

# REPORT FOR THE HEARING in Case C-181/91 \*

## I — Facts

1. In April 1991 Bangladesh was hit by a violent cyclone. After obtaining information, the Commission submitted a plan for special action in favour of Bangladesh to the Ministers of Finance meeting informally in Luxembourg on 11 May 1991. The plan was examined by the Council (General Affairs), which was holding an ordinary session on 13 and 14 May in Brussels. The question of aid for Bangladesh did not appear as a formal item of the Council's agenda. On 14 May it was agreed to grant special aid of ECU 60 million to Bangladesh, financed bilaterally by the 12 Member States, the distribution among them to be based on gross national product ('GNP'). The task of coordinating the whole of the aid was entrusted to the Commission.

2. The terms of the aid were published by means of a 'press release' drafted and put out under the responsibility of the General Secretariat of the Council.

### *'Aid for Bangladesh — Council conclusions*

The Member States meeting in the Council have decided, on the basis of a Commission proposal, to grant special aid of ECU 60 million to Bangladesh under a Community

action. The distribution among the Member States will be based on GNP. The aid will be integrated into the Community's general action for Bangladesh. It will be provided either directly by the Member States or by means of an account administered by the Commission. The Commission will coordinate the whole of the special aid of ECU 60 million.'

3. In the draft minutes of the 1487th session of the Council held in Brussels on Monday 13 and Tuesday 14 May 1991 that text is included under the heading '12. Other business — Aid to Bangladesh'.

## II — Written procedure and forms of order sought by the parties

4. Parliament's application was registered at the Court Registry on 11 July 1991.

5. The *Parliament* claims that the Court should:

— annul, pursuant to Article 173 of the EEC Treaty, the act adopted at the 1487th session of the Council (General Affairs) held in Brussels on 13 and 14 May 1991 and under the chairmanship of Jacques F. Poos, Minister of Foreign Affairs of the Grand Duchy of Luxembourg, referred to in a press release

\* Language of the case: French.

(ref: 6004/91 (Press 60)) entitled 'Aid for Bangladesh — Council conclusions';

### III — Pleas in law and arguments of the parties

— order, pursuant to Article 21 of the Statute of the Court of Justice of the EEC and Article 45 of the Rules of Procedure, the production of all documents useful for deciding the dispute;

8. The Council and Parliament's positions may be summarized as follows:

#### (a) *Admissibility*

— order the defendant to pay the costs.

6. By separate document the Council raised an objection of inadmissibility under Article 91(1) of the Rules of Procedure. On 15 June 1992 the Court decided to join that objection to the substance of the case.

9. The *Parliament* considers that the contested act, albeit allegedly adopted by 'the Member States meeting in the Council', was in fact adopted by the Council acting in its capacity as an institution of the EEC. By adopting that act, the Council encroached upon the budgetary prerogatives of Parliament as set out in Article 203 of the EEC Treaty.

10. In support of its case the Parliament relies on the following arguments:

7. The *Council*, while adhering to all its observations concerning the inadmissibility of the application, contends that the Court should:

(a) Heading and form of the contested act. It is entitled 'Council conclusions' and was adopted at the 1487th session of the Council (General Affairs), which, in particular, all the Ministers of Foreign Affairs of the Member States attended on 13 and 14 May 1991 in Brussels.

— declare the European Parliament's action for annulment unfounded;

(b) The adoption procedure. According to the terms of the contested act, it was adopted 'on the basis of a Commission proposal'. The Commission may act only within the limits of the powers conferred on it by the EEC Treaty. Only the institutions provided for by the Treaty may take cognizance of Commission proposals. In the Community decision-making process, a Commission proposal is indispensable for action by the Council. The

— order the defendant to pay the costs.

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

reference made in the contested act to the Commission proposal shows therefore that it was the Council, and not the Member States, which acted in this case.

(c) The structure. The allocation of the special aid for Bangladesh was to be made 'on the basis of gross national product (GNP)'. The contested act thus uses, as an essential part of its structure, a concept which is pre-eminently of a Community nature.

