JUDGMENT OF THE COURT (SECOND CHAMBER)
10 JUNE 1982 [1]

Nicholas William, Lord Bethell v Commission of the European Communities

(Competition — Air transport)

Case 246/81

Application for a declaration that a measure is void — Natural or legal persons — Conditions for admissibility

Action for failure to act — Natural or legal persons — Conditions for admissibilty (EEC Treaty, Art. 173, second paragraph, and Art. 175, third paragraph)

It may be seen from the second paragraph of Article 173 and the third paragraph of Article 175 of the Treaty that the applicant, for his application for a declaration that a measure is void or his action for failure to act to be admissible, must be in a position to establish either that he is the addressee of a measure of an institution having specific legal effects with regard to him, which is, as such, capable of being declared void, or that the institution, having been duly called upon to act in pursuance of the second paragraph of Article 175, has failed to adopt in relation to him a measure which he was legally entitled to claim by virtue of the rules of Community law.

A natural or legal person who is asking an institution, not to take a decision in respect of him, but to open an inquiry with regard to third parties and to take decisions in respect of them, may have an indirect interest, as other private persons may have, in such proceedings and their possible outcome, but he is nevertheless not in the precise legal position of the actual addressee of a decision which may be declared void under the second paragraph of Article 173 or in that of the potential addressee of a legal measure which the institution in question has a duty to adopt with regard to him, as is the position under the third paragraph of Article 175.

In Case 246/81

NICHOLAS WILLIAM, LORD BETHELL, Member of the European Parliament, Member of the House of Lords, represented by Ian S. Forrester of the Scots

1 — Language of the Case: English.

Bar and Mario Siragusa of the Rome Bar, instructed by Gloria Hooper of Messrs Taylor & Humbert, Solicitors, with an address for service in Luxembourg at the Chambers of Jean-Claude Wolter, 2, Rue Goethe,

applicant,

supported by

THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, represented by W. H. Godwin, Principal Assistant Treasury Solicitor, acting as Agent, with an address for service in Luxembourg at the British Embassy,

intervener,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Bastiaan van der Esch, acting as Agent, assisted by Pieter Jan Kuyper, a member of its Legal Department, with an address for service in Luxembourg at the office of Oreste Montalto, a member of the Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by the following airline operators:

AER LINGUS LIMITED (AER LINGUS), Dublin,
COMPAGNIE NATIONALE AIR FRANCE (AIR FRANCE), Paris,
LINEE AEREE ITALIANE SPA (ALITALIA), Rome,
BRITISH AIRWAYS LIMITED (BRITISH AIRWAYS), Hounslow,
BRITISH CALEDONIAN AIRWAYS LIMITED (BRITISH CALEDONIAN), Crawley,
KONINKLIJKE LUCHTVAART MAATSCHAPPIJ NV (KLM), Amstelveen,
DEUTSCHE LUFTHANSA AG (LUFTHANSA), Cologne,
OLYMPIC AIRWAYS, Athens,
SOCIÉTÉ ANONYME BELGE D'EXPLOITATION DE LA NAVIGATION AÉRIENNE, (SABENA), Brussels, and
SCANDINAVIAN AIRWAYS SYSTEM (SAS), Stockholm,

represented by Eduard Marissens of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Lambert H. Dupong, 14a, Rue des Bains,

interveners,

OBJECTION, at the preliminary stage of the proceedings, that the action brought by Lord Bethell against the Commission for failure to act with regard to the fixing by airline operators of passenger fares for transport by air for scheduled flights within the Community is inadmissible,

THE COURT (Second Chamber)

composed of: O. Due, President of Chamber, P. Pescatore and A. Chloros, Judges,

Advocate General: Sir Gordon Slynn
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, the conclusions of the parties and their submissions and arguments as to the admissibility of the action may be summarized as follows:

I — Facts

Lord Bethell, a Member of the European Parliament and of the House of Lords, is a regular user of scheduled air passenger services in the Community; he is also Chairman of the Freedom of the Skies Campaign, an organization dedicated to a reform of the present system of air transport regulation within the EEC, particularly as regards the methods and standards by which air fares are determined.

