Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 5 July 2012 [1]

Case C-402/11 P

Jager & Polacek GmbH
v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)

(Appeals — Community trade mark — Regulation (EC) No 40/94 — Regulation (EC) No 2868/95 — Procedure upon opposition to registration of a Community trade mark — Legal nature of the act adopted at the close of the stage of the examination of the admissibility of the opposition — Revocation procedure — Principle of effective judicial protection — Principle of legal certainty)

1. Is the act whereby the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) deems an opposition to registration of a Community trade mark admissible a mere 'measure of organisation of [the opposition] procedure' or a 'decision' within the meaning of European Union law?

2. That, essentially, is the question raised by the present appeal by Jager & Polacek GmbH against the judgment of the General Court of the European Union of 12 May 2011 in *Jager & Polacek* v *OHIM (REDTUBE)*.[2] The answer to that question determines the remedies available to the person concerned against the act at issue and also the circumstances in which that act may be revoked by OHIM.

I – Legal framework

A – *The procedure upon opposition to the registration of a Community trade mark*

3. Under Article 8(4) of Regulation (EC) No 40/94 on the Community trade mark,[3] OHIM may refuse to register a Community trade mark upon opposition by the proprietor of an earlier non-registered trade mark. That opposition must be submitted in accordance with Article 42 of that regulation. It must be expressed in writing and must specify the grounds on which it is made, within three months following the publication of the Community trade mark application, and is deemed to have been entered only after the opposition fee has been paid.

1 — Original language: French.

2 — Case T-488/09; 'the judgment under appeal'.

3 — Council regulation of 20 December 1993 (OJ 1994 L 11, p. 1), as amended by Council Regulation (EC) No 1891/2006 of 18 December 2006 (OJ 2006 L 386, p. 14; 'Regulation No 40/94'). Regulation No 40/94 was repealed and replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), which entered into force on 13 April 2009. None the less, in view of the time when the facts took place, the present dispute is governed by Regulation No 40/94.

4. The European Union (EU) legislature laid down the rules governing the opposition procedure in Rules 15 to 22 of Regulation (EC) No 2868/95.[4] In particular, it defined the rules on assessment of the admissibility of the opposition in Rule 17 of the implementing regulation, which is worded as follows:

'1. If the opposition fee has not been paid within the opposition period, the opposition shall be deemed not to have been entered. …

2. If the notice of opposition has not been filed within the opposition period, or if the notice of opposition does not clearly identify the application against which opposition is entered or the earlier mark … on which the opposition is based in accordance with Rule 15(2)(a) and (b), or does not contain grounds for opposition in accordance with Rule 15(2)(c), and if those deficiencies have not been remedied before the expiry of the opposition period, [OHIM] shall reject the opposition as inadmissible.

3. Where the opposing party does not submit a translation as required under Rule 16(1), the opposition shall be rejected as inadmissible. …

4. If the notice of opposition does not comply with the other provisions of Rule 15, [OHIM] shall inform the opposing party accordingly and shall invite him to remedy the deficiencies noted within a period of two months. If the deficiencies are not remedied before the time-limit expires, [OHIM] shall reject the opposition as inadmissible.

5. Any finding pursuant to paragraph 1 that the notice of opposition is deemed not to have been entered and any decision to reject an opposition as inadmissible under paragraphs 2, 3 and 4 shall be notified to the applicant.'

5. Under Rule 17 of the implementing regulation, the opposition must satisfy the absolute admissibility criteria referred to in Rule 15(2)(a) to (c) of the implementing regulation.[5] The notice of opposition must thus contain the file number of the application against which the opposition is entered and the name of the applicant for the Community trade mark, a clear identification of the earlier mark on which the opposition is based and a statement to the effect that the requirements under Article 8(4) of Regulation No 40/94 are fulfilled.

6. The opposition must also satisfy the relative admissibility criteria referred to in Article 15(2)(d) to (h) of the implementing regulation. The notice of opposition must, in particular, contain the filing date and, where available, the registration date and the priority date of the earlier mark; a representation of the earlier mark; the goods and services on which the opposition is based; and the name and address of the opposing party or, where appropriate, his representative.

7. Rule 18(1) of the implementing regulation provides as follows:

'When the opposition is found admissible pursuant to Rule 17, [OHIM] shall send a communication to the parties informing them that the opposition proceedings shall be deemed to commence two months after receipt of the communication. …'

8. Rule 19 of that regulation then specifies the nature of the facts and evidence which the opposing party is invited to submit or supplement in support of his opposition. In particular, under paragraph 2 of that rule, the opposing party is required to file proof of the existence, validity and scope of protection of his earlier mark.

