OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 9 June 2011 [1]

1. After sending by fax, within the time-limit for bringing proceedings, an application seeking annulment of a decision of the Office for Harmonisation in the Internal Market (OHIM), the lawyer representing the company Bell & Ross BV ('the appellant') sent seven copies of the same application to the Registry of the General Court ('the Registry'). Those copies were received at the Registry after the expiry of the time-limit for bringing proceedings but within the 10-day period provided for lodging the original following its transmission by fax.

2. Unable to identify the original from among those seven copies, the Registry asked the lawyer to send the original application. He sent the copy still in his possession, which arrived at the Registry after the expiry of that 10-day period. By testing the signature with a damp cloth, the Registry concluded that it was the original application and that the others were photocopies.

3. Then, by reasoned order given without taking further steps in the proceedings, the General Court declared the action manifestly inadmissible, on the ground that the original application had been lodged after the expiry of the time-limit for bringing proceedings.

4. This appeal challenges that decision [2] with regard, in particular, to the concepts of regularisable defect, excusable error or unforeseeable circumstances, to the proportionality of the General Court's decision and to the protection of legitimate expectations.

Legal framework

Statute of the Court of Justice of the European Union

5. The second paragraph of Article 21 of the Statute of the Court of Justice of the European Union ('the Statute') provides, in particular,

1 — Original language: French.

2 — Order of 18 June 2010 in Case T-51/10 *Bell & Ross* v *OHIM* ('the order under appeal').

that an application is to be accompanied, where appropriate, by the measure whose annulment is sought. If that document is not submitted with the application, 'the Registrar shall ask the party concerned to produce [it] within a reasonable period, but in that event the rights of the party shall not lapse even if such [a] document … [is] produced after the time-limit for bringing proceedings'.

Rules of Procedure of the General Court

6. Article 43 of the Rules of Procedure of the General Court ('the Rules of Procedure') provides:

'1. The original of every pleading must be signed by the party's agent or lawyer.

The original, accompanied by all annexes referred to therein, shall be lodged together with five copies for the General Court and a copy for every other party to the proceedings. Copies shall be certified by the party lodging them.

…

6. … the date on which a copy of the signed original of a pleading … is received at the Registry by telefax or other technical means of communication available to the General Court shall be deemed to be the date of lodgment for the purposes of compliance with the time-limits for taking steps in proceedings, provided that the signed original of the pleading, accompanied by the annexes and copies referred to in the second subparagraph of paragraph 1, is lodged at the Registry no later than 10 days thereafter. Article 102(2) [3] shall not be applicable to this period of 10 days.

…'

7. Article 44(6) of the Rules of Procedure provides:

'If an application does not comply with the requirements set out in paragraphs 3 to 5 of this Article, [4] the Registrar shall prescribe a reasonable period within which the applicant is to comply with them whether by putting the application itself in order or by producing any of the abovementioned documents. If the applicant fails to put the application in order or to produce the required documents within the time prescribed, the General Court shall decide whether the non-compliance with these conditions renders the application formally inadmissible.'

3 — Under which the prescribed time-limits are to be extended on account of distance by a single period of 10 days.

4 — Those paragraphs provide, respectively, for the lodging of a certificate that the lawyer is authorised to practise (paragraph 3), of the documents specified in the second paragraph of Article 21 of the Statute (paragraph 4) and, if an application is made by a legal person governed by private law, of proof of its existence in law and proof that the authority granted to the applicant's lawyer has been properly conferred (paragraph 5).

8. Article 111 of the Rules of Procedure provides:

'Where it is clear that the General Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible or manifestly lacking any foundation in law, the General Court may, by reasoned order, after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action.'

Instructions to the Registrar of the General Court

9. The Instructions to the Registrar of the General Court ('the Instructions to the Registrar') are laid down on the basis of Article 23 of the Rules of Procedure. Article 7 provides:

'1. The Registrar shall ensure that documents placed on the file are in conformity with the provisions of the Statute of the Court of Justice, the Rules of Procedure, the Practice Directions to parties and these Instructions.

If necessary, he shall allow the parties a period of time for making good any formal irregularities in the documents lodged.

Service of a pleading shall be delayed in the event of non-compliance with the provisions of the Rules of Procedure referred to in points 55 and 56 of the Practice Directions to parties.

Non-compliance with the provisions referred to in points 57 and 59 of the Practice Directions to parties shall delay, or may delay, as the case may be, the service of a pleading.

…

3. Without prejudice to Article 43(6) of the Rules of Procedure, concerning the lodgment of documents by fax or other technical means of communication, the Registrar shall accept only documents bearing the original signature of the party's lawyer or agent.

…'

Practice Directions to parties

10. The General Court's Practice Directions to parties ('the Practice Directions') are laid down on the basis of Article 150 of the Rules of Procedure. Section B, entitled 'Lodgment of pleadings', provides, inter alia:

'…

7. The original signature of the lawyer or agent acting for the party concerned must appear at the end of the pleading. Where more than one representative is acting for the party concerned, the signature of one representative shall be sufficient.

…

9. Each copy of every procedural document required to be produced by the parties pursuant to the second subparagraph of Article 43(1) of the Rules of Procedure must be signed by the lawyer or agent of the party concerned and certified by him as a true copy of the original document.'

