Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

6 November 2012*

(Appeals — Concentrations of undertakings in the book publishing market — Regulation (EEC) No 4064/89 — Nominee holding agreement — Ineffective grounds)

In Case C-551/10 P,

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

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

appellant,

the other parties to the proceedings being:

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

defendant at first instance,

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

intervener at first instance,

THE COURT (Grand Chamber),

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

Advocate General: J. Mazák,

Registrar: R. Şereş, Administrator,

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

after hearing the Opinion of the Advocate General at the sitting on 6 March 2012,

gives the following

* Language of the case: French.

Judgment

1 By its appeal, Éditions Odile Jacob SAS ('Odile Jacob') asks that the Court set aside the judgment of the General Court of the European Union of 13 September 2010 in Case T-279/04 *Éditions Odile Jacob* v *Commission* ('the judgment under appeal'), whereby the General Court dismissed its action for the annulment of Commission Decision 2004/422/EC of 7 January 2004 declaring a concentration compatible with the common market and the functioning of the Agreement on the European Economic Area ('the EEA Agreement') (Case No COMP/M.2978 — Lagardère/Natexis/VUP), published in summary form in the *Official Journal of the European Union* of 28 April 2004 (OJ 2004 L 125, p. 54, 'the contested decision').

2 By the contested decision, the Commission of the European Communities cleared the acquisition by Lagardère SCA ('Lagardère'), through Natexis Banques Populaires SA ('NBP') and its subsidiaries Segex SARL ('Segex'), Ecrinvest 4 SA ('Ecrinvest 4') and Investima 10 SAS ('Investima 10'), of publishing assets of Vivendi Universal Publishing SA ('VUP'), on condition that Lagardère complied in full with its commitments, as set out in Annex II to that decision.

3 This case is part of a series of actions brought by the various parties involved in the sale of publishing assets held in Europe by VUP which were sold to Lagardère and Wendel Investissement SA ('Wendel Investissement'), including the case which gave rise to the judgment in Case C-404/10 P *Commission* v *Éditions Odile Jacob* [2012] ECR, relating to access to documents in the course of the concentration control procedure at issue, and the cases concerning the approval of Wendel Investissement as purchaser of some of the assets sold which gave rise to the judgment in Joined Cases C-553/10 P and C-554/10 P *Commission and Lagardère* v *Éditions Odile Jacob* [2012] ECR.

Legal context

4 Article 2 of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, and corrigendum OJ 1990 L 257, p. 13), as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1, and corrigendum OJ 1998 L 40, p. 17) ('Regulation No 4064/89'), headed 'Appraisal of concentrations', provides:

'1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.

3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.

...'

5 Article 3 of Regulation No 4064/89, headed 'Definition of concentration', provides:

'1. A concentration shall be deemed to arise where:

(a) two or more previously independent undertakings merge, or

(b) one or more persons already controlling at least one undertaking, or

one or more undertakings:

acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

...

3. For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

4. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

5. A concentration shall not be deemed to arise where:

(a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

...'

6 Article 4 of that regulation, headed ‘Prior notification of concentrations’, states:

‘1. Concentrations with a Community dimension as referred to by this Regulation shall be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs.

2. A concentration which consists of a merger within the meaning of Article 3(1)(a) or in the acquisition of joint control within the meaning of Article 3(1)(b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

...’

7 Under Article 6 of Regulation No 4064/89, headed ‘Examination of the notification and initiation of proceedings’:

‘1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.

(c) Without prejudice to paragraph 2, where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.

2. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it may decide to declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

...’

8 Article 7 of that regulation, headed ‘Suspension of concentrations’, provides:

‘1. A concentration as defined in Article 1 shall not be put into effect either before its notification or until it has been declared compatible with the common market pursuant to a decision under Article 6(1)(b) or Article 8(2) or on the basis of a presumption according to Article 10(6).

...

5. The validity of any transaction carried out in contravention of paragraph 1 shall be dependent on a decision pursuant to Article 6(1)(b) or Article 8(2) or (3) or on a presumption pursuant to Article 10(6).

...'

9 Article 8 of Regulation No 4064/89, headed 'Powers of decision of the Commission', states:

'...

2. Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 85(3) of the [EEC]Treaty, it shall issue a decision declaring the concentration compatible with the common market.

It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market. The decision declaring the concentration compatible with the common market shall also cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion defined in Article 2(3) or, in the cases referred to in Article 2(4), does not fulfil the criteria laid down in Article 85(3) of the Treaty, it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where a concentration has already been implemented, the Commission may, in a decision pursuant to paragraph 3 or by a separate decision, require the undertakings or assets brought together to be separated or the cessation of joint control or any other action that may be appropriate in order to restore conditions of effective competition.

5. The Commission may revoke the decision it has taken pursuant to paragraph 2 where:

(a) the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit; or

(b) the undertakings concerned commit a breach of an obligation attached to the decision.

6. In the cases referred to in paragraph 5, the Commission may take a decision under paragraph 3, without being bound by the deadline referred to in Article 10(3).'

10 Article 10 of that regulation, headed 'Time limits for initiating proceedings and for decisions', provides:

'...

2. Decisions taken pursuant to Article 8(2) concerning notified concentrations must be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the deadline laid down in paragraph 3.

3. Without prejudice to Article 8(6), decisions taken pursuant to Article 8(3) concerning notified concentrations must be taken within not more than four months of the date on which the proceedings are initiated.

4. The periods set by paragraphs 1 and 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an investigation by decision pursuant to Article 13.

