

OPINION OF ADVOCATE GENERAL
JACOBS

delivered on 16 December 1992 *

My Lords,

1. In these proceedings the Parliament seeks the annulment under Article 173 of the EEC Treaty of a decision adopted in a meeting of the Council to provide special aid to Bangladesh (Case C-181/91) and of the measures taken by the Commission for the implementation of that decision (Case C-248/91). The proceedings raise the issue of principle whether a decision presented as a decision of the Member States meeting in Council can be challenged under Article 173 of the Treaty.

Background to the dispute

2. This dispute has its origin in a cyclone which devastated Bangladesh in the night of 29 to 30 April 1991. Following that cyclone, the Commission made an immediate grant of aid to Bangladesh of ECU 10 million and prepared a plan for special aid of ECU 60 million. The plan was first considered by the Finance Ministers of the Member States who met informally in Luxembourg on 11 May 1991. The plan was examined by the Council (General Affairs) in the course of a regular meeting held in Brussels on 13 and 14 May 1991 and attended by the Ministers for Foreign Affairs of the Member States. It

did not, however, appear on the formal agenda of that meeting. On 14 May the decision was taken, at a working lunch attended by the Ministers and by a Member of the Commission, to provide special aid of ECU 60 million to Bangladesh in accordance with the Commission's plan. The decision was the subject of a press release under the heading 'Aide au Bangladesh — conclusions du Conseil' (reference 6004/91, Presse 60-G). The press release read as follows:

'Les États membres réunis au sein du Conseil, sur la base d'une proposition de la Commission, ont décidé, dans le cadre d'une action communautaire, d'une aide spéciale de 60 Mécus pour le Bangladesh.

La répartition entre les États membres se fera selon la clé PNB.

Cette aide sera intégrée dans l'action générale de la Communauté vers le Bangladesh.

L'aide est fournie soit directement par les États membres, soit par le biais d'un compte géré par la Commission.

La Commission assure la coordination d'ensemble de l'aide spéciale de 60 Mécus.'

* Original language: English.

The same statement appeared in the draft minutes of the Council's meeting under the heading 'Divers — Aide au Bangladesh'.

approval has to be given by the Financial Controller, payments are made by the accounting officer, and proper implementation is monitored by the Court of Auditors and the budgetary authority).

3. Following the decision to provide the aid, the Commission opened a special account with a Belgian bank and invited the Member States to transfer their contributions to that account. Greece paid its contribution of ECU 716 775.45 into the special account. The other Member States however made their contributions direct, by way of bilateral aid. The contribution of Greece was incorporated into the Community budget. This came about as follows. The Director of the Revenue Directorate in the Directorate-General for Budgets of the Commission entered the sum of ECU 716 775.45 under Article 900 (Miscellaneous revenue) of the general budget of the Communities for 1991. In accordance with the provisions of the Financial Regulation applicable to the general budget of the European Communities (updated text published at OJ 1991 C 80, p. 1), a supplementary heading for the same amount was opened on the expenditure side of the budget (Item B7-3000: Financial and technical cooperation with Asian and Latin American developing countries). It appears from a letter of 2 August 1991 addressed by the Commission to the Chairman of the Committee on Budgetary Control of the European Parliament that that supplementary heading was shown and monitored separately in the accounts. That letter also stated that:

4. By its application against the Council, the Parliament seeks the annulment of the decision to provide the special aid of ECU 60 million to Bangladesh. The Parliament claims that although the decision is described in the press release as a decision taken by 'the Member States meeting in Council', it is in reality a decision of the Council. The Parliament claims that the decision has budgetary implications and should have been adopted in accordance with the procedure provided for in Article 203 of the Treaty. This would have given the Parliament a significantly increased role. The Parliament, while stressing that it supported the grant of Community aid in such a case, claims that by failing to adopt the decision under Article 203 the Council infringed the Parliament's prerogatives. It refers to the decision of the Court in Case C-70/88 *European Parliament v Council* [1990] ECR I-2041 where the Court stated at paragraph 27 of the judgment:

'... an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement. Provided that condition is met, the Parliament's action for annulment is subject to the rules laid down in the Treaties for actions for annulment brought by the other institutions.'

