

JUDGMENT OF THE COURT (Second Chamber)

16 December 2010\*

In Case C-480/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 26 November 2009,

**AceaElectrabel Produzione SpA**, established in Rome (Italy), represented by L. Radicati di Brozolo and M. Merola, avvocati,

appellant,

the other parties to the proceedings being:

**European Commission**, represented by V. Di Bucci, acting as Agent,

defendant at first instance,

\* Language of the case: Italian.

**Electrabel SA**, established in Brussels (Belgium), represented by L. Radicati di Brozolo and M. Merola, avvocati,

intervener at first instance,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev (Rapporteur), A. Rosas, A. Ó Caoimh and C. Toader, Judges,

Advocate General: E. Sharpston,  
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 September 2010,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

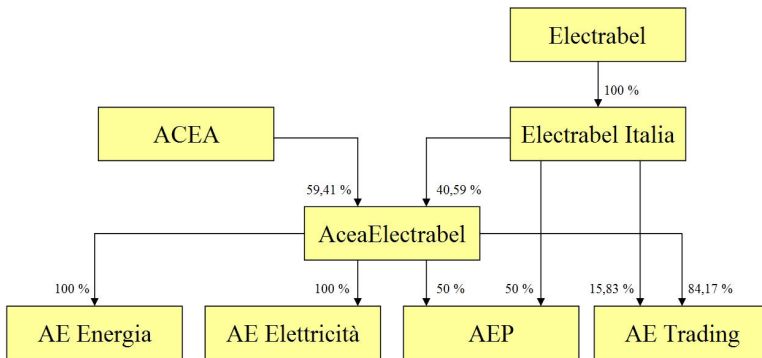
## Judgment

- 1 By its appeal, AceaElectrabel Produzione SpA ('AEP') seeks to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 8 September 2009 in Case T-303/05 *AceaElectrabel v Commission*, summary publication at [2009] ECR II-137 ('the judgment under appeal') dismissing AEP's application for annulment of Commission Decision 2006/598/EC of 16 March 2005 concerning State aid that Italy (Regione Lazio) intends to grant for the reduction of greenhouse gas emissions (OJ 2006 L 244, p. 8) ('the contested decision').

### Background to the dispute

- 2 The facts of the dispute, as set out in paragraphs 1 to 17 of the judgment under appeal, can be summarised as follows.
- 3 AEP is a an electricity generating company controlled equally by Electrabel Italia SpA ('Electrabel Italia') and by AceaElectrabel Holding SpA ('AceaElectrabel').

- 4 Electrabel Italia is wholly controlled by Electrabel SA ('Electrabel'), which is established in Belgium.
  
- 5 AceaElectrabel is a joint venture set up by ACEA SpA ('ACEA') and Electrabel Italia and is active in the electricity and gas sectors. ACEA has a controlling stake of 59.41 % in AceaElectrabel and Electrabel Italia a stake of 40.59 %. The agreements on the constitution of the joint venture provided that ACEA was to transfer to AEP two thermoelectric production installations and five hydroelectric power plants, while Electrabel was to provide a number of projects for the construction of installations.
  
- 6 AceaElectrabel also controls, in whole or in part, the undertakings AceaElectrabel Energia (100%), AceaElectrabel Elettricità (100%) and AceaElectrabel Trading ('AE Trading') (84.17 %).
  
- 7 The structure of those undertakings may therefore be illustrated as follows:



- 8 On 28 January 2002, the Italian Republic notified the Commission of the European Communities of two investment aid projects, including a project for the construction of a district heating network located near Rome, which was to be supplied with energy by a partially modernised and converted combined heat and power plant, and thus provide heating to a new district ('the aid at issue'). The investment costs of this project amounted to EUR 9 500 000 and the aid at issue amounted to EUR 3 800 000.
- 9 By letter of 13 May 2003, the Commission notified the Italian Republic of its decision to initiate the formal investigation procedure under Article 88(2) EC with regard to the aid at issue. It was of the view that the aid at issue was compatible with the common market but that the principles laid down by the Court in Case C-355/95 P *TWD v Commission* [1997] ECR I-2549, which confirmed the judgment of the General Court in Joined Cases T-244/93 and T-486/93 *TWD v Commission* [1995] ECR II-2265, ('the *TWD v Commission* case-law') had to be applied.
- 10 The Commission, in that regard, stated, first, that ACEA was one of the municipal undertakings in the energy sector to have benefited from aid schemes ('the earlier aid') declared unlawful and incompatible with the common market in Commission Decision 2003/193/EC of 5 June 2002 on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding (OJ 2003 L 77, p. 21) ('the earlier decision') and, second, that the Italian Republic had not confirmed to it, in spite of two reminders to that end, that the amounts paid to ACEA under those schemes had in fact been recovered, as required by Article 3 of that decision.
- 11 According to the Commission, ACEA was the initial beneficiary of the aid at issue, AEP having become the current beneficiary only following a series of reorganisations.

Moreover, the Commission took the view that ACEA and AEP were to be regarded as a single economic unit and that, notwithstanding the internal reorganisation, that group, including ACEA, had to be deemed to be the beneficiary of the aid at issue.

