Reports of Cases

ORDER OF THE GENERAL COURT (First Chamber)

20 November 2017*

(Action for annulment — Representation by a lawyer who is not a third party — Inadmissibility)

In Case T-702/15,

BikeWorld GmbH, established in Sankt Ingbert (Germany), represented by J. Jovy, lawyer,

applicant,

v

European Commission, represented by L. Flynn, B. Stromsky and T. Maxian Rusche, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU seeking the annulment in part of Commission Decision (EU) 2016/151 of 1 October 2014 on the State aid SA.31550 (2012/C) (ex 2012/NN) implemented by Germany for Nürburgring (OJ 2016 L 34, p. 1),

THE GENERAL COURT (First Chamber),

composed of I. Pelikánová, President, V. Valančius and U. Öberg (Rapporteur), Judges,

Registrar: E. Coulon,

makes the following

Order

Background to the dispute

1 The Nürburgring is a race track in the German *Land* of Rhineland-Palatinate that, between 2002 and 2012, was the beneficiary of several aid measures, consisting essentially of capital contributions, loans, public guarantees, letters of intent, the subordination of claims, rent at below the market rate, the payment of a fee for the provision of services and the payment of subsidies.

2 Those measures related to expenditure attributable to the construction and operation of facilities with a direct connection to the race track, principally seating, to the construction and operation of facilities designed to promote tourism (leisure activities, housing, events, shops, catering and games), and to the organisation of Formula 1 races.

* Language of the case: German.

3 Those measures were granted for the most part by the German *Land* of Rhineland-Palatinate and by public bodies controlled by that *Land*, which owned the various facilities in the Nürburgring complex, namely Nürburgring GmbH ('NG'), Motorsport Resort Nürburgring GmbH and Congress-und Motorsport Hotel Nürburgring GmbH.

4 On 21 March 2012, the European Commission decided to initiate a formal investigation procedure against the Federal Republic of Germany in respect of the aid granted to Nürburgring, including loans made by NG to its subsidiaries, which included the applicant BikeWorld GmbH, formerly BikeWorld Nürburgring Besitz GmbH ('BWNB'), subsequently BikeWorld Nürburgring GmbH ('BWN2'), or its legal predecessors, such as Bike World Nürburgring GmbH ('BWN1').

5 The business objective of BWN1 was trade in new and used motor bikes and the promotion of motor bike tourism in the Eifel region. BWN1 merged with BWNB, with effect from 6 September 2005. BWNB then changed its name to BWN2.

6 NG held shares, successively or simultaneously, in BWNB and BWN1, and subsequently in BWN2 and the applicant. It approved loans to its subsidiaries BWN1, BWNB and BWN2 ('the loans at issue').

7 On 15 May 2007, NG sold its 49% holding in the share capital of BWN2 to Mr Norbert Brückner and Mr Jörg Jovy. In the context of that sale, the value of the claims corresponding to the loans at issue was, according to the applicant, estimated at EUR 0.

8 In 2008, BWN2 ceased commercial operations at Nürburgring.

9 BWN2 subsequently changed its name to that of the applicant and its seat was transferred to Sankt Ingbert (Germany).

10 Following the granting of additional aid by the Federal Republic of Germany, the Commission extended the investigation procedure by decision of 7 August 2012.

11 On 1 October 2014, the Commission adopted Decision (EU) 2016/151 on the State aid SA.31550 (2012/C) (ex 2012/NN) implemented by Germany for Nürburgring (OJ 2016 L 34, p. 1) ('the contested decision').

12 In the contested decision, the Commission found that the loans at issue had given rise to the payment of State aid that was illegal and incompatible with the internal market and that had to be reimbursed.

13 In recital 226 of the contested decision, the Commission stated that the applicant was required to reimburse the State aid which it, under its previous names, or its legal predecessors, had received in the context of the loans at issue.

14 By letter of 5 May 2015, NG claimed reimbursement from the applicant of an amount totalling EUR 4902275.29. On 10 August 2015, it applied to the Landgericht Saarbrücken (Regional Court, Saarbrücken, Germany) for an order requiring reimbursement by the applicant of the amount of EUR 250 000 received on 4 April 2007 as a loan, in breach of Article 108(3) TFEU and of Article 107(1) TFEU. In addition to those proceedings, NG is claiming reimbursement from the applicant, on similar grounds, of the amount of EUR 4 652 200.

Procedure and forms of order sought

15 By application lodged at the Court Registry on 3 December 2015, the applicant brought the present action. The case was assigned to the Eighth Chamber and a Judge-Rapporteur was appointed.

16 On 7 April 2016, the Commission lodged a defence.

17 On 13 May 2016, by way of a measure of organisation of procedure, the Court requested the applicant to clarify its connection to its representative, Jörg Jovy, and to express its view on the admissibility of the action in the light of the third and fourth paragraphs of Article 19 of the Statute of the Court of Justice of the European Union.

18 On 30 May 2016, the applicant replied that Mr Jovy was one of its two associates, owning 10% of its shares, but that, nonetheless, he held no role in its administrative and financial management.

