Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

6 November 2012 *

(Appeals — Merger of undertakings in the book publishing market — Annulment of the decision to approve an investment company as the purchaser of the assets sold — Significance of a trustee's possible lack of independence)

In Joined Cases C-553/10 P and C-554/10 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 24 November 2010,

European Commission, represented by O. Beynet, A. Bouquet and S. Noë, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Éditions Odile Jacob SAS, established in Paris (France), represented by O. Fréget, M. Struys and L. Eskenazi, avocats,

applicant at first instance,

Wendel Investissement SA, established in Paris, represented by M. Trabucchi, F. Gordon and C. Baldon, avocats,

Lagardère SCA, established in Paris, represented by A. Winckler, F. de Bure and J.-B. Pinçon, avocats,

interveners at first instance,

and

Lagardère SCA, established in Paris, represented by A. Winckler, F. de Bure and J.-B. Pinçon, avocats,

appellant,

the other parties to the proceedings being:

Éditions Odile Jacob SAS, established in Paris, represented by O. Fréget, M. Struys and L. Eskenazi, avocats,

applicant at first instance,

* Language of the case: French.

European Commission, represented by O. Beynet, A. Bouquet and S. Noë, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Wendel Investissement SA, established in Paris, represented by M. Trabucchi, F. Gordon and C. Baldon, avocats,

intervener at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, A. Rosas, M. Berger and E. Jarašiūnas, Presidents of Chambers, E. Juhász (Rapporteur), J.C. Bonichot, A. Prechal and C.G. Fernlund, Judges,

Advocate General: J. Mazák,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 13 December 2011,

after hearing the Opinion of the Advocate General at the sitting on 27 March 2012,

gives the following

Judgment

1 By their respective appeals, the European Commission and Lagardère SCA ('Lagardère') ask that the Court set aside the judgment of the General Court of the European Union of 13 September 2010 in Case T-452/04 *Éditions Odile Jacob* v *Commission* [2010] ECR II-4713 ('the judgment under appeal'), whereby the General Court annulled Commission Decision (2004) D/203365 of 30 July 2004 relating to the approval of Wendel Investissement SA as purchaser of the assets sold in accordance with Commission Decision 2004/422/EC of 7 January 2004 declaring a concentration compatible with the common market and the functioning of the Agreement on the European Economic Area ('the EEA Agreement') (Case COMP/M.2978 – Lagardère/Natexis/VUP) (OJ 2004 L 125, p. 54) ('the contested decision').

2 By the contested decision, the Commission decided to approve Wendel Investissement SA ('Wendel Investissement') as the purchaser of the assets sold, in accordance with paragraph 14 of the commitments attached to Decision 2004/422, published in summary form in the *Official Journal of the European Union* of 28 April 2004, adopted pursuant to Article 8(2) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1 and corrigendum 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 and corrigendum OJ 1998 L 40, p. 17) ('Regulation No 4064/89'), in Case COMP/M.2978 – Lagardère/Natexis/VUP.

3 These two joined cases are part of a series of actions brought by the various parties involved in the sale of publishing assets held in Europe by Vivendi Universal Publishing SA ('VUP') which were sold to Lagardère and Wendel Investissement, including the case which gave rise to the judgment of 28 June 2012 in Case C-404/10 P *Commission* v *Éditions Odile Jacob* relating to access to documents in the

course of that concentration control procedure, and the case which gave rise to the judgment of today's date in Case C-551/10 P *Éditions Odile Jacob* v *Commission* concerning the lawfulness of the concentration itself.

Background to the dispute

4 The facts of the dispute, as set out in paragraphs 1 to 47 of the judgment under appeal, are as follows:

'1 On 25 September 2002 Vivendi Universal SA … decided to dispose of the publishing assets held in Europe by its subsidiary [VUP].

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

…

8 On 29 October 2002 [Vivendi Universal SA] approved the disposal of the target assets to Lagardère.

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

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

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

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

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

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

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

…"

…

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

15 Article 2(2) of the contract signed on 19 December 2002 by Ecrinvest 4 and the firm S. specifies, in the first subparagraph, that, in his capacity as trustee of the company, B. is to 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.

…

17 On 14 April 2003, in accordance with Article 4(1) of [Regulation No 4064/89], Lagardère notified the Commission of its proposed purchase of the target assets of VUP.

