JUDGMENT OF THE COURT

26 November 2002 *

In Case C-275/00,

REFERENCE to the Court under Article 234 EC by the Hof van Beroep te Gent (Belgium) for a preliminary ruling in the proceedings pending before that court between

European Community, represented by the Commission of the European Communities,

and

First NV,

Franex NV,

on the interpretation of the second paragraph of Article 228 EC,

* Language of the case: Dutch.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet and R. Schintgen (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, N. Colneric, S. von Bahr (Rapporteur) and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— the European Community, represented by the Commission of the European Communities, by T. van Rijn, C. van der Hauwaert and W. Neirinck, acting as Agents,

— First NV and Franex NV, by J. Mertens and J. De Paepe, advocaten,

— the Belgian Government, by A. Snoecx, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the European Community, represented by the Commission, itself represented by T. van Rijn, and of First NV and Franex NV, represented by B. Poelemans, advocaat, at the hearing on 13 November 2001,

after hearing the Opinion of the Advocate General at the sitting on 19 March 2002,

gives the following

Judgment

1 By order of 28 June 2000, received at the Court on 12 July 2000, the Hof van Beroep te Gent (Court of Appeal, Ghent) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of the second paragraph of Article 288 EC.

2 That question was raised in interlocutory proceedings between the European Community, represented by the Commission of the European Communities, and First NV (hereinafter 'First') and Franex NV (hereinafter 'Franex') in which it was sought to require the European Community to intervene in proceedings for an expert report already ordered as against the Belgian State.

Community law

3 Article 240 EC provides:

'Save where jurisdiction is conferred on the Court of Justice by this Treaty, disputes to which the Community is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member State.'

4 Article 235 EC provides:

'The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288.'

5 The second paragraph of Article 288 EC provides:

'In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'

6 Article 243 EC states:

'The Court of Justice may in any cases before it prescribe any necessary interim measures.'

7 Article 22 of the EC Statute of the Court of Justice provides:

'The Court may at any time entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion.'

8 The first paragraph of Article 36 of the EC Statute of the Court of Justice states:

'The President of the Court may, by way of summary procedure, which may, in so far as necessary, differ from some of the rules contained in this Statute and which shall be laid down in the rules of procedure, adjudicate upon applications to suspend execution, as provided for in Article 242 of this Treaty, or to prescribe interim measures in pursuance of Article 243 or to suspend enforcement in accordance with the last paragraph of Article 256.'

9 Under Article 45(1) and (2)(d) of the Rules of Procedure of the Court of Justice:

'1. The Court, after hearing the Advocate General, shall prescribe the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved....

...

2. Without prejudice to... Articles 21 and 22 of the EC Statute... the following measures of inquiry may be adopted:

...

(d) the commissioning of an expert's report.'

10 Under the second paragraph of Article 83(1) of the Rules of Procedure of the Court of Justice, any application relating to one of the interim measures referred to in Article 243 EC 'shall be admissible only if it is made by a party to a case before the Court and relates to that case'.

11 The Rules of Procedure of the Court of First Instance provide, in Article 49:

'At any stage of the proceedings the Court of First Instance may, after hearing the Advocate General, prescribe any measure of organisation of procedure or any measure of inquiry referred to in Articles 64 and 65 or order that a previous inquiry be repeated or expanded.'

12 Article 65(d) of the Rules of Procedure of the Court of First Instance is worded as follows:

'Without prejudice to Articles 21 and 22 of the EC Statute... the following measures of inquiry may be adopted:

...

(d) the commissioning of an expert's report.'

13 The first subparagraph of Article 66(1) of the Rules of Procedure of the Court of First Instance provides:

'The Court of First Instance, after hearing the Advocate General, shall prescribe the measures [of inquiry] that it considers appropriate by means of an order setting out the facts to be proved....'

14 According to the second paragraph of Article 104(1) of the Rules of Procedure of the Court of First Instance, an application relating to any interim measure referred to in Article 243 EC 'shall be admissible only if it is made by a party to a case before the Court of First Instance and relates to that case.'

National legislation

15 As regards the commissioning of an expert's report by a court, Article 962 of the Belgian Judicial Code provides:

'The court may, for the purpose of deciding a dispute brought before it or where there is an objective and present threat of a dispute, commission experts to make findings or to give a technical opinion.'