...

6. Where the Commission has not taken a decision in accordance with Article 6(1)(b) or (c) or Article 8(2) or (3) within the deadlines set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9'.

11 Article 14 of that regulation, headed 'Fines', provides:

'1. The Commission may by decision impose on the persons referred to in Article 3(1)(b), undertakings or associations of undertakings fines of from [EUR] 1 000 to 50 000 where intentionally or negligently:

(a) they fail to notify a concentration in accordance with Article 4;

(b) they supply incorrect or misleading information in a notification pursuant to Article 4;

...

2. The Commission may by decision impose fines not exceeding 10% of the aggregate turnover of the undertakings concerned within the meaning of Article 5 on the persons or undertakings concerned where, either intentionally or negligently, they:

(a) fail to comply with an obligation imposed by decision pursuant to Article 7(4) or 8(2), second subparagraph;

(b) put into effect a concentration in breach of Article 7(1) or disregard a decision taken pursuant to Article 7(2);

(c) put into effect a concentration declared incompatible with the common market by decision pursuant to Article 8(3) or do not take the measures ordered by decision pursuant to Article 8(4).

...'

Background to the dispute

12 The facts of this dispute, as set out in paragraphs 10 to 59 of the judgment under appeal, are as follows:

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

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

12 It became apparent however that the timetable for the transfer drawn up by [Vivendi Universal], which wanted to complete the sale and receive the proceeds as quickly as possible, was not compatible with the time needed to complete the formalities required to obtain prior authorisation of this proposed purchase from the competition authorities.

13 Lagardère therefore asked [NBP] to take its place, through the intermediary of one of its subsidiaries created in order to purchase the target assets from VUP, hold them on a temporary basis, then, once clearance of the proposed purchase by Lagardère of the target assets was obtained, sell them back to Lagardère.

14 Further to a commitment given by Lagardère to NBP to bear all the risks associated with the transactions intended to allow completion of the envisaged concentration and to indemnify NBP for all losses, by letter of 8 October 2002 NBP accepted Lagardère's request.

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

16 On 14 October 2002 NBP and Lagardère signed an agreement entitled "NBP/Group Lagardère Agreements relating to VUP", in which Title I, "Structures of purchase" ("HOLDCO"), contained the following clauses:

Sole purpose	Purchase from [Vivendi Universal], holding and sale of VUP businesses ...
Financing of HOLDCO by NBP	100% of the purchase price of the [target] assets, including any possible adjustment to accord with the contract for the purchase of the [target] assets from [Vivendi Universal] Own funds amounting to EUR 38 500 NBP shareholders' loan for the balance
Legal framework of the transaction	Article 3(5)(a) of Regulation ... No 4064/89 ...; objective to resell the entire share capital of HOLDCO to Lagardère

17 Lagardère then submitted to [Vivendi Universal] its offer to purchase the target assets, which provided for the replacement of Lagardère by NBP or any entity in that group.

18 [Vivendi Universal] decided to enter into negotiations with Lagardère in relation to the sale of the target assets.

19 In a joint communication of 23 October 2002 Lagardère and NBP declared:

"The involvement of NBP at the request of [Lagardère] in the process of the VUP purchase is ... with the full agreement of [Vivendi Universal] ...

The involvement of NBP is in accordance with Article 3(5)(a) of Regulation No 4064/89 ..., which enables a financial institution to acquire an undertaking with a view to reselling it without the need to obtain the authorisation of the Commission ... (since such a transaction is not deemed to be a concentration)."

20 On 29 October 2002 [Vivendi Universal] approved the sale to Lagardère of the target assets, consisting of the of book publishing business of VUP in Europe and Latin America, with the exception of Brazil.

21 On 3 December 2002 Investima 10 …, a wholly owned subsidiary of Ecrinvest 4 …, which was itself a wholly owned subsidiary of Segex …, which in turn was wholly controlled by NBP, gave to VUP a formal undertaking to purchase the target assets. In terms of that undertaking, Investima 10 bound itself to conclude with VUP the contract for the purchase of the target assets ("the purchase contract"), provided that VUP took up the abovementioned undertaking.

22 On the same date, Segex and Ecrinvest 4 concluded with Lagardère a sale contract ("the sale contract") whereby Lagardère (through Ecrinvest 4), was entitled to purchase the entire share capital of Investima 10.

23 Under the sale contract, Segex was to sell to Lagardère, firstly, the entire share capital of Ecrinvest 4 owned by Segex and, secondly, two current-account claims due by Ecrinvest 4 to Segex, as they existed at the date of transfer of ownership from Segex to Lagardère.

24 Article 3(2)(i) of the sale contract stated that the date of transfer of ownership to Lagardère of the share capital of Ecrinvest 4 and the two claims due to Segex by Ecrinvest 4 was to be subsequent to the date of Lagardère's obtaining, from the competent competition authorities, clearance to acquire Ecrinvest 4.

25 Under the first and second paragraphs of Article 3(3) of the sale contract, the transfer to Lagardère of ownership of the target assets, in the form of the share capital of Investima 10 as owner of those target assets, was to take place no later than the 30th day following the date of the decision authorising the envisaged concentration or the first working day following that 30th day, if the latter was not a working day.

26 The second paragraph of Article 1(1) of the sale contract specified that the transfer to Lagardère of ownership of the share capital of Ecrinvest 4 would take place on the date of the transfer, upon the completion by Segex of the formalities required for that transfer.

