JUDGMENT OF THE COURT
7 December 1995 *

In Case C-41/95,

Council of the European Union, represented by Jean-Paul Jacqué, Director of the Legal Service, and Félix van Craeyenest and Yves Crétien, Advisers in its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

applicant,

v

European Parliament, represented by Gregorio Garzón Clariana, Jurisconsult, assisted by Christian Pennera, Head of Division in the Legal Service, and Peter Dyrberg, of the Legal Service, acting as agents, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

defendant,

APPLICATION for the annulment of the act of the President of the European Parliament of 15 December 1994 declaring the final adoption of the general budget of the European Union for the financial year 1995 (OJ 1994 L 369, p. 1),

* Language of the case: French.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris and G. Hirsch, (Presidents of Chambers), F. A. Schockweiler, J. C. Moitinho de Almeida, P. J. G. Kapteyn (Rapporteur), C. Gulmann, P. Jann, H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

Advocate General: A. La Pergola,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 October 1995,

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

gives the following

Judgment

1 By application lodged at the Court Registry on 17 February 1995, the Council of the European Union brought an action under Article 173 of the EC Treaty and Article 146 of the EAEC Treaty for the annulment of the act of the President of the European Parliament of 15 December 1994 declaring the final adoption of the general budget of the European Union for the financial year 1995 (OJ 1994 L 369, p. 1).

2 Upon its first reading of the draft budget for 1995, on 25 and 27 October 1994, the European Parliament adopted 131 'amendments' relating to appropriations under Subsection B1 (EAGGF Guarantee Section) and Item B7-800 (International fisheries agreements) concerning expenditure referred to as 'compulsory expenditure' in the draft budget.

3 In respect of each of the relevant headings in Subsection B1, the Parliament added, under the rubric 'Remarks', the following sentence: 'The budgetary authority considers that the basic regulations leave the Commission some discretion in the management of this measure. Its implementation should conform to Article 5(2) of the Financial Regulation.' That statement is followed by a 'justification' in the following terms: 'Parliament feels that the regulations on which this measure is based leave the Commission some flexibility in the management of this measure within the limits of the appropriations entered by the budgetary authority.'

4 In respect of Item B7-800, the Parliament inserted, under the rubric 'Remarks', the following paragraph: 'ECU 1 000 000 is also earmarked to cover expenditure in connection with a fisheries agreement which the Community will negotiate with Russia on the financing of transfer fishing for herring.'

5 Upon its second reading of the draft budget, on 16 November 1994, the Council rejected the 'amendments' proposed by the Parliament, on the ground that they effectively constituted 'proposed modifications' relating to compulsory expenditure. By letter of 2 December 1994 the President of the Council reminded the President of the Parliament of the position consistently adopted by his institution, according to which expenditure falling within the agricultural guideline constitutes compulsory expenditure.

6 Upon its second reading of the draft budget for 1995, on 13 and 15 December 1994, the Parliament confirmed all of the 'amendments' regarded by the Council as 'proposed modifications'.

7 On 13 December 1994 the President of the Council stated before the Parliament that his institution was unable to accept the changes made by the Parliament to the classification of expenditure, since the expenditure falling within the budget headings concerned had to a very large extent been classified as compulsory expenditure in the Joint Declaration by the European Parliament, the Council and the Commission of 30 June 1982 on various measures to improve the budgetary procedure (OJ 1982 C 194, p. 1, hereinafter 'the 1982 declaration') and the classification of that expenditure had remained unchanged in the negotiations leading to the adoption of the Interinstitutional Agreement of 29 October 1993 on budgetary discipline and improvement of the budgetary procedure (OJ 1993 C 331, p. 1, hereinafter 'the 1993 agreement').

8 On 15 December 1994 the President of the Parliament declared the final adoption of the budget for 1995.

9 On that occasion, the President of the Council stated before the Parliament: '... The Council's position in this matter was notified to Parliament by letter from its President of 2 December 1994 and by me in my statement of 13 December 1994. I am therefore obliged to tell you that the Council reserves the right to take whatever action it sees fit on this matter. I must also point out that the Council's agreement to the new rate for non-compulsory expenditure is given on the basis of the aforementioned position.'

10 The President of the Parliament then made the following statement: 'Despite divergent points of view on some areas, an agreement with the Council pursuant to Article 203 of the EC Treaty has been obtained on a new maximum increase rate. The budgetary procedure can therefore be brought to a successful conclusion.'

11 In the present action, the Council makes two complaints against the Parliament.

12 First, it alleges that the Parliament has infringed the second subparagraph of Article 203(4) and Article 203(5) and (6) of the EC Treaty by deciding, by way of 'amendments', on headings in the draft budget drawn up by the Council concerning expenditure classified as compulsory expenditure, in relation to which, according to Article 203, it may act only by way of 'proposed modifications'.

13 Second, the Council complains that the Parliament has acted in breach of the duty of cooperation in good faith between institutions by unilaterally and arbitrarily proceeding to reclassify compulsory and non-compulsory expenditure in a way which contravenes the undertakings given in the context of the 1982 declaration and the 1993 agreement.

