JUDGMENT OF THE COURT (Third Chamber)

29 July 2010 *

In Case C-377/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal de commerce de Bruxelles (Belgium), made by decision of 14 September 2009, received at the Court on 23 September 2009, in the proceedings

Françoise-Eléonor Hanssens-Ensch, in her capacity as insolvency administrator of Agenor SA,

v

European Community,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász, T. von Danwitz (Rapporteur) and D. Šváby, Judges,

* Language of the case: French.

Advocate General: V. Trstenjak,
Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 20 May 2010,

after considering the observations submitted on behalf of:

— F.-E. Hanssens-Ensch, in her capacity as insolvency administrator of Agenor SA, by J.P. Renard and M. Elvinger, avocats,

— the Belgian Government, by J.-C. Halleux and T. Materne, acting as Agents,

— the European Commission, by J.-P. Keppenne and M. Owsiany-Hornung, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 235 EC and the second paragraph of Article 288 EC.

2 The reference has been made in proceedings which Ms Hanssens-Ensch, in her capacity as insolvency administrator of Agenor SA ('Agenor'), has brought against the European Community for damages in the amount of EUR 2 million on account of the Community's alleged misconduct, which – she claims – contributed to Agenor's insolvency.

Legal context

3 Article 530(1) of the Belgian Code des sociétés (Companies Code) provides as follows:

'In the event of the insolvency of the company and a shortfall in its assets, and where it is established that serious misconduct on their part has contributed to the insolvency, any director or former director and any other person who has actually had the power to manage the company, may be declared personally liable, jointly or severally, in respect of all or some of the company's debts up to the amount of the shortfall in assets. ...'

The dispute in the main proceedings and the question referred

4 Agenor's objects are to provide consultancy; to draw up appraisals and reports; to conduct studies; to provide training; and to supply any other related intellectual services. Following a call for tenders at the end of 1994, Agenor was given the role of Technical Assistance Office ('TAO') for the European 'Leonardo da Vinci' programme. To that end, it concluded an initial 12-month contract with the European Communities on 13 June 1995.

5 Article 3 of that contract stated that it could be renewed, provided that the European Commission was satisfied with the services provided by Agenor and depending on the availability of funds under the Communities' budget. Successive contracts were signed under that provision for the periods from 1 June 1996 to 31 May 1997 and 1 June 1997 to 31 May 1998.

6 With effect from 1 June 1998, the contract which was due to expire on 31 May 1998 was extended by an addendum until 30 September 1998. A further contract was then signed for the period ending on 31 January 1999.

7 On 6 January 1999 the Commission sent Agenor an audit report covering the period from March 1998. That report pointed to a number of weaknesses and shortcomings in the management of the TAO. It also stated that, in order for the contractual relationship to continue, a number of significant improvements had to be made to the way in which the TAO was run and that, if the contract were to be extended beyond 31 January 1999, the TAO would need to be restructured. A list was given of various improvements that were regarded as necessary.

8 On 29 January 1999 the Commission offered Agenor an addendum to the contract then in force, extending it until 15 February 1999. Agenor did not accept that offer. On 11 February 1999 the Commission therefore declared that the contract in question had expired on 31 January 1999. Also on 11 February 1999, Agenor informed the Commission that it disputed that position.

9 On 3 March 1999 Agenor declared itself insolvent.

10 On 30 January 2004 Ms Hanssens-Ensch, in her capacity as Agenor's insolvency administrator, brought an action for damages against the Community before the Tribunal de commerce de Bruxelles (Commercial Court, Brussels), principally on the basis of Article 530(1) of the Code des sociétés; she accused the Commission of imposing management constraints on Agenor that inevitably led to its insolvency and of 'abandoning' and 'lynching' Agenor, in particular by refusing to renew the contract that had previously existed between the parties.

11 The Commission challenged the jurisdiction of the Tribunal de commerce de Bruxelles, maintaining that, pursuant to Article 235 EC and the second paragraph of Article 288 EC, the Court of Justice alone has jurisdiction to adjudicate on a claim such as that made by Ms Hanssens-Ensch.

12 According to the Tribunal de commerce de Bruxelles, doubt persists as to whether, under the second paragraph of Article 288 EC, it must be the Court of Justice which hears and determines actions for damages brought on the basis of non-contractual liability, where those actions are subject to special statutory rules such as those laid down in Article 530 of the Belgian Code des sociétés.

13 The Tribunal de commerce de Bruxelles therefore decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is [the second paragraph of] Article 288 [EC] to be interpreted as meaning that an action for damages, brought under Article 530 of the Belgian Code des sociétés by an insolvency administrator, seeking an order requiring the European Community to make good the shortfall in the insolvent company's assets on the ground that the Community had *de facto* had the power to manage a commercial company and was guilty of serious misconduct in the management of that company which had contributed to its insolvency, constitutes an action for damages based on non-contractual liability for the purposes of that provision?'

The question referred for a preliminary ruling

14 By its question, the national court asks, in essence, whether an action for damages brought against the Community under national legislation establishing special statutory rules which differ from the ordinary rules of law governing civil liability in the Member State concerned constitutes an action for damages based on non-contractual liability for the purposes of the second paragraph of Article 288 EC, which – pursuant to Article 235 EC – does not fall within the jurisdiction of the national courts.