27 The sale contract stated, in the second and fourth paragraphs of Article 1(2) and (3), that the transfer of ownership of the two claims owed to Segex by Ecrinvest 4 would take place on the date of the transfer and that, as from that date, Lagardère would be the creditor of Ecrinvest 4 in place of Segex.

28 Under the second and third paragraphs of Article 3(1) of the sale contract:

"... the sale of the shares [and claims] is definite, final and irrevocable, the decisions of the competent competition authorities determining the date of transfer of ownership in those shares and claims [to Lagardère].

The parties accept that no transfer of ownership of the shares [and claims] can occur before the date of transfer and that, consequently, [Segex] may not sell, either wholly or in part, the shares [and claims] or agree to the creation of securities over them or issue any transferable security giving or potentially giving access immediately or in the future to a portion of the capital or the voting rights of Ecrinvest 4 nor give undertakings in the future or subject to conditions to implement any of the aforesaid transactions."

29 Annex 7 of the sale contract lists in the following terms the decisions of the Investima 10 management board which must be submitted to its supervisory board for the possible exercise of its right of veto:

"1. Sale or transfer by any means or break-up of all or part of the assets to third parties not controlled by [Investima 10], or the grant of securities over all or part of the assets or admission of such third parties to the share capital of the assets or undertakings in the

future or subject to conditions to implement any such transaction, other than for the purpose of implementing an agreement entered into by [Investima 10] at the date of signature of this contract;

Designation of the corporate bodies of the assets;

Implementation of price adjustment clauses and guarantees of rights and liabilities under [the purchase contract].

Implementation of any rights in respect of pre-emption, undertakings to sell or purchase, joint issue and the like in relation to share holdings, stipulated in [the purchase contract].

Distribution of interim dividends."

30 The parties agreed in Article 2(1) and (2) of the sale contract on an overall sale price for the shares and on a price for the sale of the two claims. In accordance with those provisions, on 3 December 2002 Lagardère paid to Segex the price of the shares and the two claims.

31 Segex approved overdraft facilities for Ecrinvest 4, in exchange for the latter approving equivalent overdraft facilities for Investima 10, in order to enable Investima 10 to purchase the target assets, provided that the undertaking to purchase the target assets was taken up by VUP.

32 Lagardère undertook to indemnify Segex, Ecrinvest 4 and Investima 10 for all losses which might arise as a consequence of implementation of the sale contract, except in a case of fraud or gross negligence.

33 Lagardère instructed Crédit agricole Indosuez SA to issue in favour of Segex an on-demand guarantee of its undertakings vis-à-vis Segex. To that end, Lagardère undertook to pay to Crédit agricole Indosuez the amount of any call on the guarantee which Crédit agricole Indosuez was required to meet.

34 Lastly, Lagardère undertook joint and several liability with Investima 10 for a guarantee to VUP's landlord of payment by Investima 10 of the rent due for a building intended to bring together the greater part of the publishing businesses of the VUP group.

35 A draft notification of the envisaged purchase of the target assets was made by Lagardère to the Commission on 10 December 2002.

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

37 On 14 April 2003 Lagardère notified the Commission of its proposed purchase of the target assets, pursuant to Article 4(1) of Regulation No 4064/89.

38 In accordance with Article 4(3) of that regulation, that notification led to the publication of the following notice in the *Official Journal of the European Union* of 17 April 2003 (OJ 2003 C 92, p. 9):

"1 On 14 April 2003 the Commission received notification of a proposed concentration pursuant to Article 4 of Regulation [No 4064/89], by which [Lagardère] acquires, within the meaning of Article 3(1)(b) of the Regulation, control of the undertaking [VUP France] controlled by Investima 10, ultimately controlled by [NBP], by way of purchase of shares.

..."

39 By decision of 5 June 2003, the subject of a notice published in the *Official Journal* on 12 June 2003 (OJ 2003 C 137, p. 14), the Commission, finding that the proposed concentration raised serious doubts as to its compatibility with the common market, initiated an in-depth investigation of that transaction, on the basis of Article 6(1)(c) of Regulation No 4064/89.

40 In recitals 6 to 8 of [that] decision ..., the Commission stated the following:

> "6. The structure chosen by Lagardère for acquiring [the target assets] had to meet one of the seller's desiderata, which was that the concentration could be implemented and the price paid as quickly as possible. It was in order to meet that concern for speed that, at Lagardère's request, [NBP] became involved in the process of acquiring the [target assets].
>
> 7. On 3 December 2002, [NBP] concluded with Lagardère a binding sale contract, enabling Lagardère (via Ecrinvest 4), subject to authorisation of the operation by the Commission, to become the owner of the entire share capital of Investima 10, the company which owns the [target assets]. The purchase price of those shares was immediately paid by Lagardère to Segex, the company owning all the shares constituting the share capital of Ecrinvest 4, on the same date.
>
> 8. Consequently, the concentration is an acquisition of sole control, for the purposes of Article 3(1)(b) of Regulation No 4064/89 ...".

41 Under Article 11(1) of Regulation No 4064/89, the Commission sent requests for information to Lagardère. Since all the information requested was not provided within the specified time, the Commission adopted, on 16 June and 8 August 2003, respectively, two decisions requesting information on the basis of Article 11(5) of Regulation No 4064/89.

42 Consequently, the time-limit of four months, following the date on which proceedings are initiated, within which the Commission is obliged, under Article 10(3) of Regulation No 4064/89 to issue a decision declaring that a concentration is incompatible with the common market, pursuant to Article 8(3) of that regulation, was suspended on two occasions, pursuant to Article 10(4) thereof.

