# OPINION OF ADVOCATE GENERAL TESAURO

delivered on 22 January 1998 *

1. In these proceedings under Article 173 of the EC Treaty, the United Kingdom is asking the Court to annul the decision(s) impliedly contained or provided for in the Commission's press release of 23 January 1996 announcing the grant of funding worth ECU 6 million net for 86 projects designed to overcome social exclusion.

However, in affirming its support in principle for Community action to combat social exclusion, the United Kingdom raises no objection to the Court's placing a temporal limitation, pursuant to Article 174 of the Treaty, on the effects of such annulment.

## Facts

2. To improve the quality of life enjoyed by the various peoples of the Member States has always been one of the Treaty's fundamental objectives, provided for in Article 2 of the original version thereof and strengthened by the amendments made to that provision by the Treaty of Maastricht.

In an early move towards that goal, one of the priority targets identified by the Council in its Resolution of 21 January 1974 concerning a social action programme [1] was the implementation of specific measures to combat poverty, specifically by drawing up pilot schemes.

3. In implementation of that resolution, the Council adopted over the following years a series of decisions providing for multi-annual programmes to combat poverty and social exclusion. Since the Treaty conferred no specific powers for that purpose, the legal basis for all those decisions was Article 235.

Hence the relevance, first of all, of Council Decision 75/458/EEC of 22 July 1975 concerning a programme of pilot schemes and studies to combat poverty, [2] followed by Council Decision 85/8/EEC of 19 December 1984 on specific Community action to combat poverty, [3] which set up a four-year programme (1985-88) and, lastly, Council Decision 89/457/EEC of 18 July 1989

* Original language: Italian.

1 — OJ 1974 C 13, p. 1.
2 — OJ 1975 L 199, p. 34.
3 — OJ 1985 L 2, p. 24.

which establishes a medium-term Community action programme concerning the economic and social integration of the economically and socially less privileged groups in society (hereinafter 'Poverty 3'). [4] The last-mentioned decision, which covered the 1988-94 period, continued and broadened the scope of action initiated under the preceding programme.

4. With the clear intention of further promoting such action, the Commission submitted to the Council a proposal for a decision — also based on Article 235 of the Treaty — adopting a medium-term action programme to combat exclusion and promote solidarity: a new programme to support and stimulate innovation (1994-99). [5] The draft proposal (hereinafter 'Poverty 4'), which was intended to cover the period from 1 July 1994 to 31 December 1999, was not adopted by the Council; [6] nor, in due course, were any decisions taken establishing comparable programmes.

5. The general budget of the European Union for the financial year 1995, [7] which had meanwhile been adopted, committed expenditure of ECU 20 million under budget line B3-4103 to combating social exclusion. In the explanatory remarks on that heading, the overall allocation was divided into expenditure falling within the programme proposed by the Commission, but not yet approved by the Council ('Poverty 4'), and expenditure falling outside it.

6. During 1995, the Commission decided to give partial effect to that budget line by drawing up 86 funding agreements with various bodies, selected on the basis of a wide range of projects previously submitted. This entailed a commitment of approximately ECU 6 million.

Notification of those agreements was given in the Commission's press release of 23 January 1996, to which a list of the selected projects was attached. That press release is the measure contested in these proceedings.

**The parties' arguments**

7. The United Kingdom seeks essentially a declaration that the decisions by which the Commission concluded the agreements in question are void, alleging that the grounds for their illegality are twofold.

4 — OJ 1989 L 224, p. 10.

5 — This proposal was not published in the *Official Journal of the European Communities*. See COM (93) 435 final of 22 September 1993.

6 — It is apparent from statements made by the parties that from mid-1995 onwards opposition from two of the Member States (the Federal Republic of Germany and the United Kingdom) was certain to prevent the decision's adoption.

7 — OJ 1994 L 369, p. 1.

In the first place, on the assumption that all Community expenditure requires not only a budgetary appropriation but also authorisation by the adoption of a basic act, the United Kingdom maintains that, in the absence of a Council decision based on Article 235, the Commission's measures have no legal basis and, accordingly, the Commission lacked competence to adopt them and has infringed Article 4 of the Treaty. The Commission's power of initiative can only justify Community action which is *non-significant*, namely pilot studies and preparatory action. The operations funded by the Commission through the 86 agreements at issue cannot, however, be so categorised.