After a lengthy exchange of correspondence with the Commission, Lord Bethell addressed to the Commission, on 13 May 1981, through Counsel, a long letter concerning in particular the determination of passenger fares on scheduled flights within the Community.

He noted especially that competition in air fares between undertakings offering air transportation was substantially restricted by a network of bilateral and multilateral agreements. In practice fares are fixed between airlines and not between governments. Articles 85 (1) and 86 of the EEC Treaty apply to such agreements, both in law and in fact;

should the Commission entertain any doubts on the subject, Lord Bethell stated that he would be happy to know on what grounds.

The first sentence of Article 89 (1) left the Commission no option but to proceed to action, regardless of the difficulties, and even in the absence of any implementing regulations. The Council's apparent unwillingness to create effective competition in the sector of air transport did not relieve the Commission of its duties; on the contrary, it emphasized them.

Intervention by the governments was purely formal; as a general rule they endorsed without question the tariffs agreed by their carriers through the International Air Transport Association.

Moreover, the fact that governments were implicated in restrictive practices in no way precluded investigation by the Commission.

The airlines could not take refuge in their governments' approval, nor should the latter tolerate or perpetuate the evasion of the competition rules by private or public airlines.

If the Commission considered that Article 90 (3) had been infringed it had a duty to bring actions against the Member States in question. The first priority for the consumer, for the creation of the common market and for the observance of the rules of the Treaty, must be, however, direct action against the airlines, who were the true perpetrators and perpetuators of the infringement of the competition rules.

Lord Bethell concluded his letter with a request that the Commission, if it were unable for any reason to respond affirmatively to his request, should give its answer in the form of a decision which might be challenged in the Court under Article 173.

In its reply of 17 July 1981 the Commission pointed out to Lord Bethell in particular that two inquiries, the first of which was carried out in 1978 and the other recently, had led it to the conclusion that in most cases the final fixing of air fares was the sole responsibility of the Member States; government participation generally took the form of autonomous price-fixing measurs, and not consultation between companies. There was therefore no ground, in principle, for scrutinizing the activity of either the States or the airlines under Article 85.

However, the Commission intended to examine the subject in more detail and, if it found that "the underlying reality of fare-fixing" was in conflict with Article 5, Article 90 or Article 85 of the Treaty, or all of them, it would take the necessary action under those provisions.

In addition, the Commission informed Lord Bethell that it was writing to the Member States to inform them of its views and that it would emphasize to the governments that even if fares were lawfully fixed by them by means of autonomous price-fixing measures, the fares must not be so excessive as to infringe Article 86.

The Commission also stated that it was its intention to submit in the near future a draft directive on the objective criteria to be observed by Member States when approving air fares. With regard to the

airlines themselvs the Commission was conducting an investigation on the existence of certain restrictive agreements ancillary to the fixing of air fares.

II — Written procedure

On 10 September 1981 Lord Bethell brought an action in which he claims that the Court should:

(a) find that the Commission has failed to act in response to that portion of his letter of 13 May 1981 which dealt with airline concertation regarding air tariffs within the Community;

(b) alternatively, annul the Commission's communication of 17 July 1981 either in its entirety or in so far as it declares that the competition rules are not applicable to airlines with respect to the fixing of air tariffs within the Community;

(c) take such further action pursuant to Articles 175, 173 or 176 of the EEC Treaty as the Court in its wisdom may deem appropriate;

(d) in any event, declare that the costs of the proceedings are to be borne by the Commission.

By a document lodged on 17 November 1981 the Commission requested the Court pursuant to Article 91 (1) of the Rules of Procedure to decide as to its preliminary objection regarding the admissibility of the action, to declare the action inadmissible as regards its three main heads of claim and to order the applicant to pay the costs.

In his observations thereon, lodged on 29 January 1982, Lord Bethell requested the Court to dismiss the Commission's objection of inadmissibility and to order the Commission to pay the costs.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure on the objection alone without any preparatory inquiry.

