Reports of Cases

OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 6 March 2012 [1]

Case C-551/10 P

Éditions Odile Jacob SAS
v

European Commission

(Appeal — Competition — Concentrations — French-language publishing — Council Regulation (EEC) No 4064/89 — Infringement of Article 3 — Misuse of power — Failure to state reasons — Principles of legal certainty, legitimate expectations and equality — Assessment of dominant position — Appropriateness of commitments)

I – Introduction

1. By its appeal, Éditions Odile Jacob SAS ('the appellant') seeks to have set aside the judgment of the General Court of 13 September 2010 in Case T-279/04 *Éditions Odile Jacob* v *Commission* [2] ('the judgment under appeal'), by which that court dismissed its action for annulment of Commission Decision of 7 January 2004 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.2978 – Lagardère/Natexis/VUP) [3] ('the contested decision').

II – Facts at the origin of the dispute

2. The factual background to the present appeal case has been laid out in great detail in paragraphs 1 to 59 of the judgment under appeal. I shall thus merely refer to a number of pertinent facts in order to explain briefly the origins of this appeal. On 25 September 2002, Vivendi Universal SA ('VU') decided to dispose of the publishing assets ('target assets') held in Europe by its subsidiary Vivendi Universal Publishing SA ('VUP'). Lagardère SCA ('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.

1 — Original language: English.

2 — Not published in the ECR.

3 — OJ 2004 L 125, p. 54, notified under document number C(2003) 5277.

3. On 3 December 2002, 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 ('the sale contract') with Lagardère which would allow the latter through Ecrinvest 4 to acquire all the share capital in Investima 10. The sale contract provided that the date of transfer to Lagardère of the shares in Ecrinvest 4 must be after Lagardère obtained authorisation from the relevant competition authorities to acquire Ecrinvest 4. On 3 December 2002, in accordance with the sale contract, Lagardère paid Segex, inter alia, the price of the shares. Lagardère undertook to indemnify Segex, Ecrinvest 4 and Investima 10 for any damage resulting from the operation of the sale contract. A draft notification of the purchase of the targeted assets was notified by Lagardère to the Commission on 10 December 2002. On 20 December 2002, VUP took up Investima 10's undertaking to purchase and on the same day Investima 10 concluded with VUP the contract to purchase the target assets.

4. On 14 April 2003, Lagardère notified to the Commission its proposed purchase of the target assets pursuant to Article 4(1) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.[4] On 5 June 2003, the Commission decided that the notified concentration raised serious doubts as to its compatibility with the common market and initiated a second phase investigation with regard to the notified concentration pursuant to Article 6(1)(c) of Regulation No 4064/89.

5. Investima 10 became Editis SA ('Editis') on 14 October 2003.

6. The Commission adopted the contested decision on 7 January 2004 authorising the concentration subject to commitments. Pursuant to those commitments, Lagardère was required to sell assets representing approximately 60% to 70% of its worldwide turnover and 70% to 80% of VUP's turnover on the French-language markets affected by the concentration. The Commission considered that the commitments offered by Lagardère would eliminate almost all the horizontal overlaps between the activities of the parties to the concentration in all the relevant French-language markets where the transaction created or strengthened a dominant position. The Commission considered that if the sale were to a single buyer, the commitments offered would eliminate the bulk of the vertical and conglomerate effects analysed in the contested decision which result from the overall size of the merged entity in the French-language book trade, and which contribute to the creation or strengthening of dominant positions in the relevant markets. The contested decision concludes that in the light of the commitments offered by Lagardère the concentration will not create or strengthen a dominant position held by the merged entity in the common market. The Commission thus decided that, provided the commitments offered by Lagardère are met pursuant to Articles 2(2) and 8(2) of Regulation No 4064/89, the acquisition by Lagardère of sole control pursuant to Article 3(1)(b) of that regulation over the publishing assets of VUP in Europe and Latin America, excluding Brazil, was compatible with the common market and the Agreement on the European Economic Area ('EEA Agreement').

7. On 28 May 2004, Lagardère and Wendel Investissements SA ('Wendel') entered into a draft agreement whereby Wendel would acquire the assets which Lagardère was required to sell pursuant to the commitments. By letter dated 4 June 2004, Lagardère requested the Commission to approve the purchase of the assets in question by Wendel.

8. By an action brought on 8 July 2004 against the Commission before the Court of First Instance (now the General Court) and registered as Case T-279/04, the appellant sought the annulment of the contested decision. The General Court in the judgment under appeal rejected the action for annulment of the contested decision in its entirety.

4 — OJ 1989 L 395, p. 1.

III – The appeal

9. The appellant puts forward four grounds in support of its appeal.

A – *First ground: infringement of Article 3 of Regulation No 4064/89*

1. Proceedings before the General Court

10. The appellant argued in its first plea before the General Court that the contested decision is flawed in classifying the acquisition of the target assets by NBP as the acquisition of assets with a view to resale pursuant to Article 3(5)(a) of Regulation No 4064/89 instead of classifying that acquisition as a concentration whereby Lagardère acquired sole control of the targeted assets by using NBP as an intermediary or Lagardère and NBP acquired joint control of those assets. Moreover, the appellant submitted at first instance that the acquisition by Investima 10 of the target assets did not comply with any of the cumulative conditions found in Article 3(5)(a) of Regulation No 4064/89 and that the holding arrangement in respect of the target assets therefore allowed Lagardère to exercise a decisive influence over those assets from December 2002 until their sale to Wendel on 30 September 2004.

11. The General Court found that even if the acquisition of the target assets by Investima 10 does not fulfil all the conditions required by Article 3(5)(a) of Regulation No 4064/89, that does not necessarily mean that that acquisition must be classified pursuant to Article 3(1)(b) of that regulation as the acquisition of sole control of those assets by Lagardère or joint control by Lagardère and NBP.[5] The General Court then found that the holding arrangement did not allow Lagardère to exercise a decisive influence over the target assets from December 2002 or Lagardère and NBP to exercise a decisive influence over those assets from that date pursuant to Article 3(3) of Regulation No 4064/89.[6] The General Court also added, for the sake of completeness, that even if the holding arrangement allowed from December 2002, as argued by the appellant, Lagardère to exercise on its own or with NBP control over the target assets in accordance with Article 3(1)(b) of Regulation No 4064/89 and the operation was thus put into effect prior to notification, that circumstance would not affect the legality of the contested decision.[7]

2. Arguments

12. The first ground of appeal is divided into two parts.

13. Firstly, according to the appellant, by examining in isolation the holding arrangement without taking into account the entire legal arrangement which led to Lagardère's acquisition of control of the target assets, the General Court failed to have regard to the objective of control of concentrations and competition law in general which is, as confirmed by the *Cementbouw Handel & Industrie* v *Commission* case,[8] to ascertain the economic reality underlying transactions. Moreover, by failing to respect the aim of control of concentrations and its own case-law on complex operations, the General Court established a new exception which is wider than those provided by Article 3(5) of Regulation No 4064/89. In allowing such holding arrangements, irrespective of the nature of the vehicle charged with holding the assets to be divested, thereby enabling transactions which are normally subject to

5 — See paragraph 117 of the judgment under appeal.