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

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

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

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

22 Decision [2004/422], adopted pursuant to Article 8(2) of Regulation No 4064/89, provides:

"Article 1

The notified transaction, as amended by the package of commitments of 23 December 2003, by which Lagardère acquires sole control of the [target assets] of VUP, now called Éditis, is declared compatible with the common market and with the functioning of the European Economic Area [Agreement] [of 2 May 1992 (OJ 1994 L 1, p. 3)].

Article 2

Article 1 shall apply on condition that Lagardère complies in full with the commitments referred to [in] Annex II.

Article 3

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

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

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

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

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

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

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

…"

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

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

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

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

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

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

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

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

"In the event of disagreement between Lagardère and Éditis on the restructuring measures necessary for the fulfilment of these commitments, either party may inform the trustee accordingly by registered letter, sending a copy to the other party. The trustee, having heard both sides, will then make a

recommendation, as quickly as possible, regarding the scope of the restructuring measures needed. The trustee will report to the Commission informing it of the recommendation. If the disagreement between Lagardère and Éditis persists, either party may request the Commission, after hearing both sides, to determine the scope of the restructuring measures needed."

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

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

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

…

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

34 On 5 February 2004 the Commission:

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

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

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

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

37 Lagardère made overtures to a number of undertakings, including [Éditions Odile Jacob SAS ('Odile Jacob')], who might purchase the assets sold.

38 [Odile Jacob] declared its interest in this transaction. By fax of 28 April 2004, it sent its purchase offer to Lagardère.

39 In a notice dated 19 May 2004, Lagardère declared that it held offers to purchase from five potential buyers, including [Odile Jacob], and that until midnight on 25 May 2004 it would deal exclusively with one of them, [Wendel Investissement].

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

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

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

43 By [the contested decision] the Commission approved [Wendel Investissement] as purchaser of the assets sold, after making the finding that [Wendel Investissement] satisfied the approval criteria defined in paragraph 10 of Lagardère's commitments.

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

45 By application lodged at the Registry of the General Court on 8 July 2004, [Odile Jacob] brought an action for the annulment of the decision [2004/422] (Case T-279/04).

46 By fax of 27 August 2004 the Commission notified [Odile Jacob], at its request, of the [contested] decision.

47 The transfer to [Wendel Investissement] of ownership of those assets, called "Nouvel Éditis", took place on 30 September 2004.'

The procedure before the General Court and the judgment under appeal

5 By application lodged on 8 November 2004, Odile Jacob brought an action for annulment of the contested decision, on the basis of Article 230 EC.

6 Odile Jacob relied on four pleas in law, respectively that the Commission (i) failed to fulfil its obligation to supervise the selection of prospective purchasers of the assets sold, (ii) approved Wendel Investissement on the basis of a report drawn up by a trustee who was not independent of Éditis, Lagardère and Wendel Investissement, (iii) was in breach of its obligation to state reasons and (iv) committed a manifest error in the assessment of whether Wendel Investissement'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.

7 In reply to the second plea in law, which it examined first, the General Court observed that on 20 December 2002 Investima 10, (which became Éditis), appointed B., the president of the firm S., as a member of its executive board, as an independent third party, and that, furthermore, on 9 February 2004 Lagardère appointed the same firm S. as a trustee bound, under paragraph 21(g) of the commitments reproduced in Annex II to Decision 2004/422, 'to ensure that [Lagardère] satisfactorily fulfil' its transfer of the assets sold. The trustee was remunerated in that capacity by Lagardère.

8 The firm S. was therefore appointed as trustee, in terms of paragraph 15 of Lagardère's commitments, and B., its president, carried out the duties associated with that task, although he was a member of the board of Investima 10, which became Éditis. In addition, from 9 February 2004, the date when the firm S. was appointed, until 25 March 2004, the date when Éditis was converted to a simplified limited company, B. simultaneously carried out the duties of a member of the Éditis board and of trustee.

9 In that context, the General Court considered that B. was dependent on Éditis, to an extent that questions might be raised as to the neutrality which that individual, as a member of the executive board of Éditis (formerly Investima 10) should exhibit in carrying out the duties of the firm of which he was the president and which had been appointed as trustee. Consequently, there was no certainty that the trustee would perform his task, which was to ensure that Lagardère satisfactorily fulfil its commitments, which included transfer of the assets sold, and, for that purpose, to draw up recommendations for necessary restructuring measures and a report informing the Commission of those recommendations, with complete independence. The performance by B. of his duties as a member of the executive board of the company which owned all the assets of Éditis was such as to affect the independence which B. was required to demonstrate, as president of the firm S., when drawing up recommendations for necessary restructuring measures and the report informing the Commission of those recommendations.