'It [the supplementary heading] is ... subject to the general rules applicable under the Financial Regulation (utilization is decided by the competent authorizing officer,

5. By its application against the Commission, the Parliament seeks the annulment of the measures taken by the Commission for the implementation of the decision to provide special aid to Bangladesh. The Parliament points out that the general budget for 1991 as adopted by it (OJ 1991 L 30) did not provide for the special aid to Bangladesh. By entering in the revenue and expenditure sides of the budget a sum equivalent to Greece's contribution for the aid to Bangladesh without presenting an amending and supplementary budget, the Commission infringed the Parliament's prerogatives under Article 203(5)(6) and (7) and also infringed Article 205 of the Treaty and Article 22 of the Financial Regulation.

6. By Order of 15 October 1992, the Court decided to join the applications against the Council and the Commission under Article 43 of the Rules of Procedure. I will examine the two applications in turn.

The proceedings against the Council (Case C-181/91)

7. The Council raised an objection of inadmissibility on the ground that the contested act was adopted not by the Council but by the Member States and that it could not therefore be the subject of annulment proceedings before the Court. It asked the Court to rule on that objection without considering the substance of the case. The Court decided however to examine together the issues of admissibility and substance.

8. In support of its claim that the contested decision is an act of the Council, the Parliament presents a series of arguments. First, it

argues that the act is entitled 'conclusions of the Council' and was adopted during a normal Council meeting in which the Ministers for Foreign Affairs of all Member States took part. Secondly, the Parliament points out that the act was adopted on the basis of a proposal submitted by the Commission. The Parliament states that, according to Article 149 of the Treaty, it is only the Council which acts on a proposal from the Commission. Thirdly, the Parliament points out that the division of the special aid among Member States is to be made on the basis of the Member States' gross national product (GNP). According to the Parliament, this provides further evidence that the act was adopted within the framework of the budgetary procedure, since the Member States' GNP is a Community concept. It is used as one of the bases of the Community's own resources by virtue of Article 2(1)(d) of Council Decision 88/376/EEC on the system of the Communities' own resources (OJ 1988 L 185, p. 24) and is defined by Council Directive 89/130/EEC on the harmonization of the compilation of gross national product at market prices (OJ 1989 L 49, p. 26).

9. The Parliament points out that, according to the press release, the special aid is an integral part of the Community action towards Bangladesh and is to be administered by the Commission. The Parliament states that, under Article 155, fourth indent, of the Treaty, it is only the Council which has the power to delegate to the Commission the task of integrating the special aid within the general Community aid to Bangladesh. The Parliament adds that, as appears from a letter dated 22 May 1991 addressed by the Commission to the Parliament, the Commission proposed to give effect to the contested act by entering any amounts paid by the Member States in the Community budget. It also

appears from that letter that the financial operations for the administration of the special aid were to be part of the implementation of the budget and were to be examined by the Parliament and the Court of Auditors. The Parliament claims that under Articles 206a and 206b of the Treaty, the Court of Auditors and the Parliament examine the accounts of the Community and not those of the Member States. The Parliament concludes that the financial control to which the aid would be made subject provides further evidence that the contested decision is an act of the Council.

10. The Parliament states that the issue of the aid to Bangladesh was raised again in a meeting of the Council held on 27 May 1991. Following that meeting, a press release was issued which stated that 'the Council noted the stage of implementation of the programme' for the aid to Bangladesh. The Parliament argues that the reference in that press release to 'the Council' as opposed to 'the Member States meeting in Council' provides evidence that the Council itself perceived the contested act as an act of the Council.

