

JUDGMENT OF THE COURT

10 July 2001 *

In Case C-315/99 P,

Ismeri Europa Srl, established in Rome (Italy), represented by S. Ristuccia and G.L. Tosato, avvocati, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber) of 15 June 1999 in Case T-277/97 *Ismeri Europa v Court of Auditors* [1999] ECR II-1825) seeking to have that judgment set aside,

the other party to the proceedings being:

Court of Auditors of the European Communities, represented by J.-M. Stenier, J. Inghelram and P. Giusta, acting as Agents,

defendant at first instance,

* Language of the case: Italian.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, M. Wathelet and V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet (Rapporteur), P. Jann, L. Sevón, R. Schintgen, F. Macken and C.W.A. Timmermans, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 20 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 3 May 2001,

gives the following

Judgment

- 1 By application lodged at the Registry of the Court of Justice on 24 August 1999, Ismeri Europa Srl (hereinafter 'Ismeri') brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of 15 June 1999 of the Court of First Instance in Case T-277/97 *Ismeri Europa v Court of Auditors*

[1999] ECR II-1825, hereinafter 'the contested judgment') in which the Court of First Instance dismissed its application for damages for the loss allegedly suffered by the applicant as a result of criticisms made against it by the Court of Auditors in Special Report No 1/96 on the MED programmes, adopted on 30 May 1996 (OJ 1996 C 240, p. 1, hereinafter 'Report No 1/96').

- 2 In Report No 1/96, which was published in the *Official Journal of the European Communities* of 19 August 1996, the Court of Auditors formulated various criticisms concerning the management of the MED programmes, specifically highlighting conflicts of interest in the overall system of management. In particular, it found that, of the four administrators of the Agence pour les réseaux transméditerranéens (Agency for Transmediterranean Networks, hereinafter 'ARTM'), a non-profit-making organisation established by the Commission under Belgian law in order to conduct the administrative and financial management of the MED programmes, two were directors of Technical Assistance Offices (BATs) which had been awarded contracts for the monitoring of the programmes which they had helped to draw up within the ARTM's board of directors. Ismeri is one of the two BATs named in that connection in Report No 1/96.
- 3 On 31 January 1997 Ismeri wrote to the Court of Auditors with its observations on Report No 1/96 and to request it for rectification of the points contained therein concerning it. By letter of 7 March 1997 the Court of Auditors replied that it stood by its initial findings and refused to publish the rectification requested.
- 4 On 17 July 1997 the European Parliament adopted a resolution on Report No 1/96 (OJ 1997 C 286, p. 263) in which it approved the findings of the Court of Auditors, highlighted the exemplary nature of the case and requested the Commission to act forcefully in order to prevent a recurrence of such situations.
- 5 On 20 October 1997 Ismeri brought an action for damages in respect of the injury to its reputation, and the loss resulting from termination of contracts and

for loss of profit incurred as a result of publication of Report No 1/96. It also requested the Court of First Instance to hear various witnesses by way of a measure of inquiry.

The contested judgment

- 6 After dismissing various pleas of inadmissibility raised by the Court of Auditors (paragraphs 25 to 94 of the contested judgment), the Court of First Instance dealt in two stages with the applicant's substantive pleas.
- 7 First, in regard to infringement of the principle of a right to a hearing, the Court of First Instance observed that for the Community to incur liability it was not sufficient merely that an illegality had been committed; proof also had to be adduced of a causal link between such illegal conduct and the damage complained of (paragraph 100 of the contested judgment).
- 8 The Court of First Instance held that, even if the applicant had been invited to make known its views on Report No 1/96 before its adoption and publication, the Court of Auditors would not have altered its tenor. In reaching that determination, the Court of First Instance cited the fact that Ismeri in its letter of 31 January 1997 had made observations on the accuracy of certain passages in Report No 1/96 and that the Court of Auditors had refuted all of the applicant's observations in its reply of 7 March 1997, in which it had informed the applicant that there were no grounds on which to rectify Report No 1/96. According to the Court of First Instance, it would likewise have stood by those parts of Report No 1/96 challenged by Ismeri, even if the latter's observations had been submitted not after but before adoption thereof (paragraphs 101 to 104 of the contested judgment).