19 On 19 July 2016, the applicant lodged a reply, in which it informed the Court that insolvency proceedings had been opened against it and, after repeating the claims contained in the application seeking suspension of the operation of the contested decision, requested that proceedings in the present case be stayed for nine months.

20 On 22 July 2016, the Commission submitted its observations on the request to have the proceedings stayed, stating that it was not necessary for the Court to do so.

21 By decision of 29 July 2016, the President of the Eighth Chamber of the General Court rejected the request to have the proceedings stayed.

22 On 2 September 2016 the Commission lodged a rejoinder.

23 On 16 September 2016, the Commission indicated that it did not wish to present oral argument at a hearing. The applicant did not lodge a request to present oral argument at a hearing, under Article 106 of the Rules of Procedure of the General Court, within the prescribed period.

24 By decision of the President of the General Court of 12 October 2016, the present case was assigned to a new Judge-Rapporteur sitting in the First Chamber.

25 The applicant claims that the Court should:

– annul the contested decision, in so far as it concerns the applicant;

– suspend the operation of the contested decision in its regard until the General Court has ruled on the present action.

26 The Commission contends that the Court should:

– by way of principal claim, dismiss the action as inadmissible;

– in the alternative, dismiss the action as unfounded;

– order the applicant to pay the costs.

Law

27 Under Article 129 of the Rules of Procedure, the Court may at any time of its own motion, after hearing the main parties, decide to rule by reasoned order on whether there exists any absolute bar to proceeding with a case, including the conditions governing the admissibility of an action (see order of 27 March 2017, *Frank* v *Commission*, T-603/15, not published, EU:T:2017:228, paragraph 48 and the case-law cited).

28 In the present case, the Court considers that it has sufficient information from the documents before it and from the explanations provided by the parties during the written part of the procedure, and, consequently, has decided to give a decision without taking further steps in the proceedings.

29 While not formally raising an objection of inadmissibility, the Commission has contended, in its defence and its rejoinder, that there is an absolute bar to proceedings in that, essentially, the present action does not satisfy the requirements laid down in Articles 19 and 21 of the Statute of the Court of Justice of the European Union, in so far as the lawyer representing the applicant, Mr Jovy, is one of its two associates and, therefore, is not independent of the applicant.

30 The applicant was able to set out its views on that absolute bar to proceedings in its answer to the Court's measure of organisation of procedure (see paragraph 17 above) and in its reply. In that regard it submitted, essentially, that its representative was, at the time when the application was lodged, involved in its regard only to the extent that he held 10% of its shares, but that he did not hold any role in its administrative and financial management, and that he was representing the applicant only in his capacity as a lawyer and not as an associate.

31 According to settled case-law, it is apparent from the third and fourth paragraphs of Article 19 and from the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, applicable to the General Court by virtue of the first paragraph of Article 53 of that statute, and, in particular, from the use of the term 'represented' in the third paragraph of Article 19 of that statute, that, in order to bring an action before the Court, parties other than the Member States, institutions of the European Union, States which are parties to the Agreement on the European Economic Area (EEA) other than the Member States and also the EFTA Surveillance Authority referred to in that agreement may not act themselves, but must use the services of a third party who must be authorised to practise before a court of a Member State or of another State which is a party to the EEA Agreement (see orders of 5 December 1996, *Lopes* v *Court of Justice*, C-174/96 P, EU:C:1996:473, paragraph 11 and the case-law cited, and of 16 September 2015, *Calestep* v *ECHA*, T-89/13, EU:T:2015:711, paragraph 28 and the case-law cited).

32 That requirement to have recourse to a third party is based on the view of the lawyer's role in the European Union legal order, on which Article 19 of the Statute of the Court of Justice of the European is based, as that of collaborating in the administration of justice and being required to provide, in full independence and in the overriding interests of justice, such legal assistance as his client requires (see orders of 5 September 2013, *ClientEarth* v *Council*, C-573/11 P, not published, EU:C:2013:564, paragraph 11 and the case-law cited, and of 16 September 2015, *Calestep* v *ECHA*, T-89/13, EU:T:2015:711, paragraph 29 and the case-law cited). In that regard, in the context of disputes brought before the Courts of the European Union, that requirement is implemented objectively and is necessarily independent of the national legal orders (see orders of 19 November 2009, *EREF* v *Commission*, T-40/08, not published, EU:T:2009:455, paragraph 27 and the case-law cited, and of 18 May 2015, *Izsák and Dabis* v *Commission*, T-529/13, not published, EU:T:2015:325, paragraph 17 and the case-law cited).

33 According to the Court of Justice, the essence of that requirement of representation by a third party is, first, to prevent private parties from acting on their own behalf before the Courts without using an intermediary and, second, to ensure that legal persons are defended by a representative who is sufficiently distant from the legal person which he represents (orders of 5 September 2013, *ClientEarth* v *Council*, C-573/11 P, not published, EU:C:2013:564, paragraph 14, and of 4 December 2014, *ADR Center* v *Commission*, C-259/14 P, not published, EU:C:2014:2417, paragraph 25; see also order of 6 April 2017, *PITEE* v *Commission*, C-464/16 P, not published, EU:C:2017:291, paragraph 27 and the case-law cited).

