability to carry out its tasks (recital 11 to Regulation No 1049/2001). It submits that disclosure of the documents requested by the applicant would, in the present case, 'seriously undermine' the decision-making process.

38 In addition, and in general terms, the applicant argues that even if it were to be the case that one of the exceptions invoked in the first decision or the second decision could apply, disclosure of the documents requested is none the less necessary by virtue of an overriding public interest. In that regard, it submits that the severity of the criticisms made by the Court of First Instance in the *Airtours* judgment prompted the Commission to conduct an internal inquiry in order to draw the lessons to be learned from that judgment and to determine the changes to be made to its decision-making practice. Against that background, there is an overriding public interest in understanding what happened, how it could have been prevented and what was done in order to avoid any future repetition. Transparency allows the public to ensure that the steps taken to cure a deficiency on the administration's part are adequate and appropriate. The applicant also maintains that there is an overriding public interest in the sound administration of justice. In the present case, the non-disclosure of the

documents in question would have an impact on the determination of the applicant's right to compensation for the damage suffered as a result of the Commission's actions. The policy of the Commission, as an institution, should be to compensate for the damage wrongly caused by its actions.

39 The Commission contends that more weight should be given to an overriding public interest than an interest protected by the exception to the right of access. In the present case, the applicant's interest in using the documents requested in the context of its action for damages is, in fact, of a private nature. What is more, it is in the context of the action for damages and not that of the present proceedings that the relevance of those documents for the exercise of the defendant's rights of defence falls to be considered.

Findings of the Court

40 Under the second subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned is to 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 of the document.

41 In the present case it is necessary first of all to ascertain whether the Commission committed an error of assessment in taking the view that, pursuant to the provision referred to above, disclosure of the report and the working papers in respect of which total or partial access was not granted would seriously undermine its decision-making process. If relevant, it will then be necessary to examine whether the Commission committed an error of assessment in its analysis of the existence of an overriding public interest.

— The extent of undermining of the decision-making process by disclosure of the report

42 In the first place, it is clear that the report is a 'document containing opinions for internal use as part of deliberations and preliminary consultations within the [Commission]', for the purposes of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

43 It is apparent from the mandate of the working group, which was communicated to the applicant as an annex to the first decision, that the group was created in order to analyse the different stages in the administrative and judicial procedures in the Airtours/First Choice case and to propose appropriate conclusions (point A 'Objectives'). In accordance with the mandate, the working group was required to examine the following issues and indicate any possible points of disagreement with the Court: '(1) is an appeal against the [*Airtours*] judgment appropriate? (2) which weaknesses … has the judgment revealed, in particular in the administrative procedure leading to the decision? (3) which conclusions can be drawn from this case with respect to internal procedures … ? (4) can lessons be learned from any other activity areas of DG Competition? (5) which aspects of substantive competition policy addressed in the [*Airtours*] judgment deserve further examination in ongoing or future reviews … ? (6) are there implications on other competition cases pending before the Court?' (point C 'Issues to be examined'). The mandate also stated that the report was to be submitted for discussion with the Member of the Commission responsible for competition matters (point D 'Time Schedule'), which was done on 25 July 2002, that is to say, before the expiry of the period for bringing an appeal.

44 Thus, the whole of the report concerns opinions for internal use as part of deliberations and preliminary consultations within the Commission. It is accordingly, as such, capable of falling within the scope of application of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

45 In the second place, regardless of whether or not it is well founded, the applicant's argument that the presumption in favour of disclosure is stronger where the decision envisaged in the document at issue has been adopted (see paragraph 36 above), cannot rule out all possibility of relying on the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001. It is apparent from the very wording of that provision that the exception in question may be relied upon 'even after the decision has been taken'. Therefore, the mere fact that the Commission did not bring an appeal against the *Airtours* judgment and that a variety of recommendations contained in the report were implemented (point I.3 of the first decision) does not of itself lead to the conclusion that disclosure of that report cannot be, or can no longer be, liable seriously to undermine that institution's decision-making process. Consequently, that argument must be rejected as being irrelevant.

46 Point 3.4.4 of the report on the implementation of the regulation, which the applicant has relied upon in support of its line of argument, does not alter that assessment. In that report, the Commission was attempting to produce a first qualitative evaluation of the application of Regulation No 1049/2001 in the light of the principles of the transparency policy pursued by the Community institutions (report on the implementation of the regulation, 'Foreword', p. 2). With regard to the second subparagraph of Article 4(3) of the regulation, the Commission states in point 3.4.4 that the existence of serious harm is particularly difficult to establish when refusal concerns a decision that has been adopted, in so far as the decision-making process in question has been completed and the disclosure of a preparatory document drawn up for internal deliberations concerning that matter should, in such a case, seriously undermine the institution's capacity to take future decisions, which could risk becoming too abstract. Nevertheless, that statement does not mean that the Commission means thereby to rule out the possibility of relying on the exception in question where it can establish that disclosure of the report would seriously undermine its decision-making process, even if certain decisions have been taken on the basis of the contents of that document.