Secondly, the decisions adopted by the Commission are not properly reasoned and should therefore be annulled for infringement of Article 190 of the Treaty. In its reply, the Government of the United Kingdom sets out more fully its plea as to lack of reasoning, explaining that it is directed not at the decisions authorising the individual funding agreements, but at the policy decision — on which such action was predicated — to implement, in accordance with certain criteria and procedures, that item of budgetary expenditure.

The Federal Republic of Germany, the Kingdom of Denmark and the Council have intervened in support of the applicant Government on the basis of broadly similar reasons.

8. The Commission, supported by the European Parliament, points out that a basic act is required only for significant Community action. Otherwise, the budgetary appropriation alone is sufficient. The expenditure incurred by the Commission and challenged by the United Kingdom was in fact aimed at implementing non-significant action, more specifically, preparatory action.

## The relevant legislation and case-law

9. On the basis of Article 205 of the Treaty, it is for the Commission to implement the budget, which it must do within the limits of the appropriations, on its own responsibility and having regard to the financial regulations which the Council must adopt in accordance with the procedure laid down in Article 209 of the Treaty.

Article 22 of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (hereinafter 'the Financial Regulation'), [8] as amended — so far as is relevant here — in 1990, [9] provides that 'the implementation of appropriations entered for significant Community action shall require a basic act, in accordance with the procedure and the

8 — OJ 1977 L 356, p. 1.

9 — Council Regulation (Euratom, ECSC, EEC) No 610/90 of 13 March 1990 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1990 L 70, p. 1).

provisions laid down in Chapter IV, paragraph 3(c), of the Joint Declaration of 30 June 1982'. As we know, this provision constitutes an attempt to solve the problem of the Commission's competence, when implementing the budget, to use the appropriations under particular budget lines notwithstanding the absence of a basic act.

10. In principle, that possibility must be ruled out. The European Parliament, the Council and the Commission agreed on this point when adopting the Joint Declaration of 30 June 1982 on various measures to improve the budgetary procedure. [10] Chapter IV, paragraph (3)(c), of the Declaration provides: 'The implementation of appropriations entered for significant new Community action shall require a basic regulation. If such appropriations are entered the Commission is invited, where no draft regulation exists, to present one by the end of January at the latest'.

There is no need to dwell on the question of the legal authority now attributed to joint declarations and interinstitutional agreements, [11] especially in view of the fact, already mentioned, that the principle in question has been 'consolidated' in the Financial Regulation following the 1990 amendment. Suffice it to note that the institutions subsequently reaffirmed the requirement of a legal basis for significant action when they adopted the Interinstitutional Agreement of 29 October 1993 on budgetary discipline and improvement of the budgetary procedure. [12] Indeed, in the Statement on maximum amounts and the need for a legal basis, annexed to that Agreement, 'the institutions confirm their support for the three principles listed in Chapter IV paragraphs 3(b) and (c) of the Joint Declaration of 30 June 1982 concerning maximum amounts and the need for a legal basis and they undertake to improve application of these principles'.

11. Thus, legislation exists which requires a dual legal basis for the Commission's imple-

10 — OJ 1982 C 194, p. 1.

11 — Interinstitutional agreements, like joint declarations, have clear authority for the purposes of interpretation, above all where their content is consolidated, as in the present case, in binding Community acts. Furthermore, where it is clear from an interinstitutional agreement or joint declaration that the institutions concerned intended to enter into a binding commitment towards each other, this must be recognised, in the light of the principle of interinstitutional cooperation laid down in Article 5 of the Treaty, as giving rise to a legal obligation, failure to observe which is actionable in proceedings before the Court: see, in connection with an 'arrangement' between the Council and the Commission, Case C-25/94 *Commission* v *Council* [1996] ECR I-1469, paragraph 49; for an earlier judgment, actually concerning the 1982 Joint Declaration, see Case 204/86 *Greece* v *Council* [1988] ECR 5323. For academic commentary, see M. and D. Waelbroeck, 'Les "Déclarations Communes" en tant qu'Instruments d'un Accroissement des Compétences du Parlement Européen', in Louis, D. Waelbroeck, *Le Parlement Européen dans l'Évolution Institutionnelle*, Brussels, 1988, p. 79; Thiaville, *Déclarations Communes*, in Barav, Philip, *Dictionnaire Juridique des Communautés Européennes*, Paris, 1993, p. 341; Monar, 'Interinstitutional Agreements: the Phenomenon and its New Dynamics after Maastricht', CMLRev 1994, p. 693.