11. Section F, entitled 'Regularisation of pleadings', states, in points 55 to 59, the circumstances in which applications may be put in order.

12. According to point 55, an application which does not comply with the following requirements is not to be served on the defendant and a reasonable period is to be prescribed for the purposes of putting the application in order:

'(a) production of the certificate of the lawyer's authorisation to practise (Article 44(3) of the Rules of Procedure);

(b) proof of the existence in law of a legal person governed by private law (Article 44(5)(a) of the Rules of Procedure);

(c) authority (Article 44(5)(b) of the Rules of Procedure);

(d) proof that that authority has been properly conferred by someone authorised for the purpose (Article 44(5)(b) of the Rules of Procedure);

(e) production of the contested measure (action for annulment) … (second paragraph of Article 21 of the Statute …; Article 44(4) of the Rules of Procedure)'.

13. Point 56 provides:

'In intellectual property cases in which the lawfulness of a decision of a Board of Appeal of OHIM is called into question, an application which does not comply with the following requirements under Article 132 of the Rules of Procedure shall not be served on the other party/parties, and a reasonable period shall be prescribed for the purposes of putting the application in order:

(a) the names of the parties to the proceedings before the Board of Appeal and the addresses which they had given for the purposes of the notifications to be effected in the course of those proceedings (first subparagraph of Article 132(1) of the Rules of Procedure);

(b) the date on which the decision of the Board of Appeal was notified (second subparagraph of Article 132(1) of the Rules of Procedure);

(c) the contested decision annexed (second subparagraph of Article 132(1) of the Rules of Procedure).'

14. Point 57 provides, in particular:

'If an application does not comply with the following procedural rules, service of the application shall be delayed and a reasonable period shall be prescribed for the purposes of putting the application in order:

…

(b) original signature of the lawyer or agent at the end of the application (point 7 of the Practice Directions);

…

(o) production of certified true copies of the application (second subparagraph of Article 43(1) of the Rules of Procedure; point 9 of the Practice Directions).'

15. Point 58 provides that if the application does not comply with the procedural rules relating to the address for service, to the certificate of authorisation to practise in respect of any additional lawyer, to the summary of the arguments or to the translation into the language of the case of the annexes, the application is to be served and a reasonable period is to be prescribed for the purposes of putting it in order.

16. Finally, point 59 lays down, as a principle or possibility, as appropriate, the need for regularisation where the number of pages of the application exceeds the number prescribed by the Practice Directions, and for delaying service in such a case.

Background to the case

17. By application received by fax at the Registry on 22 January 2010, the appellant brought an action against an OHIM decision.[5] As that decision had been notified to the appellant on 13 November 2009, the rules for calculating procedural time-limits provided for in the Rules of Procedure meant that the time-limit for bringing proceedings would expire on 25 January 2010.

18. The appellant's lawyer then sent to the Registry seven copies of the application and

5 — Decision of the Third Board of Appeal of 27 October 2009 in case R 1267/2008-3, *Bell & Ross BV* v *Klockgrossisten i Norden AB* ('the contested decision').

the annexes thereto, as well as the documents required by Article 44(3) to (5) of the Rules of Procedure, accompanied by a letter stating that the package included the original application and the annexes thereto, together with seven sets of true copies of those documents. [6] The package was received at the Registry on 1 February 2010, that is to say the 10th day after the transmission by fax.

19. On 2 February 2010, the Registry asked the lawyer to send the signed original application, which seemed to be missing from the package.

20. By letter of 3 February 2010, the lawyer sent to the Registry the only copy of the application which was in his file, explaining:

'Since I am convinced that I previously sent you the original document with a set of photocopies, I cannot tell you whether or not the attached document is the original. I am of the view that it is the copy that we kept in the file. I leave you to examine it and accordingly look forward to hearing your views.'

6 — It seems that none of the seven copies was certified as a true copy on the document itself, since the lawyer considered, notwithstanding point 9 of the Practice Directions, that the statement in the accompanying letter that they were certified was sufficient. The fact that the copies in question were not certified true copies in that sense is pointed out in the order under appeal but does not serve as the basis for the finding of inadmissibility. In any event, it would seem to constitute a defect which could have been put in order under point 57(o) of the Practice Directions.

21. On 5 February 2010, the Registry informed the lawyer that it had concluded that that document was an original: when the signature was rubbed with a damp cloth, the (black) ink had smudged.

22. The Registry therefore registered the application on 5 February 2010, that is to say after the expiry of both the time-limit for bringing proceedings and the 10-day period provided for in Article 43(6) of the Rules of Procedure.

23. By letter of 12 February 2010 addressed to the Registry, the appellant's lawyer claimed an excusable error as justification for having lodged the signed original application after the expiry of the abovementioned 10-day period.

24. In view of the above circumstances, the application was not served on OHIM.

The order under appeal

25. By the order under appeal, the General Court considered that it had sufficient information from the documents in the case-file and, deciding to rule without taking further steps in the proceedings pursuant to Article 111 of the Rules of Procedure, dismissed the application as manifestly inadmissible.