10 The General Court observed that the firm S., as trustee, had been asked to send to the Commission a report assessing Wendel Investissement as 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 Decision 2004/422.

11 The General Court concluded, in paragraph 107 of the judgment under appeal, that that report assessing Wendel Investissement as a prospective purchaser had been drawn up by a trustee who did not meet the condition of independence from Éditis, required by paragraph 15 of Lagardère's commitments, as set out in Annex II to Decision 2004/422.

12 The contested decision was based on, inter alia, the report of the trustee who, in the opinion of the General Court expressed in paragraph 110 of the judgment under appeal, had 'a decisive influence' on that decision.

13 Consequently, the General Court concluded, in paragraphs 118 and 119 of the judgment under appeal, that the fact that the trustee who produced that report was not independent constituted an illegality which was such as to vitiate the lawfulness of the contested decision and accordingly annulled that decision, without examining the other pleas in law presented by Odile Jacob in support of its claims for annulment.

Procedure before the Court and forms of order sought by the parties

14 By order of 29 March 2011, the President of the Court decided to join Cases C-553/10 P and C-554/10 P for the purposes of the oral procedure and the judgment.

15 By its appeal (Case C-553/10 P), the Commission claims that the Court should:

— set aside the judgment under appeal, in so far as it annuls the contested decision;

— if appropriate, give a final ruling on the questions which form the subject-matter of the present appeal and dismiss the action for annulment, and

— order Odile Jacob to pay the costs at first instance and on appeal.

16 Lagardère supports the appeal brought by the Commission.

17 Wendel Investissement contends that the Court should:

— set aside the judgment under appeal, in so far as it annuls the contested decision;

— give a final ruling on the questions which form the subject-matter of the present appeal and dismiss Odile Jacob's action for annulment, and

— order Odile Jacob to pay the costs.

18 Odile Jacob contends that the Court should:

— dismiss the appeal;

— alternatively, if the appeal is upheld and the state of the proceedings is considered to permit final judgment, annul the contested decision, and

— order the Commission to pay the costs.

19 By its appeal (Case C-554/10 P), Lagardère claims that the Court should:

— set aside the judgment under appeal, in so far as it annuls the contested decision;

— dismiss the action of Odile Jacob brought before the General Court against that decision, and

— order Odile Jacob to pay all costs relating to these proceedings both at first instance and on appeal.

20 In their responses, the Commission and Wendel Investissement claim that the Court should:

— set aside the judgment under appeal, in so far as it annuls the contested decision;

— dismiss the action for annulment of that decision brought by Odile Jacob, and

— order Odile Jacob to pay all costs relating to these proceedings both at first instance and on appeal.

21 Odile Jacob contends that the Court should:

— dismiss the appeal;

— alternatively, if the appeal is upheld and the state of the proceedings is considered to permit final judgment, annul the contested decision, and

— order the Commission to pay the costs.

The appeals

22 In its appeal in Case C-553/10 P, the Commission raises three grounds of appeal. The first ground of appeal alleges an error of law, in that the General Court failed to examine what effect the possible lack of independence of the trustee vis-à-vis Éditis had on his duties, in relation to Wendel Investissement. By its second ground of appeal, the Commission argues that the General Court committed an error of law, stated contradictory reasons and distorted the facts in that it concluded that the trustee's report had a decisive influence on the contested decision. The third ground of appeal, which alleges an error of law in the assessment of whether a plea in law was effective and an infringement of the duty to state reasons in that regard, is in two parts. The first part of that ground of appeal relates to an error of law committed by the General Court in that it annulled the contested decision on the basis of a plea in law which should have been considered to be ineffective. The

second part of that ground of appeal concerns an infringement of the duty to state reasons, in that the General Court failed to indicate the reasons which justified its holding that the contested decision might have been different if the trustee's lack of independence had not been a factor.

23 In its appeal in Case C-554/10 P, Lagardère relies on two grounds of appeal. The first ground of appeal alleges an error of law in that the General Court relied on an objection taken to the unlawfulness of the trustee approval decision as the basis for the annulment of the contested decision. By its second ground of appeal, Lagardère maintains that the General Court committed an error of law in ruling wrongly that the presence of the trustee on the Éditis executive board as an independent third party could justify annulment of the contested decision. That ground of appeal, which has four parts, essentially reproduces the first ground of appeal in Case C-553/10 P.

