

JUDGMENT OF THE GENERAL COURT (Third Chamber)

9 September 2014 (*)

(Access to documents — Regulation (EC) No 1049/2001 — Documents relating to a study of the costs and benefits to merchants of accepting different payment methods — Documents drawn up by a third party — Refusal of access — Exception relating to the protection of the decision-making process — Exception relating to the protection of the commercial interests of a third party)

In Case T-516/11,

MasterCard, Inc., established in Wilmington, Delaware (United States),

MasterCard International, Inc., established in New York, New York (United States),

MasterCard Europe, established in Waterloo (Belgium),

represented initially by B. Amory, V. Brophy and S. McInnes, lawyers, and subsequently by B. Amory and V. Brophy, lawyers,

applicants,

v

European Commission, represented by F. Clotuche-Duvieusart and V. Bottka, acting as Agents,

defendant,

ACTION for annulment of the Commission decision of 12 July 2011 refusing the applicants access to certain documents drawn up by a third party relating to a study of the costs and benefits to merchants of accepting different payment methods,

THE GENERAL COURT (Third Chamber),

composed of S. Papasavvas, President, N.J. Forwood and E. Bieliūnas (Rapporteur), Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 4 February 2014,

gives the following

Judgment

Background to the dispute

- 1 On 17 December 2010, the applicants MasterCard, Inc., MasterCard International, Inc. and MasterCard Europe requested the Directorate-General (DG) 'Competition' of the European Commission, on the basis of 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), to grant them access to a number of documents supplied to the Commission by EIM Business and Policy Research ('EIM') in connection with a study called for in 2008 following an invitation to tender for a study on the costs and benefits to merchants of accepting different payment methods (COMP/2008/D1/020) ('the study').

- 2 The request for access related more specifically to the following documents:
 - any documents, as defined in Regulation No 1049/2001, if they existed and were in the Commission's possession, listed in section 4.1 ('Deliverables') of the specifications to invitation to tender COMP/2008/D1/020, or at least non-confidential versions of those documents;
 - the EIM report on the results of the first test (the pilot study), or at least a non-confidential version of that document;
 - the EIM final opinion on the overall methodology of the study, or at least a non-confidential version of that document;
 - any other documents, as defined in Regulation No 1049/2001, provided by EIM to the Commission following the pilot study, or at least non-confidential versions of those documents.
- 3 By letter of 18 January 2011, DG Competition refused access to the documents provided by EIM to the Commission ('the EIM documents'), in accordance with the first subparagraph of Article 4(3) of Regulation No 1049/2001.
- 4 On 7 February 2011, the applicants made a confirmatory application to the Secretariat-General of the Commission, in accordance with Article 7(2) of Regulation No 1049/2001, asking the Commission to reconsider its position.
- 5 By e-mail of 8 February 2011, the Secretariat-General of the Commission acknowledged receipt of the applicants' confirmatory application and stated that they would receive a reply within 15 working days.
- 6 On 21 February 2011, the Secretariat-General of the Commission asked the applicants to clarify their application and to state whether or not they wished the EIM documents to be made public.
- 7 On 23 February 2011, the applicants confirmed that their application was for the public disclosure of the EIM documents, and sought confirmation of the date by which they would receive a reply to their confirmatory application.
- 8 On 3 March 2011, the Secretariat-General of the Commission stated that it had started to deal with the application as a confirmatory application as from 24 February 2011, in accordance with the third subparagraph of Article 2 of the Annex to Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (OJ 2001 L 345, p. 94).
- 9 The Secretariat-General of the Commission consequently fixed at 16 March 2011 the expiry of the period for dealing with the application. By letter of 7 March 2011, the applicants disputed the Secretariat General's interpretation of the period for replying.
- 10 On 14 March 2011, the Secretariat-General of the Commission reaffirmed its view that the period of 15 working days had started to run only from 24 February 2011, and added that in view of the sensitivity of the issue it might not be in a position to provide a final reply by 16 March 2011. It

therefore extended the period by 15 working days in accordance with Article 8(2) of Regulation No 1049/2001.