11. The Parliament claims that since the monies available under the general budget for 1991 had been exhausted, it was necessary for a supplementary and amending budget to be adopted in order to provide the aid envisaged. According to Article 15(2) of the Financial Regulation applicable to the general budget of the European Communities, supplementary and amending budgets are to be adopted in accordance with the procedure laid down in Article 203 of the Treaty and the corresponding provisions in the other Treaties. According to the Interinstitutional Agreement on Budgetary Discipline and Improvement of the Budgetary Procedure (OJ 1988 L 185, p. 33), the adoption of such

a budget would have required the revision of the financial perspective for 1991. The Parliament maintains that some Member States were unwilling to countenance this. Although, according to Article 12 of the Interinstitutional Agreement, a decision to revise the financial perspective may be taken by qualified majority vote, the Member States were unwilling to act in this way. It was allegedly for that reason that they resorted to the contested procedure. In support of that argument, the Parliament refers to statements made by the acting President of the Council during an address to the Parliament on 14 May 1991.

12. The Council disputes the submissions of the Parliament. It states that the wording of the press release, which has no official character and produces no legal effects vis-à-vis third parties, cannot determine the character of the decision. Although the press release stated that the contested act had been adopted on a proposal from the Commission, the Council claims that such language was not entirely appropriate and that it would be more accurate to speak of the Council having acted in agreement with the Commission.

13. The Council argues that the division of the aid on the basis of the Member States' GNP provided a practical and easy solution. The use of the GNP as a criterion for the division of the aid cannot transform the contested decision to a Community act. According to the Council, the fact that the decision to grant the aid was not a Community act did not prevent the Commission from undertaking the coordination and management of the aid. The Commission has undertaken similar operations in the past and has

developed experience and expertise. The Council adds that the Commission did not receive instructions from the Member States but undertook the coordination of the aid voluntarily.

under Article 173 of the Treaty, the Court has followed a broad interpretation based on substantive and not formal considerations. In Case 22/70 *Commission v Council (ERTA Case)* [1971] ECR 263, the Court stated at paragraphs 38 to 42 of the judgment:

14. According to the Council, neither the Member States nor the Commission were acting within the confines of the Community legal order, but rather on an *ad hoc* basis to ensure an effective and rapid response to a crisis. The Council maintains that the jurisdiction of the Community to grant humanitarian aid is not exclusive, the Member States remaining free to act, collectively or individually, alongside the Community.

‘Under Article 173, the Court has a duty to review the legality “of acts of the Council ... other than recommendations or opinions”.

Since the only matters excluded from the scope of the action for annulment open to the Member States and the institutions are “recommendations or opinions” — which by the final paragraph of Article 189 are declared to have no binding force — Article 173 treats as acts open to review by the Court all measures adopted by the institutions which are intended to have legal force.

15. In response to the Council’s submissions, the Parliament acknowledges that the jurisdiction of the Community to grant humanitarian aid to third countries is not exclusive, but insists that when the Member States wish to give aid within the framework of the Community, they can act only through the Council and only in accordance with the Community budget procedure. The Parliament adds that in the present circumstances this would have been perfectly feasible. First, the aid envisaged was for long-term projects which would take time to set up. Secondly, the Parliament strongly supported the principle of granting aid to Bangladesh and had indicated its willingness to hasten the passage of any proposal the Commission might make on the matter through the procedure laid down in the Treaty.

The objective of this review is to ensure, as required by Article 164, observance of the law in the interpretation and application of the Treaty.

It would be inconsistent with this objective to interpret the conditions under which the action is admissible so restrictively as to limit the availability of this procedure merely to the categories of measures referred to by Article 189.

16. It must first be noted that in determining what measures are subject to judicial review

An action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.’

On the basis of that reasoning, the Court accepted that the proceedings of the Council's meeting of 20 May 1972 regarding the negotiation and conclusion by the Member States of the European Road Transport Agreement constituted an act subject to judicial review. That reasoning has been confirmed in subsequent cases: see e. g. Case 114/86 *United Kingdom v Commission* [1988] ECR 5289, Case C-366/88 *France v Commission* [1990] ECR I-3571. The Court has also accepted that resolutions of the European Parliament which are intended to produce legal effects vis-à-vis third parties are subject to judicial review: see e. g. Case 294/83 *'Les Verts' v European Parliament* [1986] ECR 1339. Further, the Court has held that even an oral decision may be subject to annulment proceedings: see Joined Cases 316/82 and 40/83 *Kohler v Court of Auditors* [1984] ECR 641.