26. The General Court recalled that, according to settled case-law, [7] the time-limit for bringing proceedings is a matter of public policy, since it was established in order to ensure that legal positions are clear and certain and to avoid any discrimination or arbitrary treatment in the administration of justice, and that it is for the EU Courts to ascertain, of their own motion, whether it has been complied with. [8] The General Court then found that the application had arrived by fax at the Registry on 22 January 2010, before the expiry of the time-limit for bringing proceedings, and that, taking account of the 10-day period provided for in Article 43(6) of the Rules of Procedure, the original should have reached it before 1 February 2010. However, since that original was not received until 5 February 2010, the application was lodged out of time. [9]

27. The General Court then considered the arguments put forward in the letter of 12 February 2010 claiming an excusable error: the service provider that made the copies of the application had confused the original with one of the copies; the lawyer usually signed in black ink; the quality of the copies made it difficult to tell them from the original; the damp cloth test cannot be systematically required of an applicant; and the existence of the possibility of regularisation under point 57(o) of the Practice Directions could reduce applicants' vigilance as to the need to distinguish the original from copies.

28. The General Court considered that none of those arguments supported a finding of excusable error. According to the case-law, [10] with regard to time-limits for instituting proceedings, the concept of excusable error must be restrictively construed and can cover only exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party acting in good faith and exercising all reasonable diligence. However, in the present case, the appellant itself admitted that it was the source of the confusion when preparing the file and neither the existence of exceptional circumstances nor the exercise of reasonable diligence had been established. The difficulty of distinguishing the signed original application from the copies could have been overcome. [11]

29. Further, failure to lodge the signed original within the time-limits was not among the cases in which applications may be put in order under points 55 to 59 of the Practice Directions. The availability of regularisation under point 57(o) could not lead to

7 — Case C-246/95 *Coen* [1997] ECR I-403, paragraph 21, and Joined Cases T-121/96 and T-151/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1355, paragraphs 38 and 39.

8 — Paragraph 12 of the order under appeal.

9 — Paragraph 17 of the order under appeal.

10 — Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219, paragraph 29, and order of 11 December 2006 in Case T-392/05 *MMT* v *Commission*, paragraph 36 and case-law cited.

11 — Paragraphs 19 to 27 of the order under appeal.

applicants, who are responsible for distinguishing the original from copies, reducing their vigilance. [12]

Forms of order sought and grounds of appeal

30. The appellant claims that the Court should set aside the order under appeal, declare the action for annulment admissible, refer the case back to the General Court to rule on the substance and order OHIM to pay the costs of the two sets of proceedings.

31. It puts forward six grounds of appeal, alleging, respectively, infringement of Article 111 of the Rules of Procedure, infringement of Article 43 of the Rules of Procedure, non-compliance with point 57(b) of the Practice Directions and Article 7(1) of the Instructions to the Registrar, non-recognition of the existence of an excusable error, existence of unforeseeable circumstances and infringement of the principles of proportionality and legitimate expectations.

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

12 — Paragraph 28 of the order under appeal.

Analysis

Preliminary remarks

33. First of all, I consider it important to have a clear view of the principal distinguishing features of this case.

34. On the one hand, it is common ground that, as a result of a confusion, the copy of the application received at the Registry on 5 February 2010 was the one which bore the lawyer's original signature, those received on 1 February being accurate photocopies of it. Nor is it disputed that the document received on 5 February was the original of the fax received on 22 January. Furthermore, it is common ground that the time-limit for bringing proceedings expired on 25 January 2010 (and was therefore complied with as regards the transmission of the application by fax on 22 January) and that the 10-day period for lodging the original application following its transmission by fax expired on 1 February 2010.

35. On the other hand, I think it important to note that, for quite obvious reasons, the application itself, addressed to the General Court, contained no arguments relating to the causes of the abovementioned confusion, to any justification for lodging the application out of time or to any possibility of

regularisation. Since the application was not served on OHIM and no hearing was held, the parties had no opportunity to state their views on those aspects directly before the General Court itself. [13] It was therefore on the basis of communications between the lawyer and the Registry, both in writing and by telephone, and on the basis of the latter's identification of the lawyer's original signature, that the General Court made the decision set out in the order under appeal.

36. In addition, it is necessary to bear in mind the principles of EU law which seem most relevant for assessing this appeal: the principle of legal certainty, by virtue of which the time-limits for bringing proceedings are matters of public policy and are not at the discretion of the parties or the court; the right to an effective remedy before a court or tribunal under the conditions laid down in Article 47 of the Charter of Fundamental Rights of the European Union; the principle of proportionality, which requires that the means used by a provision of EU law must be appropriate for securing the attainment of the objective pursued and not go beyond what is necessary in order to attain it; and the principle of the protection of legitimate expectations, which extends to any person in a situation in which an EU institution has caused him to entertain expectations which are justified by precise assurances provided to him.

37. In the light of those principles and the facts of the present case, I consider that the third and sixth grounds of appeal merit particular attention, and I shall address them first. The other grounds of appeal can then be examined more briefly.