34 When it affirmed the criterion that legal advice must be provided 'in full independence' in defining the personal scope of the protection of confidentiality of communications between lawyers and their clients (judgment of 18 May 1982, *AM & S Europe* v *Commission*, 155/79, EU:C:1982:157, paragraph 24), the Court of Justice identified such advice as that provided by a lawyer who is, structurally, hierarchically and functionally, a third party in relation to the undertaking receiving that advice (judgment of 17 September 2007, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 168), an identification which is also relevant in the context of representation before the Courts of the European Union (see, to that effect, order of 9 November 2011, *Glaxo Group* v *OHIM — Farmodiética (ADVANCE)*, T-243/11, not published, EU:T:2011:649, paragraph 16). Furthermore, it has been held that the lawyer of a party for the purposes of the third paragraph of Article 19 of the Statute of the Court of Justice of the European Union, or a non-privileged party, must not have any personal connection to the case in question or any relationship of dependence with his client of such a nature as to place him at risk of not being able to fulfil his vital role of representative of the law in the most appropriate manner (see, to that effect, orders of 30 October 2008, *Ortega Serrano* v *Commission*, F-48/08, EU:F:2008:131, not published, paragraph 35). In particular, the Court has held that the financial or structural relationships that the representative has with his client cannot be such as to give rise to confusion between the client's own interests and the personal interests of its representative (order of 6 September 2011, *ClientEarth* v *Council*, T-452/10, not published, EU:T:2011:420, paragraph 20).

35 The requirement imposed by EU law that a non-privileged party be represented before the Court by an independent third party cannot therefore be regarded as being a requirement designed solely to exclude representation by employees of the principal or by those who are financially dependent on it (see, to that effect, order of 5 September 2013, *ClientEarth* v *Council*, C-573/11 P, not published, EU:C:2013:564, paragraph 13). It is a more general requirement, the observance of which must be examined on a case-by-case basis.

36 In the present case, it is relevant to examine whether the connections that Mr Jovy has with the applicant and with the present case are compatible with the requirements applicable to the representation of non-privileged parties before the Courts of the European Union.

37 It is common ground that Mr Jovy acquired 10% of the shares in the applicant from NG and that he has, since then, been one of the two sole associates of the applicant. Furthermore, it is apparent from paragraph 10 of the application that, in the context of the transaction through which Mr Jovy and the other associate of the applicant acquired shares in the applicant, '[the value of] the loans [at issue] had … been estimated at 0 and were ceded to one of the new associates in the absence of any other allocation', with that associate declaring himself to be 'willing to transfer [them] to any person'.

38 The resulting personal connection which the applicant's lawyer thus had with the applicant and with the present case at the time when proceedings were brought were of such a nature that they placed him at risk of not being able to fulfil his vital role of assisting in the administration of justice in the most appropriate manner.

39 The applicant and its lawyer have provided no material, in response to the absolute bar to proceedings raised by the Commission or to the measure of organisation of procedure of the Court, which would have made it possible for the existence of such a risk to be discounted in the circumstances of the present case.

40 On the contrary, it is apparent from paragraphs 8 and 12 of the application that, in the present case, that risk did materialise, given that Mr Jovy conflated his position and his personal interests, as investor in and associate of the applicant, with his client's position and its own interests. For the purpose of challenging the reimbursement of State aid which it is claimed was unlawfully received by the applicant in the context of the loans at issue, Mr Jovy submits that 'the current associates of the applicant [had] absolutely nothing to do with those who were associates or shareholders at the time

when the loans [were] granted'. Furthermore, he maintains that, when NG sold its shareholding in the applicant's capital, there had been no reason to call into question the lawfulness of the granting of those loans or the compliance with State aid rules, in so far as 'in the purchase and sale agreement [concluded] by NG, that company had further assured [the purchasers] that "it had not received public subsidies"'. The objections thereby raised were purely personal to Mr Jovy and to the other associate of the applicant, in their capacity as purchasers of the shares held by NG in the applicant, and did not concern the applicant, the shares of which had been sold.

41 It must therefore be held that Mr Jovy had personal connections to the applicant and to the present case at the time when the action was brought, which implies that he was not sufficiently distant from the applicant, within the meaning of the case-law cited in paragraph 33 above, in order to represent the applicant in full independence.

42 It follows from the foregoing that, in so far as the application was signed by Mr Jovy, as the applicant's lawyer, the present action was not brought in accordance with the third and fourth paragraphs of Article 19 of the Statute of the Court of Justice of the European Union and with Article 51(1) of the Rules of Procedure.

43 Consequently, the action must be dismissed as being inadmissible.

Costs

44 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby orders:

1. The action is dismissed as being inadmissible.

2. BikeWorld GmbH shall pay the costs.

Luxembourg, 20 November 2017.

E. Coulon
Registrar

I. Pelikánová
President