- 11 By letter of 15 March 2011, the applicants stated that they still did not accept the interpretation by the Secretariat-General of the Commission of the period for assessing their confirmatory application. They also stated that they challenged the ground put forward for extending that period.
- 12 On 7 April 2011, the Secretariat-General of the Commission informed the applicants that the extended period for replying had expired on 6 April 2011 but it was still unable to provide a final reply within that period. It stated, however, that a draft decision was in the course of being approved, and that it hoped to send the applicants a final version of the decision shortly.
- 13 The applicants therefore considered that the failure to reply within the extended period constituted an implied refusal of their confirmatory application for access to the documents and, by application lodged at the Court Registry on 15 June 2011, they brought an action for annulment of that decision, which was assigned case number T-330/11.
- 14 By decision of 12 July 2011 ('the contested decision'), the Commission replied to the confirmatory application of the applicants and refused them access to the EIM documents, relying on the exceptions provided for in the first subparagraph of Article 4(3) and the first indent of Article 4(2) of Regulation No 1049/2001.
- 15 In the contested decision, the Commission first of all identified the following documents as, in its view, falling within the scope of the applicants' request, namely the documents relating to:
 - costs and benefits to merchants of accepting different payment methods — inception report of 2 June 2009 ('document No 1');
 - costs and benefits to merchants of accepting different payment methods — part 1 of the methodology report of 28 September 2009 (revised version incorporating comments received from stakeholders and DG Competition) ('document No 2');
 - in-depth interview test results on costs of payments: analyses of the in-depth interviews held in the Netherlands, Hungary and the United Kingdom, 15 January 2010 (version provided on 9 March 2010) ('document No 3');
 - draft online questionnaire, 8 March 2010 ('document No 4');
 - results and conclusions of the internet feasibility test: draft report, 24 May 2010 ('document No 5');
 - costs and benefits to merchants of accepting different payment methods, methodology, draft report of 20 October 2010 ('document No 6').
- 16 The Commission explained that documents Nos 1 to 5 were preliminary working documents prepared by EIM representing the various stages of the work in progress, the results of which were incorporated into document No 6, which is the final report (first paragraph of Section 3 of the contested decision).
- 17 The Commission then stated, in particular, that '[a]s regards ... documents [Nos 1 to 5], these are interim documents received by the Commission that reflect preliminary results and analysis of the work carried out by [EIM] in the separate steps of the implementation of the contract, which at the time of their submission to the Commission's services were still subject to their assessment and

comments' and that '[g]iven that presently no final decision has been taken on the appropriate methodology to be applied ..., their disclosure would seriously undermine the decision-making process'. In addition, the Commission noted that the disclosure of documents Nos 1 to 5 'would cause undue delay and disruption of [its] continuing work on, and final assessment of, the methodology as a whole'. It added that that disclosure 'could prompt premature comments and criticism and lead to attempts to influence and skew [its] decision-making process' and that '[i]t would also unduly limit the discretion of the Commission in making informed and independent choices in the development of the final methodology' (second paragraph of Section 3.1 of the contested decision).

