JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

9 June 2010 *

In Case T-237/05,

Éditions Odile Jacob SAS, established in Paris (France), represented initially by W. van Weert and O. Fréget, and subsequently by O. Fréget, lawyers,

applicant,

v

European Commission, represented by X. Lewis, P. Costa de Oliveira and O. Beynet, acting as Agents,

defendant,

* Language of the case: French.

supported by

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

intervener,

ACTION for annulment of the decision of the Commission of 7 April 2005 partially rejecting a request by the applicant for access to certain documents relating to a procedure concerning a concentration between undertakings (Case COMP/M.2978 — Lagardère/Natexis/VUP),

THE GENERAL COURT (Sixth Chamber),

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

Registrar: E. Coulon,

having regard to the written procedure and further to the hearing on 9 September 2009,

having regard to the order of 28 September 2009 reopening the oral procedure and to the applicant's answer to the Court's written question,

gives the following

Judgment

Background to the dispute

1. *The applicant's requests for access to documents*

1 By letter of 27 January 2005, the applicant, Éditions Odile Jacob SAS, asked the Commission of the European Communities, pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), for access to a number of documents relating to the administrative procedure ('the procedure at issue') which led to the adoption of Commission Decision 2004/422/EC of 7 January 2004 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.2978 — Lagardère/Natexis/VUP) (OJ 2004 L 125, p. 54; 'the decision on compatibility'), so that it might use them

in support of its action in Case T-279/04 *Éditions Odile Jacob* v *Commission*, pending before the Court, in which it seeks the annulment of the decision on compatibility. The documents in question were:

(a) the Commission's decision of 5 June 2003 to initiate an in-depth investigation under Article 6(1)(c) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1) in the procedure at issue;

(b) the full text of the sale and purchase agreement signed on 3 December 2002 by Natexis Banques populaires SA, of the one part, and Segex Sarl and Ecrinvest 4 SA, of the other part;

(c) all the correspondence between the Commission and Natexis Banques populaires between September 2002 and the date of notification of the concentration, 14 April 2003;

(d) all the correspondence between the Commission and Lagardère SCA between September 2002 and the date of the said notification;

(e) the contract under which Natexis Banques populaires acquired ownership of the shareholdings and assets of Vivendi Universal Publishing SA ('VUP') from Vivendi Universal SA on 20 December 2002;

(f) Lagardère's promise of 22 October 2002 to purchase VUP from Vivendi Universal;

(g) all the Commission's internal memoranda relating, exclusively or otherwise, to the application of Article 3(5)(a) of Regulation No 4064/89 to the acquisition of VUP's assets by Natexis SA/Investima 10 SAS, including memoranda exchanged between the Commission's Directorate-General (DG) for Competition and its Legal Service;

(h) all the correspondence between the Commission and Natexis relating, exclusively or otherwise, to the application of Article 3(5)(a) of Regulation No 4064/89 to the acquisition of VUP's assets by Natexis/Investima 10.

2 By letter of 27 January 2005, the applicant sent the Commission a request for access to another set of documents, so that it might use them in support of its action in Case T-452/04 *Éditions Odile Jacob* v *Commission*, pending before the Court, in which it seeks the annulment of the Commission's decision of 30 July 2004 on the approval of Wendel Investissement SA as purchaser of the assets sold by Lagardère, in accordance with the decision on compatibility ('the approval decision'). The documents in question were:

(a) the Commission's decision approving the appointment of the trustee charged with ensuring the observance of the commitments entered into by Lagardère at the time when the concentration was authorised by the decision on compatibility;

(b) the mandate conferred by Lagardère upon Salustro Reydel Management SA to ensure the observance of the commitments entered into by Lagardère at the time when the concentration was authorised by the decision on compatibility;

(c) any requests by the Commission for amendment of the draft mandate and Lagardère's replies thereto;

(d) the mandate conferred by Lagardère upon the Hold Separate Manager, responsible for the management of the assets in accordance with the decision on compatibility;

(e) the Commission's decision approving the appointment of the Hold Separate Manager;

(f) the draft agreement signed on 28 May 2004 by Lagardère and Wendel Investissement on the repurchase of the transferred assets;

(g) Lagardère's letter to the Commission of 4 June 2004 seeking approval of Wendel Investissement as the repurchaser of the transferred assets;

(h) the request for information that the Commission sent to Lagardère on 11 June 2004 pursuant to Article 11 of Regulation No 4064/89, designed to enable the Commission to assess whether the conditions for approving the company Wendel Investissement had been satisfied;

(i) Lagardère's reply of 21 June 2004 to that request for information;

(j) the trustee's report assessing Wendel Investissement's proposal to act as purchaser of the transferred assets against the approval criteria, submitted to the Commission on 5 July 2004.

3 By fax dated 15 February 2005, the Director-General of the Competition DG sent the applicant the Commission's letter of 5 February 2004 approving the appointment of the trustee and the Hold Separate Manager (the documents referred to in paragraph 2(a) and (e) above), and informed it that the remaining documents could not be sent to it as they were covered by the exceptions laid down in the first to third indents of Article 4(2) and in the second subparagraph of Article 4(3) of Regulation No 1049/2001 and there was no overriding public interest in their disclosure.

4 By letter of 18 February 2005, the applicant made a confirmatory application ('the request for access') concerning the documents to which it had been denied access.

5 On 14 March 2005, the Secretary-General of the Commission informed the applicant that the time-limit for replying to its request would be extended, in accordance with Article 8(2) of Regulation No 1049/2001, until 7 April 2005, because of the complexity of the request for access and the number of documents sought.

2. *The contested decision*

6 By Decision D(2005) 3286 of 7 April 2005 ('the contested decision'), the Commission confirmed its refusal of 15 February 2005 to disclose the documents.

7 The Commission identified the documents covered by the request for access and provided a detailed list of them, except for those mentioned in point (d) of paragraph 1 above for the reason that the correspondence between Lagardère and the Commission amounted to some 20 or so binders and drawing up a list would have constituted a disproportionate administrative burden. Furthermore, the Commission stated that it was not in possession of the document mentioned in point (f) of paragraph 1 above and pointed out that the documents mentioned in point (c) of paragraph 1 included those mentioned in point (h).

8 In the contested decision the Commission invoked the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001, which relates to the protection of the purpose of inspections, investigations and audits, and refused access to all the documents requested on the ground that they were either communicated to or drawn up by the Commission's departments in the context of a procedure for the control of a concentration between undertakings. The Commission submits that, should the Court annul the decision on compatibility, it would be obliged to adopt a new decision and, consequently, to reopen its investigation. The aim of that investigation would be jeopardised if documents drawn up or received in the context of the control procedure were made public at this stage. On a more general note, the Commission takes the view that the disclosure of information given to it in the context of a procedure for the control of a concentration would upset the climate of trust and cooperation between the Commission and the interested parties which is essential if it is to garner all the information it needs.

9 The Commission also invokes the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001, which concerns the protection of commercial interests, in order to justify its refusal to grant access to the documents mentioned in points (b) to (e) and (h) of paragraph 1 above and in points (b), (c) (in part), (d), (f), (g), (i) and (j) of paragraph 2 above on the ground that they contain sensitive information about the commercial strategies of the undertakings concerned which the undertakings sent to the Commission solely for the purposes of the control of the proposed concentration. The Commission submits that the documents mentioned in point (a) of paragraph 1 above and in points (c) (a letter from the Commission to Lagardère) and (h) of paragraph 2 above, all of which it drew up itself, also contain sensitive commercial information relating to the undertakings concerned.

10 The Commission also relies on the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001, which concerns the protection of the institution's decision-making processes, in order to justify its refusal to grant access to two of the three internal Commission notes referred to in point (g) of paragraph 1 above. One of those notes is a request from the Competition DG to the Legal Service for advice. The other is a note prepared for the Member of the Commission responsible for competition, summarising the state of the file. The Commission submits that these two notes record internal opinions and preliminary consultations with a view to the adoption of the decision on compatibility and that its decision-making process would be seriously undermined if internal discussions were to be rendered public. It asserts that its various departments must be able to express points of view freely, without any external pressure, so that they can guide the Commission in taking its decisions.

11 Lastly, the Commission relied on the exception laid down in the second indent of Article 4(2) of Regulation No 1049/2001 relating to the protection of legal advice in order to justify its refusal to grant access to one of the documents referred to in point (g) of paragraph 1 above. It emphasises that frankness, objectivity and independence are essential in the provision of legal opinions and submits that, had its Legal Service been required to take into account subsequent publication of its opinion, it would not have expressed itself with absolute independence.

12 As regards documents emanating from third parties, the Commission takes the view that there was no need for it to consult the third parties concerned, in accordance with Article 4(4) of Regulation No 1049/2001, since it believed that one of the exceptions mentioned above applied and it was therefore clear that the documents in question must not be disclosed.

13 The Commission asserts that it considered the possibility of granting the applicant partial access to the documents concerned, pursuant to Article 4(6) of Regulation No 1049/2001, and decided against it because of the large number of documents involved and the fact that almost all their content was covered by the exceptions mentioned above. Identifying the parts of the documents that could be disclosed would involve a disproportionate administrative burden in comparison with the public interest in having access to the passages that would be left after such an exercise.

14 Furthermore, the Commission points out that there was no overriding public interest in the disclosure of the documents sought: the request for access arose from the defence of the applicant's interests in a case pending before the Court, and that is a private, not a public, interest.

15 The Commission draws the applicant's attention to the existence of other specific rules on access laid down both in Regulation No 4064/89 and in the provisions of the Rules of Procedure of the Court of Justice and of the General Court which enable parties to legal proceedings to apply for measures of organisation of procedure, which can consist in an order for the production of documents relating to the case.