6 — See paragraphs 144 and 153 of the judgment under appeal. The General Court did not assess whether the terms of Article 3(5)(a) of that regulation were fulfilled.

7 — See paragraphs 154 to 164 of the judgment under appeal.

8 — Case T-282/02 [2006] ECR II-319. See, in particular, paragraphs 104 to 109.

notification to the Commission to avoid control, the General Court also undermined the effectiveness of Article 3(5)(a) of that regulation by eliminating the requirement concerning credit or financial institutions and indeed the requirement concerning the temporary nature of the transaction referred to in that provision.

14. Secondly, the appellant considers that the General Court allowed the creation by contract of a 'warehousing arrangement' which eludes merger control. The General Court erred in law by making a truncated application of Article 3(3) of Regulation No 4064/89 as it limited its analysis to contractual elements thereby failing completely to assess the question of de facto control in accordance with the Commission's own practise and confirmed by the judgment of the General Court in *Aer Lingus Group* v *Commission*.[9] In addition, according to the appellant, the General Court incorrectly rejected at paragraph 134 of the judgment under appeal the arguments raised by the appellant concerning the possibility of exercising decisive influence linked to the financing and assumption of risks by stating that such financing was 'inherent to the holding arrangement'. The General Court also incorrectly rejected at paragraph 137 of the judgment under appeal the appellant's claims regarding the debt owed by Segex/Ecrinvest 4 to Lagardère.

15. The Commission and Lagardère consider that the present ground of appeal is ineffective as the object of the contested decision was not to examine the existence or otherwise of de facto control from December 2002, but to assess the compatibility with the common market of the operation notified on 14 April 2003 in relation to the acquisition by Lagardère of control of VUP. Therefore the classification of the holding arrangement and the consequences of that classification are independent of and do not affect the validity of the contested decision which authorised the operation subject to commitments. Lagardère states that the Commission may only prohibit a concentration when it creates or strengthens a dominant position which significantly impedes competition in the common market. Failure to notify or putting into effect a concentration without authorisation may only be sanctioned by the imposition of a fine pursuant to Article 14 of Regulation No 4064/89.

16. The Commission considers that the appellant incorrectly claims on the basis of the *Cementbouw Handel & Industrie* v *Commission* judgment[10] that Regulation No 4064/89 requires the Commission to assess in a unitary manner interdependent transactions which constitute a concentration. Given that the Commission found that the concentration following the imposition of commitments did not impede competition, the fact that an assessment of an operation whereby control was acquired did not extend to the phase on the holding arrangement did not affect the general objective of control of concentrations. Moreover, the finding of the General Court that the holding arrangement in respect of VUP's assets did not give Lagardère from December 2002 the possibility to exercise a decisive influence on its own or jointly with NBP over the assets can not be challenged at appeal stage in the absence of a distortion of the facts which has not been alleged. In the light of the *Aer Lingus Group* v *Commission* case,[11] given that the Commission authorised, subject to commitments, the acquisition on a lasting basis of sole control by Lagardère over the target assets of VUP, such an authorisation decision is equally coherent with an analysis which considered the holding arrangement VUP/Editis by NBP as the 'first step' in that single concentration leading only at the end of the operation (by the sale of NBP to Lagardère, pursuant to commitments) to lasting control by Lagardère. The Commission considers that the appellant's claim regarding the qualification of the holding arrangement and the creation of a new exception for the temporary acquisition of assets is ineffective as it is not decisive with respect to the legality of the contested decision and even if it is considered a first step of a concentration, it is not a concentration in itself. The Commission also considers that the judgment

9 — Case T-411/07 [2010] ECR II-3691, paragraph 61.

10 — Cited in footnote 8.

11 — Cited in footnote 9, paragraph 61.

under appeal does not exclude the possibility of de facto control. However, in that context the burden of proof lay on the appellant to establish an error on the part of the Commission. It is not sufficient to allege that Lagardère exercised control from December 2002. This is particularly the case as the contractual terms were adopted in order to exclude control.

17. Lagardère claims that the present ground of appeal is in any event in part inadmissible and in part unfounded. Lagardère considers that the appellant's claim that the holding arrangement is merely the first stage of a concentration which ultimately resulted in Lagardère's control is a new argument raised at appeal stage, is contrary to the position developed by the appellant before the General Court and is therefore inadmissible. Lagardère considers that the appellant's claim that the General Court failed to assess the possibility of de facto control of Lagardère over Editis from the time of the holding arrangement is unfounded as is evidenced by that court's analysis of that question from paragraph 119 et seq. of the judgment under appeal.

3. Assessment

18. As regards the claim that the present ground of appeal is ineffective, in my view a concentration, albeit one notified late in breach of the time-limit of one week provided by Article 4(1) of Regulation No 4064/89 and put into effect in contravention of the obligation to suspend contained in Article 7(1) of that regulation, which does not create or strengthen a dominant position as a result of which competition would be significantly impeded in the common market, must in accordance with Article 8(2) of Regulation No 4064/89 be declared compatible with the common market by the Commission.[12] The failure to notify to the Commission a concentration with a Community dimension in accordance with Article 4 of Regulation No 4064/89[13] or the putting into effect that concentration without authorisation may, however, be sanctioned by the imposition of a fine by the Commission pursuant to Article 14(1)(a) and 14(2)(b) of Regulation No 4064/89 respectively.[14]

19. In my view, it is important to stress that such an approach is based on the premiss that all factual, legal and economic matters which could affect the nature of the concentration and in turn the Commission's appraisal of its impact on competition in the common market pursuant to Regulation No 4064/89[15] have subsequently been notified to the Commission and the operation was accordingly assessed by that institution on the basis of all the relevant information. I consider that certain errors or omissions in the notification concerning the nature of transactions could therefore impinge on the correct evaluation of a concentration itself pursuant to Regulation No 4064/89.[16]

20. In that regard and in the context of the present proceedings, I consider that failure by the Commission in its decision approving a concentration or by the General Court in its judgment on review of that decision to take into account and correctly assess all the relevant information and circumstances in relation to the application of Article 3 of Regulation No 4064/89, could potentially lead to the annulment of that decision or judgment.

12 — See also Article 2(2) of Regulation No 4064/89. In contrast, in accordance with Article 8(4) of Regulation No 4064/89, the Commission may require any action that may be appropriate to restore competition where a concentration which creates or strengthens a dominant position as a result of which competition would be significantly impeded has been implemented. See also Article 2(3) of Regulation No 4064/89. Such action may extend to the dissolution of an implemented concentration. See *Aer Lingus Group* v *Commission*, cited in footnote 9, paragraphs 58 to 61.

13 — And thus no more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest.

14 — It is possible pursuant to Article 7(4) of Regulation No 4064/89 in certain circumstances to request a derogation from the Commission in respect of the obligation to suspend a concentration in accordance with Article 7(1) of that regulation.

15 — In that regard, the focus is on whether there is a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market. See, Articles 1, 2 and 3 of Regulation No 4064/89.

16 — See, by analogy, *Cementbouw Handel & Industrie* v *Commission*, cited in footnote 8, paragraphs 108 and 109. The Commission must be afforded the opportunity of carrying out an effective control of a concentration.