By order of 17 February 1982 the Court decided pursuant to Article 95 (1) and (2) of the Rules of Procedure to assign the case to the Second Chamber for a ruling on the admissibility of the application.

By order of 17 February 1982 the Court allowed the United Kingdom Government to intervene in support of the applicant's submissions.

By a further order of the same date the Court allowed Aer Lingus Limited, Compagnie Nationale Air France, Linee Aeree Italiane SpA, British Airways Limited, British Caledonian Airways, Koninklijke Luchtvaart Maatschappij NV, Deutsche Lufthansa AG, Olympia Airways, Société Anonyme Belge d'Exploitation de la Navigation Aérienne and Scandinavian Airways System to intervene in support of the defendant's submissions.

III — Submissions and arguments on the admissibility of the application, presented by the parties in the course of the written procedure

The *Commission*, which is the defendant in the action and which raised the objection of inadmissibility, is of the opinion that the application is inadmissible in a number of respects.

A — The action based on Article 175 of the EEC Treaty

(a) The applicant's first head of claim concerns an alleged failure to act on the part of the Commission in response to

that portion of his letter of 13 May 1981 which dealt with airline concertation regarding air tariffs within the Community. According to the third paragraph of Article 175 the applicant is entitled to complain to the Court only that the Commission has, in infringement of the Treaty, failed to address to him any act other than a recommendation or an opinion.

(b) As to whether the Commission had a duty to address such an act to the applicant the following observations may be made:

According to the judgment of the Court of 18 October 1979 Case 125/78 (*GEMA*, [1979] ECR 3173) the complainant within the meaning of Article 3 (2) of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-62, p. 87) is not entitled to require from the Commission a final decision as regards the existence or non-existence of the alleged infringement; *a fortiori*, the applicant, whose complaint is based on Article 89 of the Treaty, and not on Regulation No 17, cannot compel the Commission through the intermediary of Article 175 to adopt a reasoned decision within the meaning of Article 89 (2) addressed to the Member States or the airlines, or both, for such a decision would necessarily decide as to the existence or non-existence of the infringement.

Article 89 of the Treaty provides *inter alia* that the Commission shall investigate cases of suspected infringement of the principles of Articles 85 and 86 "on application by a Member State or on its own initiative"; it does not provide the same legal protection for a private individual's complaint as that which he enjoys under the regulations implementing those articles. The applicant is therefore not entitled to a letter rejecting his complaint, far less to a decision doing so. In any case the Commission's letter of 17 July 1981 is in no way a decision rejecting the applicant's complaint; it merely gives the Commission's preliminary views concerning certain points raised by the applicant and informs him of the first steps of investigations undertaken under Article 89.

The question whether Article 175 of the Treaty may be used by a complainant under Article 3 (2) of Regulation No 17 or under Article 89 of the Treaty to compel the Commission to undertake initial steps in proceedings against a third party for infringement of the Treaty does not arise in this case: in its letter of 17 July 1981 the Commission informed the applicant that it had initiated such steps.

(c) As to the acts which the applicant requested the Commission to address to him the ambiguity created by the discrepancy between the invitation to the Commission to act in the letter of 13 May 1981 and the complaint of failure to act set out in the application might be sufficient in itself to justify a declaration of inadmissibility.

In any case, in so far as the applicant asked for specific action in his letter of 13 May 1981, the Commission defined its position informally, expressing a

willingness to act, and has in fact acted in broad conformity with the applicant's wishes. Since the position and the action were appropriate to the stage reached by the procedure started at the request of the applicant, an action for failure to act is inadmissible.

As promised, the Commission wrote to the governments setting out the same views as were expressed in the letter to the applicant and emphasizing that even where tariffs were legitimately fixed by governments by autonomous measures air transport tariffs must not be so unfair as to infringe Article 86.

As promised, the Commission wrote to the airlines with reference to Article 89 requesting details of the inter-airline arrangements for matters other than tariffs.

The Commission announced legislative proposals which were in accordance with the applicant's request for action and approved both a proposal for a regulation on the application of Articles 85 and 86 of the Treaty to air transport and a proposal for a directive on tariffs for scheduled air transport between Member States.