(d) The administration and implementation of the aid in question. According to the contested act the special aid is to be granted 'under a Community action' and 'the Commission will coordinate it'. In practice, that means that the aid will be designed, organized and coordinated by the Commission's departments. The amounts transferred by the Member States will be accounted for on the 'revenue' side of the budget under Article 900 — Miscellaneous revenue — and sums of a corresponding amount will be entered in the part entitled 'expenditure under the items coming under B-7-5000'. The use in the contested act of the future tense in the French (*l'aide 'sera intégrée'*) and the present indicative (*'la Commission assure'*) clearly shows that what is invoked — in the light of instructions or, at least, a mandate — is an obligation imposed on a Community institution to achieve a result. It follows from Article 155 of the EEC Treaty that the Commission may be given the implementing tasks imposed by the contested act only on the basis of the fourth indent of Article 155. The Commission obtained the relevant power from the Council only. The Member States meeting in the Council have no capacity to give orders to the Commission.

(e) Suspension of budgetary implementation. The contested act is obviously a Community act since it will in future be subject to budgetary supervision. Under Article 206 of the EEC Treaty, the Court of Auditors is to examine only the accounts of the Community. The same is true of the budgetary suspension carried out by Parliament under Article 206b of the EEC Treaty.

(f) The Council's own assessment. The press release refers to the 'Council' and not to the 'Member States meeting in the Council'.

11. Parliament further argues that the Council claims to have been 'transformed for a fraction of a second into the Member States meeting in the Council' in order to avoid having recourse to an amending, supplementary budget, since the available funds for 1991 had already been exhausted. By refusing to deal with the question of aid for Bangladesh in accordance with the budgetary procedure laid down by the Treaty, the Council has infringed Article 203, which on no occasion provides for the unanimous intervention of the Member States in budgetary matters, as well as the Interinstitutional Agreement on Budgetary Discipline and Improvement of Budgetary Procedure.

12. Parliament adds that, legally, there was no urgency, since the contested act was drawn up while the final discussions, which were completed in mid-May 1991, were taking place on the revision of the financial projective. It would have been quite possible to include in those discussions matters relating to the aid for Bangladesh.

13. In the *Council's* view, the contested act is not an act within the meaning of Article 173 of the Treaty.

14. In that respect, the Council contends that the press release is not of an official nature. Its sole object is to explain to the press and the public decisions or positions adopted by the Council during its sessions or by the Member States meeting in the Council. Consequently, the heading 'Aid for Bangladesh — Council conclusions' does not reflect the actual measures agreed, since the Council as such took no decision. The only decision adopted was that of the 12 Member States meeting in the Council and agreeing among themselves special aid which they intended to finance bilaterally, by providing aid either directly or through an account administered by the Commission.

15. The Council denies that the contested act was adopted on the basis of a Commission proposal under Article 149 of the EEC Treaty. The wording of the press release — 'on the basis of a Commission proposal' — is therefore not quite appropriate. The Council acted in agreement with the Commission. The latter played its proper role in situations in which the international community has a duty to react when an area of the world is affected by a catastrophe.

16. The Member States did not act under the Community legal system. In fact they acted on another basis, that of *ad hoc* cooperation. It is not true that Member States acting collectively may in no case act in a Community

context. The EEC Treaty itself recognizes that consensus on the part of the Member States may have a legal effect in a number of cases. The consequence of the Parliament's line of argument is hard to accept. In the final analysis, it would mean that in a field of urgent or humanitarian aid and, taking the argument further, in the area of external aid, the competence to act could only be a Community competence. According to the Council, Community competence in that area is not exclusive. The Member States, acting collectively or individually, whether or not on the initiative of the Commission, retain the power to act at any time in parallel to any action by the Community or on their own account. What the Member States may do individually in the areas of food aid, bilateral aid and emergency aid, they may also do collectively. The Council points out that, accordingly, the European Development Fund is directly financed by each of the Member States and administered by the Commission.

17. The Commission observes that the choice of GNP as the basis for apportionment is a practical solution based on a known reference datum which may be immediately applied. GNP as the basis of apportionment can in no event have the effect of transforming collective action by the Member States into Community action.

18. The Member States' intention was to make the special aid part of the common effort undertaken at the EEC level. The Commission may be called upon in certain circumstances to respond to a request from the Member States or the Council to implement and monitor a programme or joint

action. The experience and competence acquired by the Commission may justify entrusting it with tasks outside its normal or customary duties. It is wrong to claim that the Member States gave 'orders' to the Commission. The latter voluntarily agreed to be entrusted with the coordination of the action.