21. However, I consider that even if the appellant's claims under the present ground of appeal are in fact correct, they cannot lead to the annulment of the judgment under appeal. The alleged error in the qualification of the holding arrangement, which the appellant itself agrees is an integral part of the concentration notified on 14 April 2003,[17] merely relates in reality to whether Lagardère obtained control over the target assets in December 2002 as a result of that arrangement or at a later point in time. The alleged error therefore has no other practical bearing on the nature of the concentration notified or on its effect on competition in the common market. This approach is in my view supported by the ruling of the General Court in the *Cementbouw Handel & Industrie* v *Commission* case.[18] Thus as indicated by that court, the purpose of ascertaining whether a number of transactions are unitary in nature is, inter alia, to enable the Commission to carry out an effective control of concentrations which are capable of significantly impeding competition in the common market.[19] It therefore does not avail the appellant in the present appeal case to claim that the General Court did not correctly assess the holding arrangement pursuant to Article 3 of Regulation No 4064/89.

22. I shall, however, examine the arguments of the appellant concerning the first ground of appeal for the sake of completeness.

23. In my view, Lagardère's claim that the first part of the present ground of appeal is inadmissible should be rejected. While the appellant in its pleadings before the General Court did not formulate its arguments using the terms found in the *Cementbouw Handel & Industrie* v *Commission* judgment[20] and the Commission's consolidated jurisdictional notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings,[21] this is hardly surprising as that judgment and the notice in question post-date the application for annulment of the contested decision before the General Court. However, the nature of the holding arrangement in respect of the target assets in the wider context of the operation which was notified to the Commission and the need to assess that arrangement in that context were matters raised by the appellant in its pleadings before the General Court.

24. As regards the substance of the first part of the present ground of appeal, I consider that the General Court did not fail to comprehend the economic reality of the concentration examined by the Commission in the contested decision nor indeed the various transactions that formed the basis of that concentration. Indeed, aside from the in-depth analysis of the holding arrangement itself in paragraphs 119 to 153 of the judgment under appeal, the General Court outlined in great detail in paragraphs 10 to 36 of that judgment the transactional steps that preceded the notification of the concentration on 14 April 2003. Furthermore, the appellant specifically agreed with the presentation of those facts by the General Court in the present appeal.

25. Moreover, it is clear from the judgment under appeal that the General Court examined the holding arrangement pursuant to Article 3(3) of Regulation No 4064/89 in response to the specific claims raised by the appellant in its first ground of annulment before that court. The appellant claimed that the acquisition by NBP of the target assets did not comply with Article 3(5)(a) of Regulation No 4064/89[22] and that through the holding arrangement, Lagardère was able to exercise a decisive influence over the target assets from December 2002 until they were sold to Wendel in September 2004.[23] The General Court thus, in direct response to the appellant's claims before it, examined in detail whether Lagardère had acquired single or joint control over the target assets from December 2002. Having found that Lagardère did not acquire control over the target assets from December 2002

17 — See for example, points 23, 24, 27 etc. of the application.

18 — Cited in footnote 8.

19 — See paragraph 108.

20 — Case cited in footnote 8.

21 — OJ 2008 C 95, p. 1 ('the Commission Jurisdictional Notice').

22 — See paragraphs 94 to 102 of the judgment under appeal.

23 — See paragraph 103 of the judgment under appeal.

pursuant to Article 3(3) of Regulation No 4064/89, the General Court did not proceed to examine in any detail the application of Article 3(5)(a) of that regulation.[24] It would appear therefore that an examination of the application of Article 3(5)(a) of Regulation No 4064/89, pursuant to which control is deemed not to arise, was considered by the General Court superfluous in the light of its finding of absence of control pursuant to Article 3(3) of Regulation No 4064/89. In so doing, I consider that the General Court did not deprive Article 3(5)(a) of that regulation[25] of its effectiveness (effet utile) nor indeed create a new exception with respect to the acquisition of control.

26. Moreover, I consider that the Commission has correctly pointed out in its pleadings that the assessment of the holding arrangement by the General Court is consistent with both the *Cementbouw Handel & Industrie* v *Commission* judgment,[26] and indeed the Commission Jurisdictional Notice[27] as that arrangement can be considered as a first, but in itself insufficient,[28] step in a number of linked transactions which ultimately led to Lagardère obtaining control over the target assets and thus to a concentration pursuant to Regulation No 4064/89.

27. I therefore consider that the first part of the present ground of appeal should be rejected as unfounded.

28. As regards the second part of the present ground of appeal, the appellant claims that the General Court incorrectly applied the criteria for assessing control in Article 3(3) of Regulation No 4064/89 and merely examined formal contractual elements without examining the existence of de facto control. The appellant states that it claimed before the General Court that Lagardère's ability to exercise decisive influence over the target assets derived from three factual elements, namely, the loan to NBP of the entire acquisition price (EUR 1.116 billion), the guarantee to pay leases and the provision of sums to cover VUP's cash requirements (EUR 118 million). In addition, the appellant indicated before the General Court that Lagardère's and Segex's decisive influence derived from three cumulative mechanisms: the veto right of Segex provided by Annex 7 of the contract over any change in the target assets, the economic dependence of Investima 10 on Lagardère, in the light of the EUR 1.2 billion loan and the transfer to Lagardère of the entirety of the risks over the business and the control of the premises.

29. I consider that the appellant's claim that the General Court merely examined contractual stipulations and failed to assess the question of de facto control by Lagardère over the target assets is unfounded. It is clear from the judgment under appeal that the General Court, contrary to the claims of the appellant, examined all the pleas raised by the appellant concerning de facto control and assessed the proof proffered by the appellant in that regard. The General Court examined firstly, at paragraphs 133 and 134 of the judgment under appeal, whether the fact that Lagardère had financed the holding arrangement and assumed all the risks in that regard resulted in it being able to exercise a decisive influence over the target assets. Secondly, the General Court examined, at paragraphs 136 and 138 to 142 of the judgment under appeal, the nature of the veto right granted to Segex/Ecrinvest 4 pursuant to Annex 7 of the sales contract in relation to any decision likely to affect

24 — See, however, in that regard, paragraphs 138 and 142 of the judgment under appeal where the General Court found that certain aspects of the holding arrangement would in any event comply with the conditions contained in Article 3(5)(a) of Regulation No 4064/89.

25 — I would also note that Article 3(5)(a) of Regulation No 4064/89 refers to the acquisition of securities rather than the acquisition of assets. I consider therefore that the holding arrangement in relation to the target assets could not in any event benefit from the terms of that provision.

26 — Case cited in footnote 8. '[A] concentration within the meaning of Article 3(1) of Regulation No 4064/89 may be deemed to arise even in the case of a number of formally distinct legal transactions, provided that those transactions are interdependent in such a way that none of them would be carried out without the others and that the result consists in conferring on one or more undertakings direct or indirect economic control over the activities of one or more other undertakings.' See paragraph 109 of the judgment.

27 — Cited in footnote 21. See in particular Part 1.5. on Interrelated transactions. That notice is not binding on the Court nor indeed temporally applicable and accordingly is also not binding on the Commission.