16 Lastly, the Commission observes that the fact that it communicated requests for information under Article 11 of Regulation No 4064/89 as an annex to its defence in Case T-279/04 does not mean that it is obliged to disclose the request for information which it sent to Lagardère pursuant to the same provision, referred to in point (h) of paragraph 2 above. It points out that the documents annexed to pleadings submitted to the Court of Justice and the General Court are communicated solely for the purposes of the procedure in question and are not intended to be made public, whereas the communication of a document pursuant to Regulation No 1049/2001 is the equivalent of publication of the document.

17 On 5 July 2005, after the adoption of the contested decision, the applicant lodged an application for measures of organisation of procedure in Case T-279/04 pursuant to Article 64 of the Rules of Procedure, seeking an order requiring the Commission to produce the documents referred to in points (a) to (h) of paragraph 1 above. The Commission communicated to the applicant, as an annex to its observations on that application, the document referred to in point (a), that is to say, its decision of 5 June 2003 to initiate an in-depth investigation under Article 6(1)(c) of Regulation No 4064/89 in the procedure at issue.

Procedure and forms of order sought by the parties

18 By application lodged at the Registry of the General Court on 17 June 2005, the applicant brought an action for annulment of the contested decision.

19 By document lodged at the Registry of the General Court on 29 September 2005, Lagardère applied for leave to intervene in the case in support of the form of order sought by the Commission.

20 Upon a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Sixth Chamber, to which the present case was consequently allocated.

21 By order of the President of the Sixth Chamber of 6 March 2009, Lagardère was granted leave to intervene in the present case.

22 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure, put written questions to the parties to which the latter replied within the prescribed period.

23 By order of 10 July 2009, in accordance with Article 65(b), Article 66(1) and the third subparagraph of Article 67(3) of the Rules of Procedure, the General Court ordered the Commission to produce all the documents sought, with the exception of those referred to in point (f) of paragraph 1 above and points (a) and (e) of paragraph 2 above, at the same time making it clear that those documents would not be communicated either to the applicant or to the intervener in the context of the current proceedings. That order was complied with.

24 The parties presented oral argument and replied to the Court's questions at the hearing held on 9 September 2009.

25 By order of 28 September 2009, the oral procedure was reopened so that a written question could be put to the applicant.

26 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

27 The Commission, supported by the intervener, contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

1. *The subject-matter of the dispute*

28 Several of the documents to which access had been requested by the applicant pursuant to Regulation No 1049/2001 were sent to it by the Commission, either in their entirety or partially, as annexes to its defence pleadings in Cases T-279/04 and T-452/04 and to its observations on the application for a measure of organisation of procedure

made by the applicant in Case T-279/04. The documents thus communicated were the following:

— a non-confidential version of the document mentioned in point (a) of paragraph 1 above, namely the Commission's decision of 5 June 2003 taken under Article 6(1)(c) of Regulation No 4064/89 in the procedure at issue;

— a non-confidential version of the sale agreement signed on 3 December 2002 by Segex and Ecrinvest 4, of the one part, and Lagardère, of the other part, that agreement corresponding to the document referred to in point (b) of paragraph 1 above, as the Commission and Lagardère have confirmed in reply to a written question put by the Court;

— part of the documentation referred to in point (c) of paragraph 1 above, that is to say, the correspondence between the Commission and Natexis between September 2002 and the date of notification of the concentration, 14 April 2003;

— the document referred to in point (h) of paragraph 2 above, namely the request for information that the Commission sent to Lagardère on 11 June 2004;

— a non-confidential version of the document referred to in point (j) of paragraph 2 above, namely the trustee's report on Wendel Investissement's candidature.

29 In reply to the Court's written questions, the applicant has indicated that it considers that it no longer has any interest in pursuing proceedings regarding those documents, its request for access having been satisfied in so far as they are concerned by the communications thus made.

30 There is therefore no longer any need to rule on the legality of the contested decision in so far as the Commission denied access to the documents referred to in points (a) to (c) of paragraph 1 above and points (h) and (j) of paragraph 2 above.

31 Moreover, the applicant has not disputed the Commission's contention that the document referred to in point (f) of paragraph 1 above is not in its possession.

32 Consequently, the subject-matter of the dispute is now confined to the legality of the contested decision in so far as the Commission denied complete or partial access to the documents referred to in points (d), (e), (g) and (h) of paragraph 1 above and points (b) to (d), (f), (g) and (i) of paragraph 2 above ('the documents at issue').

2. *The admissibility of one of the preliminary arguments raised by the intervener*

Arguments of the parties

33 The intervener argues, at the outset, that the request for access at issue must be evaluated in the specific context of a procedure for the control of a concentration. In this connection, it submits in particular that access to the file in procedures for the

control of concentrations is subject to the special rules laid down in Article 17 of Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 L 133, p. 1). The regime thus established is a strict one: third parties unconnected with the concentration may not have access to the file, nor may access be granted to confidential information or to the internal documents of the Commission or the competent authorities of the Member States. Access may be granted only on condition that the documents thus obtained are used solely for the purposes of the concentration procedure concerned. In accordance with the maxim *lex specialis derogat legi generali*, the special rules derogate from the rules of general application. Accordingly, it has been acknowledged in case-law that the right of access laid down by Article 255 EC and Regulation No 1049/2001 is overridden by the special rules relating to the secrecy of the proceedings of competition selection boards. Similarly, in the field of the control of concentrations, the existence of special rules should preclude, or at least restrict, the application of the general rules governing public access to documents, otherwise the rules for access laid down in Regulation No 802/2004 would be rendered nugatory.

34 The applicant disputes the merits of this preliminary observation of the intervener.

Findings of the Court

35 Pursuant to Article 113 of its Rules of Procedure, the General Court may, at any time and of its own motion, consider whether there is any absolute bar to proceeding with an action, one such bar being the admissibility of an argument raised by an intervener.

36 Under the fourth paragraph of Article 40 of the Statute of the Court of Justice, which applies to the General Court by virtue of Article 53 of that statute, an application to intervene must be limited to supporting the form of order sought by one of the parties. In addition, under Article 116(3) of the Rules of Procedure, the intervener must accept the case as it finds it at the time of its intervention. Although those provisions do not preclude an intervener from using arguments different from those used by the party it is supporting, that is nevertheless on the condition that they do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by that party.

37 In the present case, the argument alleging the exclusive application of the rules relating to access to the file laid down in the field of the control of concentrations was not raised by the main parties. That argument, were it to be upheld by the Court, would lead to the annulment of the contested decision on the ground that it was adopted, wrongly, on the basis of Regulation No 1049/2001 rather than on the basis of the provisions relating to access to the file laid down in the field of the control of concentrations, as it should have been. The argument therefore does not support the form of order sought by the Commission, which contends that the action for annulment should be dismissed.

38 Consequently, the intervener's preliminary argument based on the exclusive application of the rules relating to access to the file laid down in the field of the control of concentrations must be dismissed as inadmissible.

3. *Substance*

39 The applicant puts forward four pleas in law in support of its action, alleging the lack of any specific, individual examination of the documents referred to in the request

for access, a manifest error of assessment on the Commission's part in the application of the exceptions laid down in Article 4(2) and (3) of Regulation No 1049/2001, infringement of the right to at least partial access to the documents requested and infringement of the principle of proportionality arising from the failure to balance the exceptions invoked against the overriding public interest justifying disclosure of the documents sought.

40 As the first and second pleas are closely connected, it is appropriate to examine them together.

The first and second pleas in law, alleging the lack of any specific, individual examination of the documents sought and manifest error of assessment on the Commission's part in the application of the exceptions laid down in Article 4(2) and (3) of Regulation No 1049/2001

41 According to settled case-law, the examination required for the purpose of processing a request for access to documents must be specific in nature. First of all, the mere fact that a document concerns an interest protected by an exception is not of itself sufficient to justify the application of that exception (Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council* [2005] ECR II-1429, paragraph 75, and Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* [2006] ECR II-2023, paragraph 115). Such application may, in principle, be justified only if the institution has previously assessed, first, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, whether there is any overriding public interest in its disclosure. Furthermore, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Consequently, the examination which the institution must carry out in order to apply an exception must be specific and be evident from the statement of reasons for the

decision (Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121 ('*VKI*'), paragraph 69, and *Franchet and Byk* v *Commission*, paragraph 115).

42 That specific examination must, moreover, be carried out in respect of each document covered by the request. It is apparent from Regulation No 1049/2001 that all the exceptions mentioned in Article 4(1) to (3) thereof are specified as being applicable to 'a document' (*VKI*, cited in paragraph 41 above, paragraph 70, and *Franchet and Byk* v *Commission*, cited in paragraph 41 above, paragraph 116). Furthermore, as regards the scope *ratione temporis* of those exceptions, Article 4(7) of the regulation provides that they are to apply only for the period during which protection is justified on the basis of 'the content of the document'.

43 It follows that a specific, individual examination is in any event necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation No 1049/2001 (*VKI*, cited in paragraph 41 above, paragraph 73, and *Franchet and Byk* v *Commission*, cited in paragraph 41 above, paragraph 117). In the context of the application of that regulation, the General Court has, moreover, already held that an assessment of documents by reference to categories, rather than on the basis of the actual information contained in those documents, is in principle insufficient, since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (*VKI*, cited in paragraph 41 above, paragraphs 74 and 76).