4 — Commission regulation of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1), as amended by Commission Regulation (EC) No 1041/2005 of 29 June 2005 (OJ 2005 L 172, p. 4; 'the implementing regulation').

5 — See Opposition Guidelines, Part 1: Procedural matters, available on OHIM's website, in particular A.V, points 1 and 2.

9. Last, the EU legislature laid down the procedural rules relating to the substantive examination of the opposition in the context of Rule 20 of the implementing regulation.

B – *Rules governing the revocation of a decision adopted by OHIM*

10. Article 77a of Regulation No 40/94 sets out the conditions governing the revocation of a decision adopted by OHIM. It provides as follows:

'1 Where [OHIM] has … taken a decision which contains an obvious procedural error attributable to [OHIM], it shall ensure that … the decision is revoked …

2. … revocation shall be [ordered], *ex officio* or at the request of one of the parties to the proceedings, by the department which … took the decision. … revocation shall be [ordered] within six months from the date on which … the decision was taken, after consultation with the parties to the proceedings …

…'

11. The procedure governing the revocation of such a decision is laid down in Rule 53a of the implementing regulation. According to that rule, OHIM is to inform the party affected by the intended revocation, who may submit observations.

II – Background to the dispute

12. The background to the dispute, the proceedings before the General Court and the judgment under appeal may be summarised as follows. [6]

13. On 25 March 2008 the appellant filed an opposition under Article 42 of Regulation No 40/94 to the registration of the word mark 'REDTUBE' applied for by RT Mediasolutions s.r.o. [7]

14. By letters of 20 May 2008 the Trade Marks Department of OHIM sent a communication to each of the two parties to the proceedings. In those letters, OHIM stated that the opposition had been deemed admissible in so far as it was based on the earlier non-registered trade mark Redtube. It informed the two parties that the period for a friendly settlement would expire on 21 July 2008 and that the adversarial stage of the opposition proceedings would begin on 22 July 2008. It also specified the period within which the appellant was to substantiate its application and that within which RT Mediasolutions was to reply.

15. On 10 September 2008 RT Mediasolutions claimed that the appellant had not paid its opposition fee within the deadline and therefore requested OHIM to annul the communication of 20 May 2008 and also to find that the opposition was deemed not to have been entered.

16. On 2 October 2008 the Trade Marks Department of OHIM sent a letter, entitled 'Correction', to the appellant, informing it that the communication of 20 May 2008 had been sent in error and that it should be regarded as being devoid of purpose. Following the application to that effect lodged by RT Mediasolutions, OHIM's Opposition Division adopted on 22 January 2009 a decision according to which the opposition was deemed not to have been entered, as the opposition fee had not been paid within the requisite time-limit.

6 — For a full account of the background to the dispute, reference is made to paragraphs 1 to 20 of the judgment under appeal.

7 — 'RT Mediasolutions'.

17. On 20 March 2009 the appellant lodged an appeal against that decision, submitting that on 20 May 2008 OHIM had adopted a decision declaring the opposition admissible and that that decision had not been revoked in accordance with the procedural rules laid down in Article 77a of Regulation No 40/94. On 29 September 2009 the Fourth Board of Appeal of OHIM rejected the appellant's claims on the ground, in particular, that the letter of 20 May 2008 was a mere measure of organisation of procedure and not a decision.

III – Forms of order sought by the parties before the General Court

18. By application lodged at the Registry of the General Court on 4 December 2009, the appellant brought an action for annulment of the decision of the Fourth Board of Appeal of OHIM of 29 September 2009.

19. In support of its action, the appellant raised three pleas in law. I shall refer only to the second plea, since it alone forms the subject-matter of the present appeal.

20. The second plea in law alleged infringement of Article 77a(1) and (2) of Regulation No 40/94. In support of that plea, the appellant claimed that OHIM's communication of 20 May 2008 was a decision. Since, in application of Rule 17(5) of the implementing regulation, it is decisions that declare that the opposition is deemed not to have been filed or that reject the opposition on the ground that it is inadmissible, then under the legal principle of *actus contrarius* or paralellism of forms the act whereby OHIM deems an opposition admissible must also be qualified as a 'decision'.