47 In the third place, as regards the nature of a serious threat to the decision-making process, the Commission states, in essence, in the first decision that disclosure of the report would call into question the freedom of its authors to express their views and the opinions and assessments of those authors would be disclosed to the public, even though it had been their intention to put forward their views only to the addressee of the report (see paragraph 14 above).

48 In the present case, it is apparent from the working group's mandate communicated to the applicant as an annex to the first decision (see paragraph 42 above) that the authors were requested to put forward their views, even critical ones, on the administrative procedure followed at the time the Airtours/First Choice concentration was examined and to comment freely on the *Airtours* judgment in the context of a possible appeal against it. That work of analysis, reflection and criticism was carried out for internal purposes and was not intended to be brought to the attention of the public, because it was designed to be submitted for discussion purposes to the Member of the Commission responsible for competition matters. It is therefore in the light of that report that the latter was able to reach a decision on issues, such as the decision to bring an appeal or the decision to propose possible improvements to the administrative procedure applying to the control of concentrations or to other areas in the field of competition law, which fall within his jurisdiction or that of the Commission and not that of the working group.

49 Furthermore, unlike the position where the Community institutions act as legislators, where wider access to documents will be authorised pursuant to recital 6 to Regulation No 1049/2001, the report falls within the purely administrative functions of the Commission. Those who were primarily concerned by the appeal proceedings that were considered and by the improvements discussed in the report were the undertakings affected by the Airtours/First Choice concentration and by concentrations in general. Consequently, the interest of the public in obtaining access to a document pursuant to the principle of transparency, which seeks to ensure greater participation of citizens in the decision-making process and to guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, does not carry the same weight in the case of a document drawn up in an administrative procedure intended to apply rules governing the control of concentrations or competition law in general, as in the case of a document relating to a procedure in which the Community institution acts in its capacity as legislator.

50 In those circumstances, the Commission is correct to conclude that disclosure of the report to the public would seriously undermine the right of one of its Members to the frankly-expressed and complete views of its own services as to the steps to be taken in response to the *Airtours* judgment.

51 Disclosure of that document in this case would carry the risk not only that the possibly critical opinions of Commission officials might be made public, but also that the content of the report — which is a preparatory document containing the views and recommendations of the working group — could be compared with the decisions ultimately taken on those points by the Member of the Commission responsible for competition matters or within the Commission and, accordingly, that that institution's internal discussions would be disclosed. That would risk seriously undermining the decision-making freedom of the Commission, which adopts its decisions on the basis of the principle of collegiality and whose Members must, in the general interest of the Community, be completely independent in the performance of their duties.

52 Furthermore, if that report were to be disclosed, it would mean that the authors of a report of such a kind would take that risk of disclosure into account in the future, to the point when they might be led to practise self-censorship and to cease putting forward any views that might involve the addressee of the report being exposed to risk. The result would be that the Commission could no longer benefit from the frankly-expressed and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions as regards whether an appeal should be brought against a judgment of the Court of First Instance or the improvement of its administrative procedures relating to the control of concentrations or, more broadly, competition law.

53 In the present case, it is also important to note that the Member of the Commission responsible for competition, as addressee of the report, must be able freely to assess the views put forward in the report, taking into account factors that may go beyond the scope of the rules in force, as interpreted by the Commission services and the Community judicature. This means that it may not be possible to implement a proposal for reasons connected with the political priorities of the Commission or with the availability of resources.

54 The Court also holds that the risk of the decision-making process being seriously undermined in the present case, were the report to be disclosed, is reasonably foreseeable and not purely hypothetical. If it were to be accepted that such reports should not be confidential as regards the public and having regard to the risk of their being

disclosed, it appears logical and probable that the Member of the Commission responsible for competition would be induced to cease making requests for the written, and potentially critical, views of his advisers on issues falling within his jurisdiction or that of the Commission, including as to whether an appeal should be brought against a judgment of the Court of First Instance annulling a decision of the Commission relating to the control of concentrations. Merely to hold oral and informal discussions, which would not require the drawing up of a 'document' within the meaning of Article 3(a) of Regulation No 1049/2001, would cause significant damage to the effectiveness of the Commission's internal decision-making process, especially in areas in which it is required to carry out complex legal, factual and economic assessments and to examine particularly large amounts of documents, as in the case of the control of concentrations. It follows that it is essential that there be a written analysis, by the services responsible, of the administrative file and the proposals for a decision to be submitted, in order to ensure that the issues are considered and that a decision is taken in full awareness of all the essential elements and in the proper form, first of all, by the Member of the Commission responsible for competition matters and, thereafter, on the basis of consultation between the different services affected within the Commission. Therefore, in accordance with recital 11 to Regulation No 1049/2001, the Community institutions must be allowed to protect their internal consultations and deliberations where, as in the present case, it is necessary in the public interest in order to safeguard their ability to carry out their tasks, in particular when they are exercising their administrative decision-making powers, as in the case of the control of concentrations.

55 Consequently, the applicant's complaint that disclosure of the whole of the report would not seriously undermine the Commission's decision-making process must be rejected.

