Reports of Cases

ORDER OF THE GENERAL COURT (First Chamber)

12 September 2013*

(Action for annulment and damages — Public service contracts — Objection of inadmissibility — Action for annulment — First and fifth paragraphs of Article 263 TFEU — Article 122 of Regulation (EC) No 207/2009 — Action not premature — Status of defendant — Jurisdiction of the General Court — Action for damages — Article 44(1)(c) of the Rules of Procedure of the General Court — Admissibility)

In Case T-556/11,

European Dynamics Luxembourg SA, established in Ettelbrück (Luxembourg),

European Dynamics Belgium SA, established in Brussels (Belgium),

Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece),

represented by N. Korogiannakis, M. Dermitzakis and N. Theologou, lawyers,

applicants,

v

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by N. Bambara and M. Paolacci, acting as Agents, assisted by P. Wytinck, lawyer,

defendant,

ACTION, first, for annulment of the decision of OHIM, adopted in open tendering procedure AO/029/10 entitled 'Software Development and Maintenance Services', communicated to the applicants by letter of 11 August 2011, to award the contract in question to other tenderers and to reject the first applicant's tender; and second, for damages,

THE GENERAL COURT (First Chamber),

composed of J. Azizi (Rapporteur), President, S. Frimodt Nielsen and M. Kancheva, Judges,

Registrar: E. Coulon,

makes the following

* Language of the case: English.

Order

Legal context

A – *General provisions*

1 Under the second sentence of the first paragraph of Article 263 TFEU, the Court of Justice of the European Union is 'also [to] review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties'.

2 Under the fifth paragraph of Article 263 TFEU, '[a]cts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them'.

3 In Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1) ('Trade mark Regulation No 207/2009'), which establishes the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Article 122, which is entitled 'Control of legality', provides:

'1. The Commission shall check the legality of those acts of the President of [OHIM] in respect of which Community law does not provide for any check on legality by another body and of acts of the Budget Committee attached to [OHIM] pursuant to Article 138.

2. It shall require that any unlawful acts as referred to in paragraph 1 be altered or annulled.

3. Member States and any person directly and individually concerned may refer to the Commission any act as referred to in paragraph 1, whether express or implied, for the Commission to examine the legality of that act. Referral shall be made to the Commission within one month of the day on which the party concerned first became aware of the act in question. The Commission shall take a decision within three months. If no decision has been taken within this period, the case shall be deemed to have been dismissed.'

4 Article 124 of Trade mark Regulation No 207/2009, under the title 'Powers of the President', provides inter alia:

'1. [OHIM] shall be managed by the President.

2. To this end the President shall have in particular the following functions and powers:

…

(c) he shall draw up the estimates of the revenue and expenditure of the Office and shall implement the budget;

…

(f) he may delegate his powers.

3. The President shall be assisted by one or more Vice-Presidents. …'

5 Article 143 of Trade mark Regulation No 207/2009, which is entitled 'Financial provisions', provides:

'The Budget Committee shall, after consulting the Court of Auditors … and the Commission, adopt internal financial provisions specifying, in particular, the procedure for establishing and implementing [OHIM]'s budget. As far as is compatible with the particular nature of [OHIM], the financial provisions shall be based on the financial regulations adopted for other bodies set up by the [Union].'

6 Article 185(1) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the General Financial Regulation'), provides:

'The Commission shall adopt a framework financial regulation for the bodies set up by the Communities and having legal personality which actually receive grants charged to the budget. The financial rules of these bodies may not depart from the framework regulation except where their specific operating needs so require and with the Commission's prior consent.'

7 Article 74(1) of Commission Regulation (EC, Euratom) No 2343/2002 of 19 November 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of the Financial Regulation (OJ 2002 L 357, p. 72, corrigendum OJ 2003 L 2, p. 39), as amended by Commission Regulation (EC, Euratom) No 652/2008 of 9 July 2008 (OJ 2008 L 181, p. 23), provides that: '[a]s regards procurement, the relevant provisions of the general Financial Regulation and Regulation … No 2342/2002 shall apply subject to paragraphs 4 to 7 of this Article.'

B – *OHIM Regulation CB-3-09*

8 Under the first paragraph of Article 33 of Regulation No CB-3-09 of the Budget Committee of OHIM of 17 July 2009 laying down the financial provisions applicable to the Office, '[t]he President of [OHIM] shall perform the duties of the authorising officer' and '[h]e shall implement the revenue and expenditure of the budget in accordance with the financial rules of [OHIM], on his own responsibility and within the limits of the appropriations authorised'.

9 Article 34(1) of Regulation No CB-3-09 provides, inter alia, that '[t]he President of [OHIM] may delegate his powers of budget implementation to staff of [OHIM] covered by the Staff Regulations, in accordance with the conditions which he establishes and within the limits laid down by the act of delegation'.