14 The Parliament contends in its defence that compulsory expenditure constitutes the expenditure appearing in the Council's draft budget, in relation to which, on its first reading, the Parliament may propose modifications, whereas non-compulsory expenditure is subject to amendment by the Parliament. According to the defendant institution, when the Council is confronted, on a second reading, with changes to the draft budget which the Parliament characterizes as 'amendments', but the Council itself regards the headings in question as relating to compulsory expenditure, it reclassifies those 'amendments' as 'modifications' and generally removes them. However, if, on a second reading, the Parliament maintains its 'amendments', it definitively classifies the heading concerned as non-compulsory expenditure.

15 The Parliament further considers that, in examining the general budget, it complied with the 1993 agreement in every respect and at no time called in question the undertakings given or breached them in any way. The 1982 declaration, whilst still in force, has been largely superseded, since most of the budget headings now existing no longer correspond to those of 1982, and the 1993 agreement has modified the procedure for interinstitutional cooperation.

16 It is necessary, first of all, to examine the provisions of Article 203 of the Treaty which are in issue in the present case.

17 Article 203(9) concerns the procedure applicable to the fixing of what is known as non-compulsory expenditure, that is to say, expenditure other than that necessarily resulting from the Treaty or from acts adopted in accordance therewith.

18 It is clear from the provisions of the second subparagraph of Article 203(4), Article 203(5)(a) and Article 203(6) that, with regard to non-compulsory expenditure, the Parliament has the right to amend the budget and that the Council may then modify any of the amendments thus adopted, but that the Parliament may, on its second reading of the draft budget as modified by the Council, amend or reject the modifications made to its amendments by the Council.

19 As regards compulsory expenditure, on the other hand, although on its first reading the Parliament may propose modifications to the budget as drawn up by the Council, it is not empowered on the second reading to challenge the steps taken by the Council in relation to those proposed modifications.

20 Furthermore, Article 203(9) imposes a ceiling on the increase in non-compulsory expenditure as compared to expenditure of the same type appearing in the budget for the previous year. That ceiling is determined by a 'maximum rate of increase', to which the Community institutions are required to conform, by virtue of the third subparagraph of Article 203(9), during the budget procedure.

21 Under the second subparagraph of Article 203(9), that maximum rate of increase is to be fixed annually by the Commission on the basis of three objective factors: the

trend, in terms of volume, of the gross national product within the Community, the average variation in the budgets of the Member States and the trend of the cost of living during the preceding financial year.

22 Where the Parliament, the Council or the Commission considers during the budget procedure that the activities of the Communities require that that rate should be exceeded, another rate may be fixed by agreement between the Council and the Parliament pursuant to the fifth subparagraph of Article 203(9).

23 As the Court has previously stated, although the Treaty provides that the maximum rate must be fixed by the Commission on the basis of objective factors, no criterion has been laid down for the modification of that rate. According to the fifth subparagraph of Article 203(9), it is sufficient for the Council and the Parliament to come to an agreement. In view of the importance of such an agreement, which confers on the two institutions, acting in concert, the freedom to increase the appropriations in respect of non-compulsory expenditure in excess of the rate declared by the Commission, the existence of that agreement may not be inferred from the presumed intention of one or other of those institutions (judgment in Case 34/86 *Council* v *Parliament* [1986] ECR 2155, paragraph 34).

24 It is not disputed in the present case that the amount of the appropriations entered in the budget for 1995, as declared by the President of the Parliament under Article 203(7), in respect of total expenditure other than that necessarily resulting from the Treaty or from acts adopted in accordance therewith, exceeds the maximum rate as compared to expenditure of the same type appearing in the 1994 budget, within the meaning of the first subparagraph of Article 203(9).

25 It follows that, by virtue of that provision, the adoption of the 1995 budget could be declared by the President of the Parliament only if a new rate of increase were fixed by agreement between the Council and the Parliament.

26 There can be no agreement on the rate of increase unless the Parliament and the Council have agreed the total amount of expenditure to be classified as non-compulsory. It is that amount which effectively constitutes the basis of that rate of increase.

27 The Parliament contends in that regard, first, that it follows from the developments which took place during the plenary sitting on 15 December 1994, as reported both in the minutes of that sitting and in the verbatim record of the debates, that the President-in-Office of the Council not only publicly gave his oral consent to the new rate before the Parliament, thereby enabling the President of the Parliament to declare the final adoption of the budget, but also, in the presence of all those in attendance, behaved throughout the period leading up to the signature of the budget by the President of the Parliament as though he were fully in accord with the latter.

28 That argument cannot be accepted.

29 First of all, in his letter of 2 December 1994, the President of the Council reminded the President of the Parliament of the position adopted by his institution, according to which expenditure falling within the agricultural guideline was to be regarded, in accordance with the 1982 declaration and the 1993 agreement, as compulsory expenditure.

