Reports of Cases

OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 27 March 2012 [1]

**Joined Cases C-553/10 P and C-554/10 P**

**European Commission (C-553/10 P)**
**Lagardère SCA (C-554/10 P)**
**v**

**Éditions Odile Jacob SAS**

(Appeal — Competition — Concentrations — French-language publishing — Annulment of the decision on the approval of Wendel Investissement as purchaser of the assets sold — Significance of the trustee's lack of independence — Misinterpretation of the facts — Infringement of the obligation to state reasons)

1. The present appeals were brought by the Commission (Case C-553/10 P) and by Lagardère SCA (Case C-554/10 P) against the judgment of the General Court in *Éditions Odile Jacob* v *Commission*.[2] The Commission and Lagardère are asking the Court of Justice to set aside the judgment under appeal in so far as it annulled Commission Decision D(2004) 203365 of 30 July 2004 relating to the approval of Wendel Investissement SA ('Wendel') as purchaser of the assets sold ('the approval decision') in accordance with Commission Decision 2004/422/EC of 7 January 2004 ('the conditional authorisation decision') declaring a concentration compatible with the common market and the functioning of the EEA Agreement.[3]

2. It would appear that that was the first instance of an annulment of a Commission decision approving the purchaser of assets sold in accordance with commitments in a merger procedure. The General Court annulled the approval decision due to a possible lack of independence on the part of the trustee. I would point out, first, that the use of commitments in order to approve mergers has been a central hallmark of the Commission decision practice and, secondly, that monitoring trustees have a pivotal role to play in guaranteeing the successful implementation of commitments.[4]

## I – Background to the dispute

3. The quite complicated factual background to the present appeals has been laid out in detail in paragraphs 1 to 47 of the judgment under appeal. I shall outline a minimum of a few pertinent facts but for more detail shall otherwise merely cross-refer here to the above section of the judgment under appeal, which it is unnecessary to reproduce here at great length.

1 — Original language: English.

2 — Case T-452/04 [2010] ECR II-4713 ('the judgment under appeal').

3 — Case COMP/M.2978 – Lagardère/Natexis/VUP) (OJ 2004 L 125, p. 54.

4 — See, for instance, Hoehn, T., 'Merger remedies control – The role of the monitoring trustee in remedy cases', *Concurrences* No 2–2007 (*Doctrines/Concentrations françaises: Suivi des engagements*), pp. 37-38 (but also pp. 29-36), and De Valois Turk, M., 'The European Commission's revised Remedies Notice – the Trustee's Perspective', ECLR 2009, 30(7), pp. 332-39. See also Idot, L., 'Concentration et contrôle des engagements', Commentaires, *Europe – Revue mensuelle LexisNexis Jurisclasseur* – November 2010, pp. 25-26.

4. By the conditional authorisation decision of 7 January 2004 the Commission approved the concentration, which allowed Lagardère SCA ('Lagardère') to take control of certain assets of Vivendi Universal Publishing SA ('VUP'),[5] which became Editis, provided several commitments were respected. The notified concentration combined the activities of the two biggest companies existing on the market of French publishing, Hachette and VUP. These were also the only two companies capable, on this market, of ensuring in an autonomous fashion their development in so far as, apart from publishing, they had a complete commercialisation activity (circulation and distribution) and collections of popular pocketbooks. Therefore, the Commission identified problems related to the creation or strengthening of dominant positions on 12 markets. As a consequence, the notifying party, Lagardère, offered remedies: it undertook to sell all of the assets of Editis ('the assets sold') with the exception of certain assets.

5. Annex II to the conditional authorisation decision of 7 January 2004 specifies the conditions for the sale of a part of Editis' assets. In particular, paragraph 10 of Lagardère's commitments contains the conditions which must be fulfilled by the independent purchaser or purchasers chosen by the notifying party. In turn, paragraph 14 states that the choice of the purchaser or purchasers is to be subject to the Commission's approval. In the course of the sale, organised by Lagardère, the applicant at first instance, the publishing house Éditions Odile Jacob SAS ('Odile Jacob'), declared its interest in taking over the assets sold by Editis. However, eventually Lagardère asked the Commission to approve Wendel as purchaser of those assets.

6. On 5 February 2004 the Commission: (i) approved A.K. as the hold-separate manager and approved the draft definition of his mission statement, submitted on 30 January 2004; and (ii) approved the auditing firm S., represented by its president, B., as trustee and approved the draft definition of its mandate submitted on 30 January 2004 ('the trustee decision'). On 9 February 2004 Lagardère appointed the firm S. as trustee. On 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. On 30 July 2004, by the approval decision the Commission approved Wendel as purchaser of the assets sold, in accordance with paragraph 14 of the commitments attached to the conditional authorisation decision of 7 January 2004.

## II – Procedure before the General Court and the judgment under appeal

7. Odile Jacob brought an action for the annulment of the approval decision before the General Court and relied on four pleas, alleging 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) failed to comply with 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.

5 — In particular, it was Vivendi Universal SA ('VU') which decided to dispose of the publishing assets ('target assets') held in Europe by its subsidiary VUP. Lagardère declared its interest in acquiring the assets in question. However, as VU was seeking a quick sale and quick payment, it became clear that that wish could not be achieved given the need to obtain the prior authorisation of the sale by the competent competition authorities. Lagardère thus requested Natexis Banques Populaires SA ('NBP') to act in its place and, by means of a subsidiary set up for that purpose, to acquire the target assets from VUP, to hold them provisionally and to sell them to Lagardère once the latter had obtained authorisation for such an acquisition. Next, Investima 10 SAS ('Investima 10'), which is 100% held by Ecrinvest 4 SA ('Ecrinvest 4'), which is in turn held 100% by Segex Sarl ('Segex'), which is 100% controlled by NBP gave VUP a formal undertaking to purchase the target assets. On the same day, Segex and Ecrinvest 4 concluded a sale contract with Lagardère which would allow the latter through Ecrinvest 4 to acquire all the share capital in Investima 10.

8. In response to the fourth plea, the General Court pointed out that on 20 December 2002, B., the president of the auditing firm S., was appointed as a member of the executive board of Investima 10, proprietor of the target assets, as an independent third party.[6] The General Court further noted that on 9 February 2004, Lagardère appointed the same firm S. as a trustee bound, under paragraph 21(g) of the commitments to be found in Annex II to the decision of 7 January 2004, 'to ensure that [Lagardère] satisfactorily fulfil' its commitments to transfer the assets sold, and remunerated in that capacity by Lagardère. The firm S. was therefore appointed as trustee, in terms of paragraph 15 of Lagardère's commitments, and its president, B., 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. 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 (société par actions simplifiée, 'SAS'), B. simultaneously carried out the duties of a member of the Editis board and those of trustee.