- 18 The Commission added that the disclosure of documents Nos 1 to 5 'would give rise to potential misrepresentation [with regard to] the work carried out by EIM that is likely to be detrimental to its reputation and goodwill' (second paragraph of Section 3.2 of the contested decision).
- 19 In addition, the Commission also stated that 'disclosure of the interim documents ... would reveal the know-how of EIM for carrying out the interim steps of the assignments which, if known to competitors, would give them an advantage in their business activities to the detriment of EIM' (fourth paragraph of Section 3.2 of the contested decision).
- 20 Moreover, the Commission examined the possibility of granting partial access to the EIM documents, in accordance with Article 4(6) of Regulation No 1049/2001. However, it concluded that the requested documents were entirely covered by the exceptions laid down in the first subparagraph of Article 4(3) and the first indent of Article 4(2) of Regulation No 1049/2001 (Section 4 of the contested decision).
- 21 Lastly, the Commission examined whether there was an overriding public interest in disclosing the EIM documents. It concluded that the interest referred to by the applicants in that disclosure of the EIM documents would enable them 'to assist the Commission in its efforts and ... meaningfully contribute to future dialogues with the Commission' constituted 'an interest of a private nature and not a public interest'. Furthermore, it stated that '[n]either has the Commission identified such an overriding public interest, based on the other elements in its possession' (second and fourth paragraphs of Section 5 of the contested decision).
- 22 The Commission also stated that 'in administrative matters, the public interest in transparency d[id] not carry the same weight as in legislative matters' (fifth paragraph of Section 5 of the contested decision). Nevertheless, the Commission stated that it 'wishe[d] to respect the high standards of transparency in its process of establishing the methodology of costs and benefits to merchants of accepting different payment methods' and that accordingly it had '[had] organised a restricted stakeholder consultation in August 2009 ... and intend[ed] to consult again the interested stakeholders at a later stage' (sixth and seventh paragraphs of Section 5 of the contested decision).
- 23 By order of 25 January 2012 in Case T-330/11 *MasterCard and Others v Commission*, not published in the ECR, the Court found that as the Commission had adopted an express decision refusing access to the EIM documents, there was no longer any need to adjudicate on the action for annulment of the implied decision refusing the confirmatory application for access.

Procedure and forms of order sought by the parties

- 24 By application lodged at the Court Registry on 22 September 2011, the applicants brought the present action.
- 25 The applicants claim that the Court should:

- declare the present action admissible;
- annul the contested decision in its entirety;
- order the Commission to pay the costs.

26 The Commission contends that the Court should:

- dismiss the action;
- order the applicants to pay the costs.

27 In the reply, the applicants also claim that the Court should, as regards costs, take into account the unnecessary costs incurred by them as a result of the Commission's attempt, in the defence, to reinterpret the contested decision by relying on new legal arguments and by having recourse to arguments that are manifestly unfounded.

28 The parties presented oral argument and replied to the questions put by the Court at the hearing on 4 February 2014.

29 At the hearing, in reply to a question put by the Court, the applicants stated that they withdrew their claim seeking annulment of the contested decision in so far as it refused them access to document No 6, since the Commission has made it public in the context of another access to documents procedure.

30 Formal notice of that statement was taken in the minutes of the hearing.

Law

The admissibility of the action

31 The Commission, without expressly raising a plea of inadmissibility, maintains that the applicants' interest in pursuing the present case is insufficient and hard to understand.

32 In the first place, the Commission contends that the applicants' support for public access to the EIM documents is at odds with the position they maintained in the proceedings leading to the adoption of Decision C(2007) 6474 final of 19 December 2007 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Cases COMP/34.579 — MasterCard, COMP/36.518 — EuroCommerce, and COMP/38.580 — Commercial Cards) ('the 2007 decision'), where they requested confidentiality for the submissions they made during the investigation.

33 That argument must be regarded as ineffective since, even if the applicants' position in the present case were at odds with that adopted in another case, that could not have any bearing on their interest in seeking the annulment of the contested decision.

34 Not only must it be accepted that a party's position is likely to change from one case to another depending on the specific circumstances of each case, but it must be pointed out that what must be taken into account in order to determine whether a party has a legal interest in bringing proceedings is solely whether the annulment of the contested measure is of itself capable of having legal consequences (see Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others v Commission* [1995] ECR II-2305, paragraph 59 and the case-law cited) and whether the action can therefore, if successful, procure an advantage for the party bringing it (see, to that effect, Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 21).

