JUDGMENT OF THE COURT
29 June 1993 *

In Case C-298/89,

Government of Gibraltar, represented by Ian S. Forrester QC, of the Scots Bar, and Richard O. Plender QC, of the Bar of England and Wales, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Woelter, 8 Rue Zithe,

applicant,

v

Council of the European Communities, represented by Antonio Sacchetini, a Director in its Legal Service, and Jacques Delmoly, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Jörg Käser, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad-Adenauer,

defendant,

supported by

Kingdom of Spain, represented by Javier Conde de Saro, Director-General for Community Legal and Institutional Coordination, and by Rosario Silva de Lapuerta, Abogado del Estado, of the State Legal Department for Matters before the Court of Justice, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

* Language of the case: English.

United Kingdom of Great Britain and Northern Ireland, represented by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, assisted by Derrick Wyatt, Barrister, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

Commission of the European Communities, represented by Thomas Van Rijn, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

interveners,

CONCERNING, at the present stage of the proceedings, the admissibility of an action brought under the second paragraph of Article 173 of the EEC Treaty for the annulment of Article 2(2) of Council Directive 89/463/EEC of 18 July 1989 amending Directive 83/416/EEC concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States (OJ 1989 L 226, p. 14),

THE COURT,

composed of: O. Due, President, C. N. Kakouris, G. C. Rodríguez Iglesias, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, R. Joliet, F. A. Schockweiler, J. C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco, P. J. G. Kapteyn and D. A. O. Edward, Judges,

Advocate General: C. O. Lenz,
Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 6 May 1992, at which the Council was represented by Antonio Sacchetini and John Carbery, Legal Adviser, acting as Agents, and the Kingdom of Spain was represented by Alberto José Navarro Gonzales, Director-General for Community Legal and Institutional Coordination, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 4 May 1993,

gives the following

Judgment

1 By application lodged at the Court Registry on 28 September 1989, the Government of Gibraltar brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Article 2(2) of Council Directive 89/463/EEC of 18 July 1989 amending Directive 83/416/EEC concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States (OJ 1989 L 226, p. 14).

2 The aim of Council Directive 83/416/EEC of 25 July 1983 (OJ 1983 L 237, p. 19) is to establish a Community programme for the authorization by the Member States of scheduled inter-regional air services between those States in order to promote the development of the intra-Community network. The directive relates in particular to the authorization procedure to be followed, the possible grounds for refusal and the arrangements for approving the tariffs charged.

3 That directive was first amended by Council Directive 86/216/EEC of 26 May 1986 (OJ 1986 L 152, p. 47), which temporarily exempts from its application, on the same terms as those relating to the Greek islands already exempted by Directive 83/416, the airports in the Atlantic islands comprising the autonomous region of the Azores and Oporto airport, owing to the insufficiency of air traffic in those islands and the continuing development of the infrastructure at Oporto airport.

4 It was again amended by Directive 89/463 of 18 July 1989, cited above, which, in the light of the experience gained, lays down new rules to give airlines greater scope to develop markets and to promote the development of direct services between the various regions in the Community rather than indirect services. Essentially, this last directive extends the application of the foregoing arrangements to flights operated with aircraft with more than 70 passenger seats and eliminates several of the grounds for refusal of authorization for scheduled inter-regional air services contained in the initial directive. Directive 89/463 also contains a provision whereby its application to Gibraltar airport is suspended until the cooperation arrangements agreed between the Governments of the Kingdom of Spain and the United Kingdom come into operation.

5 That provision, which is contained in Article 2(2) of the directive with which this action is concerned, is worded as follows:

'Application of the provisions of this Directive to Gibraltar airport shall be suspended until the arrangements in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 have come into operation. The Governments of the Kingdom of Spain and the United Kingdom will so inform the Council on that date'.