9. In that context, the General Court considered[7] that questions might be raised as to the neutrality B. should exhibit in carrying out his duties as trustee. As a consequence, the General Court held that the performance by B. of his duties as a member of the executive board no longer enabled him to discharge with complete independence his responsibilities as an independent trustee. The General Court noted that the report assessing Wendel as a prospective purchaser of the assets sold – which was sent to the Commission – was thus drawn up by a trustee who did not meet the condition of independence from Editis. It was evident moreover from paragraph 6 of the approval decision that that decision was based on, in particular, the trustee's report which, according to the General Court, had a decisive influence on that decision. The General Court concluded that the lack of independence of the trustee constituted an illegality which was such as to vitiate the lawfulness of the approval decision. Therefore, that decision had to be annulled and it was unnecessary to examine the other pleas in law presented by Odile Jacob in support of its claims for annulment.

## III – The appeals

10. In Case C-553/10 P the Commission puts forward three grounds in support of its appeal. Lagardère supports the Commission's appeal and endorses the arguments developed therein. In Case C-554/10 P Lagardère puts forward two grounds in support of its appeal. Likewise, the Commission essentially supports Lagardère's appeal, arguing that the arguments made therein are very similar to its own in the former case. Save for the first ground of appeal in Case C-554/10 P concerning the plea of illegality – which I will address separately in part A of this Opinion – it is my view that the two appeals and the grounds raised therein are so similar and complementary that they should be considered together (in part B).

### A – *Case C-554/10 P (the first ground of appeal, concerning the plea of illegality)*

11. In Case C-554/10 P, by its first ground of appeal, Lagardère alleges that the General Court erred in law by relying on the unlawfulness of the trustee decision as a basis for annulling the approval decision. Lagardère contends that there is a distinction between the plea concerning the independence of the trustee and the plea in relation to the validity of the approval decision. It submits that Odile Jacob's failure to bring an action against the trustee decision in good time means it could not subsequently attack that trustee decision once it became final.

6 — 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.

7 — See further points 21 to 24 below where I cite some of these passages of the judgment under appeal.

12. According to Lagardère, the General Court erred in law by holding, as grounds for annulling the approval decision, that the nomination of the trustee was unlawful because its representative was presumed to be dependent on Editis, and that that unlawfulness was such as to vitiate the legality of the approval decision. According to Lagardère, it follows from settled case-law [8] that an applicant cannot, in an action for annulment of a decision, raise a plea of illegality against an earlier act of the same kind, annulment of which he could have sought directly. To permit that would make it possible indirectly to challenge earlier decisions which were not contested within the period for bringing proceedings prescribed in Article 263 TFEU, thereby circumventing that time-limit. The reasoning of the General Court, in effect, amounts to challenging the nomination of the trustee – which is a discrete decision – by way of a plea of illegality in respect of the approval decision. The General Court did not directly contest the grounds which led to the approval decision but the grounds which led to the nomination of the trustee prior to the approval decision.

13. The trustee decision was communicated to the parties on 15 February 2005, date as of which the decision adversely affected Odile Jacob and constituted a challengeable act in the sense of Article 263 TFEU. Therefore, it should have been attacked in the relevant time-limits, by a separate action from the one brought against the approval decision. As a consequence, the General Court could not reasonably rely on the illegality of the nomination of the trustee in order to annul the final approval decision.

14. Wendel fully endorses Lagardère's argument. The Commission, however, does not.

15. At the hearing, further to an express question from the Court, the Commission admitted that in its statement in intervention it chose not to formally support Lagardère's present ground of appeal. The Commission considers that one of the preconditions for the application of the case-law relied on by Lagardère is that the applicant at first instance, namely Odile Jacob, could have had a legal interest in bringing proceedings against the trustee decision and would have thus been able to bring an admissible action against that decision. The Commission conceded that it was not certain that Odile Jacob did indeed have such legal interest in bringing proceedings, and so it had decided to leave the issue to the discretion of the Court.

16. In my view, suffice it to say that the trustee decision should *not* be regarded as an isolated decision, but as forming part of a series of acts which led to the adoption of the approval decision by which Wendel was approved as the purchaser of the assets sold. Indeed, it follows from the case-law [9] that, in the context of complex procedures composed of several independent acts, one cannot require persons concerned to bring as many actions as the number of acts adversely affecting them. Moreover, an application expressly directed against a measure which is one of a number of measures constituting a single whole must be regarded as directed also, so far as is necessary, against the others. In that regard, an action brought formally against an act which is a part of a set of acts forming a whole must be considered as brought also, to the extent necessary, against the others.

17. In any event, the trustee decision was communicated to Odile Jacob, upon its request, only on 17 February 2005, while it had brought the action seeking annulment of the approval decision by which Wendel was approved as purchaser on 8 November 2004. In that action Odile Jacob already challenged the conditions for the acceptance of the trustee and its consequences for the validity of the approval decision by which Wendel was approved as purchaser. Therefore, it would have been

8 — In particular, Case C-135/93 *Spain* v *Commission* [1995] ECR I-1651; Case 76/83 *Boël and Fabrique de fer de Maubeuge* v *Commission* [1984] ECR 859; and Case 265/82 *Usinor* v *Commission* [1983] ECR 3105.

9 — See, inter alia, Joined Cases 25/65 and 26/65 *Simet and Feram* v *High Authority* [1967] ECR 33, paragraph 39, and Joined Cases 12/64 and 29/64 *Ley* v *Commission* [1965] ECR 107, paragraph 14.

pointless and unnecessary to bring a supplementary action given that, according to the case-law,[10] Odile Jacob was, in any event, entitled to argue the irregularity of the earlier act (the trustee decision) by way of an action directed against a later act (the approval decision), by which it is directly and adversely affected.

18. As a consequence, Lagardère's first ground of appeal in Case C-554/10 P should be rejected.

B – *Case C-553/10 P and Case C-554/10 P (the second ground of appeal, concerning the justification of the annulment of the approval decision)*

1. Case C-553/10 P (the first ground of appeal, concerning the lack of assessment of the consequences of the possible lack of independence of the trustee vis-à-vis Editis in respect of the trustee's duties in relation to Wendel) and Case C-554/10 P (the second ground of appeal, first and fourth parts)

19. The Commission, by its first ground of appeal, and Lagardère, by its second ground of appeal (first and fourth parts), essentially submit that the General Court erred in law by failing to examine the consequences of the possible lack of independence of the trustee vis-à-vis *Editis* in respect of the trustee's duties *in relation to Wendel*.