12 — OJ 1993 C 331, p. 1, amended by the Decision on the adjustment of the financial perspective (OJ 1994 C 395, p. 1).

mentation of Community expenditure. On the one hand, the relevant appropriation must be entered in the budget, which is a matter for the budgetary authority; on the other, a basic legal act must be adopted justifying the financial commitment entailed, which is a matter for the legislature, to be determined as the occasion arises by the institutions called on to participate in the Community legislative process, in accordance with the various procedures laid down by the Treaty. [13]

12. The Court's case-law has confirmed, albeit merely by implication, that there are two pre-conditions for the proper implementation of the budget. In a case where the applicants contested the lawfulness of a regulation laying down time-limits and detailed rules for recruitment to the Commission of staff employed by the European Association for Cooperation on the ground that its provisions were at odds with the relevant budget appropriations, the Court stated that 'neither the budget nor *a fortiori* an explanatory remark, though necessary in order to undertake expenditure, can be substituted for the provisions of the Staff Regulations dealing with recruitment of officials', which require steps to be taken by the legislative authority. [14]

In a later case in which it again identified as a pre-requisite the existence of a basic act justifying the implementation of expenditure, the Court drew a distinction between its own power of review and that of the Court of Auditors, stating that, whereas the latter only has power to examine 'the legality of expenditure with reference to the budget and the secondary provision on which the expenditure is based (commonly called "the basic measure")', the Court must review the legality of the basic measure. [15]

13. The delimitation of the Commission's sphere of competence, concerning implementation of the budget, in relation to the Council's power to adopt the act committing the expenditure, was addressed in the Court's judgment of 24 October 1989. [16] The Commission's argument, which the Court

13 — Needless to say, that twofold requirement for implementation of expenditure is the reflection in technical budgetary terms of a much wider problem regarding the institutions, which finds expression in the separation which persists even today between the branch of the budgetary authority which is naturally suited to a legislative role (the Parliament) and the Community legislative authority which is still concentrated in the Council, at least in cases where the legal basis requires unanimity. See, regarding the inevitable divergence between the positions of the institutions concerned, Ehlermann, Minch, 'Conflicts between Community Institutions within the Budgetary Procedure — Article 205 of the EEC Treaty', in *EuR*, 1981, p. 23; Terrasse, *Le Budget de la Communauté Européenne*, Paris, 1991, p. 72.

14 — Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others* v *Commission and Council* [1985] ECR 2523, paragraph 56, in which the Court accordingly upheld the Council's argument that existence of an appropriation in the Community budget is a necessary, but not a sufficient, condition for implementing expenditure.

15 — Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 28. The distinction between legislative powers and budgetary powers, the exercise of which is subject to different conditions, thereby reflecting the different forces at play in the institutions, is reaffirmed once again in Case 242/87 *Commission* v *Council* [1989] ECR 1425, paragraph 18.

16 — Case 16/88 *Commission* v *Council* [1989] ECR 3457. The Commission asked the Court to annul the provision in Council Regulation (EEC) No 3252/87 of 19 October 1987 (OJ 1987 L 314, p. 17) making the Commission's power to implement Community research programmes subject to the Management Committee procedure, since this enables the Council to substitute its own projects for those of the Commission in cases where the Committee delivers an adverse opinion.

rejected, was essentially based on the premiss that individual decisions which the Commission must adopt in order to give effect to programmes (in particular, the conclusion of agreements) are implicit in the notion of implementing the budget, in regard to which the Commission enjoys, pursuant to Article 205 of the Treaty, an independent power of decision which cannot be fettered by recourse to cumbersome committee procedures. Instead, the Court favoured the contrary approach espoused by the Council, according to which such individual decisions were in fact basic acts (or substantive decisions) conferring legal authority on the expenditure and enabling the budget to be implemented, that is to say, by using the relevant appropriation.

