

JUDGMENT OF THE COURT
29 June 1995 *

In Case C-135/93,

Kingdom of Spain, represented by Alberto Navarro González, Director General for Community Legal and Institutional Coordination, and Miguel Bravo-Ferrer Delgado, Abogado del Estado, of the 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,

applicant,

v

Commission of the European Communities, represented by Francisco Enrique González Diaz and Michel Nolin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for (1) a declaration that the Commission's decision of 23 December 1992 not to modify the Community framework for State aid to the

* Language of the case: Spanish.

motor vehicle industry and to extend its validity until the Commission organized a review of it is non-existent or, if appropriate, the annulment of that decision, and (2) the annulment of the extension of the said framework by Decision 91/C 81/05 (OJ 1991 C 81, p. 4) in so far as that decision is the basis for the decision of 23 December 1992,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler (Rapporteur) and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, J. L. Murray, D. A. O. Edward, G. Hirsch, H. Ragnemalm and L. Sevón, Judges,

Advocate General: C. O. Lenz,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 March 1995,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 5 April 1993, the Kingdom of Spain brought an action under the first paragraph of Article 173 of the EEC Treaty for (1) a declaration that the Commission's decision of 23 December 1992 not to modify the Community framework for State aid to the motor vehicle industry and to extend its validity until the Commission organized a review of it was

non-existent or, if appropriate, the annulment of that decision, and (2) the annulment of the extension of the said framework by Decision 91/C 81/05 (OJ 1991 C 81, p. 4) in so far as that decision was the basis for the decision of 23 December 1992.

- 2 The Commission informed the Spanish Government by letter of 31 December 1988 that at its meeting on 22 December 1988, and following its decision of 19 July 1988 to establish a general Community framework for State aid to the motor vehicle industry, on the basis of Article 93(1) of the Treaty, it had drawn up the rules for application of that framework, which were set out in a document enclosed with the letter. The Commission stated that that document took into account the principal observations made by the representatives of the Member States at a multilateral meeting on 27 October 1988. It requested the Spanish Government to notify its acceptance of the framework within one month.
- 3 The framework was published as a communication (89/C 123/03) in the *Official Journal of the European Communities* (OJ 1989 C 123, p. 3). Point 2.2 thereof provides for an obligation to notify various categories of aid, and for the communication by the Member States to the Commission of an annual report giving information on all aid granted, including aid not subject to the obligation of prior notification.
- 4 Point 2.5 of the framework states that the measures are to 'enter into force on 1 January 1989' and 'be valid for two years', and that 'the Commission shall at the end of this period review the utility and scope of the framework'.
- 5 Pending its acceptance by all the Member States, implementation of the framework was delayed until after the first six months of 1989 for ten States, until January

1990 for Spain, and until May 1990 for Germany. The Spanish Government, by letter of 5 February 1990, had accepted that the framework should apply to Spain only from 1 January 1990.

- 6 By letter of 31 December 1990 the Commission informed the Spanish Government that it had carried out the review of the utility and scope of the framework and that, in view of the situation of the Community motor vehicle industry, it considered it necessary to extend the framework.

- 7 The Commission's decision to extend the framework was also published as a communication (91/C 81/05) in the *Official Journal of the European Communities* (OJ 1991 C 81, p. 4). The fourth paragraph of that communication states that 'the only modification which the Commission has decided extends the prior notification obligation for the Federal Republic of Germany to Berlin (West) and the territory of the former GDR'.

- 8 The fifth paragraph reads:

'After two years the framework shall be reviewed by the Commission. If modifications appear necessary (or the possible repeal of the framework) these shall be decided upon by the Commission following consultation with the Member States.'

- 9 In a letter of 27 January 1993 from the Director General of the Directorate-General for Competition, the Commission first reminded the Spanish Government that in December 1990 it had decided to extend the framework without limiting its duration, but had undertaken to review it after two years and to modify or repeal

it, if necessary, after consulting the Member States. It observed that, in accordance with the undertaking given in its letter of 31 December 1990, it had carried out that review with the Member States at a multilateral meeting on 8 December 1992 at which the great majority of Member States had expressed their satisfaction with the current application of the framework and their wish for it to continue for some years. Finally, it informed the Spanish Government that it had consequently decided on 23 December 1992 not to modify the framework, which, it added, would remain valid 'until the next review organized by the Commission'.