10 Article 74(1) of Regulation No CB-3-09 provides:

'As regards procurement, the relevant provisions of the General Financial Regulation and Regulation No 2342/2002 shall apply subject to paragraphs 4 to 7 of this Article.'

Background to the dispute

11 The applicants, European Dynamics Luxembourg SA, European Dynamics Belgium SA and Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, are active in the field of information technology and communication and regularly submit tenders in tendering procedures launched by various European Union institutions and bodies, including OHIM.

12 By contract notice of 15 January 2011, OHIM published in the supplement to the *Official Journal of the European Union* (OJ 2011/S 10-013995) a call for tenders under reference AO/029/10, entitled 'Software development and maintenance services'. The contract to be awarded covered the supply to

OHIM of IT services for prototyping, analysis, design, graphic design, development, testing and installation of information systems, as well as the provision of technical documentation, training and maintenance for those systems.

13 Under point II.1.4 of the contract notice, the tender concerned the award of framework agreements for a maximum duration of seven years with three different IT service providers. In that regard, point 14.2 of the tender specifications (Annex I to the tendering documents) specifies that those framework agreements are to be concluded separately and on the basis of the so-called 'cascade system', under which if the first-ranking tenderer is unable to provide the services required, OHIM will turn to the second-ranking tenderer and so on.

14 Point IV.2.1 of the contract notice stated that the contract is to be awarded to the most economically advantageous tender, whilst point VI.4.1 provided that the body responsible for appeal procedures was to be the European Commission and that the body for mediation procedures was to be the European Ombudsman. Point VI.4.2 provided that the legal basis for any actions was to be Article 118 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994, L 11, p. 1) (now Article 122 of Trade mark Regulation No 207/2009) and that referral must be made to the Commission within 15 days of the day on which the party concerned first became aware of the act in question.

15 By letters of 19 and 24 January and 1 February 2011 addressed to OHIM, the applicants complained of certain irregularities in the terms and conditions of tendering procedure AO/029/10. OHIM replied by letters of 28 January and 4 February 2011, dismissing their allegations and drawing their attention to the possibility of lodging a complaint with the Commission pursuant to Article 122 of Trade mark Regulation No 207/2009.

16 By letter of 16 February 2011 addressed to OHIM, the applicants reiterated their criticisms about the lack of clarity and the ambiguity in certain technical criteria set out in the tender specifications, asking OHIM to amend them.

17 By letter of 4 March 2011, the applicants lodged a complaint with the Directorates General (DG) 'Internal market' and 'Competition' of the Commission, asking it to investigate OHIM's conduct in its capacity as contracting authority, including in regard to the alleged irregularities relating to the management of tendering procedure AO/029/10 and the previous maintenance framework agreements bearing number 4020070018, awarded by OHIM in May 2007, on the basis of the 'cascade system', to three companies including the third applicant.

18 By letters of 8 and 9 March 2011 addressed to OHIM, the applicants again challenged the terms and conditions of tendering procedure AO/029/10.

19 On 11 March 2011, the first applicant submitted a tender in response to the contract notice of 15 January 2011.

20 By letter of 30 May 2011, the Commission informed the applicants, first, that it considered the complaint to have been lodged after the time-limit and therefore not eligible for examination by it and, secondly, that it had forwarded certain allegations to the European Anti-Fraud Office (OLAF), as they came within that office's jurisdiction. By letter of 13 December 2011, OLAF informed OHIM that it had closed the case in so far as it related to another contract notice, also published in the supplement to the *Official Journal of the European Union* (OJ 2011/S 55-089144).

21 By letter of 31 May 2011 addressed to the Commission, the applicants challenged the dismissal of their complaint as time-barred and once again asked the Commission to examine it.

22 By letter of 11 August 2011 ('the contested letter'), OHIM informed the applicants of the outcome of tendering procedure AO/029/10 ('the award decision') and informed them that the first applicant's tender had not been successful because it was not the economically most advantageous one. That letter also contained a comparative table setting out the number of points given to that tender and the points given to the tenders of the three tenderers who had obtained the highest scores.

23 By letter of 12 August 2011, the applicants asked OHIM for information on, first, the exact composition of the consortium of the successful tenderers as well as the names of the potential partner(s) or sub-contractor(s) of those tenderers and the percentages of the contract awarded to them; secondly, the scores awarded for each technical award criterion to both its tender and the tenders of the successful tenderers, accompanied by a detailed comparative analysis of the strong and weak points of both its tender and the tender of the successful tenderers for each sub-criterion, along with an explanation of the relative advantages and the additional or better services offered by the successful tenderers in comparison to the applicants' tender; thirdly, a detailed copy of the evaluation report; fourthly, the financial offer of the successful tenderers as compared with the applicants' tender; and, fifthly, the names of the Evaluation Committee members for the purpose of identifying possible conflicts of interest. The applicants further alleged that there were conflicts of interest in the case of two of the three successful tenderers, as well as certain irregularities in OHIM's application of the financial criteria for evaluating the financial offers. Lastly, they asked OHIM to refrain from concluding a contract with the successful tenderers until they had received and examined the answers from OHIM.