44 The obligation for an institution to undertake a specific, individual assessment of the content of the documents covered by the application for access is an approach to be adopted as a matter of principle (*VKI*, cited in paragraph 41 above, paragraphs 74

and 75), with regard to all the exceptions mentioned in Article 4(1) to (3) of Regulation No 1049/2001, whatever the field to which the documents sought relate.

45 However, the application of that approach as a matter of principle does not mean that such an examination is required in all circumstances. Since the purpose of the specific, individual examination which the institution must in principle undertake in response to a request for access made under Regulation No 1049/2001 is to enable that institution to assess, first, the extent to which an exception to the right of access is applicable and, secondly, the possibility of partial access, such an examination may not be necessary where, owing to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Such a situation could arise, for example, if certain documents were manifestly covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or had already been the subject of a specific, individual assessment by the Commission in similar circumstances (*VKI*, cited in paragraph 41 above, paragraph 75).

46 Moreover, the general nature of the statement of reasons on which a refusal of access is based, as well as its brevity or its formulaic character, can be indicative of a failure to carry out a specific examination only where it is objectively possible to give the reasons justifying the refusal of access to each document without disclosing the content of the document or an essential aspect of it and thereby depriving the exception of its very purpose (see, to that effect, *Sison* v *Council*, cited in paragraph 41 above, paragraph 84; see, by analogy, as regards the 1993 Code of Conduct, Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 65). As the Court of Justice has stated, the need for the institutions to abstain from referring to matters which would indirectly undermine the interests which the exceptions are specifically designed to protect is emphasised in particular by Article 9(4) and Article 11(2) of Regulation No 1049/2001 (Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 83).

47 Lastly, a single justification may be applied to documents belonging to the same category, which will be the case, in particular, where they contain the same type of information. It is then a matter for the General Court to ascertain whether the exception relied upon covers manifestly and in their entirety the documents falling within that category.

The exception relating to the protection of the purpose of inspections, investigations and audits laid down in the third indent of Article 4(2) of Regulation No 1049/2001

— Arguments of the parties

48 The applicant argues that the Commission took an abstract, general approach, without carrying out any specific, individual examination designed to ascertain whether the communication of each of the documents sought would actually undermine the interest protected by the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001.

49 The applicant asserts that the Commission's desire to maintain a climate of trust with the interested parties in a procedure for the control of a concentration is secondary, since the latter are legally bound to communicate to the Commission any document it requires for that purpose.

50 The risk of undermining the protection of the purpose of investigations alleged by the Commission is, in any event, purely hypothetical, and that is not sufficient to justify a refusal to grant access. The Commission is unable to demonstrate the existence of such a risk because most of the documents sought relate to purely legal issues, in particular the application of Article 3(5)(a) of Regulation No 4064/89, rather than to issues of competitive analysis, which alone are capable of undermining the purpose of the Commission's investigations in the event of a new examination of the operation in the light of the control of concentrations.

51 Moreover, the documents were sent to the Commission by the undertakings concerned prior to notification of the concentration and thus not as part of any formal investigation procedure.

52 The Commission maintains that it examined each document specifically and individually, as is demonstrated by the fact that they were all, with the exception of the documents referred to in point (d) of paragraph 1 above, clearly identified and enumerated, with reference to the exceptions covering them, both in the list annexed to the contested decision and in the decision itself. It was on completion of that examination that the Commission was able to communicate to the applicant its letter of 5 February 2004 approving the appointment of the trustee and the Hold Separate Manager, which corresponds to the documents referred to in points (a) and (e) of paragraph 2 above.

53 It is clear from the statement of reasons for the contested decision that the examination carried out was individual, specific and searching. Only a careful, individual examination would have enabled it to establish, for example, that the documents mentioned in point (h) of paragraph 1 above were already included under point (c) of that paragraph and that the document referred to in point (e) of paragraph 2 above was the same as that indicated in point (a) thereof.

54 The Commission submits that stating the reasons for each document individually would be likely to undermine the interest protected by the exception in question and that it has been acknowledged in case-law that a detailed statement of reasons relating to the content of a document would be likely to disclose information protected by one of the exceptions laid down by Regulation No 1049/2001.

55 In so far as concerns the documents referred to in point (d) of paragraph 1 above, that is to say, all the correspondence between the Commission and Lagardère between September 2002 and the date of the notification of the concentration, the Commission submits that no specific, individual examination is required where it is clear whether or not the documents in question must be disclosed. The documents at issue all clearly belong, in this case, to the same category, given their common characteristics.

56 The specific, individual examination of the documents concerned, along with the summary examination of the documents referred to in point (d) of paragraph 1 above, thus demonstrated that all the documents were covered by the exception set out in the third indent of Article 4(2) relating to the protection of the purpose of inspections and that, moreover, certain documents were entirely or partially covered by other exceptions.

57 The Commission emphasises that, whilst its investigation has been completed, it cannot be regarded as closed, since the decision on compatibility is the subject of an action for annulment pending before the Court, and that, in the event that the decision is annulled, the investigation will have to be reopened. Disclosing documents to which access has been refused for that reason would expose the Commission to outside pressure which would hinder it in conducting its investigation properly, should it be reopened.

58 The Commission takes issue with the applicant's argument that the climate of trust between the Commission and economic operators, in the context of the control of concentrations, is of little importance, given the fact that the latter are legally bound to provide the institution with all useful information in the context of its investigations. It emphasises that a legal obligation may be satisfied in various ways and that investigations can be more effective if the undertakings do more than merely fulfil their minimal obligations and instead cooperate in a spirit of goodwill. The parties concerned do not expect the Commission to use information which it has gathered for purposes other than those for which it was communicated, since that would be contrary to Article 17(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1). The threat to that relationship of trust posed by the disclosure to third parties of documents provided by the undertakings concerned is therefore not purely hypothetical. The Commission illustrates that risk by citing a publication by a law firm which mentions the risk that information communicated in the context of a concentration might subsequently be disclosed by the Commission.

59 The Commission points out that, according to case-law, it is necessary for the risk of a protected interest being undermined to be reasonably foreseeable, but it is not necessary for substantiating evidence and certain proof of such a risk to be provided. It argues that the fact that the documents sought were sent to the Commission before the date of notification of the concentration is irrelevant, given that the interest protected by the exception in question is to safeguard the purpose of the investigation and not merely the formal stages of the investigation as such. The strictly confidential nature of exchanges prior to the said notification is emphasised by the Commission in its document entitled 'Best practices on the conduct of EC merger control proceedings'. To disclose such exchanges would be to breach the duty of confidentiality imposed on the institution by Regulation No 139/2004 and Article 287 EC.

60 The intervener argues that, if the rules relating to access to the file laid down by the laws which apply in the field of the control of concentrations and Regulation No 1049/2001 are to be applied concomitantly, for the reason that they pursue different objectives, care must be taken to ensure that the rules relating to access to the file in the field of the control of concentrations are not rendered nugatory by incorrect application of Regulation No 1049/2001. It submits that information provided by undertakings prior to official notification of a concentration must benefit from the same protection as information provided during the formal procedure in view of which it is provided. Any other solution would seriously undermine the legitimate trust which undertakings might have as a result of the Commission's practice of encouraging contact prior to official notification.

61 The intervener submits that it has been acknowledged in case-law that the public interest in obtaining access to a document pursuant to the principle of transparency does not carry the same weight in the case of a document drawn up in an administrative procedure intended to apply rules governing the control of concentrations or competition law in general, as it does in the case of a document relating to a procedure in which the Community institution acts in its capacity as legislator. It refers to recital 6 in the preamble to Regulation No 1049/2001, according to which wider access to documents should be authorised in cases where the institutions are acting in their legislative capacity.

62 The other arguments put forward by the intervener are essentially similar to those of the Commission.

— Findings of the Court

63 Pursuant to the third indent of Article 4(2) of Regulation No 1049/2001, the institutions must refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

64 In the contested decision, the Commission took the view that all the documents at issue were covered by the exception relating to the protection of the purpose of inspections laid down in the third indent of Article 4(2) of Regulation No 1049/2001.

65 It should be emphasised that, in accordance with the principles mentioned in paragraphs 41 to 47 above, it is for the institution concerned to consider whether, first, the document to which access is sought falls within the scope of one or other of the exceptions laid down in Article 4 of Regulation No 1049/2001, and secondly, whether disclosure of that document would specifically and actually undermine the protected interest and, if so, whether the need for protection applies to the whole of the document (see judgment of 30 January 2008 in Case T-380/04 *Terezakis* v *Commission*, not published in the ECR, paragraph 88).

66 First of all, it must be established whether the Commission was right in its view that all the documents to which access was sought related to investigation activities. In this connection, the applicant argues that certain of the documents covered by the request for access were sent by the undertakings concerned prior to notification of the concentration and not as part of any formal investigation procedure contemplated by Regulation No 4064/89.

67 The documents sent before 14 April 2003 were communicated as part of an informal 'pre-notification' procedure. Despite the informal nature of the procedure at the time when the documents were sent, they must nevertheless be regarded as relating to the investigation carried out by the Commission as part of its control of concentrations. They were placed on the Commission's preparatory file for the procedure at issue, as is clear from the letter of 14 February 2005 from the Director-General of the Competition DG, which identifies the documents as belonging to that file, and from the contested decision, which states that all the documents sought were 'drawn up or received in the context of the conduct [of the procedure at issue]'. It follows that all the documents sought do indeed relate to investigation activities.

