JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

13 September 2010 *

In Case T-452/04,

Éditions Odile Jacob SAS, established in Paris (France), represented by W. van Weert, O. Fréget, M. Struys, M. Potel and L. Eskenazi, lawyers,

applicant,

v

European Commission, represented initially by A. Whelan, O. Beynet, A. Bouquet and F. Arbault, and subsequently by A. Bouquet and O. Beynet, acting as Agents,

defendant,

* Language of the case: French.

supported by

Wendel Investissement SA, established in Paris, represented initially by C. Couadou and M. Trabucchi, and subsequently by M. Trabucchi and F. Gordon, lawyers,

and by

Lagardère SCA, established in Paris, represented initially by A. Winckler, I. Girgenson and S. Sorinas Jimeno, and subsequently by A. Winckler, F. de Bure and J.-B. Pinçon, lawyers,

interveners,

APPLICATION for the annulment of Commission Decision (2004) D/203365 of 30 July 2004 relating to the approval of Wendel Investissement as purchaser of the assets sold in accordance with Commission Decision 2004/422/EC of 7 January 2004 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.2978 — Lagardère/Natexis/VUP) (OJ 2004 L 125, p. 54),

THE GENERAL COURT (Sixth Chamber),

composed of A. W. H. Meij, President, V. Vadapalas and L. Truchot (Rapporteur), Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 28 January 2010,

gives the following

Judgment

Background to the dispute

1 On 25 September 2002 Vivendi Universal SA ('VU') decided to dispose of the publishing assets held in Europe by its subsidiary Vivendi Universal Publishing SA ('VUP').

2 Lagardère SCA declared its interest in purchasing those assets, consisting of the controlling interests and assets of VUP (the 'target assets').

3 It became apparent however that the timetable for the transfer drawn up by VU, which wanted to dispose of the target assets and receive the proceeds as quickly as possible, was not compatible with the time needed to complete the formalities required to obtain prior authorisation of this proposed purchase from the competition authorities.

4 Lagardère therefore asked Natexis Banques Populaires SA ('NBP') to take its place, through the intermediary of one of its subsidiaries, in order to purchase the target assets from VUP, hold them on a temporary basis, then, once authorisation of the proposed purchase by Lagardère of the target assets was obtained, sell them again to Lagardère.

5 By letter of 8 October 2002 NBP accepted Lagardère's request.

6 Lagardère and NBP submitted the main terms of NBP's purchase of the target assets to the Commission of the European Communities, which approved them.

7 Lagardère then submitted to VU its offer to purchase the target assets, which provided for the replacement of Lagardère by NBP or any entity in that group.

8 On 29 October 2002 VU approved the disposal of the target assets to Lagardère.

9 On 3 December 2002 Investima 10 SAS, a wholly owned subsidiary of Ecrinvest 4 SA, which was itself a wholly owned subsidiary of Segex Sarl, which in turn was wholly controlled by NBP, gave to VUP a formal undertaking to purchase the target assets.

10 On the same date, Segex and Ecrinvest 4 concluded with Lagardère a sale contract ('the sale contract') whereby Lagardère (through Ecrinvest 4), once the anticipated authorisation for the concentration was obtained from the Commission, was entitled to purchase the entire capital of Investima 10, the proprietor of the target assets, provided that VUP took up the abovementioned undertaking to purchase. The purchase price for those shares was paid in advance by Lagardère to Segex, the proprietor of the entire share capital of Ecrinvest 4.

11 On 20 December 2002 VUP took up Investima 10's undertaking to purchase and on the same date Investima 10 concluded with VUP the contract to purchase the target assets.

12 On the same date NBP issued the following press release:

'NBP is acquiring the entire package of assets sold with a view to reselling them [to Lagardère] as soon as authorisation from the competition authorities is obtained.

From today the assets of VUP will be held by Investima 10, which is a company indirectly wholly owned by NBP.

That limited liability company with an executive board and a supervisory board becomes the parent company of the companies encompassing the assets sold.

…’

13 Under Article 4(1) of the sale contract:

‘(ii) [Segex] shall ensure that Ecrinvest 4 and Ecrinvest 4 undertake that:

…

(c) [Investima 10] shall appoint as members [of its] executive board … one or more independent third parties, but excluding any person coming from the [Segex] or [Lagardère] groups;

…

(e) the articles of association [of Investima 10] shall delegate, exclusively, to one member of the executive board the responsibilities which may [fall] under this contract on the executive board vis-à-vis the Commission … or any other competent competition authority and for which, in that capacity, an independent third party may be appointed …’

14 On 20 December 2002 Investima 10's executive board was formed and B., president of the firm S., was appointed as a member of the board as the 'independent third party', in terms of Article 4(1)(ii)(e) of the sale contract.