- <sup>12</sup> On 16 March 2005, the Commission adopted the contested decision, by which it declared the aid at issue compatible with the common market but suspended payment of the aid to AEP until the Italian Republic produced evidence that ACEA had repaid the earlier aid.

### **Procedure before the General Court and the judgment under appeal**

- <sup>13</sup> By application lodged at the Registry of the General Court on 3 August 2005, AEP brought an action for annulment of the contested decision, in accordance with Article 230 EC.
- <sup>14</sup> By its first plea, AEP alleged infringement of Article 87(1) EC and that the statement of reasons and the investigation relating to the classification of the aid at issue as State aid were defective. The second plea alleged infringement of Article 88 EC and of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), as well as errors of law and inadequate and contradictory reasoning in the contested decision as regards the identity of the recipient of the aid at issue. The third plea alleged that the suspension of payment of the aid at issue was unlawful and that the reference to the *TWD v Commission* case-law was irrelevant.

- 15 On 6 December 2005, Electrabel applied for leave to intervene in support of the form of order sought by AEP. By order of 7 April 2006, the President of the Fifth Chamber of the General Court granted that application.
- 16 On 24 July 2007, the General Court requested the parties and the Italian Republic to provide, if available, factual evidence of any repayment made by ACEA of the earlier aid.
- 17 By letter of 7 September 2007, the Italian Republic confirmed that ACEA had repaid the sum of EUR 1511 135,88 in respect of 1998 and EUR 1 534 938,78 in respect of 1999.
- 18 By letter of 14 February 2008, the Commission stated that the amounts repaid by ACEA represented a very small percentage of the amounts to be reimbursed under the earlier decision in relation to the figures in ACEA's balance sheet for 2004. It pointed out that the condition precedent for payment of the aid at issue could not therefore be regarded as having been fulfilled.
- 19 In the judgment under appeal, the General Court dismissed the action.
- 20 As regards the first plea, the General Court took the view that the Commission was entitled, without infringing Article 87(1) EC, to classify the aid at issue as State aid, since the local nature of the urban heating network concerned did not preclude either competitive relationships with other energy products or any adverse effect on trade between Member States, and that sufficient reasons were given for that finding.

Moreover, the General Court rejected as inadmissible the arguments that the statement of reasons for the contested decision was contradictory and the investigation relating to the classification of the aid at issue as State aid inadequate, finding instead that the application did not contain any reasoning to substantiate those arguments.

- 21 The General Court declared that, in so far as it alleged infringement of Article 88 EC and Regulation No 659/1999, the second plea was inadmissible, since the application at first instance did not, in its view, contain any argument relating to the purported infringements. In so far as the second plea alleged errors of law and that the statement of reasons for the contested decision was inadequate and contradictory as regards the identity of the beneficiary of the aid at issue, the General Court held, first, that the Commission had not committed a manifest error of assessment in holding that, for the purpose of examining the aid at issue, ACEA and AEP were to be regarded as an economic unit and that ACEA was to be deemed to be one of the beneficiaries of the aid at issue. Second, the General Court considered that adequate reasons had been given for the contested decision and that that decision did not in any way contradict itself.
- 22 With regard to the third plea, the General Court rejected the arguments alleging that ACEA and AEP were not one and the same and that the earlier aid and the aid at issue did not have a cumulative effect, by referring to the considerations set out in connection with its assessment of the second plea. It further held that, contrary to AEP's submissions, the *TWD v Commission* case-law was also applicable to general aid schemes and not solely to individual aid. Lastly, the General Court found that the Commission had not failed to have regard to that decision by taking the view that it was not required to prove the distorting effect of the cumulation of the earlier aid and the aid at issue on competition or to be aware, in advance, of the precise amount of the earlier aid.



## **Forms of order sought by the parties**

23 AEP claims that the Court should:

- set aside the judgment under appeal and grant the form of order sought at first instance;
- in the alternative, refer the case back to the General Court; and
- order the Commission to pay the costs.

24 The Commission contends that the Court should:

- dismiss the appeal; and
- order AEP to pay the costs.

## The appeal

- <sup>25</sup> The appellant relies on two grounds of appeal, the first alleging distortion of the pleas in law relied on at first instance, errors of law and irrational and contradictory reasoning in the judgment under appeal with regard to the identification of the beneficiary of the aid at issue. The second ground of appeal alleges distortion of the pleas in law relied on at first instance, errors of law, and that the reasoning in that judgment regarding the scope of the *TWD v Commission* case-law was contradictory and inadequate.

*The first ground of appeal, relating to the identification of the beneficiary of the aid at issue*

The first part of the first ground of appeal, alleging distortion of the pleas in law relied on at first instance

— Arguments of the parties

- <sup>26</sup> AEP is of the view that the finding that the second plea relied on at first instance was inadmissible, in that it alleged infringement of Article 88 EC and of Regulation No 659/1999, derives from a superficial examination of the application, because the reference to those rules should have been read in conjunction with the arguments concerning the error in the identification of the beneficiary of the aid at issue. The

correct identification of the beneficiary, it claims, was relevant in the context of compliance with the rules of procedure governing State aid.