17. On the basis of the above case-law, the question whether the contested act constitutes an act susceptible to judicial review depends on its content and effects and not on the description of it given in the press release and in the draft minutes of the meeting at which it was adopted.

18. It is true that, unlike the situation in the present case, in the cases cited above it was not the identity of the enacting institution that was in dispute but the effects of the act itself. In *ERTA*, in particular, it appears from the minutes of the Council meeting of 20 May 1972 that the decision whose validity was challenged by the Commission was one adopted by the Council (see the Opinion of Advocate General Dutheillet de Lamothe, [1971] ECR pp. 285-286). In the present

case, by contrast, the contested act is described as a decision of the Member States meeting in Council. The fundamental distinction here is of course between, on the one hand, decisions of the Council (which, according to Article 146 of the Treaty, consists of representatives of the Member States) and, on the other hand, decisions of the Member States meeting in Council. In contrast, no distinction appears to be intended, or required, between the expression 'Member States meeting in Council' and the expression 'Representatives of the Governments of the Member States meeting in Council'. The latter expression is found in the Acts of Accession; thus, Article 3(1) of the Act concerning the Conditions of Accession to the European Communities of Denmark, Ireland and the United Kingdom, provides as follows:

'The new Member States accede by this Act to the decisions and agreements adopted by the Representatives of the Governments of the Member States meeting in Council. They undertake to accede from the date of accession to all other agreements concluded by the original Member States relating to the functions of the Communities or connected with their activities.'

Similar provisions are contained in the Acts of Accession to the European Communities of Greece and of Spain and Portugal. Those provisions show that decisions of the Member States meeting in Council do not form part of the Community legal order in the strict sense, but are nevertheless part of the *acquis communautaire*; as their very title suggests, they have a hybrid character.

19. In any event it is clear that, in adopting such acts, the Representatives of the Member States do not act in their capacity as members of the Council but in their capacity as Representatives of their Governments, exercising collectively the competences of the Member States. It follows that, in principle, such acts are not acts of the Community institutions.

20. In my view, however, the Court is not precluded from reviewing the validity of a decision solely on the ground that it is described as a decision of the Member States meeting in Council. I consider that the Court has the power to examine the content and the effects of an act, as well as the question whether the Community had exclusive competence to enact it, with a view to determining whether, although ostensibly enacted as an act of the Member States meeting in Council, it is in reality an act of the Council.

21. This approach is consistent with the functional approach which the Court has followed in defining the concept of reviewable act for the purposes of Article 173. By contrast, the opposite view would run counter to the objectives of Article 164 of the Treaty. If it were accepted that the characterization of a decision as a decision of the Member States meeting in Council was by itself sufficient to place that decision beyond the scope of Article 173, this would mean that the Court could not review the legality of the decision notwithstanding the possibility that the decision should be regarded, in all the circumstances, as a decision of the Council. In my view, to hold in those circumstances that the act was not susceptible to judicial review would not be compatible

with the purpose of Article 164. In Case 294/83 *'Les Verts' v European Parliament*, the Court stated at paragraph 23 of the judgment:

'It must ... be emphasized ... that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.'

In my view, this fundamental principle would be violated if it were accepted that an act is not susceptible to judicial review solely on the basis that it has been characterized as an act of the Member States meeting in Council.

22. It is true that if the Member States adopted a collective decision in breach of Community law, it would be open to the Commission to initiate enforcement proceedings against the Member States under Article 169 of the Treaty. It is clear, however, that that would not be done in a case such as the present where the Commission is in agreement with the Member States. In any event, the availability of such a remedy would not be a sufficient guarantee in a case where the contested decision is alleged to violate the prerogatives of the Parliament. In Case C-70/88 *European Parliament v Council* [1990] I-2041, the Court stated at paragraph 19 of the judgment:

'... while the Commission is required to ensure that the Parliament's prerogatives are respected, that duty cannot go as far as to

oblige it to adopt the Parliament's position and bring an action for annulment which the Commission itself considers unfounded'.