16 Under the first and second paragraphs of Article 972 of the Belgian Judicial Code:

'The parties shall provide the experts with the necessary documents.

They shall address all relevant requests to the experts.'

17 Article 986 of the Belgian Judicial Code provides that '[c]ourts shall not be compelled to follow an expert's opinion if they are not convinced by it'.

18 As regards expert's reports commissioned in interlocutory proceedings, Article 584 of the Belgian Judicial Code provides:

'The President of the Court of First Instance shall give his decision by interlocutory order in cases where he finds that there is urgency, in relation to all matters save those in respect of which, by virtue of statute, the courts have no jurisdiction.

...

The matter shall be brought before the President by interlocutory application or, where absolutely necessary, by originating application.

The President may in particular:

...

(2) order findings to be made or commission an expert's report for any purpose, even including assessment of damage and inquiry into its causes;

...'

19 As regards intervention, the Belgian Judicial Code provides, in the second paragraph of Article 15, that '[i]ts purpose is either to protect the interests of the intervener or of one of the original parties to the proceedings or to obtain judgment against a party or an order that it be indemnified by another party'. The second paragraph of Article 16 of the Code provides that the intervention is to be compulsory 'where a third party is summoned in the course of proceedings by one or more parties'.

The main proceedings and the question referred for a preliminary ruling

20 First is a Belgian company which produces choice charcuterie. Franex, also a Belgian company, exports meat products and similar products produced in Belgium. It handles, *inter alia*, the sale of First's products abroad. The two companies claim that they have sustained and continue to sustain damage as the result of the 'dioxin crisis' in Belgium.

21 By application of 17 June 1999, First and Franex requested the President of the Rechtbank van eerste aanleg te Dendermonde (Court of First Instance, Dendermonde (Belgium)) to appoint an expert, at the expense of the Belgian State, to make findings and give an opinion concerning the alleged damage. By interlocutory order of 14 July 1999, the President of the Rechtbank van eerste aanleg te Dendermonde appointed an expert.

22 By interlocutory application of 17 September 1999, First and Franex asked the President of the Rechtbank van eerste aanleg te Dendermonde to require the Commission to intervene in the proceedings before the expert appointed by that court on 14 July 1999, 'so that both the proceedings and the expert's final report can be considered together and used against it'.

23 It is apparent from the order for reference that, in support of that interlocutory application, First and Franex submitted, *inter alia*, that there were reasonable grounds for believing that the damage which they had sustained resulted from, amongst other things, the way in which the Commission's departments had dealt with the dioxin crisis at European level and that it could not be excluded that there had been fault or negligence on the part of both the Belgian authorities and the European Community. Those companies also maintained that, with a view to subsequent proceedings on a substantive claim, it was desirable that the European Community should intervene in the proceedings before the expert in order to take part in the technical and scientific discussions and to enable the expert to give his opinion, in full knowledge of the facts, as to any infringements of which the Belgian State or the European authorities, or both, might have been guilty. They also considered it desirable that the extent of the damage be determined in proceedings *inter partes*. There being as yet no proceedings before the Court of Justice, the national court hearing the interlocutory application had jurisdiction.

24 In response, the European Community, represented by the Commission, contended that a national court has no jurisdiction to hear and determine an application to establish its liability or joint liability.

25 By order of 5 January 2000, the President of the Rechtbank van eerste aanleg te Dendermonde required the European Community to intervene in the proceedings before the expert. He also broadened the expert's task by instructing him to 'examine the responses of and the action taken by the defending intervener and its departments or officials from the time that they became aware of the dioxin contamination, as well as the appropriateness of the measures which it took and their contribution to the adverse consequences for and the damage sustained by the applicants at first instance'. He also declared that the proceedings and the final expert's report can be considered together and used against it.

26 The European Community appealed against that order to the Hof van Beroep te Gent.

27 That court finds that the proceedings in respect of a substantive claim which First and Franex reserve the right to bring against the European Community concern a dispute relating to non-contractual liability. It is common ground in the case before it that, by virtue of Articles 235 EC and the second paragraph of 288 EC, a substantive dispute relating to such liability cannot be brought before a national court and that, by virtue of Article 243 EC and the relevant provisions of their Rules of Procedure, the Community Courts may appoint an expert only if proceedings in respect of a substantive claim have been brought before them. It is not disputed that it is still open to First and Franex to bring such proceedings.