21. Consequently, in the appellant's submission, that decision could be revoked only in accordance with the procedure laid down in Article 77a of Regulation No 40/94, read in conjunction with Rule 53a of the implementing regulation.

22. The General Court considered that the letter of 20 May 2008 was not a decision but a mere measure of organisation of procedure. It held that that letter was merely a communication sent to the appellant concerning the date on which the adversarial stage of the opposition proceedings would begin and inviting it to submit the facts, evidence and observations on which its opposition was based. Furthermore, the General Court considered that the letter had no legal effect vis-à-vis the appellant. Last, it held that the letter did not constitute a final position adopted by OHIM on the admissibility of the opposition.

23. The General Court then rejected the arguments which the appellant based on the principle of *actus contrarius* and of parallelism of forms. The Court also considered that as the letter of 20 May 2008 was not a decision the appellant could not rely on the principle of the protection of the legitimate expectations which the letter had caused it to have.

24. Last, the General Court held that the case did not concern an international registration designating the European Union and that there was no need to rule on the legal nature of OHIM's notification of oppositions deemed admissible to the World Intellectual Property Organisation (WIPO).

25. After examining the other two pleas, the General Court, by the judgment under appeal, dismissed the appellant's action.

IV – Forms of order sought by the parties before the Court of Justice

26. By its appeal, the appellant requests the Court to set aside the judgment under appeal and to order OHIM to pay the costs.

27. OHIM contends that the Court should dismiss the appeal and order the appellant to pay the costs.

V – The appeal

28. By its single plea in law, the appellant maintains that the General Court infringed Article 77a(1) and (2) of Regulation No 40/94, which lay down a specific procedure for revocation of an unlawful decision.

29. The plea is subdivided into three parts. First, the appellant maintains that the General Court erred in law in ruling that the letter of 20 May 2008 is a mere measure of organisation of procedure, and thus breached the principles of effective judicial protection and legal certainty. Second, it contends that the General Court did not correctly interpret the concept of communication in that a communication can in itself contain a decision. Third, the appellant claims that the judgment under appeal is vitiated by a failure to state reasons.

A – *First part of the plea, alleging incorrect qualification of the act at issue and breach of the principles of effective judicial protection and legal certainty*

30. The first part of the plea may be subdivided into two complaints. First, the appellant maintains that the letter of 20 May 2008 whereby OHIM deemed its opposition admissible contains a decision and that it therefore ought to have been revoked in accordance with the procedure laid down in Article 77a of Regulation No 40/94. Second, the appellant takes issue with the General Court for having failed to observe the appellant's right to effective judicial protection and the principle of legal certainty.

31. OHIM disputes those arguments.

1. First complaint, alleging error of law with respect to the legal nature of the act at issue

32. In view of the way in which it was conducted and the errors of assessment made, the procedure at issue is clearly unsatisfactory. I understand, moreover, that the fact that the act at issue did not take the form of a 'decision' deprives the appellant a priori of the procedural guarantees laid down in Article 57 of Regulation No 40/94, which provides for the possibility to bring an action for annulment, and in Article 77a of that regulation, which determines the rules on the revocation of acts that constitute decisions.

33. None the less, I share the General Court's view that that act is not a decision, in particular because it does not produce binding legal effects for the appellant.

34. In order to reach that conclusion, it is necessary, first, to refer to the Court of Justice's case-law on the nature of acts that are open to challenge and, second, to examine the substance of the act at issue and also the procedural framework of which it forms part.

(a) The Court's case-law on the nature of acts that are open to challenge in the context of an action for annulment

35. It follows from settled case-law, as the General Court observed at paragraph 90 of the judgment under appeal, that only an act capable of producing binding legal effects constitutes a decision capable in itself of forming the subject-matter of an action for annulment within the meaning of Article 263 TFEU. In other words, according to the Court of Justice, the interests of an applicant

must be affected and a distinct change must be brought about in his legal position.[8]

36. It is also common ground that, in order to determine whether an act produces such effects, it is necessary to look at its substance and not at its formal presentation.[9] It is thus irrelevant that the act is not described as a decision by the person who takes it.

37. That case-law enables the scope of an action for annulment to be extended to acts which cannot formally be classified as 'decisions' but which, in substance, produce binding legal effects. It also serves to ensure that the institutions cannot avoid review by the EU Courts by simply disregarding formal requirements such as the title of the act, the statement of reasons on which it is based or a reference to the provisions which constitute its legal basis.