24 Since the first three grounds of appeal in Case C-553/10 P and the second ground of appeal in Case C-554/10 P overlap, they can be examined together.

The first three grounds of appeal in Case C-553/10 P and the second ground of appeal in Case C-554/10 P

Arguments of the parties

25 According to the Commission, the General Court committed an error of law in that it did not examine how the trustee's lack of independence might have affected his assessment on the merits of Wendel Investissement as purchaser of the Éditis assets, nor how that trustee could have been suspected of producing a report likely to cause the Commission to err when adopting the contested decision. Such a position is contrary to the case-law of the General Court according to which the lack of independence of a person responsible for assessing a candidate is of no legal significance unless it is established that that person took account, in his assessment, of an interest other than that concerning the proper exercise of his duties. The General Court did not examine whether the fact that the trustee was insufficiently independent of Éditis was likely to have any effect on the objectivity of the content of his report and, accordingly, on the assessment of Wendel Investissement as purchaser. Thus, the General Court accepted a plea of law which was ineffective as a ground for the annulment of the contested decision.

26 The Commission observes that the final decision to approve the purchaser of the assets sold, in the context of a concentration, always lies with the Commission, which does not rely only on the trustee's report, but collects information on its own initiative.

27 In support of the Commission, Wendel Investissement endorses the criticism made of the judgment under appeal and emphasises that the General Court did not establish how the link between Éditis and the trustee could influence the content of the report assessing Wendel Investissement as a prospective purchaser.

28 According to Odile Jacob, the General Court should not be criticised for having referred to French law in order to verify whether the simultaneous exercise by B. of his duties as a member of the executive board of Éditis and of his duties as trustee, as president of the firm S., was compatible with the criterion of independence with regard to that 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 established, in particular, in 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).

29 In the opinion of Lagardère, the General Court could not conclude that a lack of independence on the part of the trustee arose automatically out of B.'s links with Éditis, but should have assessed whether B.'s duties within the company would have prevented the trustee from carrying out its tasks with independence and transparency. On the contrary, far from constituting a conflict of interest, the duties within the company carried out by B. and the tasks carried out by the trustee were both aimed at ensuring the independence of Éditis, and therefore constituted complementary tasks.

30 As regards the significance of the lack of independence on the part of the trustee, Odile Jacob consider that the Commission's argument is ineffective, since the illegality found by the General Court is an infringement of an essential contractual commitment which was made obligatory by Commission Decision 2004/422, and thereby vitiated in its entirety the decision-making process relating to the sale which Lagardère's commitments required.

31 In its second ground of appeal, the Commission considers that the judgment under appeal is vitiated by an error of law, by the fact that the reasons stated are contradictory and by distortion of the facts, in that the General Court considered that the trustee's report had a decisive influence on the contested decision. The Commission submits that, by that conclusion, the General Court disregarded the division of tasks between itself and the trustee. It was for the Commission alone to decide on the approval of a prospective purchaser. While the assessment contained in the report of a trustee is taken into account by the Commission for the production of its final decision, in no circumstances is the Commission bound by the trustee's opinion, which cannot take the place of its own assessment. The Commission remains obliged to undertake the necessary investigation, to collect information on its own initiative by relying on its own services and on various requests for information to the undertakings concerned, in this case Lagardère and Wendel Investissement.

32 According to the Commission, it cannot be inferred from certain similarities between the trustee's report and the contested decision that the report at issue had a 'decisive influence' on that decision, as stated by the General Court in paragraph 110 of the judgment under appeal. According to the Commission, there is only the reproduction of objective and verifiable facts and there are no subjective assessments.

33 Wendel Investissement endorses the Commission's argument.

34 Odile Jacob considers that the General Court did not disregard the division of tasks between the Commission and the trustee. The lack of independence on the part of the trustee appointed vitiated the decision-making process in its entirety. In reality, the Commission had indeed taken into account, in the contested decision, the trustee's report.

35 In carrying out a comparison, in paragraphs 112 to 116 of the judgment under appeal, of the trustee's report and the contested decision, with regard to the four conditions required by paragraph 10 of Lagardère's commitments as to the qualities of the prospective purchaser of the assets sold, the General Court correctly stated that the Commission's findings were identical to those contained in the trustee's report. Accordingly, Odile Jacob considers that the General Court was correct to hold that that report had a decisive influence on the contested decision.

