4. Subsequently the trade mark proprietor filed an application for restitutio in integrum pursuant to Article 78(2). This application was filed less than two months after the proprietor itself received the notifications of cancellation, but more than two months after the legally qualified representative had received them.

5. Article 78(2) requires that the application must be filed in writing within two months from the removal of the cause of non-compliance with the time limit. The issue that arises on this appeal concerns how the date from which time begins to run should be identified.

6. The proprietor contends that the relevant date is the date on which it received the notification. It had assumed responsibility itself, through a third party, to pay renewal fees. It only discovered the error, and had the opportunity to remove the cause of non-compliance, when it actually received such notification.

7. However the Court of First Instance upheld the contention of OHIM that the relevant date was the date of the receipt by the proprietor's legally qualified representative, to which OHIM had sent the notification. OHIM relied upon the provisions of rule 77 which provides that 'Any notification or other communication addressed by the Office to the duly authorized representative shall have the same effect as if it had been addressed to the represented person.'

8. The proprietor contends on this appeal that:

(i) The purpose of the deeming provisions in rule 77 is to provide that OHIM has discharged its obligations to notify a party when it sends a notification to a party's representative in relation to matters for which that representative has authority to act. OHIM is not then obliged to do anything further. But this is not a relevant consideration in the present case.

(ii) The 'cause of non-compliance' with the time limit is removed, in the case of time limits for payment of renewal fees, when the trade mark proprietor itself, and/or the person specifically delegated by it as responsible for payment, actually becomes aware of the unintended failure to pay. Any other conclusion would render the relevant provision unworkable: in particular a professional representative will always know of and be expected to be aware of the relevant time limits so that the sending of a notification by OHIM to him/her would ordinarily be irrelevant anyway.

(iii) Payment of renewal fees is a simple financial transaction that does not require legal representation. So a party can pay the fees itself or delegate any other person to do so. Where the 'representative' of a party — who acted for the party in proceedings before the Office — is not also under a separate responsibility to pay renewal fees, then notification of non-payment to that representative is not relevant; it is not notice to the party and it cannot be so deemed. That representative is not legally responsible for acting on such notification (though may transmit it to his client as a matter of professional courtesy).

(iv) On facts such as the present facts, a representative for other purposes is not a 'duly authorized representative' for the purpose of payment of renewal fees. Notice to him/her therefore does not satisfy rule 77 and does not bring the 'deeming' provision into play.

(v) In summary, the relevant person to be considered is the one with responsibility for taking the act in question. Only when that person becomes aware of the non-compliance can the relevant time period for an application begin to run.

(vi) While the provisions of the EPC are not strictly binding in community law, they must clearly be highly persuasive. Where there is EPO case law on the same wording, it is highly desirable that it be construed in the same way. If interpreted differently, then one or the other interpretation must be wrong. The appellant submits that the parallel decisions in the EPO are correct and that their reasoning is correct.

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(1) Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark
OJ L 11, p. 1

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**Appeal brought on 26 November 2009 by AceaElectrobal Produzione SpA against the judgment delivered by the Court of First Instance (First Chamber) on 8 September 2009 in Case T-303/05 AceaElectrabel Produzione SpA v Commission of the European Communities**

**(Case C-480/09 P)**

(2010/C 24/70)

*Language of the case: Italian*

**Parties**

*Appellant:* AceaElectrabel Produzione SpA (represented by: L. Radicati di Brozolo, M. Merola, T. Ubaldi and E. Marasà, lawyers)

*Other party to the proceedings:* Commission of the European Communities

**Form of order sought**

— Set aside the judgment under appeal.

— Grant the form of order sought at first instance or, in the alternative, refer the case back to the General Court pursuant to Article 61 of the Statute of the Court of Justice.

— Order the Commission to pay the costs of both sets of proceedings.

**Pleas in law and main arguments**

1. Distortion of the pleas in law, errors in law and irrational and contradictory reasoning, with reference to the identification of the aid recipient and the assessment of the Commission's discretion for the purpose of defining the aid recipient.

   By its first ground of appeal, the appellant, AceaElectrabel Produzione SpA ('AEP' or 'the appellant') complains that the judgment is seriously flawed, insofar as the Court of First Instance rejected the plea in law relating to the failure properly to identify the recipient of the aid, which is the subjective condition for the application to the case in question of the principle established in the *Deggendorf* case-law (according to which, the grant of new aid which in itself is judged to be compatible with the common market may, in certain circumstances, be suspended until previous unlawful aid paid to the same undertaking has been reimbursed). First of all, the appellant disputes the finding that that plea is inadmissible insofar as it relates to infringement of Article 88 of Regulation (EC) No 659/99. [1] AEP submits that the Court of First Instance distorted that part of the plea, which was intended by the appellant simply to indicate that the misidentification of the aid recipient resulted from one of the characteristic defects of the administrative measure. By stating that arguments alleging infringement of the rules governing the recovery of aid have no bearing on the case, the Court of First Instance demonstrated that it had distorted the arguments put forward in support of that part of the plea in law in question.

   Moreover, the appellant challenges the judgment insofar as it failed to declare the decision unlawful, notwithstanding the serious error of identifying AEP (the recipient of the new aid) with the ACEA Group (the recipient of the aid which was not reimbursed), based on the incorrect, illogical and contradictory application of the concept of an economic unit of a group of undertakings developed in Community case-law. The appellant disputes that such a concept can be applied to the case of a joint venture controlled jointly by two separate groups (as is the case with AEP), since the established case-law on economic units of undertakings refers only to cases involving a number of undertakings controlled solely by a single entity. The error is compounded insofar as the Court of First Instance regarded as irrelevant the fact that 70 % of AEP's capital is in a different economic group, which has nothing whatsoever to do with the recipient of the aid which was not reimbursed. The Court of First Instance also erred in its application of the concept of a functionally autonomous undertaking, since it stated that the appellant cannot be regarded as functionally autonomous because it is subject to the joint control of two undertakings.

2. Distortion of the pleas in law, error in law and contradictory and inadequate reasoning, with reference to the arguments put forward by the appellant concerning the scope of the *Deggendorf* case-law for the purpose of the assessment of the case in question.

   By its second ground of appeal, the appellant submits that the judgment incorrectly applied the *Deggendorf* case-law insofar as it also supported the Commission's assessment regarding the existence of the objective requirement for the application of the *Deggendorf* case-law. The appellant disputes in particular the reasoning of the Court of First Instance in the part in which it finds that the Commission was not required to adduce precise, detailed evidence to show that the combined effect of the first and second aid would adversely affect intra-Community trade in such a way as to render the new aid incompatible with the common market. The burden of proof for the purpose of determining whether notified aid is incompatible cannot be rebutted at will, in particular where the Commission has failed to make use of the instruments which the rules of procedure make available to it. The Court of First Instance failed to address those issues raised by the appellant and uncritically confirmed the Commission's decision. Lastly, the Court of First Instance neither understood nor addressed the plea raised by the appellant insofar as it maintained that the *Deggendorf* case-law is not intended to establish a means of penalising undertakings which have not reimbursed previous aid but simply to prevent the combined effect of more than one grant of aid to a single undertaking adversely affecting intra-Community trade in such a manner as to render the new aid incompatible, until such time as the previous aid has been repaid.

[1] Council Regulation (EC) No 659/99 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

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**Action brought on 27 November 2009 — European Commission v Czech Republic**

**(Case C-481/09)**

(2010/C 24/71)

*Language of the case: Czech*

**Parties**

*Applicant:* European Commission (represented by: S. Pardo Quintillán and M. Thomannová-Körnerová, acting as Agents)

*Defendant:* Czech Republic