The Court continued at paragraph 23 of the judgment:

'The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance and, consequently, review the observance of the Parliament's prerogatives when called upon to do so by Parliament, by means of a legal remedy which is suited to the purpose which the Parliament seeks to achieve.'

In my view, those considerations apply also in this case. It follows that it is appropriate to examine the competence of the enacting authority and the content and the effects of the contested decision with a view to ascertaining whether the contested decision is in a disguised form an act of the Council.

23. I do not think that much significance should be attached to the reference in the press release to a 'proposal' of the Commission. That reference should not be taken to imply that there was a formal proposal within the meaning of Article 149 of the Treaty. Certainly the term 'proposal' may lead to confusion: I note that the same point was discussed as long ago as 1966: see Gerhard Bebr, 'Acts of representatives of the Governments of Member States', 14 SEW (1966) pp. 529-545, at p. 539. It is normal practice for the Commission to be involved

in the preparation of decisions of the representatives of Member States meeting in Council, and such decisions will no doubt often be based on informal initiatives of the Commission. In any event the precise form of the Commission's initiative should not be taken to determine the legal character of the resulting measure: so to hold would wrongly give precedence to questions of form over questions of substance.

24. In the present case, it is I think plain that, whatever the nature of the plan submitted by the Commission, the intention of the author of the decision was to adopt it as an act of the Member States meeting in Council and not as an act of the Council. As I understand the Parliament's case, it does not deny that the act was presented as an act of the Member States meeting in Council; rather, it denies that the act could properly be adopted otherwise than by the Council, and claims that in reality it was the Council which acted.

25. However, it is common ground that in the field of humanitarian aid the competence of the Community is not exclusive but concurrent with that of the Member States. It follows that the Member States retain the power to act individually or collectively as they see fit in providing financial assistance to third countries which have been hit by natural disasters.

26. In my view, contrary to the submissions of the Parliament, the involvement of the

Commission for the purposes of coordinating the special aid to Bangladesh is not an indication that the contested decision is in reality a Community act. It is true that if, as the Parliament suggests in its action against the Commission, the Commission can in no circumstances act outside the framework of the Community Treaties, then the involvement of the Commission would strongly support the contention that the contested decision is a Community act. However, even if one accepted the suggestion that the Commission could not act outside the Community framework, the consequence might be that the Commission's intervention was unlawful rather than that the contested decision was a Community act. It may not therefore be strictly necessary to consider that suggestion, but in my view it cannot be accepted. In practice, the Commission regularly participates, as I have already mentioned, in the activities of the representatives of Member States meeting in Council. Such participation reflects what I have described as the hybrid character of these activities. The Council has referred in the present proceedings to other activities of the Commission analogous to its role in the present case. Thus, the Council points out that the European Development Fund is financed directly by the Member States and administered by the Commission. The Council also states that it is possible for the Commission to undertake at the request of the Council, the Member States or even third parties the coordination of collective action. A recent example was the coordination by the Commission of the action agreed by the international community towards the countries of Central and Eastern Europe. Similar arguments are advanced by the Commission in the Parliament's action against the Commission. In my view, those arguments are persuasive. In cases where the Member States decide to act individually or collectively in a field within their competence, there is nothing in principle to prevent them from conferring on the Commission the task of ensuring

coordination of such action. It is for the Commission to decide whether or not to accept such a mission, provided of course that it does so in a way which is compatible with its duties under the Community Treaties. Whether the Commission did so in the present case is an issue in the Parliament's action against the Commission. Subject to that proviso, there can in my view be no objection to the Commission, which is itself a political institution, accepting tasks, outside the framework of the Community Treaties, commensurate with the political responsibilities of the Community. In the performance of such tasks, the Commission's actions will be subject to review by the Court if they are challenged as being unlawful under the Treaties. But the Commission's involvement will not otherwise bring the activities in question within the jurisdiction of the Court or within the scope of the Community Treaties.

