REPORT FOR THE HEARING
delivered in Case 377/87 *

I — Facts and procedure

1. *Legal context*

(a) The time-table for the budgetary procedure

Article 203 of the EEC Treaty and Article 177 of the EAEC Treaty [1] provide that the financial year is to run from 1 January to 31 December and that the budgetary procedure is to take place in accordance with the time-table and in the stages set out below:

First stage:

1 July to 1 September: each institution of the Community is to draw up, before 1 July, estimates of its expenditure. The Commission is to consolidate these estimates in a preliminary draft budget which is to contain an estimate of revenue and an estimate of expenditure (first and second subparagraphs of Article 203 (2)). The Commission is to place the preliminary draft budget before the Council not later than 1 September of the year preceding that in which the budget is to be implemented (first subparagraph of Article 203 (3)).

Second stage:

1 September to 5 October: the Council is to examine the preliminary draft budget. Acting by a qualified majority, it is to establish the draft budget and forward it to the European Parliament (second and third subparagraphs of Article 203 (3)). The draft budget is to be placed before the European Parliament not later than 5 October of the year preceding that in which the budget is to be implemented (first subparagraph of Article 203 (4)).

Third stage:

5 October to 19 November: the Parliament is to examine the draft budget and has a period of 45 days in which to propose changes to the Council (second and third subparagraphs of Article 203 (4)). If, within 45 days of the draft budget being placed before it, the European Parliament has not amended the draft budget or proposed any modifications thereto, the budget is to be deemed to be finally adopted (third subparagraph of Article 203 (4)).

Fourth stage:

20 November to 4 December: if the European Parliament has adopted amendments or proposed modifications, the Council has a period of 15 days of the Parliament's placing before it the draft budget, together with the amendments or proposed modifications, to examine the Parliament's proposals and amendments. If, within that period, the Council has not modified any of the amendments adopted by the Parliament and if the modifications proposed by the latter have been accepted, the budget is to be deemed to be finally adopted (third subparagraph of Article 203 (5)).

If the Council has modified one or more of the amendments adopted by the Parliament or if the modifications proposed by the latter have been rejected or modified, the

* Language of the Case: French.

1 — For reasons of simplicity, only the EEC Treaty is referred to hereafter.

modified draft budget is again to be forwarded to the Parliament (fourth subparagraph of Article 203 (5)).

Fifth stage:

5 to 19 December: the Parliament has a period of 15 days in which to fix the non-compulsory expenditure and adopt the budget. If, within this period, the Parliament has not acted, the budget is to be deemed to be finally adopted (Article 203 (6)).

The temporal constraints imposed by the timetable laid down in Article 203 on the budgetary procedure led the Commission to propose, and the Council and the Parliament to accept, in 1976, a 'pragmatic' timetable. This timetable is an agreement between the three institutions under which, whilst observing the strict application of the dates laid down in Article 203 of the Treaty, they established a timetable making it possible to allow a longer period of examination for the first reading by the Parliament, to double the time allowed for each of the two second readings and to discount the month of August, the traditional holiday month.

(b) Other provisions of the Treaty

Article 199 of the Treaty provides:

'All items of revenue and expenditure of the Community, including those relating to the European Social Fund, shall be included in estimates to be drawn up for each financial year and shall be shown in the budget. The revenue and expenditure shown in the budget shall be in balance.'

As regards the budget revenue, Article 200 (1) of the Treaty provides that it 'shall include, irrespective of any other revenue, financial contributions of Member States' and it fixes the scale according to which those contributions are determined. Paragraph 3 of Article 200 provides that 'the scales may be modified by the Council, acting unanimously'.

Article 201 of the Treaty provides:

'The Commission shall examine the conditions under which the financial contributions of Member States provided for in Article 200 could be replaced by the Community's own resources, in particular by revenue accruing from the common customs tariff when it has been finally introduced.

To this end, the Commission shall submit proposals to the Council.

After consulting the European Parliament on these proposals the Council may, acting unanimously, lay down the appropriate provisions, which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements.'

(c) Own resources

Pursuant to Article 201 of the Treaty the Council introduced a Community system of own resources by decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (Official Journal, English Special Edition 1970 (I), p. 224). It provided in particular for three

types of own resources: levies and contributions provided for within the framework of the common agricultural policy; Common Customs Tariff duties and other duties established in respect of trade with non-member countries; and resources accruing from value-added tax and obtained by applying a rate not exceeding 1% to an assessment basis which is determined in a uniform manner for Member States according to Community rules.