24 By letter of 26 August 2011, OHIM provided the applicants with an extract of the evaluation report comprising the qualitative evaluation of their tender on the basis of three criteria: the quality of software maintenance; business case; and quality of customer services. It also provided them with the names of the successful tenderers and two tables setting out the scores obtained by those tenderers and the first applicant respectively for their technical and financial tenders.

25 By letter of 29 August 2011 addressed to the Commission, the applicants complained that the Commission had still not investigated the matters brought to its attention in their letters of 4 March and 31 May 2011. They also challenged the lawfulness of the award decision in the light of 'new irregularities' which had arisen in the course of tendering procedure AO/029/10. Thus, the second- and third-ranking successful tenderers ought to have been excluded from the tendering procedure due to a conflict of interest and the fact that the third tenderer's consortium included a party who had been involved in drawing up the tender specifications. The applicants asked the Commission to examine 'the evaluation process followed by OHIM in the case of [tendering procedure] AO/029/10 and to take the necessary measures to guarantee compliance with the applicable European Union legislation'.

26 By letter of 2 September 2011 addressed to OHIM, the applicants complained of the insufficiency of the information provided on the outcome of the tendering procedure, in particular the non-disclosure of the parts of the evaluation report concerning the tenders submitted by the successful tenderers, as well as the exact composition of those tenderers. They further alleged that there had been manipulation of the 'financial evaluation formula' used by OHIM to assess the financial offers. They also reiterated the allegations set out in their previous letters.

27 In a letter of 15 September 2011 addressed to the applicants, OHIM referred to the statement of reasons set out in the contested letter and in the letter of 26 August 2011, which it deemed to be sufficient. It nevertheless stated that it was prepared to provide further details on the financial criteria and provided a comparative table. As to the 'financial evaluation formula' used by it, OHIM informed the applicants that that formula was based on a working hypothesis, the weighting factors of which were based on the situation existing in OHIM at the time the award criteria were drawn up.

28 By letter of 16 September 2011 addressed to OHIM, the applicants reiterated their criticisms, questioned the explanation provided as to the use of the 'financial evaluation formula' on the basis of a working hypothesis, challenged the outcome of tendering procedure AO/029/10 and asked OHIM to reconsider its position.

Procedure and forms of order sought

29 By application lodged at the Registry of the General Court on 21 October 2011, the applicants brought the present action.

30 The applicants claim that the Court should:

— annul the award decision as communicated by the contested letter inasmuch as it rejects the first applicant's tender;

— annul all related decisions of OHIM, including those awarding the contract in question to the tenderers ranked first to third in the 'cascade' mechanism;

— order OHIM to pay compensation of EUR 67 500 000 for the harm caused to the applicants by the tendering procedure in question;

— order OHIM to pay compensation of EUR 6 750 000 for the harm suffered by the applicants due to the lost opportunity and the damage to their reputation and credibility;

— order OHIM to pay the costs.

31 The applicants put forward three pleas in law in support of their action, some of which are broken down into a number of parts. The first plea alleges infringement by OHIM of its obligation to state reasons pursuant to Article 100(2) of the General Financial Regulation inasmuch as it provided the applicants with insufficient information and explanations about the reasoning which led the contracting authority to adopt the award decision. The second plea in law alleges a number of manifest errors of assessment concerning, in particular, the use of new or unknown award criteria which were contrary to the tender specifications and not sufficiently clarified (first part), the use of an incorrect financial assessment formula giving rise to distortions (second part) which was manipulated by the successful tenderers (third part), and also a change in the subject-matter of the contract (fourth part). The third plea in law alleges infringement of the principle of equal treatment, due in particular to the failure to exclude successful tenderers whose participation involved a conflict of interest, of Article 93(1)(f), Articles 94 and 96 of the General Financial Regulation, of Articles 133a and 134b of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the General Financial Regulation (OJ 2002 L 357, p. 1) and of the principle of sound administration.

32 By separate document lodged at the Court Registry on 31 January 2012, OHIM raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the General Court against the actions for annulment and damages. The applicants submitted their observations on that objection on 26 April 2012.

33 In its objection of inadmissibility, OHIM contends that the Court should:

— dismiss the actions for annulment and damages as manifestly inadmissible;

— order the applicants to pay the costs.

34 In their observations on the objection of inadmissibility, the applicants reiterate their forms of order sought set out in the application and ask the Court to dismiss the objection of inadmissibility and to examine the case on its merits.

Law

A – *Preliminary observations*

35 Pursuant to Article 114(1) of the Rules of Procedure, the Court may, if a party so requests, rule on the question of admissibility without considering the merits of the case. Under Article 114(3), unless the Court otherwise decides, the remainder of the proceedings is to be oral.