- 35 In the second place, the Commission takes the view that the EIM documents to which access was requested form part of the specific step of preparing an ongoing Commission-ordered study, which belongs to and has significance for a number of ongoing anti-trust investigations.
- 36 That argument must also be regarded as ineffective since it does not seek to show that the applicants have no interest in obtaining the annulment of the contested decision, but seeks to justify the refusal of access to the EIM documents.
- 37 In the third place, the Commission contends that in so far as the EIM documents belong to an ongoing study which, according to the invitation to tender, forms part of several ongoing anti-trust investigations, a new decision could be adopted with regard to the applicants. Consequently, the applicants will have access to the Commission's file and, possibly, to the study. Accordingly, the applicants seek to circumvent existing procedures on access to the file by prematurely asking the Commission to provide to them parts of the anti-trust file before the case has reached a stage where such a right would be open.
- 38 Consequently, the Commission argues, in essence, that the applicants have sought to circumvent the procedure for accessing the Commission's file, laid down by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003, L 1, p. 1), as amended, by prematurely requesting access to the EIM documents pursuant to Regulation No 1049/2001.
- 39 Without it being necessary, at this stage, to examine whether the EIM documents form part of a file assembled in the context of anti-trust proceedings concerning the applicants, the Commission's argument may be rejected solely on the ground that it seeks to call in question the validity of the applicants' request for access to the documents, not their interest in pursuing the present case. In addition, it must be pointed out that the Commission did not rely on such a ground, in the contested decision, in order to refuse the applicants' request for access.
- 40 In any event, it must be observed that any person may request access to any Commission document and is not required to give a reason for the request. It follows that a person who is refused access to a document or to part of a document has, by virtue of that very fact, established an interest in the annulment of the decision refusing access (Joined Cases T-109/05 and T-444/05 *NLG v Commission* [2011] ECR II-2479, paragraph 62).
- 41 Consequently, the applicants have an interest in seeking the annulment of the contested decision and it must therefore be concluded that the present action is admissible.

Substance

- 42 In support of their action, the applicants rely on two pleas in law alleging infringement, in essence, of (i) the first subparagraph of Article 4(3) of Regulation No 1049/2001 and (ii) the first indent of Article 4(2) of that regulation.
- 43 In addition, the applicants also allege infringement of Article 8(1) of Regulation No 1049/2001.

Preliminary considerations

- 44 In the first place, it must be pointed out that Regulation No 1049/2001 is intended, as is apparent from recital 4 thereto and from Article 1, to give the fullest possible effect to the right of public access to documents of the institutions (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 33, and Case T-63/10 *Jurašinović v Council* [2012] ECR, paragraph 28).

- 45 However, that right is none the less subject to certain limitations based on grounds of public or private interest (Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 62, and *Jurašinić v Council*, cited in paragraph 44 above, paragraph 29).
- 46 More specifically, and in reflection of recital 11 in the preamble thereto, Article 4 of Regulation No 1049/2001 provides that the institutions are to refuse access to a document where its disclosure would undermine the protection of one of the interests protected by that provision (Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533, paragraph 71, and *Jurašinić v Council*, cited in paragraph 44 above, paragraph 30).
- 47 In addition, when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents of the institutions set out in Article 4 of Regulation No 1049/2001 (*Sweden and Turco v Council*, cited in paragraph 44 above, paragraph 35). In view of the objectives pursued by Regulation No 1049/2001, those exceptions must be interpreted and applied strictly (*Sweden and Turco v Council*, cited in paragraph 44 above, paragraph 36).
- The first plea in law, alleging infringement of the first subparagraph of Article 4(3) of Regulation No 1049/2001
- 48 The applicants submit, in essence (i) that the Commission has not established how the disclosure of the EIM documents might seriously undermine its decision-making process, as protected by the exception under the first subparagraph of Article 4(3) of Regulation No 1049/2001, (ii) that the Commission relied on inaccurate information, such as attempts to influence and exert external pressure or curtail its independence as consequences of disclosing the EIM documents, and (iii) that there is an overriding public interest in disclosing the documents.
- 49 Under the first subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, is to be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.
- 50 It should also be recalled that, according to settled case-law, the examination required for the purpose of processing an application for access to documents must be specific in nature. The mere fact that a document concerns an interest protected by an exception is not sufficient to justify application of that exception. Such application may, as a rule, be justified only if the institution has previously assessed whether access to the document could specifically and actually undermine the protected interest. In addition, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. In the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, the institution must also assess whether there is an overriding public interest in the disclosure of the document concerned (see the judgment of 11 March 2009 in Case T-166/05 *Borax Europe v Commission*, not published in the ECR, paragraphs 50 and 88 and the case-law cited).
- 51 The Commission contends none the less that the EIM documents benefit from a general presumption that they are clearly covered by the exception on protection of the decision-making process. The present case concerns ongoing administrative anti-trust proceedings which are governed by specific rules ensuring a limited right of access to the file, professional secrecy and a restriction on use, in accordance with Regulation No 1/2003 and Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18). The Commission is not therefore required to

demonstrate how each document would specifically undermine the decision-making process.