20. Let us first consider the relevant paragraphs of the judgment under appeal. The General Court stated that 'since [B.] 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' (paragraph 94 of the judgment under appeal).

21. The General Court concluded 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 Lagardère's commitments' (paragraphs 104 to 106 of the judgment under appeal).

22. Therefore, the General Court held that 'the report assessing Wendel as a prospective purchaser of the assets sold, in the light of which the [approval decision] was adopted, was drawn up by a trustee who did not meet the condition of independence, from Editis, required by paragraph 15 of Lagardère's commitments, as set out in Annex II of the decision of 7 January 2004' (paragraph 107 of the judgment under appeal).

23. The General Court added that 'as regards the report's effect on the content of the [approval decision], 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 Lagardère's commitments, as annexed to the decision of 7 January 2004' (paragraph 108 of the judgment under appeal).

24. First of all, I consider that it is not for the Court of Justice to debate at the stage of the appeal the General Court's analysis of the lack of independence of the trustee in the present case.

10 — Case 35/64 *Alfieri* v *Parliament* [1965] ECR 261, p. 337, and Joined Cases 18/64 and 19/64 *Alvino and Others v Commission* [1965] ECR 789 (p. 797).

25. Next, Odile Jacob argues that the General Court should not be criticised for having referred to French law, specifically its Commercial code, in order to verify whether the exercise by the trustee of the function of a member of the executive board of Editis was compatible with the criterion of independence with regard to this company, in so far as it is only an application of *lex societatis* and of the principle determining the law applicable to a company, in accordance with the principles of private international law, including inter alia the 'Rome I' Regulation.[11] Be that as it may, I consider that the present appeal begs the question whether the trustee and, in particular, the condition of his independence is a national concept or a European one. I think that the correct answer is clearly the latter in so far as the condition of the trustee's independence – as laid down by paragraph 15 of the commitments to be found in Annex II to the decision of 7 January 2004 – should be interpreted and assessed in the same fashion throughout the European Union.

26. Therefore, I agree with Wendel and the Commission that in order to rule on the condition of independence the General Court should have based itself instead on the criteria laid down in the Commission's 2001 Notice on remedies[12] and the Commission's 2003 Best Practice Guidelines: Model Texts for Divestiture Commitments and the Trustee Mandate.[13] Indeed, the trustee's independence vis-à-vis the target undertaking, namely Editis, is not required by the Best Practice Guidelines for divestiture commitments in merger cases (see paragraph 40) or by the Model Texts themselves – that is, the Standard Model for Divestiture Commitments and the Standard Model for Trustee Mandates (see paragraphs 17 and 20 respectively). Lastly, the Standard Model for Trustee Mandates, published by the Commission, expressly accepts that the trustee may be a member of the board of the target undertaking where this is necessary for the exercise of his mission. The Best Practice Guidelines also clearly infer that the Monitoring Trustee and the Divestiture Trustee may be the same person (see paragraph 35), and indeed this may often make sense, not least because of the knowledge the Monitoring Trustee already possesses.

27. Next, it is necessary to recall that the Commission had submitted at first instance that the argument concerning the lack of independence was unfounded in so far as Odile Jacob did not prove that that potential irregularity led the trustee to produce a report which was not objective and thus liable to mislead the Commission in its approval decision.

28. In paragraph 80 of the judgment under appeal the General Court noted the above argument and yet it altogether failed to respond to it and examine that question.

29. What the General Court did was simply to conclude in paragraph 107 that the trustee 'did not meet the condition of independence, from Editis'. In the process it failed to analyse how that lack of independence was liable to affect the trustee's assessment of the qualities of Wendel as purchaser of the assets of Editis – which was the subject-matter of the approval decision – and, as a consequence, prepare a report which was biased and liable to mislead the Commission.

11 — Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

12 — Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (OJ 2001 C 68, p. 3, paragraph 56; ('the 2001 Notice on remedies'). 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).

13 — Published on the Commission's website: http://ec.europa.eu/competition/mergers/legislation/note.pdf, paragraph 17. See also the general website: http://ec.europa.eu/competition/mergers/legislation/divestiture.html.

30. Accordingly, I agree with the Commission that – aside from failing to comply with its obligation to state reasons – the General Court infringed the case-law according to which the lack of independence of a person responsible for assessing a candidate [14] is of no legal significance unless it is established that that person took account in his assessment of an interest other than that of the proper exercise of his duties. [15]

31. Therefore, the General Court failed to assess whether the fact that the trustee was not sufficiently independent of Editis was capable of having consequences for the objectivity of the content of the trustee's report and for the assessment of Wendel as purchaser. It follows that the General Court upheld a plea which was ineffective in order to annul the decision in question.

32. Indeed, I consider that even if it was established that the trustee was not sufficiently independent, the fact remains that the General Court still had to assess *in concreto* in what way that lack of independence was liable to affect the trustee's capability to evaluate Wendel's candidature in the light of the approval criteria mentioned in paragraph 10 of Lagardère's commitments.

33. Odile Jacob puts forward arguments based essentially on the definition of auditors and accountants [16] and on the Commission Recommendation of 16 May 2002 – Statutory Auditors' Independence in the EU: A Set of Fundamental Principles. [17]

34. However, I consider that those arguments are not helpful to its cause. Suffice it to say that that line of argument is not such as to vindicate the flawed approach in the judgment under appeal. Indeed, it does not change the fact that the General Court was still required to analyse *in concreto* the consequences of the lack of independence on the trustee's mission.

35. Instead, in my opinion, the case-law concerning the statutory obligations of European Union officials is much more relevant and enlightening: the existence of a professional relationship between an official and a third party does not of/in itself call into question the independence of the official, and that even where the latter is called on to pronounce on a case in which that third party is involved – in particular, on his evaluation. The simple existence of a purely abstract risk of a conflict of interests concerning the official is not sufficient to establish an infringement of the statutory obligations, provided that there is no 'concrete element of fact to support the conclusion that the evaluator breached, by specific actions, the obligations of impartiality and integrity which were incumbent upon him'. [18]

36. As was pointed out by Lagardère, such assessment – in order to establish *in concreto* whether the lack of independence was liable to affect the trustee's capability to evaluate Wendel's candidature – was also necessary in light of the case-law according to which a decision may be annulled only if it is shown that, in the absence of the alleged irregularities, the decision could have been different. In other words, even if it had been established that the trustee was appointed in an improper way, it was incumbent on the General Court to show that, in the absence of that irregularity, the approval

14 — I see no reason why one should distinguish here between a natural person and a legal person.