36 Pursuant to Article 114(4) of its Rules of Procedure, the Court may either decide on the objection of inadmissibility or reserve its decision for the final judgment. In the present case, the Court considers that it has sufficient information from the documents before it to rule on the objection. It is therefore not necessary to open the oral procedure.

B – *Admissibility of the applications for annulment*

1. *Arguments of the parties*

37 OHIM puts forward three grounds in support of its objection of inadmissibility concerning the application for annulment. First, the application for annulment was lodged prematurely. In OHIM's submission, the administrative procedure initiated before the Commission under Article 122(3) of Trade mark Regulation No 207/2009 is an obligatory step before an action may be brought before the EU Courts. As the application in the present case was lodged before the end of the period laid down in that article, it is premature and therefore inadmissible. That would be so even if the administrative review to be carried out by the Commission were considered optional since, in the present case, the applicants did in fact lodge a complaint pursuant to Article 122 of Trade mark Regulation No 207/2009. Secondly, in the alternative, OHIM submits that it does not have the required status to act as defendant since, following the close of the administrative procedure under Article 122 of Trade mark Regulation No 207/2009, the action should have been directed against the Commission. Thirdly, in the further alternative, OHIM submits that the General Court does not have jurisdiction to hear the case. Even if the review to be conducted by the Commission under Article 122 of Trade mark Regulation No 207/2009 were merely optional, the complaint and the action before the Commission and the General Court respectively are based on the same facts and pursue the same objectives, with the result that the complaint, which was lodged earlier, takes priority over the legal proceedings, which must be declared inadmissible *ratione temporis*.

38 OHIM submits, as a preliminary point, that Article 122 of Trade mark Regulation No 207/2009 must be interpreted in the light of the second paragraph of Article 263 TFEU. Under the relevant budgetary provisions, the contested award decision is an act of the President of OHIM who, in the present case, delegated his administrative powers to the Vice-President of OHIM, Mr Archambeau, who signed the award decision. Moreover, the reference in point VI.4.1 of the contract notice to Article 118 of Regulation No 40/94 should be construed as a reference to Article 122 of Trade mark Regulation No 207/2009.

39 As regards the first ground of inadmissibility put forward, alleging that the applications for annulment were lodged prematurely, OHIM argues, first, that the conduct of the administrative procedure before the Commission under Article 122(3) of Trade mark Regulation No 207/2009 is an obligatory prerequisite for legal proceedings to be brought. Thus, in order to be admissible, that action must be

lodged after the end of that administrative procedure. Secondly, OHIM argues that even if the administrative procedure under Article 122 of Trade mark Regulation No 207/2009 were optional, the legal proceedings would still be premature because the applicants chose to initiate the administrative procedure under that provision.

40 OHIM observes that, on 29 August 2011, the applicants lodged a complaint with the Commission against the award decision taken at the end of tendering procedure AO/029/10 and that, pursuant to Article 122 of Trade mark Regulation No 207/2009, the Commission had until 29 November 2011 to adopt a decision on the matter. Under Article 122(3) of the same regulation, failure by the Commission to take a formal decision amounted to an implied decision to reject the complaint (orders of 9 July 2009 of the General Court in Cases T-176/08 and T-188/08 *infeurope* v *Commission*, not published in the ECR, paragraphs 38 and 39 and 34 and 35 respectively), with the result that the period for bringing proceedings under the sixth paragraph of Article 263 TFEU against that implied decision to dismiss the complaint began to run on 29 November 2011.

41 OHIM submits that Article 122 of Trade mark Regulation No 207/2009 should also be interpreted in the light of the fifth paragraph of Article 263 TFEU, which provides for a derogation for EU bodies as regards the direct review of the lawfulness of their acts by the EU Courts. In OHIM's submission, under general principles of EU law, the specific conditions under the fifth paragraph of Article 263 TFEU should be construed as referring to procedures for reviewing lawfulness which are mandatory or optional in the steps involved in bringing an action before the EU Courts. When specific conditions, such as those provided for in Article 122 of Trade mark Regulation No 207/2009, are mandatory, they must necessarily be complied with by the applicant before such an action is brought.

42 OHIM submits that the administrative procedure under Article 122 of Trade mark Regulation No 207/2009 is mandatory, with the result that no judicial proceedings may be brought while that procedure is under way. The mandatory nature of that procedure is justified by the principles of procedural economy and effective judicial protection, which require 'resolute' and expeditious intervention by the Commission, at no cost to the parties. The Court has recognised, first, that the Commission's administrative review under that provision is a prerequisite for bringing an action before the EU Courts (see orders in *infeurope* v *Commission*, cited in paragraph 40 above, paragraphs 38 and 34 respectively and the case-law cited) and, secondly, that that provision established a mechanism for reviewing the lawfulness of acts of the President of OHIM, inter alia in the area of public procurement, in respect of which EU law does not provide for review by any other body (see orders in *infeurope* v *Commission*, cited in paragraph 40 above, paragraphs 37 and 32 respectively and the case-law cited). OHIM states, in essence, that it is of no import that that case-law dates from a time when Article 230 EC was still in force and that it made no specific reference to actions for annulment of decisions by bodies, the admissibility of which has expressly been recognised by the case-law, as codified by Article 263 TFEU.