15 Article 2(2) of the contract signed on 19 December 2002 by Ecrinvest 4 and the firm S. specifies, in the first subparagraph, that, in his capacity as trustee of the company, B. shall act in the interests of Investima 10 and of the target assets and, more specifically, in the interests of preserving their viability, their economic value and their competitiveness.

16 To that end, in the second subparagraph, Article 2(2) of that contract states that B. must comply with, and ensure that Investima 10's executive board complies with:

'(i) the [stipulations] in Article 4 of sale contract … relating to … the principles of prudent management of the assets which must be observed by the executive board and the company bodies responsible for the holdings with the objective of preserving the integrity of the assets sold and their value.

…'

17 On 14 April 2003, in accordance with Article 4(1) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (corrigenda in 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), Lagardère notified the Commission of its proposed purchase of the target assets of VUP.

18 By decision of 5 June 2003 the Commission, finding that the proposed concentration raised serious doubts as to its compatibility with the common market, commenced an in-depth investigation of this transaction, on the basis of Article 6(1)(c) of Regulation No 4064/89.

19 The parties' written pleadings indicate that Investima 10 became Editis SA on 14 October 2003.

20 On 27 October 2003 the Commission sent to Lagardère a statement of objections setting out competition issues raised by the notified concentration, and Lagardère replied on 17 November 2003.

21 Consequently, on 2 December 2003 Lagardère submitted to the Commission a number of remedial measures in the form of commitments to sell the target assets.

22 Commission Decision 2004/422/EC of 7 January 2004 (Case COMP/M.2978 — Lagardère/Natexis/VUP) (OJ 2004 L 125, p. 54) ('the decision of 7 January 2004'), adopted pursuant to Article 8(2) of Regulation No 4064/89, provides:

'*Article 1*

The notified transaction, as amended by the package of commitments of 23 December 2003, by which Lagardère acquires sole control of the [target assets] of Vivendi Universal Publishing, now called Editis, is declared compatible with the common market and with the functioning of the European Economic Area.

Article 2

Article 1 shall apply on condition that Lagardère complies in full with the commitments referred to in paragraphs 1 to 3 and 10 of Annex II.

Article 3

This Decision is subject to an obligation on Lagardère to comply in full with the other commitments set out in Annex II.'

23 Under paragraph 1 of the commitments in Annex II, Lagardère undertook to sell all of the assets of Editis (the 'assets sold') with the exception of the assets specifically listed in that paragraph (the 'assets retained').

24 The assets sold represented approximately 60 to 70 % of the worldwide turnover of VUP and 70 to 80 % of the turnover achieved by VUP in the French-language publishing markets concerned by the authorised concentration ('the concentration').

25 Paragraph 2 of Lagardère's commitments states that the assets retained are defined in detail in Annex 1 to those commitments.

26 In Paragraph 3 of those commitments, Lagardère undertakes to conclude irrevocable contracts of sale within a period (confidential) from the date of reception of the conditional authorisation decision and to ensure that the sale actually takes place within a period (confidential) from the conclusion of the contract.

27 Lagardère had the right to choose the purchaser of the assets sold, according to selection criteria defined as follows in paragraph 10 of its commitments:

'In order to preserve effective competition on the relevant markets the notifying party undertakes to sell the Assets Sold to one or more buyers independent of the notifying party and satisfying the following tests:

(a) Lagardère may have no significant interest, direct or indirect, in the buyer [or buyers];

(b) The buyer or buyers must be viable operators capable of maintaining or developing effective competition, and having the economic incentive to do so; this wording is not to be interpreted as excluding any category of industrial or financial buyers in advance;

(c) The acquisition of one or more of the Assets Sold by a potential buyer must not be such as to create fresh competition difficulties or to threaten to delay the fulfilment of these commitments. The notifying party must be able to show the Commission that the buyer satisfies the tests laid down in these commitments and that the Asset or Assets Sold are being transferred in accordance with these commitments;

(d) The buyer or buyers must have obtained or be reasonably supposed to be able to obtain all the approvals necessary for the acquisition and operation of the Assets Sold.'

28 Paragraph 14 of Lagardère's commitments states that the choice of the buyer or buyers is to be subject to the Commission's approval and that the application for the approval of the parties concerned is to include the information necessary to enable the Commission to establish that the proposed buyer or buyers satisfy the tests set out in paragraph 10 as quoted in paragraph 27 above.