— The extent of undermining of the decision-making process by disclosure of working papers 4 to 14 and 16 to 19

56 As regards the working papers in respect of which access was refused in whole or in part by the Commission in the first decision on the basis of the exception relating to the protection of the decision-making process, it must be observed that the applicant

simply indicates that the arguments put forward in relation to the report are also applicable to the documents used by the working group.

57 In that regard, the inventory which forms the annex to the first decision shows that the documents in respect of which the exception laid down by the second subparagraph of Article 4(3) of Regulation No 1049/2001 was invoked are as follows:

— documents 4 and 5, which comprise a revised report and a note of analysis prepared by the sub-group responsible for the analysis and assessment of the *Airtours* judgment, including any possible points of disagreement with the judgment, and of the appropriateness of bringing an appeal;

— documents 6, 7 and 8, which comprise notes of analysis of the *Airtours* judgment prepared by an official of the legal service, an official of DG Competition and a hearing officer, respectively, each of whom was a member of the sub-group concerned;

— document 9, which comprises a discussion paper on the internal organisation and possible improvements, prepared by the sub-groups responsible for examining any weaknesses on the Commission's part and the appraisal of proposals for improvement;

— document 10, which comprises an interim report prepared by one of those sub-groups, and documents 11 to 13, which are annexes to that report (partial access was granted to document 13);

— document 14, which sets out the questions for the interviews carried out with the Airtours team;

— document 16 (to which partial access was granted), which comprises a background document used by one of the sub-groups;

— document 17, which comprises proposals for improvement and the provisional report of 25 June 2002 prepared by one of the sub-groups;

— document 18, which comprises a note entitled 'Lessons for other activity areas' prepared by the sub-group responsible for considering the implications for other areas of competition policy;

— document 19, which comprises a provisional report of 26 June 2002, prepared by the sub-group responsible for the identification of substantive policy questions.

58 The Commission also stated in the first decision that the working papers were drawn up in order to prepare the report and that the provisional reports of the different sub-groups were often reproduced in it word-for-word. In addition, the Commission mentioned in the first decision that each of the working papers had been examined individually.

59 As a result, the Court considers that, since the report is protected under the second subparagraph of Article 4(3) of Regulation No 1049/2001, the documents which

enabled it to be produced and which comprise preparatory assessments or provisional conclusions for internal use, as is shown by the inventory, also come within that exception. The Commission was accordingly well founded in relying on that exception in the first decision in order to reach the view that total or partial access to working papers 4 to 14 and 16 to 19 would seriously undermine its decision-making process.

— Whether an overriding public interest exists

60 Regulation No 1049/2001 provides that both the exceptions laid down by Article 4(2) and the exceptions laid down by Article 4(3) are not to apply where disclosure of the document in question is justified by an 'overriding public interest'.

61 In the present case, the applicant puts forward the same arguments in relation to the first decision and the second decision, without making any distinction between the different categories of documents concerned and the exception invoked. Essentially, it claims that the need to understand what took place and what was done by the Commission, as well as the need to ensure the sound administration of justice constitute overriding public interests justifying disclosure of those of the documents requested to which access was refused.

62 However, those arguments do not allow the overriding public interest required by Regulation No 1049/2001 to be established to the requisite legal standard, nor do they allow it to be ascertained whether, on setting that alleged overriding public interest against the interest in maintaining the confidentiality of the documents as regards the public under the exceptions examined above, the Commission ought to have reached the conclusion that those documents should none the less be disclosed.

63 As regards the need to understand what took place, the applicant does not explain either the reasons for which it takes the view that that alleged need constitutes an overriding public interest within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001, or in what way that alleged interest should mean that the Commission had, after setting that interest against the general interest in protecting the confidentiality of the documents in question, to disclose those documents.

64 As regards the need to understand what the Commission did after the *Airtours* judgment, it must be pointed out that in the first decision and the second decision the Commission gave the reasons for which it took the view that it was entitled to rely on the exception laid down by the second subparagraph of Article 4(3) of Regulation No 1049/2001 in order to object to disclosure of the report, of certain working papers and of the other internal documents. The applicant has not explained the reasons for which its own interest, which bears on its individual position in the dispute in Case T-212/03, in understanding what the Commission did subsequent to the *Airtours* judgment could give rise to such an overriding public interest. In any event, even if it were to be assumed that such an interest were to exist, the applicant has neither explained nor established in what way that interest was capable of prevailing over the general interest in the protection of the confidentiality of the documents in question in any weighing up of those two interests.

65 As regards the need to obtain disclosure of the documents requested under the overriding interest in the sound administration of justice, it must be pointed out that that argument seeks, in substance, to assert that those documents would allow the applicant to argue its case better in the action for damages. That objective does not, however, of itself, constitute an overriding public interest in disclosure which is capable of prevailing over the protection of confidentiality provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001. Having regard to the general principle of access to documents laid down by Article 255 EC and recitals 1 and 2 to the regulation, that interest must be objective and general in nature and must not be indistinguishable from individual or private interests, such as those

relating to the pursuit of an action brought against the Community institutions, since such individual or private interests do not constitute an element which is relevant to the weighing up of interests provided for by the second subparagraph of Article 4(3) of the regulation.

