

JUDGMENT OF THE COURT

27 September 1988 *

In Case 204/86

Hellenic Republic, represented by Giannos Kranidiotis, Special Secretary at the Ministry of Foreign Affairs, assisted by Stelios Perrakis, Legal Adviser on European Affairs at the European Communities Department of the Ministry of Foreign Affairs, and Professor Krateros Ioannou, with an address for service in Luxembourg at the Embassy of the Hellenic Republic, 117, Val-Sainte-Croix,

applicant,

v

Council of the European Communities, represented by Félix Van Craeynest, Principal Administrator in the Legal Department of the Council of the European Communities, with an address for service in Luxembourg at the office of Jörg Käser, Manager of the Legal Directorate of the European Investment Bank, 100 boulevard Konrad-Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Hendrik van Lier, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, also a member of its Legal Department, Jean Monnet Building, Kirchberg,

intervener,

APPLICATION for a declaration that the act whereby the Commission's proposal concerning transfer No 4/86 of appropriations from Chapter 100, Item 9631, to Chapter 96, Item 9632, of the European Communities' budget for 1986 was tacitly approved on 2 June 1986 is void,

* Language of the Case: Greek.

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. N. Kakouris and R. Joliet, Judges,

Advocate General: G. F. Mancini

Registrar: D. Louterman, Administrator

having regard to the Report for the Hearing and further to the hearing on 16 March 1988, at which the defendant's Agent was assisted by Stavros Afendras, of the Athens Bar, and the intervener's Agent was assisted by Mrs Buissart, a member of the Legal Department of the Commission of the European Communities,

after hearing the Opinion of the Advocate General delivered at the sitting on 25 May 1988,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 4 August 1986, the Hellenic Republic brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of the act whereby on 2 June 1986 the Council tacitly approved the Commission's proposal concerning transfer No 4/86 of appropriations from Chapter 100 (provisional appropriations), Item 9631 (Fourth Financial Protocol with Turkey), to Chapter 96 (Cooperation with Mediterranean countries) Item 9632 (Special aid for Turkey) of the budget of the European Communities for the 1986 financial year.
- 2 According to the justification appended to the Commission's proposal, a broad consensus emerged during the Council meeting on general affairs held on 17 February 1986 on the Commission's proposed approach, consisting in 'the normal-

ization of relations between the Community and Turkey in stages and, in particular the progressive resumption of the financial cooperation, which has been suspended, for political reasons, since 1981'. According to the plan outlined by the Commission, the intention was to begin the resumption of financial cooperation by unfreezing special aid for Turkey. However, the Hellenic Republic opposed that proposal on the grounds that neither democratic liberties nor the protection of human rights had been sufficiently re-established in Turkey to justify a resumption of relations.

- 3 It appears from the documents before the Court that the origins of that aid go back to 1979. On 16 May 1979, with a view to reviving the EEC-Turkey Association, the Council adopted the Community's position, in various fields, for the purposes of negotiations within the institutional framework of the Association. As far as financial cooperation was concerned, the Community stated that it was ready to begin negotiating a fourth financial protocol. For the transitional period until the protocol entered into force, the Community was prepared to consider specific action — in the form of grants to Turkey amounting to ECU 75 million over a period of two years — to finance cooperation measures. On 19 September 1980 the Association Council took formal note of the Community's offer to grant Turkey exceptional aid totalling ECU 75 million and laid down the conditions governing the implementation of that offer (Decision No 2/80 of the Association Council).
- 4 In view of developments in Turkey's domestic policy, the Community decided, in late 1981, to freeze its relations with that country, particularly in the field of financial cooperation. For that reason, the Fourth Financial Protocol, which had been initialled in June 1981, was not concluded. The special aid was suspended after ECU 46 million had been committed. Therefore, ECU 29 million was still available.
- 5 In the 1986 budget no commitment appropriation was entered in respect of financial cooperation with Turkey under the appropriate headings of Chapter 96. However, an amount of ECU 10 million in commitment appropriations was provided for in Chapter 100 in respect of the Fourth Financial Protocol with Turkey (Item 9631). However, the Commission considered that it would not be possible to implement the Fourth Financial Protocol, which had been blocked since 1981, until 1987 at the earliest, and that under those circumstances the corresponding appropriations entered in Chapter 100 of the 1986 budget could not be used as envisaged.

