

# General Court rules on European Commission's document gathering powers in merger investigations

## Introduction

The General Court (GC) has dismissed in full the actions brought by French media companies **Vivendi** and **Lagardère** challenging the European Commission's information gathering powers in the context of its ongoing gun-jumping investigation against the two companies. The rulings clarify that the Commission's document gathering powers in merger investigations mirror those available in antitrust investigations and can extend to personal devices and journalists' communications.

## Background

In October 2022, French media and publishing company Vivendi notified its acquisition of rival Lagardère to the Commission, which conditionally **cleared** the deal in June 2023.

In July 2023, the Commission **opened an investigation** into whether the companies had infringed the notification and standstill requirements set out in the EU Merger Regulation (EUMR) - in particular, whether Vivendi had exercised decisive influence over Lagardère prior to clearance, including in relation to editorial and human resources decisions (a Statement of Objections was issued in that investigation in July last year).

In the course of that investigation, the Commission issued binding requests for information (RFIs) under Article 11(3) EUMR, requiring the companies to produce a broad range of documents, including emails and messages from the professional and personal accounts of employees and journalists. Following concerns raised by the companies about the sensitivity of the documents requested, the Commission introduced additional safeguards for sensitive documents - specifically, a virtual data room for documents containing sensitive personal data, and protection for documents containing journalists' sources (analogous to that afforded to documents protected by

legal professional privilege). Nevertheless, Vivendi and Lagardère each lodged an action for the annulment of the RFIs (and sought interim measures, which were ultimately granted in part after several rounds before the courts).

## The General Court's ruling

Vivendi and Lagardère raised a number of similar pleas, including as regards alleged misuse of the Commission's powers, impossibility of complying with the RFIs and breach of fundamental rights.

### Misuse of powers

Both companies argued that the Commission had misused its powers, on the basis that Article 11(3) could only be used to assess the substantive effects of a concentration (and not to investigate gun-jumping), and the RFIs were moreover "exploratory". The court dismissed these arguments, finding that investigating compliance with notification and standstill requirements falls within the Commission's tasks under the EUMR.

The companies also argued that the RFIs were disproportionate on account of, amongst other things, their temporal scope, the custodians covered, and the requirement to produce entire message threads. The GC dismissed these arguments, finding for example that documents pre-dating the transaction were necessary to understand the context of the transaction, the individuals in scope held strategic functions and may have been involved in relevant communications, and the companies failed to identify less burdensome alternatives that would have been equally effective.

### Impossibility

Both companies argued it was impossible to comply with the RFIs - Vivendi on the basis that it could not produce documents held by its controlling shareholder (the Bolloré

Group) over whom it had no control, and Lagardère on the basis that compliance would require it to access employees' personal devices contrary to French criminal law.

The GC rejected both arguments. It noted that Vivendi had in fact ultimately produced the documents in question, demonstrating that compliance with the obligation was not impossible. It rejected Lagardère's arguments based on French criminal law on the basis of the primacy of EU law. Moreover, the court noted that the French law on which Lagardère was relying punishes "voluntary", "bad faith" or "fraudulent" actions, and specifically provides that a person who is complying with regulatory provisions (such as a Commission RFI) is not criminally liable.

### Fundamental rights

The companies raised arguments based on freedom of expression and the right to privacy. Specifically, that: (i) the RFIs (and Article 11(3) EUMR itself) breached the protection of journalistic sources required by Article 10 of the European Convention on Human Rights (ECHR) and Article 11 of the Charter of Fundamental Rights; and (ii) the RFIs interfered with the right to privacy under Article 8 ECHR and Article 7 of the Charter, particularly regarding the obligation to produce communications from personal devices.

The GC found that Article 11(3) EUMR can be interpreted in a way that is compatible with the ECHR - the system of legal remedies available (judicial review and interim measures) provides adequate procedural safeguards. As for whether the RFI itself infringed the protection of journalistic sources, the GC noted the additional procedural safeguards that had been put in place by the Commission, and found that the companies had failed to explain why annulling the RFIs would be necessary in light of those safeguards.

As regards the parties' arguments that the RFIs breached the right to privacy, the GC found an interference - and acknowledged the risk of a potentially serious interference - with privacy but found that it was justified on the basis that it was provided for by law and respected the essence of the right to privacy, and was necessary and proportionate to achieve a legitimate aim of the EU (i.e. the enforcement of competition law). In particular, the court considered that limiting the scope of the RFIs to personal

devices which had been used for professional purposes at least once was proportionate - any other threshold would risk relevant documents escaping disclosure. It found that the proportionality of the requests was also ensured by the limited scope of the custodian list, the search-term methodology, and the safeguards in place (encryption, use of a virtual data room and professional secrecy obligations binding EU officials).

### Practical takeaways

The judgments (which Vivendi has already said it will appeal) mark the first time since 2009 that the Commission's investigative powers under Article 11(3) EUMR have been challenged before the European courts.

But in the intervening years, various cases have confirmed the broad scope of the Commission's investigative powers in other contexts. For example, in 2020 Meta challenged the scope of RFIs issued by the Commission under Article 18(3) of Regulation 1/2003 in the context of an antitrust investigation into Meta's data practices, arguing that the request was excessively broad (amounting to a fishing expedition) and infringed the rights of Meta's staff and third parties to privacy. The GC dismissed Meta's appeal in May 2023, finding that: (i) information will be regarded as necessary for a Commission investigation where the Commission can "reasonably suppose" that the information will assist in determining whether an infringement has occurred; and (ii) any interference with private life was justified as it was provided for by law, pursued an EU objective (enforcement of competition law), was necessary and proportionate. Meta has appealed this decision. While the outcome of that appeal is pending, the Advocate General has issued an [opinion](#) indicating that the GC's judgment should be upheld.

Read together (and absent a Court of Justice judgment overturning either ruling), these cases confirm that parties under Commission investigation can - in all contexts - anticipate wide-ranging document requests. Companies should in particular take note that employees' personal devices can be requested where they have been used for professional purposes at least once, and that entire message threads might be requested.

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