27. I also consider that the reference in the press release to the Member States' GNP provides no indication that the contested act is in its true nature an act of the Council. It is clear that in cases where the Member States undertake collectively financial obligations outside the framework of the Community, the GNP formula may be used as a practical method for the division of the financial obligations among the Member States.

28. Further, the fact that the special aid was to be integrated into the general Community

action towards Bangladesh is not material. Since the Community and the Member States have concurrent competences, it must be open to them to coordinate their actions.

29. There remains the question of the use of the Community budget. It may be necessary to consider, in the action against the Commission, whether it was lawful to use the Community budget as a vehicle for the payment of aid given outside the framework of the Community. It appears, however, from the press release that the decision to provide special aid did not necessarily involve the use of the Community financial procedures and, *a fortiori*, the use of the Community budget as a vehicle for the payment of the aid. On the contrary, it appears from the press release that the decision to provide aid, as conceived by the author of the decision, was capable of being implemented without involving any Community machinery. The contested act provided that Member States could pay their contributions either by way of bilateral aid or via the Commission. It would therefore have been possible for all Member States to pay their contributions by way of bilateral aid. Further, the contested act did not specify the procedure to be used by the Commission for the administration of the aid in case a Member State paid its contribution via the Commission, but merely referred to an account administered by the Commission. As appears from the Commission's letter of 2 August 1991, it was the Commission which decided to follow a particular method of implementation. It was open to the Commission to implement the decision to provide aid without integrating the contributions of the Member States in the general budget. It is clear that the method chosen by the Commission for the implementation of the aid can affect the validity of the implementing

measures without affecting the validity of the decision contested in Case C-181/91.

30. I conclude that the Parliament has failed to show that, contrary to its form and to the ostensible intentions of its author, the contested act is an act of the Council. It follows that the application of the Parliament against the Council should be dismissed as inadmissible.

The proceedings against the Commission (Case C-248/91)

31. In this application, the Parliament seeks the annulment of the measures adopted by the Commission and its services with a view to implementing the decision challenged in the action against the Council. The Parliament seeks the annulment, in particular, of the decision to enter the sum of ECU 716 775.45 under Article 900 (Miscellaneous Revenue) of the revenue side of the Community budget for 1991 and the corresponding decision of 13 June to open a supplementary heading for the same amount in the expenditure side of that budget (Item B7-3000: Financial and technical cooperation with Asian and Latin American developing countries). The Parliament finally seeks the annulment of any other budgetary measures on the same subject of which the Parliament had no knowledge at the time of the submission of its application.

32. The Parliament presents in substance three arguments. I will adopt a different

sequence from that followed by the Parliament. First, the Parliament raises a plea of illegality under Article 184 of the Treaty. It claims that the decision to provide special aid to Bangladesh is a decision of the Council which violates the financial provisions of the Treaty and the budgetary powers of the Parliament and is, therefore, void. It follows, according to the Parliament, that the contested measures of the Commission which implement that decision are also void. Secondly, the Parliament claims that the Commission may only exercise the competences conferred upon it by the Treaty. On the assumption, therefore, that the decision to provide special aid to Bangladesh is not an act of the Council but an act of the Member States, the Commission executed within the framework of the Community budget and according to the forms of management and control provided for in the Treaty an act which is not a Community act. The measures adopted by the Commission for the implementation of that act must therefore be annulled. Thirdly, the Parliament points out that the general budget for 1991 as adopted by it did not provide for the special aid to Bangladesh. By entering in the revenue and expenditure sides of the budget a sum equivalent to that provided by Greece for the aid to Bangladesh without presenting an amending and supplementary budget the Commission infringed the Parliament's prerogatives under Article 203(5)(6) and (7) and also infringed Article 205 of the Treaty and Article 22 of the Financial Regulation.