29 Lagardère was to appoint a trustee satisfying the conditions set in the following terms in paragraph 15 of its commitments:

'The notifying party will appoint a trustee to perform the duties set out below. The trustee will be independent of Lagardère and of Editis, will possess the qualifications needed to perform its mandate, being for example a consultant bank, consultant or auditor, and will not be exposed to any conflict of interests. The trustee will be remunerated by Lagardère in a manner that does not compromise the proper performance of the trustee's duties or the trustee's independence.'

30 Paragraph 9 of Lagardère's commitments provides as follows for the appointment of a manager of the assets held separately (the hold-separate manager):

'The notifying party will appoint a hold-separate manager within the time-limits and in accordance with the mechanisms for the appointment of the trustee laid down in paragraph 16 to 19. The hold-separate manager will be responsible for the management of the Assets Sold, under the supervision of the trustee. The hold-separate manager must manage the Assets Sold independently and in the ordinary course of business with a view to ensuring the preservation of their economic viability, their saleability, their competitiveness and their independence of the Assets Retained and Lagardère's other businesses. If an officer of a subsidiary of Editis within the scope of the commitment to sell terminates his or her duties, the hold-separate manager will have authority to appoint a successor, under the supervision of the trustee'

31 The task of the trustee is defined as follows in Lagardère's commitments:

'20. The object of the trustee's actions is to ensure that these commitments are met. On its own initiative or upon application by the trustee or the notifying party, the Commission may address any instruction to the trustee which is designed to ensure that these commitments are met.

21. The trustee's duties will consist of the following:

(a) to ensure that the Assets Sold are held and managed in a distinct structure, separately from and independently of the Assets Retained and Lagardère's other businesses, until the date of the transfer of the Assets Sold;

(b) to ensure that the hold-separate manager maintains the viability and saleability of the Assets Sold and the management and operation of the Assets Sold in the ordinary course of business and in accordance with previous practice until the date of the transfer of the Assets Sold;

(c) to ensure that effective steps are taken to prevent any information that is sensitive with regard to competition from being communicated to the notifying party, with the exception of information necessary for the sale of the Assets Sold on the best possible terms in accordance with these commitments;

(d) to ensure that the restructuring measures are taken in accordance with these commitments, to ensure that it is informed of discussions in progress between Lagardère and Editis regarding demarcation, and if necessary to attend such discussions;

…

(f) generally to ensure that the economic and competitive value of the Assets Sold is preserved, and to take any steps conducive to that end;

(g) generally to ensure that the notifying party satisfactorily fulfils these commitments.'

32 Further, paragraph 24 of the commitments states the following:

'In the event of disagreement between Lagardère and Editis on the restructuring measures necessary for the fulfilment of these commitments, either party may inform the trustee accordingly by registered letter, sending a copy to the other party. The trustee, having heard both sides, will then make a recommendation, as quickly as possible, regarding the scope of the restructuring measures needed. The trustee will report to the Commission informing it of the recommendation. If the disagreement between Lagardère and Editis persists, either party may request the Commission, after hearing both sides, to determine the scope of the restructuring measures needed.'

33 Lastly, Lagardère's commitments in the section 'Alteration of the legal form of Editis' provide:

'30. After Editis's new constitution has been approved by the Commission, the notifying party will convert Editis into the form of a simplified limited company (société par actions simplifiée, SAS). Thereafter the governing bodies of the company will be … a chief executive officer, who will perform the duties of the hold-separate manager, and … a shareholders' committee, made up of three representatives of the trustee referred to in paragraph 15 and two representatives of Lagardère.'

31. The simplified limited company will be organised as follows:

(a) The management of Editis will be the responsibility of its Chief Executive Officer under the supervision of the trustee exercising the tasks entrusted to him as defined above;

(b) The shareholder's committee will supervise the management of the retained assets and will be entitled for this purpose to receive all information relating to those assets;

(c) As regards the assets sold, the shareholder's committee will, under the supervision of the trustee, be entitled to receive information concerning all decisions or events which might affect the property interests of Lagardère in the assets sold and, in particular, the following information: the current balances, investment decisions and asset sale or purchase decisions having an impact of more than EUR 200 000, decisions affecting the company's debt level and guarantees of any kind, and all decisions which are strategic or outside the area of ordinary business. However, the trustee will ensure that commercial or technical information concerning the assets sold which is confidential, including, as the case may be, that referred to in the previous sentence, is not communicated to Lagardère.

32. During the period between the adoption by the Commission of a decision authorising the notified transaction and the conversion of Editis to a simplified limited company Editis shall continue to be managed by the company governing bodies currently in place, in coordination with the trustee. During that time, Lagardère, in its capacity as shareholder in Editis, will be entitled to access to all information concerning the Assets Retained. In the case of the Assets Sold the trustee will ensure that the information referred to in paragraph 31(c) is transmitted to Lagardère.'