15 — See, inter alia, Case T-89/01 *Willeme* v *Commission* [2002] ECR-SC I-A-153 and II-803, paragraph 72, and Case T-137/03 *Mancini* v *Commission* [2005] ECR-SC I-A-7 and II-27, paragraph 36.

16 — The Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) [EC] on the approval of persons responsible for carrying out the statutory audits of accounting documents (OJ 1984 L 126, p. 20), repealed by Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC […] (OJ 2006 L 157, p. 87). Odile Jacob argues that the Eighth Directive left it to the Member States to determine the criteria of independence of those persons.

17 — OJ 2002 L 191, p. 22. Odile Jacob submits that this recommendation notes that differences exist in the legislation of the different Member States and that independence must be assessed 'in mind and in appearance'. Moreover, it shows that the existence of any financial, business, employment or other relationship between the statutory auditor and his client are capable of compromising the statutory auditor's independence and, essentially, that the acceptance of a position as a member of a managerial body of an entity should be prohibited.

18 — Case T-157/04 *De Bry* v *Commission* [2005] ECR-SC I-A-199 and II-901, paragraphs 36 to 38.

decision would have had a different content.[19] For instance, in *HFB and Others* v *Commission*[20] the General Court held that on the assumption that Commission officials are responsible, in breach of the provisions governing the obligation of professional secrecy, for leaks of confidential information used in the course of the administrative proceedings instigated for infringement of the EU competition rules, that would in any event not affect the legality of the decision, since it *has not been proved that the decision would not in fact have been adopted or would have been different* had the disputed statements not been made. It is clear that that rule makes it possible to safeguard the principle of proportionality. As pointed out by Wendel and the Commission, the above assessment (in italics) is necessary in so far as it allows a fair balance to be struck between the safeguarding of the respect of legal rules and procedural rules, on the one hand, and the protection of the legal certainty and legitimate expectations, on the other.

37. For instance, in the area of State aid law, in *Germany* v *Commission*,[21] having found that the rights of defence of Germany (addressee of a Commission decision finding aid to be incompatible with the common market) had been infringed, the Court came to the conclusion that the rights of defence plea was ineffective for the purposes of the annulment of the decision in question in so far as the German Government had been unable, during the proceedings before the Court, to point to any element of fact or law which, had it been disclosed to the German Government, would have led the Commission to reach a different decision. In *Schneider Electric* v *Commission*,[22] the General Court, having found an infringement of the rights of defence, carried out an in-depth assessment of the bearing that infringement actually had on the decision before reaching the conclusion that the decision had to be annulled. As the Commission pointed out, it was only after the General Court came to the conclusion that the decision in question could have been different – in particular, because the applicant could have submitted proposals for divestiture which could have led to an approval decision – that the General Court concluded that the infringement of the rights of defence should entail the annulment of the decision. Finally, there is case-law[23] which states that in an action for annulment, a plea based on a manifest error of assessment is ineffective and accordingly would not be sufficient to warrant annulment of the decision in question if, in the particular circumstances of the case, it could not have had a decisive effect on the outcome.

38. *In merger cases, according to Honeywell* v *Commission*,[24] *'where the operative part of a Commission decision is based on several pillars of reasoning, each of which would in itself be sufficient to justify that operative part, that decision should, in principle, be annulled only if each of those pillars is vitiated by an illegality. In such a case, an error or other illegality which affects only one of the pillars of reasoning cannot be sufficient to justify annulment of the decision at issue because it could not have had a decisive effect on the operative part adopted by the Commission. Where a pillar of reasoning that is sufficient to justify the operative part of a measure is not called into question by an applicant in his action for annulment, that pillar of reasoning, and thus the measure founded on it, must be held to be lawful and established with regard to him … That rule applies in particular in the context of merger control decisions'. Finally, the Court noted in Falck and Acciaierie de Bolzano v Commission*[25] *that 'the errors of law committed in that respect in the contested decision and in the contested judgment cannot have any effect on their validity. Even without such errors of law, the operative part of the contested*

19 — See, to that effect, Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraph 26; Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 47; Case C-142/87 *Belgium* v *Commission*, '*Tubemeuse*' [1990] ECR I-959, paragraph 48; Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 31; order of 24 September 2007 in Case C-405/06 P *Torres* v *OHIM and Bodegas Muga*, paragraph 29; Case C-407/04 P *Dalmine* v *Commission* [2007] ECR I-829, paragraph 70; and Case C-141/08 P *Foshan Shunde Yongjian Housewares & Hardware* v *Council* [2009] ECR I-9147, paragraph 81.

20 — Case T-9/99 [2002] ECR II-1487, paragraph 370 and the case-law cited.

21 — Case C-288/96 [2000] ECR I-8237, paragraph 101 et seq.

22 — Case T-310/01 [2002] ECR II-4071, paragraphs 457 to 460.

23 — Case T-60/05 *Ufex and Others* v *Commission* [2007] ECR II-3397, paragraph 77; see, to that effect, Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraphs 48 and 49.

24 — Case T-209/01 [2005] ECR II-5527, paragraphs 48 to 50. See also Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraphs 42 to 45, 48 and 734.

25 — Joined Cases C-74/00 P and C-75/00 P [2002] ECR I-7869, paragraph 122.

*decision, so far as concerns the compatibility of the aid in question with the common market, would have been the same and the [General Court] would have been obliged, in any event, to confirm that decision in that respect. The ground of appeal alleging an error of law as regards the choice of applicable code must therefore fail'.*

39. The above must be contrasted with the judgment under appeal. As was noted by Wendel, the General Court simply dispensed with the requisite assessment. It has not shown that the link between Editis and the representative of the trustee could have had an influence on the content of the report evaluating the candidature of Wendel. The trustee's mission consisted in verifying that Wendel was a viable operator capable of maintaining or developing effective competition, and having the economic incentive to do so. Therefore, it would appear *prima facie* that the lack of independence of the trustee cannot have had any impact on his mission relating to assessing the candidate to buy the assets sold. Moreover, the General Court's analysis of the lack of independence of the trustee clearly did not concern the question whether Wendel had the qualities to constitute an adequate purchaser.

