OPINION OF ADVOCATE GENERAL LÉGER

delivered on 19 March 2002 [1]

1. This request for a preliminary ruling relates to the interpretation of the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) concerning the non-contractual liability of the European Community where damage is caused by its institutions or by its servants in the performance of their duties.

2. More specifically, the Hof van Beroep te Gent (Court of Appeal, Ghent, Belgium) asks whether the abovementioned provision allows it to adopt a decision requiring the Commission of the European Communities to intervene in an expert report procedure ordered by a national court in order to establish the respective liability of the Belgian State and of the Commission for damage caused by their acts or omissions in connection with the dioxin crisis, with a view to the subsequent bringing of an action for damages against the Commission and the Belgian State.

The companies First NV [2] and Franex NV [3] applied for the expert report in issue, which in its final form will be common to the parties and may subsequently be used against the Commission, in order to enable an expert to appraise the responses of and the action taken by the latter (and its departments or officials) from the time it became aware of dioxin contamination as well as of the appropriateness of the measures which it took and their contribution to the adverse consequences for and the damage sustained by the companies.

I — Legal framework

A — *Community law*

The Treaty

3. According to Article 178 of the EC Treaty (now Article 235 EC):

1 — Original language: French.
2 — Hereinafter 'First'.
3 — Hereinafter 'Franex'.

'The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 215.'

4. According to Article 183 of the EC Treaty (now Article 240 EC):

'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 States.'

5. In relation to non-contractual liability, the second paragraph of Article 215 of the Treaty provides that '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'.

The Rules of Procedure of the Court of Justice

6. Under Article 45 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. Before the Court decides on the measures of inquiry referred to in paragraph 2... (d)..., the parties shall be heard.

The order shall be served on the parties.

2 ... the following measures of inquiry may be adopted:

...

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

...'

7. Article 49 of the Rules of Procedure of the Court of Justice provides:

'1 The Court may order that an expert's report be obtained. The order appointing the expert shall define his task and set a time-limit within which he is to make his report.

2 The expert shall receive a copy of the order, together with all the documents necessary for carrying out his task. He shall be under the supervision of the Judge-Rapporteur, who may be present during his investigation and who shall be kept informed of his progress in carrying out his task.

...'

The Rules of Procedure of the Court of First Instance

8. Article 49 of the Rules of Procedure of the Court of First Instance provides:

'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 Article... 65 or order that a previous inquiry be repeated or expanded.'

9. Under Article 65(d) of those Rules of Procedure, the measures of inquiry include 'the commissioning of an expert's report'.

10. It is apparent from Article 70 of the Rules of Procedure of the Court of First Instance that:

'1 The Court of First Instance may order that an expert's report be obtained. The order appointing the expert shall define his task and set a time-limit within which he is to make his report.

2 The expert shall receive a copy of the order, together with all the documents necessary for carrying out his task. He shall be under the supervision of the Judge-Rapporteur, who may be present during his investigation and who shall be kept informed of his progress in carrying out his task.

...'

B — *Belgian law*

11. Under the Belgian Judicial Code, a court may, for the purpose of deciding a dispute brought before it, commission experts to make findings or to give a technical opinion. [4]

12. Section 6 of the Belgian Judicial Code sets out the conditions for carrying out the expert report.

13. Article 963 of that code states:

'The decision ordering the expert report shall indicate precisely the purpose thereof and set a time-limit for submission of the report.'

14. Under Article 973 of the Belgian Judicial Code:

'Experts shall carry out their tasks under the supervision of the judge.

The latter may, at any time, of his own motion or pursuant to an application, be present in the proceedings before the expert....

The parties shall be invited to attend all proceedings before the expert unless they have dispensed with the requirement that the latter inform them of those proceedings.'

15. Article 978 of the Belgian Judicial Code states:

'On completion of the proceedings, the experts shall inform the parties of their findings and shall record the latter's observations.'

16. As regards expert reports ordered 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.

...

4 — *Les codes Larcier*, Tome 1 — 'Droit civil et judiciaire', Larcier, 2001 (1 January 2001), p. 294 et seq.

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 report for any purpose, even including assessment of damage and inquiry into its causes.'

17. The first paragraph of Article 15 of the Belgian Judicial Code defines intervention as 'a procedure by which a third party becomes a party to the action'.

According to the second paragraph of Article 15 of that code, the purpose of an intervention 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'.

18. Article 16 of the Belgian Judicial Code provides for two types of intervention:

'Intervention is voluntary where the third party comes forward to defend its interests.

It is compulsory where a third party is summoned in the course of proceedings by one or more parties.'