In short, according to the Court, only the last stage in the procedure falls within the Commission's exclusive competence under Article 205 to implement the budget. On the other hand, the decision-making stage at which expenditure is committed, or the adoption of an administrative measure imposing a legal obligation *vis-à-vis* third parties, is governed by the rules of the decision-making procedure applicable in the particular case and remains outside the scope of the 'implementation of the budget' under Article 205. [17]

14. Although I find it difficult to endorse the extremely narrow scope accorded to the notion of committing expenditure, which has led the Court to regard the Commission's adoption of individual administrative measures committing expenditure as separate from implementation of the budget, [18] the case-law fully upholds the principle that implementation of expenditure presupposes not only the entry of a budgetary appropriation, but also the existence of a basic act which accords such expenditure legal authorisation. [19]

15. As I mentioned earlier, the principle consistently upheld by the Court that the proper implementation of expenditure requires both a budgetary appropriation and a legal basis justifying it has found expression in legislation, to be precise in Article 22 of the Financial Regulation, which in that respect gave effect to the 1982 Joint Declaration.

However, in view of the need to resolve the practical difficulties arising from the interinstitutional management of the budget procedure, Article 22 of the Financial Regulation, like the Joint Declaration, requires the prior adoption of a basic act for the purposes of implementing appropriations entered for

17 — In that case, competence to adopt substantive decisions rested throughout with the Commission, albeit by virtue of the powers delegated to it by the Council in accordance with Article 145. Thus, the lawfulness of the Management Committee procedure derived from that provision.

18 — This aspect of the judgment has in fact been criticised by academic commentators: see the remarks made by Blumann in *RTDE*, 1990, p. 173, and the Opinion of Advocate General Darmon delivered on 30 June 1989, in which he emphasised that in the majority of Member States commitment of expenditure goes beyond a strictly financial or accounting operation and encompasses substantive decisions as well (see Case 16/88, cited above, paragraph 37).

19 — Needless to say, that principle is not called in question by the criticism which I feel obliged to make of the judgment in question. In the case of an individual Commission measure effecting certain expenditure, the basic act — that is to say, the legal basis for that measure — is the *legislative* act implemented by the Commission's measure.

*significant Community action.* [20] It follows that Community action which is not of that nature — that is to say, which is *non-significant* — does not require the prior adoption of a basic act authorising implemention of the relevant appropriation.

— *The concept of non-significant action*

17. Interinstitutional cooperation has resulted in the creation of two categories of action, 'significant' and 'non-significant'. However, neither the 1982 Joint Declaration nor the 1993 Interinstitutional Agreement defines those terms. Such a definition ought probably to have been agreed between the institutions, as suggested by the Statement on maximum amounts and the need for a legal basis (annexed to the 1993 Agreement), where it confirms the institutions' commitment to improving the application of Chapter IV, paragraph 3(b) and (c) of the 1982 Declaration.

Albeit not embodied in a formal act or statement, a guide to interpreting the concept of non-significant action — all the more useful in that it emerged from interinstitutional dialogue — is provided by the Statement entered in the minutes of the interinstitutional meeting of 28 June 1982 between the Council, the Parliament and the Commission. The representatives of the three institutions, who were due to sign the 1982 Joint Declaration only two days later, acknowledge that the requirement that a legal act should be adopted before appropriations entered in the budget for any significant Community action can be used would enable the Commission to assume its rightful role and in particular exercise its powers of initiative by initiating, on its own responsibility,

## Substance

16. Turning to the substance of the dispute, the central question is therefore whether or not the Commission's funding of the 86 projects is to be classed as significant action. If, as the United Kingdom maintains, it is, then, in the absence of a basic act, the appropriation entered under budget line B3-4103 should not have been implemented and the related measures adopted by the Commission must be annulled. If, on the other hand, such action may plausibly be regarded as non-significant, no basic act is required for the expenditure to be lawful and, accordingly, the grant of funding by the Commission is valid.

20 — The wording of the regulation differs from that of the Joint Declaration in two ways. First, instead of a basic 'regulation', it requires a basic 'act'; secondly, it requires this in respect of significant Community action, not just significant *new* Community action. However, these changes are not particularly important: the first clearly implies that any legislative act (for instance, a decision addressed to all the Member States) is capable of serving as the legal basis for the expenditure; the reason for the second difference is not clear, but possibly the adjective has been omitted simply because it was superfluous.

the studies or projects required to prepare its proposals. [21]

18. However, the interinstitutional approach betrays a clear tendency to confine 'non-significant action' within narrow bounds, essentially involving the exercise of the Commission's power of initiative under the Community decision-making procedure. In other words, the formulation of legislative proposals presupposes the espousal by the proposing authority of a particular policy, which will have to be adjusted also in response to the foreseeable effects of the proposed legislation on the social situation which it is sought to remedy. This inevitably entails study and research, as well as experimentation on a reduced scale with the legislation to be proposed. The funding of such action cannot — by definition, I would suggest — depend on a basic act which has yet to be adopted and which presupposes the accomplishment of such action.