40. Similarly, the Commission pointed out that the trustee's mission was to objectively evaluate the capacity of the purchaser of Editis' assets, namely Wendel, who was chosen by Lagardère, to grow those assets and make sure they could effectively compete with Lagardère. Clearly, in order to do so the trustee had to see to it that the purchaser of Editis' assets was fit to safeguard Editis' interests. Therefore, even if the link to Editis led the trustee, in the context of his mission, to have undue regard to the interests of Editis – which was not found as a fact by the General Court – the fact remains that his mission consisted precisely in taking into account those interests in order to evaluate whether the purchaser would protect them in the future. It follows that the exercise of his mission was not affected in the present case, since, in the context of his task of reporting on the qualities of the purchaser, taking into account Editis' interests was precisely one of his missions. That conclusion could be different, of course, if the lack of independence had been established, for instance, vis-à-vis the purchaser of the assets, namely Wendel.

41. In paragraph 106 of the judgment under appeal, the General Court would appear to have implicitly rejected that argument by insinuating that eventual bias vis-à-vis Editis would have had unacceptable consequences with regard to the trustee's neutrality vis-à-vis Lagardère.

42. I consider (as does the Commission) that by doing so the General Court analysed *in abstracto* whether the trustee met the condition of independence. One cannot call into question a report favourable to Wendel on the basis that the trustee was too unfavourable to Lagardère, given that Lagardère chose Wendel as purchaser and the trustee's report favoured that undertaking. In addition, the General Court in no way examined how the positive report issued in respect of Wendel – which stated that the latter fulfilled the conditions to be regarded as capable of growing Editis' assets – could have been affected. In other words, it did not examine whether the trustee's lack of independence vis-à-vis Editis meant the report's analysis of Wendel's ability to compete with Lagardère was not objective or trustworthy.

43. It follows that it is apparent that the judgment under appeal does not demonstrate that the existence of such a possible doubt as to the trustee's independence could have had any influence *in concreto* on the trustee's evaluation of Wendel's candidature.

44. Furthermore, as Lagardère pointed out, it should be borne in mind that, according to the case-law,[26] a decision of which certain grounds are unlawful may be annulled only to the extent that it is not justified to the requisite legal standard on other grounds. Therefore, the simple fact that the trustee's report had decisive influence on the approval decision was not, in any event, sufficient by itself for the annulment of the decision in question.

26 — See, inter alia, Case C-447/02 P *KWS Saat* v *OHIM* [2004] ECR I-10107, paragraphs 46 to 51, and Case C-93/02 P *Biret International* v *Council* [2003] ECR I-10497, paragraph 60.

45. What is more, the judgment under appeal is insufficiently reasoned in so far as it does not explain how the existence of a possible doubt concerning the independence of the trustee should have the slightest influence on the assessment of Wendel in the light of the criteria for approval laid down in the commitments of Lagardère.

46. Finally, I consider that another important point is the fact that, in the context of a merger, the final decision to approve the purchaser of the assets sold always lies with the Commission, which does not base itself only on the trustee's report, but collects information on its own initiative. That is what happened in the present case. The trustee, whose mission in the present case was to provide an evaluation of the purchaser and say whether, in his opinion, that purchaser fulfilled the conditions laid down in the commitments, does not take the place of the Commission, which has the final say on the approval of the purchaser. That decision is in no way 'delegated' by the Commission to the trustee. [27]

47. It should be pointed out that Odile Jacob itself would appear to recognise in its response the fact that the General Court failed to assess whether the approval decision would have been different. However, Odile Jacob essentially submits that all the above arguments are ineffective in so far as the unlawfulness found by the General Court concerns the breach of an 'essential contractual commitment which was rendered obligatory by the Commission decision', thus automatically vitiating the whole decisional process relating to the sale imposed by the commitments. In its view, it is not necessary to show in what way the absence of objectivity of the trustee had consequences for the preparation of the report in question, with the result that the Commission was misled in its approval decision, since that breach constitutes an infringement of essential procedural requirements which leads *per se* to the nullity of the decision. In support of its argument Odile Jacob refers by analogy to the General Court's case-law concerning selection boards in civil service competitions and to the judgment in *Decoster*. [28]

48. Those arguments, however, cannot be upheld in the present case. Indeed, for this to be a question of infringement of essential procedural requirements we would have to be dealing with a very serious infringement of fundamental principles of EU law. [29] However, the source of the requirement that the trustee be independent is simply a commitment undertaken by a private party in a particular Commission decision. Even as regards the existence of a report carried out by the trustee, the only source of the obligation to carry out such a report is the contract between Lagardère and the trustee. Therefore, the Commission is right when it argues that the present issue does not concern any fundamental principle of law based on a norm of higher order in the hierarchy of legal norms. Indeed, the requirement of independence vis-à-vis Editis does not result from a general norm, impersonal and imperative in nature, which would protect the public interest.

49. Next, as regards Odile Jacob's reliance on the case-law concerning selection boards in civil service competitions, suffice it to say that that case-law is not applicable to the present case in so far as the opinion rendered by the trustee is of a merely advisory nature – as opposed to the selection board which actually makes the decision itself. In relation to *Decoster*, [30] Odile Jacob's argument is not such as to call into question the conclusion of the present Opinion. This is so not least because the role of the trustee in the decisional process is fundamentally different from that of a body responsible for drawing up technical specifications, monitoring their application and granting type-approval, which must be independent of public or private undertakings offering goods and/or services in the

27 — See, for instance, the 2001 Notice on remedies, cited in footnote 12, paragraphs 58 and 59.

28 — Case C-69/91 [1993] ECR I-5335, paragraphs 13, 16 and 22. The simple fact that, for the body responsible for drawing up the specifications, monitoring their application and granting type-approval not to meet the condition of independence vis-à-vis operators likely to benefit from those specifications, a condition laid down by a norm of EU law (in that case a directive) was sufficient to lead to that body not being qualified to draw up such specifications, without there being any need to show *in concreto* or on a case-by-case basis a potential 'interest' or 'partiality'.

29 — See, to that effect, Opinion of Advocate General Fennelly in Joined Cases C-287/95 P and C-288/95 P *Commission* v *Solvay* [2000] ECR I-2391.

30 — Cited in footnote 28.

telecommunications sector. Indeed, in *Decoster* the condition of independence flowed from the Treaty and from a Commission directive, whereas – as already noted in point 48 above – here that condition stems simply from a commitment undertaken by a private party in a particular Commission decision. Even as regards the existence of a report carried out by the trustee, the obligation to carry out such a report finds its source solely in the contract between Lagardère and the trustee.