38. The existence of binding effects assumes particular importance when it is necessary to assess whether an act adopted in an administrative procedure consisting of several stages, such as the procedure applicable to examination of an opposition before OHIM, is open to challenge. In that context, OHIM adopts numerous acts whereby it not only decides on measures of organisation of procedure but also carries out a final assessment of the merits of the application, yet not all those acts have legal effects vis-à-vis the parties to the proceedings.

39. The Court therefore places those acts in different categories.

40. The first category consists of acts whereby the institution concerned definitively determines its position at the end of the procedure. Those acts are open to challenge in so far as they produce binding legal effects and are not followed by any other act capable of giving rise to an action for annulment. That is the case of the decision whereby OHIM deems an opposition by an undertaking well founded and therefore rejects the registration of a Community trade mark.

41. The second category consists of intermediate acts whose purpose is to pave the way for the final decision.

42. On the one hand, such acts include measures which, although adopted in the course of the preparatory procedure, mark the culmination of a distinct stage of the main procedure and produce legal effects.[10]

43. Numerous examples may be found in the context of the procedures for the implementation of Articles 101 TFEU and 102 TFEU. Those procedures are arranged in several successive stages, such as the preliminary investigation stage, the *inter partes* inquiry stage, and then the hearing stage. Thus, in *Hoechst* v *Commission*[11] and *Orkem* v *Commission*,[12] the Court accepted that the decisions whereby the European Commission requests information from the undertakings or conducts on-the-spot investigations are acts open to challenge.

8 — Case 133/79 *Sucrimex and Westzucker* v *Commission* [1980] ECR 1299, paragraph 15, and Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9. See also Case C-322/09 P *NDSHT* v *Commission* [2010] ECR I-11911, paragraph 45 and the case-law cited.

9 — Case C-147/96 *Netherlands* v *Commission* [2000] ECR I-4723, paragraph 27 and the case-law cited.

10 — *IBM* v *Commission*, paragraph 11.

11 — Joined Cases 46/87 and 227/88 [1989] ECR 2859.

12 — Case 374/87 [1989] ECR 3283.

44. In the same way, the Court has held that the decision whereby the Commission initiates the formal investigation procedure following its preliminary analysis is an act open to challenge.[13] The Court takes the view that such a decision entails legal effects vis-à-vis the Member State and undertakings concerned, since the Commission can order suspension of the measure. According to the Court, those effects are independent of the final decision and are not capable of being rectified in an action against the final decision, thus depriving the applicants of sufficient judicial protection.[14]

45. On the other hand, the second category includes measures of a 'purely'[15] or 'simply'[16] preparatory character. Such measures constitute only one of the stages that enable the institution to adopt its final decision. They do not produce any legal effects and are not, in accordance with the case-law, acts open to challenge. From that standpoint, the Court takes the view that any defects in such measures may be relied upon in an action directed against the final decision, for which they represent a preparatory step.[17] That is true, in competition law, of the act whereby the Commission communicates its objections against the undertakings.

46. Reference to that case-law reveals the imperatives which guide the Court's action in this field.

47. As we have just seen, the Court seeks to ensure effective judicial protection of an individual's rights under EU law. In *Athinaïki Techniki* v *Commission*,[18] the Court noted that, as the European Union is a community based on the rule of law, the procedural rules governing actions must be interpreted in such a way as to ensure that those rules can contribute to the attainment of such an objective.[19] It is for that reason that preparatory acts capable of producing legal effects and constituting the culmination of a procedure ancillary to the main procedure must, according to the Court, be acts against which an action for annulment may be brought.

48. None the less, the Court also seeks to avoid an increase in the number of actions against preparatory measures, which could paralyse the activity of the institutions.

49. That case-law defines the context within which the act at issue must be classified. Is that act, as the General Court asserts in the judgment under appeal, a mere measure of organisation of the opposition proceedings, which is thus not amenable to an action, or is it, as the appellant maintains, a decision?

50. In order to answer that question, it is necessary to examine the substance of the letter of 20 May 2008 and the procedural framework of which it forms part.