68 Nevertheless, the fact that a document concerns an investigation cannot in itself justify application of the exception invoked. According to case-law, any exception to the right of access to Commission documents must be interpreted and applied strictly (Case C-64/05 P *Sweden* v *Commission* [2007] ECR I-11389, paragraph 66; Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723 ('*Turco*'), paragraph 36; and *Franchet and Byk* v *Commission*, cited in paragraph 41 above, paragraph 84).

69 As regards the application *ratione temporis* of the said exceptions, Article 4(7) of Regulation No 1049/2001 also provides that the exceptions listed in Article 4(1) to (3) only apply for the period during which protection is justified on the basis of 'the content of the document'.

70 Thus, it is necessary to establish whether the exception relating to the protection of the purpose of inspections still applied, *ratione temporis*, at the time when the investigation in question had led to the adoption of two Commission decisions, the decision on compatibility and the approval decision, which were not yet final, given the two

actions for their annulment pending before the General Court (Cases T-279/04 and T-452/04).

71 It is not disputed that the investigation carried out by the Commission as part of its control of the concentration, which led to the adoption of the decision on compatibility on 7 January 2004 and the approval decision on 30 July 2004, had been completed by the time the contested decision was adopted on 7 April 2005. The Commission nevertheless argues that, should the decision on compatibility be annulled, it would be obliged to adopt a new decision and thus to reopen its investigation and that the aim of that investigation would clearly be jeopardised if documents drawn up or received in the context of the control procedure were made public.

72 According to case-law, the third indent of Article 4(2) of Regulation No 1049/2001 must be interpreted in such a way that this provision, the aim of which is to protect 'the purpose of inspections, investigations and audits', applies only if disclosure of the documents in question may endanger the completion of those activities (*Franchet and Byk* v *Commission*, cited in paragraph 41 above, paragraph 109).

73 It is true that the various acts of investigation or inspection may remain covered by the exception based on the protection of inspections, investigations and audits as long as the investigations or inspections continue, even if the particular investigation or inspection which gave rise to the report to which access is sought is completed (see *Franchet and Byk* v *Commission*, cited in paragraph 41 above, paragraph 110, and the case-law cited).

74 However, to allow that the various documents relating to inspections, investigations or audits are covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001 until the follow-up action to be taken has been decided

would make access to such documents dependent on an uncertain, future and possibly distant event, depending on the speed and diligence of the various authorities (*Franchet and Byk* v *Commission*, cited in paragraph 41 above, paragraph 111).

75 Such a solution would be contrary to the objective of ensuring public access to the documents of the institutions, with the aim of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers (see, to that effect, *Franchet and Byk* v *Commission*, cited in paragraph 41 above, paragraph 112).

76 In the present case, to concede that the documents sought remain covered by the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001 until the decision on compatibility and the approval decision adopted following the investigation become final, that is to say, until such time as the General Court and, possibly, the Court of Justice dismiss the actions brought against those decisions or, in the event of annulment, until one or more new decisions are adopted by the Commission, would make access to those documents dependent on an uncertain, future and possibly distant event.

77 It follows from the foregoing that, when the contested decision was adopted, the documents sought no longer fell within the scope of the exception relating to the protection of the purpose of investigations.

78 It should be pointed out that, even if the documents sought did possibly fall within the scope of the exception relating to the protection of the purpose of investigations, it is in no way clear from the statement of reasons for the contested decision that the Commission carried out any specific, individual examination of those documents.

79 In order to justify its refusal to disclose the documents sought, the Commission says first of all in the contested decision that the purpose of the investigation which it would be obliged to reopen should the decision on compatibility be annulled would be jeopardised if documents drawn up or received in the context of the control procedure leading to the adoption of that decision were made public at this stage.

80 The Commission next asserts in the contested decision, more generally, that the disclosure of information given to it in the context of a procedure for the control of a concentration would upset the climate of trust and cooperation between it and the interested parties which is essential if it is to be able to gather all the information it needs in order to conduct such an investigation and to take reasoned decisions in the field.

81 Lastly, the Commission states that each of the documents sought contains information about the commercial strategy of the undertakings concerned, commentaries and requests on its part or the undertakings' responses to the views expressed by the Commission.

82 Those assertions are excessively vague and general and are unsupported by any particular aspect of the case. The same reasoning could apply to all the documents provided in the context of any procedure for the control of a concentration, in that the Commission's abstract and general reasoning is unrelated to the content of the documents in question.

83 The Commission's argument that, first, stating the reasons for each document individually would be likely to undermine the interest protected and, secondly, that a detailed statement of reasons relating to the content of a document would be likely to disclose information protected by one of the exceptions laid down by Regulation

No 1049/2001 must be dismissed. The Commission could clearly demonstrate, for each document in question, the reasons why the document is covered, partially or otherwise, by the exception relating to the protection of the purpose of investigations, without defeating the purpose of the exception or jeopardising the confidentiality of the information intended, on the basis of that exception, to remain secret.

84 Moreover, it should be pointed out that neither the drawing-up of a detailed inventory of the documents sought, nor their allocation to the various exceptions relied upon by the Commission in order to justify its refusal to grant access, nor the grant of access to certain of the documents sought is, alone, capable of establishing that a specific, individual examination of the documents to which access was refused has been carried out.

85 In so far as concerns the documents mentioned in point (d) of paragraph 1 above, that is to say, all the correspondence between the Commission and Lagardère between September 2002 and the date of the notification of the concentration, the Commission maintains that no specific, individual examination is required where it is clear whether or not the documents in question must be disclosed.

86 As was emphasised in paragraph 45 above, whilst, admittedly, it is acknowledged in case-law that a specific, individual examination may not be necessary where it is obvious that access must be refused or, on the contrary, granted, that is not the situation in the present case. Indeed, under Article 2(3) of Regulation No 1049/2001, the provisions on public access to Commission documents apply to all documents held by that institution, that is to say, all documents drawn up or received by it and in its possession in all areas of activity of the European Union. It cannot therefore be accepted that, in the field of concentrations, correspondence between the Commission and

interested parties should be regarded as obviously covered by the exception relating to the protection of the purpose of investigations. Whilst that exception can, in appropriate cases, apply to certain documents drawn up by or sent to the Commission, it is not necessarily the case for all documents or for all parts of those documents. The Commission is, at the very least, under a duty to satisfy itself that the exception does apply, by means of a proper, specific examination of each document, as is required by the first indent of Article 4(2) of Regulation No 1049/2001.

87 The Commission's argument that, generally speaking, the disclosure of information given to it in the context of a procedure for the control of a concentration would upset the climate of trust and cooperation between it and the interested parties must also be dismissed. Those concerns are also too vague and general to establish the existence of any real, reasonably foreseeable and not purely hypothetical risk of a protected interest being undermined. The examination which the institution must carry out in order to apply an exception must be specific and be evident from the statement of reasons for the decision (*VKI*, cited in paragraph 41 above, paragraph 69, and *Franchet and Byk* v *Commission*, cited in paragraph 41 above, paragraph 115). In the present case, the Commission ruled in the abstract on the harm that disclosure of the documents in question could cause to its investigation, without proving to the requisite legal standard that their disclosure would actually and effectively undermine the protection of the purpose of the investigation.

88 Admittedly, the Commission attempted to illustrate that risk by referring, in its defence, to the publication by a law firm which, following the judgment in *VKI*, cited in paragraph 41 above, invited undertakings which are the subject of a Commission investigation to be prudent when sending information to that institution, in view of the risk of its subsequent disclosure in response to the right of access to documents. In addition to the fact that it must be clear from the statement of reasons for the Commission's decision, not from its written pleadings before the Court, that the examination carried out by the Commission was specific in nature, that factor is not sufficient, in itself, to demonstrate that the risk which the Commission alleges is reasonably foreseeable and not merely hypothetical. However prudent they feel they must be,

for reasons of their own, the undertakings concerned cannot escape their legal duty to provide the information requested by the Commission as part of its control of concentrations.

89 The Commission's argument based on Article 17(1) of Regulation No 139/2004, according to which '[i]nformation acquired as a result of the application of [that regulation may] be used only for the purposes of the relevant request, investigation or hearing' is no more convincing. That provision, which is worded in similar fashion both in the version to which the Commission refers and that which applies to the present case, namely Regulation No 4064/89, addresses the way in which the Commission is entitled to use information provided to it but does not govern the access to documents guaranteed by Regulation No 1049/2001. It cannot be interpreted as precluding exercise of the right of access to documents guaranteed by Article 255 EC and by Regulation No 1049/2001. Moreover, it must be read in the light of Article 17(2) of Regulation No 139/2004, which prohibits the disclosure only of information 'of the kind covered by the obligation of professional secrecy'. Notifying undertakings must therefore expect that any information obtained that is not covered by the duty of professional secrecy will be disclosed.

90 According to case-law, to the extent that the public has a right of access to documents containing certain information, that information cannot be considered to be of the kind covered by the duty of professional secrecy (Case T-198/03 *Bank Austria Creditanstalt* v *Commission* [2006] ECR II-1429, paragraph 74). The duty of professional secrecy is therefore not so extensive as to justify any general, abstract refusal of access to documents sent in the context of the notification of a concentration. Admittedly, Article 287 EC and Regulations No 4064/89 and No 139/2004 contain no exhaustive list of the kind of information that is covered by the duty of professional secrecy. Nevertheless it is clear from the wording of Article 17(2) of those regulations that not all information gathered is necessarily covered by the duty of professional secrecy. Assessing whether or not information is confidential therefore requires that

the legitimate interests opposing disclosure be weighed against the public interest in the activities of the Community institutions taking place as openly as possible (see, to that effect, *Bank Austria Creditanstalt* v *Commission*, paragraph 71, and Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission* [2007] ECR II-4225, paragraphs 63 to 66).