The Commission is aware of the risk of infringement of the rules on competition which is inherent in the close relations between governments and their national airlines. It certainly does not consider that no action is legally available against the airlines directly; it has started a fresh investigation and is endeavouring to obtain the material necessary to disprove or corroborate its preliminary point of view. It is too early for the Commission's position to be final at this stage.

The Commission's attitude and action are appropriate at the present stage of the procedure initiated at the applicant's request; the action under Article 175 is inadmissible in so far as it concerns his specific requests for action on the part of the Commission.

Inasmuch as the applicant may have wished the Commission to adopt a different approach, the judgment of the Court of 13 July 1971 Case 8/71 (*Komponistenverband* [1971] ECR 705) indicates that such a wish cannot be satisfied by means of an action under the second paragraph of Article 175.

Lastly, the portion of the letter of 13 May 1981 concerning concertation between airlines with regard to tariffs does not constitute a request for action addressed to the Commission and the latter is in no way bound to make known its views on opinions of fact or law expressed by Community citizens; in any case, it cannot be compelled to do so by means of an action under Article 175. In so far as the action under Article 175 is intended to elicit confirmation that the Commission agrees with that portion of the applicant's letter which contains opinions of fact and of law, it is inadmissible.

B — The action based on Article 173 of the EEC Treaty

(a) Contrary to the applicant's allegation the Commission nowhere

states in its letter of 17 July 1981 that the competition rules are not applicable to airlines with respect to the fixing of air tariffs within the Community.

(b) An examination of the wording of Articles 175 and 173, and of the case-law of the Court, indicates that the statement of a position, or action taken in response to an invitation to act under Article 175 does not constitute an act which may be challenged before the Court by an individual on the basis of Article 173.

(c) As to the criteria which the Court has laid down in its decisions for determining whether a letter may, by its very nature, constitute a decision, the conclusion must be that whilst it emanates from the competent authority the Commission's letter of 17 July 1981 does not satisfy the other criteria.

It does not produce legal effects for the applicant: it gives the Commission's provisional opinion on the factual and legal aspects of competition in the airline sector; it announces certain steps in an investigation under Article 89 of the Treaty, but those steps do not bring about any distinct change in the legal position of the airlines or the governments in question and, *a fortiori*, do not produce legal effects touching the applicant's interests or legally binding on him.

The letter of 17 July 1981 in no way signifies the end of a procedure; on the contrary, it announces the beginning of a procedure under Article 89 of the Treaty.

The position adopted by the Commission is not definitive; it could not be so at such an early stage in the inquiry. Far from rejecting the applicant's complaints the letter constitutes an essentially provisional measure.

Finally, the form of the letter is not such as to enable it to be identified as a decision.

For all those reasons the letter which was sent to the applicant on 17 July 1981 by the Commission is not a decision within the meaning of Article 189 of the Treaty and cannot be challenged by the applicant under Article 173.

C — The action based on Articles 175, 173 and 176 of the EEC Treaty

(a) The Commission is of the opinion that if the action is inadmissible under the first two heads of claim it must necessarily be so under the third.

(b) The latter is in any case inadmissible in itself: it is clear from Articles 173 and 174 of the Treaty that all that may be obtained from the Court under Article 173 is a declaration that the act in question is void; under Article 175, on the other hand, the only relief available is a declaration that the inaction complained of is unlawful. The Court cannot give a ruling which goes beyond those two measures.

Article 176 states expressly that it is for the institution in question to take the necessary measures to comply with the judgment of the Court; the Court has no power to take action itself under that provision.

2. *Lord Bethell*, the applicant in the main action and the defendant as regards the objection, considers that the Commission's objections of inadmissibility are unfounded in their entirety.

(a) The Commission has not taken a position, or acted, with respect to the core of his complaint, namely, the infringement of Article 85 of the Treaty by airlines when they fix tariffs. The formula expressed on that point in the Commission's letter of 17 July 1981, viewed in the context of its prior pronouncements and actions, is so obscure and incomprehensible that it cannot constitute the taking of a position within the meaning of Article 175 of the Treaty. Inasmuch as the Commission's letter referred to a review of the matter, the action taken and the manner in which the Commission described the action to the Court show that the applicant's key contention has not received any fresh consideration.