36 As regards the third ground of appeal in Case C-553/10 P, Odile Jacob maintains that the lack of independence of the trustee is not a mere irregularity but an infringement of essential requirements of the administrative procedure, which must entail the annulment of the contested decision irrespective of whether it is demonstrated that the content of that decision might have been different in the absence of that irregularity. The condition that the trustee be independent is specified as a fundamental condition in Lagardère's commitments, which Decision 2004/422 rendered obligatory. The requirement of the trustee's independence should be verified not *ex post*, but *ex ante*, in order to avoid a review of any personal motivation which might affect the trustee's performance of his tasks, as is clear from the Commission Recommendation of 16 May 2002 entitled 'Statutory Auditors'

Independence in the EU: A Set of Fundamental Principles' (OJ 2002 L 191, p. 22). That requirement of independence is comparable to the requirement that a judge be independent and be seen to be independent.

Findings of the Court

37 The appellants claim in essence that the General Court committed a series of errors of law, failing to analyse the effects of any lack of independence on the part of the trustee vis-à-vis Éditis on the assessment of Wendel Investissement as prospective purchaser of the Éditis assets. They dispute that the trustee's report was likely to cause the Commission to err in its task of assessing Wendel Investissement as prospective purchaser in order to approve its purchase of the assets sold.

38 Under Article 1 of Decision 2004/422, the notified transaction whereby Lagardère is to acquire exclusive control of the target assets of VUP, now called Éditis, is declared compatible with the common market and with the functioning of the EEA Agreement, provided that Lagardère comply with the commitments referred to in Annex II to that decision.

39 Under paragraphs 15 and 21 of Annex II to Decision 2004/422, the notifying party is to appoint a trustee to carry out the specific and general tasks which are conferred on him, namely, in particular, to ensure that Lagardère satisfactorily meet the commitments it has undertaken, and to ensure that the assets sold are held and managed in a distinct structure, separately from and independently of the assets retained and Lagardère's other businesses, until the date of the actual sale of the assets sold.

40 In the event of disagreement between Lagardère and Éditis on the restructuring measures required for the fulfilment of the commitments, the trustee may be called on. The trustee is to decide by means of a recommendation on the extent of those measures, according to paragraph 24 of those commitments. The trustee is to inform the Commission, which may itself determine the extent of the restructuring measures required.

41 As regards the performance of those tasks, paragraph 15 of those commitments states, inter alia, that the trustee is to be independent of Lagardère and of Éditis, and is not to be exposed to any conflict of interests. The trustee is to be remunerated by Lagardère in a manner that does not compromise the proper performance of the trustee's duties or his independence.

42 That independence is a component of the commitments which were undertaken by Lagardère and which must be fully respected. That independence was laid down *ex ante* and extends to every activity of the trustee.

43 It is clear from paragraphs 85 and 87 of the judgment under appeal that B., president of the firm S., was appointed on 20 December 2002 as a member of the executive board of Investima 10, later Éditis, and that on 9 February 2004 the firm S. was appointed trustee. In paragraph 89 of the judgment under appeal, it is found that B. simultaneously carried out the duties of a member of the Éditis board and of trustee from 9 February 2004 until 25 March 2004, the date when Éditis was converted to a simplified limited company. After the conversion of Éditis, B. maintained his close links with Éditis, given that the trustee had three representatives on the shareholders' committee.

44 In those circumstances, the General Court correctly concluded, in paragraph 104 of the judgment under appeal, that the performance by B. of the duties of a member of the executive board of Investima 10 (later Éditis) was such as to affect the independence of the trustee, and that that situation did not ensure an entirely independent discharge of his responsibilities as an independent trustee as required by paragraph 15 of Lagardère's commitments.

45 Likewise, the General Court was correct to hold, in paragraph 107 of the judgment under appeal, that the report assessing Wendel Investissement as a prospective purchaser of the assets sold was drawn up by a trustee who did not meet the condition of independence from Éditis.

46 The Commission does not dispute the findings of the General Court concerning the trustee's lack of independence for the reason that that is a question of fact. On the other hand, the Commission claims that the General Court erred in failing to examine whether that lack of independence actually had an effect on the contested decision or whether, without that irregularity, the content of the contested decision might have been different. According to the Commission, the trustee's situation did not affect the objectivity of the assessment which he presented in his report on the purchaser of the Éditis assets and, consequently, the legality of the contested decision.

47 That argument of the Commission must be rejected.

48 In this case, the trustee responsible for 'ensuring the satisfactory fulfilment' of the commitments of the notifying party carried out tasks which were indirectly conferred on him by the Commission. Those were tasks which the Commission could, if it had possessed sufficient personnel, have carried out itself.