- 6 Consequently, in a letter dated 17 April 1986, the Commission proposed to the budgetary authority the direct transfer of ECU 10 million from Chapter 100 (provisional appropriations), Item 9631 (Fourth Financial Protocol with Turkey), to Chapter 96 (Cooperation with Mediterranean countries), Item 9632 (Special aid for Turkey), on the basis of the procedure set out in Article 21 (2) of the Financial Regulation. Article 21 (2) provides that in the case of proposals for transfers relating to expenditure which is compulsory under the terms of the Treaties or of acts adopted pursuant thereto ('compulsory expenditure'), the Council, after consulting the European Parliament, is to act by a qualified majority within six weeks. Where the Council does not act within that time-limit, the proposals for transfers are deemed to be approved. In contrast, proposals for transfers relating not only to compulsory expenditure but also to non-compulsory expenditure are deemed to be approved if neither the Council nor the European Parliament has taken a decision to the contrary within six weeks of the date on which the two institutions received the proposals.
- 7 The Commission considered that the proposed transfer related to appropriations intended to cover compulsory expenditure. Pursuant to the relevant procedure laid down in the second subparagraph of Article 21 (2) of the Financial Regulation, the European Parliament delivered an opinion on 29 May 1986 in which it maintained that the proposed transfer should be rejected.
- 8 Since the Council did not adopt a formal decision, the proposed transfer was deemed to be approved by virtue of that provision on 2 June 1986.
- 9 Reference is made to the Report for the Hearing for a fuller account of the facts, the course of the procedure and the submissions and arguments of the parties, which are mentioned hereinafter only in so far as is necessary for the reasoning of the Court.
- 10 The Hellenic Republic advances three submissions in support of its application, namely: lack of competence on the part of the Council; misuse of powers by the Council; and breach by the Community of an obligation under international law.

Lack of competence on the part of the Council

- 11 The Hellenic Republic maintains that the transfer authorization must be regarded as invalid because the Council lacks competence with respect to transfers of appropriations relating to non-compulsory expenditure.
- 12 In this case a 'mixed' transfer was involved, since the expenditure under the original item (Item 9631 of Chapter 100) was compulsory and the expenditure provided for under the item to which the transfer was made (Item 9632 of Chapter 96) was non-compulsory. The Council decided on the special aid unilaterally on 8 May 1979 when it adopted its position with regard to the development of the Association with Turkey; the aid therefore constituted essentially a 'gesture of goodwill' towards that country, as witness, moreover, the very wording of Decision No 2/80 of the Association Council. Consequently, the procedure laid down in the fourth subparagraph of Article 21 (2) of the Financial Regulation for transfers involving both compulsory and non-compulsory expenditure was applicable and, in view of the negative opinion of the European Parliament, the transfer should not have been carried out.
- 13 For their part, the Council and the Commission consider that the conditions for applying the transfer procedure for compulsory expenditure are satisfied in this case. The two institutions claim, in particular, that the classification of Item 9632 as compulsory expenditure has never been called into question by the three institutions participating in the budgetary procedure, that is to say the European Parliament, the Council and the Commission. According to the Joint Declaration by those three institutions of 30 June 1982 (Official Journal 1982, C 194, p. 1) an external obligation on the part of the Community to Turkey is involved. The special aid resulted in Decision No 2/80 of the Association Council of 19 September 1980 which, under Article 22 of the EEC-Turkey Association Agreement, is binding on the Community. Accordingly, Item 9632 is classed as compulsory expenditure in the annex to the Joint Declaration. The Council further considers that any problem of classification arising should be resolved within the framework of the procedure provided for by the Joint Declaration, and not by recourse to legal proceedings.
- 14 It must be observed in the first place that, in order to determine the respective powers of the European Parliament and the Council in budgetary matters, Article 203 of the Treaty draws a distinction between 'expenditure necessarily resulting

from this Treaty or from acts adopted in accordance therewith' and 'expenditure other than that necessarily resulting from this Treaty or from acts adopted in accordance therewith'. That distinction is also adopted in Article 21 of the Financial Regulation.