(b) The applicant does not seek an opinion from the Commission and his position is in no way ambiguous: he complains that he and his constituents are suffering as a result of infringements of Article 85 by the airlines and he calls upon the Commission either to initiate a procedure under Article 89 to rectify the situation or to state clearly why it does not do so.

(c) In so far as the Commission's letter of 17 July 1981 conveyed and confirmed the adoption of a definite position on the absence of any infringement of Article 85 (1) by the airlines in fixing tariffs the applicant seeks to have that position annulled under Article 173. In his letter of 13 May 1981 he expressly requested that the Commission's response, if negative, be in the form of a decision subject to appeal.

A — The action based on Article 175

(a) The applicant's main preoccupation, on which he based his invitation of 13 May 1981 to take action and which is at the heart of the proceedings before the Court, is the virtual absence of competition between airlines in the Community as a result of agreements and concerted practices between the airlines which constitutes an infringement by them of Article 85 (1); neither the limited government participation in fixing tariffs nor the provisions of Article 90 of the Treaty alter that conclusion. That was the complaint which led the applicant to request the Commission on 13 May 1981 to declare at last its intention of taking the steps envisaged in Article 89 and demanding information and explanations from the airlines without delay; it is on that basis that he has applied to the Court for a finding that the Commission has failed to act in response to that portion of his letter concerning concertation between airlines on air tariffs within the Community.

(b) Until 17 July 1981 the Commission rejected the possibility that the airlines might themselves be implicated in the infringements of Article 85 (1) as regards the fixing of tariffs; on the contrary, it took the view that tariffs were fixed by the Member States and constituted autonomous price-fixing measures; it continued to maintain in reserve the possibility of taking action against

Member States under Article 90 of the Treaty for maintaining in force measures contrary to the competition rules.

In the light of that the attitude taken by the Commission in its letter of 17 July 1981, far from constituting the taking of a position or action within the meaning of Article 175 of the Treaty can only be considered as an attempt, presumably motivated by political rather than legal considerations, to use words which could be made to mean whatever their authors wished.

Moreover, the various proposals drawn up by the Commission subsequently are at best not inconsistent with the applicant's position; at worst some of them imply a rejection of that position. In any case, none of them corresponds to his request to take action.

(c) Both in his letter of 13 May 1981 and in his application to the Court the applicant has clearly asked the Commission to investigate and impose penalties, as required by Article 89 of the Treaty, with regard to specific cases and he gave a precise description of the alleged infringements of the Treaty competition rules perpetrated by the airlines. There is no ambiguity on that point; the applicant's request cannot be characterized as an implied request for an opinion.

(d) The textual basis for the decision in *GEMA* on which the Commission relies is obviously not applicable in the present case: the measures of enforcement sought by the applicant must, in the absence of a procedural regulation applying to air transport, be sought on the basis of Article 89 of the Treaty and not the rules concerning the application of Articles 85 and 86. The application does not purport to obtain as its immediate outcome a declaration by the Court that the Commission's failure to adopt a decision reflecting the applicant's position on the infringement of Article 85 in the fixing of tariffs by airlines is unlawful; at the present stage he requests merely that the Commission initiate the procedure envisaged in Article 89. Should the Commission, during the course of that procedure, conclude that there has been no infringement or that an exemption is warranted under Article 85 (3) there will be time enough to consider whether that conclusion may be reviewed by the Court.

(e) The absence of a procedural regulation in the air transport sector cannot deprive individuals of any right which may be reviewed by the Court to complain to the Commission on the subject of competition; that individuals having the necessary interest have a right to complain is to be inferred from the combined provisions of Articles 175 and 89. It is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 that persons affected by price-fixing among airlines in breach of Article 85 (1) should be able to institute proceedings if their request is not complied with either wholly or in part.

