JUDGMENT OF THE COURT
27 September 1988 *

In Case 114/86

United Kingdom of Great Britain and Northern Ireland, represented by B. E. McHenry, of the Treasury Solicitor's Department, acting as Agent, with an address for service in Luxembourg at the British Embassy, 18 boulevard Royal,

applicant,

supported by

Kingdom of the Netherlands, represented by G. M. Borchardt, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Netherlands Embassy, 5 rue C. M. Spoo,

intervener,

v

Commission of the European Communities, represented by F. S. Benyon, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, also a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

Italian Republic, represented by L. Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by I. M. Braguglia, avvocato dello Stato, having an address for service in Luxembourg at the Italian Embassy, 5 rue Marie-Adelaïde,

intervener,

* Language of the Case: English.

APPLICATION under Article 173 of the EEC Treaty for the annulment of an act of the Commission announced at the ACP/FIN Working Party meeting of 6 March 1986, re-introducing, with effect from 1 March 1986, the system as applied prior to 1 June 1983, whereby the Commission takes into account the nationality of firms in drawing up lists of candidates for service contracts concluded within the framework of the Second ACP-EEC Convention of Lomé of 31 October 1979 (Official Journal 1980, L 347, p. 1),

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco and O. Due (Presidents of Chambers), T. Koopmans, R. Joliet, T. F. O'Higgins and F. A. Schockweiler, Judges,

Advocate General: C. O. Lenz
Registrar: D. Louterman, Administrator

having regard to the Report for the Hearing and further to the hearing on 26 May 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 30 June 1988,

gives the following

Judgment

1 By application lodged at the Court Registry on 16 May 1986, the United Kingdom brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of an act of the Commission announced at the ACP/FIN Working Party meeting of 6 March 1986, re-introducing, with effect from 1 March 1986, the system as applied prior to 1 June 1983, whereby the Commission takes into account the nationality of firms in drawing up lists of candidates for service contracts concluded within the framework of the Second ACP-EEC Convention of Lomé of 31 October 1979 ('Lomé II') (Official Journal 1980, L 347, p. 1).

2 In the context of technical cooperation, Article 142 (1) of Lomé II provides that the rules governing the placing and award of service contracts are to be determined by a decision of the Council of Ministers. Pending such a decision, the Commission is authorized under Article 142 (2), and under Article 25 of Protocol No 2 to the First ACP-EEC Convention ('Lomé I') (Official Journal 1976, L 25, p. 1), to compile, for the purposes of the award of service contracts, a list of selected candidates 'selected according to criteria guaranteeing their qualifications, experience and independence and taking into account their availability for the proposed undertaking'.

3 The wording of the English version of Article 25 of Protocol No 2, according to which the Commission is to compile 'a list of selected candidates', seems to indicate that the candidates who may appear on the list in question must be 'selected' exclusively on the basis of the criteria mentioned in that provision. However, the Commission submits that, in accordance with the established case-law of the Court, the need for a uniform interpretation of Community legislation requires that this version should not be considered in isolation and that where doubt arises it should be interpreted and applied in the light of the other language versions. All the other language versions expressly refer to a 'restricted' ('restreinte', 'begrenzt', 'beperkt', 'ristretto', 'begrænset') list of candidates, which implies that there is a distinction between the method for selecting candidates, carried out according to the criteria above, and the subsequent limitation of the number of candidates with a view to compiling a restricted list.

4 According to the documents before the Court, the Commission has applied internal instructions for the purposes of compiling the list in question. One such instruction related to what it has been decided to call the 'ideal share' of each Member State of the service contracts, calculated by reference to the financial contribution of the Member State concerned to the European Development Fund, as laid down by the Internal Agreement on the financing and administration of Community aid.

5 It further appears from the documents before the Court that, on the basis of statistics compiled by the services of the Commission enabling a constantly updated comparison to be made between the service contracts concluded and each Member State's 'ideal share', internal instructions were also issued with a view to promoting

or discouraging the candidatures of certain nationalities having regard to the 'ideal share' of each Member State when the restricted lists of candidates are compiled.

6 As from 1 June 1983, the Commission applied, on a trial basis, a system under which approximately 81.75% of the service contracts in question were to be shared amongst the Member States on the basis of the criterion of each Member State's 'ideal share', and 18.25% were to be awarded irrespective of nationality or of the Member States' 'ideal shares'.

7 At an ACP/FIN Working Party meeting held on 6 March 1986, the Commission representative stated that the Commission would no longer be using the system introduced in 1983 on a trial basis; after evaluating the results of that experiment, it had decided to revert to the system in force prior to 1 June 1983. The United Kingdom's action in this case is directed against that decision, the purpose of which was to revert to a selection system based on nationality in the compilation of restricted lists of candidates for all service contracts concluded pursuant to Lomé II.

8 By two orders of 15 October 1986, the Court authorized the Kingdom of the Netherlands and the Italian Republic to intervene in support of the applicant's and the defendant's conclusions respectively.

9 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility of the application

10 The Commission lodged an objection of inadmissibility on the ground that the alleged 'decision' against which the action is brought was simply a non-definitive expression of its will. It further argues that the contested act is not binding and does not have precise legal effects.

11 For its part, the United Kingdom considers that the Commission's 'decision' to revert to the system in question in order to apply the criterion of Member States' 'ideal shares' as regards all service contracts with effect from 1 March 1986 constitutes an 'act' of the Commission which has legal effects in so far as its application leads to the exclusion of certain undertakings from the restricted list which can therefore be contested under the first paragraph of Article 173 of the Treaty. The United Kingdom further argues that the 'decision' to stop applying the partial quota system to service contracts as from a specified date is a fixed rule which has general effects on the procedure followed by the Commission, even if the quotas based on nationality are applied flexibly, having regard also to the other criteria set out in Article 25 of Protocol No 2 to Lomé I.

12 In order to determine whether an action for the annulment of the contested act will lie under the first paragraph of Article 173 of the Treaty, it must be borne in mind in the first place that, according to the established case-law of the Court, the nature of the act in question must be considered rather than its form. In particular, an action for annulment may not be brought if the act in question is not intended to have legal effects.

13 It appears from the documents before the Court that in this case the contested act reflects the intention of the Commission, or of one of its departments, to follow a particular line of conduct with regard to the establishment of restricted lists of candidates for the service contracts in question. However, it is not the announcement of that intention but the drawing-up of the lists themselves which is capable of having legal effects, in so far as it may result in the omission of certain undertakings from those lists and thus deprive them of the possibility of participating in the contracts in question.

14 This conclusion is reinforced by the fact that, as is also indicated by the documents before the Court, as a general rule the lists in question are not settled entirely in conformity with the criteria adopted by the Commission. Moreover, it appears from the statistics submitted by the Commission at the Court's request that in practice service contracts have not been allocated in accordance with the Member States' 'ideal shares'.

15 The contested act cannot therefore be regarded as an act intended to produce legal effects. Consequently, the application must be dismissed as inadmissible.

Costs

16 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the United Kingdom, supported by the Kingdom of the Netherlands, has failed in its action, it is appropriate to order those parties to bear the costs jointly and severally, including the costs of the Italian Republic, which intervened in support of the defendant's conclusions.

On those grounds,

THE COURT

hereby:

(1) Dismisses the action as inadmissible;

(2) Orders the United Kingdom and the Kingdom of the Netherlands to bear the costs jointly and severally.

Mackenzie Stuart Bosco Due

Koopmans Joliet O'Higgins Schockweiler

Delivered in open court in Luxembourg on 27 September 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President