43 OHIM infers from the foregoing considerations that the action for annulment under Article 263 TFEU is inadmissible, since it entails a circumvention of the specific, mandatory conditions laid down in Article 122 of Trade mark Regulation No 207/2009, which were referred to expressly in point VI.4.2 of the contract notice and of which the applicants availed themselves in lodging their complaint of 29 August 2011. OHIM observes that the present action was brought on 21 October 2011, before the end of the administrative procedure before the Commission, which could last until 29 November 2011.

44 OHIM submits that even if the administrative procedure under Article 122 of Trade mark Regulation No 207/2009 could be regarded as optional, which is not the case, the applications for annulment would still be inadmissible because they were brought prematurely. In the present case, the allegedly optional nature of the procedure is irrelevant because the applicants deliberately opted for that remedy without waiting for the Commission's decision bringing the administrative procedure to a close before bringing their legal proceedings. The applications for annulment are therefore

inadmissible, irrespective of whether the Commission's administrative review is mandatory or optional, since in either case the action was brought before the end of the administrative procedure provided for to that effect.

45 As regards the second ground of inadmissibility, alleging OHIM's lack of legal standing, OHIM observes that, according to the General Court's case-law (see orders in *infeurope* v *Commission*, cited in paragraph 40 above, paragraphs 39 and 35 respectively and the case-law cited), the applicants ought to have brought an action for annulment under Article 263 TFEU against the Commission's implied decision to reject the complaint and not against OHIM's award decision, with the result that the applications for annulment should in any event be held to be inadmissible.

46 Regarding the third ground of inadmissibility, alleging the General Court's lack of jurisdiction, OHIM states, in essence, that the Commission's administrative review of lawfulness under Article 122 of Trade mark Regulation No 207/2009 is based on the same facts as those which are the subject-matter of the judicial proceedings before the Court under Article 263 TFEU and pursues the same objectives as the legal proceedings. Furthermore, the Court has held that the European Union legislature did not design the administrative procedure under Article 122 of Trade mark Regulation No 207/2009 in such a way as to offer individuals an alternative remedy to actions before the EU Courts in order to protect their interests (see orders in *infeurope* v *Commission*, cited in paragraph 40 above, paragraphs 38 and 34 respectively and the case-law cited).

47 OHIM concludes that, should the procedure provided for under Article 122 of Trade mark Regulation No 207/2009 be held not to be mandatory, it should be held to be 'substitutive' before the EU Courts. In contrast to the procedure before the European Ombudsman, the applicant remains free to choose which of the two remedies available best serves his interests. However, once a decision has been handed down in one of the remedies, the other is no longer available. OHIM submits that since, in the present case, the applicants lodged a complaint with the Commission under Article 122 of Trade mark Regulation No 207/2009 before bringing an action under Article 263 TFEU, the latter remedy is no longer available and the action must be held to be inadmissible on the ground that the General Court has no jurisdiction *ratione temporis* to hear the case.

48 The applicants claim that the objection of inadmissibility should be rejected. They dispute, first, the applicability of Article 122 of Trade mark Regulation No 207/2009 to the present case and, secondly, the arguments that their action is premature, that the procedure before the Commission is mandatory, that OHIM has no legal standing and that the General Court has no jurisdiction.

2. *The jurisdiction of the EU Courts for hear actions brought against acts of OHIM*

49 The Court finds it appropriate to begin by examining the third ground of inadmissibility, that is to say, the question whether – irrespective of the scope of Article 122 of Trade mark Regulation No 207/2009 – the EU Courts have jurisdiction to hear the case when an action is brought against an act of OHIM.

50 It should be borne in mind in that regard that the second sentence of the first paragraph of Article 263 TFEU, as introduced by the Treaty of Lisbon and as it entered into force on 1 December 2009, lays down a new provision of primary law under which the EU Courts 'also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties'. That provision is intended to make up for a serious shortcoming in the previous version of that article, in the first paragraph of Article 230 EC and, therefore, in the codified system of remedies available under the Treaty, by providing expressly that, in addition to acts of its institutions as defined in Article 13 TEU, the legally binding acts of bodies, offices or agencies of the Union are also to be subject to judicial review by the EU Courts (see, to that effect, Case T-411/06 *Sogelma* v *AER* [2008] ECR II-2771, paragraph 33 et seq., in particular paragraph 36, referring to Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339).