(f) There is no comparison between the Commission's action in the *Komponistenverband* case, where it acted

essentially to satisfy the interest for which protection was sought, and the reluctant, obscure steps which it claims to have taken in the present case in response to the applicant's complaints. In the present instance the Commission has neither adopted a position nor acted.

B — The action based on Article 173

If the correct interpretation of the letter of 17 July 1981 is that the Commission did not adopt a position with respect to the autonomous fixing of airline tariffs by governments, no action is available under Article 173; however, if it amounted to a definition of the Commission's position in that sense, such action is possible.

C — The action based on Article 176

It is for the Court to decide what action on its part is appropriate in the event of its upholding his application under either Article 175 or Article 173.

IV — Oral procedure

At the sitting on 18 March 1982 the Commission, represented by Bastiaan van der Esch; Lord Bethell, represented by Ian S. Forrester; and the airlines which had intervened, represented by Eduard Marissens, presented oral argument on the admissibility of the application and their replies to the questions raised by the Court.

The *airlines, intervening,* maintained that the application was inadmissible in a number of respects.

It was inadmissible under Article 175 because the applicant was not entitled to demand that the Commission address a decision to him and there was no provision of Community law giving him any *locus standi.*

The application was inadmissible under Article 173 because it was directed against a measure which did not have the form of a decision.

The other objections raised by the Commission did not belong to a preliminary examination of the application from the point of view of procedure, but led to a consideration of the merits; in particular, the Court could not, at this stage, decide whether or not the Commission had, as it claimed, acted on the applicant's request. The Commission had no capacity to act: the competition rules did not apply to transport; the Commission had no powers of action in that domain and any action on its part would amount to a misuse of powers.

The Advocate General delivered his opinion at the sitting on 6 May 1982.

Decision

1 By application lodged at the Court Registry on 10 September 1981 Lord Bethell brought an action under the third paragraph of Article 175 of the

EEC Treaty for a declaration that the Commission had failed, in infringement of the Treaty, to adopt measures against a concertation alleged to exist between European airlines in the matter of fares for passenger transport, although requested to do so by him in a letter of 13 May 1981.

2 In the alternative the applicant asks the Court, in pursuance of the second paragraph of Article 173, to annul the communication of 17 July 1981, constituting the reply to his letter of 13 May 1981, by which the Commission refused to do as he had requested.

The background to the dispute

3 It may be seen from the file that Lord Bethell, who is a Member of the European Parliament, a Member of the House of Lords and Chairman of the Freedom of the Skies Campaign, has for some time past been engaged in action against agreements and concerted practices which, he alleges, exist between airlines operating scheduled flights as regards passenger fares in Europe.

4 In a letter sent to the Commission on 13 May 1981, after setting out the problem as a whole, the applicant complained that the Commission had done nothing to bring that situation to an end and asked "that the Commission make a start with discharging the duty it should have been discharging in the past, that it announce that it is going to act under Article 89" of the EEC Treaty, "and that it start to do so by demanding information and explanations from the airlines". In conclusion Lord Bethell gave the Commission notice that he intended to complain to the Court of Justice under Article 173 or 175 of the Treaty if the Commission declined to take the action he deemed appropriate.

5 By letter of 17 July 1981 the Director-General for Competition explained to the applicant the Commission's attitude with regard to the problem raised in his letter of 13 May 1981 in so far as it related to the fixing of air fares. He

indicated in this connection that a recent examination of air fares completed by the Commission in collaboration with governmental experts showed that in most cases the final fixing of air fares was the sole responsibility of the Member States so that there was in principle no ground to scrutinize the activity of companies on the basis of Article 85. However, bearing in mind the special relationships existing between the States and the companies, the Commission would examine the subject further from the point of view of Articles 5 and 90 of the Treaty in conjunction with Article 86, regard being had to the fact that most scheduled airlines were in a dominant position within the common market. After emphasizing the difficulty and complexity of an analysis intended to establish the abusive nature of air fares, the Director-General informed the applicant of the future steps proposed by the Commission; transmission to the Council of a report on the examination it had effected; communication to the Member States drawing their attention to the fact that tariffs must not be unfair and thereby infringe Article 86; communication to the companies under Article 89 of the Treaty requesting full details of various arrangements and common rules relating to air transport; submission to the Council of a draft directive and a draft regulation applying Articles 85 and 86 of the Treaty to air transport to supplement Regulation No 17.