Third ground of appeal: non-compliance with Article 7(1) of the Instructions to the Registrar and point 57(b) of the Practice Directions

38. The appellant argues that the General Court erred in law by failing to allow regularisation of the application in accordance with Article 7(1) of the Instructions to the Registrar (according to which, if necessary, the Registrar is to allow the parties a period of time for making good any formal irregularities in the documents lodged) and point 57(b) of the Practice Directions (according to which a reasonable period is to be prescribed for the purposes of putting the application in order if it does not comply with the procedural rule

13 — I note that, if the order under appeal had been made on the basis of Article 113 and not Article 111 of the Rules of Procedure, it would have been necessary to hear the parties. Article 113 provides that '[t]he General Court may at any time, of its own motion, *after hearing the parties*, decide whether there exists any absolute bar to proceeding with an action ...' (emphasis added). However, since manifest inadmissibility on the ground that the application was lodged out of time is an absolute bar to proceeding with an action, it is not easy to see where the distinction lies between the respective scopes of Articles 111 and 113 of the Rules of Procedure or, consequently, to identify the extent of the obligation imposed on the General Court, before making an order in circumstances such as those in the present case, to hear the parties, if only their written arguments (see, inter alia, Case C-417/04 P *Regione Siciliana* v *Commission* [2006] ECR I-3881, paragraph 37).

which requires the original signature of the lawyer at the end of the application).

39. First of all, I cannot accept OHIM's objection to the admissibility of this ground of appeal. OHIM's argument is that, before the General Court, the appellant did not rely on point 57(b) of the Practice Directions.

40. It is true that, in principle, a plea relating to the dispute in the main proceedings which was not raised before the General Court cannot be put forward for the first time before the Court of Justice. [14] However, in the present case, I do not think that the admissibility of the grounds of appeal can be assessed according to whether or not they are similar to the pleas raised at first instance. The appellant had no opportunity in the course of the proceedings before the General Court to raise any plea relating to the provision at issue. The application itself could not contain any argument concerning the circumstances in which it was lodged and which, for obvious reasons, were not anticipated when it was drawn up. And, even when the exchanges between the appellant's lawyer and the Registry were in writing, they were never documents in which the appellant could have raised a plea which would have been admissible in the context of its action.

14 — See, inter alia, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others* v *API and Commission* [2010] ECR I-8533, paragraph 126 and case-law cited.

41. As to the substance of this ground of appeal, I find the appellant's arguments highly persuasive, while OHIM's objections fail to convince me.

42. Although Article 44(6) of the Rules of Procedure does indeed refer only to non-compliance with the requirements set out in Article 44(3) to (5) as capable of giving rise to a reasonable period, to be prescribed by the Registrar, for the application to be put in order, that reference is not – contrary to OHIM's submissions – explicitly exhaustive.

43. Article 7(1) of the Instructions to the Registrar provides that the Registrar is to ensure that documents placed on the file are in conformity with the provisions 'of the Statute …, the Rules of Procedure, the Practice Directions to parties and these Instructions' and that, if necessary, 'he shall allow the parties a period of time for making good any formal irregularities in the documents lodged'. I conclude that the formal irregularities referred to include all those set out in the provisions of the four instruments referred to.

44. It is true that the absence of the original signature of the lawyer at the end of the application is not a purely formal irregularity (as would be the case, for example, with the use of a paper size other than A4, as required by point 8(a) of the Practice Directions), since it relates to the identification of the document as originating from an authorised source and thus to its very substance. Nevertheless, the

signature is only one of the elements which together allow such identification. Other elements are proof of the existence in law of an applicant who is a legal person, the authority conferred on the lawyer, proof that that authority has been properly conferred and the certificate of the lawyer's authorisation to practise. The absence of just one of those elements makes it impossible to verify that the document is from an authorised source and therefore renders it inadmissible. Since it is common ground that the absence of one of those other documents constitutes a formal irregularity which can be made good, I conclude that the same applies to the original signature of the lawyer.

45. According to point 57(b) of the Practice Directions, if an application does not comply with the procedural rule which requires the original signature of the lawyer at the end of the application, 'service of the application shall be delayed and a reasonable period shall be prescribed for the purposes of putting the application in order'.

46. It thus seems to me that, read together, Article 7(1) of the Instructions to the Registrar and point 57(b) of the Practice Directions provide – clearly – for a reasonable period to be prescribed for the purposes of putting the application in order when the original signature of the lawyer is not appended to the application.

47. OHIM contends, however, that the Instructions to the Registrar cannot add any possibilities of regularisation after the expiry of the time-limit for bringing proceedings which are not set out in the Statute or the Rules of Procedure.

48. That argument presupposes, in the first place, a distinction between regularisation after the expiry of the time-limit for bringing proceedings (which can be provided for only by the Statute and the Rules of Procedure and which is provided for in the circumstances set out in the second paragraph of Article 21 of the Statute and Article 44(6) of the Rules of Procedure) and regularisation before the expiry of that time-limit (which may be provided for in instructions laid down by the General Court).

49. However, first, I do not consider it possible to infer from the fact that the second paragraph of Article 21 of the Statute states that 'the rights of the party shall not lapse even if such documents are produced after the time-limit for bringing proceedings' that, where other provisions setting out circumstances in which an application can be regularised contain no such statement, it necessarily follows that in those other circumstances there is *no possibility* of regularisation after expiry of that time-limit.