Therein lies the justification for the Commission's power to fund pilot projects or preparatory action solely on the basis of a budgetary appropriation and its powers of implementation under Article 205 of the Treaty, without the need for prior adoption of a basic act. [22]

19. That interpretation is confirmed by the approach expressly taken by the Commission in its 1994 Communication concerning legal bases and maximum amounts (mentioned above). [23] In that document, the Commission links the concept of non-significant action with the power to initiate and conduct the research or tests necessary for the formulation of its proposals and, accordingly, regards it as falling within the scope of its powers of initiative. In the same document, non-significant action is divided into two categories, namely pilot projects and preparatory action. Of the two, preparatory action is part of a longer-term plan, being designed to prepare the ground for future developments brought about by significant action; also, it comes in a wider variety of forms and may last longer.

Non-significant action is inherently a tenuous undertaking, in the sense that, after a while, it must either give way to significant action (whose implementation depends on the adoption of a basic act) or come to an end. In an attempt to introduce a greater measure of certainty, the Commission proposes a maximum duration of three years.

21 — The text of the statement is set out in Annex 2 to the Commission's communication to the budgetary authority on legal bases and maximum amounts of 6 July 1994 (SEC(94) 1106 final). See also the reference to the declaration by way of clarification of the concept of non-significant Community action as used in the 1982 Joint Declaration, in Strasser, *Les Finances de l'Europe*, Paris, 1990, p. 131.

22 — See, to that effect, Strasser, *Les Finances de l'Europe*, cited in footnote 21, p. 131.

23 — See footnote 21 above.

Thus non-significant action is an exception to the normal operation of the budget and the utilisation of appropriations. As such, it must be subject to narrow interpretation. Although this may to a certain extent stand in the way of more streamlined Community action, it is none the less consistent and is strictly aimed at giving full effect to the basic principle of legality, which must be reflected in every aspect of the procedure for implementation of the Community budget.

20. More specifically, the Commission's Communication contains a list of appropriations entered in the draft budget for 1995, broken down in terms of those involving significant action [24] and those involving non-significant action. The appropriation at issue here (budget line B3-4103, measures to combat poverty and social exclusion) is designated by the Commission as significant action for which a legal basis has been proposed but has not yet been adopted. [25] It is noteworthy that, when the Council made no move to adopt that measure, the Commission used part of the relevant appropriation for the 86 funding agreements. Equally surprising is the fact that such action, while also dedicated to the fight against poverty and social exclusion, and representing the continuation of action taken earlier, is now categorised as 'non-significant'.

Although the position adopted by the Commmission is not conclusive, it constitutes, at the very least, powerful evidence of a somewhat 'casual' approach, which may well be directed to a more efficient management of the resources allocated but falls somewhat short of respect for the principle of legality. [26]

21. That said, I think it only proper to proceed nevertheless with an examination of the action which the Commission funded by means of the 86 agreements concluded, comparing it with the action — which all the parties, including the Commission, unhesitatingly agree was significant — carried out in accordance with the earlier 'Poverty' programmes and with that scheduled for implementation under 'Poverty 4', had it been approved.

Of the 86 agreements concluded by the Commission with various bodies from the various Member States, the Commission has provided the Court with only three

24 — The list is further sub-divided into appropriations for which a legal basis has already been proposed but has not been adopted and those for which the Commission undertakes to propose a legal basis before 30 May 1995.

25 — Indeed, the Commission had submitted its own proposal for the 'Poverty 4' programme, dated 22 September 1993: see footnote 5 above.

26 — The same may be said of the statements made at the hearing by the Commission's Agent, according to whom, once the Commission realised that the Council was unlikely to approve initiation of significant action under the 1995 budget, it sought at the implementation stage to convert those programmes into non-significant action.

examples, pleading practical considerations. [27] The first concerns funding for one year of a literacy programme for families in disadvantaged areas, with the aim of facilitating their access to employment. The second concerns a programme for the training of young unemployed persons from areas with a high level of youth unemployment. The third concerns a one-year programme to assist the rehabilitation of teenage mothers, and unemployed persons suffering from alcoholism.

