The COMP/M.2978 Lagardère/Natexis/VUP case concerned the proposed acquisition of Edits (formerly called Vivendi Universal Publishing or VUP) by the Lagardère conglomerate. Before the transaction, Edits was the leader in the publishing, marketing and distribution of French language books and Lagardère’s subsidiary Hachette Livre was the second player in the sector. Lagardère is also active in book retailing, broadcasting and newspaper publishing as well as distribution.

The case, following formal notification on 14 April 2003, resulted in a number of decisions by the Commission: Article 6(1)(c) (opening of proceedings) on 5 June 2003, Article 9 (refusal to refer the case to France) on 23 July 2003, two Article 11(5) Decisions (suspending the procedure) and the final Article 8(2) Decision authorising Lagardère to acquire around 40% of Edits on 7 January 2004. This case also featured numerous complaints from associations of readers, retailers, book wholesalers, publishers, authors and illustrators.

The Commission's investigation and analysis revealed that the acquisition of the entire Edits publishing business, as planned in the transaction notified to the Commission, would have produced a heavily dominant group with a turnover at least seven times that of its nearest rival in French-speaking countries of the European Union. In reply to the Commission's objections, Lagardère undertook to sell the entirety of Edits with the exception of certain assets (Larousse, Dunod, Dalloz and the Anaya group) making up around 40% of the worldwide turnover of the company, while only below 25% of Edits in the French-speaking regions of the EU (i.e. the relevant markets) was retained.

I – The French-speaking publishing sector

The publishing sector is best described as a ‘book chain’, where a series of steps allow the production, marketing, distribution and sale of books. At the top of the chain is the acquisition of content — publishing rights — which are provided by authors or by other publishers. The book has then to be marketed and distributed (1) towards various types of resellers (either distinct kinds of retailers or wholesalers). At the end of the chain, retailers sell the book to the final consumers.

Along that book chain, the French-speaking publishing sector is characterised by different tiers of players, depending on their scope and degree of vertical integration. The first tier is made of Hachette Livre and Edits, which not only produce all kinds of publications, but are also active through the entire book chain including with their own wholesaling structures as well as Hachette Livre's retailing activities through Virgin stores, Furet du Nord, and the Relay outlets. The second category of players is made of four medium sized groups, three of which (Gallimard, Flammarion and Seuil) are vertically integrated (marketing/distribution and pocket format (2) series) but partly dependent on Hachette Livre and/or Edits for marketing as regards the smaller outlets, and the fourth group (Albin Michel) is rather more dependent, as a significant proportion of its books are marketed by Hachette Livre and its pocket format books are generally published by LGF, an Hachette Livre subsidiary. Finally, the third category is made of small publishers heavily, and sometimes totally, dependent on the larger publishers for the marketing of their products and the publication of their pocket format books.

(1) The book distributor will typically handle logistics as well as all financial transactions (such as invoicing) related to the sales of books by publishers to resellers (in that context, a specific provision is also given to resellers, in the case of new publications, to return unsold books to the original publisher).

(2) ‘Livres de poche’ or ‘pocketbooks’ can be defined as books with specific characteristics such as the format (usually 10x18 cm or 11x17.8cm), a soft cover and the fact that they usually belong to a collection.
This structure leads to the situation in which large publishers usually market and distribute the books of their smaller competitors who lack the minimum scale required to afford sales representatives or distribution facilities. For that reason, the Commission has identified separate markets for marketing and sales services to third parties and for distribution services to third parties, where demand originates from non-integrated publishers and supply from the vertically integrated publishers, who in addition to marketing and distributing their own books, also market and distribute the books of smaller competitors.

Against that background, the Commission found that competition between publishers essentially occurred at two levels of the book chain: first, access to publishing rights, then access to the resellers’ shelves. The economics of the book industry show that it is an inherently risky activity as sales performances can vary greatly from one book to the other, especially for creative works, like general literature (novels, fictions, essays, etc). It is therefore critical for a publisher to be able to work with renowned authors and be properly available on the store shelves in order to maintain some stable resources and remain competitive.