66 Under Article 2(1) of Regulation No 1049/2001, the beneficiaries of the right of access to the documents of the institutions comprise 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State'. That provision makes it clear that the purpose of the regulation is to guarantee access for everyone to public documents and not just access for the requesting party to documents concerning it (Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council* [2005] ECR II-1429, paragraph 50). Consequently, the individual interest which a party may invoke when requesting access to documents of personal concern to it cannot generally be decisive for the purposes both of the assessment of the existence of an overriding public interest and of the weighing up of interests under the second subparagraph of Article 4(3) of Regulation No 1049/2001.

67 Thus, it is clear from settled case-law that even if those documents prove necessary for the applicant's defence in the action for damages — a question which falls to be considered in that case — that circumstance is irrelevant for the purpose of assessing the balance of the public interest (see, to that effect and by way of analogy, *Sison* v *Council*, cited in paragraph 66 above, at paragraph 55, and order of 8 June 2005 in Case T-287/03 *SIMSA* v *Commission*, not published in the European Court Reports, paragraph 34).

68 Consequently, the applicant's complaint that there is an overriding public interest in disclosure of the report and working papers 4 to 14 and 16 to 19 under the second subparagraph of Article 4(3) of Regulation No 1049/2001 will be rejected. The same applies to the question as to whether an overriding public exists under Article 4(2) *in*

fine of the regulation, in respect of which the applicant puts forward the same arguments as those analysed above.

The exception relating to the protection of inspections, investigations and audits

Arguments of the parties

69 As regards both (i) the parts of the reports covered by the exception relating to the protection of inspections, investigations and audits and (ii) the working papers in relation to which the Commission invoked that exception, the applicant submits that because the investigation had been completed and any measures consequent upon it have been taken, that exception did not apply. Since the procedures in question were changed as a result of that investigation, the report is of historical interest only and cannot be of a particular sensitivity justifying a derogation from the presumption of accessibility. Moreover, it cannot be contended that an internal investigation designed to modernise administrative procedures could not be independent if its results were published. On the contrary, its publication would ensure that it was carried out independently and in the spirit of transparency which lies at the heart of Regulation No 1049/2001. Furthermore, the exception in question does not apply to purely internal investigations carried out by the Commission, but only to investigations carried out by the Commission which involve third parties.

70 As regards the report, the Commission maintains that what is important is that the internal investigation was carried out with the sole purpose of formulating recommendations intended to be used within its services. That investigation would not have been carried out in the same way if its authors had had to take into account

the fact that its results would have been disclosed, even after it had been completed. Even though the investigation had been completed, its purpose could remain. The Commission also submits that there is no reason to distinguish between internal and external investigations.

Findings of the Court

71 The third indent of Article 4(2) of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of 'the purpose of inspections, investigations and audits', unless there is an overriding public interest in disclosure of the document in question.

72 That provision applies only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits (*Franchet and Byk* v *Commission*, cited in paragraph 32 above, at paragraph 109).

73 Moreover, according to settled case-law, the examination required for the purpose of processing a request for access to documents must be specific in nature. First, the mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify the application of that exception. Secondly, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Consequently, the examination carried out by the institution in order to apply an exception must be specific and be evident from the statement of reasons of the decision (*Franchet and Byk* v *Commission*, cited in paragraph 32 above, at paragraph115).

74 That specific examination must, moreover, be carried out in respect of each document referred to in the request for access. It is clear from Regulation No 1049/2001 that all the exceptions mentioned in Article 4(1) to (3) are specified as being applicable 'to a document'. A specific and individual examination of each document is also necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation No 1049/2001 (*Franchet and Byk* v *Commission*, cited in paragraph 32 above, at paragraphs 116 and 117).

75 In the present case, the inventory annexed to the first decision relies only on the exception in question as a basis for its refusal, on that ground alone, to disclose document 15, entitled 'Minutes from the conversation of a member of the case team in Case M.1524 Airtours/First Choice on the Airtours case conducted on 24 June 2002'.

76 When questioned on that point at the hearing, the Commission indicated to the Court that the reason for which the exception laid down by the third indent of Article 4(2) of Regulation No 1049/200 applied to that document appeared in the following sentence of the first decision:

'With regard to parts of documents 13 and 16 and all the other working papers, I confirm the initial examination of the Directorate-General for Competition according to which the working papers are a fortiori also covered by the exceptions provided for under Articles 4(2), 2nd and 3rd indent, and 4(3), 2nd subparagraph, of Regulation [No] 1049/2001.'

77 Such considerations are too vague and general and it is not possible on reading the first decision and its annexes to understand in what way the 'inspections, investigations and audits' of the Commission could have been threatened by the disclosure of document 15.

78 In the absence of explanations of that kind, the Commission has not demonstrated to the requisite legal standard that the exception laid down by the third indent of Article 4(2) of Regulation No 1049/2001 applied to document 15. Consequently, the first decision must be annulled in that regard, without it being necessary to examine the line of argument relating to the existence of an overriding public interest.