(b) The substance of the act at issue and the procedural framework of which it forms part

51. As is apparent from the facts set out at paragraph 9 of the judgment under appeal and from the findings of the General Court at paragraphs 91, 92 and 95 of that judgment, first, the letter of 20 May 2008 informs the appellant that its opposition 'has been deemed admissible in so far as it was based on the earlier non-registered trade mark Redtube' and that, if the opposition was based on other earlier rights, examination of those other rights has not yet taken place. Second, it informs the appellant, together with RT Mediasolutions, of the duration of the 'friendly settlement' period, of the time-limit for initiating the adversarial stage of the procedure and, last, of the periods within which the appellant could substantiate its opposition and RT Mediasolutions could respond.

13 — Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303.
14 — Ibid., paragraphs 59, 60, 62 and 63.
15 — *IBM* v *Commission*, paragraph 12.
16 — *Italy* v *Commission*, paragraph 63.
17 — *IBM* v *Commission*, paragraph 12.
18 — Case C-521/06 P [2008] ECR I-5829.
19 — Paragraph 45 and the case-law cited.

52. It is clear that the second part of the letter constitutes a simple communication to the parties, not having the nature of a decision, in so far as OHIM informs them, in accordance with Rule 18(1) of the implementing regulation, of the time-limits applicable to the opposition procedure.

53. None the less, the letter cannot be interpreted as merely informing the parties of the initiation of the opposition procedure and the relevant time-limits. It is necessary to take account of the first part of the letter of 20 May 2008, in which OHIM informs the appellant that its opposition 'has been deemed admissible' in that it is based on the earlier non-registered trade mark Redtube.

54. In the appellant's view, that in itself constitutes a decision in so far as, in substance, OHIM adopts a definitive assessment of the admissibility of the opposition, capable of giving rise to binding legal effects. It is true that the use of the verb 'deem' indicates that OHIM did in fact rule on the admissibility of the claim.

55. To my mind, however, that is not sufficient for the act at issue to be recognised as being in the nature of a decision.

56. The opposition procedure consists of two stages that must be distinguished. There is, first, the stage of examination of the admissibility of the opposition referred to in Rule 17 of the implementing regulation and, second, the stage of the examination properly so-called, established by Article 43 of Regulation No 40/94 and governed by Rules 18 to 20 of the implementing regulation.

57. The stage of examination of the admissibility of the opposition is of a preliminary nature. It must enable OHIM to assess the admissibility of the opposition in the light of the conditions expressly referred to in Rules 15 and 16 of the implementing regulation. OHIM must therefore ensure that the absolute conditions laid down in Rules 15(2)(a) to (c) and 16(1) of the implementing regulation are satisfied, namely, first, that the opposition act does indeed identify the Community trade mark challenged, the earlier mark and the grounds on which the opposition is based, and, second, that the opposition is translated. OHIM must also ensure that the relative conditions laid down in Rule 15(2)(d) to (h) of the implementing regulation are satisfied, that is to say, the notice of opposition must contain a representation of the earlier trade mark and identify the goods and services concerned and also the opposing party or his representative.

58. If those conditions are not satisfied, OHIM must then reject the opposition as inadmissible by adopting a decision, which therefore puts an end to the opposition proceedings. Only in those circumstances does the EU legislature require that OHIM adopt a decision, which may form the subject-matter of an action in accordance with Article 57 of Regulation No 40/94.

59. On the other hand, where all the conditions are satisfied, OHIM acknowledges that the opposition is admissible, by an act which the EU legislature has not in fact defined.

60. In those circumstances, and in accordance with the first sentence of Rule 18(1) of the implementing regulation, that act opens what may properly be called the examination procedure of the opposition.[20] That procedure must enable OHIM to have full information concerning all the evidence submitted in support of the opposition and to adjudicate on the related substantive issues. Thus, it is only at that stage of the procedure that the opposing party is required to submit the facts, the evidence and the observations in support of his opposition, in accordance with Rule 19 of the implementing regulation, and it is on that basis that OHIM will proceed to examine the merits of the opposition by assessing whether the registration of the trade mark applied for might harm the rights

20 — It should also be noted that, in accordance with Article 43(4) of Regulation No 40/94, OHIM may, at this stage, propose that the parties make a friendly settlement and, in that regard, set a deadline before which the examination stage properly so-called will not be opened. If OHIM considers that the friendly settlement is ineffective or if the parties have not arrived at such a settlement, the stage of examination of the merits of the opposition is opened.

acquired by the opposing party. Only at the close of that examination will OHIM adopt a definitive decision, whereby it may reject the opposition in whole or in part, or deem it well founded, thus rejecting, in whole or in part, the application for registration of the Community trade mark. In accordance with Article 57 of Regulation No 40/94, that decision may form the subject-matter of an action for annulment.