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

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

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

46 On 22 December 2003 the Advisory Committee on concentrations of undertakings unanimously issued an opinion in favour of the preliminary draft of the decision conditionally authorising the notified concentration sent to it by the Commission pursuant to Article 19(3) of Regulation No 4064/89.

47 By the [contested decision], adopted pursuant to Article 8(2) of Regulation No 4064/89, the Commission authorised the notified concentration ..., on condition that Lagardère complied in full with its commitments as set out in Annex II to that decision.

48 In the [contested decision], the Commission stated that VUP and [Hachette Livre SA ("Hachette"), controlled by Lagardère,] were the only two large French-language publishing groups capable of ensuring fully independent development, since their business, includes, in addition to printing, a full marketing operation (publishing and distribution) and they have, in addition, popular pocket-format series. All the other groups are dependent more or less on VUP and/or Hachette in respect of certain businesses, and, in particular, in respect of marketing. By combining the operations of the two largest undertakings in the French-language publishing market, the resultant horizontal, vertical and conglomerate effects of the notified transaction would thus be anti-competitive.

49 The Commission concluded that, in the absence of remedies, the concentration [at issue] would lead in a number of sectoral markets to the creation or strengthening of dominant positions as a result of which effective competition would be significantly impeded.

50 Under its commitments, Lagardère was to sell all the target assets ("the assets sold"), with the exception of the following target assets ... :

...

51 The assets sold represented approximately 60 to 70% of the worldwide turnover of VUP and 70 to 80% of the turnover achieved by VUP in the French-language markets concerned by the concentration [at issue].

52 In [the contested decision], the Commission considered that the effect of Lagardère's commitments would be the elimination of almost all the horizontal overlaps between the businesses of the parties to the concentration [at issue] in all the French-language markets where that transaction created or strengthened a dominant position, with the exception of the market for works of reference where the assets which Lagardère had agreed to sell were however greater than Hachette's initial market share ....

53 The Commission also considered that the result of Lagardère's commitments would, if the sale was to a single buyer, be the elimination of the bulk of the vertical and conglomerate effects of the transaction analysed in [the contested decision], which were caused by, inter alia, the overall size of the merged entity in the French-language publishing sector, and in particular, in the publishing and distribution of books, which contributed to the creation or strengthening of dominant positions in the relevant markets.

54 The Commission concluded that, in the light of Lagardère's commitments, the concentration [at issue] would not lead to the creation or strengthening of a dominant position held by the merged entity in the common market.

55 The Commission therefore decided that, provided that Lagardère fully complied with its commitments in accordance with Article 2(2) and Article 8(2) of Regulation No 4064/89, Lagardère's acquisition of sole control, in terms of Article 3(1)(b) of that regulation, of the [target] assets, was compatible with the common market and the functioning of the EEA Agreement [of 2 May 1992 (OJ 1994 L 1, p. 3)].

56 The [contested] decision was published in summary form in the *Official Journal* of 28 April 2004 ..., pursuant to Article 20(1) of Regulation No 4064/89.

57 Lagardère made overtures to a number of undertakings, including [the appellant], as possible purchasers of the assets sold. [The appellant] expressed its interest in that transaction.

58 On 28 May 2004 Lagardère and Wendel Investissement ... entered into a draft agreement for the purchase of the assets sold.

59 By letter of 4 June 2004, Lagardère asked the Commission to approve Wendel [Investissement] as the purchaser of the assets sold.'

13 By decision of 30 July 2004, of which Odile Jacob was notified, upon its request, by fax of 27 August 2004, the Commission approved Wendel Investissement as the purchaser of the assets sold.

14 The transfer to Wendel Investissement of ownership of the assets sold, called 'Nouvel Éditis', took place on 30 September 2004.

15 By application lodged at the Registry of the General Court on 8 November 2004, the appellant brought an action for annulment of the Commission's decision of 30 July 2004.

16 By judgment of 13 September 2010 in Case T-452/04 *Éditions Odile Jacob* v *Commission* [2010] ECR II-4173, the General Court annulled that decision.

17 By judgment of 9 June 2010 in Case T-237/05 *Éditions Odile Jacob* v *Commission* [2010] ECR II-2245 the General Court annulled the Commission's decision D (2005) 3286 of 7 April 2005 rejecting a request from the appellant to obtain, under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), access to certain documents concerning the concentration control procedure at issue.

18 By judgment of 28 June 2012 in Case C-404/10 P *Commission* v *Éditions Odile Jacob*, the Court set aside the abovementioned judgment of the General Court of 9 June 2010 in Case T-237/05, and dismissed the action brought before the General Court seeking annulment of the Commission decision of 7 April 2005.

The procedure before the General Court

19 By application lodged at the Registry of the General Court on 8 July 2004, the appellant brought an action for the annulment of the contested decision.

20 In support of its claims for annulment the appellant relied on nine pleas in law, all of which were rejected by the General Court in the judgment under appeal.

Forms of order sought by the parties

21 By its appeal, Odile Jacob claims that the Court should:

— set aside the judgment under appeal, and

— order the Commission to pay the costs, including the costs it was ordered to pay at first instance and those incurred by it in this appeal.

22 The Commission contends that the Court should:

— dismiss the appeal, and

— order the appellant to pay the costs.

23 Lagardère contends that the Court should:

— dismiss the appeal, and

— order the appellant to pay the costs.