50. Next, I note that neither Article 44(6) of the Rules of Procedure nor Article 7(1) of the Instructions to the Registrar, nor even point 57 of the Practice Directions indicates,

either expressly or by implication, whether or not an application may be regularised after the expiry of the time-limit for bringing proceedings. The three provisions are worded in very similar terms and each of the three provides that the Registrar is to prescribe a (reasonable) period for regularising a document which contains a formal irregularity. Accordingly, if an application can be regularised after the expiry of the time-limit for bringing proceedings in the circumstances referred to in Article 44(6) of the Rules of Procedure, there is no reason to conclude that the same is not true in the circumstances listed in the other two provisions. [15]

51. It seems to me, moreover, that any possibility for regularisation of an application which is set out in a procedural provision must be available after the expiry of the time-limit for bringing proceedings. Until the time-limit for bringing proceedings has expired, [16] an applicant is always free to supplement his application, without there being any need for an express provision authorising him to do so, whether on his own initiative or following a communication from the Registry informing him of a formal irregularity. If no express provision is necessary to allow an application to be put in order *before* the expiry of the time-limit for bringing proceedings, the existence of such a provision should be seen as meaning that the application can be put in order *after* the expiry of that time-limit – and that is what makes it necessary for the Registry to intervene and for a reasonable period to be prescribed. [17]

52. However, OHIM also argues that no possibility for regularisation which is not provided for in the Rules of Procedure can be introduced by the Practice Directions.

53. It is true that the Practice Directions are lower-ranking rules than the Rules of Procedure, which constitute their legal basis. Nevertheless, the two instruments apply together and must, accordingly, be interpreted as consistently as possible. In the present case, the Rules of Procedure contain no provision from which it can be inferred that the circumstances which it sets out are the only ones in which regularisation may be available (or may be available after the expiry of the time-limit for bringing proceedings). Consequently, the Rules of Procedure and the Practice

15 — If it were necessary to infer, *a contrario*, from the wording of the second paragraph of Article 21 of the Statute ('the rights of the party shall not lapse even if such documents are produced after the time-limit for bringing proceedings') that, where there is no such statement, an application can only be regularised before the expiry of the time-limit for bringing proceedings – and I see no reason to make such an inference – OHIM's argument would be inconsistent, since that statement is also absent from Article 44(6) of the Rules of Procedure.

16 — And so long as the application has not been served on the opposing party; however, in accordance with the Instructions to the Registrar, an application which contains a formal irregularity should not be served.

17 — The Registrar, when deciding on the period to prescribe in each case, must of course take into account not only what is reasonable for the applicant but also what is reasonable from the point of view of the defendant (and, in trade mark cases such as the present, that of the other party to the proceedings before OHIM), whose legal situation must be ascertainable in a clear and certain manner, having regard to the time-limits for bringing proceedings and for service.

Directions can be interpreted consistently, since the possibilities for regularisation provided for in the latter are not limited to the period prior to the expiry of the time-limit for bringing proceedings. By contrast, were there to be any conflict between the two, the Rules of Procedure should take precedence. However, it seems to me that, even if the Practice Directions were to go beyond what is permitted by the Statute or the Rules of Procedure, parties are entitled to expect the General Court to regard itself as bound by instructions which it has itself laid down, particularly where it decides, of its own motion and without hearing the parties, that an action is inadmissible.

54. Finally, OHIM argues that the possibilities for regularisation provided for in points 55 to 59 of the Practice Directions are concerned not with the admissibility of the application, but solely with service on the defendant.

55. That argument cannot in my view be upheld. It is true that each of the points at issue in the Practice Directions states whether or not service must be deferred. It also seems likely that some of the defects referred to – for example, failure to number the paragraphs, referred to in point 57(c) – might not render the application inadmissible if they were not regularised. Others, however – including the absence of the original signature of the lawyer or agent at the end of the application, referred to in point 57(b) and at issue in the present case – would necessarily have the effect of rendering the application inadmissible if they were not corrected. It is therefore not possible to assert that the possibilities for regularisation provided for in point 57 of the Practice Directions affect only the service of the application and do not relate to its admissibility.

56. Moreover, it seems to me that the assertion, in paragraph 28 of the order under appeal, that point 57(o) of the Practice Directions makes it possible 'to defer the assessment, by the General Court, of the requirements as to the admissibility of the application provided for in the second paragraph of Article 43(1) of the Rules of Procedure' is irrelevant in that regard. Whenever the criteria for admissibility of an application are in issue, the General Court's assessment must necessarily be deferred in relation to the date which is relevant for that assessment, without there being any need for an express provision to that end.

57. I am accordingly of the view that the third ground of appeal is well founded.

Sixth ground of appeal: infringement of the principles of proportionality and legitimate expectations

58. The appellant claims that, by declaring the action inadmissible even though eight copies of the application, all bearing the lawyer's signature, were received within the time-limits by fax or by mail, the General Court disregarded the principles of proportionality and legitimate expectations. Both the Instructions to the Registrar (Article 7) and the Practice Directions (point 57(b)) provide for the possibility of regularising the application by adding the lawyer's original signature.