- 52 In that regard, the Commission states, in the defence, that the EIM documents inform a Commission-ordered study ongoing in the context of a number of anti-trust investigations which are ongoing or for which that study has significance. That study could also be used as evidence in the context of the ongoing anti-trust investigation relating to the multilateral interchange fee applied by the V entity. In the Commission's view, that is apparent not only from the invitation to tender but also from the contested decision itself.
- 53 The applicants submit that those arguments are new and therefore inadmissible. In any event, they are unfounded.
- 54 It should be observed, as regards, first, the invitation to tender, that, contrary to the Commission's claims, it is not apparent from its wording that the ongoing study was carried out in the context of several ongoing anti-trust investigations. As set out in the invitation to tender, the aim of the study ordered by the Commission was to provide it with information and data to enable it to compare effectively the costs and benefits to merchants of accepting different payment methods.
- 55 Although the tender specifications state that a proceeding was initiated against the applicants leading to the adoption of the 2007 decision and that the Commission has conducted surveys in the framework of anti-trust investigations, the Court notes that the study carried out by EIM had *a priori* a different objective. That is indeed confirmed by the contested decision in which the Commission stated that it had launched the study with a view to improving the factual basis for assessing the level of multilateral interchange fees which would be in accordance with the merchant indifference methodology.
- 56 As regards, secondly, the contested decision, it is not stated therein that the EIM documents form part of a file assembled in the context of ongoing anti-trust proceedings or any other ongoing proceedings governed by specific rules guaranteeing access to the file.
- 57 In the contested decision, the Commission did not rely on the fact that the study was not completed. It refused access to the EIM documents on the ground that the disclosure of documents Nos 1 to 5 'would cause undue delay and disruption of [its] work on, and final assessment of, the methodology as a whole' and that '[s]ince ... the process [was] still incomplete, the disclosure of [document No 6] would be misleading as inconclusive results and policy options reflected therein could change with progress' (second and fifth paragraphs of Section 3.1 of the contested decision).
- 58 It follows that the Commission did not rely on the exception relating to the protection of the decision-making process in the light of a possible decision relating to ongoing anti-trust proceedings in which the study at issue could have been used as evidence.
- 59 In addition, contrary to the Commission's claims in its rejoinder, although the existence of anti-trust proceedings is referred to in the contested decision, (i) it is not stated that the EIM documents form part of a file assembled in the context of such proceedings and (ii) that reference is made only in the context of Section 1 of the contested decision entitled the 'Context of your request' and is not used in order to justify refusing access to the EIM documents. In that regard, in Section 3 of the contested decision, entitled 'Assessment under Regulation 1049/2001', which includes the reasons for refusing access to the EIM documents, the existence of such anti-trust proceedings was not relied on in order to refuse access.
- 60 Consequently, the argument developed by the Commission in the defence was not relied on in the contested decision and amounts therefore to a new reason for the refusal of access to the EIM

documents. In those circumstances, that argument cannot justify refusing access to the EIM documents.