34 On 5 February 2004 the Commission:

— approved A. K. as the hold-separate manager and approved the draft definition of his mission statement, submitted on 30 January 2004;

— approved as trustee the firm S., represented by its president, B., and approved the draft definition of its mandate submitted on 30 January 2004.

35 On 9 February 2004 Lagardère appointed the firm S. as trustee.

36 On 25 March 2004 Editis was converted, pursuant to paragraph 30 of Lagardère's commitments, to a simplified limited company, the governing bodies of which thereafter comprised the Chief Executive Officer with the duty of managing the separated assets and the shareholders' committee consisting of three representatives of the trustee and two representatives of Lagardère.

37 Lagardère made overtures to a number of undertakings, including the applicant, who might purchase the assets sold.

38 The applicant declared its interest in this transaction. By fax of 28 April 2004, it sent its purchase offer to Lagardère.

39 In a notice dated 19 May 2004, Lagardère declared that it held offers to purchase from five potential buyers, including the applicant, and that until midnight on 25 May 2004 it would deal exclusively with one of them, Wendel Investissement SA ('Wendel').

40 On 28 May 2004 Lagardère and Wendel reached a draft agreement to purchase the assets sold.

41 By letter of 4 June 2004 Lagardère asked the Commission to approve Wendel as purchaser of those assets.

42 One 5 July 2004 the firm S. submitted to the Commission its summary report with the conclusion that Wendel's prospective purchase was compatible with the approval criteria defined in paragraph 10 of Lagardère's commitments.

43 By decision (2004) D/203365 of 30 July 2004 the Commission approved Wendel as purchaser of the assets sold, after making the finding that Wendel satisfied the approval criteria defined in paragraph 10 of Lagardère's commitments.

44 That decision was adopted in accordance with paragraph 14 of Lagardère's commitments and on the basis of the abovementioned application for approval, the draft sale contract annexed to it, the report from the firm S., written replies from Lagardère and Wendel to a Commission request for information, information provided by Wendel at a meeting with Commission staff, and an exchange of views on Wendel's prospective purchase with organisations representing the staff of Editis and interested third parties.

45 By application lodged at the Registry of the General Court on 8 July 2004, the applicant brought an action for the annulment of the decision of 7 January 2004 (Case T-279/04).

46 By fax of 27 August 2004 the Commission notified the applicant, at its request, of the decision approving Wendel as the purchaser of the assets sold.

47 The transfer to Wendel of ownership of those assets, called 'Nouvel Editis', took place on 30 September 2004.

Procedure

48 By application lodged on 8 November 2004, the applicant brought this action for annulment of the approval decision of 30 July 2004 (the 'decision of 30 July 2004').

49 By judgment of today's date, the General Court (Sixth Chamber) dismissed the applicant's action for annulment, in Case T-279/04, of the decision of 7 January 2004.

50 By documents lodged on 25 January and 24 March 2005, Wendel and Lagardère sought leave to intervene in the proceedings, in support of the form of order sought by the Commission, under Article 115 of the Court's Rules of Procedure.

51 By documents lodged on 3 March and 18 April 2005, the applicant (i) made an application, under Article 116(2) of the Rules of Procedure, that certain documents annexed to the application initiating this action and certain passages in that application

and in the defence should be excluded from the procedural documents to be served on Wendel and Lagardère and (ii) produced, for the purposes of such service, a non-confidential version of the documents concerned.

52 By orders of the President of the Fourth Chamber of 11 May and 25 October 2005, Lagardère and Wendel were granted leave to intervene in the proceedings in support of the form of order sought by the Commission, and the Registrar of the General Court was instructed to serve on them the non-confidential version of the procedural documents.

53 By document lodged at the Registry of the Court on 10 June 2005, Lagardère challenged the application for confidentiality submitted by the applicant.

54 Lagardère and Wendel lodged their statements of intervention on 16 September 2005 and 27 April 2006.

55 The applicant submitted its observations in reply, by documents lodged on 8 November 2005 and 4 July 2006.

56 By order of 19 June 2007 the President of the Fourth Chamber dismissed the application for confidentiality submitted by the applicant vis-à-vis Lagardère and instructed the Registrar of the Court to serve on Lagardère the original versions of the documents concerned.

57 The composition of the chambers of the General Court having been modified, the Judge-Rapporteur was assigned to the Sixth Chamber, to which this case was therefore allocated on 24 October 2008.

58 Upon hearing the report of the Judge-Rapporteur, the General Court (Sixth Chamber) decided to open the oral procedure and invited the parties to reply in writing to certain questions. The parties complied with that request within the prescribed period.

