Reports of Cases

ORDER OF THE GENERAL COURT (Third Chamber)

22 June 2016*

(Action for annulment — Signature of the application initiating proceedings — Articles 76 and 77 of the Rules of Procedure — Rejection of the plea of inadmissibility)

In Case T-43/16,

1&1 Telecom GmbH, established in Montabaur (Germany), represented by J.-O. Murach, lawyer, and P. Alexiadis, Solicitor,

applicant,

v

European Commission, represented by N. Khan and M. Farley, acting as Agents,

defendant,

APPLICATION pursuant to Article 263 TFEU seeking the annulment of the decision of the Commission of 19 November 2015 on the implementation of the Non-MNO Remedy in Case COMP/M.7018 — Telefónica Deutschland/E-Plus,

THE GENERAL COURT (Third Chamber),

composed of S. Papasavvas, President, E. Bieliūnas and I.S. Forrester (Rapporteur), Judges,

Registrar: E. Coulon,

makes the following

Order

Facts, procedure and forms of order sought

1 By decision C(2014) 4443 final of 2 July 2014, the European Commission declared the acquisition of E-Plus Mobilfunk GmbH & Co. KG ('E-Plus') by Telefónica Deutschland Holding AG ('Telefónica Deutschland') to be compatible with the internal market and Article 57 of the Agreement on the European Economic Area (EEA) (Case COMP/M.7018 Telefónica Deutschland/E-Plus), subject to Telefónica's compliance with certain final commitments set out in the annexes to that decision ('the Final Commitments').

* Language of the case: English.

2 By application lodged at the Court Registry on 5 June 2015, the applicant sought the annulment of the merger decision at issue (case T-307/15, *1&1 Telecom* v *Commission*, currently pending).

3 By application lodged at the Court Registry on 29 January 2016 by means of the e-Curia application, the applicant brought the present proceedings seeking the annulment of the decision of the Commission of 19 November 2015 on the implementation of the Non-MNO Remedy, that is to say, the corrective measures for mobile virtual network operators and mobile telecommunication service providers except mobile network operators that own their own network infrastructure, such as those stipulated in the Final Commitments ('the contested decision'). The first page of the application shows that the applicant is represented by Jens-Olrik Murach, lawyer established in Brussels (Belgium). Furthermore, the application is accompanied by an authority to act in favour of Mr Murach. Nevertheless, the lodging by means of e-Curia was undertaken by Peter Alexiadis, solicitor registered with the Law Society of England and Wales and an associate of Mr Murach in the same law firm.

4 By decision of 2 February 2016, in which it was held that the application did not comply with the conditions set out in Article 51(3) and Article 78(4) of the Rules of Procedure of the General Court, in that it was not accompanied by an authority to act in favour of Mr Alexiadis, the Court Registry requested that the application be put in order by 10 February 2016 at the latest, in accordance with Article 78(5) of the Rules of Procedure.

5 By document lodged at the Court Registry on 9 February 2016 by means of e-Curia, the applicant submitted, within the set time limit, an authority to act in favour of Mr Alexiadis. The letter accompanying the authority was signed by Mr Murach. Nevertheless, the lodging by means of e-Curia was undertaken by Mr Alexiadis.

6 By a document lodged at the Court Registry on 25 February 2016, the Commission raised a plea of inadmissibility under Article 130(1) of the Rules of Procedure.

7 By document lodged at the Court Registry on 9 March 2016, the applicant submitted its observations on that plea of inadmissibility.

8 In the application, the applicant claims that the Court should:

— annul the contested decision;

— order the Commission to request that Telefónica Deutschland issues a new Self-Commitment letter that is strictly limited to the obligation required from it, as set out in paragraph 78 of the Final Commitments;

— order the Commission to pay the costs.

9 In its plea of inadmissibility, the Commission contends that the Court should:

— dismiss the application as manifestly inadmissible;

— order the applicant to pay the costs.

10 In its observations on the plea of inadmissibility, the applicant claims that the Court should:

— reject the plea of inadmissibility;

— continue the written and oral procedure.

Law

11 Pursuant to Article 130(1) of the Rules of Procedure, a defendant can request the Court to rule on admissibility without going into the substance of the case. In accordance with Article 130(6) of those rules, the Court can decide to open the oral procedure on the plea of inadmissibility.

12 In the present case, the Court considers that it has sufficient information from the documents before it and decides to give judgment without opening the oral procedure.

13 In its plea of inadmissibility, the Commission claims, in essence, that the application is inadmissible in that it is not signed by Mr Murach who is, according to the Commission, the applicant's sole representative. The lack of signature of the application by the lawyer representing the applicant amounts to a procedural defect which cannot be put in order.