The appeal

24 In its appeal, Odile Jacob raises four grounds. The first ground of appeal alleges an error of law in the assessment of the meaning of 'concentration' and in the legal characterisation of the nominee holding arrangement, namely the arrangement whereby the target assets were transferred to NBP. The second ground of appeal relates to an error of law in that the General Court failed to draw the legal conclusions from the fact that procedural infringements were committed by the Commission. The third ground of appeal concerns an error of law in that the General Court failed to draw the legal conclusions from the fact that the statement of reasons was insufficient. The fourth ground of appeal relates to the disregard of the criteria relevant to the assessment of whether a dominant position is strengthened and whether the commitments were sufficient.

25 Since the first two grounds of appeal overlap, they can be examined together.

The first and second grounds of appeal, relating to errors of law committed by the General Court: (i) an error of law in the assessment of the meaning of 'concentration' and in the characterisation of the nominee holding arrangement, and (ii) failure to draw the legal conclusions from the fact that procedural infringements were committed by the Commission

Arguments of the parties

26 Odile Jacob claims, by its first ground of appeal, that, by undertaking an examination of the nominee holding arrangement in isolation, without taking into consideration the overall legal arrangement which led to Lagardère's taking control of the target assets, the General Court disregarded the general purpose of the control of concentrations, which is aimed at discerning the economic reality which underlies the legal transactions. According to Odile Jacob, the General Court did not examine the transactions as a whole, one of which was the transaction of transferring an undertaking to a provisional purchaser on the basis of an agreement providing for the future resale of the business to an ultimate purchaser, with the result that, ultimately, exclusive or joint control of the assets sold is conferred on that ultimate purchaser, in this case Lagardère. The exception provided for in Article 3(5) of Regulation No 4064/89 should be interpreted strictly.

27 Odile Jacob states that the General Court erred in approving the creation of a 'warehousing contract' undertaking which evades the control of concentrations. That entity has no independence, since it is subject to the decisive influence of Lagardère, its management possessing some discretion defined by contract. The sale contract, which imposes duties and obligations on the shareholders and management of the new entity vis-à-vis Lagardère, removes the independence of those who have subscribed to it.

28 The Commission and Lagardère consider that this ground of appeal is ineffective, since the object of the contested decision was not to examine the facts from December 2002 onwards, but to assess the compatibility with the common market of the concentration notified on 14 April 2003 in relation to the acquisition of control of the assets of VUP. Consequently, the characterisation of the nominee holding arrangement and the consequences of that characterisation are independent of and do not affect the legality of the contested decision, which gave conditional clearance to that concentration.

29 By its second ground of appeal, Odile Jacob claims that, because the General Court held that the only penalty for failure to notify the concentration at issue within the time-limits prescribed by Article 4(1) of Regulation No 4064/89 was a fine, and not the annulment of the contested decision, the judgment under appeal is vitiated by an error of law. Such a financial penalty is applicable only to undertakings, but under no circumstances to procedural infringements committed by the Commission itself. That notification, on 14 April 2003, in other words more than four months after the signature of the sale contract, had as a consequence the premature implementation of that concentration contrary to the provisions of Regulation No 4064/89.

30 According to Odile Jacob, the General Court failed to draw the legal conclusions from those procedural infringements and, accordingly, validated a circumvention of the regulatory provisions comparable to misuse of power by the Commission, which is contrary both to the scope and the objective of Regulation No 4064/89. The effect of the failure to comply with the time-limits concerned was that the concentration at issue was not examined in good time, that the period for its examination was artificially suspended, and that the price was immediately paid to the seller, thereby conferring a competitive advantage on Lagardère vis-à-vis its competitors.

31 In the opinion of the Commission, the second ground of appeal is both ineffective and unfounded.

32 According to the Commission, the appellant has not demonstrated in what way those alleged procedural infringements could have any effect on the validity of the contested decision. There is nothing in Regulation No 4064/89 to enable the Commission to declare a concentration incompatible with the common market as a form of penalty for an alleged procedural infringement, whether it is committed by the Commission or by the notifying party.

Findings of the Court

33 It must be observed that the General Court held, in paragraph 162 of the judgment under appeal, that the characterisation of the nominee holding arrangement in respect of the target assets is, in any event, of no relevance to the legality of the contested decision.

34 The General Court concluded, in paragraph 164 of the judgment under appeal, that, in any event, even if the nominee holding arrangement at issue were to have permitted Lagardère to acquire, from December 2002, sole control, or control jointly with NBP, of the target assets, such a circumstance could not affect the legality of the contested decision, and rejected the ground of appeal as being ineffective.

35 That conclusion of the General Court is not vitiated by any error of law.

36 The purpose of the action brought by Odile Jacob was solely the annulment of the contested decision by which the Commission declared the concentration at issue compatible with the common market.

37 Even if the transactions carried out in December 2002 enabled Lagardère to acquire, as early as that period, the control, or control jointly with NBP, of the target assets, that circumstance had no consequences other than that the notification of the concentration at issue might be found to have been made late or, possibly, as stated by the General Court in paragraph 154 of the judgment under appeal, that that concentration might be found to have been implemented prematurely, and without clearance under Regulation No 4064/89.

38 Although such findings may entail the penalties prescribed by that regulation, inter alia the imposition of a fine, in accordance with Article 14(1)(a) or (2) of Regulation No 4064/89, they cannot lead to the annulment of the contested decision, since they have no relevance to the compatibility of the concentration at issue with the common market.