61. It must be emphasised that the act whereby OHIM deems the opposition admissible is therefore not an act adopting OHIM's final decision in the opposition proceedings, but a preparatory procedural act which, in that it initiates the procedure of the examination of the merits of the opposition, takes place at the beginning of the preparation, in stages, of the final decision.

62. Nor, to my mind, does that act entail any binding legal effect. It enables the 'friendly settlement' stage to be initiated between the parties and, in the absence of a friendly settlement, initiates the discussion of the substantive issues connected with the opposition. So far as the opposing party is concerned, the initiation of the opposition proceedings properly so-called places only one obligation on him – if he wishes his opposition to succeed – namely to produce all the evidence and to present all the facts and observations in support of his opposition.

63. Consequently, I am unable to conclude that the act at issue affects the appellant's interests or alters its legal situation. That legal situation is not comparable to the situation of a Member State which, because the Commission has initiated the formal examination procedure in respect of State aid which is in the course of being implemented, is required to suspend the application of the aid, or the situation of an individual who, because the file which he has submitted to the relevant authority in order to establish his over-indebtedness has been declared admissible, finds that the enforcement proceedings against his assets are automatically suspended. In the present case, the effects of the act at issue do not go beyond the actual effects of a procedural act and do not affect, beyond its procedural situation, the legal situation of the appellant,[21] and, more broadly, of the parties to the procedure.

64. In that regard, it must be observed that the appellant has no interest in bringing an action against the act whereby OHIM deems his opposition admissible.

65. In the light of those factors, I am of the view that the act whereby OHIM deemed the appellant's opposition admissible is a preparatory measure, having no binding legal effects vis-à-vis the appellant.

66. Consequently, I consider that the General Court did not err in law in holding, at paragraph 102 of the judgment under appeal, that the letter of 20 May 2008 is not a decision,[22] and I propose that the Court should reject this first complaint as unfounded.

2. Second complaint, alleging breach of the principles of effective judicial protection and legal certainty

67. By its second complaint, the appellant takes issue with the General Court for having breached its right to effective judicial protection by denying that the act at issue in any way constituted a decision. The appellant also maintains that the General Court breached the principle of legal certainty in so far as the appellant could legitimately claim, first, that OHIM definitively ruled on the admissibility of its application and would initiate the opposition proceedings and, second, that it would comply with the requirements laid down in Article 77a of Regulation No 40/94.

21 — See, in that regard, the reasoning of the General Court at paragraphs 128 and 129 of the judgment under appeal.

22 — On the other hand, I have some reservations where the General Court qualifies the act at issue as a mere 'measure of organisation of procedure'. However, that point was not discussed and, if that qualification were incorrect, that would have no consequence on the outcome of the dispute.

(a) Breach of the principle of effective judicial protection

68. The right to effective judicial protection is a general principle of EU law which, it will be recalled, is also enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [23] and also in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. [24] That principle requires that any individual whose rights have been violated can have an effective remedy before a judicial authority.

69. In the present case I do not think that the General Court committed a breach of that principle when it took the view that the act at issue was not a decision. First, it will be recalled that the act does not create any right in favour of the appellant and therefore does not affect its legal situation. Nor, as I have said, does the appellant have any interest in bringing a legal action seeking annulment of the act at issue, since the object of the act is to acknowledge the admissibility of the opposition filed by the appellant itself. Second, it is common ground that the appellant has not been deprived of the opportunity to rely on its rights and to denounce any irregularities in the present procedure, since it brought an action for annulment of the decision of 22 January 2009 whereby OHIM deemed the appellant's opposition incomplete.

70. Consequently, this complaint must in my view be rejected.

(b) Breach of the principle of legal certainty

71. It is apparent from the content of the letter of 2 October 2008, entitled 'Correction', that OHIM revoked the act at issue, stating that it had been sent in error and that it should be regarded as being devoid of purpose. It is clear – and as OHIM, moreover, acknowledged at the hearing – that that act in reality contained an error of assessment, which vitiated the examination of the admissibility of the application at issue, and wrongly entailed the initiation of the opposition proceedings. The way in which the act was revoked, like the period within which OHIM reacted, is to my mind very much open to criticism and clearly raises questions relating to compliance with the principles of legal certainty and the protection of legitimate expectations.