91 By carrying out a specific, individual examination of the documents sought, in accordance with the first indent of Article 4(2) of Regulation No 1049/2001, the Commission is thus in a position to ensure the practical effect of the provisions applicable in the field of concentrations in a manner fully consistent with Regulation No 1049/2001. It follows that the duty of professional secrecy arising from Article 287 EC and from Article 17 of Regulations No 4064/89 and No 139/2004 is not such as to relieve the Commission of its obligation to carry out the specific, individual examination of each of the documents in question required by Article 4(2) of Regulation No 1049/2001.

92 Lastly, in its rejoinder, the Commission makes the assertion that the disclosure of the documents sent by the undertakings concerned prior to notification of the concentration would breach the duty of confidentiality imposed on the institution by Article 287 EC and Article 17 of Regulation No 139/2004 and by the document entitled 'Best practices on the conduct of EC merger control proceedings'.

93 That argument too must be dismissed, for the reasons set out in paragraph 90 above.

94 It follows from the foregoing that neither Article 287 EC nor Article 17 of Regulations No 4064/89 and No 139/2004 can prevent the disclosure of a document that is not covered by one of the exceptions laid down in Regulation No 1049/2001.

95 That is all the more true of the guidelines set out in the Commission's document entitled 'Best practices on the conduct of EC merger control proceedings'. Without it being necessary to rule on the question whether that document is a binding legal instrument or, in particular, to establish whether it is an act having legal effects, it should be observed that the document, which was not published in the Official Journal and paragraph 2.4 of which expressly states that it neither creates nor alters the rights and obligations established by the Treaty establishing the European Community, cannot prevent the disclosure of a document to which access is guaranteed by Article 255 EC and Regulation No 1049/2001.

96 Having considered the lawfulness of the contested decision in the light of Regulation No 1049/2001, there is therefore no need to then consider whether the information contained in the documents sought is covered by the duty of professional secrecy.

97 It follows from all the foregoing that the Commission erred in law by refusing to grant access to the documents sought on the ground that they were covered by the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001 relating to the protection of the purpose of inspections, investigations and audits, when in fact, at the time when the contested decision was adopted, they no longer fell within the scope of that exception and, in any event, in the absence of any clear indication in the statement of reasons for the contested decision that a specific, individual examination of each of those documents had been carried out.

98 The contested decision is therefore vitiated by unlawfulness on this point.

99 All the documents at issue to which the Commission refused access nevertheless remain capable of being covered, according to the contested decision, by another of the exceptions laid down in Regulation No 1049/2001. It is therefore necessary to consider the lawfulness of the refusal to disclose them on the ground of the exceptions relating to the protection of commercial interests, of the Commission's decision-making process and of legal advice.

The exception relating to the protection of commercial interests laid down in the first indent of Article 4(2) of Regulation No 1049/2001

— Arguments of the parties

100 The applicant argues that the Commission took an abstract, general approach, without carrying out any specific, individual examination designed to ascertain whether the communication of each of the documents sought would actually undermine the interest protected by this exception. The Commission has, it alleges, failed to show that the risk of the protected interest being undermined was reasonably foreseeable and not purely hypothetical.

101 According to the applicant, the Commission was under a duty to identify and to set apart any business secrets amenable to compulsory special protection and to provide a non-confidential version of the documents concerned. Moreover, it disputes that the documents sought could contain very much sensitive commercial information, given that they relate to a large extent to the application of Article 3(5)(a) of Regulation No 4064/89, that is to say, to a question of a legal, rather than a commercial, nature.

102 The applicant points out that the Commission did not consult the undertakings whose commercial interests it alleges were concerned and that, in the context of other proceedings pending before the General Court, it communicated certain documents which it claims contain business secrets without referring to the authors of those documents.

103 The Commission emphasises that it carefully listed in the contested decision the documents to which the exception in question applies and that it indicated the nature of the information they contained, namely sensitive information relating to the commercial strategies of the undertakings in question. It alleges that it carried out a specific, individual examination of the documents sought, except for those referred to in point (d) of paragraph 1 above, which, it was able to conclude on summary examination, could not be disclosed without harming the commercial interests of the undertakings concerned. It submits that stating the reasons for each document individually would be likely to undermine the protected interest and that it has been acknowledged in case-law that a detailed statement of reasons relating to the content of a document would be likely to disclose protected information.

104 It submits that it was not able to provide a non-confidential version of the documents sought and thus to grant partial access to them, since they were covered in their entirety by one or more exceptions. The sole purpose of the non-confidential versions which the undertakings concerned sent to the Commission was to enable the interested parties to exercise their rights of defence and they cannot therefore, on that ground alone, be disclosed to the public pursuant to Regulation No 1049/2001. If it were otherwise, the special rules laid down for access to the file in the context of the control of concentrations would be rendered nugatory.

105 The content of the documents is not, the Commission alleges, limited to strictly legal questions. It relates to the sale and purchase agreement, the correspondence exchanged on that subject, the contract under which Natexis acquired ownership of the

shareholdings of VUP, the mandate for ensuring the observance of the commitments entered into by Lagardère, the mandate conferred upon the Hold Separate Manager, the draft agreement between Lagardère and Wendel Investissement, and documents relating to that draft agreement. All those documents reflect the commercial strategy of the undertakings concerned. The notifying parties expressly indicated that the documents which they submitted to the Commission were confidential. Nor can it be said that the information has lost its confidentiality over time because it is in fact recent.

106 As regards third-party documents, the Commission takes the view that Article 4(4) of Regulation No 1049/2001 does not require consultation of the third parties with a view to determining whether an exception is applicable if it is clear whether or not the documents must be disclosed. That is the case in these proceedings. As regards the documents of which it is the author, the Commission emphasises that it would not be able to consult the third parties concerned, as such consultation is only provided for by Regulation No 1049/2001 in the case of documents drawn up by third parties.

107 Communication of the documents sought is, moreover, prohibited by Article 287 EC, which requires members and officials of the institutions not to disclose information covered by the duty of professional secrecy, which includes business secrets. That duty not to disclose information covered by the duty of professional secrecy also appears in Article 17(2) of Regulation No 4064/89, which was replaced by Regulation No 139/2004. Article 18(3) of both those regulations makes access to the file subject to the legitimate interest of undertakings in the protection of their business secrets.

108 The intervener submits in particular that business secrets benefit from special protection in the field of the control of concentrations pursuant to Article 287 EC, Article 41 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1), the case-law of the Court of

Justice and of the General Court and Article 18(1) of Regulation No 802/2004. The other arguments put forward by the intervener are substantially similar to those of the Commission.

— Findings of the Court

109 Under the first indent of Article 4(2) of Regulation No 1049/2001, the institutions must refuse access to a document where disclosure would undermine the protection of the 'commercial interests of a natural or legal person, including intellectual property'.

110 Article 4(4) of that regulation provides that 'as regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed'.

111 The Commission submits that, among the documents at issue, those referred to in points (d), (e) and (h) of paragraph 1 above and points (b), (c) (in part), (d), (f), (g) and (i) of paragraph 2 above are covered, at least in part, by the exception relating to the protection of commercial interests.

112 It is in the light of the principles mentioned in paragraph 65 above that the Commission's application of the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001 in order to refuse access to the documents sought must be examined.

113 In the present case, first, some of the documents in relation to which the exception is invoked are likely to contain confidential information falling within the scope of the exception relating to the protection of commercial interests. Indeed, by reason of their very purpose, those documents are, as is emphasised in the contested decision, likely to contain information about the commercial strategies of the undertakings concerned.

114 Secondly, it is necessary to address the question whether the disclosure of documents falling within the scope of the exception relating to the protection of commercial interests would specifically and actually undermine the protected interest.

115 It is important to recall that, according to case-law, the examination which the institution must carry out in order to apply an exception must be specific and be evident from the statement of reasons for the decision.

116 In the contested decision, the Commission refused to disclose the documents listed in paragraph 111 above on the ground that they contained sensitive information about the commercial strategies of the undertakings concerned. Their disclosure would therefore clearly harm the commercial interests of the undertakings concerned.

117 However, it is not evident from the statement of reasons that any specific, individual examination of those documents was carried out. The abstract and general reasons offered by the Commission do not refer to the content of the documents in question and such a justification could apply to all the documents provided in the context of any procedure for the control of a concentration.

118 Moreover, the circumstances in which the institution might, in accordance with case-law (*VKI*, cited in paragraph 41 above, paragraph 75), dispense with a specific, individual examination are not present.

119 Indeed, it follows from the finding made in paragraph 86 above that it cannot be accepted that all the documents to which access was refused pursuant to the exception relating to the protection of commercial interests are obviously covered in their entirety by that exception.

120 Similarly, it cannot be maintained that it was objectively impossible for the Commission to give the reasons justifying the refusal of access to each document without disclosing the content of the document or an essential aspect of it and thereby depriving the exception of its very purpose, something which could justify the general nature, brevity and formulaic character of a statement of reasons (*Sison* v *Council*, cited in paragraph 46 above, paragraph 83, and *Sison* v *Council*, cited in paragraph 41 above, paragraph 84; see, by analogy, as regards the 1993 Code of Conduct, *WWF UK* v *Commission*, cited in paragraph 46 above, paragraph 65).

121 The Commission could indeed have described the content of each document and stated the nature of the confidential information therein without in fact revealing it. The obligation upon undertakings providing information to the Commission to identify any information which they consider to be confidential and to send a non-confidential version of the documents provided, laid down in Article 17(2) of Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 (OJ 1998 L 61, p. 1), enables the Commission, at the very least, to give a detailed statement of reasons for its refusal to grant access to each document, without disclosing the confidential information it contains.