In that respect, the Commission’s investigation showed that marketing and distribution are critical in the book chain to the extent they enable access to the retail networks, and ensure the proper transit of physical and financial flows. Given the important volumes produced (1), the success of a book largely depends on its appropriate display on the tables and shelves of the retail outlets. The capacity to properly market a book to retailers (wholesalers, bookshops and hypermarkets) has therefore a critical impact on its commercial success. For that reason, marketing and sales as well as distribution are important not only as services to third party publishers, but also given their vertical relationship with the sales markets. The strong position held by a given publisher in marketing and distribution services will consequently improve its position on the book sales markets towards retailers, since that publisher will account not only for its own production but also for that of the other publishers it markets and distributes. In turn, this situation will increase the attractiveness of that strong vertically integrated publisher towards authors.

**II – Product market definition issues**

An important number of product markets were identified along the book chain: i) publishing rights, ii) marketing and sales as well as distribution services, and iii) sales of books (at distinct retailer levels).

As regards publishing rights, Lagardère had taken the view that there existed no market between authors and publishers, because relationships between them would not be based on traditional market mechanisms but rather on trust, mutual understanding and collaboration. The Commission’s investigation revealed that even though such elements played a role, other elements, such as the compensation paid for the rights, exposure to media and marketing as well as distribution capabilities towards a large number of retailers were equally important factors for authors when they select their publisher. The Commission found that while unknown or new authors were generally not tendered bids by publishers seeking to acquire their works, that was the case for successful authors. Such findings were strengthened by the fact that a number of authors, in particular foreign authors, are represented by literary agents, who are particularly sensitive to economic and monetary considerations. In the end, taking account of the type of contracts, the nature of the rights and the differences in prices, types of book written and whether it was a collective or an individual work, the Commission identified a number of relevant publishing rights markets: (i) markets for primary rights for general literature, cartoons, university and professional publications in French and in foreign languages respectively, as well as (ii) markets for secondary rights for pocket books and for books sold through book clubs.

As far as marketing and sales and distribution services to third publishers are concerned, the Commission found that, despite the fact that these services were sold to third-party publishers through a single contract that covered the marketing and sales of the books to different types of resellers (including wholesalers) as well as the distribution of the books, several distinct markets ought to be distinguished, because of the specificities of the services concerned, and because of demand side and product side lack of substitutability. For that reason, distinct markets for marketing and sales services and distribution services were retained. In addition, the Commission found that marketing and sales services had to be distinguished according to the types of resellers

(1) More than 40,000 new publications each year (more than 600 new novels were produced for the literary opening of September 2002, which in practice means that no one is able to perfectly know the entire offer of books).
that were handled by the service providers. The Commission found that bookshops, hypermarkets and book wholesalers ought to be distinguished because of the differences for marketers in handling them and because client publishers valued the access to these three types of resellers differently (1). The question was also raised about whether services for third parties constituted distinct markets or whether they should include services for own account, since integrated publishers may use the same resources as the publishers who buy marketing and sales and distribution services from them. In that respect, the Commission followed the Endemol judgement (2) to conclude that only services to third parties constituted a market, because marketing and distribution capabilities are mostly for own use, involve fixed costs investments and because only capacities that are not used internally are offered to third parties. At the same time, the Commission considered that the overall position of the various players should be taken into account in the competitive assessment since, as already explained above, it bears an impact on a given vertically integrated publisher's position towards resellers.