Conclusions in relation to the first decision

79 It follows from the above that the Commission did not commit an error of assessment in considering, in accordance with the second subparagraph of Article 4(3) of Regulation No 1049/2001, that disclosure of the whole of the report and of working papers 4 to 14 and 16 to 19 would seriously undermine its decision-making process and that there was no overriding public interest that might none the less justify disclosure of those documents. As a result, it is not necessary in the interest of procedural economy to examine the applicant's complaints relating to the other exceptions invoked in the first decision in order to refuse the disclosure of a particular part of the report or of the working papers in respect of which the exception in question was invoked.

80 Conversely, as regards working document 15, it follows from the above that the Commission has not established to the requisite legal standard that the exception

laid down by the third indent of Article 4(2) of Regulation No 1049/2001 applied to that document (see paragraph 71 et seq. above).

81 In conclusion, the action must be dismissed in so far as it covers the first decision except for working document 15, in respect of which the decision must be annulled.

3. *The second decision, relating to the other internal documents*

82 In the second decision, the Commission relied on three exceptions laid down in Regulation No 1049/2001 as the basis for its refusal to grant access to certain internal documents (see paragraphs 21 to 22 above). These comprised the exception relating to the protection of the decision-making process, the exception relating to the protection of investigations and audits and the exception relating to the protection of legal advice.

The exception relating to the protection of the decision-making process

83 This exception falls to be examined by reference to the different categories of documents identified by the Commission in the second decision.

The extent of undermining of the decision-making process by disclosure of the draft texts, the notes to the Commissioner, the notes to the other services and the notes in reply from the services other than the legal service

— Arguments of the parties

84 The applicant challenges the Commission's application in the second decision of the second subparagraph of Article 4(3) of Regulation No 1049/2001 as a basis for its refusal to communicate the whole or certain parts of the internal documents requested. The need to ensure 'space to think' for its services, which is invoked by the Commission, is abstract and incompatible with the general objective of transparency pursued by Regulation No 1049/2001 and with the limited scope of the exceptions to that principle. The Commission's services do not require to implement the competition rules in secret and the control of concentrations does not justify any particular difference in treatment compared with the other areas in which that institution intervenes. Moreover, the embarrassment or inconvenience which disclosure of the documents requested might entail does not, of itself, have the result that the application of the exception at issue can be justified. In addition, the applicant submits that the argument based on the risk of inhibiting the control of future and similar concentrations has no basis. Since the Airtours decision has been annulled, the disclosure of internal documents relating to it could not undermine the Commission's ability to take another decision or even to determine the contents of such a decision. The Commission's analysis in the field of concentrations must be undertaken in the light of the circumstances of the particular case, without regard to media or political pressure.

85 The Commission states that, even if the internal documents fall within the scope of Regulation No 1049/2001, Article 17(3) of Commission Regulation No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 L 133, p. 1), which replaced Article 17(1) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 (OJ 1998 L 61, p. 1), excludes internal documents in the administrative file from the regime governing access to the applicable file. Thus, the fact that the parties to a concentration do not have a right of access to those documents reinforces the notion that their disclosure to the public would seriously undermine the Commission's

decision-making process in the area. The Commission also argues that the exception at issue was not applied in the abstract, because each document was scrutinised individually and partial access was granted where that was possible. The purpose of that exception is, however, to safeguard the Commission's decision-making process in general, having regard in particular to future circumstances or to matters relating to the same question, and not merely to the proceedings in question. According to the Commission, the ability of its services to set out their opinions is essential to the decision-making process and that ability would be curtailed if they were to have to draft their opinions in taking into account the possibility that those opinions might be disclosed to the public, even after the case has been closed.

— Findings of the Court

86 The first point to be noted is that it is clear that there is no provision of Regulation No 1049/2001 which states that the existence of a right of access by the public to the documents of the Commission may be dependent on the fact that the person requesting those documents is an undertaking which is a party to a concentration, which has, under Article 17(3) of Regulation No 802/2004 (or Article 17(1) of Regulation No 447/98, which preceded it), no right of access to the internal documents in the Commission's administrative file.

87 On the contrary, Article 2(1) of Regulation No 1049/2001 gives a very wide right of access to the documents of the Commission, because that right is available to any citizen of the Union and any natural or legal person residing or having its registered office in a Member State, without any other conditions being imposed. It is also apparent from Article 2(3) of that regulation that the provisions relating to public access to the documents of the Commission apply to all documents held by that institution, that is to say, all documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

88 Furthermore, the second subparagraph of Article 4(3) of Regulation No 1049/2001 specifies expressly the circumstances in which access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned can be refused, even after the decision has been taken, by stipulating that in such a case disclosure of the document must seriously undermine the decision-making process of the institution concerned. That provision is of general application and is not dependent on the Commission's areas of activity or the rules applying to the proceedings which relate to them.

89 Consequently, the fact that an undertaking which is party to a concentration does not have the right of access to the internal documents in the administrative file by virtue of Article 17(3) of Regulation No 802/2004 does not mean that it can be ruled out that any person, whoever it may be, may have a right of access to those documents on the basis of the principles laid down in Regulation No 1049/2001 (see, to that effect and by way of analogy, *Interporc* v *Commission*, cited in paragraph 15 above, at paragraphs 44 and 46).