14 The applicant disputes that line of argument. It argues that the application was signed by a lawyer authorised to act before the Court, in this instance Mr Alexiadis, by means of his e-Curia user identification and password. The use of e-Curia constitutes the signature pursuant to Article 3 of the decision of the General Court of 14 September 2011 on the lodging and service of procedural documents by means of e-Curia (OJ 2011 C 289, p. 9) ('the e-Curia Decision'). The applicant accepts that it did not submit the authority to act in favour of Mr Alexiadis when the application was lodged, but argues that such an irregularity can be put in order pursuant to Article 78(5) of the Rules of Procedure and this was done on 9 February 2016.

15 First, it must be borne in mind in that regard that, according to the fourth paragraph of Article 19 of the Statute of the Court of Justice of the European Union, applicable to the procedure before the General Court by virtue of the first paragraph of Article 53 thereof, only a lawyer authorised to practise before a court of a Member State or another State which is a party to the EEA Agreement can represent or assist a party before the General Court.

16 According to the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, also applicable to the procedure before the General Court by virtue of the first paragraph of Article 53 thereof, the application must contain, in particular, the name and address of the applicant and the capacity of the person signing.

17 It follows from the fourth paragraph of Article 19 and the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union that the application must be signed by a person authorised to act by the applicant.

18 Secondly, it should also be noted that pursuant to Article 73(1) of the Rules of Procedure, the original paper version of a procedural document must bear the handwritten signature of the party's agent or lawyer.

19 That provision is supplemented by Article 74 of the Rules of Procedure, which, under the heading 'Electronic lodgement' lays down that:

'The General Court may, by decision, determine the criteria for a procedural document sent to the Registry by electronic means to be deemed to be the original of that document …'

20 That option was implemented by the Court by the adoption of the e-Curia Decision, Article 3 of which lays down:

'A procedural document lodged by means of e-Curia shall be deemed to be the original of that document for the purposes of the first subparagraph of Article 43(1) of the Rules of Procedure where the representative's user identification and password have been used to effect that lodgment. Such identification shall constitute the signature of the document concerned.'

21 In that respect, it must be noted that setting up an e-Curia account requires that the interested person indicate in particular his name, forename(s), professional status, postal address, electronic address and telephone number. The interested party must also supply a copy of his identity card or passport, as well as a document establishing his entitlement to represent an institution or a Member State or to practice before a court of a Member State or a State which is party to the Agreement on the European Economic Area. Finally, in accordance with the e-Curia application's conditions of use applicable to the parties' representatives, published on the Court of Justice's website, the interested party must agree to a certain number of undertakings, non-compliance with which can result in deactivation of the e-Curia account, including the following undertakings:

— 'not to inform third parties of [his] user identification and password; any process carried out using that user identification and password will be deemed to have been carried out by [the representative]';

— 'to give notice immediately of any change of [his] email address, the termination of [his] professional activity or a change in [his] responsibilities'.

22 Thirdly, it is settled case-law that the absence of signature of the application by a lawyer entitled to undertake procedural steps before the Court is not among the formal procedural irregularities that are capable of being put in order after the expiry of the period prescribed for bringing the action, in accordance with Article 19 of the Statute of the Court of Justice of the European Union and Articles 51(4) and 78(5) of the Rules of Procedure (order of 24 February 2000 in *FTA and Others* v *Council*, T-37/98, EU:T:2000:52, paragraph 28; judgment of 23 May 2007 in *Parliament* v *Eistrup*, T-223/06 P, EU:T:2007:153, paragraph 48, and order of 12 March 2014 in *Xacom Comunicaciones* v *OHIM — France Telecom España (xacom Comunicaciones)*, T-252/13, not published, EU:T:2014:163, paragraph 19).

23 The requirement for a signature by the applicant's representative on the application, which is designed, for reasons of legal certainty, to ensure the application is genuine and eliminate the risk that it is not, in reality, the work of the author authorised for that purpose, must be regarded as an essential procedural rule and applied strictly, so that failure to comply with it leads to the inadmissibility of the action (judgment of 23 May 2007 in *Parliament* v *Eistrup*, T-223/06 P, EU:T:2007:153, paragraph 51, and order of 12 March 2014 in *xacom Comunicaciones*, T-252/13, not published, EU:T:2014:163, paragraph 20).

24 The plea of inadmissibility raised by the Commission must be considered in the light of those principles.

25 In the present case, it must be noted that, first, the application has been signed by a lawyer entitled to undertake procedural steps before the General Court. It is not disputed that Mr Alexiadis is a member of a European Bar and is entitled in that capacity to undertake procedural steps before the General Court. The lodging of the application by means of e-Curia using Mr Alexiadis' user identification and password constitutes the signature in accordance with Article 3 of the e-Curia Decision.