59. OHIM stresses that the right to effective judicial protection is not affected by a strict application of time-limits for bringing proceedings and other essential procedural requirements. Inadmissibility on the ground that the application is lodged out of time is neither contrary to that right nor disproportionate. Point 57(b) of the Practice Directions cannot, by its very nature, form the basis of a legitimate expectation concerning the possibility of putting in order an application which does not bear the original signature and cannot in any way derogate from the clear requirement set out in Article 43(6) of the Rules of Procedure.

The principle of the protection of legitimate expectations

60. First, I recall that the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation in which an EU institution has caused him to entertain expectations which are justified by precise assurances provided to him. However, nobody can rely on an infringement of that principle in the absence of such assurances. [18]

61. Is it possible to conclude, in the present case, that the General Court (or its Registry) provided precise assurances capable of justifying an expectation on the appellant's part that the application could be regularised?

62. It is true that the appellant does not claim to have received any express assurance in that regard. However, on the one hand, the existence of the various provisions of the Instructions to the Registrar (in particular Article 7) and of the Practice Directions (in particular point 57) which have been cited was likely to suggest that a possibility of regularisation such as that relied on in the present case might be available. In that regard, any applicant should, in general, be entitled to expect that the General Court will comply with rules which it has itself laid down. On the other

18 — See, most recently, Case C-321/09 P *Greece* v *Commission* [2011], paragraph 45 and case-law cited.

hand, it is apparent from the order under appeal and from the letter of 3 February 2010 that, on 2 February 2010, that is to say on the day following the expiry of the 10-day period provided for in Article 43(6) of the Rules of Procedure, the Registry 'asked [the appellant] to send the signed original application.' [19] Considered in the light of those provisions, such a request could be interpreted only as a precise (albeit implicit) assurance that the application could be regularised if the signed original were received. Since the Registry was not in possession of that original and both the time-limit for bringing proceedings and the 10-day period had expired, its production could serve no purpose other than regularisation. An applicant receiving such a request from the Registry and being aware that both the time-limit for bringing proceedings and the 10-day period had expired could conclude only that regularisation was possible, since, if the Registry did not have the original in its possession at that time, it would have been pointless to ask for its subsequent production merely as confirmation.

63. In the light of the existence of that precise though implicit assurance on the part of the Registry, together with the provisions of Article 7 of the Instructions to the Registrar and point 57 of the Practice Directions, laid down by the General Court and thus giving rise to a presumption that it would comply with them, the appellant could, in my view, entertain a legitimate expectation that the General Court would not dismiss out of hand any possibility of regularising the lodgment of the application by producing the original in response to the Registry's request – even in the absence of an excusable error on the part of the appellant or its lawyer, no requirement relating to the existence of such an error being set out in the provisions cited or having been referred to by the Registry.

64. However, in the order under appeal, the General Court based its finding of inadmissibility on its statements, first, that only the date of lodging the signed original application, namely 5 February 2010, was to be taken into consideration when assessing compliance with the time-limit for bringing proceedings and, secondly, that failure to lodge the signed original application within the 10-day period provided for in Article 43(6) of the Rules of Procedure was not among the circumstances in which regularisation is possible under points 55 to 59 of the Practice Directions. [20] For the rest, it confined itself to considering and rejecting the arguments put forward by the appellant's lawyer in his letter to the Registry of 12 February 2010, claiming an excusable error.

19 — Paragraph 4 of the order under appeal. The date of the request is not stated in that order, but is apparent from the letter of 3 February 2010 (see point 20 above), the accuracy of which does not seem to be in dispute in that respect. However, even assuming that the Registry asked for the original to be sent on the same day that it received the seven copies, that is to say on 1 February 2010, when the 10-day period for sending the original expired, the Registry would not obviously have considered likely that it would receive, in Luxembourg, before that period expired at midnight, the document still in the possession of the lawyer in Paris.

20 — Paragraphs 17 and 28, respectively, of the order under appeal.

65. The statement that failure to lodge the signed original application within the 10-day period is not among the circumstances in which regularisation is possible under points 55 to 59 of the Practice Directions seems to me to be incorrect, since those circumstances include, under point 57(b), the absence of the lawyer's original signature at the end of the application.

66. In any event, the General Court took no account of the possibility of regularising the application by simply lodging the signed original in response to the Registry's request – a possibility in which the appellant could entertain a legitimate expectation – but only considered whether the inadmissibility found to exist could be overcome by the existence of an excusable error. It seems to me, therefore, that the General Court thereby disregarded the principle of the protection of legitimate expectations vis-à-vis the appellant.

The principle of proportionality

67. With regard to the principle of proportionality, the question to be addressed is whether the General Court's application of its procedural rules in the order under appeal was appropriate for securing the attainment of the objective pursued and did not go beyond what was necessary in order to attain it.

68. As the General Court recalled in its order, the objective pursued is that of ensuring the clarity and certainty of legal situations and of avoiding any discrimination or arbitrary treatment in the administration of justice. Accordingly, the strict application of time-limits for bringing proceedings and the requirement that the application lodged must bear the original signature of a person duly authorised for that purpose allow (in particular) an EU institution, body or organisation whose act may be challenged to determine whether, once a certain period has elapsed, any admissible challenge to that act has been lodged.