Finally, as regards markets for the sale of books from publishers to resellers (i.e. retailers and wholesalers), the Commission adopted the general approach towards cultural goods that supply side substitutability should be the main determinant of relevant markets. From a strict demand side perspective, most of the books are indeed unique and therefore not substitutable. But from a supply side perspective, it is clear that strip cartoons publishers have no difficulty to produce a new strip cartoon while they will find it more difficult to produce a novel or a dictionary. For that reason, and also because of the various product characteristics and other distinctions, the Commission considered that the sale markets had to be distinguished according to the broad categories of books considered: (i) general literature titles, (ii) children's books, (iii) art books, (iv) guides and manuals, (v) strip cartoons, (vi) educational books, (vii) academic and professional books, (viii) reference works and (ix) books published in instalments. In addition, an important issue was to clarify whether books in pocket format (typically 18x11 cm) should be distinguished from books in larger format. The Commission found that in the field of general literature, pocket books constituted a distinct market versus large format books. Reasons for this include distinct formats and visual identities, distinct types of rights, distinct prices and cost structures, distinct market demand trends, distinct corporate structures as well as distinct publication timings and life cycles (3).

Furthermore, the Commission took the view that book sale markets had to be distinguished according to the type of resellers, between bookshops, hypermarkets and wholesalers, as it also had found for marketing and sales services. This is due to structural properties that distinguish these types of resellers, notably the different kinds of books they buy, the ways in which commercial relations are organised and the different conditions governing rebates levels, resulting in observed differences in the rebates obtained by the three types of resellers. There are in addition specific barriers in accessing hypermarkets and wholesalers, linked to product offer, financial entry costs, brand image and other factors too. The Commission also found that wholesalers served a different type of retailers, like press outlets, food stores or other specialised shops for which books are only secondary products (such retailers are generally called 'level 3' retailers). For that reason, a market for the sales of books from wholesalers to level 3 retailers was retained.

III – Geographic market definition and the Article 9 decision

Article 9 of the Merger Regulation makes it possible for a Member State to request the referral in full or in part of an operation notified to the Commission. The purpose of this provision is to ensure that transactions are dealt with by the authority which is best placed to do so in accordance with the principle of subsidiarity.

According to Article 9(2)(a), a request can be made when a concentration threatens to create or to strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State, which presents all the characteristics of a distinct market. In this case, the Commission has to assess whether (i) there exists such a distinct market within the territory of the relevant Member State, and (ii) the notified concentration may give rise to the creation or strengthening of a dominant position. If these two conditions are fulfilled the

---

(1) While bookshops generally carry a lot of different books, hypermarkets and wholesalers focus on the best-selling segment of books that rotate rapidly.
(2) Court of First Instance judgement of 28.4.1999, case T-221/95.
(3) Interestingly, the Bundeskartellamt, reached a similar conclusion for German language pocket books when it analysed the proposed acquisition of Ullstein-Heyne-List by the Bertelsmann group (see Decision of 24.11.2003 in the case B6 — 7/03 Random House/ Wilhelm Heyne Verlag).
Commission has the discretion whether to grant a referral.

On 14 May 2003, the French authorities asked for part of the case to be referred to them under Article 9 of the Merger Regulation. The request concerned the analysis of the effects of the transaction on the markets for publishing general literature titles in large format, general literature titles in pocket format, the acquisition of publishing rights for pocket format publishing, school textbooks, educational supporting materials, single language dictionaries, bilingual and multilingual dictionaries, single volume general encyclopaedias, as well as marketing and distribution services provided to publishers. The French authorities argued that the two above-mentioned conditions were met as each of these markets had a national dimension and that the notified concentration may give rise to the creation or strengthening of dominant positions.

However the Commission considered that the condition that there should be a distinct geographic market was not satisfied for the pocket format publishing rights, marketing and distribution services, large format general literature titles, pocket format general literature titles, single language dictionaries, bilingual and multilingual dictionaries and single volume general encyclopaedias. These markets could consequently not be referred to the French authorities under the second subparagraph of Article 9(3) of the Merger Regulation as the investigation revealed a broader geographic dimension, namely supranational, corresponding to the entire French speaking area of the European Union in the case of the markets for the sale of most of the books by the editors to the resellers, or even wider, in particular in the case of the markets for publishing rights, which were found to be of world geographic dimension, notably because of the worldwide scope of the contracts. The markets for marketing and sales services as well as for distribution services were found to be of a geographic dimension corresponding to the French speaking area of the European Union, notably because of single contracts and of the presence of the same actors throughout that territory.