- 15 In view of the difficulty of determining the scope of those words and of the budgetary crises which have arisen between the institutions on several occasions, the European Parliament, the Council and the Commission stated in the Joint Declaration of 30 June 1982, cited above, that 'harmonious cooperation between the institutions is essential to the smooth operation of the Communities' and that 'various measures to improve the operation of the budgetary procedure . . . should be taken by agreement between the institutions of the Communities, due regard being had to their respective powers under the Treaties'. The three institutions accordingly agreed that 'compulsory expenditure [is] such expenditure as the budgetary authority is obliged to enter in the budget to enable the Community to meet its obligations, both internally and externally, under the Treaties and acts adopted in accordance therewith'.
- 16 It must be borne in mind in that regard that, as the Court held in its judgment of 3 July 1986 in Case 34/76 *Council v European Parliament* [1986] ECR 2155, the problems regarding the delimitation of non-compulsory expenditure in relation to compulsory expenditure are the subject of an inter-institutional conciliation procedure set up by the Joint Declaration of the European Parliament, the Council and the Commission of 30 June 1982, and are capable of being resolved in that context. Indeed the operation of the budgetary procedure, as it is laid down in the financial provisions of the Treaty, is based essentially on inter-institutional dialogue. That dialogue is subject to the same mutual duties of sincere cooperation which, as the Court has held, govern relations between the Member States and the Community institutions (see the judgment of 10 February 1983 in Case 230/81 *Luxembourg v European Parliament* [1983] ECR 255).
- 17 It should be added that, as far as the classification of expenditure is concerned, the Community institutions possess a discretionary power which, however, is limited by the separation of powers, as laid down in the Treaty, between the institutions. The Court must therefore make sure that in the context of inter-institutional cooperation the institutions do not ignore the rules of law and do not exercise their discretionary power in a manifestly wrong or arbitrary way.

- 18 In that respect, it must be observed that the parties do not contest the classification as compulsory expenditure of the item from which the transfer was made, namely Item 9631 (Fourth Financial Protocol) of Chapter 100 (provisional appropriations). That classification is based, moreover, on the fact that provisional appropriations constitute a reserve earmarked, in principle, for allocation to the operating heading. In this case, the appropriation entered under Item 9631 is classed as compulsory expenditure, since it was intended to cover Community obligations arising under the Fourth Financial Protocol when it has been duly signed and concluded. Therefore, the Community institutions did not commit an error in law by classifying the item from which the transfer was made as compulsory expenditure.
- 19 As regards the item to which the transfer was made, namely Item 9632 (Special Aid for Turkey) of Chapter 96 (Cooperation with Mediterranean countries), it must be observed that in the document of 10 May 1979, adopted by the Council on 16 May 1979, which established the Community's position with a view to the revival of the EEC-Turkey Association, the Community declared that it was 'prepared to consider specific action — in the form of grants to Turkey amounting to ECU 75 million over two years — to finance cooperation measures'. It is clear from both the wording and the content of that document that its purpose was to give directives to the Community's delegation for the negotiations with Turkey. Consequently those directives were not, as such, capable of giving rise to an external obligation.
- 20 In contrast, the fact that those negotiations resulted in Decision No 2/80 of the Association Council indicates that the Community's offer 'to grant Turkey exceptional aid totalling 75 million European units of account' was accepted by Turkey. By providing for cooperation with regard to '... the implementation of the ... aid ... made available to Turkey', the Association Council placed that aid within the institutional framework of the Association. Under those circumstances, there is nothing in the documents before the Court to suggest that the classification of the special aid as compulsory expenditure is vitiated by an error of law or a manifest error of assessment.
- 21 The Government of the Hellenic Republic also maintained that the suspension of the special aid, following the freezing of relations between the Community and Turkey in 1981, could have affected the compulsory character of the aid. However, in that connection, it is sufficient to observe that the consequences of such a suspension have no effect on the legal nature of the obligation in question. Decision No 2/80 was not modified in any way following the suspension of the special aid.