122 As regards the absence of any list of the documents mentioned in point (d) of paragraph 1 above, that is to say, the correspondence between the Commission and Lagardère, the Commission puts forward the argument that that correspondence amounted to some 20 or so binders and therefore drawing up a detailed list mentioning each individual document would have constituted a disproportionate administrative burden. It states in the contested decision that it considered the category of documents as a whole and submits in its written pleadings that it was entitled to refuse access to those documents on completion of a summary examination, since they were obviously covered in their entirety by the exception relating to the protection of commercial interests.

123 Those arguments must be rejected. As was pointed out in paragraph 86 above, under Article 2(3) of Regulation No 1049/2001, the provisions on public access to Commission documents apply to all documents held by that institution, that is to say, all documents drawn up or received by it and in its possession in all areas of activity of the European Union. It cannot therefore be accepted that, in the field of concentrations, correspondence between the Commission and interested parties should be regarded as obviously covered by the exception relating to the protection of commercial interests. Whilst that exception can, in appropriate cases, apply to certain documents drawn up by or sent to the Commission, it is not necessarily the case for all documents or for all parts of those documents. The Commission is, at the very least, under a duty to satisfy itself that the exception does apply, by means of a proper, specific examination of each document, as is required by the first indent of Article 4(2) of Regulation No 1049/2001.

124 The argument put forward by the Commission and the intervener relating to the preservation of professional secrecy ensured by Article 287 EC and Article 17(2) of Regulation No 4064/89 and the safeguarding of business secrets ensured by Article 18(3) of that regulation must also be dismissed. As was pointed out in paragraph 90 above, according to case-law, to the extent that the public has a right of access to documents containing certain information, that information cannot be considered to be of the

kind covered by the duty of professional secrecy or the protection of business secrets (see, to that effect, *Bank Austria Creditanstalt* v *Commission*, cited in paragraph 90 above, paragraph 74).

125 The applicant also complains that the Commission failed to consult the undertakings the protection of whose commercial interests might be undermined by the disclosure of the documents in question.

126 In this connection, it must be recalled that, in the case of third-party documents, Article 4(4) of Regulation No 1049/2001 requires the institution to consult the third party concerned with a view to assessing whether an exception under Article 4(1) or (2) is applicable, unless it is clear whether or not the document should be disclosed. It follows that the institutions are under no obligation to consult the third party concerned if it is clearly apparent whether the document should or should not be disclosed. In all other cases, the institutions must consult the relevant third party. Accordingly, consultation of the third party is, as a general rule, a precondition for determining whether the exceptions to the right of access provided for in Article 4(1) and (2) of Regulation No 1049/2001 are applicable in the case of third-party documents (Case T-168/02 *IFAW Internationaler Tierschutz-Fonds* v *Commission* [2004] ECR II-4135, paragraph 55, and *Terezakis* v *Commission*, cited in paragraph 65 above, paragraph 54).

127 Failure to consult the authors of third-party documents is thus inconsistent with Regulation No 1049/2001 unless one of the exceptions laid down in that regulation clearly applies to the documents in question. That is not the case in these proceedings, as was held in paragraphs 63 to 98 above, with respect to the exception relating to the protection of the purpose of investigations and in paragraphs 109 to 124 above with respect to the exceptions relating to the protection of commercial interests.

128 As regards documents of the Commission, that institution was right to argue that Regulation No 1049/2001 provides for no third-party consultation procedure for that type of document. The applicant's complaint is incorrect in law in so far as it concerns documents of which the Commission is the author.

129 It follows from all the foregoing that the contested decision is vitiated by unlawfulness in that it applied the exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001 to the documents referred to in points (d), (e) and (h) of paragraph 1 above and points (b), (c) (in part), (d), (f), (g) and (i) of paragraph 2 above in the absence of any clear indication in the statement of reasons for the contested decision that a specific, individual examination of each of those documents had been carried out and in the absence of any consultation of the third-party authors of certain of those documents, in so far as concerns the disclosure of third-party documents.

The exception relating to the protection of the decision-making process laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001

— Arguments of the parties

130 The applicant argues that the Commission took an abstract, general approach, without carrying out any specific, individual examination designed to ascertain whether the communication of each of the documents sought would actually undermine the interest protected by this exception. The Commission has, it alleges, failed to show that the risk of the protected interest being undermined was reasonably foreseeable and not purely hypothetical.

131 The applicant asserts that, by relying upon this exception in order to refuse access to the documents referred to in point (g) of paragraph 1 above, the Commission contradicts the argument it put forward in its defence in Case T-279/04 by which it maintained that the decision to apply Article 3(5)(a) of Regulation No 4064/89 to the acquisition of VUP's assets by Natexis/Investima 10 had no effect upon the decision on compatibility and that the possibly mistaken application of that provision cannot therefore affect the validity of that decision. By so doing, the Commission infringed the principle *venire contra factum proprium*.

132 According to the applicant, those documents relate to the interpretation of a legal point and cannot therefore constitute preparatory acts the disclosure of which should be refused. In any event, the communication of those documents is, it alleges, in the public interest, since it would clarify the conditions under which Article 3(5)(a) of Regulation No 4064/89 is applied.

133 The Commission observes that assessing the validity of the decision on compatibility is a separate matter from the question of the legality of applying the exceptions laid down in Regulation No 1049/2001 and thus disputes the relevance of the applicant's argument. The two requested documents to which access was refused in order to protect the Commission's decision-making process are internal documents of the Commission relating to internal deliberations concerning the procedure at issue. The disclosure of those documents would seriously jeopardise the decision-making process in that it is essential to preserve the ability of the Commission's departments to conduct the matters with which they are entrusted without let or hindrance and free from external pressure, so that the Commission can take decisions in full knowledge of the relevant facts.

134 It is, the Commission alleges, all the more important to protect those preparatory documents since the decision taken on the basis of them is the subject of an action for annulment and they will therefore remain relevant in the event of annulment.

135 The arguments put forward by the intervener are essentially similar to those of the Commission.

— Findings of the Court

136 Under the second subparagraph of Article 4(3) of Regulation No 1049/2001, 'access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

137 The Commission refused access to two of the three internal notes referred to in point (g) of paragraph 1 above pursuant to the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001. One is a note dated 10 February 2002 from the Competition DG to the Commission's Legal Service requesting an opinion on the application of Article 3(5)(a) of Regulation No 4064/89, the other is a note dated 4 November 2002 summarising the state of the file, prepared for the Member of the Commission responsible for competition.

138 First, it should be observed that those documents, which were produced to the General Court (see paragraph 23 above), are preparatory documents relating to the final decision and were sent around the Commission in order to enable the documents formally setting out the position adopted by the institution to be drafted. They contain 'opinions for internal use as part of deliberations and preliminary consultations' within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001 and thus clearly fall within the scope of that provision.

139 Secondly, it is necessary to consider whether the refusal of access to the internal documents sought is justified in this case by the exception based on the protection of the institution's decision-making process.

140 According to settled case-law, in order to apply this exception, it must be shown that access to the documents requested is likely specifically and actually to undermine the Commission's decision-making process and that that risk is reasonably foreseeable and not purely hypothetical (judgment of 18 December 2008 in Case T-144/05 *Muñiz* v *Commission*, not published in the ECR, paragraph 74, and the case-law cited).

141 Moreover, in order to fall within the scope of the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, the undermining of the institution's decision-making process must be serious. It will be so, inter alia, where the disclosure of the documents sought has a significant effect on the decision-making process. How serious it is will depend on all the circumstances of the case, and in particular the negative effects on the decision-making process to which the institution refers in connection with disclosure of the documents concerned (*Muñiz* v *Commission*, cited in paragraph 140 above, paragraph 75).

142 In the present case, the contested decision mentions the serious harm that would be caused to the decision-making process if the internal deliberations of the Commission's departments relating to this case were made public. The decision emphasises the importance of the Commission's being in a position to adopt its decisions without any disruption and free from external pressure and of its departments being able to express their points of view freely, so that they can guide the Commission in taking decisions. It submits that Commission staff would be seriously hindered in their ability to formulate such points of view if they had to take into account the possibility of publication.

143 It must be observed that those justifications are made in a general and abstract fashion, without being supported by any detailed argument based on the content of the

documents in question. The same considerations could apply with respect to any document of a similar nature. They are therefore insufficient to justify the refusal of access to the documents requested in the present case, without imperilling the principle of strict interpretation of the exceptions laid down in Article 4 of Regulation No 1049/2001, and in particular that laid down in the second subparagraph of Article 4(3) of that regulation.

144 The Commission has therefore failed to show that the exception laid down in the second subparagraph of Article 4(3) of Regulation No 1049/2001 applies to the internal documents requested.

145 Therefore, the wholesale refusal of access to the internal documents sought was erroneous in law and must be annulled, without it being necessary to consider the question of whether there is any overriding public interest.

The exception relating to the protection of legal advice laid down in the second indent of Article 4(2) of Regulation No 1049/2001

— Arguments of the parties

146 The applicant argues that the Commission took an abstract, general approach, without carrying out any specific, individual examination designed to ascertain whether the communication of the note from the Legal Service which the applicant has

requested would actually undermine the interest protected by this exception. The Commission has, it alleges, failed to show that the risk of the protected interest being undermined was reasonably foreseeable and not purely hypothetical.