19. The Council cannot see how aid financed bilaterally by the Member States could be examined by the Court of Auditors. It is difficult to see how Article 206a of the EEC Treaty could apply to the financial operations connected with this special aid.

20. In the Council's view, Parliament attributes to it intentions or motives which it suspects were aimed in the final analysis at excluding it from the decision-making process in respect of the special aid for Bangladesh. In that respect, the Council states that at no time did the Commission submit to it a preliminary draft amending and supplementary budget or a proposal to review the financial prospects in order to take account of a plan of action for Bangladesh. The emergency aspect played a decisive role in motivating the Member States when they agreed the special aid amongst themselves. They therefore chose another approach by exercising competence which they had individually or collectively in order to decide to grant the humanitarian aid.

21. The Council argues that it did not adopt any act or decision on a Commission proposal for aid to Bangladesh on 14 May 1991. The contested act does not exist substantively, since, no such act was ever adopted.

## (b) *Substance*

22. The *Parliament* states that, since the Luxembourg and Brussels Treaties, it has become the budgetary authority of the Community. It is clear from Articles 199 and 202 of the EEC Treaty that the Community budget is the act which provides for and gives prior authorization each year for the foreseeable revenue and expenditure of the Communities. Any outlay of expenditure not provided for in the budget totally lacks legal basis. In order to increase the total amount of appropriations during the financial year, Article 15 of the Financial Regulation provides for supplementary or amending budgets. Such budgets are adopted in accordance with the same procedure as the General Budget. It is for Parliament, and Parliament alone, seised by the Council in accordance with the applicable procedures, to adopt any amendment of the budgetary document relating to revenue or expenditure, while complying with the provisions in force.

23. As a result of the special aid, the forecast revenue and expenditure for 1991 changed during the financial year. There was thus an infringement of the rule laid down by Article 199 of the EEC Treaty that there is to be a single budget. In the same way, the principles that the budget should cover all revenue and expenditure and be annual were flouted. Finally and above all, the rule relating to the legality of the budget was called in question by the contested act.

24. In addition to the formal infringement of the financial provisions of the EEC Treaty, Parliament considers that the Council's conduct testifies to a disregard for the fundamental democratic principle. The Council

was also in breach of its duties of cooperation in good faith under Article 5 of the EEC Treaty, especially in so far as it refused to revise the financial prospects in accordance with the procedures set forth in the Interinstitutional Agreement.

25. The *Council* rejects Parliament's premiss that the special aid for Bangladesh is expenditure chargeable to the General Budget of the Communities. It clearly emerges from the minutes of the Council session that the aid is to be financed in full by the Member States. Thus the finance falls outside the scope of the Community budget. The fact that the Member States meeting in the Council conceived that bilateral aid as a common action to be integrated with the general action of the Community and of its Member States in favour of Bangladesh cannot transform it *ipso jure* into expenditure chargeable

to the budget. At no time did the Council receive a proposal from the Commission to implement the aid or a preliminary draft amending or supplementary budget. It cannot be argued that the Council amended of its own motion in the course of the financial year the forecast revenue and expenditure for the 1991 financial year, thereby infringing the rules relating to the unity and legality of the budget and the principles that the budget should cover all revenue and expenditure and be annual. In this connection, Parliament's arguments alleging that the Council disregarded the democratic principle and infringed its duties of cooperation in good faith under Article 5 of the EEC Treaty must also be rejected.

P. J. G. Kapteyn  
Judge-Rapporteur

## REPORT FOR THE HEARING in Case C-248/91 \*

### I — Facts

1. In April 1991 Bangladesh was hit by a violent cyclone. After obtaining information, the Commission submitted a plan for special action in favour of Bangladesh to the Ministers of Finance meeting informally in Luxembourg on 11 May 1991. The plan was examined by the Council (General Affairs), which was holding an ordinary session on 13 and 14 May in Brussels. The question of aid for Bangladesh did not appear as a formal

item of the Council's agenda. On 14 May it was agreed to grant special aid of ECU 60 million to Bangladesh, financed bilaterally by the 12 Member States, the distribution among them to be based on gross national product ('GNP'). The task of coordinating the whole of the aid was entrusted to the Commission.

2. The terms of the aid were published by means of a 'press release' drafted and put out

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