- 22 In those circumstances, it must be observed that the budgetary authority did not exercise its discretionary power in a manifestly wrong or arbitrary manner when it classified Item 9632 (Special aid for Turkey) as compulsory expenditure. The submission based on lack of competence on the part of the Council must therefore be rejected.

Misuse of powers

- 23 The Hellenic Republic maintains that the provisional appropriations can be transferred only to the headings mentioned in the remarks relating to Chapter 100, and only after the corresponding basic act has been adopted. In this case, the basic act for Item 9631 (Fourth Financial Protocol) was never adopted and the transfer was used to provide funds for a different item, namely Item 9632 (Special aid for Turkey). In addition, the Council transferred the appropriations directly from Chapter 100 to a heading different from that required according to the remarks relating to that chapter, whereas the correct 'triangular' transfer procedure, that is to say transfer via the corresponding operating heading, was applicable.
- 24 The Council and the Commission consider that the restrictions to which, according to the Hellenic Republic, transfer operations are subject, are not derived from budgetary instruments. First, authorization for a transfer from Chapter 100 cannot be made conditional on the prior existence of a corresponding basic act. Secondly, a direct transfer is perfectly lawful, provided only that the procedure laid down in Article 21 of the Financial Regulation is complied with.
- 25 According to Article 15 (4) of the Financial Regulation provisional appropriations 'may be used only by means of transfer in accordance with the procedure laid down in Article 21' of the Financial Regulation. Article 21 lays down the conditions and the limits within which the Community institutions may modify the budget forecast. Neither Article 21 of the Financial Regulation nor any other budgetary provision prohibits the transfer of provisional appropriations to headings other than those mentioned in the remarks relating to Chapter 100.

- 26 It follows from the foregoing that the budgetary authority may carry out a 'direct' transfer from Chapter 100 to a heading other than the heading required on the basis of the remarks relating to that chapter. A transfer procedure such as that envisaged by the Hellenic Republic would not improve the transparency of the budget or the correctness of its implementation. The submission based on misuse of powers must therefore be rejected.

Breach of an obligation under international law

- 27 The Hellenic Republic claims in this connection that the Community has infringed an obligation under international law, namely Resolution No 541 of 18 November 1983 of the Security Council of the United Nations calling upon all States not to recognize any Cypriot State other than the Republic of Cyprus. In so far as Turkey failed to comply with that resolution, the Community disregarded that breach by granting special aid to Turkey, and consequently is itself in breach of an obligation under international law.
- 28 In that regard, it is sufficient to observe that the resolution of the Security Council of the United Nations, cited above, is completely extraneous to relations between the Community and Turkey in the context of the Association. As a result, that submission must also be rejected.
- 29 Consequently, the application must be dismissed in its entirety.

Costs

- 30 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions, it must be ordered to pay the costs, including those of the intervener.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application.

(2) Orders the Hellenic Republic to pay the costs, including those of the intervener.

Mackenzie Stuart

Bosco

Due

Moitinho de Almeida

Rodríguez Iglesias

Koopmans

Everling

Bahlmann

Galmot

Kakouris

Joliet.

Delivered in open court in Luxembourg on 27 September 1988.

J.-G. Giraud

A. J. Mackenzie Stuart

Registrar

President