50. Last but not least, it should also be added that the General Court erroneously interpreted the EU law concept of independence of a trustee. The General Court should have assessed the trustee's possible lack of independence because of his link with Editis on a case-by-case basis, on the basis of concrete elements furnished by the parties. I agree with Lagardère that it would appear that in the present case the mandate of B. did not in any way compromise the mission of the trustee charged to perform his duties with objectivity and transparency. On the contrary, far from constituting a conflict of interest, the mandate exercised by B. in his role as member of the board – as an independent third party – of the undertaking which was the proprietor of the assets sold, on the one hand, and the mission exercised by the trustee, on the other, were both concerned with the independence of Editis, and accordingly constituted complementary missions. The conflicts pointed out by the General Court (in paragraph 99 of the judgment under appeal) which arose between the trustee and Lagardère – where the trustee firmly defended the interests of the assets – demonstrate independence in the trustee's work and the fact that he fulfilled his general mission to ensure satisfactory execution by Lagardère of its commitments.

51. I consider that it is surprising that the condition of independence laid down by the Commission, which the Commission considered to be fulfilled, in the present case[31] on the basis of an interpretation *in concreto*, should then be considered not to be fulfilled *in abstracto* by the General Court on the basis of the provisions of the French commercial code. Indeed, in spite of the fact that the Commission's 2008 Notice on remedies is not applicable *ratione temporis*, the fact remains that the clarification it contains confirms the correctness of the Commission's previous practice – as also applied in the present case – to the effect that the independence of the trustee is to be assessed on a case-by-case basis in the light of concrete information supplied by the parties.

52. It follows from all the foregoing considerations that the General Court erred in law in so far as it concluded in an automatic and abstract fashion that the trustee's lack of independence was 'such as to vitiate' the lawfulness of the approval decision (see paragraph 118 of the judgment under appeal). As a consequence, the judgment under appeal should be set aside.

2. Case C-553/10 P (the second ground of appeal) and Case C-554/10 P (the second ground of appeal, third part), concerning an error of law, a contradiction in the grounds and a distortion of facts in so far as the General Court concluded that the trustee's report had a decisive influence on the approval decision

53. By its second ground of appeal, the Commission alleges that the General Court erred in law and misinterpreted the facts in finding that the trustee's report – which according to paragraph 107 of the judgment under appeal did not fulfil the condition of independence – had a decisive influence on the approval decision. Similarly, by its second ground of appeal (third part), Lagardère submits that the General Court misinterpreted the facts and vitiated the judgment under appeal by a manifest failure to state reasons in finding that the trustee's report had such a decisive influence on the approval decision.

31 — Indeed, the new (2008) Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ 2008 C 267, p. 1), at paragraph 125, now clarifies that 'the Commission will not accept persons or institutions as trustees which are at the same time the parties' auditors or their investment advisors in the divestiture. However, no conflicts of interests will arise by relations of the trustee with the parties if those relations will not impair the Trustee's objectivity and independence in discharging its tasks. It is the parties' responsibility to supply the Commission with adequate information for it to verify that the trustee fulfils the requirements'.

54. Contrary to what Odile Jacob seems to argue, these two grounds of appeal are not seeking to revisit an assessment of facts carried out by the General Court. Indeed, the Commission successfully argues that, by analysing the decisive influence, the General Court erred in law in so far as it failed to acknowledge that in fact the approval decision is taken by the Commission, which has at its disposal the whole case-file and not just the report of the trustee, and that the Commission retains the power to make the decision. Likewise, Lagardère is right that the General Court misinterpreted the facts and failed to state reasons in that respect. Therefore, both grounds are manifestly admissible.

55. I would recall at the outset that, as we have seen above under the Commission's first ground of appeal, although the Commission is required to take the trustee's report into account, it is not legally bound by the trustee's opinion and it is still required to undertake the necessary investigation in order to ascertain that the purchaser does indeed satisfy the approval criteria. The Best Practice Guidelines (cited in footnote 13, see paragraph 28) confirm that the report of the monitoring trustee constitutes no more than 'one element for [the Commission's] assessment'.

56. I consider that the General Court contradicted itself in so far as it pointed out, at paragraph 109, that the approval decision was based only 'in particular' and not 'exclusively' on the trustee's report, while concluding that that same report had a decisive influence on the final decision of the Commission. Thus, the General Court failed to have regard to the division of responsibilities between the Commission and the trustee in the relevant procedure. Again, and contrary to what Odile Jacob seeks to argue, it is for the Commission alone to decide on the approval of a candidate purchaser. The assessment contained in the trustee's report is obviously taken into account in its final decision, but the Commission is in no way legally bound by the trustee's opinion, and can substitute its assessment for the trustee's without any legal consequences.

57. Indeed, I cannot stress enough the fact that the Commission remains required to undertake the necessary investigation, to collect information on its own initiative by relying on its own services and on requests for information. Here, for instance, several such requests were sent to Lagardère and to Wendel. It is clear that the Commission *did not* rely solely on the trustee's report. I would insist that, in fact, it *could not* validly rely only on that report. That was the rule applied, for example, in *Microsoft* v *Commission*,[32] concerning remedies and the monitoring trustee's role in an antitrust case, where the General Court rightly acknowledged that the Commission 'is not entitled to delegate to a third party the powers of investigation and enforcement conferred on it by Regulation No 17'.[33]

58. In the present case the Commission showed before the General Court that it had carried out an investigation which was very much in-depth in nature and indeed its case-file runs to several thousand pages. In that connection, I also disagree with Odile Jacob's argument that it is incumbent on the Commission itself to produce evidence which it considered relevant in order to show that it did not base itself only on the trustee's report, and that the Commission failed to do this before the General Court. Suffice it to say that the General Court itself decided against ordering a measure of inquiry in order to acquaint itself with the Commission's investigation. Without such a measure of inquiry, the General Court could not validly come to the conclusion whether or not the trustee's report had decisive influence.

59. Indeed, in my view it should not be deduced from certain similarities between the wording of the trustee's report and that of the final decision of the Commission that the report in question had a 'decisive influence' on it, as paragraph 110 of the judgment under appeal would suggest. A series of examples may not be considered to constitute proof – especially of influence which is meant to be 'decisive'. As the Commission noted in this respect, the fact that the very expression that the trustee 'emphasised' certain elements in the same way as the Commission does (paragraph 112 of the

32 — Case T-201/04 [2007] ECR II-3601, paragraph 1264.