30 Next, on 13 December 1994 the President of the Council stated before the Parliament that his institution was unable to accept any modification to the classification

as compulsory expenditure of the expenditure concerned, since it had been agreed in the 1993 agreement that all of the expenditure under items 2 and 3 was henceforth to be classified as non-compulsory, on the basis that the classification of all other expenditure, including that under item 1 with which the present case is concerned, was to remain unchanged.

31 Lastly, in the declaration made by him prior to the signature of the budget by the President of the Parliament, which resulted in its final adoption, the President-in-Office of the Council stated that his institution reserved all of its rights in the matter and referred to the letter of 2 December 1994 and to the statement of 13 December 1994.

32 It follows that the Council did not give its consent to the new rate of increase in respect of non-compulsory expenditure as classified by the Parliament.

33 Second, the Parliament maintains that, since, in the circumstances referred to in the fifth subparagraph of Article 203(9) of the Treaty, the legality of the act of the President of the Parliament declaring the final adoption of the budget is dependent on the attitude of the Council, that institution has not only the power but also the duty to intervene if there is any ambiguity whatever as to the existence of consent on its part. Contrary to the Council's contention, the attitude adopted by its President at the time when the budget was finally adopted cannot be regarded as having been dictated simply by the rules of diplomatic courtesy.

34 That argument must also be rejected. Under Article 203(10) of the Treaty, each institution is to exercise the powers conferred on it in budgetary matters with due regard for the provisions of the Treaty. Since the Council did not give its consent to the new rate of increase in respect of non-compulsory expenditure, as classified by the Parliament, it is not open to the latter to claim that, by behaving towards the Parliament in a manner consistent with the dictates of courtesy after making

the statement referred to in paragraph 31 above, the President of the Council modified the Council's position as expressed in the letter of 2 December 1994 and the statement of 13 December 1994.

35 Lastly, the Parliament maintains that, instead of bringing proceedings before the Court at the end of the period laid down in the fifth paragraph of Article 173 of the Treaty, the Council should have pointed out, upon receiving the act of the President of the Parliament declaring the final adoption of the 1995 budget, the defect vitiating it.

36 It is sufficient in that connection to observe that, as regards the period within which proceedings are to be brought before the Court, the fifth paragraph of Article 173 merely requires actions under that article to be brought within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

37 In the light of the foregoing, the Court finds that the act of the President of the Parliament of 15 December 1994 declaring the final adoption of the 1995 budget took place at a time when, in the absence of agreement between the two institutions concerned on the basis for the new maximum rate of increase, the budget procedure had not yet been completed. That act is consequently illegal.

The consequential effects of the illegality established

38 The Council additionally seeks from the Court an order invalidating the budget as adopted by the Parliament on 15 December 1994.

39 Since the act of the President of the Parliament has been annulled, the Parliament considers that this claim is inadmissible because it is devoid of purpose.

40 It should be observed that the annulment of the act of the President of the Parliament of 15 December 1994 arises from the fact that although the President declared, pursuant to Article 203(7), the 'final' adoption of the budget, the two institutions had not agreed the figures in relation to a new maximum rate of increase, nor the total amount of non-compulsory expenditure on which it was to be based. In the absence of agreement on those essential matters, the President of the Parliament was not legally in a position to declare the final adoption of the budget, with the result that that declaration must be annulled.

41 The effect of the annulment of the act of the President of the Parliament is to invalidate the 1995 budget. There is therefore no need to give a decision on the Council's claim that the Court should declare the budget invalid.

42 It is for the Council and the Parliament to adopt measures to comply with this judgment and to resume the budget procedure at the point where the Parliament declared, on its second reading, its intention to maintain all of the amendments regarded by the Council as 'proposed modifications'.

The temporal effects of this judgment

43 It should be noted, however, that the 1995 budget has been found to be invalid at a point in time when the 1995 financial year has for the most part already elapsed.

44 In those circumstances, the need to ensure the continuity of the European public service, together with important considerations of legal certainty comparable to those which apply in the event of the annulment of certain regulations, justify the exercise by the Court of the power expressly conferred on it by the second paragraph of Article 174 of the EC Treaty and the second paragraph of Article 147 of the EAEC Treaty, in the event of the annulment of a regulation, and call for a statement by the Court as to which of the effects of the 1995 budget are to be regarded as definitive.

45 In view of the special circumstances of the case, the effects of the 1995 budget, as published in the *Official Journal of the European Communities*, must be preserved until the date of the final adoption of the budget.

Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Parliament has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Annuls the act of the President of the European Parliament of 15 December 1994 declaring the final adoption of the general budget of the European Union for the financial year 1995;**

2. **Preserves the effects of the 1995 budget, as published in the *Official Journal of the European Communities*, until the date of the final adoption of the budget;**

3. **Dismisses the remainder of the action;**

4. **Orders the Parliament to pay the costs.**

Rodríguez Iglesias Kakouris Hirsch

Schockweiler Moitinho de Almeida Kapteyn

Gulmann Jann Ragnemalm

Sevón Wathelet

Delivered in open court in Luxembourg on 7 December 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President