- 61 As regards the question whether the refusal of access to documents Nos 1 to 5 could be based on the exception relating to the protection of the decision-making process, the applicants submit, in the first place, that the Commission has not established how the conditions for applying the exception under the first subparagraph of Article 4(3) of Regulation No 1049/2001 are fulfilled in the present case. In particular, the Commission has not shown how the disclosure of part or all of the EIM documents might have seriously undermined the decision-making process.
- 62 It must, first of all, be noted that, in order to be covered by the exception in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the decision-making process would have to be ‘seriously’ undermined. That is the case, in particular, where the disclosure of the documents in question has a substantial impact on the decision-making process. The assessment of that serious nature depends on all of the circumstances of the case including, inter alia, the negative effects on the decision-making process relied on by the institution as regards disclosure of the documents in question (judgment of 18 December 2008 in Case T-144/05 *Muñiz v Commission*, not published in the ECR, paragraph 75).
- 63 Next, it must be noted that the EIM documents are documents received by the Commission. In the contested decision, the Commission stated that those documents are ‘preliminary working documents prepared by EIM representing the different stages of the work in progress — documents Nos (1) to (5) — the results of which were finally incorporated into the final report — document [No] 6’ (first paragraph of Section 3 of the contested decision).
- 64 As regards the refusal of access to documents Nos 1 to 5, the Commission states in the contested decision that ‘these are interim documents received by [it] that reflect preliminary results and analysis of the work carried out by [EIM] in the separate steps of the implementation of the contract, which at the time of their submission to [its] services were still subject to their assessment and comments’. It added that, ‘[g]iven that presently no final decision has been taken on the appropriate methodology to be applied ..., their disclosure would seriously undermine the decision-making process’ (second paragraph of Section 3.1 of the contested decision).
- 65 Consequently, in the contested decision, the Commission infers that its decision-making process would be seriously undermined from the fact that disclosure of documents Nos 1 to 5, interim documents, would take place before the final report on methodology — document No 6 in this case — was adopted.
- 66 However, that reasoning conflicts with the very wording of the first subparagraph of Article 4(3) of Regulation No 1049/2001, which provides that access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution is to be refused where its disclosure would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure. It follows that, in order to refuse the access sought, the institution cannot simply rely on the fact that it received the documents from a third party or on the absence of a decision and thus decide that in those circumstances its decision-making process has been seriously undermined, as required by the article cited above (see, to that effect, *Borax Europe v Commission*, cited in paragraph 50 above, paragraph 92).
- 67 In addition, the preliminary nature of documents Nos 1 to 5 does not, in itself, justify the application of the exception provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. That provision does not make a distinction according to the state of progress of the

works of a third party and the Commission's position with regard to them. That provision envisages in general the documents relating to a question where a 'decision has not been taken' by the institution concerned, by contrast with the second subparagraph of Article 4(3), which envisages the situation where a decision has been taken by the institution concerned. In the present case, the preliminary nature of the documents and the fact that they were still being commented upon and discussed by the Commission do not therefore establish, in themselves, that the decision-making process is seriously undermined (see, to that effect, Case T-233/09 *Access Info Europe v Council* [2011] ECR II-1073, paragraph 76).

68 In the second place, the applicants submit that the information relied on by the Commission in order to refuse access to the EIM documents is factually inaccurate. That is the case as regards the arguments put forward by the Commission concerning the applicants' alleged attempts to influence or exert undue pressure on the Commission and the curtailment of the Commission's independence and scope for manoeuvre should the EIM documents be disclosed.

69 The Commission stated that documents Nos 1 to 5 contained 'intermediate methodological proposals deemed inconclusive by [it and the disclosure of which] would cause undue delay and disruption of [its continuing work] on, and final assessment of, the methodology as a whole'. Their disclosure 'could prompt premature comments and criticism and lead to attempts to influence and skew the Commission's decision-making process', which 'would also unduly limit the discretion of the Commission in making informed and independent choices in the development of the final methodology' (second paragraph of Section 3.1 of the contested decision).

70 It follows from those grounds that the refusal of access is, in essence, based on the fear that the disclosure of documents Nos 1 to 5 may, by the comments to which they might give rise, delay, disrupt and influence the Commission's work and thus amount to an external pressure on the ongoing decision-making process in this case.

71 It should be recalled that the protection of the decision-making process from targeted external pressure may constitute a legitimate ground for restricting access to documents relating to the decision-making process. Nevertheless, the reality of such external pressure must be established with certainty, and evidence must be adduced to show that there was a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure (see, to that effect, *Muñiz v Commission*, cited in paragraph 62 above, paragraph 86).