39 It must be recalled that Article 7(5) of Regulation No 4064/89 provides that the validity of any transaction which is carried out before its notification and before it has been declared compatible with the common market is to be dependent on the decision taken by the Commission on conclusion of the examination of the notification or of the in-depth examination procedure. As stated in paragraph 47 of the judgment under appeal, the Commission, by the contested decision, authorised the concentration at issue subject to a number of conditions.

40 Consequently, there was no need for the General Court to examine the question whether Lagardère acquired sole control, or control jointly with NBP, of the target assets, by means of the nominee holding arrangement at issue, in order for it to rule on the legality of the contested decision. The findings of the General Court in relation to that matter must therefore be regarded as having been made for the sake of completeness.

41 It must be added that all the grounds of appeal and arguments of the appellant concerning the possible effects of the nominee holding arrangement are, consequently, also ineffective.

42 Therefore, the first ground of appeal must be rejected as being ineffective and the second ground of appeal must be rejected as unfounded.

The third ground of appeal, relating to an error of law committed by the General Court in that it failed to draw the legal conclusions from the fact that the statement of reasons in the contested decision was insufficient

Arguments of the parties

43 Odile Jacob considers that the General Court should have penalised the lack of reasons in the contested decision as regards the characterisation of the nominee holding arrangement.

44 The General Court, by validating the absence of any duty to state reasons concerning the application by the Commission of an exception to the mandatory provisions of Regulation No 4064/89, allowed an infringement of the principles of equal treatment and legal certainty. Lagardère thus benefited from a position which was more advantageous than that of its competitors who took part in the sale of the target assets, thereby infringing the principle of equal treatment of those responding to the call for offers to purchase those assets. The Commission is not entitled to abandon its usual decision-making practice in the area of control of concentrations without a statement of reasons, unless it is thereby to disregard the principle of legal certainty and the principle of protection of legitimate expectations.

45 The Commission contends that the appellant has not at all demonstrated in what way the statement of reasons in the contested decision and the judgment under appeal were insufficient in relation to the nominee holding arrangement. In any event, the Commission states that questions relating to the characterisation of the nominee holding are of no relevance to the operative parts of the contested decision. Irrespective of how the nominee holding arrangement is characterised, it is undeniable that the concentration at issue, as notified on 14 April 2003, was indeed a concentration and that, accordingly, the Commission was not required to rule on and express its position on the nominee holding arrangement itself. The discussion of all the other grounds by the General Court was for the sake of completeness, and those grounds cannot be used in order to call into question the statement of reasons in the judgment under appeal.

Findings of the Court

46 In claiming that the General Court should have penalised the absence of a statement of reasons in the contested decision as regards the characterisation of the nominee holding arrangement, Odile Jacob's argument is based on the premiss that the characterisation of that arrangement is relevant to the legality of the contested decision.

47 However, it is clear from paragraphs 37 to 40 of this judgment that the characterisation of the nominee holding arrangement is of no relevance to the legality of the contested decision.

48 In any event, in accordance with settled case-law, when a measure is drafted, the institutions of the European Union are not obliged to define their position on matters which are plainly of secondary importance or to anticipate potential objections. The degree of precision of the statement of the reasons for a decision must be weighed against practical realities and the time and technical facilities available for making the decision. Thus, the Commission does not infringe its duty to state reasons if, when exercising its power to examine concentrations, it does not include in its decision appraisal of a number of aspects of the concentration which appear to it to be manifestly irrelevant or insignificant or plainly of secondary importance to the appraisal of that concentration (see Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 167 and the case-law cited).

49 It follows that where the Commission declares a concentration to be compatible with the common market on the basis of Article 8(2) of Regulation No 4064/89 the requirement to state reasons is satisfied when that decision clearly sets out the reasons for which the Commission considers that the concentration in question, where appropriate following modification by the undertakings concerned, does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it (see *Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 168).

50 In those circumstances, it is clear from paragraphs 234 to 240 of the judgment under appeal that the General Court, in relying on recitals 6, 7 and 989 to 1003 of the contested decision, examined the statement of reasons in that decision and concluded that it was sufficient.

51 It follows that the third ground of appeal must be rejected as unfounded.

The fourth ground of appeal, relating to the disregard of the criteria relevant to the assessment of whether a dominant position is strengthened and whether the commitments were sufficient

Arguments of the parties

52 Based on alleged errors of law in respect of the analysis of the concentration at issue, the fourth ground of appeal has two parts.

– The first part of the fourth ground of appeal

53 According to Odile Jacob, the General Court, by holding that the break-up of Éditis has no influence on the appraisal of the compatibility of the concentration at issue with the common market, did not make an appropriate assessment of the creation or strengthening of a dominant position on the market concerned. In a case of the break-up of one of two undertakings forming a non-dominant duopoly on the market, the General Court could not rule out, as a matter of principle, the possibility that the

weakening of one of the two competitors operating on that market might result in the creation or strengthening of a dominant position of the other. Consequently, the General Court should have taken into account the effect of the break-up of Éditis on the creation of a dominant position.

54 In the opinion of the Commission, the General Court did not at all lay down a legal rule that the possibility that the weakening of one of two competitors might result in the creation of a dominant position was ruled out as a matter of principle. The General Court merely stated that the relevant criterion was the creation or strengthening of a dominant position and that the concept of a break-up, an expression which was an exaggeration, was not in itself a sufficient criterion in order to identify a creation or strengthening of a dominant position, those being the result of several factors taken together. The General Court therefore made a correct analysis of the ability of Éditis to exercise competitive pressure after the sale of the assets sold.