72. None the less, it is settled that OHIM is entitled to revoke an act which it considers to be defective. [25] Its power to do so is based on the principle of legality, which prohibits the continuation of any illegality and permits the authorities, by elimination of the defective act, to restore the legal order which was wrongly disrupted. It also makes it possible to avoid the development of contentious proceedings and clearly contributes to ensuring a smooth administration of the procedure.

73. It has consistently been held that the revocation of a vitiated act must be subject to very strict conditions since such revocation involves reconciling the principle of legality with the principle of legal certainty and, in that context, respecting the legitimate expectation of the beneficiary of the act, who may have been led to rely on the lawfulness of the act. [26] Indeed, the principle of legal certainty, which is a general principle of EU law, [27] is intended to ensure the foreseeability of situations and legal relationships governed by EU law [28] and requires that the EU institutions respect the intangibility of the

23 — The convention was signed in Rome on 4 November 1950.

24 — See, in particular, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37 and the case-law cited.

25 — Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraph 68 and the case-law cited.

26 — Case C-90/95 P *de Compte* v *Parliament* [1997] ECR I-1999, paragraph 35 and the case-law cited, and Case T-251/00 *Lagardère and Canal+* v *Commission* [2002] ECR II-4825, paragraph 140.

27 — Case 13/61 *De Geus* [1962] ECR 45.

28 — See, to that effect, Case 325/85 *Ireland* v *Commission* [1987] ECR 5041, paragraph 18, and Case C-107/97 *Rombi and Arkopharma* [2000] ECR I-3367, paragraph 66 and the case-law cited.

acts which they have adopted. Consequently, where a vitiated act is revoked, the Court requires that the institution concerned observe the relevant rules of competence and procedure, act within a reasonable time and take account of the extent to which the person concerned may have been led to rely on the lawfulness of the act.

74. In the context of Regulation No 40/94, the EU legislature thus made provision, in Article 77a, for a special procedure that would enable OHIM to revoke a *decision* containing an obvious procedural error attributable to OHIM. In accordance with paragraph 2 of that article, OHIM must thus order revocation of such a decision within six months from the date on which the decision was taken, after consultation with the parties to the proceedings. According to that procedure, the revocation of the unlawful act must take place within a time-limit, thus ensuring legal certainty, and each of the parties has the right to be consulted.

75. None the less, the guarantees afforded to the person concerned in that context are recognised only in so far as the act in question creates rights and affects his legal and material situation.

76. However, I have stated that the act at issue, in that it constitutes a procedural act, preparatory to the final decision, is not capable of producing legal effects vis-à-vis the appellant and, as such, is not a decision. Consequently, the appellant cannot in my view rely on the principle of legal certainty with respect to the revocation of the act at issue.

77. In the light of those factors, I consider that the appellant's second complaint must also be rejected.

78. Consequently, I invite the Court to find that the first part of the single plea in law raised by the appellant is unfounded.

B – *Second part of the plea, alleging incorrect interpretation of the concept of communication*

79. By the second part of its single plea, the appellant takes issue with the General Court for having, at paragraph 114 of the judgment under appeal, based its reasoning on the fact that Rule 17(5) of the implementing regulation mentions a 'decision' where the notice of opposition is deemed not to have been entered and that Rule 18(1) of that regulation uses the word 'communication'. In the appellant's submission, it follows from Rule 62(1) of the implementing regulation that a communication may also contain a decision. [29]

80. OHIM challenges that argument.

81. Like OHIM, I consider this argument to be unfounded.

82. First, the appellant cannot take issue with the General Court for having referred to the actual wording of the applicable legislation in order to substantiate its assessment of the legal nature of the act at issue.

83. Second, the appellant fails to take account of the reasoning preceding paragraph 114 of the judgment under appeal and, in particular, that set out at paragraphs 88 to 102 of that judgment, where the General Court set out the reasons why the act at issue was not capable of constituting a decision. In that regard, the General Court gave full consideration to the fact that a communication, such as that at issue, could, as such, contain a decision. Indeed, at paragraph 94 of the judgment under

29 — That provision is worded as follows:

> 'Decisions subject to a time-limit for appeal, summonses and other documents as determined by the President of [OHIM] shall be notified by registered letter with advice of delivery. All other notifications shall be by ordinary mail.'

appeal, the General Court observed that 'it is not possible to examine only the form of the letter of 20 May 2008' and that, in order to establish whether that letter constitutes a decision, it is necessary to look at the substance of the act rather than at its form, in accordance with the case-law of this Court.