26 Consequently, contrary to the Commission's contentions, the present case should be differentiated from previous cases in which the application was signed by a person who is not entitled to undertake procedural steps before the General Court, whether the person is not a lawyer (order of 17 July 2014 in *Brown Brothers Harriman* v *OHIM*, C-101/14 P, not published, EU:C:2014:2115), a lawyer of a third country not registered with a Bar of the European Union (orders of 27 November 2007 in *Diy-Mar Insaat Sanayi ve Ticaret and Akar* v *Commission*, C-163/07 P, EU:C:2007:717; of 20 juin 2013 in *Interspeed* v *Commission*, C-471/12 P, not published, EU:C:2013:418, and of 24 February 2000 in *FTA and Others* v *Council*, T-37/98, EU:T:2000:52), or a lawyer who is himself the applicant or cannot be considered as a third party in relation to the applicant because of his links to the applicant (orders of 5 December 1996 in *Lopes* v *Court of Justice*, C-174/96 P, EU:C:1996:473, and of 8 December 1999 in *Euro-Lex* v *OHIM (EU-LEX)*, T-79/99, EU:T:1999:312).

27 Similarly, the present case should be differentiated from previous cases in which the signature on the application, despite being in theory that of a lawyer authorised to undertake acts of procedure before the courts of the Union, was not genuine, either because a copy of the application rather than the original had been lodged at the Registry (judgment of 22 September 2011 in *Bell & Ross* v *OHIM*, C-426/10 P, EU:C:2011:612, and order of 21 September 2012 in *Noscira* v *OHIM*, C-69/12 P, not published, EU:C:2012:589), or because the signature was not handwritten but placed by means of a stamp (judgment of 23 May 2007 in *Parliament* v *Eistrup*, T-223/06 P, EU:T:2007:153) or because the signature, despite being handwritten, was illegible and could not be recognised as that of a lawyer authorised to sign the procedural documents at issue (orders of 6 October 2015 in *Marpefa* v *OHIM*, C-181/15 P, not published, EU:C:2015:678, and of 12 March 2014 in *xacom Comunicaciones*, T-252/13, not published, EU:T:2014:163). The case-law cited by the Commission in support of its plea of inadmissibility is therefore irrelevant in the present case.

28 Secondly, the Commission's arguments disputing Mr Alexiadis' status as the representative of the applicant because his name does not appear on the first page of the application must be rejected. Indeed, that status is evidenced by the fact that the applicant has submitted an authorisation to act in favour of Mr Alexiadis. The fact that that authorisation was not lodged together with the application does not affect that finding nor result in the inadmissibility of the application, since such an omission at the time of lodging an application can be put in order, and has been put in order, by the applicant within the time limit prescribed by Article 78(5) of the Rules of Procedure (judgment of 4 February 2015 in *KSR* v *OHIM — Lampenwelt (Moon)*, T-374/13, not published, EU:T:2015:69, paragraphs 12 and 13).

29 Thirdly, it should be noted that the application was lodged by Mr Alexiadis by means of e-Curia, using his user identification and password. As stated in paragraphs 21 and 25 above, the use of an e-Curia account not only constitutes signature but, unlike a mere handwritten signature, also automatically provides information regarding the identity, the professional status and address of the signatory representing the applicant.

30 Therefore, the application must be treated as having also met the obligation to provide the particulars of status and address of the applicant's representative referred to in Article 76(b) of the Rules of Procedure. In any event, the mere lack of reference to the address of the lawyer concerned or to the fact that the latter is the representative of the applicant in the body of the application is not, in itself, such as to render inadmissible an application duly signed by a lawyer of the Union authorised by the applicant, whether that signature is handwritten or electronic by means of e-Curia, and lodged within the time limit prescribed in Article 263(6) TFEU.

31 Fourthly, it should be stated that the principles underpinning the obligation that the application be signed by a lawyer are met in the present case, that is to say, the need to ensure that the responsibility for, and the contents of, that procedural document is borne by a person entitled to represent the applicant before the courts of the Union (see, to that effect order of 12 March 2014 in *xacom Comunicaciones*, T-252/13, not published, EU:T:2014:163, paragraph 18 and case-law cited) and to

guarantee the authenticity of the procedural document and exclude the risk that it is not, in reality, the work of the author authorised for that purpose (see, to that effect order of 6 October 2015 in *Marpefa* v *OHIM*, C-181/15 P, not published, EU:C:2015:678, paragraph 22). Mr Alexiadis is authorised to represent the applicant before the courts of the Union, as stated in paragraphs 25 and 28 above, and it is not disputed that he is the author or one of the authors of the application.

32 In the light of the foregoing, the Commission's plea of inadmissibility must be rejected.

Costs

33 Under Article 133 of the Rules of Procedure, a decision as to costs shall be given in the final judgment or in the order closing the proceedings. As the present order does not close the proceedings, the costs are reserved.

On those grounds,

THE GENERAL COURT (Third Chamber),

hereby orders:

1. The plea of inadmissibility is dismissed.

2. Costs are reserved.

Luxembourg, 22 June 2016.

E. Coulon
Registrar

S. Papasavvas
President