Judgment of the Court of First Instance, Ismeri Europa v Court of Auditors, Case T-277/97 (15 June 1999)

Caption: First judgment directly concerning the auditing powers of the Court of Auditors. According to the Court of First Instance, the Court of Auditors must report any irregularities which it discovers in the course of its control duties, regardless of whether or not fraud is involved. It is not the responsibility of the Court to establish whether or not an irregularity constitutes fraud. The Court of Auditors nevertheless plays an important role in the fight against fraud. It contributes to its prevention and detection, since its reports may be of help in subsequent investigations. The role of the Court of Auditors in the prevention of fraud was confirmed by the Treaty of Amsterdam (Article 248(2) and Article 280(4) of the EC Treaty).

Source: Reports of Cases before the Court of Justice and the Court of First Instance. 1999. [s.l.].

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http://www.cvce.eu/obj/judgment_of_the_court_of_first_instance_ismeri_europa_v_court_of_auditors_case_t_277_97_15_june_1999-en-5ca23594-4d2c-4315-9705-15073604c6ff.html
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Case T-277/97
Ismeri Europa Srl v Court of Auditors of the European Communities

(Non-contractual liability - MED programmes - Report of the Court of Auditors - Criticisms concerning the applicant)

Summary of the Judgment

1. Procedure - Application initiating proceedings - Procedural requirements - Subject-matter of the dispute to be indicated - Pleas in law relied upon to be briefly stated - Application claiming compensation for damage caused by a Community institution - Where the application does not quantify the damage but indicates the evidence on the basis of which it can be assessed - Whether admissible - Condition - Non-material damage
(EC Statute of the Court of Justice, Art. 19, first para.; Rules of Procedure of the Court of First Instance, Art. 44(1)(c))

2. Non-contractual liability - Conditions - Illegality - Damage - Causal link - Burden of proof
(EC Treaty, Art. 215, second para. (now Art. 288, second para., EC))

3. Non-contractual liability - Conditions - Special report of the Court of Auditors - Whether defamatory - Not defamatory - Liability not incurred
(EC Treaty, Art. 188C(2), first and fourth subparas (now, after amendment, Art. 248(2), first and fourth subparas, EC))

1. Under the first paragraph of Article 19 of the EC Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, all applications are to indicate the subject-matter of the dispute and briefly state the pleas in law relied upon. This must be done with clarity and precision so that the defendant is able to prepare its defence and the Court can rule on the application, if necessary, without any further information. In order to guarantee legal certainty and sound administration of justice, it is necessary, for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. To satisfy those requirements, an application seeking compensation for damage allegedly caused by a Community institution must state the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons for which the applicant considers that there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage.

Although a claim for an unspecified form of damages is not sufficiently concrete and must therefore be regarded as inadmissible, that is not the position where the application clearly indicates the evidence on the basis of which the nature and extent of the alleged damage can be assessed. Despite the fact that the loss has not been quantified, the defendant institution is thus able to defend itself and the Court is in a position to give judgment in the action. In those circumstances, the lack of figures in the application does not affect the rights of the defence, especially if the figures are produced in the reply, so that the defendant can discuss them both in the rejoinder and at the hearing.

A claim for compensation for non-material damage, whether as symbolic reparation or as genuine compensation, must specify the nature of the damage alleged, in relation to the wrongful conduct imputed to the institution in question, and must quantify the entirety of the damage, albeit approximatively.

2. For the Community to incur liability under the second paragraph of Article 215 of the Treaty (now Article 288, second paragraph, EC), the applicant must prove not only the illegality of the conduct alleged against the institution concerned and the fact of the damage, but also the existence of a causal link between that conduct and the damage complained of. Moreover, the damage must be a sufficiently direct consequence of the conduct complained of.

3. Where, in the course of its duties, the Court of Auditors discovers grave malfunctions seriously affecting the lawfulness and regularity of revenue and expenditure or the requirements of sound financial management, it must report them. The assessments made in its annual report or in special reports on third parties directly involved are fully subject to review by the Court of First Instance. They may constitute maladministration and thus give rise, where appropriate, to non-contractual liability on the part of the

Community, if either the facts reported are not substantively correct or the interpretation placed on facts which are substantively correct is erroneous or one-sided.