55 Lagardère considers that it is impossible to take into account the break-up of the target, as part of the commitments, for the purposes of appraisal of a dominant position. At the initial stage, the Commission should assess whether the notified operation creates or strengthens a dominant position likely to impede competition. At that stage, the commitments proposed by the parties are not taken into account and the notified operation is analysed as a whole. Only during second and third stages, in other words subsequently, does the Commission examine whether the commitments make it possible to resolve the identified competition problems and whether those commitments are actually implemented. Consequently, the alleged break-up of the target is the result of the analysis of the commitments and is therefore of no relevance at the stage of appraisal of a potential dominant position.

– The second part of the fourth ground of appeal

56 As to whether the commitments which made it possible to obtain conditional clearance for the concentration at issue were sufficient, Odile Jacob considers that, first, the General Court failed to take into account the need to restore and develop effective competition. The General Court, by failing to observe that the wording of the commitments made possible one alternative of either maintenance 'or' development of competition, committed an error of law. According to the appellant, those two conditions are cumulative, as stated in recital 13 of the preamble to Regulation No 4064/89. The degree of effective competition in the common market not only cannot be inferior to that which existed prior to the operation, but further the structure of the market should allow an actual increase in that level of competition in the short term.

57 Secondly, the General Court did not properly assess the ability of the purchaser of the assets sold to maintain effective competition. According to Odile Jacob, a financial buyer, which has no experience in the market concerned and whose staff could be altered, does not have the ability to maintain and develop the competition of the publishing businesses concerned. Consequently, Éditis is structurally weakened and the General Court, by not penalising the Commission because it failed to require an upfront buyer, committed an error of law capable of calling into question the concentration at issue.

58 On the effectiveness of the commitments, the appellant maintains that the judgment under appeal correctly analysed the effects linked to portfolio and conglomerate effects of the concentration at issue, but failed to verify whether the commitments undertaken by Lagardère were legally sufficient. The General Court thus validated a 'fragmented' approach which merely assessed an overlap on a market by market basis without taking into consideration in a more comprehensive manner the effects of that concentration on all the relevant markets, as the Court of Justice did in *Bertelsmann and Sony Corporation of America* v *Impala*.

59 In the opinion of the Commission, the appellant relies on a mistaken premiss as the basis of the fourth ground of appeal. The Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98 (OJ 2001 C 68, p. 3, 'the Remedies Notice'), refers only to the 'restoration' and 'maintenance' of competition, so that those remedies can ensure that a degree of competition, which existed before the concentration concerned, is maintained or restored. However, in no circumstances can there be any question of improving that level of competition, in a form of market engineering or economic planning.

60 On the capacity of the purchaser of the assets sold, the Commission states that that argument amounts in reality to disputing the General Court's analysis of the facts. In any event, a potential competitor is nothing more than an actor who as yet is not present as a competitor on a given market, but who possesses the means and incentives to enter it. In the present case, Éditis was an independent undertaking in possession of all the assets required to be a competitor on the market concerned, namely approximately 80% of the target assets, while also having access to its own administrative, management and logistical structures. The General Court was correct to hold that a financial buyer was not necessarily lacking in the experience required, since it could rely on the existing senior management of Éditis.

61 Alternatively, the Commission states that the situation in the present case is clearly distinguishable from situations where an upfront buyer is chosen by the Commission. In the latter circumstance, there are situations where the assets sold do not in themselves amount to a viable operator, but could nonetheless become one depending on the identity of the purchaser. That does not apply to the concentration at issue, where Éditis was a viable operator, active in the markets concerned, possessing all the resources required to compete with Lagardère. Odile Jacob's argument on the specific features of the non-dominant duopoly are irrelevant, since that factor is not one of the criteria stated in the Remedies Notice for the choice of the ultimate purchaser.

62 As to whether the commitments undertaken by Lagardère were legally sufficient, the Commission emphasises that the much reduced extent of the assets in the form of trade marks and market positions previously held by VUP, which were retained by Lagardère subsequent to its commitments, rules out the possibility that the addition of those positions to those held by Lagardère before the concentration at issue might create portfolio or conglomerate effects. The extent of the trade marks and positions on the various publishing markets, held by Lagardère before the concentration, are not significantly enlarged by the addition of the retained target assets, whereas the extent of trade marks and market positions held by Éditis subsequent to the commitments on the French-language markets is essentially comparable to that held by VUP before the concentration.

63 Lagardère states that there is no provision in Regulation No 4064/89 indicating that a concentration or the commitments stemming from it must necessarily lead to an increase in the existing level of competition. There can be no requirement that those commitments make it possible to develop competition beyond the initial competitive position.

64 As regards the arguments on the validation of the conditions for the choice of the purchaser of the assets sold, Lagardère considers them to be inadmissible.

65 As to the commitments undertaken by Lagardère and the question of the removal of any additional market share over all the markets at issue, Lagardère states that the General Court correctly considered that, on the basis of its assessment of the facts, the effect of those commitments was in fact to bring about a sufficient reduction of the size of the new entity and a very marked reduction of any potential 'range effect'. The commitments thus undertaken were, consequently, sufficient.

Findings of the Court

66 As regards the first part of the fourth ground of appeal, Article 2(2) and (3) of Regulation No 4064/89 confer on the Commission the task of ensuring that the concentrations referred to it for appraisal do not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

67 It is therefore not the duty of the Commission, as the appellant would suggest, to establish a perfect competition system and to decide, in place of the economic actors, who should operate on the market.