28 — See, by analogy, *Aer Lingus Group* v *Commission*, cited in footnote 9, paragraph 65. In that case the acquisition of a minority shareholding did not result in the acquisition of control. Further acquisitions of shares could however have that result.

the target assets.[29] Thirdly, the question whether the debt owed by Segex/Ecrinvest 4 to Lagardère could have deprived Segex of real power to exercise the rights attached to the target assets and resulted in Segex acting on behalf of Lagardère was examined at paragraph 137 of the judgment under appeal. Fourthly, the question of the independence of the members of the board responsible for the management of Investima 10 was examined at paragraph 143 of the judgment under appeal.[30] It is evident from the judgment under appeal that the General Court examined the above questions of de facto control and a considerable number of contractual stipulations in the sales contract and found that those stipulations were sufficient to exclude the possibility of de facto control by Lagardère over the target assets.[31]

30. In my view, in the absence of any demonstration that the General Court's weighing of the evidence of de facto control and the contractual stipulations in the sales contract was erroneous, I consider that the appellant's claim on de facto control should be rejected as unfounded.

31. The appellant also claims that the General Court's reasoning at paragraph 133 of the judgment under appeal is purely circular. The General Court found that the financing of the holding arrangement and the assumption of all the risks by Lagardère did not give the latter the possibility of exercising a decisive influence over the target assets as the financing and assumption of risks resulted from or were inherent to the holding arrangement itself. The appellant makes the same claim in respect of the General Court's treatment of its argument concerning the debt incurred by Segex/Ecrinvest 4 to Lagardère which was dismissed at paragraph 137 of the judgment under appeal.

32. In my view, the above claim should be construed as a claim of lack of adequate reasoning by the General Court which is a matter of law which must be examined by the Court of Justice on appeal.[32] I consider that it is necessary to examine the adequacy of the statement of reasons of the General Court on the questions of financing and assumption of risk in the context of the previous finding by the General Court, outlined in considerable detail in the judgment under appeal, that the possibility of Lagardère exercising a decisive influence over the target assets pursuant to the holding arrangement was excluded by the explicit terms of the sales contract.[33]

33. The General Court added at paragraph 134 of the judgment under appeal that the financing of the holding arrangement resulted from the arrangement itself as NBP would not have agreed to the arrangement unless Lagardère agreed to bear all the risks and indemnify NBP for all damage. The General Court therefore found at paragraph 135 of the judgment under appeal that the financing of the operation was not sufficient, in itself, to demonstrate Segex's absence of power over the target assets. At paragraph 136 of the judgment under appeal the General Court also noted that Segex/Ecrinvest 4 had a veto right over all decisions which would affect the target assets which was more extensive than that provided by Article 3(5)(a) of Regulation No 4064/89. For the same reasons the General Court rejected at paragraph 137 of the judgment under appeal the appellant's claim that as a result of the considerable debt owed by Segex/Ecrinvest 4 to Lagardère, Segex would be deprived of any real power over the target assets and would in fact act as an agent for Lagardère in respect of the assets. In my view, the reasoning of the General Court on the questions of financing and the debt incurred is clear, comprehensible and sufficient in the light of that court's assessment of the contractual stipulations.

34. I therefore consider that the first ground of appeal is ineffective and in any event unfounded.

29 — The General Court found that the veto right complied with the terms of Article 3(5)(a) of Regulation No 4064/89 and that Article 4(2) of the sales contract concerning the powers of the responsible bodies of Ecrinvest 4 and Investima 10 excluded any intervention by Lagardère, save that inherent to the holding arrangement itself.

30 — The General Court stated that the appellant had not produced any factual elements which would undermine its assessment of the independence of Investima 10 pursuant to contractual stipulations.

31 — See paragraphs 120 to 144 of the judgment under appeal.

32 — See judgment of 11 January 2007 in Case C-404/04 P *Technische Glaswerke Ilmenau* v *Commission*, paragraph 90.

33 — Paragraphs 120 to 144 of the judgment under appeal.

B – *Second ground: error of law as the General Court failed to draw the legal consequences of procedural infringements committed by the Commission*

1. Arguments

35. By its second ground of appeal, the appellant alleges an error of law insofar as the General Court failed to draw the legal consequences of the procedural infringements committed by the Commission. By shielding from any review those infringements of Regulation No 4064/89, relating, inter alia, to the infringement of the obligation to suspend the concentration, to the absence of notification of such a kind as to form the basis of the Commission's competence and to fraud by the apparent substitution of the purchaser, the General Court validated an infringement of the law equivalent to a misuse of powers by the Commission.

36. According to the appellant, the General Court erred in finding that if the concentration had been put in place since December 2002 and thus before it was notified, the only sanction available was the imposition of a fine pursuant to Article 7(1) of Regulation No 4064/89 rather than the annulment of the contested decision. The General Court also erred in finding that failure to notify the concentration within the time-periods laid down by Article 4(1) of Regulation No 4064/89 was merely subject to a fine but did not affect the validity of the contested decision. According to the appellant, while an infringement of Article 7(1) and Article 4(1) of Regulation No 4064/89 by undertakings only leads to the imposition of fines, those sanctions cannot by definition apply to the Commission itself. The Commission misused its powers by allowing Lagardère to incorrectly rely on Article 3(5)(a) of Regulation No 4064/89 and avoid notifying the concentration from December 2002. The failure to examine the transaction within the time periods conferred a competitive advantage with respect to other potential buyers on Lagardère by allowing it to pay the purchase price immediately to VUP.

37. In its reply, the appellant stresses that the present ground of appeal is not principally directed at the sanctions which the Commission could impose on an undertaking for failure to comply with certain obligations but at the sanctions which must be imposed for infringements by the Commission and consequently the fate of a decision adopted in disrespect of the rules provided by a Community regulation.

38. The Commission considers that the present ground of appeal is ineffective and unfounded. Lagardère considers that the present ground of appeal is inadmissible as the appellant merely refers to factual elements which were examined by the General Court without claiming that there was a distortion of facts.

2. Assessment

39. I consider, in the light of my findings on the first ground of appeal, that the General Court's finding at paragraphs 116 to 164 of the judgment under appeal that the holding arrangement did not constitute a concentration from December 2002 as Lagardère was unable to exercise a decisive influence either on its own or jointly with NBP over the target assets pursuant to that arrangement is correct. It follows therefore that the obligation to suspend a concentration pursuant to Article 7(1) of Regulation No 4064/89 was not infringed by VUP and Lagardère as a result of the holding arrangement.[34] Thus in the absence of any procedural infringement concerning the obligation to suspend a concentration, the claim that the General Court erred in law by failing to draw the legal consequences of such a procedural infringement should, in my view, be rejected.

34 — Moreover, it is clear from the contractual stipulations contained in the sales contract that the transfer to Lagardère of the shares in Ecrinvest 4 could only take place after the authorisation of the relevant competition authorities had been obtained. See paragraphs 24 and 25 of the judgment under appeal.