That is not the position where the Court of Auditors reports a conflict of interests involving the award by the Community of public contracts. A conflict of interests constitutes, objectively and in itself, a serious irregularity without there being any need to qualify it by having regard to the intentions of the parties concerned and whether they were acting in good or bad faith, or to establish that it caused quantifiable material injury.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
15 June 1999*

In Case T-277/97,

Ismeri Europa Srl, a company incorporated under Italian law, established in Rome, represented by Sergio Ristuccia and Gian Luigi Tosato, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 7 Val Sainte-Croix,

applicant,

v

Court of Auditors of the European Communities, represented by Jean-Marie Stenier, Jan Inghelram and Paolo Giusta, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Court of Auditors, 12 Rue Alcide de Gasperi, Kirchberg,

defendant,

APPLICATION for damages under Articles 178 and 215 of the EC Treaty (now Articles 235 EC and 288 EC) for injury allegedly suffered by the applicant undertaking following criticisms made against it by the Court of Auditors in Special Report No 1/96 on the MED programmes together with the Commission's replies, submitted pursuant to the second subparagraph of Article 188c(4) of the EC Treaty (OJ 1996 C 240, p. 1),

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Third Chamber),

composed of: M. Jaeger, President, K. Lenaerts and J. Azizi, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 11 February 1999,

gives the following

Judgment

Facts

The MED Programmes

1 Aid from the European Union to the Mediterranean non-member countries comes under a single programme known as the New Mediterranean Policy (NMP). The overall objectives of this policy are,

economically speaking, to foster the emergence of a prosperous region around the Mediterranean and, politically speaking, to reinforce democracy and regional integration there.

2 The MED programmes are a reflection of the Community's desire to develop multilateral cooperation with and between the Mediterranean non-member countries. They were created because the financial protocols, which are bilateral agreements between States, were unsuited to carrying out such a policy.

3 The MED programmes were designed so as to make it possible to develop decentralised cooperation on the basis of new instruments. Under those programmes, partners from Member States of the European Union and from the Mediterranean basin which form networks of four to eight members amongst themselves are entrusted with the realisation of a project planned by themselves. The areas concerned are local government (MED-Urbs), higher education (MED-Campus), the media (MED-Media), research (MED-Avicenne), and small and medium-sized companies (MED-Invest). The Commission provides the additional financing and technical assistance which they need in order to complete their projects.

Management of the MED programmes

4 Since it lacks sufficient own resources to enable it to manage the MED programmes itself, the Commission subcontracts their administration and financial management to the Agence pour les Réseaux Transméditerranéens (Agency for Trans-Mediterranean Networks - ARTM), a non-profit-making organisation established by it under Belgian law specifically for this task. The technical monitoring functions were contracted out to Technical Assistance Bureaux (BATs), which are usually consultancy firms.

5 Projects are approved by a committee, known as the Commitment Committee, made up of both the ARTM and the BAT representatives, the latter attending discussions in order to give technical advice but without voting rights. The committee is presided over by the Commission official responsible.

The Court of Auditors' Special Report No 1/96 on the MED programmes

6 In view of the large number of irregularities and major shortcomings in the financial management of the MED programmes, the Court of Auditors adopted on 30 May 1996 Special Report No 1/96 on the MED programmes together with the Commission's replies, submitted pursuant to the second subparagraph of Article 188c(4) of the EC Treaty (OJ 1996 C 240, p. 1, hereinafter 'Special Report No 1/96').

7 In particular, the Court of Auditors found that the conditions under which contracts were awarded, and the involvement of the same consultancy firms in the conception of the programmes, in the preparation of financing proposals, in the management of the ARTM, and in the technical monitoring of the programmes, had given rise to a serious conflict of interests, which was prejudicial to the proper management of Community funds.

8 Furthermore, the resources and procedures of the Commission for monitoring the implementation of the MED programmes and for supervising their decentralised administration were inadequate: when the serious conflict of interests referred to above was identified by the Commission, it was unable for a long time to resolve the matter.