51 It is clear that, by virtue of Article 115(1) of Trade mark Regulation No 207/2009, OHIM is a body of the Union for the purposes of the second sentence of the first paragraph of Article 263 TFEU.

52 Consequently, the Court has jurisdiction to rule on actions brought against acts of OHIM, including acts of its President in the field of public procurement, which are intended to produce legal effects vis-à-vis third parties.

3. *The scope of Article 122 of Trade mark Regulation No 207/2009*

53 Secondly, an assessment needs to be made of whether and, if so, to what extent, that jurisdiction is limited or affected by Article 122 of Trade mark Regulation No 207/2009.

54 It should be observed in that regard that Article 122(1) of Trade mark Regulation No 207/2009, entitled 'Control of legality', provides that '[t]he Commission shall check the legality of those acts of the President of [OHIM] in respect of which Community law does not provide for any check on legality by another body …'. The scope of that provision is thus expressly contingent on there being no check of the legality of acts of the President of OHIM by another body. Yet the General Court, as a judicial body of the Court of Justice under the first sentence of Article 19(1) TEU is 'another body', as it reviews the legality of acts in accordance with the second sentence of the first paragraph of Article 263 TFEU.

55 It follows that, contrary to what OHIM asserts, the present case does not come within the scope of Article 122 of Trade mark Regulation No 207/2009 and that, therefore, inter alia, the second sentence of the third paragraph of that article, according to which '[r]eferral shall be made to the Commission within one month of the day on which the party concerned first became aware of the act in question' is not applicable. Accordingly, OHIM cannot successfully argue that the referral to the Commission of a complaint against an act of the President of OHIM, or the completion of an administrative procedure to that end, or any express or implied decision of the Commission concerning that complaint, is a mandatory precondition – or perquisite for admissibility – for an action brought before the EU Courts against such an act pursuant to the second sentence of the first paragraph or the fourth paragraph of Article 263 TFEU.

56 That assessment is confirmed by a teleological interpretation of Article 122 of Trade mark Regulation No 207/2009. When the rules of primary law governing the system of judicial protection of the Treaty still suffered from the shortcoming referred to in paragraph 50 above, recognition of the Commission's role in reviewing lawfulness, such as that provided for in Article 122 of that same regulation, addressed the need perceived by the EU legislature to have a decision of the Commission in order to make acts adopted by EU bodies or agencies at least indirectly reviewable before the EU Courts. Thus, the wording 'acts … in respect of which Community law does not provide for any check on legality by another body' confirms that the Commission was to be given a residual, subsidiary power of review in order to ensure access to the EU Courts, at least through an express or implied decision of the Commission for the purposes of the third and fourth sentences of Article 122(3) of Trade mark Regulation No 207/2009. However, at the latest when the second sentence of the first paragraph of Article 263 TFEU entered into force, that objective lost its purpose and cannot now serve as a basis for alleging that the procedure under Article 122 of that regulation is a mandatory step before proceedings may be brought before the EU Courts.

57 OHIM argues, however, in support of its objection of inadmissibility, that since the entry into force of the Treaty of Lisbon, Article 122 of Trade mark Regulation No 207/2009 must also be interpreted in the light of the fifth paragraph of Article 263 TFEU, which states that '[a]cts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them'.

58 Yet it is clear that, for the reasons set out in paragraph 55 above, Article 122 of Trade mark Regulation No 207/2009 is inapplicable to the present case, with the result that the criteria laid down in that provision cannot be categorised as 'specific conditions and arrangements' within the meaning of the fifth paragraph of Article 263 TFEU.

59 In any event, the fifth paragraph of Article 263 TFEU cannot call into question the General Court's jurisdiction, as provided for in the second sentence of the first paragraph of Article 263 TFEU (see paragraphs 49 and 52 above). Any interpretation to the contrary would risk undermining the clear separation between, on the one hand, the legislative and executive powers and, on the other, the judicial powers underlying Articles 13 TEU to 19 TEU, and the duty which falls on the EU Courts alone to ensure that 'in the interpretation and application of the Treaties the law is observed', as required by the second sentence of Article 19(1) TEU. This is all the more clear since the wording of Article 122(2) of Trade mark Regulation No 207/2009, under which the Commission is to 'require that any unlawful acts as referred to in paragraph 1 be altered or annulled', presupposes that the Commission has made a finding of unlawfulness and, therefore, a genuine judgment of the acts of the President of OHIM, as would a court. Similarly, the passage in the first sentence of Article 122(3), which states that 'Member States and any person directly and individually concerned may refer to the Commission any act … for the Commission to examine the legality of that act' shows that the EU legislature intended to confer on the Commission a power of review similar to that of the Court of Justice under the second and fourth paragraphs of Article 230 EC. Moreover, even if, from the EU legislature's point of view, on the date of adoption of Article 122 of Trade mark Regulation No 207/2009, that power of review of lawfulness conferred on the Commission could still be intended to make up for any shortcoming in the Treaty's system of judicial protection, that power in any event lost its purpose following the entry into force of the second sentence of the first paragraph of Article 263 TFEU (see paragraph 56 above).