72 It is apparent that the risk of an attempt to influence and skew the Commission's decision-making process is referred to in the contested decision only in a vague and general manner. The Commission's claims are not sufficiently specific and substantiated to constitute proof of a real risk of such external pressure if the documents requested had been disclosed before the final report was adopted.

73 In addition, it is apparent from the contested decision and from Annex A.2 to the application (letter of 11 August 2009 from DG Competition to the applicants) (i) that although document No 1 was not sent to the stakeholders, a revised version of that document was the subject of a restricted consultation by them, including the applicants, (ii) that document No 2 is a consolidated version of the proposed methodology incorporating, in particular, the comments received from stakeholders, (iii) that document No 3 was tested by means of in-depth interviews with merchants and (iv) that documents Nos 4 and 5 are, as specified in the contested decision, a revised draft questionnaire and the finalisation of a test of that draft questionnaire on the internet respectively, so that those various documents necessarily have shared features.

74 Even if the Commission correctly states that the reference to stakeholder consultation is to be

distinguished from giving public access with an *erga omnes* effect, it must none the less be inferred from that stakeholder consultation and also from the interviews with merchants, persons external to the institution, that the Commission could not simply refuse to disclose the documents on the unsubstantiated basis of a risk of external influence.

75 The fact that the Commission organised such a consultation and tests presupposes that it expected observations, remarks and, possibly, criticism from the stakeholders or merchants. Such comments are necessarily examined by the Commission which then decides whether or not to take them into consideration. Consequently, it cannot be denied that such comments, requested by the Commission, are capable of having a certain impact on its work.

76 Accordingly, after seeking such comments, the Commission cannot thereafter justify its refusal to grant access by relying on a hypothetical risk of external influence.

77 Consequently, the reasons put forward by the Commission are not sufficient to establish that there is a risk of seriously undermining the decision-making process if documents Nos 1 to 5 had been disclosed.

78 The first plea in law must therefore be upheld, and there is no need to examine the applicants' complaint that there is an overriding public interest in disclosing the EIM documents.

The second plea in law, alleging infringement of the first indent of Article 4(2) of Regulation No 1049/2001

79 The applicants submit, in essence, that the Commission has not established that the conditions of the first indent of Article 4(2) of Regulation No 1049/2001 are fulfilled in the present case, nor has it put forward any statements from EIM to the effect that granting access to the EIM documents would undermine the protection of its commercial interests.

80 The first indent of Article 4(2) of Regulation No 1049/2001 provides that access to a document is to be refused where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure.

81 It must be pointed out that although the concept of commercial interests has not been defined in the case-law, the Court has specified that it is not possible to regard all information concerning a company and its business relations as requiring the protection which must be guaranteed to commercial interests under the first indent of Article 4(2) of Regulation No 1049/2001 without frustrating application of the general principle of giving the public the widest possible access to documents held by the institutions (see Case T-437/08 *CDC Hydrogene Peroxide v Commission* [2011] ECR II-8251, paragraph 44 and the case-law cited).

82 Consequently, in order to apply the exception provided for by the first indent of Article 4(2) of Regulation No 1049/2001, the institution must show that the documents requested contain elements which may, as a result of the disclosure, seriously undermine the commercial interests of a legal person.

83 That is the case, in particular, when the requested documents contain commercially sensitive information relating to the commercial strategies of the undertakings involved, their sales figures, market shares or customer relations (see, by analogy, Case C-477/10 P *Commission v Agrofert Holding* [2012] ECR, paragraph 56).

84 Similarly, an undertaking's working methods and business relationships may be revealed as a result

of the disclosure of the documents requested, thereby undermining its commercial interests, in particular when the documents contain information particular to that undertaking which reveal its expertise.