6 The Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 provides in particular, in its paragraph 8, that the arrangements for the joint use of Gibraltar airport will come into operation when the British authorities have notified their Spanish counterparts that the legislation necessary to give effect to paragraph 3.3 (customs and immigration controls in the respective terminals) is in force, or on completion of the construction of the Spanish terminal, whichever is the later, but in any event not more than one year after the notification referred to above.

7 Pursuant to the first subparagraph of Article 91(1) of the Rules of Procedure of the Court of Justice, the Council has raised an objection of inadmissibility against the

application and has requested the Court to decide on that objection without going into the substance of the case.

8 Pursuant to Article 93(1) and (2) of the Rules of Procedure, the Court has granted the Kingdom of Spain (order of 15 November 1989), the United Kingdom (order of 17 January 1990) and the Commission of the European Communities (order of 21 February 1990) leave to intervene in support of the form of order sought by the defendant.

9 In support of its objection of inadmissibility, the Council first challenges the capacity of the Government of Gibraltar to bring proceedings, asserting that under British law the power to bring an action such as this is vested in the Governor. It further contends that a directive cannot be the subject of proceedings for annulment brought by a natural or legal person under the second paragraph of Article 173 of the EEC Treaty. Lastly, the Council maintains that the contested provision is not of direct or individual concern to the Government of Gibraltar.

10 The Government of Gibraltar claims that the objection of inadmissibility should be rejected. It maintains, first, that its legal personality is recognized under British law and that it encompasses, *inter alia*, the capacity to bring these proceedings, since the action relates to a 'defined domestic matter' within the meaning of section 55 of Annex 1 to the Gibraltar Constitution Order of 23 May 1969 and the Despatch from the Foreign Secretary to the Governor of Gibraltar of the same date, which includes tourism and the airport's civil air terminal amongst the matters recognized as falling within the competence of the ministers of Gibraltar. The applicant goes on to assert that Article 2(2) of Directive 89/463 constitutes a decision distinct from that directive which, since it has a direct effect, is subject to review by the Court of Justice under the second paragraph of Article 173 of the EEC Treaty. Lastly, the Government of Gibraltar claims to be directly and individually concerned by virtue of the nature of its participation in the procedure for the authorization of air services, as the body responsible for improving the well-being of the population of Gibraltar and as the owner of the airport terminal.

11 The interveners have all endorsed and expanded the objection of inadmissibility raised by the Council. In particular, the United Kingdom maintains, with regard to the constitutional provisions specific to Gibraltar, that as regards the fulfilment of international obligations, even adopting the hypothesis most favourable to the applicant's case, it is only on the instructions of the Governor that legal proceedings may be initiated on behalf of the Government of Gibraltar. The Kingdom of Spain and the Commission, for their part, observe that the contested directive does not contain any individual decision against which proceedings may be brought under the second paragraph of Article 173 of the EEC Treaty.

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

13 Article 173 of the EEC Treaty provides:

'The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

Any natural or legal person may, under the same conditions, 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. ...'.

14 Since the Government of Gibraltar is not — and does not claim to be — amongst the applicants provided for in the first paragraph of Article 173, the admissibility of its application must be determined solely in the light of the second paragraph of that article.

15 It should be noted, first, that the Court has held, since its judgment in Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes* v *Council* [1962] ECR 471, that the term 'decision' used in the second paragraph of Article 173 of the Treaty has the technical meaning employed in Article 189, and that the criterion for distinguishing between a measure of a legislative nature and a decision within the meaning of that latter article must be sought in the general 'application' or otherwise of the measure in question.

16 It should also be noted that even though a directive is in principle binding only on the parties to whom it is addressed, namely the Member States, it is normally a form of indirect regulatory or legislative measure. Moreover, the Court has already had occasion to classify a directive as a measure of general application (see, for example, the judgment in Case 70/83 *Kloppenburg* [1984] ECR 1075, paragraph 11, and the order in Case 160/88 R *Fédération européenne de la santé animale* v *Council* [1988] ECR 4121, paragraph 28).