59 The parties presented oral argument and replied to the questions put by the Court at the hearing which took place on 28 January 2010.

60 By judgment of 9 June 2010 in Case T-237/05 *Éditions Odile Jacob* v *Commission* [2010] ECR II-2245 the Court annulled the Commission's decision of 7 April 2005 rejecting a request from the applicant to obtain, under 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), access to certain documents in order to use them in support of this action.

61 By letter lodged on 21 June 2010, the applicant requested that deliberations in this case be suspended for a reasonable period after the sending by the Commission of the documents at issue.

Forms of order sought by the parties

62 The applicant claims that the General Court should:

— annul the decision of 30 July 2004;

— order the Commission and Lagardère to pay the costs.

63 The Commission, supported by Lagardère and Wendel, contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

64 In support of its action, the applicant relies on four pleas in law, respectively that the Commission (i) failed to fulfil its obligations to supervise the selection of prospective purchasers of the assets sold, (ii) approved Wendel on the basis of a report drawn up by a trustee who was not independent of Editis, Lagardère and Wendel, (iii) was in breach of its obligation to state reasons and (iv) committed a manifest error in the assessment of whether Wendel's prospective purchase complied with the conditions governing approval of the purchaser of the assets sold, as set out in paragraph 10(b) of Lagardère's commitments.

65 The second plea in law should be examined first, whereby the applicant claims that the decision of 30 July 2004 was adopted on the basis of a report produced by a trustee who was not independent of Editis.

Arguments of the parties

66 The applicant claims that when, on 9 February 2004, Lagardère, pursuant to paragraph 15 of its commitments, appointed the firm S., represented by its president, B., as trustee, B. had, since 20 December 2002, been a member of the board of Investima 10 which, as stated in paragraph 19 above, became Editis on 14 October 2003.

67 According to the applicant, B., in his capacity as a director of Editis, vested, as far as third parties were concerned, with the full range of powers conferred on the members of an executive board, was therefore not independent of Editis, contrary to the requirements prescribed in paragraph 15.

68 The exercise of the duties of an independent trustee with the responsibility, in the name of and on behalf of the Commission, of supervising the sale of assets to be divested entailed that the person concerned have no links of any kind whatsoever to the entity the sale of whose assets he was to supervise and, *a fortiori*, that none of those links be financial. Yet B.'s duties as a member of the executive board were remunerated.

69 Furthermore, B. remained a member of the executive board of Editis until 25 March 2004 and therefore from 9 February 2004 until that date combined two duties, namely the supervision of the sale of Editis to Lagardère and then the resale to a third party of the assets sold.

70 Lastly, even after the termination of his duties as a member of the executive board of Editis, B. necessarily remained linked to Editis, to the extent that he might for several years incur civil and criminal liability to shareholders and third parties.

71 The mere existence of a doubt as to the independence of the trustee was sufficient to vitiate the procedure relating to the assets sold and, consequently, the decision of 30 July 2004. The assessment report on a prospective purchaser drawn up by the trustee was, in fact, a fundamental and decisive factor in the Commission's decision to approve, or not, the party concerned.

72 Unless the very role of the trustee in the procedure of selling the assets were to be called into question, the conclusions of his report necessarily had a decisive effect on the decision of 30 July 2004. One need only compare the conclusions in the trustee's report and those in the decision of 30 July 2004 to establish that the latter is directly derived from the text of the report, on which it is in many respects modelled.

73 The Commission does not accept the applicant's arguments. The Commission states that, when VUP passed into the control of NBP, B., president of the firm S., was appointed a member of the board of Investima 10, a subsidiary of NBP holding the target assets, pursuant to Article 4(1)(ii)(e) of the sale contract.

74 Given that the individual concerned was required, in his capacity as a third party independent of the competent competition authorities, to discharge the responsibilities of the board of Investima 10, now Editis, that duty was comparable to that of the trustee referred to in paragraph 15 of Lagardère's commitments.

75 After the firm S. was appointed, in the person of its president B., trustee with responsibility for supervising Lagardère's sale commitments, subsequent to the takeover of Editis by Lagardère, B. continued temporarily to perform the duties of an independent third-party member of the board of Editis remunerated by NBP, because of the knowledge of Editis which the individual concerned had acquired in that capacity.

76 Far from creating any link of dependence between B. and Editis, B.'s continued presence on that board was perfectly compatible with the decision of 7 January 2004 and with Lagardère's commitments. The objective was to preclude Lagardère having any influence on the management of Editis in the transition period, during which period the governing bodies established after NBP took control of VUP were, in accordance with paragraph 30 of Lagardère's commitments, to remain in place until Editis was converted into a simplified limited company, which took place on 25 March 2004.