90 The Commission does not, moreover, deny that the internal documents at issue do indeed fall within the scope of application of Regulation No 1049/2001. In addition, the argument it now makes, based on the application of Article 17(3) of Regulation No 802/2004, is not mentioned in the second decision as a justification relied on in invoking the exception laid down by the second subparagraph of Article 4(3) of Regulation No 1049/2001.

91 It is thus by having regard, first, to the fact that the applicant is a legal person having its registered office in a Member State and requests, in that capacity, to have a right of access to certain documents held by the Commission, and, secondly, to the reasoning set out in the second decision, that the Court should review the lawfulness of the decision.

92 In the present case, in the second decision the Commission relies on the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001 as regards four categories of documents: the draft texts, the notes to the Commissioner, the notes to the other services and the notes in reply from the services other than the legal service (see paragraph 21 above). Even if that examination was undertaken on a specific and individual basis, document by document, the reason invoked by the Commission in order to justify the exception referred to above remains essentially the same. It is, moreover, for that reason that the parties refer to those documents together, rather than individually, in their written pleadings, in the light of the explanations set out in the second decision as regards each of the four categories mentioned above.

93 At the hearing, the applicant indicated that it was not interested in the communication of the draft texts, that is to say, the drafts of the decision taken under Article 6(1)(c) of Regulation No 4064/89, the statement of objections and the final decision in the Airtours/First Choice case and in reply to a question from the Court on that point, it stated that it withdrew its request for access to those documents. There is therefore no longer any need for the Court to examine the question of the lawfulness of the second decision in that regard.

94 With respect to the notes to the Commissioner, the notes to the other services and the notes in reply from the services other than the legal service, the Commission is right to submit that the partial or total disclosure, as the case may be, of those documents would reduce the ability of its services to express their point of view and would seriously undermine its decision-making process in the field of the control of concentrations.

95 In the control of concentrations, it is the final decision which is important, together with the outcome of the various procedural stages laid down under Regulation No 4064/89 in order to reach that decision (such as the decision adopted under Article 6(1)(c) of Regulation No 4064/89 or the statement of objections). In that

context, the notes to the Commissioner, the notes to the other services and the notes in reply from the services other than the legal service were exchanged within the Commission in order to allow the documents formalising the views adopted by the administration to be drawn up.

96 As the Commission contends in the second decision, the disclosure of such documents to the public is liable seriously to undermine its decision-making process, whether this involves the proceedings relating to the concentration in question or future similar concentration proceedings, between the same parties, or which concern principles applied in the disputed proceedings, in so far as those documents do no more than record a point in the proceedings that has not yet been formalised in a definitive document. Those preparatory documents may indicate the opinions, the doubts or the changes of mind of the Commission services, which — at the end of the decision-making process in question — may no longer appear in the final versions of the decisions.

97 As was held in relation to the report (see paragraph 52 above), disclosure of the documents in respect of which access was refused would mean that their authors would take that risk of disclosure into account in the future, to the point where they might be led to practise self-censorship and to cease putting forward any views that might involve the addressee of the document in question being exposed to risk. The result would be that communication between the Commission's services would no longer be as frankly expressed and complete as it has to be in order to allow for the drawing up of the decisions and statements of objection required in proceedings for the control of concentrations.

98 The applicant's arguments do not put that analysis in question. The Commission did not simply invoke the need to protect the time to reflect which it seeks in a general and abstract manner, but did so on a document-by-document basis, in an individual and specific way. Thus, certain documents were disclosed in part. What

is more, that analysis is not put in question by the mere fact that the proceedings in question have ended, given that the second subparagraph of Article 4(3) of Regulation No 1049/2001 continues to apply even after the decision has been taken and the Commission explained in the second decision that disclosure of the documents at issue risked undermining its assessment of similar concentrations which might arise between the parties concerned or in the same sector.

99 It is significant in that regard that the Commission illustrated that proposition in the second decision by reference both to cases in the same sector or between the same parties and to cases involving the concept of a collective dominant position. It referred specifically to the EMI/Time Warner case, in which it refused a request for access under Regulation No 1049/2001 to the statement of objections in order to protect the deliberations of its services in the BMG/Sony case, which concerned the same sector of activities.

100 The Court also holds that the risk in the present case of the decision-making process being seriously undermined in the event of the internal and preparatory documents drawn up in the Airtours/First Choice case being disclosed, is reasonably foreseeable and not purely hypothetical. It thus appears reasonable to believe, as the Commission states in the second decision, that such documents could be used — even though they do not necessarily represent the Commission's definitive position — to influence the position of its services, which are entitled to be kept free and independent from all external pressures, in the examination of similar cases involving the same sector of activities or the same economic concepts. It is therefore necessary to allow the Commission to protect the internal consultations and deliberations of those services where, as in the present case, to do so is necessary in order to preserve the Commission's ability to undertake its duties in the control of concentrations.

101 Consequently, the applicant's complaint that disclosure of the documents referred to above would not seriously undermine the Commission's decision-making process will be rejected.