6 Lord Bethell was not satisfied with that answer and on 10 September 1981 brought an action based, as stated above, on Article 175 or, in the alternative, on Article 173 of the Treaty.

7 By an application dated 17 November 1981 under Article 91 of the Rules of Procedure the Commission put forward an objection of inadmissibility and asked the Court for a decision thereon at this preliminary stage of the procedure.

8 The United Kingdom and a number of airline operators, comprising the principal European airlines, applied to intervene in the action. The United Kingdom stated that it wished to intervene in support of Lord Bethell's claim

that the Commission's communication of 17 July 1981 should be declared void in so far as the Commission stated that there was no ground for applying Article 85 with regard to the fixing of air fares. The airlines for their part applied to intervene in support of the Commission's submissions.

9 The Court decided to accede to the Commission's request and as a preliminary step to consider the objection of inadmissibility. Following that decision, by order of 17 February 1982 it assigned the case to the Second Chamber for a decision as to the admissibility of the action.

10 By orders of the same date the Court allowed the intervention of the United Kingdom and the airlines. Only the airlines gave their views, during the oral procedure, as to the question of admissibility.

The question of admissibility

11 In the words of the second paragraph of Article 173, any natural or legal person may, under the conditions laid down in that article, institute proceedings "against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former".

12 According to the third paragraph of Article 175, any natural or legal person may, under the conditions laid down in that article, complain to the Court that an institution of the Community "has failed to address to that person any act other than a recommendation or an opinion".

13 It appears from the provisions quoted that the applicant, for his application to be admissible, must be in a position to establish either that he is the addressee of a measure of the Commission having specific legal effects with regard to him, which is, as such, capable of being declared void, or that the

Commission, having been duly called upon to act in pursuance of the second paragraph of Article 175, has failed to adopt in relation to him a measure which he was legally entitled to claim by virtue of the rules of Community law.

14 In reply to a question from the Court the applicant stated that the measure to which he believed himself to be entitled was "a response, an adequate answer to his complaint saying either that the Commission was going to act upon it or saying that it was not and, if not, giving reasons". Alternatively the applicant took the view that the letter addressed to him on 17 July 1981 by the Director-General for Competition was to be described as an act against which proceedings may be instituted under the second paragraph of Article 173.

15 The principal question to be resolved in this case is whether the Commission had, under the rules of Community law, the right and the duty to adopt in respect of the applicant a decision in the sense of the request made by the applicant to the Commission in his letter of 13 May 1981. It is apparent from the content of that letter and from the explanations given during the proceedings that the applicant is asking the Commission to undertake an investigation with regard to the airlines in the matter of the fixing of air fares with a view to a possible application to them of the provisions of the Treaty with regard to competition.

16 It is clear therefore that the applicant is asking the Commission, not to take a decision in respect of him, but to open an inquiry with regard to third parties and to take decisions in respect of them. No doubt the applicant, in his double capacity as a user of the airlines and a leading member of an organization of users of air passenger services, has an indirect interest, as other users may have, in such proceedings and their possible outcome, but he is nevertheless not in the precise legal position of the actual addressee of a decision which may be declared void under the second paragraph of Article 173 or in that of the potential addressee of a legal measure which the Commission has a duty to adopt with regard to him, as is position under the third paragraph of Article 175.

17 It follows that the application is inadmissible from the point of view of both Article 175 and Article 173.

Costs

18 Under Article 69 (2) of the Rules of Procedure an unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading.

19 As the applicant has failed in his submissions he must be ordered to pay the costs.

20 As only the Commission has asked for costs the order must be limited to the costs incurred by the Commission.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicant to pay the costs incurred by the Commission and orders the interveners to bear their own costs.**

Due Pescatore Chloros

Delivered in open court in Luxembourg on 10 June 1982.

For the Registrar

H. A. Rühl
Principal Administrator

O. Due
President of the Second Chamber