- 9 Accordingly, the Court of First Instance rejected that plea without expressing a view as to whether the applicant was entitled to rely before the Court of Auditors on the principle of a right to a hearing in order to obtain the right to be heard before adoption of Report No 1/96 (paragraph 105 of the contested judgment).
- 10 Secondly, on the defamatory nature of the criticisms contained in Report No 1/96 concerning Ismeri, the Court of First Instance held that the Court of Auditors might in certain cases be required to give the names of third parties directly involved in serious malfunctions of the Community institutions (paragraph 109 of the contested judgment). The assessments made in such cases of the persons concerned might constitute a fault giving rise to liability on the part of the Community if the facts on which those assessments were based were not accurately reported or were incorrectly interpreted. Those were matters which were fully subject to review by the Court of First Instance (paragraph 110 of the contested judgment).
- 11 In regard to the first specific plea of defamation, relating to the confusion of interests, the Court considered that, without being under any obligation to express a view as to whether or not there was fraudulent intent on the applicant's part, the Court of Auditors was required to point out the objective malfunction which enabled Ismeri to exert influence on the decision-making process within the ARTM, thereby furthering its private interests as a result of its position and that of its director. According to the Court of First Instance, the facts themselves revealed a confusion of interests and the Court of Auditors did not err in exposing them (paragraphs 112 to 124 of the contested judgment).
- 12 On the second plea regarding resistance by the applicant to the Commission's requests that the directors of the BATs should resign from the board of the ARTM, the Court of First Instance adjudged that the facts described in Report No 1/96 were substantively established and had been correctly interpreted, since the managing director of Ismeri only resigned two years after being requested to do so by the Commission and made his resignation subject to successive conditions concerning the award of contracts and choice of successor (paragraphs 126 to 143 of the contested judgment).

- 13 On the third plea according to which the Court of Auditors omitted to take account of the positive results of the work to which the applicant had contributed, the Court of First Instance emphasised that that was not a criterion capable of calling in question the defendant's findings within the sphere of its competence, namely that of financial management (paragraphs 144 to 147 of the contested judgment).
- 14 Accordingly, the Court of First Instance dismissed the application (paragraph 148 of the contested judgment).

The appeal

- 15 Ismeri claims that the Court should set aside the judgment appealed against, grant the form of order which it sought at first instance and order the Court of Auditors to pay the costs both at first instance and on appeal. To that end it raises six annulment pleas.
- 16 The Court of Auditors contends that the Court should dismiss the appeal and order Ismeri to pay the costs.

First plea: defects vitiating the proceedings at first instance comprising omission to decide on the request for the hearing of witnesses and inadequacy of investigative measures

- 17 Ismeri maintains that its request for the hearing of witnesses constituted an independent point in its conclusions to which the Court of First Instance ought to

have responded in the contested judgment. It adds that the Court of First Instance's tacit refusal to grant the request reveals inadequacies in the measures of inquiry adopted in connection with the case since, although the Court of First Instance stated that it had doubts concerning the credence to be attached to certain documents, it relied on the version of the facts contained in Report No 1/96.

- 18 The Court of Auditors replies that the choice of evidence to be adduced is a matter for the Court of First Instance alone and, in the alternative, that the measures of inquiry adopted were adequate. Moreover, the Community judicature is not obliged to explain in a judgment why it has not granted a request for the adoption of measures of inquiry such as the hearing of witnesses.
- 19 In that connection the Court of First Instance is the sole judge of any need for the information available to it concerning the cases before it to be supplemented. Whether or not the evidence before it is convincing is a matter to be appraised by it alone and is not subject to review by the Court of Justice on appeal, except where the clear sense of that evidence has been distorted or the substantive inaccuracy of the Court of First Instance's findings is apparent from the documents in the case-file (judgment in Case C-119/97 P *Ufex and Others v Commission* [1999] ECR I-1341, paragraph 66, and order in Case C-437/98 P *Infrisa v Commission* [1999] ECR I-7145, paragraph 34).
- 20 No matter has been adverted to in the course of this appeal to lead the Court to believe that anything of that kind occurred in the present case. In those circumstances the Court of First Instance cannot be criticised for not responding in its judgment specifically to Ismeri's request for the hearing of witnesses.
- 21 The first plea must therefore be rejected.