The extent of undermining of the decision-making process by disclosure of the Hearing Officer's report

— Arguments of the parties

102 The applicant claims that the report of the Hearing Officer cannot benefit from the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001, since, under the terms of his mandate, the Hearing Officer was, at the time at which he prepared his report in 1999, part of DG Competition and was attached to the Director-General, to whom he reported. In those circumstances, the independence of hearing officers is fully protected in accordance with the mandate under which they operate and they have no reason to fear the disclosure of their reports to the public.

103 The Commission states that the mandate of the hearing officer is irrelevant when it takes a decision on disclosure to the public of a document containing the opinions of the hearing officer in a given case. Since he gives his opinion on the substance and the procedural aspects of the case, his report forms part of the internal deliberations of the Commission before the adoption of the final decision.

— Findings of the Court

104 As with the other internal documents drawn up by the different services involved in the preparation of the Airtours decision (see paragraph 94 above), the Commission is correct to consider that disclosure of the report of the Hearing Officer would, in the present case, seriously undermine its decision-making process in the area of the control of concentrations.

105 It is apparent from the second decision that it is not merely the fact that the document at issue contained an opinion intended for internal use which was invoked by the Commission as a basis for its application of the exception, but the fact that in that document the Hearing Officer gave his opinion of the substance and the procedural aspects of the Airtours/First Choice case (point II.7 of the second decision).

106 In the second decision, the Commission also, correctly, stated that the Hearing Officer's freedom to express his views would be jeopardised if he had to take into account the possibility that his report could be disclosed to the public and that such disclosure would seriously undermine the decision-making process in the area of concentrations, since it could no longer rely in the future on the frankly-expressed and complete opinions of hearing officers (point II.7 of the second decision).

107 Consequently, the applicant's complaint that the disclosure of the Hearing Officer's report would not seriously undermine the Commission's decision-making process must be rejected.

The extent of undermining of the decision-making process by disclosure of the note from DG Competition to the Advisory Committee

— Arguments of the parties

108 The applicant claims that the second subparagraph of Article 4(3) of Regulation No 1049/2001 cannot apply to the note from DG Competition to the Advisory Committee, because that committee is composed of representatives of the Member States and thus the procedure involving that committee does not form part of deliberations or preliminary consultations 'within the institution concerned'.

109 The Commission argues that that consultation is a necessary step in the preparation of the final decision and must therefore be considered as taking place within that institution.

— Findings of the Court

110 As with the other internal documents drawn up by the different services involved in the preparation of the Airtours decision (see paragraph 94 above), the Commission is correct to consider that disclosure of the note from DG to the Advisory Committee (document 7.7) would, in the present case, seriously undermine its decision-making process in the area of the control of concentrations (point II.4 of the second decision).

111 As is stated in the second decision, consultation with the Advisory Committee also forms part of the internal decision-making process in the control of concentrations.

Even though the Advisory Committee is composed of representatives of the Member States, and is therefore separate from the Commission for that reason, the fact of being obliged to transmit internal documents to the Advisory Committee under Article 19 of Regulation No 4064/89 in order that that committee may reach a view in accordance with a procedure which requires its intervention permits the inference that the documents at issue are documents which are internal to the Commission for the purposes of the application of Article 4(3) of Regulation No 1049/2001.

112 Consequently, the applicant's complaint that disclosure of the note from DG Competition to the Advisory Committee would not seriously undermine the Commission's decision-making process must be rejected.

The extent of undermining of the decision-making process by disclosure of a part of the note to file relating to a site visit to First Choice

— Arguments of the parties

113 The applicant denies that a note of that kind could constitute an 'opinion for internal use' within the meaning of Article 4(3) of Regulation No 1049/2001. According to the applicant, oral submissions made by First Choice are analogous to written observations and there is no policy reason to prevent access to those observations.

114 The Commission replies that the parts of the disputed note in respect of which access was refused contain the personal views of the official who drew up that note.

— Findings of the Court

115 As with the other internal documents drawn up by the different services involved in the preparation of the Airtours decision (see paragraph 94 above), the Commission is right to consider that disclosure of a part of the note to file relating to a site visit to First Choice (document 7.2) would, in the present case, seriously undermine its decision-making process in the area of the control of concentrations (point II.8.a of the second decision).

116 It is apparent from the second decision that it is not merely the fact that the document at issue contained an opinion intended for internal use which was invoked by the Commission in order to justify the application of the exception, but the fact that, for certain parties, that document reflected the views of the officials of DG Competition during the visit. The Commission is therefore correct to consider that that document contained deliberations internal to DG Competition concerning the enquiry and that its disclosure would, in the present case, seriously undermine its decision-making process.

117 Consequently, the applicant's complaint that disclosure of certain parts of the note to file relating to a site visit to First Choice would not seriously undermine the Commission's decision-making process must be rejected.

Whether an overriding public interest exists

118 As regards the existence of an overriding public interest which, were it to be established, would require disclosure of those documents, reference should be made to paragraphs 38 and 60 to 66 above, inasmuch as the applicant puts forward the same line of argument in relation to the first decision as in relation to the second decision.