28 The referring court also states that the case before it raises the question whether a national court may appoint an expert and instruct him to examine the non-contractual liability of the European Community or, in other words, whether, from the point of view of judicial jurisdiction, an application for the appointment of an expert must be treated in the same way as a substantive claim relating to such liability.

29 In those circumstances, the Hof van Beroep te Gent decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'On a proper construction of the second paragraph of Article 288 EC (formerly the second paragraph of Article 215 of the EC Treaty), where (i) an application is made with a view to requiring the Commission of the European Communities to

intervene in proceedings before an expert already ordered as against the Belgian State and to obtaining a declaration that those proceedings and the expert's final report can be considered together and used against the Commission of the European Communities, (ii) where the expert's tasks in that connection include examination of the responses of and action taken by the Commission of the European Communities and its departments and officials from the time it became aware of the dioxin contamination, and of the appropriateness of the measures taken by it and their contribution to the adverse consequences for and the damage sustained by the respondents, and (iii) where the application in question has been made with a view to subsequent proceedings in respect of a substantive claim relating to the liability of the Belgian State and the European Community respectively in the dioxin crisis, does that application fall within the exclusive jurisdiction of the Court of Justice of the European Communities or the Court of First Instance of the European Communities in respect of non-contractual liability?'

The question referred for a preliminary ruling

30 By the question referred for a preliminary ruling, the national court is seeking, essentially, to ascertain whether Article 235 EC, in conjunction with Article 240 EC and the second paragraph of Article 288 EC, preclude a national court from ordering, with respect to one of the institutions of the European Community, proceedings for an expert report whose purpose is to determine the role of that institution in events alleged to have caused damage, with a view to subsequent proceedings against the European Community to establish its non-contractual liability.

Observations submitted to the Court

31 The Commission, which represents the European Community in the national proceedings, submits that the exclusive jurisdiction of the Community Courts

under Articles 235 EC, in conjunction with 288 EC, extends not merely to assessment of the substance of the case, but also to measures of inquiry, such as the commissioning of an expert's report, designed to establish the relevant facts.

32 According to those provisions, the Community Courts have jurisdiction in disputes relating to compensation for damage caused by the European Community or by its servants in the performance of their duties. The terms used have a wide scope, referring both to finding and assessing the relevant facts and to the interpretation and application of the legislation relevant to the facts so established. A measure of inquiry designed to establish the relevant facts with a view to reparation of damage pursuant to Article 235 EC in conjunction with Article 288 EC is therefore an integral part of the proceedings for such reparation, which fall within the exclusive jurisdiction of the Community Courts (see Case 101/78 *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623, paragraphs 13 and 14, and Case C-55/90 *Cato* v *Commission* [1992] ECR I-2533, paragraph 17).

33 Similarly, the strict separation of jurisdiction which the Court of Justice has established, in relation to non-contractual liability, between the Community Courts and the national courts, according to whether damage was caused by the European Community or by a Member State (see *Granaria*, cited above, paragraph 14, and Joined Cases 106/87 to 120/87 *Asteris and Others* v *Greece* [1988] ECR 5515, paragraphs 17 to 19) must also hold good with regard to measures of inquiry serving to ascertain the facts.

34 Moreover, the case-law of the Court of Justice according to which the Commission, by virtue of Article 10 EC, is under a duty of loyal cooperation

with the Member States (see order in Case C-2/88 IMM. *Zwartveld and Others* [1990] ECR I-3365) is not applicable in the case in the main proceedings. Nevertheless, even though the principles established in that case-law do not require it to do so, the Commission should in principle warmly welcome any invitation by a national court to cooperate, on a voluntary basis, in proceedings before an expert commissioned by that court, provided that there is no question of its incurring liability and that its cooperation is in other respects compatible with Community law. That cooperation could, for example, consist in providing information to which the national court would have access only with difficulty, if at all.