- 10 That decision of the Commission was also published as a communication (93/C 36/06) in the *Official Journal of the European Communities* (OJ 1993 C 36, p. 17).
- 11 Considering that decision to be unlawful, or even non-existent, as having been adopted in breach of essential procedural requirements, Article 190 of the Treaty and the principle of legal certainty, and that that illegality also affected the extension of the framework decided at the end of 1990, in so far as it was the basis for the decision of 23 December 1992, the Kingdom of Spain brought the present action.
- 12 By separate document lodged at the Court Registry on 17 May 1993, the Commission pleaded that the action was inadmissible, in accordance with Article 91(1) of the Rules of Procedure. By decision of 14 December 1993 the Court, after hearing the Advocate General, reserved its decision on that plea for the final judgment.

Admissibility

- 13 The Commission submits that the decision of 23 December 1992, in so far as it extends the validity of the framework for an indefinite period, is just an act which

purely confirmed an earlier decision, namely the 1990 extension. It also submits that in so far as the 1992 decision does not modify the content of the framework, it is of a purely internal nature and does not alter the legal position of the applicant under the 1990 extension decision. Finally, with respect to the latter decision, the Commission considers that the action was not brought within the period prescribed in Article 173 of the Treaty.

- 14 The Kingdom of Spain does not accept that the 1990 decision could in itself extend the validity of the framework for an indefinite period, since such a substantial change in the nature of the framework would have required the express agreement of the Member States. It considers that the decision of 23 December 1992 necessarily has legal effects, in that it obliges Member States to comply with the scheme of the framework during its term, and constitutes the expression of a choice between different possibilities available to the Commission.
- 15 The Kingdom of Spain further submits that it is challenging the 1990 extension decision only indirectly, under Article 184 of the Treaty, by invoking its illegality in support of the action against the decision of 23 December 1992. It then argues that by contesting, in the body of its originating application, the very existence of the 1990 extension decision, it is pleading conduct offending against public policy of which the Court is required to take cognizance at any time, whatever the procedural context in which it is raised.
- 16 With respect to the action against the 1990 extension decision, it must be stated that in its application the Kingdom of Spain does not invoke the illegality of that decision as a ground for the annulment of the decision of 23 December 1992, but

formally seeks its annulment. To be admissible, such a claim should have been made within the period of two months laid down in the third paragraph of Article 173 of the Treaty.

- 17 In any case, to accept that an applicant could, in an action for annulment of a decision, raise a plea of illegality against an earlier act of the same kind, annulment of which he could have sought directly, would make it possible indirectly to challenge earlier decisions which were not contested within the period for bringing proceedings prescribed in Article 173 of the Treaty, thereby circumventing that time-limit.

- 18 Finally, with reference to the argument that serious and manifest defects such as to affect the very existence of a legal act can be submitted for examination by the Court, irrespective of when they are raised, it must be pointed out that the Kingdom of Spain is not seeking a finding by the Court that the 1990 extension decision is non-existent. Moreover, neither from the letter of 31 December 1990 by which the Commission informed the Spanish Government of its decision to extend the framework, nor from the relevant communication published in the *Official Journal of the European Communities* is it apparent that the decision is vitiated by an irregularity of such manifest seriousness that it could not be tolerated by the Community legal order.

- 19 The action must therefore be dismissed as inadmissible in so far as it is directed against the 1990 extension decision.

- 20 With respect to the action against the decision of 23 December 1992, it should be noted that the Court has consistently held that an action for annulment must be available in the case of all measures adopted by the institutions, whatever their

nature or form, which are intended to have legal effects (Case 22/70 *Commission v Council* [1971] ECR 263, paragraph 42).

- 21 Whether the action against the decision of 23 December 1992 is admissible thus depends on whether that decision changed the legal position resulting from the 1990 extension decision.
- 22 To assess whether it did, the content of the 1990 decision must be analysed in the light not only of its wording but also of its context and legal background.
- 23 It can be seen from the fourth paragraph of point 1 of the communication on the original framework that it was adopted on the basis of Article 93(1) of the Treaty.
- 24 Under that provision the Commission, in cooperation with the Member States, is to keep under constant review all systems of aid existing in those States. It is to propose to them any appropriate measures required by the progressive development or by the functioning of the common market. The provision thus involves an obligation of regular, periodic cooperation on the part of the Commission and the Member States, from which neither the Commission nor a Member State can release itself for an indefinite period depending on the unilateral will of either of them.
- 25 The scope of the 1990 decision to extend the framework must be examined in the light of that obligation.