For the sale of school textbooks by publishers to retailers, the Commission considered that all the conditions imposed by Article 9(2)(a) of the Merger Regulation were satisfied. However, even if the geographic dimension of this market was national, the Commission, in accordance with the first subparagraph of Article 9(3) of the Merger Regulation, decided not to refer the analysis of this market to the French authorities and to analyse the effects of the merger itself in view of the close links between this market and the other markets, and notably the distribution services market.

This position was reflected in the Commission’s decision of 23 July 2003, rejecting the French authorities’ request (1).

From a more procedural perspective, the case raised several issues surrounding the application of Article 9 of the Merger Regulation. In particular, Articles 9(4)(b) and 9(5) of the Merger Regulation state that, in a second phase investigation, the Commission has to take a decision on the referral request within three months from the notification of the concentration, except if it has taken preparatory steps in order to adopt the necessary measures to maintain or restore effective competition on the markets concerned, otherwise the referral request is deemed to be granted. The sending of a Statement of Objections to the notifying party is undoubtedly a preparatory step (2).

In this case, as the Commission had taken an Article 11(5) Decision, the deadline to take an Article 8 decision was extended, and then the internal deadline to notify the objections to the notifying party was exceeding the three months period, in accordance with Article 9(1)(a) and Article 9(2)(a) of the Implementing Regulation. Nevertheless this Article omits to give any indication on the effects of such a situation on the suspension of the three months deadline set by the Article 9(4) of the Merger Regulation. In practice, the Commission was not yet in a position to send a Statement of Objections as essential information was still missing, in particular pending the reply of the notifying party to the Article 11 requests. Furthermore neither the European Court of Justice nor the Commission itself, through its administrative practice, had ever addressed whether acts such as an Article 11 Decision or a State of Play meeting with the notifying party could be considered as ‘preparatory steps’. Finally, the Commission adopted a formal Article 9 Decision, thereby avoiding any judicial risk.

This procedural omission regarding the suspension of the Article 9(4) deadline in case of an Article 11(5) Decision has now been filled by the revised Implementing Regulation (3).

---

(1) This conclusion was supported by the Belgian authorities who had expressed their position against the referral in a letter addressed to the Commission.
(2) See Article 9 in Notes on Council Regulation (EEC) 4064/89.
(3) See Article 9(1) of the new Implementing Regulation.
IV – Competitive assessment

The Commission's investigation identified a number of competitive problems that would result from the combination of Editis and Hachette Livre, the two leading market players with the highest vertical integration. Dominant positions for the new entity were found along the whole book chain and notably in the more industrialised part of the publishing business: marketing, distribution and pocket format publishing. The new entity would control access both to the 'raw material', i.e. well-known authors, whose sales are the lifeblood of publishers, and to sales outlets, which cannot absorb, let alone promote, more than a limited proportion of the works published each year.

First, the Commission concluded that the transaction would give rise to the creation of a dominant position in the primary markets for French language general literature publishing rights, and for the secondary market for French language general literature publishing rights in pocket format. The Commission's investigation showed that competition on these markets took place through competitive bidding, where the amount of non-refundable advance payments played a critical role. The merger would not only eliminate the competition between Editis and Hachette Livre, but also create a significant gap between them and the other publishers, in their capacity to attract well-known authors, notably because of the vertical integration of the parties into pocket books, marketing and sales as well as distribution services (1).