The second plea: infringement of the principle of the right to a hearing, and third plea: failure to make a determination as to the alleged infringement of this principle

- 22 In its second plea Ismeri essentially alleges that in the contested judgment the Court of First Instance relied on the fact that the Court of Auditors declined to rectify Report No 1/96 in the manner desired by the applicant after its publication in order to infer therefrom that it would have acted in the same way even if Ismeri had been heard prior to adoption of Report No 1/96.
- 23 However, observance of the principle of the right to a hearing which requires persons to be heard before adoption of decisions concerning them is said to be a basic condition governing exercise of a discretionary power by a public authority. That condition, it is submitted, applies under Article 206 of the EC Treaty (now, after amendment, Article 276 EC) as regards both the Community institutions and other persons subject to supervision by the Court of Auditors. It is also a necessary part of the procedure for obtaining a discharge before the European Parliament.
- 24 The Court of Auditors points out that the three conditions which have to be met for the Community to incur non-contractual liability, which include the existence of a causal link between the illegality and the injury sustained are cumulative and that the Court of First Instance was under no obligation to express a view on the two other conditions if it considered that one of them was not met. The argument that a third party implicated should have the same right to a hearing as an institution subject to supervision it considers to be inadmissible for not being an allegation made against the contested judgment; in the alternative, it considers it to be unfounded.

- 25 In its third plea Ismeri essentially reproduces the previous plea in criticising the Court of First Instance for avoiding what to the applicant is a key issue, namely the unlawful nature of the failure to apply the principle of the right to a hearing in the present case. The defendant replies by raising the same arguments as for the second plea.
- 26 These two pleas, which should be examined together, are directed at the Court of First Instance's reasoning at paragraphs 100 to 105 of the contested judgment in which it rejected the plea that there had been an infringement of the right to a hearing 'without there being any need to consider the question whether or not, in the present case, the applicant was entitled to rely on that principle'.
- 27 It should be noted that, under the provisions applicable to its proceedings, the Court of Auditors is not bound to submit draft reports to third parties under the same conditions which apply in the case of Community institutions or to publish the replies of those concerned following publication of its reports. The procedure provided for under Articles 188c(4) of the EC Treaty (now, after amendment, Article 248(4) EC) and Article 206 of the Treaty is intended to contribute to improving the financial management of the Community by providing for reports to be transmitted to the institutions and for the latter to respond to them. Involvement of third parties in that procedure would not contribute to attainment of the objective pursued.
- 28 None the less, the principle of the right to a hearing is a general principle of law whose observance is ensured by the Court of Justice. It applies to any procedure which may result in a decision by a Community institution perceptibly affecting a person's interests (see, in particular, judgment in Case 17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063, paragraph 15).

- 29 Although the adoption and publication of reports of the Court of Auditors are not decisions directly affecting the rights of persons mentioned therein, they are capable of having consequences for those persons such that those concerned must be enabled to make observations on those points in such reports which refer to them by name, before those reports are definitively drawn up.
- 30 Since the Court of Auditors omitted to invite Ismeri to express its views on passages concerning it which were intended for inclusion in Report No 1/96, it follows that the procedure for adopting that report is vitiated by an infringement of the principle of the right to a hearing.
- 31 That infringement was not remedied by the opportunity which was made available to the appellant to submit its observations to the Court of Auditors once Report No 1/96 was published. It goes without saying that an institution is naturally more willing to welcome observations before definitively determining its view of a matter than after publication thereof since acknowledgment after publication that criticisms were well founded would compel it to go back on its views by issuing a rectification.
- 32 For the same reason it cannot be inferred from the mere fact that, on 7 March 1997 the Court of Auditors refuted the criticisms levelled by Ismeri on 31 January 1997 concerning Report No 1/96, published on 19 August 1996, that it would necessarily have reacted in the same way if those criticisms had been made prior to adoption on 30 May 1996 of Report No 1/96.
- 33 However, it is clear from all the circumstances of the case, as analysed by the Court of First Instance, and in particular the flagrant and serious failure to