- 85 In the present case, access to documents Nos 1 to 5, classified as ‘interim documents’, is refused on the grounds that that disclosure ‘reflecting “the trial and error” process would give rise to potential misrepresentation [with regard to] the work carried out by EIM that is likely to be detrimental to its reputation and goodwill’ and would reveal ‘the know-how of EIM for carrying out the interim steps of the assignments which, if known to competitors, would give them an advantage in their business activities to the detriment of EIM’ (second and fourth paragraphs of Section 3.2 of the contested decision).
- 86 That line of argument justifying, in the Commission’s view, the refusal of access to documents Nos 1 to 5 is therefore based, in essence, on the risk that the interim nature of those documents may be detrimental to EIM’s commercial interests in providing an incomplete picture of the work carried out by it and revealing its know-how.
- 87 However, that line of argument is not supported by sufficient evidence to conclude that there was a reasonably foreseeable – and not a purely hypothetical – risk that disclosure of the documents at issue would undermine the protection of EIM’s commercial interests.
- 88 In particular, the interim nature of documents Nos 1 to 5 cannot in itself prove that there is such a risk. Contrary to the Commission’s claims, it cannot be inferred simply from the fact that the documents are not final that their disclosure will automatically undermine EIM’s reputation or reveal its know-how.
- 89 Apart from the interim nature of documents Nos 1 to 5, the Commission does not put forward, in the contested decision, other evidence capable of showing that there is a risk of undermining EIM’s commercial interests.
- 90 Consequently, it must be concluded that the evidence relied on by the Commission in the contested decision is not sufficient in order to apply the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001.
- 91 That conclusion cannot be called in question by the Commission’s argument developed in the defence, according to which the disclosure of document No 3 would (i) reveal the sources of information used by EIM for the gathering of data, and could thus put at risk its know-how in gathering and filtering information and its goodwill, and (ii) would compromise business secrets.
- 92 It is sufficient to note in that regard that the Commission did not rely on such a ground in the contested decision. It is therefore a new ground which cannot justify the refusal of access to document No 3.
- 93 Consequently, the second plea in law must be upheld, and there is no need to examine the applicants’ complaint that there is an overriding public interest in disclosing the EIM documents.
- 94 In the light of all the foregoing, the contested decision must be annulled, in that it refuses, in breach of the first subparagraph of Article 4(3) and the first indent of Article 4(2) of Regulation No 1049/2001, to grant access to documents Nos 1 to 5, and there is no need to rule on the complaint concerning the alleged breach of Article 8 of Regulation No 1049/2001 raised by the applicants. In any event, if even, by that last complaint, the applicants sought, at the stage of the application and irrespective of their claim for the annulment of the contested decision, to obtain an interpretation of Article 8 of that regulation, it must be found that the Court does not have

jurisdiction, in the context of a review of legality under Article 263 TFEU, to issue declaratory judgments (order of 6 March 2012 in Case T-578/11 *Nutrimed-Klek & Szybiński v Commission*, not published in the ECR, paragraph 14; see, to that effect, the order in Case C-224/03 *Italy v Commission* [2003] ECR I-14751, paragraphs 20 to 22).

- 95 Lastly, it must be recalled that it is not for the Court to substitute itself for the Commission and to indicate the documents to which total or partial access should have been granted, the institution being required, when giving effect to this judgment, to take into account the reasoning set out in it (see, to that effect, Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, paragraph 133).

Costs

- 96 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicants.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls the decision of the European Commission of 12 July 2011 refusing MasterCard, Inc., MasterCard International, Inc. and MasterCard Europe access to certain documents drawn up by a third party relating to a study of the costs and benefits to merchants of accepting different payment methods in so far as it refuses access to the documents relating to:**
 - **costs and benefits to merchants of accepting different payment methods (inception report of 2 June 2009);**
 - **costs and benefits to merchants of accepting different payment methods — part 1 of the methodology report of 28 September 2009 [revised version incorporating comments received from stakeholders and the Competition Directorate-General (DG) of the European Commission];**
 - **in-depth interview test results on costs of payments: analyses of the in-depth interviews held in the Netherlands, Hungary and the United Kingdom, 15 January 2010 (version provided on 9 March 2010);**
 - **draft online questionnaire, 8 March 2010;**
 - **results and conclusions of the internet feasibility test: draft report, 24 May 2010;**
2. **Orders the Commission to pay the costs.**

Papasavvas

Forwood

Bieliūnas

Delivered in open court in Luxembourg on 9 September 2014.

[Signatures]

* Language of the case: English.