II — The facts and procedure in the main action

19. First is a Belgian company which produces high-class charcuterie. Franex, also a Belgian company, exports meat-based products. It undertakes the sale of First's products abroad. Both companies maintain that they sustained damage as a result of what is generally termed 'the dioxin crisis'. [5]

20. By application of 17 June 1999, First and Franex requested the President of the Rechtbank van eerste aanleg te Dendermonde (Court of First Instance, Dender-

5 — See the French version of the order for reference, p. 2.

monde, Belgium) to appoint an expert, at the expense of the Belgian State, to make findings and give an opinion on the damage which they consider they have suffered, and continue to suffer, as a result of the dioxin crisis.

21. By interlocutory order of 14 July 1999, the President appointed an expert.

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

23. In support of that interlocutory application, First and Franex submitted 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. According to First and Franex, it was quite possible that there was fault and negligence on the part of both the Belgian authorities and the Commission. They put forward three lines of argument.

24. First of all, First and Franex considered that it was desirable, with a view to the proceedings on the substantive claim, for the European Community to 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 indeed both, might have been guilty.

25. Next, they also asked that the extent of the damage be determined in proceedings *inter partes*.

26. Lastly, they submitted that the national court hearing the interlocutory application had jurisdiction because there were as yet no proceedings before the Court of Justice.

27. By order of 5 January 2000, the President of the Rechtbank van eerste aanleg required the Commission to intervene in the proceedings before the expert. He extended the ambit of that investigation by instructing the expert to examine the responses of and the action taken by the

party ordered to intervene (the Commission) and of 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 First and Franex. He also declared that the proceedings and final expert report were to be common to the parties and could be used in argument against the Commission.

28. The Commission appealed against that order to the Hof van Beroep.

29. It is apparent from the order for reference made by that court that the proceedings in respect of a substantive claim which First and Franex reserve the right to bring against the Commission concern a dispute relating to non-contractual liability. It is common ground that, under Article 178 and the second paragraph of Article 215 of the Treaty, this dispute cannot be brought before a national court and that, under Article 186 of the EC Treaty (now Article 243 EC) and Community provisions of their Rules of Procedure, the Community Courts may appoint an expert 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.

30. The Hof van Beroep states that the question which arises is whether the national court may appoint an expert and instruct him to examine the non-contractual liability of the Commission or, in other words, whether, from the point of view of jurisdiction, an application for the appointment of an expert can (or must) be treated in the same way as a substantive claim relating to such liability. [6]

III — The question referred for a preliminary ruling

31. Since it considered that the dispute raises a problem of interpretation of Community law, the Hof van Beroep 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

6 — See the French version of the order for reference, p. 7.

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?'

IV — Legal analysis

32. By that question, the national court is asking, in essence, whether Community law, in particular Article 178 and the second paragraph of Article 215 of the Treaty, precludes the compulsory intervention of the Commission in proceedings before an expert ordered by a national court and aimed at examining the liability of both the Belgian State and the Commission in a report common to the parties which may subsequently be used against the Commission.

33. In their observations, First and Franex allege that the Commission and the Belgian State failed to take the decisions necessary to combat contamination by dioxin. They seek a common expert report in order to determine the respective liability of each and to enable them, once the expert report has been produced, to institute proceedings on a substantive claim against the Community.

34. In that regard, they specify that the proceedings before the national court hearing the interlocutory application are not aimed at obtaining a remedy for damage in respect of which the Community has incurred non-contractual liability. It is a matter solely of requiring the Commission to intervene in proceedings before an expert, the purpose of which is to make certain findings of fact, to establish and quantify material and commercial damage and to identify the causes of that damage.

First and Franex submit further that the proceedings in question do not undermine the independence of the Court of First Instance, since the latter is not bound to follow the opinion of the expert.

35. The Commission contends, conversely, that the national court does not have jurisdiction to force it to intervene in the

expert report proceedings ordered in the context of the dispute between First and Franex and the Belgian State. In its view, one should treat the national investigative measure at issue as a measure of inquiry which only the Court of First Instance or this Court may adopt. Compulsory intervention by the Commission in the national expert report proceedings would therefore undermine the exclusive jurisdiction of the Community Courts in matters concerning its non-contractual liability.

36. The arguments of the Belgian Government are in line with the Commission's observations.

37. According to the Belgian Government, the national court cannot, where damage is attributable to the combined fault or conduct of the Community authorities and the national authorities, force the Commission to intervene in expert report proceedings without calling into question the division of jurisdiction between the Community Courts and the national court.