77 B's status as a member of the shareholders' committee of Editis, conferred on him on 25 March 2004 when ownership of the assets sold was transferred to Wendel, was also compatible with Lagardère's commitments. Paragraph 30 stated that the representatives of the trustee were to have a majority in the shareholders' committee, to guarantee that an independent third party, the trustee, would ensure that Lagardère could not exercise any influence over the management of Editis.

78 Since the firm S. was appointed, in the person of its president, as trustee only after the sale of Editis by NBP to Lagardère, any earlier or subsequent link between the firm S. and NBP was irrelevant to the assessment of its independence vis-à-vis Editis since, when the commitments were implemented, NBP no longer had control of Editis. Any links between the trustee and NBP, the former proprietor of assets targeted by a decision granting conditional authorisation of a concentration, were not capable of jeopardising the completion of sales intended to resolve competition issues arising from the merger of those target assets with those of Lagardère.

79 According to the Commission, the applicant's evidence that the trustee was not independent of Editis is based solely on the fact that the trustee was not entirely divested of any link or contact with Editis. However, the condition of independence of Editis which the Commission required of the trustee was designed to ensure that the supervision of the prospective purchaser of the assets sold was based only on the viability and competitive power of those assets, to the exclusion of personal considerations.

The trustee cannot therefore properly be criticised for having had an interest in acting for the benefit of Editis, since that was a necessary condition of the commitments being fully implemented and of effective competition being maintained.

80 In any event, before the trustee's lack of independence, were it established, could be relied on as a ground for annulment of the decision of 30 July 2004, it would also be necessary to prove that that irregularity led the individual concerned to draw up a report which lacked objectivity and that the report had a decisive effect on the content of that decision.

81 However, not only does the applicant provide no evidence to prove that the trustee produced a report which was incorrect or biased, but nor does the applicant in any way prove that that report had a decisive effect on the tenor of the decision of 30 July 2004.

82 For the purposes of the final decision approving the purchaser of the assets sold, the task of the trustee was merely to provide an assessment of the purchaser and to state whether, in his opinion, the purchaser satisfied the conditions set out in the commitments. The Commission's adoption of the decision of 30 July 2004 was not founded solely or decisively on the trustee's report, but was based on a body of information, including that given by the trustee.

Findings of the Court

83 Under paragraph 15 of Lagardère's commitments, the trustee appointed by Lagardère to ensure that it met its commitments was, vis-à-vis Lagardère and Editis, to 'be independent … and not …exposed to any conflict of interests'. It was also stated in paragraph 15 that the 'trustee [would] be remunerated by Lagardère in a manner that does not compromise the proper performance of the trustee's duties or the trustee's independence'.

84 It must be observed that, after NBP agreed to take the place of Lagardère and to purchase on a temporary basis the target assets through the intermediary of Segex and Ecrinvest 4, subsidiaries which were wholly owned by NBP, on 3 December 2002 those subsidiaries concluded with Lagardère the sale contract transferring to Lagardère, subject to the prior authorisation of the concentration by the Commission, the entire capital of Investima 10, which was a wholly owned subsidiary of Ecrinvest 4, itself a wholly owned subsidiary of Segex, and which on 20 December 2002 acquired the target assets from VUP.

85 On 20 December 2002 Investima 10, as proprietor of the target assets, pursuant to Article 4(1)(ii)(c) of the sale contract, appointed B., the president of the firm S., as a member of its executive board, in terms of that provision, as an independent third party, in terms of Article 4(1)(ii)(e).

86 In that capacity, B., remunerated by NBP, was, pursuant to Article 4(1)(ii)(e) of the sale contract, 'exclusively' delegated 'the responsibilities which [might] fall on the executive board under … the [sale] contract vis-à-vis the Commission …'.

87 Furthermore, under paragraph 15 of its commitments to be found in Annex II to the decision of 7 January 2004, on 9 February 2004 Lagardère appointed the firm S. as a trustee bound, under paragraph 21(g) of those commitments, 'to ensure that [Lagardère] satisfactorily fulfil' its commitments to transfer the assets sold, and remunerated in that capacity by Lagardère. B. was president of the firm S. at that time and the Commission has accepted that B. carried out the trustee's duties, as laid down in the decision of 7 January 2004.

88 The firm S. was therefore appointed as trustee, in terms of paragraph 15 of Lagardere's commitments, and its president carried out the duties associated with that task, although the same individual was a member of the board of Investima 10, which later became Editis.

89 In addition, from 9 February 2004, the date when the firm S. was appointed, until 25 March 2004, the date when Editis was converted to a simplified limited company, B. simultaneously carried out the duties of a member of the Editis board and of trustee.