40. On the question of late notification of the concentration by Lagardère,[35] it is undisputed that the concentration was notified late in breach of the time-limit of one week provided by Article 4(1) of Regulation No 4064/89.[36] However, I consider that that procedural irregularity alone, even if it were induced by the Commission itself as alleged by the appellant, could have had no impact on the assessment of the concentration[37] in the case at hand, particularly in the absence of a breach of the obligation to suspend the concentration.[38] Thus as the outcome of the contested decision would not have been different if the concentration had been notified on time, it would, in my view, be wholly disproportionate to annul the Commission's decision on the concentration on that basis alone.[39] The General Court therefore correctly found at paragraphs 201 and 202 of the judgment under appeal that unless a concentration creates or strengthens a dominant position as a result of which effective competition would be significantly impeded, the Commission cannot declare that concentration incompatible with the common market pursuant to Article 8(3) of Regulation No 4064/89 merely on the basis that the concentration was notified out of time.

41. I would also note pursuant to paragraph 10 et seq. of the judgment under appeal that VUP and Lagardère entered into negotiations from late September 2002 concerning the acquisition by the latter of the target assets. Moreover, the Commission was aware of and approved the main conditions of the acquisition of the target assets by NBP on or after 8 October 2002[40] and the Commission received on 10 December 2002 a draft notification of the purchase by Lagardère of the target assets,[41] the actual notification only taking place on 14 April 2003 approximately four months late. It is thus clear from the file before the Court that the Commission had informal pre-notifications contacts with the notifying parties to the envisaged concentration. In my view, such contacts whereby the Commission and the notifying parties discuss a future concentration and the Commission clarifies its preliminary view on certain legal or other matters or indicates its potential position on that concentration do not constitute a misuse of power by the Commission.[42]

42. On the contrary, such contacts comply with the principle of good administration as they promote 'a spirit of cooperation and better understanding between DG Competition and the legal and business community'[43] to the benefit of the control of concentrations. Such pre-notification contacts therefore are not aimed at and do not serve to favour a particular buyer over another.[44]

35 — The obligation to notify the concentration in question fell on Lagardère pursuant to Article 4(2) of Regulation No 4064/89.

36 — See paragraph 200 of the judgment under appeal.

37 — And whether it creates or strengthens a dominant position.

38 — Pursuant to recital 17 in the preamble to Regulation No 4064/89, the requirements of prior notification and indeed suspension of concentrations are imposed in order to ensure effective control of undertakings by the Commission. Both obligations thus pursue the same overriding objective pursuant to Regulation No 4064/89. In addition, the obligation to suspend a concentration pursuant to Article 7(1) of Regulation No 4064/89 seeks to avoid the necessity of retrospectively unravelling uncompetitive concentrations pursuant to Article 8(4) of that regulation. In addition, and as claimed by the Commission, I consider that the obligation to notify a concentration within a week of the conclusion of the agreement pursuant to Article 4(1) of Regulation No 4064/89 also seeks to ensure that concentrations which could be detrimental to competition in the common market are not put into effect prior to examination by the Commission. The obligations of notification and suspension of concentrations with a Community dimension pursuant to Regulation No 4064/89 thus seek to pre-empt in a timely manner certain structural alterations in undertakings which could be detrimental to competition in the common market.

39 — See, by analogy, Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraph 13.

40 — See paragraph 15 of the judgment under appeal.

41 — See paragraph 35 of the judgment under appeal.

42 — It is settled case-law that an act is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case. See, to that effect, inter alia, Case C-342/03 *Spain* v *Council* [2005] ECR I-1975, paragraph 64 and the case-law cited.

43 — DG Competition – Best practices on the conduct of EC merger control proceedings.

44 — Outside the realm of commitments imposed pursuant to Article 8(2) of Regulation No 4064/89, the Commission has no power whatsoever in the approval of buyers.

43. Given the clearly informal, non-binding and preliminary nature of such pre-notification contacts between the Commission and notifying parties, they are not aimed at substituting the notification process but rather seek to enhance it. Furthermore, such informal contacts are clearly not of such a nature as to relieve the parties which are subject to the notification requirement contained in Article 4(1) of Regulation No 4064/89 of that legal obligation which falls on them alone.

44. I therefore consider that the second ground of appeal should be rejected as unfounded.

C – *Third ground: error of law in that the General Court failed to draw the legal consequences of a violation of essential procedural requirements due to a failure to provide a statement of reasons, infringement of the principles of legal certainty, legitimate expectations and equality*

1. Arguments

45. By its third ground of appeal, the appellant alleges that the General Court erred in law by failing to sanction by annulment essential procedural requirements vitiating the contested decision. The present ground of appeal relates in particular to the failure to provide a statement of reasons in relation to the qualification by the Commission of the holding arrangement at issue and to the applicability of Article 3(5)(a) of Regulation No 4064/89 to a part of the operation. The appellant considers that the General Court upheld the position (implicit as unreasoned) of the Commission that the holding arrangement was not a concentration subject to notification pursuant to Regulation No 4064/89. While that position has legal effects in particular for potential buyers such as the appellant, paragraph 6 of the contested decision merely makes an evasive reference to the matter. Contrary to the situation which arose in *Bertelsmann and Sony Corporation of America* v *Impala*,[45] the absence of reasoning in the present proceedings related to the competence of the Commission and thus concerns matters which are not irrelevant or secondary in nature. The Commission should have determined the date on which the operation should have been notified in order to ensure compliance with the obligation to notify and suspend the operation, and if necessary impose sanctions for infringement of those obligations.

46. The finding of the General Court at paragraphs 231 to 233 of the judgment under appeal that the Commission had no competence with respect to the holding arrangement as it was not notified because it was not a concentration is circular in nature and cannot justify the total absence of reasoning on why that operation did not constitute a concentration or did not form part of the notified concentration. By validating the failure of the Commission to provide a statement of reasons in respect of the application of an exception pursuant to Regulation No 4064/89, the General Court at paragraph 233 of the judgment under appeal permitted an infringement of the principles of equality and legal certainty. The possibility afforded to Lagardère to invoke that exception placed it in a more favourable position in respect of the sale of VUP and thus infringed the principle of equality. Moreover, the position of the Commission was at odds with its own practise and guidelines from which the Commission could not depart without providing reasons in order not to breach the principle of legal certainty and the protection of legitimate expectations.

47. The Commission considers that the present ground of appeal is ineffective. The Commission and Lagardère consider that the present ground of appeal is unfounded.

45 — Case C-413/06 P [2008] ECR I-4951, paragraph 167.

2. Assessment

48. It is clear from settled case-law that the Commission does not infringe its duty to state reasons if, when exercising its power to examine concentrations, it does not include precise reasoning in its decision as to the appraisal of a number of aspects of the concentration which appear to it to be manifestly irrelevant or insignificant or plainly of secondary importance to the appraisal of the concentration. Such a requirement would be difficult to reconcile with the need for speed and the short timescales which the Commission is bound to observe when exercising its power to examine concentrations and which form part of the particular circumstances of proceedings for control of those concentrations. [46]

49. It follows that where the Commission declares a concentration to be compatible with the common market on the basis of Article 8(2) of Regulation No 4064/89 the requirement to state reasons is satisfied when that decision clearly sets out the reasons for which the Commission considers that the concentration in question, where appropriate following modification by the undertakings concerned, does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. [47]

50. In that regard, while it is true that the Commission is not obliged, in the statement of reasons for decisions adopted under Regulation No 4064/89, to take a position on all the information and arguments relied on before it, including those which are plainly of secondary importance to the appraisal it is required to undertake, it nonetheless remains the case that it is required to set out the facts and the legal considerations having decisive importance in the context of the decision. The reasoning must in addition be logical and must not disclose any internal contradictions. [48]

51. It is in the light of these principles that the objections raised by the appellant under the third ground of appeal should be examined.