- <sup>27</sup> According to AEP, the question whether there was economic continuity between ACEA and AEP as a result of the transfer of the branch of the undertaking which was responsible for the project that is the subject-matter of the aid at issue was addressed in detail both in the parties' written pleadings and at the hearing. However, the General Court failed to take account of that exchange of views, thereby distorting the plea relied on and the results of the investigations.

— Findings of the Court

- <sup>28</sup> It is settled case-law that the General Court is obliged to reject as inadmissible a head of claim in an application brought before it if the essential matters of law and of fact on which the head of claim is based are not indicated coherently and intelligibly in the application itself (Case C-214/05 P *Rossi v OHIM* [2006] ECR I-7057, paragraph 37, and order of 13 March 2007 in Case C-150/06P *Arizona Chemical and Others v Commission*, C-150/06 P, paragraph 45).
- <sup>29</sup> The General Court was entitled, after pointing out that, under Article 44(1)(c) of its Rules of Procedure, any application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based in a manner which is sufficiently clear and precise to enable the defendant to prepare his defence and the General Court to give a ruling, to reject the argument alleging infringement of Article 88 EC and Regulation No 659/1999 as inadmissible on the ground that it did not satisfy those conditions.

- 30 The application before the General Court failed to identify in a clear, unequivocal, coherent and intelligible manner in what way the contested decision infringed those provisions. Moreover, AEP has failed to produce before the Court of Justice any concrete evidence to demonstrate that the application presented before the General Court satisfied those conditions.
- 31 In particular, it is not sufficient to claim that the reference to those provisions was to be read in conjunction with the arguments concerning the error in the identification of the beneficiary of the aid at issue, since the application at first instance did not make that connection clear or specify in what way the purported error would result in infringement of those provisions.
- 32 Accordingly, the first part of the first ground of appeal must be rejected.

The second part of the first ground of appeal, alleging errors of law

— Arguments of the parties

- 33 AEP submits that the General Court erred in law in upholding the Commission's claim that ACEA and AEP form an economic unit. While ACEA has a holding of less than 30% in AEP, Electrabel has a 70% holding in that company, with the result that it is not possible to claim that AEP formed an economic unit together with ACEA.

34 According to AEP, it is clear from all the case-law cited by the General Court in support of its analysis that the discretion enjoyed by the Commission in determining whether, for the purpose of identifying the beneficiary of aid, two or more undertakings form an economic unit is restricted to cases in which the same person or group has sole control. On the other hand, in a case where, as here, an undertaking is controlled by a joint venture, which itself is controlled by two separate groups, it cannot be inferred from that case-law that the Commission is entitled to conclude that there is an economic unit between the controlled undertaking and one of the two companies which control the joint venture.

35 AEP also considers that the Commission would never have adopted such an approach in other areas of competition law, even though that law applies the same concepts in all areas covered by it. Contrary to view taken by the General Court, the concepts applicable to concentrations or restrictive practices can be transposed to the field of State aid, except in certain specific situations in which a different interpretation is justified.

36 In its decision approving AEP's constitution, the Commission classified that joint venture as a concentration because it was an undertaking which operated independently of its parent companies. The concept of operational independence, however, is used, in competition law, for joint ventures which, albeit controlled by different economic groups, have their own organisational and administrative structure and operate on the market with independent operational and financial means.

37 According to AEP, the General Court therefore erred in concluding at paragraph 142 of the judgment under appeal, in spite of that earlier finding by the Commission, that AEP did not have genuine operational independence vis-à-vis ACEA and Electrabel

because it was jointly controlled by those companies. The General Court, it claims, confused the concepts of operational independence and control, since not all control affects the operational independence of an undertaking.

<sup>38</sup> Moreover, in so far as the General Court took the view, at paragraph 142 of the judgment under appeal, that AEP is not operationally independent because the energy which it produces is marketed by AE Trading, AEP observes that such considerations are irrelevant, given that the separation of production and wholesale marketing, carried out in this case by AEP, and retail marketing, carried out in this case by AE Trading, is common in the energy sector and the Commission was aware of this when it approved the concentration.

<sup>39</sup> AEP adds that, while the General Court stated that the Commission did not attribute any liability to AEP or request that it reimburse the earlier aid, the fact remains that AEP and, through its intermediary, Electrabel bear the consequences of the suspension of the aid at issue. If the Commission's intention was to reach ACEA, through the intermediary of AEP, it should have avoided affecting the situation of Electrabel and, therefore, have suspended the aid at issue only to an extent commensurate with ACEA's holding, namely 29.705 %.

<sup>40</sup> The reference made by the General Court to Case C-91/01 *Italy v Commission* [2004] ECR I-4355, paragraphs 50 to 53, is, according to AEP, irrelevant, since the case which gave rise to that judgment concerned the issue of whether a company was entitled to preferential treatment granted to small and medium-sized undertakings and not whether a company formed part of an economic unit. Moreover, at most, that case concerned exclusive control of a single group.