84. In the light of those factors, I therefore propose that the Court should reject this second part of the plea as unfounded.

C – *Third part of the plea, alleging breach of the obligation to state reasons*

85. By the third part of its single plea, the appellant claims, in substance, that the General Court committed a breach of its obligation to state reasons by failing to respond sufficiently to the argument which the appellant based on the actual legal effects of the international registration of a trade mark designating the European Union. At first instance, the appellant maintained that, in the event of such registration, OHIM is required to inform the WIPO of the admissibility of an opposition, which entails actual legal effects in so far as mention is made in the international trade marks registry of the provisional refusal of protection. However, at paragraph 132 of the judgment under appeal, the General Court merely responded as follows:

'… it is sufficient to state that the present case does not concern an international registration designating the EU, but an application for a Community trade mark. There is thus no need to rule on the legal nature of such notification by OHIM to the WIPO in the context of applications for international registrations designating the European Union.'

86. The appellant takes issue with the General Court for not having taken account of the fact that the act whereby OHIM informs the WIPO of the admissibility of an opposition constitutes a decision. In the appellant's submission, the principles of effective judicial protection and legal certainty thus required that the act at issue, in that it constitutes a communication addressed to the applicant for the trade mark in the same context, also be qualified as a 'decision'.

87. OHIM disputes that argument, maintaining, in particular, that the Community and international registration procedures are not comparable.

88. In order to assess the merits of that argument, it is appropriate to recall the scope of the General Court's obligation to state reasons.

89. The obligation to state reasons is laid down in Article 36 of the Statute of the Court of Justice, applicable to the General Court under the first paragraph of Article 53 of the Statute, and in Article 81 of the Rules of Procedure of the General Court.

90. It is settled case-law that a judgment must disclose in a clear and unequivocal fashion the reasoning followed by the General Court, in such a way as to enable the persons concerned to ascertain the reasons for the decision adopted and the Court of Justice to exercise its power of review.[30] In the case of an action under Article 263 TFEU, the requirement to state reasons means that the General Court must examine the pleas in law relied on by an applicant in seeking annulment and state the grounds on which it rejects a plea or annuls the act at issue.

30 — Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraph 136. See also Case C-259/96 P *Council* v *de Nil and Impens* [1998] ECR I-2915, paragraphs 32 to 34; Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 70; and the orders of the President in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 58, Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 52, and Case C-159/98 P(R) *Netherlands Antilles* v *Council* [1998] ECR I-4147, paragraph 70.

91. However, in *Connolly* v *Commission* the Court of Justice placed limits on that obligation to respond to the pleas relied on.[31] It considered that the grounds of a judgment must be assessed in the light of the circumstances of the case[32] and that the General Court is 'not obliged to respond in detail to every single argument advanced by the appellant, particularly if the argument was not sufficiently clear and precise and was not adequately supported by evidence'.[33]

92. In the light of those factors, I consider that the General Court responded to the requisite legal standard to the arguments put forward by the appellant. It explained the reason why there was no need, in its view, to adjudicate on the legal nature of the act whereby OHIM informs the WIPO of the admissibility of an opposition in the context of an application for international registration designating the European Union. Admittedly, that explanation is succinct, but it is none the less sufficient in so far as the nature of the act at issue clearly cannot be determined by reference to that of an act adopted in the context of a separate procedure that produces effects specific to that procedure, but must be assessed in the light of the substance and the legal effects specific to the act at issue.

93. I would also observe that that explanation enabled the appellant to challenge the findings of the General Court and also enables the Court of Justice to exercise its power of review.

94. In that context, I am of the view that the reasoning set out by the General Court at paragraph 132 of the judgment under appeal is not insufficient.

95. I therefore propose that the Court should reject the third part of the single plea as unfounded.

96. In the light of all the preceding factors, I propose that the Court declare the single plea raised by the appellant, alleging infringement of Article 77a(1) and (2) of Regulation No 40/94, unfounded and, accordingly, dismiss the appeal.

VI – Conclusion

97. In the light of the foregoing considerations, I propose that the Court should:

(1) dismiss the appeal;

(2) order Jager & Polacek GmbH to pay the costs.

31 — Case C-274/99 P [2001] ECR I-1611.

32 — Paragraph 120.

33 — Paragraph 121. See also Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 81.