33 — Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] [now Articles 101 TFEU and 102 TFEU] (OJ, English Special Edition 1959-62(I), p. 87).

judgment under appeal) or that two documents 'state' in identical terms a certain circumstance (paragraph 113 of the judgment under appeal) merely shows that the trustee's report simply took up objective facts and verifiable elements and essentially did not contain subjective assessments. In any event, it would appear from the documents before the Court that the matters referred to in paragraphs 112, 113, 114 and 116 of the judgment under appeal are also expounded in Wendel's response to a request for information of 11 June 2004,[34] to which both the trustee and the Commission had equal access. Finally, as regards paragraph 115 of the judgment under appeal, suffice it to say that rather than '[taking] significant inspiration from [the trustee's] report' (see paragraph 111 of the judgment under appeal), the approval decision would merely appear to take up the criterion laid down in paragraph 10(c) of Lagardère's commitments.

60. Moreover, I consider that the General Court distorted the facts and vitiated its judgment by a manifest failure to state grounds. Indeed, the Commission had at its disposal other sources of information, which were distinct from the trustee's report, such as the application for approval submitted by Lagardère, the project of the sale attached to it, the written responses of Lagardère and Wendel to the Commission's several requests for information, the report of Secafi Alpha prepared for the attention of the representatives of Editis of 2 July 2004, the information provided by Wendel during a meeting with the Commission, as well as an exchange of views on the candidature of Wendel with the organisations representing Editis' personnel and certain other interested parties. As pointed out above, the General Court merely puts forward a certain similarity between the approval decision and the trustee's report, without effectively comparing the evidence in the case-file actually used by the Commission to found its approval decision with the content of that decision. In the approval decision, the Commission essentially assessed Wendel's candidature against the criteria laid down in the conditional authorisation decision. Since that conditional authorisation decision used similar terms to those used by the approval decision and by the trustee in his report, and since the conditional authorisation decision predates the trustee's report, the General Court's purely formal assessment based on the similarity of the terms used leads it to a misconceived conclusion.

61. Therefore, I consider that the General Court attached excessive importance to the trustee's report, which was not justified by the facts in the present case, and was generally mistaken about the role of the trustee in the approval procedure. The General Court did so in spite of the fact that the approval of the purchaser is the sole competence of the Commission and that, in fact, the relevant EU provisions do not even render obligatory the nomination of a trustee in the context of a commitments procedure.[35] Indeed, there are cases where the Commission takes a decision without any intervention or report of a trustee.

62. The approval decision of the Commission, as any other decision of an administrative or judicial body, contains a part relating to the factual basis and another part relating to the legal basis. In the present case it is necessary to draw the line between these two parts.

63. The trustee's report is at all times only a part of the factual basis, which is clear, inter alia, from the fact that a trustee does not indicate the legal reasoning behind his opinion and conclusions and from the fact that the Commission is, in any event, obliged to collect its own evidence in order to take the final decision – very much like the facts of this case. Therefore, the independence of the trustee may only be assessed by reference to its contribution to the establishment of the Commission decision's factual basis. If a trustee presents correct and objectively verifiable factual conclusions, then the case is in order. If he does not, for instance due to his misrepresenting or incorrectly interpreting the

34 — Attached as Annex B3 to the Commission's response before the General Court.

35 — No such obligation existed in Regulation No 4064/89, in Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Council Regulation (EEC) No 4064/89 (OJ 1998 L 61, p. 1), or in the Commission's 2001 Notice on remedies (cited in footnote 12). Commission Regulation (EC) 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), as amended by Commission Regulation (EC) No 1033/2008 (OJ 2008 L 279, p. 3), now specifies that the commitments offered by the undertakings 'may' include, at their own expense, the appointment of a trustee.

findings of fact, then we may be dealing with an instance of a lack of independence (indeed, this is similar in the case of appointment of an expert to give evidence in a given case). The fact remains that the part of the Commission decision relating to the legal basis is exclusively the Commission's prerogative and the trustee has no impact thereon. It follows that the Commission may either concur with the findings of fact in the trustee's report, or replace or supplement them with its own findings. However, the final legal assessment is always the Commission's territory: under EU law, the Commission is solely empowered to make that assessment in a given case (as we saw in point 46 above, the Commission does not delegate such powers to third parties and, as point 57 above shows, the case-law confirms that the Commission could not do so even if it wished to). Otherwise it would be possible to bring proceedings against the trustee as well, which naturally is out of the question.

64. It follows from the foregoing that the reasoning in the judgment under appeal contains errors of law, contradicts itself and misinterprets the facts in so far as the General Court found that the trustee's report had a decisive influence on the approval decision. As a consequence, the judgment under appeal should be set aside.

3. Case C-553/10 P (the third ground of appeal) and Case C-554/10 P (the second ground of appeal, second part)

65. By its third ground of appeal, which is in two parts, the Commission alleges, first, a misinterpretation of the law as regards the relevance of the plea raised by the applicant at first instance on the validity of the approval decision and, second, an infringement of the obligation to state reasons in that connection. Lagardère submits, in its second ground of appeal (second part), that the General Court failed to show in its statement of reasons how the links between the trustee's representative and Editis could have tainted the content of the report submitted by the trustee to the Commission.

66. As is apparent from my analysis in this Opinion, I consider that the General Court manifestly erred in law when it annulled the approval decision on the basis of the sole finding of a lack of independence of the trustee, without having assessed whether the result of the Commission's decision – the approval of Wendel as purchaser – could have been different but for the trustee's lack of independence.

67. Odile Jacob essentially retorts that the lack of independence of the trustee is not a simple irregularity incapable of having consequences for the legality of the decision. I consider that that argument is flawed and that the General Court infringed settled case-law of the Court,[36] according to which an irregularity, except for cases of infringement of essential procedural requirements,[37] does not lead to the annulment of the entirety or a part of the decision unless it is established that, in the absence of that irregularity, the decision could have had another content.

68. In particular, in the above judgment the Court held that 'under the first paragraph of Article 231 EC [now Article 264 TFEU] and the sixth paragraph of Article 224 EC [now Article 254 TFEU], if the action is well founded, the [General Court] is to declare the act concerned to be void … In that regard, the Court finds, first, that the [General Court] may not, merely because it considers a plea relied on by the appellant in support of its action for annulment to be well founded, automatically annul the challenged act in its entirety. Annulment of the act in its entirety is not acceptable where it is obvious that that plea, directed only at a specific part of the challenged act, is such as to provide a basis only for partial annulment' (paragraphs 103 and 104).

36 — See, to that effect, Case C-295/07 P *Commission* v *Département du Loiret* [2008] ECR I-9363.

37 — As we saw in point 48 above, and contrary to what Odile Jacob submits, this is certainly not the case here.