147 The applicant submits that the opinion of the Commission's Legal Service, referred to in point (g) of paragraph 1 above, should be disclosed in order to enable third parties and the General Court to review the way in which the Commission interpreted and applied the legal rule laid down in Article 3(5)(a) of Regulation No 4064/89.

148 According to the applicant, the Commission may not rely upon the need to protect the independence of its Legal Service in order to justify its refusal to grant access to this document, since it is required to respect the obligation of transparency which, according to the preamble to Regulation No 1049/2001, ensures that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. The Commission's refusal to grant access, far from reinforcing the independence of its legal opinions, gives credence to the notion that the decision on compatibility was not given with absolute independence.

149 The Commission observes that access to documents as provided for by Regulation No 1049/2001 may be granted or refused independently of particular interests and of the reasons for which the applicant desires access to the documents it requests. The arguments raised by the applicant are therefore irrelevant. The disclosure of the legal opinions in question is dependent solely upon the degree of harm that such disclosure could cause to the independence and impartiality of such opinions. The exception relating to legal opinions is designed to protect their independence and to ensure that such opinions may be given with complete frankness and objectivity. The opinion in question was intended solely to guide the Commission's departments and its disclosure would lead the Legal Service of that institution to draft its opinions in a more guarded fashion, thus depriving the institution of an essential tool for the proper execution of its duties.

150 The Commission points out that there are limits on the exercise of the rights of access to documents under Article 255(2) EC. The applicant's reference to the obligation of transparency cannot therefore prevail over the exceptions laid down in Regulation No 1049/2001.

151 The Commission objects to the allegation that the refusal of access to the document requested leads to the supposition that it was not adopted absolutely independently. It points out that it is required to refuse access to a document where the conditions for applying one or other of the exceptions laid down in Regulation No 1049/2001 are met and that it cannot therefore grant access to a document covered by one of the exceptions in order to refute accusations of fraud.

— Findings of the Court

152 Under the second indent of Article 4(2) of Regulation No 1049/2001, the institutions must refuse access to a document where disclosure would undermine the protection of court proceedings and legal advice, unless there is an overriding public interest in disclosure.

153 It was on the basis of that provision that the Commission refused to disclose the document referred to in point (g) of paragraph 1 above, the opinion of its Legal Service of 10 October 2002 on the application of Article 3(5)(a) of Regulation No 4064/89.

154 It must be observed first of all that that document, which was produced to the General Court (see paragraph 23 above), in addition to the way it is described, contains a legal opinion issued by the Commission's Legal Service. The document must therefore

be regarded as being, in its entirety, a legal opinion within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001 and likely to fall within the scope of the exception laid down in that provision.

155 Next, it must be established whether the disclosure of that legal opinion would undermine the protection of legal advice within the meaning of the second indent of Article 4(2) of Regulation No 1049/2001.

156 In this connection, it must be recalled that the exception relating to legal advice must be construed as aiming to protect the Commission's interest in seeking legal advice and receiving frank, objective and comprehensive advice. The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical (*Turco*, cited in paragraph 68 above, paragraphs 42 and 43).

157 In the present case, the contested decision justifies the refusal to disclose the opinion in question on the ground that legal opinions are internal documents the essential purpose of which is to provide the Commission and its departments with opinions on legal questions on the basis of which to adopt their final decisions. Frankness and objectivity are essential in the provision of such opinions. The disclosure of the opinion of the Commission's Legal Service in the present case, and of the questions put to the Legal Service by the Competition DG, would have the effect of making public an internal discussion about the scope of Article 3(5)(a) of Regulation No 4064/89. Had the Legal Service been required to take into account subsequent publication of its opinion it would not have expressed itself with absolute independence. There would no longer be any point in drafting a written opinion on the question, and this would deprive the institution of an essential tool for the proper performance of its duties.

158 It is appropriate to observe that it was not only the fact that the document in question is a legal opinion, which the Commission relied upon in the contested decision, to justify application of the exception in question, but also the fact that the disclosure of that opinion would risk conveying to the public information about the state of internal discussions between the Competition DG and the Legal Service concerning the scope of Article 3(5)(a) of Regulation No 4064/89.

159 The disclosure of the note in question would be likely to lead the Commission's Legal Service to draft such notes in the future in a more guarded and prudent fashion so as not to affect the Commission's ability to take decisions in matters where it acts in its capacity as an administrative authority.

160 It must also be held that the risk of undermining the protection of legal advice laid down by the second indent of Article 4(2) is reasonably foreseeable and not purely hypothetical. In addition to the reasons indicated in paragraphs 157 and 159 above, disclosure of that advice would risk putting the Commission in the difficult position where its Legal Service might find itself having to defend a position before the Court which was not the same as the position which it argued for internally in its role as adviser to the departments responsible for the file during the internal discussions which took place during the administrative procedure. The risk of such a conflict arising would be liable to have a considerable effect on both the freedom of the Legal Service to express its views and its ability effectively to defend before the judicature of the European Union, on an equal footing with the other legal representatives of the various parties to legal proceedings, the Commission's definitive position and the internal decision-making process of that institution. The Commission reaches its decisions as a college, having regard to the particular task assigned to it, and must have the freedom to defend a legal position which differs from that initially adopted by its Legal Service.

161 Furthermore, unlike the position where the Community institutions act as legislators, where wider access to documents should be authorised in accordance with recital 6 in the preamble to Regulation No 1049/2001 (*Turco*, cited in paragraph 68 above, paragraph 46), the legal opinion in question was drafted as part of the purely administrative functions of the Commission. The interest of the public in obtaining access to a document pursuant to the principle of transparency, which seeks to ensure greater

participation by citizens in the decision-making process and to guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, is not the same where the document relates to an administrative procedure intended to apply rules governing the control of concentrations or competition law in general as it is where the document relates to a procedure in which the institution in question acts in its capacity as legislator.

162 The applicant's argument that the disclosure of the opinion of the Legal Service referred to in point (g) of paragraph 1 above would not undermine the protection of legal advice must therefore be dismissed.

163 It follows from all the foregoing that the first and second pleas in law are well founded, except in so far as concerns the refusal to disclose the opinion of the Legal Service referred to in point (g) of paragraph 1 above.

The third plea in law, alleging infringement of the right to at least partial access to the documents requested

Arguments of the parties

164 The applicant takes issue with the Commission's refusal to grant it at least partial access to the documents requested pursuant to Article 4(6) of Regulation No 1049/2001. It submits that the Commission did not determine the administrative burden that the preparation of non-confidential versions of the documents sought would have

represented, since it carried out no specific, individual examination of those documents. According to case-law, the public's right of access to documents takes precedence over the principle of sound administration and it is only in very rare cases and to a limited extent that an exception to that right can be allowed.

165 Moreover, it is not for the Commission to assess the interest which the applicant might have in disclosure of the passages which might, if appropriate, be made public in the event of partial access.

166 The Commission asserts that it carried out a specific, individual examination of the documents sought, except for those referred to in point (d) of paragraph 1 above. On completion of that examination, the Commission took the view that only certain passages might be disclosed and that the administrative burden that identifying those passages would represent was, in accordance with the principle of sound administration, disproportionate in comparison with the public interest in obtaining those passages.

Findings of the Court

167 Article 4(6) of Regulation No 1049/2001 provides that 'if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.'

168 Article 4(6) of Regulation No 1049/2001 calls for a specific, individual examination of the content of each document. Indeed, only such an examination can enable the institution to assess the possibility of granting the applicant partial access. An assessment

of documents by reference to categories rather than by reference to the actual information contained in them is in principle insufficient, since the examination required of the institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (see, to that effect, *Franchet and Byk* v *Commission*, cited in paragraph 41 above, paragraph 117, and the case-law cited).

169 In the present case, such an examination of the documents sought is not evident from the statement of reasons for the contested decision. The Commission took the view that such an examination would involve a disproportionate administrative burden in comparison with the public interest in having access to the passages that would be left after such an exercise.

170 According to case-law, it is only in exceptional cases and only where the administrative burden entailed by a specific, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required, that a derogation from the obligation to examine the documents may be permissible (*VKI*, cited in paragraph 41 above, paragraph 112).

171 In addition, in so far as the right of access to documents held by the institutions constitutes an approach to be adopted in principle, it is with the institution relying on an exception related to the unreasonableness of the task entailed by the request that the burden of proof of the scale of that task rests (*VKI*, cited in paragraph 41 above, paragraph 113, and judgment of 10 September 2008 in Case T-42/05 *Williams* v *Commission*, not published in the ECR, paragraph 86).

172 Lastly, where the institution has adduced proof of the unreasonableness of the administrative burden entailed by a specific, individual examination of the documents referred to in the request, it is obliged to try to consult with the applicant in order,

first, to ascertain or to ask him to specify his interest in obtaining the documents in question and, secondly, to consider specifically whether and how it may adopt a measure less onerous than a specific, individual examination of the documents. Since the right of access to documents is the principle, the institution nevertheless remains obliged, against that background, to prefer the option which, whilst not itself constituting a task which exceeds the limits of what may reasonably be required, remains the most favourable to the applicant's right of access (*VKI*, cited in paragraph 41 above, paragraph 114).

173 It follows that the institution may avoid carrying out a specific, individual examination only after it has genuinely investigated all other conceivable options and explained in detail in its decision the reasons for which those various options also involve an unreasonable amount of work (*VKI*, cited in paragraph 41 above, paragraph 115).

174 In the present case, it must be held that the contested decision, which refused the applicant even partial access to any of the documents, could be lawful only if the Commission had explained in advance, and in specific terms, the reasons for which any alternative solutions to a specific, individual examination of each of the documents sought would also involve an unreasonable amount of work.

