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Advocate General's Opinion in Joined Cases C-553/10 P and C-554/10 P  
European Commission and Lagardère SCA v Éditions Odile Jacob SAS

## **According to Advocate General Mazák, the Commission's approval of Wendel as purchaser of Editis's assets in the Lagardère/VUP merger should be confirmed**

*In annulling that decision at first instance, the General Court committed numerous errors which should lead the Court of Justice to set that judgment aside*

On 7 January 2004 the Commission adopted a decision<sup>1</sup> authorising the acquisition of Vivendi Universal Publishing ("VUP"), which subsequently became Editis, by Lagardère subject to certain conditions. The acquisition would result in the combination of the two largest French publishers, Hachette, a subsidiary of Lagardère, and VUP. Therefore, Lagardère was required to sell all of Editis's assets with certain exceptions. This sale was to be subject to the Commission's approval.

The publishing house Éditions Odile Jacob SAS declared its interest in acquiring the assets to be sold by Editis. However, Lagardère chose to ask the Commission to approve another company, Wendel Investissement SA, as purchaser.

In February 2004 the Commission approved, and Lagardère subsequently appointed, the auditing firm S., represented by its president, B., as trustee for the transaction. On 5 July 2004 the firm S. submitted its report to the Commission that Wendel's purchase of the assets was compatible with the criteria identified by the Commission. As a result, on 30 July 2004, the Commission approved the purchase of the assets by Wendel<sup>2</sup>.

On 13 September 2010 the General Court, whilst rejecting a challenge to the conditional authorisation decision in one judgment<sup>3</sup>, annulled the approval decision at the request of Odile Jacob in a separate case<sup>4</sup>. The General Court found that questions might be raised as to the neutrality of the trustee, B., as for a period of time he was simultaneously the independent trustee and a member of the executive board of the company which later became Editis. He therefore did not meet the condition of independence required and this was sufficient to annul the approval decision.

Both Lagardère and the Commission have appealed against this ruling to the Court of Justice.

In today's Opinion, **Advocate General Ján Mazák considers that the General Court committed a number of errors in its judgment which should lead the Court of Justice to set it aside.**

**Firstly**, in Advocate General Mazák's opinion, **the General Court erred by merely finding, in an abstract manner, that the trustee, B., lacked independence vis-à-vis Editis, rather than showing concretely how that alleged lack of independence was liable to affect his assessment** of the qualities of Wendel as purchaser of the assets of Editis.

<sup>1</sup> Commission Decision 2004/422/EC of 7 January 2004 (OJ 2004 L 125, p. 54)

<sup>2</sup> Commission Decision D(2004) 203365 of 30 July 2004 relating to the approval of Wendel Investissement SA as purchaser of the assets sold.

<sup>3</sup> Case [T-279/04](#) *Éditions Odile Jacob v European Commission*. This judgment is the subject of separate pending appeal proceedings before the Court of Justice (Case [C-551/10 P](#) *Éditions Odile Jacob v Commission*, see also Press Release No [22/12](#))

<sup>4</sup> Case [T-452/04](#) *Éditions Odile Jacob v European Commission*. See also Press Release [84/10](#).

In this respect the Advocate General points out that, in order to assess whether B. was independent, the General Court should have based itself on EU concepts, rather than referring to French law. Under Commission Best Practice Guidelines in this area, such trustee independence with regard to the target undertaking (in this instance Editis) is not required. Moreover, the Commission's Standard Model for Trustee Mandates explicitly accepts that the trustee may be a member of the board of the target company where this is necessary.

The Advocate General also highlights that a lack of independence is of no legal significance unless it is established that that person took account in his assessment of an interest other than that of the proper exercise of his duties. Therefore, even if it had been established that the trustee was not sufficiently independent, the General Court was still obliged to assess, on the basis of concrete elements provided by the parties, how that lack of independence had affected the trustee's capability to evaluate Wendel's suitability. This it did not do.

Indeed, in the present case, Advocate General Mazák believes that the mandate of B. did not in any way compromise his mission to perform his duties with objectivity and transparency. On the contrary, far from being a conflict of interest, his mandate in his role as an independent third party member of the board of Editis and his mandate as trustee were both concerned with the independence of Editis and accordingly were complementary missions.

**Secondly, the General Court's reasoning contains errors of law, contradicts itself and misinterprets the facts in its finding that the trustee's report had a decisive influence on the approval decision.**

Advocate General Mazák finds that it is clear that the Commission could not, and did not, rely solely on the trustee's report when taking its decision. Whilst the Commission is required to take the trustee's report into account it is not legally bound by his opinion and still has to carry out its own investigation in order to satisfy itself that the purchaser does indeed satisfy the conditions. This the Commission clearly did, showing before the General Court that it had carried out an in-depth investigation with a case-file running to several thousand pages. The purely formal assessment carried out by the General Court based on the similarity of the terms used in the trustee's report and the Commission decision was erroneous and led it to a misconceived conclusion.

Thirdly and finally, Mr Mazák considers that **the General Court manifestly erred in law when it annulled the approval decision on the sole basis of the alleged lack of independence of the trustee, without having assessed whether the Commission's decision would have been any different in the absence of that alleged flaw.**

In the Advocate General's view, it is settled case-law that an irregularity, except for cases of infringement of essential procedural requirements, does not lead to the annulment of a decision unless it is established that, in the absence of that irregularity, a different decision would have been taken. Despite this, the General Court failed to show how the trustee's presumed lack of independence had any consequence for the Commission's assessment of Wendel's qualities to purchase the assets of Editis but merely concluded in an altogether automatic and laconic manner that that irregularity rendered the decision void.

In light of this, **Advocate General Mazák considers that the Court of Justice should set aside the judgment of the General Court.** Moreover, the Advocate General deems it appropriate, given the state and length of the proceedings in this case, for the Court of Justice to give final judgment itself on the matter. That being so, he suggests that the Court of Justice **reject all the pleas raised by Odile Jacob**, dismiss that company's action at first instance **and confirm the Commission's approval decision.**

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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