Odile Jacob: the rehabilitation of the parking arrangement

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More than six years after the case was launched, the General Court rendered its judgment in Case T-279/04, Editions Odile Jacob Sas v. Commission, relating to the appeal against a 2004 decision of the European Commission approving the acquisition by French publisher Lagardère of its rival Vivendi Universal Publishing ("VUP").
The saga begins in 2002, when Vivendi Universal, VUP's parent, decides to sell VUP as quickly as possible. Lagardère is one of the main potential buyers, but given that a Lagardère/VUP combination is virtually certain to raise significant competition issues, the timing of the Commission's review under the EC Merger Regulation does not fit Vivendi Universal's agenda. As a solution, the parties enter into a so-called parking arrangement: Lagardère enters into an agreement with Natexis Banque Populaire ("NBP"), a financial institution, which purchases VUP on 20 December 2002, with the express commitment to resell the assets to Lagardère, as soon as the latter receives Commission approval.

The benefits are clear. Vivendi Universal immediately receives the purchase price and sells the target assets, without having to endure the bar on implementation in Article 7 of the ECMR. The acquisition of VUP by NBP is not notified, because it falls under the exemption of Article 3.5.(a) of the ECMR (at the time, the prior Merger Regulation was still in force, but the relevant article is still the same under the new Regulation 139/2004), whereby the temporary holding of securities by credit institutions or other financial institutions with a view to reselling them is not considered a notifiable concentration. And Lagardère manages to acquire VUP.

Or better put, part of VUP, because after a full Phase II investigation, the Commission approves the acquisition on 7 January 2004, subject to Lagardère agreeing to divest a significant part of VUP to a third party. This decision was then appealed by Odile Jacob, which was one of the candidate purchasers of the divested business (which was ultimately sold to Wendel).

On appeal, Odile Jacob's main arguments against the parking arrangement were first, that the requirements of Article 3.5.(a) on temporary acquisitions of securities by financial institutions were not met and second, that NBP was only a front and that in reality, Lagardère had acquired control over VUP already since December 2002, when the NBP/VUP transaction was completed, and thereby violated the ECMR suspension obligation.

The Court focuses mainly on the second argument, and (somewhat awkwardly) does not offer a detailed analysis of Odile Jacob's arguments on the applicability of Article 3.5.(c). Instead, the Court focuses on the issue whether Lagardère has acquired control before having obtained approval from the Commission.

Odile Jacob argued that NBP was acting under the orders of Lagardère mainly because Lagardère (i) had financed the creation of the acquisition vehicle used by NBP to acquire VUP and the acquisition itself; and (ii) had guaranteed any losses that NBP may suffer from holding the VUP assets. Here, the judgment does provide a rigorous analysis of Lagardère's rights over VUP (or lack thereof) in the interim period during which NBP held the assets for Lagardère. The Court concludes that the agreement between Lagardère and NBP did not leave any room for Lagardère to exercise control over VUP. Specifically, it found that, until the Commission's 2004 ECMR approval decision, Lagardère did not acquire any ownership rights over VUP, was barred from appointing any representatives on the governance bodies of NBP's acquisition vehicles which had acquired VUP and was not entitled to receive any sensitive, competitive or strategic commercial information relating to VUP (except insofar necessary for the preparation of the Form CO). There were only a limited number of instances where NBP would have needed to seek Lagardère's cooperation with regard to decisions relating to VUP – for example, a general strike, a liquidity crisis or the collective resignation of management. And even in these circumstances, the agreement stipulated that Lagardère would only participate in the decision-making process after having received the authorization from the Commission. Last, the Court took the position that Lagardère's financing of the NBP/VUP acquisition did not amount to the exercise of control, given that the financing was part of the very nature of the arrangement whereby NBP would "carry" the VUP assets until Lagardère could acquire them.

The judgment does not answer all of the questions on the parking arrangement. However, it is clear that the Court adopts a favourable approach, which to a certain extent goes against the Commission's general reluctance in recent years to accept parking arrangements.

The Commission's Consolidated Jurisdictional Notice notes rather harshly that "[f]rom the date of the adoption of this Notice, the Commission will examine the acquisition of control by the ultimate acquirer, as provided for in the agreements entered into by the parties. The Commission will consider the transaction by which the interim buyer acquires control in such circumstances as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer." By doing so, the Commission raises questions about the applicability of Article 3.5.(a) to the interim parking arrangement and even leaves the possibility open for the Commission to oppose the closing of the interim step until the overall transaction is approved by the Commission. This position arguably reduces the usefulness of parking arrangements in a significant way.

The Court's judgment could certainly have been be clearer on a number of points. However, it is clear that the Court, through a number of its dicta and its general acceptance of the NBP/Lagardère parking arrangement seriously questions the validity of the Commission's approach as currently reflected in the Jurisdictional Notice.

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