Similarly, the proposal for a decision on the draft 'Poverty 4' programme made provision for the Commission to implement action at local level (as well as at national or regional level) aimed at the economic and social integration of disadvantaged groups. Those projects were to have been implemented by social networks and volunteer groups, which is essentially what the bodies with which the Commission has concluded the agreements at issue are.

22. On the face of it, the projects funded by the Commission have exactly the same objectives as the action which the Commission was empowered to promote or financially support under 'Poverty 3'. On the basis of Article 3 of Decision 89/457/EEC, [28] the Commission may promote or financially support pilot projects 'which are integrated into the fabric of local society and aimed at fostering the economic and social integration of the economically and socially less privileged groups in society' or 'innovatory measures to foster the economic and social integration of certain groups of people who suffer from specific forms of isolation'. The three projects described above specifically concern local action aimed at the integration of disadvantaged categories and also target particular forms of isolation, such as that of teenage mothers and alcohol-dependent unemployed persons.

23. The action funded by the 86 agreements concluded in 1995 is undoubtedly similar in all respects to that entrusted to the Commission under both 'Poverty 3' and the 'Poverty 4' proposal. Given that such action is unanimously regarded as significant, there is no reason why the action at issue should be classified as non-significant.

Aside from the question of its similarity, it is difficult to understand how the action contemplated in the agreements at issue can be regarded as consisting of pilot projects or preparatory action, since it has been devised not so much with a view to testing the effects of untried methods, as to achieving substantive results at once. Nor does such action appear to be intended to pave the way for future Community measures to combat

27 — On the other hand, the United Kingdom did not make a proper application for measures of inquiry under Article 45 of the Rules of Procedure.

28 — Cited in footnote 4 above.

social exclusion, but rather to dovetail neatly with projects funded under previous programmes.

24. Furthermore, I am not swayed by the Commission's arguments purporting to show that the 86 projects to be funded cannot be equated with the action covered by earlier programmes. The fact that the funding is to be of different duration — one year instead of four, or even five, as provided for in the 'Poverty 4' proposal — and for a different annual amount — ECU 70 000 [29] rather than ECU 250 000 — points to a formal difference which cannot be such as to alter the nature of the action contemplated, which must be appraised by reference to the programmes and the beneficiaries. I would suggest that the one-year duration was dictated more by budget-related considerations than by any actual characteristics of the action planned. Such action — if only because of its delicate nature and its complexity — would need a longer time-span if it were ever to have any useful effect. The duration and the amount of funding are undoubtedly indications of whether or not Community action is significant but, considered in isolation, they cannot determine how it should be classified. Even the existence of a sophisticated mechanism for the administration of 'Poverty 3' and 'Poverty 4', such as a monitoring body for national policies to combat social exclusion, and the high degree of coordination resulting therefrom, is again a formal consideration, unconnected with the aims and specific working methods of the action itself. Moreover, the 86 projects at issue are in any event assured of a coordinating mechanism, if only through the direct intervention of the Commission.

However, when describing the salient essential characteristics of the 86 projects, the Commission merely repeats the somewhat perfunctory formula of short-term innovatory action designed to establish whether future funding is practicable. It then proceeds to state — by way of tautology, almost — that such action is non-significant, but provides no solid evidence in support of that view.

25. According to the Parliament's statement in intervention, it regards any Community action costing less than ECU 10 million as non-significant. Such a purely 'quantitative' interpretation is not only unacceptable, but also — since no reference is made to it either in the Financial Regulation or in the interinstitutional cooperation measures — markedly at odds with the position adopted by the Parliament on other occasions.

29 — However, some of the agreements are for a higher amount. For instance, one provides for funding of approximately ECU 130 000.

I would refer in particular to the Resolution on the Commission's communication to the budgetary authority concerning legal bases and maximum amounts, [30] in which pilot projects or preparatory action are identified as non-significant action, and to the Resolution of 24 October 1996 on the draft budget for the financial year 1997, which fixes a ceiling of ECU 10 million but always and only with reference to pilot projects and preparatory action.

26. It is all too clear from the above observations that the 86 projects funded by the Commission cannot be classified as non-significant Community action but instead constitute significant action, the content and aims of which are in all respects comparable to that under 'Poverty 3'. Accordingly, implementation of the relevant appropriations required the prior adoption of a basic act, namely a Council decision under Article 235 of the Treaty.