38. In order to reply to the question raised by the national court, the principles enshrined in the Treaty relating to non-contractual liability should be borne in mind.

39. It is clear from Article 178 and the second paragraph of Article 215 of the Treaty that the Court of Justice has jurisdiction in disputes relating to compensation for damage caused by the Community institutions or by their servants.

40. The Court has held that '[t]he second paragraph of Article 215 of the Treaty provides that, in the case of non-contractual liability, the Community is, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants in the performance of their duties'. [7]

41. The Court has also held that 'the action for damages provided for by Article 178 and the second paragraph of Article 215 was established by the Treaty as an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use, conceived with a view to its specific purpose'. [8]

42. In order for the Community to incur non-contractual liability, a number of con-

7 — Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 39.

8 — Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 6; Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969, paragraph 11; Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 26; and Case 20/88 *Roquette frères* v *Commission* [1989] ECR 1553, paragraph 15.

ditions must be met as regards the unlawfulness of the conduct alleged against the institutions, the existence of the damage claimed and a causal link between the conduct and the alleged damage. [9]

43. Such a finding of liability, however, can prove complex where it is possible to attribute the damage both to the Community and to another legal person, in particular, to a Member State. Where that situation arises, this Court has held that, on the one hand, '[i]t is necessary to avoid the applicants' being insufficiently or excessively compensated for the same damage by the different assessment of two different courts applying different rules of law' [10] and, on the other, '[b]efore determining the damage for which the Community should be held liable, it is necessary for the national court to have the opportunity to give judgment on any liability on the part of the [Member State concerned]'. [11]

44. According to the case-law of the Court, '[t]he Court of Justice has exclusive jurisdiction only where the action seeks compensation for alleged damage attributable to the Community, which is bound, under the second paragraph of Article 215 of the EEC Treaty, to make good, in accordance with the general principles common to the laws of the Member States, any damage caused by its institutions or by its servants in the performance of their duties. Pursuant to Article 178, it is the Court of Justice, to the exclusion of any national court, which has jurisdiction to determine such liability'. [12]

45. The Court has therefore clearly laid down the principle that 'the Court has exclusive jurisdiction pursuant to Article 178 of the EEC Treaty to hear actions for compensation brought against the Community under the second paragraph of Article 215 of the EEC Treaty. However, national courts retain jurisdiction to hear claims for compensation for damage caused to individuals by national authorities in implementing Community law'. [13]

46. It is apparent from the case-law referred to above that only the Community

9 — Case 59/83 *Biovilac* v *European Economic Community* [1984] ECR 4057, paragraph 10; Case 281/84 *Zuckerfabrik Bedburg and Others* v *Council and Commission* [1987] ECR 49, paragraph 17; Case 50/86 *Les Grands Moulins de Paris* v *European Economic Community* [1987] ECR 4833, paragraph 7; Case C-282/90 *Vreugdenhil* v *Commission* [1992] ECR I-1937, paragraph 16; Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 42; Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraph 11; and Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraph 17.

10 — Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245, 266, third unnumbered paragraph.

11 — Ibid.

12 — Joined Cases 106/87 to 120/87 *Asteris and Others* v *Greece and European Economic Community* [1988] ECR 5515, paragraph 14. See also Case 101/78 *Granaria* [1979] ECR 623, paragraphs 13 and 14, and Case C-55/90 *Cato* v *Commission* [1992] ECR I-2533, paragraph 17.

13 — *Asteris and Others* v *Greece and European Economic Community*, paragraph 15.

Courts have jurisdiction to hear proceedings in respect of non-contractual liability brought against the Commission, even where the damage is also attributable to a Member State.

47. In connection with the exercise of that jurisdiction, the Community Court may need to call upon the opinion of an expert.

48. It should be borne in mind that the Court of First Instance or the Court of Justice may order preliminary measures of inquiry such as, for example, the appointment of an expert. [14] Where this occurs, the expert is placed under the supervision of the Judge-Rapporteur, who may be present during the expert's investigation and who is to be kept informed of his progress in carrying out his task. [15]

49. In that connection, Article 22 of the EC Statute of the Court of Justice sets out the principle that:

'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.'

50. That provision, in conjunction with the specific legal arrangements established by the Rules of Procedure of this Court and of the Court of First Instance, [16] does indeed signal the existence of a procedure for instructing experts specific to the Community Courts.