52. In the judgment under appeal, the General Court considered at paragraphs 231 to 233 that as the holding arrangement itself was not a concentration, there was no obligation to notify that arrangement pursuant to Article 4(1) of Regulation No 4064/89. [49] Accordingly, as the holding arrangement was not the concentration examined in the contested decision, the General Court considered that the Commission was not obliged in the contested decision to state reasons for its qualification of that arrangement pursuant to Article 3(5)(a) of Regulation No 4064/89. [50]

53. It is clear from the foregoing that the General Court considered that as the holding arrangement did not constitute in itself a concentration its qualification was a matter of secondary importance in the context of the notified concentration and thus that the Commission was not obliged to provide a statement of reasons in the contested decision on its qualification of that arrangement pursuant to Article 3(5)(a) of Regulation No 4064/89. I consider that this approach is correct. Moreover, I consider that contrary to the assertions of the appellant, that reasoning is not circular in nature. Rather that reasoning complies with both the letter and spirit of Regulation No 4064/89 as the Commission only has competence to assess transactions pursuant to Regulation No 4064/89 which are required to be notified to the Commission and thus where they are deemed to constitute a concentration with a Community dimension.

46 — *Bertelsmann and Sony Corporation of America* v *Impala*, cited in footnote 45, paragraph 167.

47 — *Bertelsmann and Sony Corporation of America* v *Impala*, cited in footnote 45, paragraph 168.

48 — *Bertelsmann and Sony Corporation of America* v *Impala*, cited in footnote 45, paragraph 169.

49 — As I have indicated in my answer to the first ground of appeal, I consider that the General Court was correct in finding that the holding arrangement did not in itself constitute a concentration and was thus not subject to notification pursuant to Regulation No 4064/89.

50 — At paragraphs 5 to 8 of the contested decision, the Commission described the notified concentration as the acquisition by Lagardère of VUP's publishing assets in Europe and Latin America (except Brazil) of total control within the meaning of Article 3(1)(b) of Regulation No 4064/89.

54. In addition, as the question of whether the holding arrangement falls within the scope of Article 3(5)(a) of Regulation No 4064/89 is not, in the present case, a matter which could affect the assessment of the nature of the notified concentration nor indeed the appraisal of its impact on competition pursuant to that regulation [51] and is thus, in particular, of no relevance to the question of whether the notified concentration created or strengthened a dominant position which was likely to have a significant impact on competition in the common market, I consider that the General Court did not err in law by considering that the Commission in its contested decision had provided an adequate statement of reasons on the matter.

55. As regards the appellant's claim that the judgment under appeal uses contradictory reasoning as the General Court at paragraph 142 of the judgment under appeal bases its arguments on the terms of Article 3(5)(a) of Regulation No 4064/89 while nonetheless dismissing the application of that provision, I consider that a statement by the General Court that a transaction would comply with certain of the conditions contained in Article 3(5)(a) of Regulation No 4064/89 does not preclude a finding that control over the target assets was not acquired pursuant to Article 3(3) of that regulation. In my view, the reasoning of the General Court is not contradictory as compliance with some of the conditions contained in Article 3(5)(a) of Regulation No 4064/89 is perfectly consistent with and indeed may support a finding that control has not been acquired pursuant to Article 3(3) of Regulation No 4064/89.

56. In light of the above, I consider that the appellant's claims of infringement of the principles of equality, legal certainty and legitimate expectation should be dismissed as they are clearly dependent on a finding of failure to provide an adequate statement of reasons.

57. I therefore consider that the third ground of appeal should be rejected as unfounded.

D – *Fourth ground: error of assessment of strengthening of a dominant position and the appropriateness of commitments*

1. Arguments

58. By its fourth and final ground of appeal which is divided into two parts, the appellant claims that the General Court erred in law and committed manifest errors of assessment firstly, in that it disregarded the relevant legal criteria for assessing the creation or strengthening of a dominant position and secondly, as regards whether the commitments were appropriate in the light of the criteria of restoring and developing effective competition and the statements made by the Commission concerning portfolio and conglomerate effects.

59. Firstly, the appellant claims that it is uncontestable that the question of whether an undertaking holds a dominant position depends on the degree of competitive pressure exercised on it. [52] The General Court thus erred in finding at paragraph 286 of the judgment under appeal that its argument concerning the break-up of Editis was ineffective as it did not concern the question of the creation or strengthening of a dominant position. The error is particularly evident given that the Commission found in the contested decision that the competitive balance in the different relevant markets was based on a non-dominant duopoly. It such circumstances, it is the rivalry between two competitors of equal size and strength that constitutes the engine of competition. The General Court could not therefore exclude as a matter of principle that the weakening of one of the two competitors by its break-up would not also lead to the creation of a dominant position. Moreover, the General Court, by

51 — See point 21 above.

52 — See, in particular, Case 27/76 *United Brands and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 65, and Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38.

stating at paragraphs 293 and 294 of the judgment under appeal that the identity of the buyer substantially influenced the effectiveness of the sale of assets agreed to by Lagardère, admitted that the remedy proposed by Lagardère did not eliminate *ab initio* any doubt as to the effectiveness of that remedy as required by the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98. [53]

60. Secondly, the appellant claims that in accordance with recital 13 in the preamble to Regulation No 4064/89, the degree of effective competition in the common market should not only be maintained but should, as a result of the use of the term 'develop' in that recital, be increased following the concentration. The General Court erred in paragraph 342 of the judgment under appeal in finding that it was sufficient if the level of competition was 'maintained or developed'.

61. The General Court also manifestly erred in its assessment as, contrary to its claim at paragraphs 342 and 343 of the judgment under appeal, nothing guarantees that an operator having the economic incentives [54] to develop or maintain effective competition is an actual or potential competitor. The appellant considers that the contrast between the judgment under appeal and *Petrolessence and SG2R* v *Commission* [55] is striking as in the latter case the Commission refused to approve a potential buyer of assets as it was not active in the sector in question. In the present proceedings, not only does the text of the commitments in the contested decision not require that the buyer of the target assets to be an actual or potential competitor, but also the General Court adopted a minimalist interpretation of the capacity of the buyer to preserve competition by accepting at paragraph 345 of the judgment under appeal that it could be an operator with no experience of the market in question.