68 The Commission, under Article 2(1)(a) of that regulation, is to take into account the need to maintain and develop effective competition in the common market. That is a requirement which constitutes a major factor in the appraisal which the Commission must undertake, but it cannot alter the rule stated in Article 2(2) of the regulation.

69 As regards the alleged break-up of Éditis, contrary to the position of the appellant, the General Court did not as a matter of principle rule out the possibility that the weakening by break-up of one of two undertakings forming a non-dominant duopoly in the market might have the result of creating or strengthening a dominant position of the other.

70 It is clear from paragraphs 285 to 287 of the judgment under appeal that the General Court did no more than find that the sale of target assets amounting originally to 60% of VUP's overall turnover and the retention by Lagardère of the remaining target assets, therefore, the alteration of the initial position of the parties concerned in the various sectoral markets affected, were not, in themselves, sufficient ground to determine whether the concentration created or strengthened a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.

71 Lastly, it must be observed that, in paragraph 290 of the judgment under appeal, the General Court considered that the break-up of Éditis was not substantiated and added, in paragraph 293 of that judgment, that, in any event, the competitive capacity of Nouvel Éditis is dependent on the capacity of the purchaser of the assets sold to maintain or develop effective competition. That Éditis may have been broken up does not, in itself, constitute a criterion which may be relied to support a finding of its potential weakening on the market.

72 The first part of the fourth ground of appeal must therefore be rejected.

73 As regards the second part of the fourth ground of appeal, nor can it be maintained by Odile Jacob that the General Court erred in its assessment of the commitments in relation to the capacity of a financial buyer.

74 As regards the choice of purchaser of the assets sold, it is not for the Commission itself to select a purchaser who might theoretically satisfy the optimal conditions for perfect competition on a specific market.

75 It is clear from paragraph of 49 of the Remedies Notice that, in order to ensure the effectiveness of the commitments undertaken, the sale to a purchaser is subject to the prior approval of the Commission.

76 Consequently, it is open to the Commission merely to approve or not approve a purchaser who is submitted to it and to determine, in accordance with paragraph 49 of the Remedies Notice, that the purchaser is a viable existing or potential competitor, independent of and unconnected to the parties, possessing the financial resources, proven expertise and necessary incentive to be able to maintain and develop the business as an active competitive force in competition with the parties.

77 In that regard, it must be observed that the General Court considered, in paragraphs 341 to 343 of the judgment under appeal, that the purchaser of the assets sold met the criteria defined in paragraph 10 of Lagardère's commitments.

78 Further, even if a financial buyer does not possess any prior experience in the market concerned, it could retain the existing managers of the entity sold or even equip itself with other skill resources available in the sector concerned.

79 As regards the fact that the General Court did not undertake an analysis of the conditions for the selection of the upfront buyer of the assets sold, Odile Jacob claims that the viability of those assets was dependent on the identity of the purchaser since that purchaser had to be a competitor at least as efficient as Lagardère in order to ensure that the inevitable disruption of the duopolistic balance should not result in the creation of a dominant position for the new entity.

80 It must be observed that, as indicated by the General Court, the appellant does not demonstrate in what way the selection of an upfront buyer was required in the present case.

81 Paragraph 20 of the Remedies Notice provides that, in certain circumstances, the viability of the divestiture of assets is dependent on the identity of the purchaser. In such circumstances, the concentration is not to be cleared unless the parties undertake not to complete the notified operation before having entered into a binding sale agreement with an upfront buyer approved by the Commission.

82 As stated by the General Court in paragraphs 290 and 291 of the judgment under appeal, Éditis was a viable operator, active in the markets concerned, possessing all the resources necessary in order to compete actively with Lagardère. The selection of an upfront buyer was therefore not required in order to protect the viability of the assets.

83 Lastly, as regards the final argument on the question of whether Lagardère's commitments were sufficient in the light of the findings made by the Commission on the existence of portfolio and conglomerate effects, suffice it to observe that that argument was previously raised at first instance, as is clear from paragraphs 296 to 300 of the judgment under appeal, and that it was analysed by the General Court in paragraphs 302 to 321 of that judgment.

84 Under the pretext of a claimed error of law, the reality is that Odile Jacob is seeking to challenge the appraisal of the facts made by the General Court.

85 In accordance with settled case-law, the General Court has exclusive jurisdiction to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it, and to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice (see, inter alia, the judgment in Case C-289/11 P *Legris Industries* v *Commission* [2012] ECR, paragraph 51 and the case-law cited).

86 In the present case, the basis of Odile Jacob's claims is not that there was any substantive inaccuracy in the findings made by the General Court attributable to the documents submitted or that there was any distortion of the clear sense of the evidence submitted to the General Court. The appellant criticises the appraisal, as such, made by the General Court in respect of the facts, the evidence and the related arguments, and therefore, in reality, complains that the General Court wrongly analysed the sufficiency of the remedies accepted by the Commission in relation to the portfolio and conglomerate effects of the concentration at issue subsequent to the divestiture agreed by Lagardère.

87 Consequently, that argument must be rejected as being inadmissible on appeal.

88 It follows that the fourth ground of appeal must be rejected as being in part unfounded and in part inadmissible.

89 Since none of the grounds of appeal raised by the appellant has been upheld, the appeal must be dismissed.

Costs

90 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where an appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those Rules of Procedure, which applies to appeal proceedings pursuant to Articles 184(1) and 190(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Odile Jacob has been unsuccessful and the Commission and Lagardère have applied for costs, Odile Jacob must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders Éditions Odile Jacob SAS to pay the costs.

[Signatures]