69. However, the potential defendant's interest in thereby acquiring some certainty as to the status of its act – challenged or no longer challengeable – must be weighed against the interest of any person who considers himself adversely affected by the act in contesting it under reasonable conditions. The objective pursued, in terms of legal clarity and certainty, is therefore twofold. It is not only to protect the defendant against a late or non-authenticated action, but also to guarantee the applicant's right to an effective remedy. Any provision or act which upsets the necessary balance between those two aspects of the objective, by excessively favouring one at the expense of the other, would, in my view, be incompatible with the principle of proportionality.

70. In the present case, it is not claimed that the time-limits at issue or the requirement for authentication of the application were such as to interfere with the appellant's right to bring an action against the contested decision.

However, by finding the application formally inadmissible as a result of an error on the appellant's part, the General Court put an end to that right. In so far as I take the view, as I have stated above, that the finding of inadmissibility was not required by the applicable provisions, I consider it necessary to examine whether the General Court's decision did not excessively favour protecting OHIM at the expense of the appellant's right to an effective remedy.

71. In my view, the tipping point between the interests at issue has indeed been shifted too far in OHIM's favour in the order under appeal.

72. On the one hand, the relevant date for deciding whether or not a formally admissible application has been lodged depends on a number of factors including, in particular, the date on which the applicant could take cognisance of the contested act, whether or not there was a prior application for legal aid,[21] whether or not the application was sent by a 'technical means of communication available to the General Court' and the possibilities for regularisation after the expiry of the time-limit for bringing proceedings (of which at least the possibility provided for in the second paragraph of Article 21 is indisputable). Moreover, in practice, it is never possible to serve an application which is formally admissible on a defendant on the same day that it is registered at the Registry. A potential defendant can therefore never be certain that his act will not be challenged without checking (at least) all those factors. Accordingly, the date on which it can acquire that certainty may therefore be later (perhaps much later) than the expiry of the time-limit for bringing proceedings and, in order to have that certainty, it may have to seek information from the Registry.

73. On the other hand, the fact that the Registrar can prescribe a (reasonable) period for regularising an application which does not comply with certain formal rules as to admissibility substantially reduces the risk that a defendant's period of uncertainty will be prolonged merely on account of a failure on the part of an applicant.

74. In the light of those considerations and the factual background to the present case (application, not disputed to be a faithful reproduction of the original, lodged by fax before the expiry of the time-limit for bringing proceedings; seven copies of the application, not disputed to be faithful copies of the original, lodged within the 10-day period

21 — Article 96(4) of the Rules of Procedure provides: 'The introduction of an application for legal aid shall suspend the period prescribed for the bringing of the action until the date of notification of the order making a decision on that application or … of the order designating the lawyer instructed to represent the applicant.'

provided for in Article 43(6) of the Rules of Procedure; and original lodged four days later in immediate response to a request from the Registry after the expiry of that period), I am of the view that the General Court, by ruling out any possibility of regularisation under provisions which it had itself laid down, infringed the principle of proportionality.

75. Accordingly, I am of the view that the sixth ground of appeal is well founded.

Interim remark

76. From my analysis of the third and sixth grounds of appeal, I consider that the appeal should be upheld. Since the case is clearly not at a stage at which a final decision can be given, it should therefore be referred back to the General Court.

77. If, however, the Court were to adopt a different approach as regards those two grounds of appeal, I do not think that it could uphold the appeal on the basis of the remaining grounds, for the reasons I shall briefly set out below.

First ground of appeal: infringement of Article 111 of the Rules of Procedure

78. The appellant submits that the Advocate General was not heard, in breach of Article 111 of the Rules of Procedure.

79. That article, on which the order under appeal is based, does indeed provide for the Advocate General to be heard. However, Article 2(2) of the Rules of Procedure states that references to the Advocate General 'shall apply only where a Judge has been designated as Advocate General'. In the present case, no Judge was designated as Advocate General in the proceedings before the General Court. This ground of appeal must therefore be rejected as ineffective.

Second ground of appeal: infringement of Article 43 of the Rules of Procedure

80. The appellant submits that the General Court misinterpreted Article 43 of the Rules of Procedure by considering that the application was lodged out of time. It points out that the facts of the present case differ from those in *PubliCare Marketing Communications* v

OHIM [22] referred to in paragraph 17 of the order under appeal. In that case, the application was sent by fax, but the original arrived late because insufficient postage was paid. In the present case, the Registry received seven copies of the application signed by the relevant lawyer on 1 February 2010, before the expiry of the applicable time-limit. The relevant issue is that of identifying the original application. Article 43 lays down no detailed rules concerning the signing of the application (colour, type of pen, and so forth). The damp cloth test is questionable, since some inks do not smudge. In the order under appeal, the General Court, without referring to the method by which it distinguished the original from the copy, therefore imposed requirements additional to those set out in Article 43 of the Rules of Procedure.

81. OHIM considers this ground of appeal to be manifestly unfounded. Article 43(1) of the Rules of Procedure requires the lawyer's handwritten signature. [23] Article 7(3) of the Instructions to the Registrar states that the Registrar is to accept only documents bearing the 'original signature of the party's lawyer'. The method whereby the Registrar distinguishes an original from a copy is irrelevant since the appellant does not dispute that the documents lodged on 1 February 2010 were not originals. It has therefore not been claimed that the General Court distorted the facts. The question whether the document lodged at the Registry on 5 February 2010 was actually an original is irrelevant. Even if it was an original, it was lodged out of time. If not, the action is inadmissible in the light of Article 43(1) of the Rules of Procedure.