60 Furthermore, it follows from the considerations set out above that the fifth paragraph of Article 263 TFEU does not cover a situation such as that provided for by Article 122 of Trade mark Regulation No 207/2009, which confers a power to review the lawfulness of the acts of a body, office or agency of the European Union to an external institution. On the contrary, the reference to 'specific conditions and arrangements' in the fifth paragraph of Article 263 TFEU must be interpreted as referring to the drawing up by that body, office or agency of purely internal terms and conditions which are prerequisites to legal proceedings, governing, inter alia, the operation of a self-monitoring mechanism or the course of an out-of-court settlement with a view to preparing or avoiding litigation before the EU Courts. Thus, in the context of public procurement, Articles 33 and 34 of Decision 2007/497/EC of the European Central Bank of 3 July 2007 laying down the rules on procurement (OJ 2007 L 184, p. 34) provide for a prior internal appeal procedure before the Procurement Review Body, whilst recognising the exclusive, autonomous jurisdiction of the Court of Justice to hear disputes arising between the European Central Bank (ECB) and a tenderer.

61 Lastly, to the extent that OHIM relies, in support of its objection of inadmissibility, on the orders in *infeurope* v *Commission* (cited in paragraph 40 above, paragraphs 37 and 38 and 33 and 34 respectively), in which it was held, in essence, that the laying down in Article 118(3) of Regulation No 40/94 (now Article 122(3) of Trade mark Regulation No 207/2009), of a period in which to lodge a complaint with the Commission through administrative action illustrates the mandatory nature of that administrative procedure, which is a prerequisite for bringing legal proceedings before the EU Courts pursuant to Article 230 EC, suffice it to say that that earlier case-law has become obsolete with the entry into force of the second sentence of the first paragraph of Article 263 TFEU (see paragraphs 49 and 52 above).

62 In those circumstances, OHIM's argument that the administrative procedure under Article 122 of Trade mark Regulation No 207/2009 must be initiated as a mandatory precondition before an action may be brought before the General Court and is, therefore, a condition of admissibility of that action, must also be rejected.

4. *The relevance of the fact that the applicants initiated the procedure under Article 122 of Trade mark Regulation No 207/2009*

63 OHIM argues, in essence, that since the applicants intentionally initiated the administrative procedure pursuant to Article 122 of Trade mark Regulation No 207/2009 in having lodged a complaint with the Commission by their letter of 29 August 2011, they ought to have waited for the outcome of that procedure before bringing judicial proceedings which, moreover, ought to have been directed against the Commission's final decision. The applicants, by contrast, deny having lodged such a complaint pursuant to Article 122 of Trade mark Regulation No 207/2009.

64 It is not necessary in the present case to rule on the question whether the applicants' letter of 29 August 2011 amounted to a complaint for the purposes of Article 122 of Trade mark Regulation No 207/2009. Even if that were so, it is apparent from the discussion in paragraphs 49 to 62 above that the commencement of a complaints procedure with the Commission does not preclude the applicants from lodging, within the time-limits laid down in the sixth paragraph of Article 263 TFEU, an action against the award decision, as communicated by the contested letter. Apart from relying on the wording of Article 122 of Trade mark Regulation No 207/2009, which is inapplicable in the present case (see paragraph 55 above), and the obsolete case-law deriving from the orders in *infeurope* v *Commission* (paragraph 40 above), OHIM does not invoke any legal basis for such a restriction on the applicants' right to an effective judicial remedy for the purposes of Article 47 of the European Charter of Fundamental Rights (OJ 2010 C 83, p. 389). On the contrary, the considerations set out in paragraphs 49 to 62 above show that the applicants would have exposed themselves to a considerable risk of being barred from bringing an action against OHIM's decision if they had restricted themselves to lodging a complaint with the Commission.

65 Consequently, the mere fact that the applicants attempted, in their letter of 29 August 2011, to insist that the Commission follow up on their complaint of 4 March 2011 cannot make the applications for annulment brought by them before the General Court pursuant to Article 263 TFEU inadmissible.

5. *Consequences for the assessment of the grounds of inadmissibility relied on*

66 In the light of the considerations discussed in paragraphs 49 to 62 above, the Court finds that the applicants' action, in so far as it comprises applications for annulment, was neither premature nor inadmissible and that the first ground of inadmissibility put forward must therefore be rejected. The same holds true for the second and third grounds of inadmissibility relied on, since the General Court's jurisdiction – both substantive and *ratione temporis* – is grounded directly in the second sentence of the first paragraph of Article 263 TFEU and not merely indirectly in Article 122 of Trade mark Regulation No 207/2009 which, due to its inapplicability, is not liable to restrict that jurisdiction. It also follows that, in the present case, OHIM has the status of defendant in these proceedings and that the admissibility of the applications for annulment is not contingent on a prior administrative procedure having been completed before the Commission pursuant to Article 122 of that same regulation.