33. As far as the first argument of the Parliament is concerned, I need only refer to my observations on the application of the Parliament against the Council. It follows from

those observations that the decision to provide special aid to Bangladesh was taken by the Member States acting collectively outside the framework of Community law and that it was not an act of the Council. In the absence of an act of the Council, the plea based on the illegality of such an act cannot succeed. The first argument of the Parliament must therefore, in my view, be rejected.

34. I proceed to examine the second and the third arguments of the Parliament.

35. The Commission claims that the application is inadmissible on two grounds. First, it argues that the contested measures are not susceptible to judicial review. Secondly, it argues that none of them has infringed the prerogatives of the Parliament.

36. In relation to the first ground of inadmissibility, the Commission claims that, according to Article 19 of the Statute of the Court and Article 38 of the Court's Rules of Procedure, the application must define with precision the acts whose annulment is sought. It follows, according to the Commission, that the application is inadmissible in so far as it attacks, without identifying them, 'other measures' implementing the budget. In any event, the Commission adds, there have been no other measures apart from those known to the Parliament. The Commission also states that for the purposes of annulment proceedings no distinction can be made between acts of a Community institution and acts of its services. Further, the Commission claims that the entries of Greece's contribution to the special aid

under the appropriate headings of the budget have the character of technical accounting operations which are not capable of producing legal effects vis-à-vis third parties. According to the decision to provide special aid to Bangladesh, Member States had the option to pay their contribution to the aid either directly or through the Commission. The decision to enter the sum in the Community budget did not have any legal effects vis-à-vis the Greek Government. Finally, the Commission submits that it did not act within the framework of the Community legal order but on the basis of a mandate which the Member States conferred upon it outside its functions as a Community institution. It follows that the contested measures were not Community acts amenable to judicial review under Article 173.

37. In relation to the second ground of inadmissibility, the Commission states that even if, by adopting the contested measures, it violated the budget, such irregularity occurred in relation to the implementation of the budget. According to the Commission, the Treaty recognizes the right of the Parliament to participate in the adoption of the budget. By contrast, according to Article 205 of the Treaty and Article 22 of the Financial Regulation, the implementation of the budget is the sole responsibility of the Commission. No provision of the Treaty provides for the intervention of the Parliament in the implementation of the budget. It follows, according to the Commission, that even if it acted irregularly, the Commission did not infringe the prerogatives of the Parliament. The Commission adds that if it were accepted that every illegal Community act necessarily violated the prerogatives of the Parliament, then the Parliament would have a right of action under Article 173 of the Treaty much broader than that recognized by the case-law of the Court.

38. The issues of admissibility are closely linked with the issues of substance, and I will consider the issues of substance first.

39. The Commission disputes the argument of the Parliament that it acted unlawfully. The Commission argues that, although it received Greece's contribution outside the framework of the Community legal order, it made the accounting entries in question in the interests of sound financial management and transparency. The Commission admits that it has no authority to amend the budget but argues that the entries of the Greek aid were made not in the budget itself but in the accounts recording the budget. It argues that such entries are simply accounting transactions.

40. The Commission claims that it applied Article 4(2) and (3) of the Financial Regulation by analogy and carried out the payment of the aid under conditions similar to those which apply in relation to the implementation of the budget. By way of exception to the principle that total revenue covers total appropriations for payments, Article 4(2) provides a list of revenues which may only be used for specific purposes. The Commission states that although the list of revenues provided thereby does not expressly include the case where a special contribution is made by a Member State for a particular purpose, such as that in the present case, the list provided for in Article 4(2) is not exhaustive. It was therefore empowered to use that article by analogy. The Commission concludes that no violation of the financial provisions of the Treaty took place since the administration of the aid was

not part of the implementation of the budget.