- 26 By making application of the framework subject to its acceptance by the Member States and by providing for it to be valid for two years, at the end of which the Commission was to review its utility and scope, the original framework fully complied with the obligation of regular, periodic cooperation imposed on the Commission and the Member States by Article 93(1) of the Treaty.
- 27 Having regard to that obligation, it must be accepted that by providing for a further review to take place after two years of application, the 1990 extension decision, despite a slightly different formulation, was intended to renew the framework for a further period of two years, at the end of which a decision was to be taken to maintain, amend or repeal it.
- 28 That intention to renew the provision in point 2.5 of the original framework relating to its period of validity is moreover confirmed by the fourth paragraph of the relevant communication, according to which the only modification of the original framework made by the 1990 extension decision was the extension to West Berlin and the territory of the former German Democratic Republic.
- 29 Consequently, in the absence of a further extension, the framework, which had been renewed by the 1990 decision for another two years from 1 January 1991, would have expired on 31 December 1992. It follows that the Commission's decision of 23 December 1992 to extend the validity of the framework beyond that date produced legal effects of its own.
- 30 In those circumstances, the action is admissible in so far as it is directed against the Commission's decision of 23 December 1992.

Substance

- 31 In support of its action, the Kingdom of Spain raises several pleas alleging defective external appearance of the decision of 23 December 1992, lack of competence of the Commission, failure to comply with the procedure under Article 93(1) of the Treaty, and breach of Article 190 of the Treaty on the ground of lack of legal basis.
- 32 It submits, firstly, that the text of the letter of 27 January 1993, by which the Commission informed it that it had decided on 23 December 1992 to extend the framework, does not make it possible to ascertain whether that alleged 'decision' by the Commission satisfies the minimum requirements for it to exist in law.
- 33 It considers, secondly, that by deciding to extend the validity of the framework until it organized a further review, the Commission altered the very nature of the framework by making it valid for an indefinite period. According to the Kingdom of Spain, by unilaterally changing the nature of the framework in such a way without first consulting the Member States and obtaining their consent, the Commission exceeded the limits of its competence under Article 93(1) of the Treaty, and thus also infringed that provision.
- 34 The Kingdom of Spain states, finally, that by referring in its letter of 27 January 1993, as also in the communication published in the *Official Journal of the European Communities*, to Article 93(1) of the Treaty as the basis for the framework it had decided to extend, the Commission failed to state the legal basis for the adoption of the extension decision itself.

- 35 By those pleas the applicant seeks to deny that the Commission could have extended the validity of the framework for an indefinite period without consulting the Member States, or indeed obtaining their consent.
- 36 However, it does not appear that by its decision of 23 December 1992 the Commission did actually extend for an indefinite period the framework originally agreed with the Member States.
- 37 It is settled law that where the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to its being incompatible with the Treaty (Case 218/82 *Commission v Council* [1983] ECR 4063, paragraph 15). Consequently, even though the provision to the effect that the framework would remain valid until the following review organized by the Commission may appear ambiguous, it must be understood in a manner consistent with the Treaty provision it is intended to implement (see, as an instance of the application of that principle, Joined Cases 201/85 and 202/85 *Klensch v Secrétaire d'Etat* [1986] ECR 3477, paragraph 21).
- 38 As noted in paragraph 24 above, the obligation of regular periodic cooperation under Article 93(1) of the Treaty precludes existing systems of aid from being examined according to rules established or agreed for an indefinite period depending on the unilateral will of either the Commission or the Member States.

39 In those circumstances, the decision of 23 December 1992 must be interpreted as having extended the framework only until its next review, which, like the previous ones, had to take place at the end of a further period of application of two years.

40 Since the pleas in law raised by the Kingdom of Spain against the decision of 23 December 1992 to extend the validity of the framework until the Commission organized its review are based on the incorrect premise that that decision altered the period of validity of the framework by extending it for an indefinite period, they must be rejected.

41 Accordingly, the action must be dismissed in its entirety.

Costs

42 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, under Article 69(3) the Court may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads or where the circumstances are exceptional. Such exceptional circumstances are present in this case in that, although the Kingdom of Spain's action must be dismissed, the legal position it put forward has largely been upheld. It thus appears equitable to decide that the parties are to bear their own costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;
2. Orders the parties to bear their own costs.

Rodríguez Iglesias	Schockweiler	Kapteyn	Mancini
Kakouris	Moitinho de Almeida	Murray	Edward
Hirsch	Ragnemalm		Sevón

Delivered in open court in Luxembourg on 29 June 1995.

R. Grass
Registrar

G. C. Rodríguez Iglesias
President