49 That is evident from paragraphs 52, 53, 55 and 56 of the Commission 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). In particular, paragraph 56 of that notice states that 'the trustee will assume specified duties designed to ensure compliance in good faith with the commitments on behalf of the Commission'.

50 It must be recalled that paragraph 15 of its commitments required Lagardère to appoint a trustee who, among other conditions, was 'to be independent of Lagardère and Éditis'.

51 It is therefore common ground that such a trustee must, first, be independent of the parties and, in addition, act independently of the parties, with the result that a lack of independence is sufficient ground for the annulment of a Commission decision such as the contested decision. The question of whether that trustee did act independently arises only if it has first been established that the trustee was in fact independent of the parties.

52 Given that the General Court correctly found that the trustee was not independent of the parties, it was under no obligation to examine whether that trustee actually acted in a way which was evidence of that lack of independence.

53 It follows from the foregoing that the General Court did not commit an error of law in annulling the contested decision because of the trustee's lack of independence. Consequently, the three grounds of appeal put forward by the Commission and Lagardère's second ground of appeal are unfounded and must be rejected.

The first ground of appeal in Case C-554/10 P, on the objection of illegality

Arguments of the parties

54 Lagardère claims that the General Court could not rely on the illegality of the trustee approval decision as a ground for declaring the contested decision to be illegal, since the procedure of raising a plea of illegality by way of objection cannot be relied on where two individual decisions are at issue. Since Odile Jacob did not bring an action against the trustee approval decision, within the prescribed

time-limits for proceedings, it could not object to the illegality of that approval decision - because that decision had become final so far as it was concerned - in support of its action for annulment of the contested decision.

55 According to Lagardère and Wendel Investissement, the reasoning adopted by the General Court amounts to reliance on the illegality, raised by way of objection, of the trustee approval decision, which is an individual decision. The General Court examined directly not the grounds which led to the contested decision, but the grounds which led to the appointment of the trustee, the latter grounds being 'upstream' of the contested decision, so far as it was concerned.

56 Lagardère claims that the trustee approval decision was communicated to the parties on 15 February 2005, the date after which the decision adversely affected Odile Jacob and constituted a challengeable act under Article 263 TFEU. Therefore, that decision should have been challenged, within the relevant time-limits for proceedings, by a separate action from the one brought against the contested decision. As a consequence, the General Court could not validly rely on the illegality of the trustee's appointment as a ground for the annulment of the contested decision.

57 Odile Jacob disputes the arguments of Lagardère and Wendel Investissement by stating that the trustee approval decision must be considered not as an isolated decision, but as a decision forming part of a series of measures which led to the adoption of the contested decision.

58 Further, Odile Jacob states it was not a person to whom the trustee approval decision was addressed, within the meaning of Article 263 TFEU and the case-law, and that, as a consequence, it would have been difficult for it to challenge that decision by separate proceedings.

Findings of the Court

59 The trustee approval decision was communicated to Odile Jacob only on 17 February 2005.

60 On 8 November 2004 Odile Jacob brought before the General Court its action for the annulment of the contested decision, while challenging at the same time the conditions of the trustee's approval. It may be observed that at that time Odile Jacob had not yet received notice of the trustee approval decision. Accordingly, Odile Jacob cannot be criticised for having called into question, in its action against the contested decision, the legality of the trustee approval decision without having first sought its annulment where that decision and the contested decision were both part of the same group of measures.

61 It would be pointless and unnecessary formalism to require Odile Jacob to bring a separate action in order to challenge an individual decision, of which it was given notice after the bringing of its main action, which is one of a series of measures, and the validity of which is in any event questioned by that main action.

62 Accordingly, this ground of appeal must be rejected.

63 Since none of the grounds of appeal raised by the appellants have been upheld, the appeals in Cases C-553/10 P and C-554/10 P must be dismissed.

Costs

64 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where an appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules of Procedure, which applies to appeal proceedings pursuant to Articles 184(1) and 190(1) of those rules, 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 been unsuccessful and Odile Jacob has applied for costs, they must be ordered not only to bear their own costs but also to pay the costs incurred by Odile Jacob in relation to these appeals.

65 Since Odile Jacob has not applied for costs against Wendel Investissement, the latter shall bear only its own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Dismisses the appeals;

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

3. Orders Wendel Investissement SA to bear its own costs.

[Signatures]