9 In this connection the Court of Auditors points out in particular that:

[…]

Once the Commission had realised the danger of this situation, it asked the managers of the BATs responsible for monitoring to resign from the ARTM's Management Board. The minutes of the meetings of the Agency's Management Board show how vigorously those concerned resisted the Commission's

requests. Nearly a year and a half went by before they finally decided to step down, in circumstances which are questionable, to say the least. […]

[…]

[...] In view of the seriousness of these findings, the Court immediately informed the Commission of them, so that it could take appropriate measures and examine, in particular, the need to take legal action against those responsible. At the end of November 1995, the responsible Commission departments informed the Court that they intended not to renew contracts signed with the ARTM when they expired in January 1996 and to wind up the ARTM. They were also minded not to renew contracts signed with the BATs and to open an enquiry so as to establish responsibilities and to examine, in cooperation with the Commission's Legal Service, whether it was appropriate to take legal action.'

[…]

Substance

95 The Community's liability under the second paragraph of Article 215 of the Treaty depends on the fulfilment of a series of conditions as regards the unlawfulness of the conduct alleged against the Community institutions, the fact of damage and the existence of a causal link between the conduct of the institution concerned and the damage complained of (Case C-308/87 *Grifoni v EAEC* [1990] ECR I-1203, paragraph 6, and Case T-168/94 *Blackspur and Others v Council and Commission* [1995] ECR II-2627, paragraph 38).

96 The applicant takes the view that the defendant conducted itself unlawfully, inasmuch as it infringed the principle that proceedings must be *inter partes* and expressed defamatory criticisms of the applicant in Special Report No 1/96.

Infringement of the principle that proceedings must be *inter partes*

[…]

Defamatory nature of the defendant's criticisms of the applicant

The principle of defamation

106 The applicant claims that in Special Report No 1/96 the defendant expressed criticisms of it which are unfounded. This is, it states, the first time that the defendant has included in a special report to the Parliament serious criticisms relating directly to persons outside the Community institutions and referring to them by name. The accusations made are based on a partial and distorted view of the true state of affairs.

107 It takes the view that an assertion may be defamatory irrespective of whether or not the matter reported is well founded. A statement may be defamatory even if the matter raised is true or partly true. Thus, under Italian law, not only untrue or subjective statements but also insinuations are deemed liable to injure or jeopardise the reputation of another person.

108 The Court notes that, under the first subparagraph of Article 188c(2) of the Treaty, the Court of Auditors is required to examine whether all revenue has been received and all expenditure incurred by the Community in a lawful and regular manner and whether financial management has been sound. Under paragraph 4 of that provision, it is to submit its observations either in the annual report or in the form of special reports.

109 Actuated by the concern to ensure that its tasks are properly carried out, the Court of Auditors may

exceptionally, and in particular where there is a serious malfunction affecting the lawfulness and regularity of revenue and expenditure or the requirements of sound financial management, make a full report on the facts established and give the names of any third parties directly involved. The naming of those involved is all the more necessary where anonymity may give rise to confusion or cast doubt on their identity, which is liable to harm the interests of those concerned by the investigation of the Court of Auditors but not implicated by its critical assessments.

110 In those circumstances, the assessments made concerning third parties are fully subject to review by the Court of First Instance. They may constitute maladministration and thus give rise, where appropriate, to non-contractual liability on the part of the Community, if either the facts reported are not substantively correct or the interpretation placed on facts which are substantively correct is erroneous or one-sided.

The specific allegations of defamation

111 The applicant denies that it gained a privileged position for itself as a result of a conflict of interests or that it resisted the Commission's requests. Furthermore, the defendant allegedly failed to take account of the significant results yielded by work to which the applicant had contributed.

- The conflict of interests

112 The fact that a person who helps to evaluate and select tenders for a public contract has the contract awarded to him is highly questionable and constitutes a chargeable offence under the criminal law of several Member States, regard being had to the principle of equal treatment in the award of public contracts, the concern for sound financial management of Community funds and the prevention of fraud.

113 Where, in the exercise of its duties, the Court of Auditors encounters serious irregularities of that kind, it is obliged to report them.

114 In the present case, Special Report No 1/96 states, at paragraphs 50 to 55 and in Annex 3 thereto, that the applicant participated in the proceedings of the management board of the ARTM, its director being one of the ARTM's four administrators, in the planning of the MED programmes, including the stage at which draft financing proposals were prepared, and in monitoring the programmes. Yet, during that period, in its capacity as a BAT it was awarded contracts under those programmes totalling ECU 2 088 700.