- 41 In so far as the General Court found that there was economic continuity between ACEA and AEP as a result of the transfer of the branch of the undertaking which was responsible for the project that is the subject-matter of the aid at issue, AEP considers that that transfer is not sufficient for it to be established that it carries on the activities previously pursued by ACEA and that it became the beneficiary of that aid. Nor can that transfer provide any justification for the finding that AEP and ACEA form an economic unit.
- 42 AEP states, in that connection, that the transfer of that project took place in the context of a joint venture agreement which marked the end of a tendering procedure organised by ACEA, in the course of which the branch of the undertaking transferred was appropriately evaluated in accordance with market rules. It is apparent from paragraph 33 of the Commission Notice entitled 'Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid' (OJ 2007 C 272, p. 4) that, in cases involving the transfer of assets ('asset deals'), such as that in the present case, there is no continuity between the old and the new undertaking.
- 43 With regard to the reasoning of the General Court concerning the possibility that the purpose of the transfer to AEP of the branch of undertaking in question from ACEA might have been to circumvent the recovery order in the contested decision, AEP points out that it stated before the General Court that an operation as important, from an economic and strategic point of view, as the formation of AceaElectrabel could not have been devised in order to avert the risk that State aid of such an insignificant amount, in relation to the overall value of the operation, might be suspended.
- 44 Moreover, by finding, first, that it was not for the Commission to prove that the purpose was to circumvent the recovery order and, second, that the finding that there had been a transfer and the account of the risks which that entailed in the light of the rules on State aid constituted sufficient arguments on the part of the Commission, the

General Court exempted the Commission from its obligation to state the reasons for its decisions other than by reference to hypothetical or paradoxical situations.

- <sup>45</sup> At the hearing, Electrabel supported AEP's arguments seeking to establish that there was no economic unity between AEP and ACEA and no intention to circumvent the recovery order in the earlier decision when the branch of the undertaking in question was transferred from ACEA to AEP. In particular, Electrabel submits that any risk of circumvention must be evaluated not in the abstract but on the basis of concrete facts.

— Findings of the Court

- <sup>46</sup> Since AEP and Electrabel challenge the General Court's finding that the Commission was entitled to consider AEP and ACEA as forming an economic unit for the purpose of the earlier aid and the aid at issue, it is necessary to determine whether that court was entitled, without erring in law, to confirm the contested decision on that point.
- <sup>47</sup> According to the established case-law of the Court, following a restructuring entailing a transfer of production facilities from one company to other newly constituted manufacturing companies, since the former company continues to have an interest in those newly constituted manufacturing companies, all those companies may, as far as the aid granted is concerned, together form a single group, notwithstanding the fact that each of the newly constituted manufacturing companies has a legal personality separate from the former company (see, to that effect, Case 323/82 *Inter Mills v Commission* [1984] ECR 3809, paragraph 11).



- 48 The former company and the new operating companies can form an economic unit, inter alia, where the restructuring carried out constitutes an indivisible whole, from an industrial and economic point of view (see, to that effect, *Intermills v Commission*, paragraph 12).
- 49 It is also apparent from the Court's case-law that an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking (Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 112 and 118).
- 50 If that is not the case, the simple separation of an undertaking into two different entities, the first of which pursues directly the former economic activity and the second of which controls the first, being fully involved in its management, would be sufficient to deprive the rules of the European Union relating to State aid of their practical effect. It would enable the second entity to benefit from subsidies or other advantages granted by the State or by means of State resources and to use them in whole or in part for the benefit of the former, in the interest, also, of the economic unit formed by the two entities (*Cassa di Risparmio di Firenze and Others*, paragraph 114).
- 51 What may reveal that it is possible to exercise functions relating to control, direction and financial support — going beyond the simple placing of capital by an investor — and illustrate the existence of organic and functional links between an entity owning a controlling shareholding in a company and the controlled company itself, is the fact that members of the management committee and the controlling body of that entity are appointed to the equivalent bodies of the controlled company (see, to that effect, *Cassa di Risparmio di Firenze and Others*, paragraphs 116 and 117).

- 52 In the present case, neither AEP nor Electrabel have disputed the following findings of the General Court: first, that court found, at paragraph 103 of the judgment under appeal, that ACEA was the original beneficiary of the aid at issue, that the branch of the undertaking receiving that aid was transferred from ACEA to AEP and that the latter carries on the activity of that branch of the undertaking. The General Court also stated, at paragraph 142 of the judgment under appeal, that the marketing of the energy produced by AEP was carried out by AE Trading, in which AceaElectrabel has a 84.17 % holding, ACEA having, in turn, a 59.41 % holding in AceaElectrabel.
- 53 Second, the General Court stated, at paragraph 109 of the judgment under appeal, that AEP is linked to both ACEA and Electrabel and that ACEA holds a majority of the capital in AceaElectrabel, which itself holds 50 % of the capital in AEP and, at paragraph 111 of the judgment, that ACEA expressly affirmed that it has joint control over AEP, together with Electrabel.
- 54 Third, the General Court pointed out, at paragraph 119 of the judgment under appeal, that, although Electrabel is represented by eight members out of twelve on AEP's board of directors and by four members out of six on its executive committee, the agreement of one of the members representing ACEA is required for the most important matters, which gives it the power to block decisions.
- 55 It is apparent from the case-law cited at paragraphs 47 and 48 above that, in such circumstances, the Commission was entitled to take the view, without overstepping the bounds of its discretion, that, following the restructuring carried out by ACEA with the support of Electrabel, ACEA and AEP form part of an indivisible whole in so far as the earlier aid and the aid at issue are concerned, since that restructuring entailed the transfer of the branch of the undertaking in question from ACEA to AEP, AEP continued the activities of that branch of the undertaking, ACEA retained an interest in AEP and the energy generated by AEP was marketed by AE Trading, which was controlled by ACEA through its majority holding in AceaElectrabel.