51. According to the case-law of the Court of Justice cited above, determination of the non-contractual liability of the Community is an independent form of action. [17] Where an expert opinion is required in order to ascertain whether there is such liability, the expert investigation will be subject to the conditions laid down by Community law. That investigation is not an independent form of action in relation to the substantive claim. Under Community law, the giving of an expert opinion is a procedure ancillary to the substantive claims brought before the Community Courts. Accordingly, wherever the non-contractual liability of the Community is at issue, only the Court of First Instance or the Court of Justice has jurisdiction to appoint an expert.

52. In the instant case, the national court cannot give judgment on the non-contractual liability of the Commission, even if the

14 — See Article 45(1), first subparagraph and (2), of the Rules of Procedure of the Court of Justice and Articles 49 and 65(d) of the Rules of Procedure of the Court of First Instance.

15 — See the first subparagraph of Article 49(2) of the Rules of Procedure of the Court of Justice and the first subparagraph of Article 70(2) of the Rules of Procedure of the Court of First Instance.

16 — See points 6 to 10 of this Opinion.

17 — In that regard, Article 43 of the EC Statute of the Court of Justice states that '[p]roceedings against the Community in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto'.

latter did contribute to the damage sustained by First and Franex. The national court's jurisdiction is confined to examining whether the Belgian State is liable. Should the Commission be constrained to intervene in the expert report proceedings, it could not be a party to the action on the merits before the national court since, by virtue of the case-law of this Court cited above, the Court of First Instance has exclusive jurisdiction to determine the non-contractual liability of the Commission.

53. If the solution advocated by First and Franex were accepted, that would have the result of requiring the Commission to intervene in the national interlocutory proceedings but would prevent it from defending itself before the national court trying the merits of the case when that court came to adjudge the liability of the Belgian State.

54. By the same token, to agree to requiring the Commission's intervention in the Belgian expert report proceedings would, in my view, have the effect of undermining the independence of the system governing the non-contractual liability of the Community. The giving of an expert opinion is governed by different legal rules depending on the national provisions in force. As pointed out at the hearing, if this Court took the view that the Commission should intervene in a national expert report proceeding intended subsequently to determine its non-contractual liability, that would mean that the scope and features of such liability, in particular as regards the rules of evidence, could vary according to the law of the Member State involved.

55. I am of the view, therefore, that Community law does not authorise a national court to require the Commission to intervene in national expert report proceedings commissioned in the context of an action already brought which raises, *inter alia*, the question whether the Community has incurred non-contractual liability.

56. However, I should draw attention to the fact that, under Article 5 of the EC Treaty (now Article 10 EC), the Commission has a duty of loyal cooperation with the judicial authorities of the Member States responsible for ensuring that Community law is applied and observed in their national legal system. In the words of the case-law of this Court:

'In its judgment in Case 294/83 *Les Verts* v *European Parliament* [1986] ECR 1357,

the Court established the principle that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty (paragraph 23)....

In that community subject to the rule of law, relations between the Member States and the Community institutions are governed, according to Article 5 of the EEC Treaty, by a principle of sincere cooperation. That principle... imposes on Member States and the Community institutions mutual duties of sincere cooperation... .

This duty of sincere cooperation imposed on Community institutions is of particular importance *vis-à-vis* the judicial authorities of the Member States who are responsible for ensuring that Community law is applied and respected in the national legal system'. [18]

57. Thus, according to the case-law of this Court, the Commission must cooperate with the national judicial authorities by providing them with the information necessary [19] to ensure that Community law is correctly applied and observed in the context of national court proceedings.

58. In the present case, I am of the view that the Commission is bound to comply with that duty of loyal cooperation with the national court. In its observations, moreover, the Commission states that 'it warmly welcomes in principle any step... inviting it to cooperate... in expert report proceedings' [20] ordered by the national court. It adds that '[t]hat cooperation could take the form, for example, of the transmission of information to which the national court would have access only with difficulty or not at all'. [21]

18 — Order in Case C-2/88 Imm. *Zwartveld and Others* [1990] ECR I-3365, paragraphs 16 to 18.

19 — For example, in its judgment in Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 53, this Court stated that the national court may contact the Commission to obtain the economic and legal information which that institution can supply to it.

20 — See paragraph 39 of its observations.

21 — Ibid.

V — Conclusion

59. In the light of the foregoing considerations, I propose that the Court should answer the question raised by the Hof van Beroep te Gent as follows:

Article 178 and the second paragraph of Article 215 of the EC Treaty (now Article 235 EC and the second paragraph of Article 288 EC) preclude the compulsory intervention by the Commission in proceedings before an expert already ordered by the national court in the context of an action brought against the Belgian State seeking subsequently to determine the non-contractual liability of both the Member State in question, before the national court, and of the Community before the Community Courts.