At the next level of the book chain, the markets for marketing and sales services as well as for distribution services, the Commission also concluded that the transaction would give rise to the creation of dominant positions. Before the merger, there was evidence that Editis and Hachette Livre were competing to attract publishers from one another, as illustrated by the case of Albin Michel, which had left Editis to be marketed and distributed by Hachette Livre. Editis and Hachette Livre were not only the two largest players, but also the only ones to have their own wholesaling activities and to offer access to all types of retailers down to the smallest ones. The Commission's investigation revealed that the combination of Editis and Hachette Livre would lead to high market shares for marketing and sales services to bookshops and very high market shares for marketing and sales services to hypermarkets and wholesalers, both representing essential sales channels for the client publishers (2). The high market shares, also observed for distribution services, together with the fact that these services are tied in a single contract with marketing and sales services contributed to the creation of a dominant position on that market as well. Commonalities across these markets included the significant gap resulting from the transaction between the merged entity and its competitors, the limited purchasing power of customers as well as the inability of competing service providers to present a viable alternative to the merged entity because, among other things, of the other marketers and distributors' lack of integrated wholesaling structures.

Hachette Livre and Editis' wholesalers were actually the two leading structures in the market and were necessary for other distributors to reach level 3 retailers (retailers for which books are only secondary products). In that respect, the Commission also found that the merger would lead to the creation of a dominant position in the market for the sales of books by wholesalers to level 3 outlets, mainly because of the merged entity's high market share, the high barriers to entry and the dependence of competing wholesalers for Hachette Livre and Editis' products resulting from the merged entity's dominant position on the markets for the sale of large format and pocket format general literature books (3). In the end, the merger would therefore risk limiting the access to retailers for competing publishers, thus leading to a reduction of choice for the consumer.

Finally, further down the book chain, the Commission concluded that several dominant positions would be created or reinforced on several of the relevant markets for the sale of books to resellers, even though for some markets (strip cartoons, art books and professional and university books) it was considered that effective competition would not be impeded as a result of the transaction.

With regard to the markets for the sales of schoolbooks in France, the combination of Hachette Livre and Editis, currently market leaders, would lead to very high market shares of around 80%

(1) In addition the Commission's investigation revealed that merged entity could benefit from its financial surface and from Lagardère's important media activities, even though the Commission retained that these factors alone could not lead to the creation of a dominant position.

(2) These two categories of retailers are essential for best-selling books, which represent a critical share of the publishers' turnover and profits.

(3) In that respect, Hachette Livre had been condemned by the French competition authorities for its abusive behaviour towards the book wholesaler DNL, its main competitor outside Editis.
with the merged entity combining the main brands (Hachette, Hatier, Nathan, Bordas) and the strongest marketing capabilities in a market characterised by high entry barriers.

On the markets for the sale of educational supporting materials by publishers to bookshops, hypermarkets and wholesalers, the parties would equally have achieved near monopoly market shares and would have benefited from their vertical integration into marketing and distribution services to strengthen their prescribing power towards retailers.

On the markets for the sale of dictionaries by publishers to bookshops, hypermarkets and wholesalers and on the markets for the sale of smaller general encyclopaedias by publishers to bookshops, hypermarkets and wholesalers, the Commission concluded to the strengthening of the dominant position of Editis. Editis already had very high market shares (more than 80% for dictionaries) and Hachette Livre was virtually the only remaining or potential competitor, in markets characterised by high barriers to entry and where retailers had very little countervailing power.

The Commission concluded that the merger would lead to the creation of dominant positions on the markets for the sale of general literature titles in both large and pocket format by publishers to bookshops, hypermarkets and wholesalers with relatively high market shares for general literature titles in large format and very high market shares for pocket formats. In addition, the Commission found that the vertical integration of the merged entity into marketing services, distribution services as well as into the acquisition of publishing rights increased its market power towards resellers and its ability to promote its books on the shelves to the detriment of its competitors. The Commission also identified the creation of dominant positions on the markets for the sale of children's books by publishers to hypermarkets and wholesalers as well as on the markets for the sale of guides and manuals by publishers to hypermarkets and wholesalers, in particular due to the dominant position of the merged entity in the marketing and sales and distribution of books to hypermarkets and wholesalers. For the sales of children's books and of guides and manuals to bookshops, the Commission took the view that other publishers could still access bookshops and present competitive alternatives to the merged entity, which was not the case for hypermarkets and wholesalers, where significant barriers to entry prevail.