- 56 Moreover, in the light of the case-law referred to at paragraphs 49 and 51 above, it is apparent from those findings that the Commission was entitled to take the view that, since it had holdings giving it joint control in AEP, ACEA in fact exercised that control by involving itself directly or indirectly in the management of that company by means of both the presence of its representatives on AEP's board of directors and on its executive committee and its majority holding in AceaElectrabel, which in turn held 50 % of the capital in AEP.
- 57 Moreover, the General Court pointed out, at paragraph 125 of the judgment under appeal, first, that the agreement allocating the branch of the undertaking transferred from ACEA to AEP contained a clause precluding any possible dispute concerning that branch and, second, that ACEA had already, at that point, contested the earlier decision.
- 58 In such circumstances, the General Court cannot be criticised for having erred in taking the view, at paragraph 130 of the judgment under appeal, that the Commission has established in the present case that the restructuring carried out by ACEA together with Electrabel could have given rise to the risk of circumvention of the recovery order in the earlier decision.
- 59 First, it must be concluded that, contrary to what is claimed by AEP and Electrabel, the risk that the order for recovery of the earlier aid might be circumvented cannot be taken into account only where such an objective can be proved to exist in the factual circumstances of the case. If that were so, undertakings would be encouraged to devise company structures designed to circumvent the recovery of unlawful aid by taking advantage of the fact that the burden of proving that such an objective was being pursued lay with the Commission.
- 60 The General Court therefore acted correctly in finding that it was sufficient for the Commission to show that there was such a risk in the present case.

- 61 Second, the Commission was entitled to take the view that, in the absence of any finding that it formed an economic unit with ACEA, AEP could, following the restructuring carried out and under the joint control of ACEA, pursue the transferred activity which had benefited from the earlier aid and obtain the aid at issue. The Commission was also entitled to find that ACEA was able to benefit from the aid at issue granted to AEP, given that they pursued their respective economic activities as an indivisible whole.
- 62 In the light of the case-law cited at paragraph 50 above, if ACEA had been able to benefit from the aid at issue, that would have been sufficient to deprive the rules of the European Union on State aid of their practical effect and would also have been incompatible with the reasoning of the *TWD v Commission* case-law.
- 63 Accordingly, the General Court was entitled to form the view, without erring in law, that the Commission, which has broad discretion in this field, did not commit a manifest error of assessment in concluding that ACEA and AEP formed an economic unit in so far as the earlier aid and the aid at issue are concerned.
- 64 In particular, the General Court was entitled to consider that the fact that ACEA exercised control over AEP only in conjunction with Electrabel and that Electrabel had a greater share in the capital of AEP than in that of ACEA did not, in the circumstances, preclude the Commission from concluding that ACEA and AEP formed such an economic unit.
- 65 That conclusion cannot be affected by the other arguments put forward by AEP.
- 66 First, it must be concluded that, in the light of the above analysis, the arguments relating to, first, the Commission's finding in its assessment of the concentration that AEP

was operationally independent of ACEA and, second, the concept of an economic unit as applied in the field of restrictive practices and concentrations, cannot be accepted. Indeed, as the General Court correctly held at paragraphs 135, 137 and 138 of the judgment under appeal, the concept of an economic unit in State aid matters can differ from that applicable in other areas of competition law.

- 67 In any event, neither any operational independence on the part of AEP nor the concept of an economic unit applicable in the field of restrictive practices and concentrations is capable of altering the fact that in the light, in particular, of ACEA's power to block decisions for the most important matters concerning the management of AEP, the General Court was entitled, in the circumstances, to confirm the Commission's finding that ACEA exercised joint control over AEP and that the latter formed part of an indivisible whole.
- 68 Second, with regard to the argument relating to the transfer of the branch of the undertaking in question to AEP as part of a purported transfer of assets ('asset deal'), suffice it to note that the rules governing that kind of transaction cannot be applied in circumstances such as those in the present case, in which ACEA retained joint control over the branch of the undertaking in question and could therefore be regarded as forming an economic unit together with AEP.
- 69 Third, as regards the argument relating to the reference made by the General Court to the judgment in Case C-91/01 *Italy v Commission*, it is clear from the considerations set out at paragraphs 55 to 64 above that, even if that reference were incorrect, as AEP claims, the General Court was nevertheless entitled to conclude that it was possible for the Commission to find that ACEA and AEP formed an economic unit. Accordingly, that argument is ineffective.

70 Fourth, as regards the argument that the aid at issue should have been suspended only to an extent commensurate with ACEA's share in the capital of AEP, suffice it to point out that, on the grounds set out at paragraph 61 above, the Commission and the General Court were entitled to consider that all aid, even in a small amount, granted to AEP was capable of conferring advantages on ACEA.

71 In the light of all the foregoing, the second part of the first ground of appeal must be rejected.

The third part of the first ground of appeal, alleging that the reasoning of the judgment under appeal was irrational and contradictory

— Arguments of the parties

72 AEP criticises the General Court for having simply adopted as its own all the Commission's arguments without pointing out their inherent contradiction or the manifest error of law and assessment vitiating those arguments.