15 Ms Hanssens-Ensch submits that, given the reference made therein to 'the general principles common to the laws of the Member States', the second paragraph of Article 288 EC refers only to proceedings brought on the basis of the Community's non-contractual liability under the ordinary rules of law, as provided for – under Belgian law, for example – in Article 1382 of the Code civil (Civil Code). By contrast, an action brought under any other provision falls within the jurisdiction of the national courts, even if the grounds for that action do not relate to a contract. Thus, an action

brought under Article 530 of the Code des sociétés, which constitutes the legal basis for the action before the referring court, cannot be regarded as an action for damages brought on the basis of non-contractual liability under the ordinary rules of law, notwithstanding the fact that the grounds for that action do not relate to a contract.

16 The EC Treaty provides for jurisdiction to be divided between the Community Courts and the national courts as regards judicial proceedings brought against the Community in which its liability for damage is at issue.

17 With regard to the Community's non-contractual liability, such disputes fall within the jurisdiction of the Court of Justice. Article 235 EC provides that the Court of Justice has jurisdiction to hear and determine actions seeking compensation for damage brought under the second paragraph of Article 288 EC, which covers such non-contractual liability. That jurisdiction of the Community Courts is exclusive (see, to that effect, inter alia, Case C-282/90 *Vreugdenhil* v *Commission* [1992] ECR I-1937, paragraph 14, and Case C-275/00 *First and Franex* [2002] ECR I-10943, paragraph 43 and the case-law cited).

18 On the other hand, so far as the Community's contractual liability is concerned, the only provision of the Treaty which confers jurisdiction on the Court of Justice to hear and determine such cases is Article 238 EC, that is to say, under an arbitration clause in a contract concluded by or on behalf of the Community (see, to that effect, Case 426/85 *Commission* v *Zoubek* [1986] ECR 4057, paragraph 11, and Joined Cases C-80/99 to C-82/99 *Flemmer and Others* [2001] ECR I-7211, paragraph 42).

19 Since Article 235 EC refers only to the second paragraph of Article 288 EC, which concerns solely the non-contractual liability of the Community, the Community's contractual liability being referred to in the first paragraph of Article 288 EC, it cannot be inferred from Article 235 EC that the Court of Justice has jurisdiction to hear and determine an action for damages based on the Community's contractual liability (see, to that effect, *Flemmer and Others*, paragraph 42). It follows that, in the light of Article 240 EC, where there is no arbitration clause, proceedings concerning the Community's contractual liability fall within the jurisdiction of the national courts (see, to that effect, judgment of 20 May 2009 in Case C-214/08 P *Guigard* v *Commission*, paragraph 41).

20 It follows from the foregoing that, in order to decide which court has jurisdiction to hear and determine a specific action brought against the Community seeking compensation for damage, it is necessary to determine whether the action in question concerns the Community's contractual liability or its non-contractual liability.

21 In that regard, it is necessary to take into consideration the fact that the reference made in Article 235 EC to the second paragraph of Article 288 EC concerns only the concept of damage for the purposes of the latter provision, that is to say, damage caused by institutions of the Community or by its servants in the performance of their duties, in respect of which non-contractual liability arises. However, the reference made in the second paragraph of Article 288 EC to the general principles common to the laws of the Member States does not relate to that concept. The purpose of that particular reference is to determine the conditions which must be met if the Community is to be required to make good such damage.

22 Moreover, so far as the action before the referring court is concerned, it should be noted that – as Ms Hanssens-Ensch herself concedes – the grounds for that action are not related to a contract. Also, the fact that such an action may be brought only in special circumstances – in that, for example, the person concerned can incur liability only in the event of 'serious misconduct' – does not obscure the fact that that action

has the general characteristics of an action for damages based on non-contractual liability, for the purposes of the second paragraph of Article 288 EC.

23 In those circumstances, the fact that the national legislation, under which an action for damages has been brought against the Community on the basis of non-contractual liability, consists in special statutory rules which differ from the ordinary rules of law governing civil liability in the Member State concerned cannot have the effect of excluding that action from the scope of Article 235 EC.

24 The judgment in Case C-330/88 *Grifoni* v *EAEC* [1991] ECR I-1045, paragraph 20, relied on by Ms Hanssens-Ensch, cannot invalidate the above conclusion, since the action which led to that judgment was based on the contractual liability of the Community.

25 Accordingly, Ms Hanssens-Ensch's argument postulating, in addition to contractual liability and non-contractual liability within the meaning of the second paragraph of Article 288 EC, a third category of liability which, pursuant to Article 240 EC, falls within the jurisdiction of the national courts, is unfounded.

26 In consequence, the answer to the question referred is that an action for damages brought against the Community on the basis of non-contractual liability, even if it is brought under national legislation establishing special statutory rules which differ from the ordinary rules of law governing civil liability in the Member State concerned, does not – pursuant to Article 235 EC, read in conjunction with the second paragraph of Article 288 EC – fall within the jurisdiction of the national courts.

Costs

27 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

An action for damages brought against the European Community on the basis of non-contractual liability, even if it is brought under national legislation establishing special statutory rules which differ from the ordinary rules of law governing civil liability in the Member State concerned, does not – pursuant to Article 235 EC, read in conjunction with the second paragraph of Article 288 EC – fall within the jurisdiction of the national courts.

[Signatures]