observe the rules of sound management consisting in the prolonged presence on the board of the ARTM of persons representing private interests directly concerned by deliberations of that body, that if Ismeri had been given a right to a hearing that would not have altered the view taken by the Court of Auditors as to the expediency of mentioning that company by name in Report No 1/96 or as to the terms used in that connection.

34 It follows that, in the present case the illegality committed was not capable of influencing the content of Report No 1/96 and that, consequently, there is no causal link between the failure to allow Ismeri a right to a prior hearing and the damage which it alleged that it suffered owing to publication of Report No 1/96.

35 Accordingly, Ismeri's allegation that the Court of First Instance rejected its plea of an infringement of the right to a hearing is unfounded.

36 The second and third pleas must therefore be rejected.

Fourth plea: infringement of Community law and inadequate reasoning concerning the alleged defamation

37 Ismeri maintains that the Court of First Instance, wrongly and without giving reasons, concluded that there had been no defamation, although the publication of information about a named third party, accompanied by references to possible criminal charges, is contrary, without there being any necessity for it, first, to the

rule of anonymity applied save in exceptional cases by the Court of First Instance, secondly, to the principle of confidentiality which according to the general principles of law must be observed when criminal proceedings are initiated, and thirdly, to the principle of proportionality which imposes on the Community institutions the obligation not to jeopardise the situation of individuals more than is necessary in order to attain the objective which they are pursuing.

- 38 According to the Court of Auditors, the allegations are inadmissible for not being directed specifically at the legal reasoning followed by the Court of First Instance. In the alternative, the defendant emphasises that, faced with a serious malfunction in which Ismeri was involved, the Court of First Instance advisedly accepted as being necessary and therefore proportionate the naming of persons involved in the conflict of interest which had been revealed. The reference by Ismeri to a hypothetical principle of discretion is in any event new.
- 39 It is clear from paragraph 109 of the contested judgment that the Court of First Instance accepted that the Court of Auditors might exceptionally, and in particular where there is a serious malfunction affecting the lawfulness and regularity of revenue and expenditure or sound financial management, fully report the matters found, thereby giving the names of third parties directly involved. According to the Court of First Instance, the Court of Auditors, actuated by a concern to ensure that its tasks are properly carried out, may consider the naming of persons involved to be particularly necessary where anonymity may cast doubt on the identity of the persons involved.
- 40 It must be accepted, as the Court of First Instance acknowledged, that there may be specific circumstances, which may be due to the seriousness of the facts or the risk of confusion liable to harm the interests of third parties, where the Court of Auditors is allowed to mention by name in its reports persons who in principle

are not subject to its supervision, subject to the condition that such persons are entitled to a right to a hearing, as stated at paragraphs 28 and 29 hereof.

- 41 It is for the Community judicature in an action brought before it to assess in such a case whether the naming of persons was necessary and proportionate to the objective pursued by publication of the report. The full power of review which it exercises in that connection falls within its untrammelled appraisal of the facts against which no appeal lies except where there is a substantive inaccuracy in the findings of fact or the clear sense of the evidence in the case-file has been distorted.
- 42 Thus, the assessment which led the Court of First Instance to accept that the Court of Auditors was legitimately entitled expressly to refer to Ismeri in Report No 1/96 and, in particular, to cite at paragraph 57 thereof, the examination conducted by the Commission as to the possible need to initiate criminal proceedings cannot be reviewed by the Court, since no matter has been adverted to in the course of these appeal proceedings which would warrant the conclusion that the clear sense of the evidence of the case-file had been distorted or that its findings were vitiated by the presence of a substantive inaccuracy.
- 43 The fourth plea must therefore be rejected.