119 Consequently, the applicant's complaint that there is an overriding public interest in disclosure of the internal documents covered by the exception relating to the protection of the decision-making process must be rejected.

The exception relating to the protection of court proceedings and legal advice

Arguments of the parties

120 The applicant claims that the exception laid down by the second indent of Article 4(2) of Regulation No 1049/2001 cannot be applied to the notes in reply from the legal service.

121 The Commission states that, even though the Airtours decision has been annulled, its capacity to benefit from the advice of its services would be jeopardised by the disclosure of the documents at issue, since the College of Commissioners may overrule that advice and take a different decision.

Findings of the Court

122 The second indent of Article 4(2) of Regulation No 1049/2001 provides that the Commission is to refuse access to a document where disclosure would undermine the protection of 'court proceedings and legal advice', unless there is an overriding public interest in disclosure of the document.

123 The expression 'legal advice' must be understood as meaning that the protection of the public interest may preclude disclosure of the content of documents drawn up by the Commission's legal service, not only in the course of legal proceedings, but also on any other ground.

124 In the present case, it is apparent from the second decision that it is not merely the fact that the documents at issue were — following individual examination — held to constitute legal advice, which was invoked by the Commission as a basis for its application of the exception, but also the fact that disclosure of the notes in reply from the legal service would risk communicating to the public information on the state of internal discussions between DG Competition and the legal service on the lawfulness of the assessment of the compatibility of the Airtours/First Choice concentration with the common market, which would, as such, risk affecting decisions which might fall to be made as regards the same parties or in the same sector (see paragraphs 22, 99 and 100 above).

125 To accept that the notes in question should be disclosed would be liable to lead the legal service to display reticence and caution in the future in the drafting of such notes in order not to affect the Commission's decision-making capacity in areas in which it is involved in its administrative capacity.

126 It must also be held that the risk of undermining the protection of legal advice laid down by the second indent of Article 4(2) is reasonably foreseeable and not purely hypothetical. As well as the reasons referred to in paragraph 124 above, disclosure of that advice would risk putting the Commission in the difficult position in which its legal service might see itself required to defend a position before the Court which was not the same as the position which it had argued for internally in its role as adviser to the services responsible for the file, which it was its duty to perform during the administrative procedure. It is clear that the risk of such a conflict arising would be liable to have a considerable effect on both the freedom of the legal service to express

its views and its ability effectively to defend before the Community judicature, on an equal footing with the other legal representatives of the various parties to legal proceedings, the Commission's definitive position and the internal decision-making process of that institution which reaches its decisions, as a College, having regard to the particular task assigned to it, and which must have the freedom to defend a legal position which differs from that initially adopted by its legal service.

127 That analysis is not called into question by the fact that the Airtours decision, in respect of which the notes in reply from the legal service were written, has been annulled by the Court. The exception at issue protects documents prepared at a point prior to the adoption of the definitive decision, irrespective, in principle, of whether that decision is subsequently sustained or annulled in proceedings before the Community judicature.

128 Consequently the applicant's complaint that disclosure of the notes in reply from the legal service would not undermine the protection of legal advice must be rejected.

129 As regards the existence of an overriding public interest which would, were it to be established, justify disclosure of those documents, reference should be made to paragraphs 38 and 60 to 66 above. Consequently, the applicant's complaint that there is an overriding public interest in disclosure of the internal documents covered by the exception relating to the protection of legal advice must be rejected.

Conclusions in relation to the second decision

130 It follows from the foregoing that the Commission did not commit an error of assessment in relying on the second subparagraph of Article 4(3) or the second indent of Article 4(2) of Regulation No 1049/2001 as a basis for refusing, following a specific and individual examination, disclosure of the various internal documents and legal advice with respect to which those exceptions were invoked. As a result, it is not necessary in the interest of procedural economy to examine the applicant's complaints relating to the third exception invoked in the second decision, in conjunction with the first exception examined above, in order to refuse the disclosure of certain of those documents.

131 In conclusion, the action should be dismissed in so far as it relates to the second decision.

Costs

132 Under the first subparagraph of Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court of First Instance may order that costs be shared or that each party bear its own costs. In the circumstances of the present case, the Commission should bear one-tenth of the applicant's costs and one-tenth of its own costs. The applicant should bear nine-tenths of its own costs and nine-tenths of the Commission's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)

hereby:

1. **Annuls the decision of the Commission of 5 September 2005 (D(2005) 8461) in so far as it refuses access to a working document entitled 'Minutes from the conversation of a member of the case team in Case M.1524 Airtours/ First Choice on the Airtours case conducted on 24 June 2002';**

2. **Dismisses the action as to the remainder;**

3. **Orders MyTravel Group plc to bear nine-tenths of its own costs and nine-tenths of the costs incurred by the Commission;**

4. **Orders the Commission to bear one-tenth of its own cos and one-tenth of the costs incurred by MyTravel Group.**

Azizi Cooke Cremona

Labucka Frimodt Nielsen

Delivered in open court in Luxembourg on 9 September 2008.Registrar

Registrar Presidentts

E. Coulon J. Azizi