69. Suffice it to say that the General Court concluded in an altogether automatic and laconic manner that the irregularity was liable to vitiate the legality of the approval decision. The General Court did so without having actually assessed, on the one hand, whether the decision of the Commission was based on grounds other than those relating to the findings of the trustee's report, and on the other hand, whether it did not follow from evidence brought to the Commission's attention which formed part of its case-file that, in any event, Wendel fulfilled the conditions for obtaining the approval of the Commission.

70. Indeed, according to paragraph 14 of the commitments to be found in Annex II to the decision of 7 January 2004, the Commission had to approve the purchaser provided that the latter fulfilled the conditions mentioned in paragraph 10 of those commitments. Therefore, that assessment is an objective one, and the aim of the Commission is not to choose the best purchaser, but simply to verify that the purchaser proposed by the notifying party fulfils the relevant conditions. I consider that it is telling in this respect that after the judgment under appeal was handed down the Commission restarted the procedure and, having prepared the case for decision again with a new trial *inter partes* and a new trustee fully independent of Editis, the Commission again approved Wendel as purchaser of the assets – not Odile Jacob. Thus even without the irregularity the conclusion is identical: Wendel fulfils, and did fulfil, the conditions for approval.

71. An example of the correct approach can be found in a previous decision of the General Court. In the area of merger control and, in particular, in relation to the Hearing Officer, the General Court pointed out in one case that the applicant had been unable to identify any specific provision of the decision in question which the Hearing Officer allegedly infringed, or any provision on the basis of which, had he known that he had to apply that decision, *he would have been likely to adopt a different position from that actually adopted*.[38] Furthermore, it is arguable that a breach of the rights of the defence in a given case (for instance, where the Commission fails to produce documents) would not be liable to be penalised as such and it would be necessary first to proceed to a concrete examination of those documents. Next, it should be pointed out that there is case-law which clearly states that an applicant has no legitimate interest in the annulment of a decision which can only lead to the adoption of another decision identical in substance.[39] Finally, the General Court has also held that an error of law committed by a jury in the context of assessing the candidature of an applicant was not of such a kind as to call in question *per se* the legality of its decisions, pointing out that 'an applicant does not have a legitimate interest in the annulment of a decision of which it is already certain that it could only be confirmed anew'.[40]

72. In the present case, the General Court did not show how the trustee's presumed lack of independence had any consequence for the legal assessment by the Commission of Wendel's qualities to purchase the assets sold.

73. I agree with the Commission that there is nothing in the judgment under appeal which would allow one to conclude that the approval decision could have had different content in the absence of the irregularity found in the judgment. Indeed, the General Court found no error or imprecision in the trustee's assessment of the purchaser, admitted in paragraph 109 that that assessment was based only 'in particular' on the trustee's report, and found no consequence which the supposed lack of independence could have had on that report.

38 — *General Electric* v *Commission*, cited in footnote 24, paragraph 722.

39 — See, to that effect, Case 117/81 *Geist* v *Commission* [1983] ECR 2191, paragraph 7; Case T-43/90 *Díaz García* v *Parliament* [1992] ECR II-2619, paragraph 54; Case T-261/97 *Orthmann* v *Commission* [2000] ECR-SC I-A-181 and II-829, paragraphs 33 and 35; and Case T-16/02 *Audi* v *OHIM* (*TDI*) [2003] ECR II-5167, paragraphs 97 and 98.

40 — See, to that effect, Joined Cases T-357/00, T-361/00, T-363/00 and T-364/00 *Martínez Alarcón* v *Commission* [2002] ECR-SC I-A-37 and II-161, paragraphs 91 to 93.

74. In relation to the second part of this ground of appeal, concerning infringement of the obligation to state reasons, Odile Jacob contends that it is not necessary to assess whether the General Court should have examined the question whether the content of the approval decision would have been different if the trustee had not lacked independence and that, therefore, the General Court gave sufficient reasons in its judgment.

75. I consider that that argument cannot succeed. Indeed, in spite of the very clear and abundant case-law cited in a number of points above – and in spite of the pleas raised in this respect before the General Court by the Commission (paragraphs 49 to 55 of the defence and paragraph 35 of the rejoinder), Wendel (paragraph 24 of its statement in intervention) and Lagardère (paragraph 19 of its statement in intervention), as well as the oral argument – the General Court did not take the trouble to explain the legal basis and reasons for its finding that the existence of a link between the representative of the trustee and Editis was 'such as to vitiate the lawfulness' of the approval decision (paragraph 118 of the judgment under appeal).

76. Finally, it should be pointed out that the General Court also made another error by failing to assess all the pleas which the Commission raised at first instance [41] in response to all the applicant's pleas. In particular, this concerns the pleas relating to the fact that it followed from all the evidence at the Commission's disposal – and not merely from the trustee's report – that Wendel fulfilled the conditions laid down in the conditional authorisation decision.

77. It follows from the foregoing that the General Court also infringed its obligation to state reasons. As a consequence, the judgment under appeal should be set aside.

## IV – The consequences of setting aside of the judgment under appeal

78. Pursuant to the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if it quashes the decision of the General Court, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits. In my opinion, this is a situation in which it is proper for the Court of Justice to give final judgment in the matter. In addition, this is justified in view of the length of the court proceedings in this case. In the light of all the foregoing considerations, it is appropriate for the Court to reject all the pleas raised by Odile Jacob against the approval decision before the General Court and dismiss Odile Jacob's action at first instance.

## V – Costs

79. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 69(2) in conjunction with Article 118 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 and Lagardère have claimed that Odile Jacob should be ordered to pay the costs of both the appeal proceedings and the proceedings at first instance, and Odile Jacob has been unsuccessful in its claims at both instances, Odile Jacob must be ordered to pay the costs of both sets of proceedings.

41 — See judgment of 25 October 2007 in Case C-167/06 P *Komninou and Others* v *Commission*, paragraph 22.

## VI – Conclusion

80. For the foregoing reasons, I propose that the Court should:

— set aside the judgment of the General Court of the European Union (Sixth Chamber) of 13 September 2010 in Case T-452/04 *Éditions Odile Jacob* v *Commission*, in so far as that judgment annulled Commission Decision D(2004) 203365 of 30 July 2004 on the approval of Wendel Investissement 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);

— dismiss the action brought by Éditions Odile Jacob before the General Court of the European Union;

— order Éditions Odile Jacob to bear its own costs and those of the Commission and Lagardère for both sets of proceedings;

— order Wendel Investissement to bear its own costs.