73 In particular, AEP is of the view that, since the General Court acknowledged that AEP is controlled by two separate groups and that, within those two groups, Electrabel has the greatest shareholding, its conclusion that AEP and ACEA have one and the same control centre is contradictory, arbitrary and illogical, since a sole company cannot, logically, form a single economic unit with two separate legal personalities.

- 74 Furthermore, no explanation capable of clarifying its implications has been given for the General Court's finding that AEP is not operationally independent because AE Trading markets the energy which it produces.
- 75 AEP is of the view that it is unrealistic and illogical to consider, as the General Court did, that AceaElectrabel was conceived in order to circumvent the rules applicable to State aid and that it was not for the Commission to prove that that was the objective, but that the finding that there had been a transfer and the account of the risks which that entailed in the light of the rules on State aid constituted sufficient reasoning on the part of the Commission.
- 76 According to AEP, the General Court also contradicted itself by taking the view, at paragraph 140 of the judgment under appeal, that in order to determine whether there is an economic unit, it is necessary to take account of the stake held by the undertaking concerned in a group of companies, over which control is exercised directly or indirectly by one of those companies, and whether a single group controlled by one entity has been formed, whereas the General Court itself found that AEP was controlled by two separate entities.

#### — Findings of the Court

- 77 It is settled case-law that the duty incumbent upon the General Court under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice to state reasons for its judgments does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know why the measures in question were taken and provides the Court of Justice with sufficient material for it to exercise its powers of review (Case C-431/07 P *Bouygues and Bouygues Télécom v Commission* [2009] ECR I-2665, paragraph 42, and order of 21 January 2010 in Case C-150/09 P *Iride and Iride Energia v Commission*, C-150/09 P, paragraph 42).

- 78 In the present case, it need merely be observed that the reasoning followed by the General Court is clear and intelligible and is such as to enable both AEP and Electrabel to know why the General Court rejected the pleas in question and to provide the Court with sufficient material to enable it to exercise its powers of review.
- 79 In particular, it should be noted that the purported inconsistencies alleged by ACEA in the reasoning of the General Court relate in fact to the same purported errors in law which have already been examined and rejected in connection with the second part of the first ground of appeal, and do not relate to defective reasoning.
- 80 Accordingly, the third part of the first ground of appeal must be rejected, as must, consequently, the first ground of appeal in its entirety.

*The second ground of appeal, concerning the scope of the TWD v Commission case-law*

The first part of the second ground of appeal, alleging distortion of the pleas in law relied on at first instance

— Arguments of the parties

- 81 AEP submits that, by stating, at paragraph 172 of the judgment under appeal, that the Commission was not required, in the earlier decision, to analyse aid individually



granted under a scheme, the General Court distorted the third plea relied on in the application seeking to establish that, to order recovery of individual aid granted under a scheme, it is necessary first to ascertain the individual situation of each undertaking concerned.

- <sup>82</sup> According to AEP, it is essential to determine, before a recovery order is made, whether and to what extent each undertaking belonging to the category affected by the scheme in question benefited from aid that is incompatible with the rules of the EC Treaty. In the present case, however, no such assessment has yet been made.

#### — Findings of the Court

- <sup>83</sup> As regards those claims, it need merely be noted, first, that it is apparent from a reading of paragraphs 23 to 28 of the application at first instance and paragraphs 147 to 151 of the judgment under appeal that the General Court faithfully summarised the arguments put forward by AEP and, second, that the General Court addressed those arguments at paragraphs 164 to 181 of that judgment.

- <sup>84</sup> In particular, it is clear from the final section of paragraph 25 of the application at first instance that AEP argued in particular that, in order for it to be able to claim as against ACEA and AEP that the earlier aid received by ACEA was unlawful, the Commission should have examined, in the earlier decision, the application of the earlier aid schemes to ACEA and that, having failed to carry out such an examination, it was not entitled to put forward such a claim of illegality.

- 85 The General Court cannot therefore be criticised for having distorted the third plea relied on at first instance when it responded to the arguments put forward by AEP, in particular by its finding at paragraph 172 of the judgment under appeal that the Commission was not required in the earlier decision to analyse aid granted on an individual basis under those schemes.
- 86 It follows that the first part of the second ground of appeal must be rejected.

The second part of the second ground of appeal, alleging errors of law

— Arguments of the parties

- 87 First, AEP submits that the *TWD v Commission* case-law, which concerns the assessment of the effects of cumulative aid on an undertaking, can be applied only in relation to one and the same undertaking. AEP argues that it has, however, shown, in the context of the first ground of appeal, that ACEA and AEP itself cannot be regarded as forming part of an economic unit. The General Court therefore incorrectly confirmed the contested decision, in so far as it applied that case-law.
- 88 Second, AEP is of the view that, in order to demonstrate that the cumulation of the earlier aid and the aid at issue could have had adverse effects, the General Court should have verified that ACEA had in fact received unlawful aid, since that verification was carried out neither by the Italian Republic nor by the Commission.