35 According to First and Franex, in Belgian law the purpose of an expert's report commissioned in interlocutory proceedings is indeed to provide one or the other of the parties with the evidence it needs for any subsequent action on a substantive claim and to acquaint the court adjudicating on the merits of that action with the facts and the technical — that is to say, non-legal — aspects of the case, and even to reconcile the parties. However, such a report serves above all to enable the victim of damage and his advisers to assess, on the basis of the expert's report, whether proceedings in respect of a substantive claim have a reasonable chance of success, to form an idea of the extent of the damage established and to identify the party potentially liable against whom an action can and should be brought.

36 First and Franex contend that, in the present case, it is highly desirable to involve the Commission in the proceedings before the expert commissioned by the national court, because that institution unquestionably has information which is important for determining the acts and omissions of the Belgian authorities but to which those companies cannot have access. The Commission is best placed to respond appropriately, with full knowledge of the facts, in the proceedings before the expert, to the statements made by the Belgian State and the evidence it provides. The expert's inquiry will therefore remain incomplete without the participation and cooperation of the Commission.

37 While accepting that Article 235 EC, read in conjunction with Article 288 EC, implies that only the Community Courts have jurisdiction to hear and determine disputes relating to compensation for damage caused by the European Community in the context of its non-contractual liability, First and Franex contend that Article 235 EC constitutes an exception to the general rule laid down in Article 240 EC and must therefore be construed narrowly.

38 The proceedings initiated by First and Franex before the national judge responsible for hearing interlocutory applications merely seek an order requiring the European Community to intervene in the proceedings before the expert appointed by the court with a view to finding facts, establishing and quantifying material and commercial damage and identifying its causes. Given the nature of the judge's interlocutory jurisdiction and of the task entrusted to the expert, those proceedings cannot, in any event, be directed either to obtaining an examination of the acts of the Commission in the light of national law or Community law or to obtaining a finding, in law, of the existence of fault.

39 In addition, Article 243 EC does not state that the Court of Justice has sole jurisdiction to prescribe interim measures or measures of inquiry in interlocutory proceedings. First and Franex therefore conclude that, as long as an action for damages has not been brought before the Court of Justice, the national judge responsible for hearing interlocutory applications retains jurisdiction to prescribe interim measures and, *a fortiori*, measures of inquiry.

40 The Belgian Government states that, in the field of non-contractual liability, actions brought against a Member State and those brought against the European

Community are entirely distinct procedures, which can and must be treated separately (see Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245 and Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969). That separation between procedures results from the exclusive jurisdiction granted to the Community Courts in respect of the non-contractual liability of the European Community.

41 It follows that the examination carried out by a national court can relate only to acts of the national authorities. The appointment by such a court of an expert empowered to make findings with respect to the acts of the European Community would therefore not be compatible with the case-law of the Court of Justice. The exclusive jurisdiction of the Community Courts also implies that those courts must be completely free in adjudicating on the facts of the case. If examination of the issue of the European Community's liability calls for an expert's report, it is for the Court of First Instance to commission it (see Joined Cases 29/63, 31/63, 36/63, 39/63 to 47/63, 50/63 and 51/63 *Société Anonyme des Laminoirs, Hauts Fourneaux, Forges, Fonderies et Usines de la Providence and Others* v *High Authority* [1965] ECR 911).

42 By contrast, it is possible that, in the context of an action for damages brought before it against the authorities of a Member State, a national court would need to obtain information as to both the context and the facts of the case, and in particular on the acts of the Commission. The Belgian Government considers that, if the expert appointed by a national court finds it necessary for the Commission to provide him with certain information, he may request it from the Commission. The principle of loyal cooperation between the European Community and the Member States, laid down in Article 10 EC, requires the Commission to cooperate in such a case. In carrying out his task, the expert must be regarded as an officer of the court, entitled to invoke the rights conferred on the Member States under Article 10 EC.

Findings of the Court

43 It is settled case-law that, while national courts retain jurisdiction to hear and determine claims for compensation for damage caused to private persons by national authorities in the application of Community law, Article 235 EC gives the Community Courts exclusive jurisdiction to hear and determine actions for reparation of damage brought under the second paragraph of Article 288 EC against the European Community (see *Granaria*, cited above, paragraph 14, *Asteris and Others*, paragraph 15, and *Cato* v *Commission*, paragraph 17).