41. In my view, these arguments cannot be accepted. Article 1(1) of the Financial Regulation provides that the budget of the European Communities is the instrument which sets out forecasts of, and authorizes in advance, the expected revenue and expenditure of the Communities for each year. It follows from that article in combination with Articles 199 and 202 of the Treaty and the equivalent provisions of the other Treaties that, in principle, no revenue may validly be collected and no expenditure may validly be incurred in the name of the Communities unless provided for in the budget. It is also clear from Articles 199 and 202 of the Treaty and the equivalent provisions of the other Treaties that only revenue and expenditure of the Communities may be entered into the budget. Where the Commission undertakes the administration of aid granted by the Member States to third countries outside the framework of the Communities, the Commission may not use the Community budget for the purposes of administering that aid. The Commission argues that the entries of the Greek aid were not made in the budget itself but in the accounts relating to the implementation of the budget. In my view, this difference is not material. It is clear from Articles 205 and 205a of the Treaty that in implementing the budget and in drawing up the accounts the Commission must remain within the limits of the budget as adopted. The argument of the Commission that it applied by analogy Article 4(2) of the Financial Regulation is not persuasive. Such application by analogy cannot justify the incorporation within the budget of aid granted by Member States outside the Community framework.

42. I conclude that the Commission was not entitled to enter in the revenue and the expenditure sides of the accounts relating to the implementation of the Community budget for the financial year 1991 Greece's contribution to the special aid to Bangladesh.

43. I turn now to the question of admissibility. In my view, the argument of the Commission that the contested measures were simply technical accounting operations which did not produce binding effects is not correct. It follows from the letter of 2 August 1991 that the entry of Greece's contribution in the accounts recording the budget represented a position taken by the Commission as to the proper procedure to be followed for the utilization of that contribution and the monitoring of its implementation and, if the entry was lawful, it did indeed have the effects ascribed to it by the Commission. It entailed the use of Community procedures including monitoring by the Court of Auditors and the budgetary authority. It was not therefore devoid of legal consequences and is in principle subject to review by the Court.

44. However, according to the case-law of the Court, the Parliament has the capacity to bring an action for annulment against the Council or the Commission only where that action seeks to safeguard the Parliament's prerogatives and is founded on submissions alleging their infringement: see Case C-70/88 *Parliament v Council*, paragraph 27 of the judgment; Case C-65/90 *Parliament v Council* [1992] ECR I-4593, paragraph 13. The question then is whether the measures adopted by the Commission in this

case infringed the prerogatives of the Parliament so as to give the Parliament the right to take proceedings for annulment. The case-law of the Court to date is confined to the prerogatives of the Parliament in the legislative process.

45. So far as the budget is concerned there is no doubt in my view that the Parliament would be entitled to take proceedings if another Community institution violated the Parliament's right to participate in the adoption of the budget in accordance with the provisions of the Treaty. As regards the implementation of the budget, that is the exclusive responsibility of the Commission under Article 205 of the Treaty. The Parliament has, however, the duty to monitor the implementation of the budget and to grant a discharge to the Commission under Article 206b of the Treaty and Article 89 of the Financial Regulation. It may well be argued that the Parliament's powers in relation to the discharge are in themselves sufficient to ensure that its prerogatives are not infringed by anything done by the Commission in its implementation of the budget. It might then

follow that the Parliament is in no circumstances entitled to challenge implementing measures in an action for annulment. I think that view may well be correct, but it is not necessary to decide the question in this case. There might conceivably be circumstances in which the Parliament could seek the annulment of implementing measures, for example if they had the effect of so subverting the budget as to make it fundamentally different from the budget adopted under the Treaty procedures. In any event, no such question arises here. The Parliament has not been able to identify any effects of the disputed entry which could in any way have affected its prerogatives. Indeed the only potential effect, so far as the Parliament was concerned, was to give the Parliament the opportunity of monitoring the use of the money. The entry was in my view improper but it in no way adversely affected the Parliament's prerogatives.

46. Accordingly the Parliament's action against the Commission is in my view inadmissible.

Conclusion

47. I am therefore of the opinion that:

- (1) the actions of the Parliament against the Council and Commission should be dismissed;
- (2) the Parliament should be ordered to pay the costs.