67 Consequently, the objection of inadmissibility must be rejected in so far as it is directed at the applications for annulment.

C – *Admissibility of the claims for damages*

68 OHIM considers that, since the applications for annulment are inadmissible, the claims for damages must also be held to be inadmissible. In the alternative, OHIM asks for the claims for damages to be held inadmissible and manifestly lacking any foundation in law pursuant to Article 111 of the Rules of Procedure, on the ground that the requirements laid down in Article 44(1)(c) of those rules of procedure are not met. In the absence of at the very least a brief description of the pleas in law or

matters of law on which the claims for damages are based, the application does not satisfy the requirement that it must state the nature and extent of the harm in sufficient detail. In the application in particular, the applicants did not adduce any evidence of the unlawful conduct alleged and did not explain in sufficient detail the link between that conduct and the alleged harm.

69 The applicants deny that their claims for damages are inadmissible.

70 In the first place, it should be observed that, in the light of the discussion in paragraphs 49 to 68 above, OHIM's principal argument, to the effect that the inadmissibility of the claims for damages stems directly from the inadmissibility of the applications for annulment, must be rejected.

71 In the second place, regarding the argument put forward in the alternative, alleging failure to satisfy the requirements of Article 44(1)(c) of the Rules of Procedure, it should be borne in mind that, under the first paragraph of Article 21, read in conjunction with the first paragraph of Article 53 of the Statute of the Court of Justice of the European Union and Article 44(1)(c) of the Rules of Procedure, an application must state the subject-matter of the proceedings and give a summary of the pleas in law on which the action is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary, without any further information. In order to guarantee legal certainty and the sound administration of justice it is necessary, in order for a plea to be admissible, that the essential matters of law and fact relied on are stated, at least in summary form, coherently and intelligibly in the application itself. More specifically, in order to satisfy those requirements, an application for compensation for damage said to have been caused by an EU institution must indicate the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons why the applicant considers there is a causal link between the conduct and the harm it claims to have suffered, and the nature and extent of that harm (see Case T-16/04 *Arcelor* v *Parliament and Council* [2010] ECR II-211, paragraph 132 and the case-law cited).

72 In the present case, OHIM cannot successfully argue that the applicants failed to satisfy those formal requirements in their application, as the application does contain sufficient material allowing for the allegedly unlawful conduct by OHIM to be identified, the reasons why the applicants consider there is a causal link between the conduct and the harm they claim to have suffered as well as the nature and extent of that harm. In fact, without the need to pre-empt the assessment of the merits of the claims for damages, the applicants provide an extensive description of those matters in paragraphs 126 to 155 of their application, under a separate section entitled 'Damages', basing themselves on the pleas of unlawfulness elaborated on in support of their applications for annulment (paragraphs 126, 133 to 136 and 140), explaining the presence of a causal link (paragraph 137) and stating the nature and extent of the alleged harm arising from the unlawful conduct (paragraphs 139 and 141 to 148 concerning the loss of the contract, and paragraphs 150 to 155). Accordingly, contrary to the assertions made by OHIM, in the present case it is not for the General Court to look for and identify, from along the various complaints formulated in support of the applications for annulment, which argument(s) the applicants intend to use as the basis of the claims for damages, or to speculate on and verify the existence of a possible causal link between the conduct against which those complaints are directed and the alleged harm (see, to that effect, order of the General Court of 11 January 2012 in Case T-301/11 *Ben Ali* v *Council*, not published in the ECR, paragraph 72 et seq.), which could serve as a basis for the dismissal of those claims for damages as inadmissible pursuant to Article 44(1)(c) of the Rules of Procedure.

73 In the third place, in the present case OHIM has not specified the reasons why it considered that the claims for damages are manifestly lacking any foundation in law pursuant to Article 111 of the Rules of Procedure, with the result that this argument must also be rejected. In any event, in the absence of any defence by OHIM on the point, including OHIM's allegedly unlawful conduct, at this stage the Court is not in a position to give a definitive judgment on the merits of the various pleas of unlawfulness put forward by the applicants (see paragraph 31 above).

74 Accordingly, the grounds of inadmissibility put forward by OHIM directed against the claims for damages must be rejected in their entirety.

75 It follows from all the foregoing considerations that the applications for annulment and for damages are admissible and that the objection of inadmissibility raised by OHIM must be rejected.

Costs

76 Costs are reserved.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby orders:

1. The objection of inadmissibility is dismissed.

2. Costs are reserved.

Luxembourg, 12 September 2013.

E. Coulon
Registrar

J. Azizi
President

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