[…]

123 However, that argument is not relevant. The conflict of interests constitutes, objectively and in itself, a serious irregularity without there being any need to qualify it by having regard to the intentions of the parties concerned and whether they were acting in good or bad faith. The presence of BATs, including the applicant, on the ARTM's management board was objectively incapable of being justified. The defendant was therefore bound to report it without being required to consider whether that serious irregularity was due to a mere lack of foresight or a clear intent to defraud. That question, which has no bearing on the financial supervision exercised by the Court of Auditors, is, however, relevant to any action to be taken by the Commission in response to Special Report No 1/96.

124 It follows that there was no maladministration on the part of the defendant, nor did the latter misinterpret or put a one-sided interpretation on the facts by drawing attention in the special report to a conflict of interests involving the applicant.

125 The plea must therefore be rejected.

- The applicant's opposition to the Commission's requests

126 The applicant criticises the following passage in Special Report No 1/96 (paragraph 56):

‘... The minutes of the meetings of the Agency’s Management Board show how vigorously those concerned resisted the Commission’s requests. Nearly a year and a half went by before they finally decided to step down, in circumstances which are questionable to say the least.’

127 The applicant considers this presentation of the facts to be a complete distortion. There was no resistance on the part of those concerned to resigning, nor were the circumstances in which they resigned questionable.

[…]

142 In conclusion, paragraph 56 of Special Report No 1/96 not only refers to established facts but also gives an objective and comprehensive interpretation of those facts by stressing that the circumstances in which the applicant’s director resigned were questionable. That resignation, which was justified owing to a conflict of interests, was subsequently made subject to a series of new conditions. Initially, it was made subject to the grant to the ARTM of the contract for the management of the MED programmes. Then it was made subject to the twofold condition that the applicant be reappointed as the BAT for the MED-Campus programme and that the applicant’s director could propose a candidate of his choice to replace him. It was only after all those conditions had been fulfilled that the applicant’s director finally resigned in April 1995. However, between the date on which the Commission first sought that resignation, in May 1993, and the date on which it finally occurred, in April 1995, the applicant was awarded two contracts as the BAT for the MED-Campus programme, the first in January 1994 relating to 1994 for ECU 610 800, and the second on 18 January 1995 relating to 1995 for ECU 720 000.

143 The plea must therefore be rejected.

- Failure by the defendant to take into consideration the results of work to which the applicant contributed

144 The applicant criticises the defendant for making no mention whatever in Special Report No 1/96 of the results obtained under the MED programmes during the trial period. It considers those results to have been very positive, a conclusion based on the outcome of a survey conducted at the Commission’s request with the network participants mentioned in the Parliament’s Resolution of 17 July 1997 on the special report. Furthermore, the independent auditors called upon to appraise the activities carried on during the trial period had even laid emphasis on the need to strengthen the applicant’s role as a BAT.

145 The Court points out that, under Article 188c(2) of the Treaty, the Court of Auditors is competent to examine whether revenue has been received and expenditure incurred in a lawful and regular manner and whether the financial management of the Community has been sound. In principle, therefore, its competence is limited to the financial sphere. Without there being any need to answer the question whether that competence might also extend to the appraisal of fundamental policy choices, it must nevertheless be held that it plainly covers a review, in terms of sound financial management, of the means by which effect is given to those choices.

146 In the present case, the defendant uncovered serious irregularities in the financial management of the MED programmes which took the form, in particular, of a conflict of interests involving the applicant. A conflict of interests as regards the award of public contracts already compromises the sound management of Community funds and equal access for all to such contracts, without there being any need for it to cause quantifiable material injury as well. Assessment of the quality of the work carried out by the applicant and of the results achieved is not therefore a criterion which is capable of calling into question the relevance of the findings made by the defendant.

147 The plea must therefore be rejected.

148 It follows from the foregoing that the action must be dismissed in its entirety.

Costs

149 Under Article 87(2) 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 in its submissions, it must be ordered to pay the costs, in accordance with the form of order sought by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Jaeger
Lenaerts
Azizi

Delivered in open court in Luxembourg on 15 June 1999.

H. Jung
Registrar

M. Jaeger
President

* Language of the case: Italian.