Fifth plea: distortion of the facts, inadequate reasoning and erroneous legal definition of 'confusion of interests'

- 44 The applicant alleges that, by concluding that Ismeri was involved in a confusion of interests, the Court of First Instance distorted the facts of the case. It goes on to

submit, first, that the ARTM of which one of its directors was a member did not have the power to decide on the award of contracts to the technical assistance offices, secondly, that the decision to award the only two contracts entered into with Ismeri on which Report 1/96 is based was taken by the Commission and that the ‘experimental phase’ of the MED programmes justifying the award of contracts on a private-treaty basis extended beyond the time when the ARTM was established.

- 45 The applicant adds that the concept of ‘confusion of interests’, used without reference to the intentions of those concerned, has no meaning in law and does not provide an appropriate description of the situation.
- 46 The Court of Auditors states that, there being no evidence of distortion of the clear sense of the evidence of the case-file or of a substantive inaccuracy, the arguments concerning the power of the ARTM, the role of the Commission and the duration of the ‘experimental phase’ constitute no more than an inadmissible exhortation to reopen the finding of facts carried out at first instance. As regards the discussion concerning the concept of ‘confusion of interests’ which is merely a repetition of arguments already rehearsed at first instance, it is neither admissible nor well founded, since the Court of First Instance clearly defined what was to be understood by this concept.
- 47 It should be stated, first, that, in the context of the sound financial management of the institutions and Community bodies carried out by the Court of Auditors, the concept of ‘confusion of interests’ defined by the Court of First Instance as being ‘the fact that a person who helps to evaluate and select bids for a public contract has this contract awarded to him’ is pertinent, relevant and indicative of a serious malfunction of the institution or body concerned.

48 Secondly, the Court of First Instance's assessment that the facts before it constituted a situation of a confusion of interests is a matter solely for the court determining the case on its merits. Since no evidence of a substantive inaccuracy in the findings or of distortion of the clear sense of the evidence of the case-file in the contested judgment has been adduced in these appeal proceedings, that assessment by the Court of First Instance is not reviewable by the Court.

49 Accordingly, the fifth plea must be rejected.

Sixth plea: distortion of the facts and inadequate reasoning concerning Ismeri's alleged resistance to the request that its director should resign from the board of ARTM

50 Ismeri maintains that the Court of First Instance was not entitled merely to express doubts as to the credence to be attached to a document intended to demonstrate that the Commission was no longer insisting on the resignation of one of its directors from the board of the ARTM. The appellant also calls in question the reasoning on the basis of which the Court of First Instance accepted that it was after a protracted bargaining process concerning the award of contracts and the putting forward of replacement candidates that the resignation finally took place.

51 The Court of Auditors does not consider that these matters reveal evidence warranting a conclusion that the clear meaning of the facts had been distorted which would be the only ground for calling in question the assessment by the Court of First Instance.

- 52 The discussion entered into by Ismeri in these appeal proceedings concerning the interpretation of the minutes of the meeting of 21 January 1994 of the board of the ARTM, and the conditions laid down by Ismeri to be met prior to its director resigning from that board, has not brought to light the existence in the reasoning of the contested judgment of any substantive inaccuracy or distortion of the clear sense of the evidence of the case-file.
- 53 Under those conditions, the sixth plea constitutes an exhortation to reopen the assessment of the facts by the Court of First Instance, which cannot form the subject-matter of the appeal.
- 54 Accordingly, the sixth plea must be rejected as inadmissible.
- 55 It follows from all the foregoing that the appeal must be dismissed in its entirety.

Costs

- 56 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal by virtue of Article 118, 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 Court of Auditors contended that the appeal should be dismissed and Ismeri has been unsuccessful in its appeal, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the appeal;
2. Orders Ismeri Europa Srl to pay the costs.

Rodríguez Iglesias

Gulmann

Wathelet

Skouris

Edward

Puissochet

Jann

Sevón

Schintgen

Macken

Timmermans

Delivered in open court in Luxembourg on 10 July 2001.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