17 Furthermore, the Court has consistently held that the general application, and thus the legislative nature, of a measure is not called in question by the fact that it is possible to determine more or less precisely the number or even the identity of the persons to whom it applies at any given time, as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose (judgments in Case 6/68 *Zuckerfabrik Watenstedt* v *Council* [1968] ECR 409; Case 64/69 *Compagnie française commerciale et financière* v *Commission* [1970] ECR 221, paragraph 11; Case 242/81 *Roquette Frères* v *Council* [1982] ECR 3213, paragraph 7; Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris* v *Commission* [1988] ECR 2181, paragraph 13; order in *Fédération européenne de la santé animale*, cited above, paragraph 29; Joined Cases C-15/91 and C-108/91 *Buckl* [1992] ECR I-6061, paragraph 25).

18 Lastly, the Court has already recognized that, where an instrument contains limitations or derogations which are temporary (judgments in *Zuckerfabrik Watenstedt*, cited above, and *Compagnie française commerciale et financière*, cited above, paragraphs 12 to 15) or territorial in nature (judgment in Joined Cases 103/78 to 109/78 *Société des Usines de Beauport* v *Council* [1979] ECR 17, paragraphs 15 to 19), they form an integral part of the provisions as a whole within which they are found and, in the absence of any misuse of powers, are of the same general nature as those provisions.

19 In the present case, there is no dispute as to Directive 89/463 being of general application, save as regards Article 2(2), and the directive does indeed concern all scheduled inter-regional air services in the Community and it modifies the system for the authorization of such services by the Member States.

20 The provision under challenge suspends the application of that new system to services to or from Gibraltar until the arrangements in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 come into operation. It thus affects equally all air carriers wishing to operate a direct inter-regional air service between another Community airport and Gibraltar airport and, more generally, all those using the latter airport. It therefore applies to objectively defined situations.

21 Furthermore, it should be noted that Gibraltar airport is not the only airport to have been temporarily excluded from the territorial scope of the directive. Other airports (those in the Greek islands and in the Atlantic islands comprising the autonomous region of the Azores, as well as Oporto airport) have already been temporarily exempted from its application, by virtue of Directive 83/416 of 25 July 1983 and Directive 86/216 of 26 May 1986, cited above, for technical or economic reasons, such as the insufficiency of air traffic or the continuing development of the airport infrastructure.

22 Directive 89/463 justifies the suspension of its application to Gibraltar airport by reference to the agreement in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987. This constitutes a finding that there is an obstacle of an objective nature to implementation of the directive, having regard to its aims. In view of the differences between the Kingdom of Spain and the United Kingdom, discussed at length by the applicant itself, concerning sovereignty over the territory on which Gibraltar airport is situated and the operational problems resulting from those differences, the development of air services between that airport and the other airports within the Community is conditional on the implementation of the cooperation arrangements agreed between those two States.

23 In those circumstances, Article 2(2) of Directive 89/463 cannot be regarded as constituting a decision within the meaning of the second paragraph of Article 173, but on the contrary is of the same general nature as that directive.

24 It follows that the application is inadmissible and must therefore be dismissed, without there being any need to consider the other submissions made in support of the objection of inadmissibility.

Costs

25 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Government of Gibraltar has been unsuccessful, it must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4) of the Rules of Procedure, the Kingdom of Spain, the United Kingdom and the Commission, interveners, are to bear their own costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicant to pay the costs;

3. Orders the Kingdom of Spain, the United Kingdom and the Commission, interveners, to pay their own costs.

Due Kakouris Rodríguez Iglesias Zuleeg Murray

Mancini Joliet Schockweiler Moitinho de Almeida

Grévisse Diez de Velasco Kapteyn Edward

Delivered in open court in Luxembourg on 29 June 1993.

J.-G. Giraud — Registrar

O. Due — President