- 89 According to AEP, since it is apparent from the reasoning of the General Court that the Commission's analysis should have taken into account, in particular, the effects of the aid on ACEA, the General Court distorted the *TWD v Commission* case-law by creating a new condition of compatibility which is not laid down by the Treaty and which seeks to impose penalties where earlier aid has not been repaid. Instead of taking account of any possible cumulative effect as a simple factor in assessing whether or not the aid at issue is compatible with the common market, the General Court applied that decision and transformed it into an instrument for securing reimbursement of the earlier aid, while at the same time ensuring that the company which received the earlier aid should not enjoy any further advantage, even of an indirect nature, until that aid had been reimbursed. The General Court failed to define its position on that fundamental objection and rejected it, at paragraph 188 of the judgment under appeal, in a statement given for the sake of completeness and which is based on mere hypotheses.
- 90 AEP states that, at the time when the contested decision was adopted, it was impossible to operate on the presumption of the existence of a cumulative effect or to assess its importance. When it examines an aid scheme, the Commission can choose either to proceed on a case-by-case basis or simply to carry out a general abstract assessment. If it chooses the second option, the means available to it for ensuring that the Member State concerned has implemented the decision are confined to actions for failure to comply with obligations, since the *TWD v Commission* case-law was not designed to provide it with an alternative means of imposing penalties.
- 91 AEP takes the view that, since the aim of that decision is to prevent the beneficiary of new aid from enjoying an excessive advantage on the market as a result of its failure to reimburse earlier unlawful aid, the application of that decision requires a specific and detailed examination of the advantages conferred by the new aid, which should be conducted by way of specific reference to the position of the recipient undertaking on the market in question relative to that of its competitors and to trends in Community trade.

- 92 Accordingly, AEP takes the view that, in order to be able to suspend payment of the new aid, the Commission should have come to the informed conclusion that the distortion of competition and trade arising from the combined effect of the two aid measures in the sectors in question would be such that the adverse effects of the new aid would prevail over the positive effects, thereby making it impossible to authorise the new aid until the initial aid had been reimbursed.
- 93 Accordingly, in so far as it took the view, at paragraph 186 of the judgment under appeal, that the *TWD v Commission* case-law does not require the Commission to establish that the combined effect of the two aid measures is such as to affect trade but that the mere possibility alone is sufficient, the General Court erred in law.
- 94 Third, according to AEP, the General Court erred in law in considering that the Member State and the undertaking receiving new aid are required to provide the Commission with evidence to show that the new aid and earlier unlawful aid which has not been repaid do not have any cumulative effect. While the Member State concerned is under a duty to provide the Commission with evidence capable of demonstrating that new aid is compatible with the common market, neither that Member State nor the undertaking concerned is required, according to AEP, to provide negative evidence, that is to say, evidence that the cumulation of the aid measures in question has no effect on trade.

#### — Findings of the Court

- 95 First, it should be borne in mind that the argument that ACEA and AEP are two separate economic entities in so far as the earlier aid and the aid at issue are concerned was rejected in the context of the examination of the second part of the first ground of appeal. It was also pointed out in that examination that the General Court did not,

therefore, err in law in finding that the Commission was entitled to form the view that the grant of the aid at issue to AEP enabled ACEA to benefit from it.

- <sup>96</sup> Next, it is clear from the Court's case-law that the need to prevent the cumulative effect of aid that has not been repaid and of aid which is planned is the same, regardless of whether individual aid or aid covered by an aid scheme is in issue, and that the *TWD v Commission* case-law allows the Commission to make compatibility of aid conditional upon prior repayment of earlier unlawful aid (see, to that effect, the order in *Iride and Iride Energia v Commission*, paragraphs 49, 50 and 70).
- <sup>97</sup> First, the Commission must, where appropriate, take into account any cumulative effect of the earlier unlawful aid that has not been repaid and the new aid (see, to that effect, Case C-355/95 P *TWD v Commission*, paragraphs 26 and 27) and, second, it can find that the new aid is compatible with the common market only when the evidence at its disposal enables it to reach such a conclusion (see, to that effect, the order in *Iride and Iride Energia v Commission*, paragraph 70).
- <sup>98</sup> In the present case, the General Court found, first, that the Commission had at its disposal evidence indicating that ACEA had benefited from the earlier aid and, second, that the Commission did not have at its disposal evidence from which it could conclude that the cumulation of the earlier aid and the aid at issue was not unlawful and incompatible with the common market.
- <sup>99</sup> As the General Court correctly pointed out at paragraph 187 of the judgment under appeal, it is apparent from the *TWD v Commission* case-law that, where the Commission decides to initiate a formal investigation procedure, it is for the Member State and the potential beneficiary of new aid to provide the Commission with evidence

capable of showing that the aid is compatible with the common market and that obligation also extends to the need to establish that the new aid and the earlier unlawful aid that is incompatible with the common market and has not been repaid do not have a cumulative effect.