90 In accordance with paragraph 32 of Lagardère's commitments, Editis continued to be controlled by its existing governing bodies from 7 January 2004, when the decision of that date was adopted, until 25 March 2004, when Editis was converted to a simplified limited company.

91 In reply to a question from the Court, the Commission stated that B. carried out the duties of a member of the executive board of Investima 10/Editis in accordance with the relevant provisions of the French commercial code, and that, accordingly, the fact that the individual concerned performed tasks required of him as an independent third party on that board in no way precluded that individual from carrying out the statutory duties imposed on members of the executive board of a commercial company by that code.

92 However, under the first sentence of the first subparagraph of Article L 225-64 of that code, 'the [executive board] shall have the widest powers to act on the company's behalf in any circumstances'.

93 Prior to the appointment of the firm S., represented by its president B., as trustee, B. was therefore a member of the executive board of Editis and remained so for more than a month after that appointment.

94 Since he was a member of the executive board of Investima 10 (thereafter Editis) when the firm S. of which he was president was appointed trustee, and since he then simultaneously performed his duties as a member of the executive board with his duties as trustee conferred on him by the firm S., B. was dependant on Editis, to an extent that questions might be raised as to the neutrality he should exhibit in carrying out his duties as trustee.

95 It must be added that, as the trustee with the responsibility, under paragraph 21(g) of Lagardère's commitments, of ensuring that Lagardère satisfactorily fulfil its commitment to transfer the assets sold, and remunerated in that capacity by Lagardère, it was incumbent on the firm S., in the person of its president, B., to ensure that Lagardère dispose of the assets sold in a way consistent with the sales specified in paragraph 1 of Lagardère's commitments.

96 That transaction comprised, according to the Commission itself, 'a particularly delicate demarcation of the assets before their sale by Lagardère to a third party'.

97 In particular, the trustee was, under paragraph 21(d) of Lagardère's commitments, 'to ensure that the restructuring measures are taken in accordance with [Lagardère's] commitments' and he was to be 'informed of discussions in progress between Lagardère and Editis regarding demarcation and, if necessary, to attend such discussions'.

98 According to paragraph 24 of those commitments, the trustee was 'in the event of disagreement between Lagardère and Editis on the restructuring measures necessary' to make a recommendation, 'having heard both sides…regarding the scope of

the restructuring measures needed' and to report to the Commission informing it of his recommendation.

99 It is apparent from the documents before the Court that such disagreements did in fact arise between Lagardère and Editis. The Commission declared, in its rejoinder, that it was properly made aware of tensions sometimes created by Lagardère, which had an interest in ensuring that the identification of the assets of Editis which the decision of 7 January 2004 had allowed it to retain be as broadly based as possible. The Commission also added that trustee had on several occasions opposed Lagardère in order to protect interests linked to the assets sold, after prior consultation with the Commission.

100 However, the performance by B. of his duties as a member of the executive board of the company which owned all the assets of Editis was such as to affect the independence which the individual concerned was required to demonstrate when drawing up recommendations for necessary restructuring measures and the report informing the Commission of those recommendations.

101 Under the first subparagraph of Article 2(2) of the contract entered into on 19 December 2002 by Ecrinvest 4 and the firm S., B. was to act from 20 December 2002, 'in terms of his mandate … in the interests of Investima 10 and its assets and more specifically with a view to maintaining their viability, their economic value and their competitiveness'.

102 Further, B. was obliged, under the second subparagraph of Article 2(2) of that contract, to comply with, and ensure that Investima 10's executive board complied with the provisions in Article 4 of the sale contract relating to 'the principles of prudent management' of the target assets which the executive board was obliged to follow in order 'to preserve the continuity and value of the assets'.

103 It is evident from paragraph 92 above that, in addition to the specific tasks conferred on him as a member of the executive board, namely to discharge the responsibilities falling on the executive board under the sale contract vis-à-vis the Commission or any other competition authority, B. was thus, in his capacity as member of the executive board of Investima 10 (thereafter Editis) necessarily implicated in the performance, in relation to all the target assets owned successively by those two companies, of the full range of statutory powers of a member of the executive board of a commercial company.

104 It follows that the performance by B., from 20 December 2002 until 25 March 2004, of the duties of a member of the managing authority of Investima 10 (Editis), whose interests he was bound to protect by acting, under his mandate, in accordance with 'the principles of prudent management', no longer enabled him to provide an entirely independent discharge of his responsibilities as an independent trustee as required by paragraph 15 of Lagardere's commitments.