In conclusion, as a result of the transaction, the merged entity would have had the capacity and the incentive to alternatively or cumulatively increase prices, reduce rebates to retailers or reduce diversity on the markets for the sale of books where a dominant position would have been created or strengthened.

V – Remedies

Given the scope of the competition problems raised by the combination of Hachette Livre and Editis, the case could only be cleared if very substantial remedies were submitted. Such remedies not only had to provide solutions (in terms of divestiture of assets) for almost every market along the book chain (publishing rights, marketing and distribution services, sale of books), in which the merger would bring together the two leading players, they also had to address the numerous vertical and conglomerate links between these markets.

On the one hand, as a result of these links, a divestiture could have positive effects in more than one market. For example, the divestiture of a publishing house active in general literature could help to restore competition not only on the market for the sale of general literature titles, but also on the markets for secondary publishing rights (by making the titles published by that publisher available to pocket format publishing houses) or marketing and distribution services (by providing critical mass and in particular titles with a high sales volume).

On the other hand, very often, the viability of a divestiture that was needed to solve the competition problem on one market depended on a suitable remedy for an upstream or downstream market. For instance the divestiture of a pocket format publishing house would only be viable if it had sufficient access to secondary publishing rights (upstream) as well as marketing and distribution (downstream). Last but not least, the viability of the divestiture of a large distribution centre — necessary to solve not only the competition problem in the markets for distribution services to third parties, but also to remedy the creation of dominant position in the markets for the sale of books to resellers as well as to ensure the distribution of divested publishing houses — would depend on the divestiture of publishing houses delivering a critical mass of books to be distributed.

The solution that was finally proposed by Lagardère and accepted by the Commission as basis for clearance therefore consisted in a commitment to divest the whole of Editis, except for a number of assets which could be retained by Lagardère without creating competition problems.
Lagardère consequently committed to divest all assets of Editis except dictionary publisher Larousse, professional and academic publishers Dalloz and Dunod as well as the Spanish publishing group Anaya, which is active mainly in schoolbooks and general literature in Spain and Latin America.

The assets of Editis that Lagardère committed to divest are in principle to be sold to a single purchaser. A divestiture to more than one purchaser will indeed only be accepted by the Commission under exceptional circumstances and provided that the requirement of re-establishing a viable vertically integrated competitor is fully satisfied. By that way, a viable vertically integrated player with appropriate access to publishing rights, marketing and distribution capacities (in particular the Editis distribution centre) will remain in the market as a competitor to Hachette and the other publishing groups.

Lagardère, on the other hand, will be able to retain those assets of Editis that are active in markets where no competition issues arise (essentially French language academic and professional publishing and Spanish language publishing) or where the situation after the divestiture is more competitive than before the operation (French-language dictionaries, where in the future Larousse — owned by Lagardère — will compete with Le Robert — owned by the divested Editis group — whereas pre-merger both these publishing houses — that account for the almost the totality of the market for dictionaries — belonged to Editis). As a result, Lagardère will become the new market leader in book publishing in the French language area and gain a strong position in the Spanish language area as well.

The Lagardère/Natexis/VUP case shows once more that in some cases remedies need to go beyond what is strictly necessary to purely eliminate horizontal overlaps. If a notified operation raises very serious competition concerns on a large scale, a significant modification of the transaction in terms of divestiture commitments may be necessary in order to make it possible for the remaining of the operation to go ahead.

**VI – Conclusion**

The Lagardère case, by its scope and by the depth of the Commission’s investigation, should be regarded as a landmark in the book publishing and sales sector.