62. In accordance with the judgment in *Petrolessence and SG2R* v *Commission*, [56] an assessment of the capacity of a buyer to guarantee effective and durable competition would require the rejection of candidates with no experience of the markets in question. Moreover, contrary to the statements at paragraph 345 of the judgment under appeal, nothing in the commitments requires the buyer to maintain the existing managers of the target assets. A buyer which is already present in the industry is of much greater interest than a financial buyer, as the former has by definition an experienced team capable of maintaining and developing the competitive capacity of the divested activity. Furthermore, the appellant considers that the General Court incorrectly at paragraph 347 of the judgment under appeal rejected its claims concerning an upfront buyer. According to the appellant the dismantling of Editis resulted in a loss to the distribution centre of the latter of the volume corresponding to the four publishing houses maintained by Lagardère. Thus the identity of the buyer was essential for the efficacy of the commitments in order to ensure that it could supply the distribution centre with equivalent volumes. The appellant therefore considers that the commitments are ineffective in the absence of an upfront buyer and that by accepting a financial buyer, Editis was structurally weakened.

63. The appellant claims that the General Court found in the judgment under appeal that the contested decision correctly analysed the effects linked to portfolio and conglomerate effects, but that court failed to verify whether the commitments offered by Lagardère were legally sufficient. The General Court thus validated a fragmented approach which merely assessed overlap on a market by market basis without taking into consideration in a more global manner the effects of the operation on all the relevant markets as the Court did in the *Bertelsmann and Sony Corporation of America* v *Impala* case. [57]

64. The Commission and Lagardère consider that the present ground of appeal is unfounded.

53 — OJ 2001 C 68, p. 3 ('the Commission Remedies Notice'), point 7.

54 — Sometimes referred to as a financial buyer.

55 — Case T-342/00 [2003] ECR II-1161.

56 — Cited in footnote 55.

57 — Cited in footnote 45, paragraph 125.

2. Assessment

65. The present ground of appeal relates to the General Court's review of the commitments accepted by the Commission in the contested decision.

66. As regards the first part of the present ground of appeal,[58] in my view the General Court correctly stated at paragraph 284 of the judgment under appeal that a concentration may only be declared incompatible with the common market pursuant to Article 8(3) of Regulation No 4064/89 where it creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market.[59] The commitments proposed to the Commission by the undertakings concerned pursuant to Article 8(2) of Regulation No 4064/89, if accepted by the Commission, form the basis for a decision pursuant to that article.[60] I consider that when commitments have been proposed to the Commission, the overall assessment of whether the concentration creates or strengthens a dominant position cannot be separated from the analysis of the commitments.[61] Thus where commitments are accepted by the Commission, they form an integral part of the concentration and thus the Commission's global and final assessment of that concentration. In addition, the question of dominance and thus the proposed commitments must always be assessed with regard to defined relevant markets. In my view, to find otherwise would deprive the assessment of concentrations of the necessary rigour. Thus while the question of whether an undertaking holds a dominant position, be it pursuant to Article 102 TFEU or Regulation No 4064/89, undoubtedly depends on the degree of competitive pressure exercised on that undertaking, that assessment must always be carried out within the framework of defined relevant markets.

67. I therefore consider that the General Court correctly found that the Commission cannot declare a concentration incompatible on the sole basis that it altered the initial position of the parties in question on the relevant markets.[62] In addition, it is clear from a careful reading of both paragraphs 285 and 286 of the judgment under appeal, and contrary to the appellant's claims, that the General Court did not consider that the divestiture of the target assets constituting 60% of the global turnover of VUP and the retention of the remainder by Lagardère was irrelevant in assessing whether there was a creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the common market. The General Court merely indicated that the dismantling of Editis was not a sufficient criterion in itself to permit a finding of the necessary anti-competitive effect. The General Court also correctly added at paragraph 288 of the judgment under appeal that the global turnover figures of two entities cannot provide relevant indications as the assessment of dominance must be done in the context of defined markets. The General Court therefore, contrary to the claims of the appellant, did not exclude as a matter of principle that the weakening of one of the two competitors by its break-up could not lead to the creation of a dominant position. I would also add, as pointed out by Lagardère in its pleadings, that the General Court found at paragraph 290 of the judgment under appeal that it had not been demonstrated that Editis had been dismantled as the commitments required the divestiture of almost all the target assets.

58 — The appellant claimed before the General Court that the Commission failed to analyse the consequences of the break-up of VUP into two unequal entities, given that the purchase of the target assets was subject to an obligation to divest 60% of those assets. See paragraph 276 of the judgment under appeal.

59 — See also Article 2(3) of Regulation No 4064/89.

60 — See Article 18(2) of 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 on the control of undertakings between undertakings (OJ 1998 L 61, p. 1).

61 — See point 6 of the Commission Remedies Notice (cited in footnote 53). 'It is the responsibility of the Commission to show that a concentration creates or strengthens market structures which are liable to impede significantly effective competition in the common market. It is the responsibility of the parties to show that the proposed remedies, once implemented, eliminate the creation or strengthening of such a dominant position identified by the Commission. To this end, the parties are required to show clearly, to the Commission's satisfaction in accordance with its obligations under the Merger Regulation, that the remedy restores conditions of effective competition in the common market on a permanent basis.'

62 — See paragraph 285 of the judgment under appeal.

68. As regards the appellant's criticism of the statement by the General Court at paragraphs 293 and 294 of the judgment under appeal, in my view, the use of the words 'in any event'[63] at the beginning of paragraph 293 of the judgment under appeal together with the actual contents of paragraphs 293 and 294, in which the General Court states that it was not presented within the framework of the case before it with the necessary evidence to assess *in concreto* the effects on competition of the dismantling of Editis, show that they were included merely for the sake of completeness.

69. In effect, the General Court stated that the appellant could not contest the failure of the Commission to assess the consequences of the break-up of Editis on its capacity to exercise competitive pressure similar to that which existed before the concentration, as that depended on the capacity of the buyer of the assets being sold to maintain or develop effective competition as required by the commitments. That court stated that it did not assess that issue as it had not been sent, within the framework of the case at hand, the information necessary to assess which resources would be required in order to compete effectively with Lagardère. I would note that within the scope of these proceedings, the appellant has not contested the statement by the General Court that it was not sent sufficient evidence.

70. It is settled case-law that complaints directed against the grounds of a judgment of the General Court included merely for the sake of completeness must be rejected outright since such grounds cannot provide any basis for setting that judgment aside.[64]

71. I would add, for the sake of completeness, that the fact that the General Court stated at paragraph 294 of the judgment under appeal that the identity of the buyer would substantially influence the effectiveness of the sale of the assets to be divested, does not constitute an admission by that court that the remedy proposed by Lagardère did not eliminate *ab initio* any doubt as to the effectiveness of that remedy as required by point 7 of the Commission Remedies Notice.[65] While point 7 of that notice requires the parties to a concentration from the outset to remove any uncertainties as to any factors which might cause the Commission to reject the remedy proposed, in my view, commitments do not necessarily have to be implemented in advance of a clearance decision. Indeed it is clear from point 5 of that notice that while such commitments 'may be offered and implemented in advance of a clearance decision', 'it is more common that the parties submit commitments with a view to rendering the concentration compatible with the common market within a specific period following clearance'.