175 It is not however apparent from the statement of reasons for the contested decision that the Commission considered specifically and exhaustively the various options available to it in order to take steps which would not impose an unreasonable amount of work on it but would, however, increase the chances that the applicant might receive, at least in respect of part of its request, access to the documents requested. In particular, it is not evident from the contested decision that the Commission specifically considered the option of asking the undertakings which communicated certain

of the documents requested whether a non-confidential version of those documents might be sent to the applicant.

176 It follows from all the foregoing that the contested decision must be annulled in so far as it refused even partial access to all the documents requested, in the absence of any clear indication in the statement of reasons for the contested decision that a specific, individual examination of each of those documents had been carried out, and in the absence of any explanation from the Commission, in specific terms, of the reasons for which solutions other than a specific, individual examination of each of the documents sought would represent an unreasonable amount of work.

The fourth plea in law, alleging infringement of the principle of proportionality

Arguments of the parties

177 The applicant emphasises that its request for access was not aimed exclusively at protecting private interests. Its purpose was also to preserve undistorted competition on the publishing markets in France and to prevent the rules relating to the control of concentrations from being circumvented by fraudulent use of Article 3(5)(a) of Regulation No 4064/89. There is, therefore, an overriding public interest, pursuant to Article 4(2) and (3) of Regulation No 1049/2001, in the disclosure of the documents requested.

178 The Commission maintains that the applicant has failed to show the existence of any overriding public interest in the disclosure of the documents requested. The applicant's use of the documents requested in support of its action against the decision on compatibility cannot be regarded as an overriding public interest. Such an action is dependent upon the existence of a personal interest in bringing proceedings and would be inadmissible if the applicant were to act in the name of the public interest.

179 Moreover, even if the applicant's action had been brought in the public interest, it is not the use which the applicant for disclosure means to make of the documents that is relevant; the disclosure must be justified by an overriding public interest and the particular characteristics of the documents must justify their disclosure in the name of that overriding public interest, independently of the aim pursued by the applicant. That is not the case in the present proceedings.

180 Lastly, the Commission argues that it is for the Court deciding upon the lawfulness of the contested decision in Case T-279/04 to assess whether or not the documents requested are necessary for the applicant's defence in that case.

181 The applicant emphasises that it can be both a legal person directly and individually concerned by the contested decision and at the same time a legal person with citizenship of the European Union who are entitled to obtain access to the documents requested. It argues that the disclosure of the documents sought and the use which is to be made of them both pursue the same end, namely the preservation of undistorted competition and the transparent application of competition law.

182 The applicant submits that it is permissible for a party to proceedings in which the production of documents may be ordered by the Court to take issue, in parallel proceedings, with a decision refusing access to those same documents under Regulation No 1049/2001.

183 The Commission argues that, according to case-law, the overriding public interest referred to in Article 4(2) and (3) of Regulation No 1049/2001 must, in principle, be distinct from the principles underlying that regulation, among which is the obligation of transparency upon which the applicant relies.

184 The intervener emphasises that there is no overriding public interest justifying the disclosure of the documents requested by the applicant, whose request for access to those documents is based upon purely private interests. It also emphasises, in its preliminary observations, that the applicant's request for access to the documents is abusive and goes against the aims of Regulation No 1049/2001, since it is motivated by the applicant's private interest in defending its rights in Cases T-279/04 and T-452/04. It argues that it has been held in case-law that the purpose of Regulation No 1049/2001 is not to protect the particular interest which a specific individual may have in gaining access to a document of the institutions. It has also been recognised in case-law that the purpose of the regulation is to ensure access for everyone to public documents and not only access for the requesting party to documents concerning him and that it should not enable the pursuit of private interests relating, for example, to the pursuit of an action brought against the institutions.

Findings of the Court

185 Article 4(2) and (3) of Regulation No 1049/2001 state that the exceptions laid down in those provisions apply 'unless there is an overriding public interest in disclosure'.

186 In the contested decision, the Commission refused to hold that there was any overriding public interest justifying disclosure, for the reason that the request for access was based on the defence of the applicant's interest in a dispute pending before the General Court. That is obviously a private, not a public, interest. According to the regulation, however, only a public interest is capable of taking precedence over the need to protect the interests referred to in Article 4(2) and (3) of Regulation No 1049/2001.

187 Given the Court's findings that the Commission erred in law in relying on the exceptions relating to the protection of the purpose of investigations, of commercial interests and of the decision-making process, there is no need to consider the possible existence of any overriding public interest justifying disclosure of the documents to which access was refused on the basis of those exceptions.

188 The intervener's argument that the applicant's request for access is abusive in that it is based on strictly private interests must be dismissed at the outset. The last sentence of Article 6(1) of Regulation No 1049/2001 provides that the applicant is not obliged to state reasons for the application. Given that the aim of that regulation is to give the general public a right of access to the documents of the institutions, the particular interest that a specific person might have in gaining access to such a document was not taken into account by the institution when asked to give a decision on the request for access (see, to that effect, *Sison* v *Council*, cited in paragraph 46 above, paragraphs 43 to 47). A request for access based on strictly private interests cannot, therefore, be regarded as abusive.

189 However, it is necessary to consider whether there is any overriding public interest capable of justifying the disclosure of the opinion of the Legal Service referred to in point (g) of paragraph 1 above.

190 According to case-law, the overriding public interests that are capable of justifying the disclosure of a document covered by an exception are, in particular, those which underlie Regulation No 1049/2001 (*Turco*, cited in paragraph 68 above, paragraphs 67, 75 and 76). Contrary to the Commission's assertions, the overriding public interest capable of justifying disclosure need not therefore be distinct from the principles underlying that regulation.

191 Having regard to the general principle of access to documents laid down by Article 255 EC and recitals 1 and 2 in the preamble to Regulation No 1049/2001, the overriding public interest justifying disclosure must be objective and general in nature and must not be indistinguishable from individual or private interests, such as those relating to the pursuit of an action brought against the institutions, since such individual or private interests do not constitute an element which is relevant to the weighing-up of interests provided for by the second subparagraph of Article 4(3) of the regulation.

192 Under Article 2(1) of Regulation No 1049/2001, the beneficiaries of the right of access to the documents of the institutions comprise 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State'. That provision makes it clear that the purpose of the regulation is to guarantee access for everyone to public documents and not just access for the requesting party to documents concerning it (*Sison* v *Council*, cited in paragraph 41 above, paragraph 50). Consequently, the individual interest which a party may invoke when requesting access to documents of personal concern to it cannot generally be decisive either in the assessment of the existence of an overriding public interest or in the weighing-up of interests under the second subparagraph of Article 4(3) of Regulation No 1049/2001.

193 Thus, even if those documents requested prove necessary for the applicant's defence in the legal action — a question which falls to be considered in that case — that circumstance is irrelevant for the purpose of assessing the balance of public interests (see, to that effect and by way of analogy, *Sison* v *Council*, cited in paragraph 41 above, paragraph 55, and order of 8 June 2005 in Case T-287/03 *SIMSA* v *Commission*, not published in the ECR, paragraph 34).

194 The fact that the documents requested might help the applicant to make good its arguments in the actions for annulment which it has brought against the decision on compatibility and the approval decision cannot, therefore, amount to an overriding public interest justifying the disclosure of the legal opinion in question.

195 As regards the applicant's argument that such disclosure could have the effect of helping to preserve undistorted competition on the publishing markets in France and of preventing the rules relating to the control of concentrations from being circumvented by fraudulent use of Article 3(5)(a) of Regulation No 4064/89, it is not evident from the information in the file or the content of the opinion of the Commission's Legal Service, which were produced to the General Court (see paragraph 23 above), that the disclosure of that opinion would be justified by such an overriding public interest.

196 This plea in law must therefore be rejected inasmuch as it seeks to show the existence of an overriding public interest justifying disclosure of the legal opinion referred to in point (g) of paragraph 1 above.

197 It follows from the whole of the foregoing that the contested decision must be annulled in so far as it refused both complete and partial access to all the documents requested, with the exception of the legal opinion referred to in point (g) of paragraph 1 above, and in so far as it refused partial access to that legal opinion.

Costs

198 Under the first subparagraph of Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that costs be shared or that each party bear its own costs.

199 In the circumstances of the present case, since the Commission has failed in most of its heads of claim, it is a just reflection of the outcome of the case to order the Commission to bear its own costs and to pay nine tenths of the costs borne by the applicant.

200 The intervener must bear its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Declares that there is no further need to rule on the lawfulness of Decision D(2005) 3286 of the Commission of the European Communities of 7 April 2005, in so far as it refused both complete and partial access to the documents referred to in paragraph 1(a) to (c) and paragraph 2(h) and (j) of this judgment;**

2. **Annuls Decision D(2005) 3286 in so far as it refuses complete access to the documents referred to in paragraph 1(d), (e), (g) and (h) and paragraph 2(b) to (d), (f), (g) and (i) of the present judgment, with the exception of the opinion of the Commission's Legal Service referred to in paragraph 1(g) of the present judgment;**

3. **Annuls Decision D(2005) 3286 in so far as it refuses partial access to the documents referred to in paragraph 1(d), (e), (g) and (h) and paragraph 2(b) to (d), (f), (g) and (i) of the present judgment;**

4. **Dismisses the action as to the remainder;**

5. **Orders the Commission to bear its own costs and to pay nine tenths of the costs incurred by Éditions Odile Jacob SAS;**

6. **Orders Lagardère SCA to bear its own costs.**

Meij Vadapalas Truchot

Delivered in open court in Luxembourg on 9 June 2010.

[Signatures]