The failure to adopt a basic act beforehand cannot but constitute an infringement of Article 22 of the Financial Regulation and disregard for the institutional balance required under the Treaty, in particular by Article 4, in connection with the implementation of the budget. [31] The allegation made by the applicant Government is therefore well founded.

— *Lack of reasons*

27. Given the unlawful nature of the contested decisions in the light of the first plea, the second plea put forward by the United Kingdom — lack of reasons — seems redundant. I shall therefore confine myself to a few brief comments. First of all, I would point out that, as mentioned earlier, the United Kingdom stated in its reply that the second plea was directed not so much at the decisions concerning the individual agreements entered into by the Commission, as at the more general decision(s) previously adopted by the Commission in opting for implementation of the appropriation through particular forms of action.

In answering this point, the Commission stated that adequate reasons had been given for its decision in the communication to the

30 — See OJ 1996 C 17, p. 27.

31 — Merely as an aside, I would point out that this conclusion confirms the prima facie appraisal expressed in the order of the President of the Court of 24 September 1996 in Joined Cases C-239/96 R and C-240/96 R *United Kingdom* v *Commission* [1996] ECR I-4475, where, in determining the prima facie justification of the application for annulment of the Commission circular inviting applications for funding of action to combat poverty and social exclusion, the Court took the view that the Commission's arguments concerning the short duration and the illustrative and innovative nature of the projects to be funded were not entirely convincing.

budgetary authority of 18 July 1995, a press release of 11 August 1995 and a letter to the United Kingdom Ministry of Social Security of 13 September 1995.

28. There is no need to dwell on the question whether it is appropriate — which is dubious — to discharge the duty to state reasons for a measure of general application through a number of dissimilar communications which are not even brought to the attention of all those concerned. Suffice it to note that such documents do not yield comprehensive information enabling those concerned to assert their rights and to have knowledge of the conditions under which the Commission applies the Treaty. [32] Nor, on closer scrutiny, do those documents disclose the procedures whereby the Commission sought to implement the appropriations entered in the budget for the fight against social exclusion; still less do they reveal why, or on what basis, the Commission chose to proceed by means of non-significant action.

I therefore conclude that the Commission's decision(s) to implement the appropriations entered under budget line B3-4103 is/are unlawful also for failure to state adequate reasons.

32 — According to the now well-established wording of the basis for the duty to state reasons: Case 158/80 *Rewe* [1981] ECR 1805, at p. 1833, paragraph 25.

The limitation in time of the effects of annulment

29. Since the 86 funding agreements cover a period of one year, they must be considered to have exhausted their effects or at least to have produced some of their effects already, with the result that payments will have been made by the Commission and used by the beneficiaries. In those circumstances, that is to say, given the manifest impossibility of recovering the sums paid, and in the light of the funding's objective and the fundamental principles of legal certainty and protection of the beneficiaries' legitimate expectations, it seems only right that the Court, in exercising its powers under the second paragraph of Article 174 of the Treaty, should state which of the effects of the decisions annulled are to be treated as definitive. [33]

Given that in the present case the decisions implementing the expenditure through the conclusion of the agreements at issue have produced a number of legal effects which must be regarded as irreversible, I consider it only fair and proper that the Court should rule that the judgment annulling the decision(s) in question is without prejudice to any payments made and commitments entered into as a result of the conclusion of the 86 funding agreements which are the subject of these proceedings.

33 — It is scarcely necessary to add that, as the Court has already stated, although Article 174 of the Treaty only mentions regulations, it also applies to directives. This was to avoid harming the interests of those holding a right under the Treaty and also because the substantive content of the measure in question was not called in question: Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193. To my mind, the application of Article 174 to a decision such as that at issue in the present case may be justified by substantially the same considerations.

*Costs*

30. Pursuant to Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since all the pleas in law put forward by the Commission have failed, it must be ordered to pay the costs. Under Article 69(4) of those Rules, the Member States and the institutions which have intervened must be ordered to bear their own costs.

## Conclusion

31. In the light of the foregoing, I propose that the Court:

(1) annul the Commission's decision(s) notified by the press release of 23 January 1996 announcing the grant of funding under the 1995 budget for 86 projects designed to overcome social exclusion;

(2) declare that such annulment is without prejudice to the validity of any payments made and commitments entered into on the basis of the 86 funding agreements concluded;

(3) order the Commission to pay the costs;

(4) order each of the interveners to bear its own costs.