72. In accordance with point 19 of the same notice which concerns divestiture, the condition for a clearance decision for the Commission is that a viable business will be transferred to a suitable purchaser within a specific deadline. In the case of divestiture therefore, the suitability and thus the identity of the purchaser is always relevant. In my view, it is however sufficient in such cases of divestiture that the decision approving the concentration is subject to commitments which specify, inter alia, appropriate criteria for the selection of a suitable purchaser of the assets in question within a reasonable timeframe. However, an upfront buyer[66] is required by the Commission when only a part[67] of a business is being sold.[68] Given that in the case at hand the General Court found at

63 — 'En tout état de cause' in French.

64 — See Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297, paragraph 41, and Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraph 148 and the case-law cited.

65 — Cited in footnote 53.

66 — Thus a buyer who has, inter alia, been approved by the Commission prior to the completion of the notified operation.

67 — The sale of such a part may only be viable from a competition perspective in the light of the identity of a specific identified purchaser rather than one defined in the abstract.

68 — See point 20 of the Commission Remedies Notice (cited in footnote 53). 'There are cases where the viability of the divestiture package depends, *in view of the assets being part of the business*, to a large extent on the identity of the purchaser. In such circumstances, the Commission will not clear the merger unless the parties undertake not to complete the notified operation before having entered into a binding agreement with a purchaser for the divested business (known as the "upfront buyer"), approved by the Commission' (emphasis added).

paragraph 290 of the judgment under appeal that Lagardère had accepted to divest almost all of the target assets and thus 80% of the French language assets, it is apparent that such assets would constitute in themselves a viable business.[69] I therefore consider that a requirement of an upfront buyer for those assets would be disproportionate.

73. Consequently, the first part of the fourth ground of appeal should in my view be dismissed as unfounded.

74. As regards the claim that the General Court failed to take into account the need to maintain and develop effective competition, I wish to restate that it is sufficient for the purposes of Article 8(2) of Regulation No 4064/89 that the notified concentration as modified by the commitments proposed by the undertakings concerned does not create or strengthen a dominant position. The Commission and Lagardère have correctly pointed out in their pleadings that the commitments proposed to the Commission by the undertakings concerned pursuant to Article 8(2) of Regulation No 4064/89 thus do not have to improve the initial competitive situation prior to the concentration. To find otherwise would, in my view, breach the principle of proportionality.[70] Moreover, as the Commission rightly pointed out in its pleadings, the procedure for the control of concentrations and in particular the assessment of commitments proposed by the undertakings cannot be instrumentalised by the Commission as a means or opportunity for 'engineering markets or economic planning'.

75. I would also note that the 'need to maintain and develop effective competition' is not only referred to in recital 13 in the preamble to Regulation No 4064/89 as indicated by the appellant, but is also referred to in Article 2(1)(a) of that regulation. In my view, the use of those terms in Article 2(1)(a) of Regulation No 4064/89 emphasises the need for the Commission to analyse markets in a dynamic, forward looking manner. This is particularly evident from the reference to potential competition in that same provision. Those provisions may not, however, be invoked out of context and in a manner which would clearly deform both their spirit and the clear letter of other provisions of Regulation No 4064/89 such as Article 8(2) and 8(3).

76. The appellant claims that the General Court manifestly erred in its assessment of the capacity of a financial buyer to constitute an actual or potential competitor.[71] The appellant considers in effect that in the light of the *Petrolessence and SG2R* v *Commission* case,[72] candidates with no experience in the market in question should be rejected.

77. I consider that the General Court did not err in finding that a financial buyer would be a potential competitor if it had a real capacity to maintain or preserve effective competition on the market in question even though it had no experience on that market. The General Court rightly added that a financial buyer could rely on its experience in other markets[73] or indeed a financial buyer could in any event, if it wished, maintain the existing and thus experienced management of the divested entity.[74]

69 — See also paragraph 291 of the judgment under appeal.

70 — In *Cementbouw Handel & Industrie* v *Commission* (cited in footnote 8), the General Court in my view correctly found that 'in order to be accepted by the Commission with a view to the adoption of a decision under Article 8(2) of Regulation No 4064/89, the parties' commitments must not only be proportionate to the competition problem identified by the Commission in its decision but must eliminate it' (see paragraph 307).

71 — See point 49 of the Commission Remedies Notice (cited in footnote 53).

72 — See paragraph 65 (cited in footnote 55).

73 — See paragraph 344 of the judgment under appeal.

74 — See paragraph 345 of the judgment under appeal.

78. In my view, each concentration and the viability of eventual commitments attached thereto must be assessed on its merits on an individual basis. The fact that a particular buyer of given divested assets was not acceptable in the *Petrolessence and SG2R* v *Commission* case can by no means prejudge the outcome of the present concentration. Moreover, I can only underscore the enormous factual differences between the present case and the *Pertrolessence and SG2R* v *Commission* case and in particular the fact that the buyer in that latter case wished to acquire a very small percentage of the assets to be divested.

79. As regards the appellant's claims concerning the finding of the General Court at paragraph 347 of the judgment under appeal on the question of an upfront buyer, I refer to my reasoning at point 72 above concerning the application of, inter alia, points 19 and 20 of the Commission Remedies Notice.[75] Furthermore, I consider that the appellant's claim concerning the structural weakening of Editis, which the General Court found at paragraph 290 of the judgment under appeal had not been established, constitutes a challenge to the factual assessment of the General Court and should be rejected as inadmissible in the absence of any claim of distortion of the facts.

80. On the question of portfolio and conglomerate effects, I also consider that the appellant is in fact challenging the factual assessment of the General Court on the matter and thus the appellant's claim should be rejected as inadmissible in the absence of any claim of distortion of the facts. In any event, I consider that the General Court did not adopt a fragmented approach to the matter based purely on market overlaps.[76] The General Court found at paragraph 314 of the judgment under appeal that the Commission had not manifestly erred in its appreciation in considering that the conglomerate effects of the concentration identified would not arise given the limited amount of assets retained and which would be added to Lagardère's conglomerate resources. The General Court assessed at paragraph 315 of the judgment under appeal the findings of the Commission at paragraph 996 et seq. of the contested decision on vertical and conglomerate effects of the concentration and confirmed the global finding of the Commission at paragraph 996 that the sale of 60% to 70% of VUP's turnover in the French-speaking markets would eliminate, inter alia, most of the vertical and conglomerate effects resulting from the overall size of the merged entity in the French-language book trade. At paragraph 316 of the judgment under appeal, the General Court found that the elimination of nearly all horizontal overlaps between Lagardère's and Editis' activities on the French-speaking markets affected would also have the corollary result of eliminating the effects of scale and the accumulation of trademarks by the entity resulting from the authorised concentration.

81. Consequently, the second part of the fourth ground of appeal should in my view be dismissed as unfounded.

IV – Costs

82. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, 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 applied for costs and the appellant has been unsuccessful, the latter must be ordered to pay the costs.

V – Conclusion

83. For the foregoing reasons, I suggest to the Court that it should decide as follows:

(1) dismiss the appeal;

75 — Cited in footnote 53.

76 — See, inter alia, paragraph 310 of the judgment under appeal on the question of market overlaps.

(2) order Éditions Odile Jacob SAS to bear its own costs and those of the Commission and Lagardère SCA.