44 It should also be recalled that, in accordance with Article 22 of the EC Statute of the Court of Justice, Article 45(1) and (2) of the Rules of Procedure of the Court of Justice and Articles 49 and 65 of the Rules of Procedure of the Court of First Instance, the Community Courts may order measures of inquiry, including the commissioning of expert's reports.

45 In addition, it follows from Article 243 EC, Article 36 of the EC Statute of the Court of Justice, Article 83 of the Rules of Procedure of the Court of Justice and Article 104 of the Rules of Procedure of the Court of First Instance that the President of each of the two Community Courts may, at the request of one or more parties to a dispute, order the necessary interim measures pending a decision on the substance of the case. By virtue of that jurisdiction, he may, *inter alia*, appoint an expert to carry out any verifications which have been requested (see, as regards the EAEC Treaty, order in Case 318/81 R *Commission* v *CO.DE.MI.* [1982] ECR 1325, paragraphs 1 to 3).

46 As the Commission has rightly observed, interim measures or measures of inquiry designed to determine the role of an institution of the European Community in events which allegedly gave rise to damage, with a view to reparation of that damage in accordance with Article 235 EC and the second paragraph of Article 288 EC, are an integral part of the procedure in the action for reparation of the alleged damage. Since the Community Courts have exclusive jurisdiction to hear and determine actions for reparation of damage brought against the European Community under the second paragraph of Article 288 EC, they must therefore also have exclusive jurisdiction to prescribe, with regard to one of the institutions of the European Community, any interim measure or measure of inquiry, such as commissioning an expert report whose purpose is to establish the role of that institution in the events which allegedly caused damage, for the purposes of an action which may be brought against the European Community to establish its non-contractual liability.

47 Any other solution would undermine the uniform application of the system of non-contractual liability of the European Community. Both the possibility of submitting requests for interim measures and measures of inquiry to the national courts — in particular, the possibility of doing so without being required to bring proceedings in respect of a substantive claim — and the rules governing expert reports vary from one Member State to another.

48 In the result, it must be held that a national court has no jurisdiction to order, with respect to one of the institutions of the European Community, proceedings for an expert report whose purpose is to determine the role of that institution in events alleged to have caused damage, for the purposes of subsequent proceedings against the European Community to establish its non-contractual liability.

49 However, it should be remembered that relations between the Member States and the Community institutions are governed, under Article 10 EC, by a principle of loyal cooperation. That principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of

Community law, but also imposes on the Community institutions and the Member States mutual duties of loyal cooperation (see order in *Zwartveld and Others*, cited above, paragraph 17). Therefore, if a national court needs information that only the Commission can provide, the principle of loyal cooperation laid down in Article 10 EC will, in principle, require the Commission when requested to do so by the national court to provide that information as soon as possible, unless refusal to provide such information is justified by overriding reasons relating to the need to avoid any interference with the functioning and independence of the Community or to safeguard its interests (see, to that effect, order in *Zwartveld and Others*, cited above, paragraphs 24 and 25; Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 53; and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 50).

50 Accordingly, the answer to the question referred to the Court for a preliminary ruling must be that Article 235 EC, in conjunction with Article 240 EC and the second paragraph of Article 288 EC, preclude a national court from ordering, with respect to one of the institutions of the Community, proceedings for an expert report whose purpose is to determine the role of that institution in events alleged to have caused damage, for the purposes of subsequent proceedings against the European Community to establish its non-contractual liability.

Costs

51 The costs incurred by the Belgian Government, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Hof van Beroep te Gent by order of 28 June 2000, hereby rules:

Article 235 EC, in conjunction with Article 240 EC and the second paragraph of Article 288 EC, preclude a national court from ordering, with respect to one of the institutions of the Community, proceedings for an expert report whose purpose is to determine the role of that institution in events alleged to have caused damage, for the purposes of subsequent proceedings against the European Community to establish its non-contractual liability.

Rodríguez Iglesias Puissochet Wathelet

Schintgen Gulmann

Edward La Pergola Jann

Colneric von Bahr

Cunha Rodrigues

Delivered in open court in Luxembourg on 26 November 2002.

R. Grass G.C. Rodríguez Iglesias

Registrar President