82. By this ground of appeal, the appellant seems to criticise, above all, the Registry's use of the 'damp cloth test' and its endorsement by the General Court which, it is claimed, adds requirements not contained in the applicable provisions, as to the way in which the original signature of the duly authorised person must be appended to a procedural document.

83. I cannot accept that reasoning, although some of the arguments put forward in the context of this ground of appeal may be relevant in the context of other grounds.

84. The requirement of an original signature on some documents (originals) but not on others (copies) necessarily presupposes that it must be possible to distinguish between the original and the copy. Contrary to what the appellant seems to argue, the order under appeal imposes no precise requirement in that regard. Although the use of smudgeable ink and/or a colour other than that of a photocopy may be among the means of ensuring

22 — Order of 28 April 2008 in Case T-358/07.

23 — Order of 24 February 2000 in Case T-37/98 *FTA and Others* v *Council* [2000] ECR II-373.

that such a distinction can be made, there is nothing in the order which precludes reliance on other evidence.

85. In any event, it is not disputed that the test used by the Registry in the present case, unsophisticated though it may be, did indeed enable the original to be identified from among the eight copies of the application in the Registry's possession.

86. I am therefore of the view that the second ground of appeal is unfounded.

Fourth and fifth grounds of appeal: excusable error or unforeseeable circumstances

87. The appellant claims, first, an excusable error. In view of the considerable volume of copies required (2651 pages in total), its lawyer used an external service provider. In doing so, he acted diligently. The service provider left one document out of the package sent to the General Court, an error which the lawyer managed to put right in good time. The appellant acted in good faith. All the documents sent to the Registry were signed and lodged within the time-limits. The appellant argues, secondly, that the confusion between the original and the copies stems from unusual circumstances beyond its control, namely the fact that the service provider confused the original and the copies and delivered an incomplete annex. The appellant used all possible means to remedy those problems and at all times acted in good faith, convinced that the original was already in the Registry's possession.

88. OHIM considers that the concept of excusable error concerns only exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party. However, the distinction between an original and a copy is of considerable importance. The appellant should have clearly distinguished the original from the copies, for example by having the original signed in blue ink. If it had acted more quickly, the application could have been regularised within the time-limit for bringing proceedings. OHIM submits, further, that the confusion between the original and the copies is attributable to the appellant.

89. With regard to these two grounds of appeal, I concur with OHIM. Responsibility for preparing, monitoring and checking procedural documents to be lodged at the Registry rests entirely with the representative of the party concerned, to whom he is answerable, under the control of that party. It is true that exceptional and/or unforeseeable circumstances may give rise to entirely excusable confusion. However, in the present case, nothing in the General Court's findings or the appellant's claims suggests anything other

than a lack of diligence on the part of the appellant or its lawyer, in the context, it seems likely, of inadequate planning in relation to a strict time-limit for bringing proceedings. It is quite clear from the Rules of Procedure that the original application must be lodged at the Registry. All applicants are thus aware of the need to identify that original. The means used for that purpose are entirely a matter for the applicant's diligence. No particular procedure is required, but differentiating between the original and a photocopy by means of the colour of ink of the signature, or by any other suitable means, could prove helpful.

90. I therefore consider that it is not possible to uphold the grounds of appeal relating to the existence of an excusable error or unforeseeable circumstances.

Final remarks

91. At a time when the three tiers of the Court of Justice of the European Union have asked the Council of the European Union to approve the inclusion in their respective Rules of Procedure of the 'e-curia' system, in order to allow procedural documents to be lodged and served by electronic means, with authentication by means of an authorised electronic signature, the documents thus lodged being deemed to be originals, the present appeal appears to relate to a system which is destined to disappear in due course.

92. Even though the decision in this case might therefore directly affect only a shrinking number of future cases, I feel it is important that the Court should express its view on a situation in which, on account of an error, a document lodged within the time-limits is a faithful copy of the original which should have been lodged in its place, but which was none the less lodged promptly following a request by the Registry, and in which the appellant could consider, in the light of that request and the provisions laid down by the General Court itself, that it had been allowed a short period to put the application in order.

Costs

93. Under Article 69(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 69(3) of the Rules of Procedure, the Court may order that, where the circumstances are exceptional, each of the parties should bear its own costs.

94. In the present case, even though I consider that OHIM must be unsuccessful, it seems to me that the particular circumstances of the appeal justify not ordering it to pay the appellant's costs. OHIM in no way contributed to the General Court's decision to dismiss the application as manifestly inadmissible and its intervention on appeal has occasioned no costs for the appellant which, following the lodging of OHIM's response, sought neither to lodge a reply nor to present oral argument.

95. In those circumstances, I consider that it is fair to order each party to bear its own costs in respect of the appeal.

Conclusion

96. In the light of all the foregoing considerations, I am of the opinion that the Court should:

— set aside the order of the General Court of the European Union of 18 June 2010 in Case T-51/10 *Bell & Ross* v *OHIM*;

— refer the case back to the General Court of the European Union;

— order each party to bear its own costs in respect of the appeal.