- <sup>100</sup> The General Court was therefore correct in finding that, since the earlier decision related to an aid scheme and not to individual aid, with the result that it fell to the Italian Republic to determine the amounts to be repaid by the beneficiaries of that scheme, it was for the latter, ACEA and AEP to communicate to the Commission, in the procedure which led to the contested decision, the amounts to be repaid and, if any, actually repaid in respect of the earlier aid, in order to demonstrate, if relevant, that there had not been any accumulation of unlawful aid.
- <sup>101</sup> Since the Commission was not provided with any such information, it follows that the General Court cannot be criticised for finding, on the basis of the *TWD v Commission* case-law, that it was not for the Commission, in those circumstances, to determine precisely the amount of earlier aid received by ACEA prior to any suspension of payment of the aid at issue.
- <sup>102</sup> Lastly, since it is clear from the Court's case-law that it is sufficient for the Commission to establish that the aid at issue is capable of affecting trade between Member States and distorting competition (order in *Iride and Iride Energia v Commission*, paragraph 72), the General Court acted correctly in finding that the Commission was not required, in the circumstances of the case, to carry out a specific detailed examination of the advantages to be derived from the aid at issue by referring specifically to the position of AEP and ACEA on the market in question relative to that of their competitors, and to trends in Community trade.

103 In the light of all the foregoing, it is clear that the reasoning of the General Court is not vitiated by any error of law and that the second part of the second ground of appeal must therefore be rejected.

The third part of the second ground of appeal, alleging contradictory and inadequate reasoning in the judgment under appeal

— Arguments of the parties

104 AEP points out that, at paragraph 179 of the judgment under appeal, the General Court acknowledges that it could not say with any certainty that ACEA had received aid that was incompatible with the rules of the Treaty. AEP therefore fails to understand why, in the following paragraph of that judgment, the General Court expressed the view that the mention in ACEA's financial report of the possibility that a certain sum might have to be repaid constituted sufficient reasoning on the part of the Commission.

105 AEP considers paragraph 186 of the judgment under appeal to be unclear and paragraph 187 thereof to be inexplicable and not properly reasoned. Further, it claims, paragraph 188 of that judgment is not reasoned.

106 AEP adds, in that connection, that, since the reasoning set out by the General Court in those paragraphs suggests that it took the view that the Commission had not received from the Italian Republic the information necessary to enable it to carry out its examination, the General Court ought to have addressed the argument put forward at the hearing that, in such a case, the Commission cannot take a decision on the basis of the information at its disposal alone but is required to follow the procedure laid

down in Article 5 of Regulation No 659/1999. The General Court, however, failed to address that argument.

— Findings of the Court

- <sup>107</sup> It has been pointed out, at paragraph 77 above, that the duty incumbent upon the General Court to state reasons for its judgments does not require it to address expressly all the arguments articulated by the parties and that the reasoning is sufficient where it enables the persons concerned to know why the measures in question were taken and provides the Court of Justice with sufficient material for it to exercise its powers of review.
- <sup>108</sup> In the present case, it is sufficient, first, to observe that the reasoning of the General Court is clear and intelligible and is such as to enable both AEP and Electrabel to know why the General Court rejected the plea in question and to provide the Court of Justice with sufficient material for it to exercise its powers of review.
- <sup>109</sup> In particular, the General Court explained, at paragraph 180 of the judgment under appeal, why, in its opinion, the Commission was entitled take the view, notwithstanding AEP's arguments examined at paragraph 179 of that judgment, that ACEA had benefited from earlier unlawful aid. Moreover, it is clear from paragraphs 186 to 188 of the judgment under appeal that the General Court set out therein its interpretation of the *TWD v Commission* case-law.



- 110 Second, it is apparent from the case-file that AEP did not put forward the argument referred to at paragraph 106 above at the stage of the written procedure before the General Court but did so for the first time at the hearing before that Court, a fact which AEP itself acknowledges. In those circumstances, the view must be taken that this constituted a new argument directed at the annulment of the contested decision.
- 111 It is apparent from the case-file that that argument did not expand on an argument raised previously, whether directly or by implication, in the original application which is closely connected to the original complaint. However, Articles 48(2) of the Rules of Procedure of the General Court provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure (see, to that effect, the judgment of 12 November 2009 in Case C-564/08 P *SGL Carbon v Commission*, C-564/08 P, paragraphs 20 to 34).
- 112 Accordingly, since the argument referred to in paragraph 106 of the present judgment was not based on new matters which came to light during the procedure, the General Court cannot be criticised for having failed to address that argument expressly.
- 113 Moreover, in so far as AEP presented that argument for the first time at the stage of the written procedure before the Court of Justice, it follows from settled case-law that to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court would in effect allow that party to bring before the Court a wider case than that heard by the General Court. In an appeal, the Court's jurisdiction is, as a general rule, confined to a review of the assessment by the General Court of the pleas argued before it (see, inter alia, Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237, paragraph 38, and the order in *Iride and Iride Energia v Commission*, paragraph 32).

114 Consequently, the third part of the second ground of appeal must be rejected, as must, therefore, the second ground of appeal in its entirety.

115 It follows that the appeal must be dismissed in its entirety.

## **Costs**

116 Under Article 69(2) of the Court's Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and AEP has been unsuccessful, AEP must be ordered to pay the costs. Moreover, since Electrabel has been unsuccessful, it must be ordered to bear its own costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. Dismisses the appeal;**
  
- 2. Orders AceaElectrabel Produzione SpA, in addition to bearing its own costs, to pay those incurred by the European Commission;**
  
- 3. Orders Electrabel SA to bear its own costs.**

[Signatures]