105 The Commission cannot therefore validly claim that the performance by B. of duties as an independent third party, a member of Editis' executive board, and then of duties as an independent trustee, was intended to prevent Lagardère from influencing the management of the assets at issue and that the trustee cannot be criticised for having had an interest in acting for the benefit of Editis, since such an interest was a necessary condition of Lagardere's commitments being met in full and of effective competition being maintained.

106 Since Lagardère had been authorised by the decision of 7 January 2004 to retain those target assets specifically listed in paragraph 1 of its commitments, it was, on the contrary, the responsibility of the trustee to ensure, completely independently, that Lagardère, in accordance with paragraph 1, carried out only those commitments to sell assets which the Commission itself deemed to be sufficient — while respecting the contractual freedom of the parties to the concentration — to preserve effective

competition and, consequently, to make that concentration compatible with the common market.

107 Consequently, the report assessing Wendel as a prospective purchaser of the assets sold, in the light of which the decision of 30 July 2004 was adopted, was drawn up by a trustee who did not meet the condition of independence from Editis, required by paragraph 15 of Lagardere's commitments, as set out in Annex II of the decision of 7 January 2004.

108 As regards the report's effect on the content of the decision of 30 July 2004, it must be observed that, as is clear from paragraph 5 of that decision, the firm S., as trustee, was asked to send to the Commission a report assessing Wendel as a prospective purchaser of the assets sold in the light of the approval criteria set out in paragraph 10 of Lagardere's commitments, as annexed to the decision of 7 January 2004.

109 It is evident moreover from paragraph 6 of the decision of 30 July 2004 that that decision is based, in particular, on the trustee's report.

110 While it is true that the decision of 30 July 2004 is not exclusively based on that report, it is nonetheless clear that the report had a decisive influence on that decision.

111 It is evident from a comparison of the trustee's report and the decision of 30 July 2004 that the decision was prompted substantially by that report.

112 In order to demonstrate Wendel's ability to preserve and develop Nouvel Editis, both the trustee firm, in its report, and the Commission, in the decision of 30 July 2004, emphasise the 'limited field' of Nouvel Editis and the preservation by Wendel of the 'managerial, publishing and support resources' needed for Nouvel Editis.

113 Both documents state in identical terms that the valuation of Wendel's investment involves the 'reconstitution and development of the cost of the Interforum distribution centre'.

114 Both the trustee firm and the Commission refer to the majority or principal distribution of Wendel's capital and to its 'property-based' approach, distinct from that of traditional investment funds, and the possibility of relying on a commitment from Wendel to Editis beyond the short-term perspectives of such funds.

115 While the trustee firm considers that Wendel is a prospective purchaser likely to ensure prompt realisation of Lagardere's commitments, the Commission holds that the acquisition by Wendel of the assets sold by Lagardère is not such as to raise fresh competition issues likely to delay realisation of those commitments.

116 Lastly, like the trustee, who estimates the length of Wendel's investment at around five to seven years, considered necessary for the 'consolidation' of the undertaking, the Commission considers, for its part, that a short-term 'exit' by Wendel from the capital of Nouvel Editis is improbable and that this is sufficient to ensure the 'stabilisation of the undertaking'.

117 Further, the Commission has itself referred on several occasions to the conclusions of the trustee firm's report in challenging the claim, in the applicant's fourth plea in law in support of annulment, that it committed a manifest error in its assessment of whether Wendel's prospective purchase complied with the approval conditions set out in paragraph 10(b) of Lagardere's commitments.

118 The illegality found is therefore such as to vitiate the lawfulness of the decision of 30 July 2004.

119 That decision must therefore be annulled, and it is unnecessary to examine the other pleas in law presented by the applicant in support of its claims for annulment.

The request for the suspension of deliberations

120 It is apparent, in the light of all of the foregoing, that the Court has been able to rule on the action on the basis of the forms of order, pleas in law and arguments presented by the parties in the written and oral procedure.

121 The applicant's request for the suspension of deliberations must therefore be rejected.

Costs

122 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.

123 Since the Commission and Lagardère have been unsuccessful and costs were applied for by the applicant, they must be ordered to bear their own costs and to pay those incurred by the applicant.

124 Since the applicant did not seek an order that Wendel should pay costs, Wendel shall bear only its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Annuls Commission Decision (2004)D/203365 of 30 July 2004 on the approval of Wendel Investissement SA as purchaser of the assets sold in accordance with Commission Decision 2004/422/EEC of 7 January 2004 declaring**

a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.2978 — Lagardère/Natexis/VUP);

2. Orders the European Commission and Lagardère SCA to bear their own costs and to pay the costs incurred by Éditions Odile Jacob SAS;

3. Orders Wendel Investissement to bear its own costs.

Meij Vadapalas Truchot

Delivered in open court in Luxembourg on 13 September 2010.

[Signatures]