The 1970 Decision was replaced as from 1 January 1986 by the Council Decision of 7 May 1985 on the Communities' system of own resources (Official Journal L 128, p. 15), hereinafter referred to as the 1985 Decision. That decision provides in particular that the rates applicable to the assessment basis for value-added tax are to be fixed, taking into account all other revenue, within the framework of the budgetary procedure and that those rates are not to exceed 1.4%.

In its communication 'Making a success of the Single Act: a new frontier for Europe' (COM(87) 100 final) and in its report to the Council and the Parliament on the financing of the Community budget (COM(87) 101 final), dated 15 and 28 February 1987 respectively, the Commission put forward a number of ideas and suggestions with a view to reforming the financing system of the Community and increasing own resources. On 4 August 1987 the Commission submitted to the Council a 'Proposal for a Council Decision on the system of the Communities' own resources' (COM(87) 420 final, Official Journal C 241, p. 3). That proposal provided for the introduction of an additional own resource based on the difference between the sum of the gross national products (GNP) and the sum of the uniform bases for value-added tax in the Member States.

The Commission's proposals were largely accepted by the Council at the Brussels Summit on 11 and 12 February 1988.

2. *Background to the proceedings*

The origin of the proceedings may be traced to the fact that the Council did not place before the European Parliament a draft budget for the 1988 financial year before 6 October 1987. On 14 May 1987 the Commission adopted the preliminary draft budget for that financial year. On 15 June 1987 it forwarded it to the Council (COM(87) 240), pointing out in particular that the preliminary draft budget was based on the proposals put forward in Documents COM(87) 100 and 101, mentioned above, and would necessitate an increase in the Communities' own resources. The Commission also pointed out that should its proposals on the future financing of the Community budget not be adopted the gap between the 1.4% VAT limit laid down in the 1985 decision and the total financial requirements of the Community for 1988 would have to be met by means of an intergovernmental agreement.

The European Parliament formulated proposals and stressed the desirability of finding a solution for the future financing of the Community *inter alia* in its resolutions of 23 October 1986 on the future financing of the European Community (Official Journal C 297, p. 103), of 7 April 1987 on the budgetary situation with a view to preparation of the 1988 Community budget (Official Journal, C 125, p. 68), of 13 May 1987 on the questions raised by the Communication 'Making a success of the Single Act' (Official Journal C 156, p. 52) and of 18 June 1987 on the next European Council in Brussels and the future financing

of the Community (Official Journal C 190, p. 100). Following the meeting of the European Council at Brussels on 29 and 30 June 1987, the Parliament pointed out in its Resolution of 8 July 1987 on that meeting that 'any budgetary decisions which do not cover completely the real financial requirements for 1987 and 1988 cannot be accepted by the European Parliament'.

At its meetings held on 23 July, 17 and 18 September and 1 October 1987, the Council was unable to establish a draft budget for 1988. On 6 October 1987 the President of the Council informed the President of the European Parliament that the Council had not been able to meet the deadline of 5 October 1987 for placing before the Parliament the draft budget for 1988. By letter of 7 October 1987 the President of the Parliament called upon the Council pursuant to Article 175 of the EEC Treaty

'to establish without further delay a draft budget for the financial year 1988'.

At the plenary sitting held on 15 October 1987 the Parliament then adopted the following resolution:

'The European Parliament,

...

1. Decides to bring proceedings against the Council for failure to act before the Court of Justice, should no action be taken in response to the notice given to the Council by Parliament's President on 7 October 1987, pursuant to Article 175;

2. Considers that the Council's failure to act goes far beyond simply failing to submit the 1988 draft budget on time; therefore intends to ask the Court of Justice to give a ruling on the Council's failure to meet its obligations under the Treaties, particularly as regards the adoption in due time of the decisions necessary to ensure the full financing of Community policies;

3. Instructs its President to institute the procedures necessary to implement this decision.'

Following the European Council meeting at Copenhagen on 4 and 5 December 1987 at which no decision was adopted as regards the 1988 budget or its financing, the impossibility of adopting a draft budget was officially confirmed at the Council's meeting of 9 December 1987.

Taking note of that situation, the Parliament adopted on 16 December 1987 the following resolution:

'The European Parliament

...

6. Invites its President, in accordance with the resolution of 15 October, to bring an action against the Council for failure to submit the 1988 draft budget; points out that the failure to establish a draft budget for 1988 is a direct result of the Council's failure to take the decisions necessary to ensure the proper financing of Community policies; intends to draw attention to this wider perspective during its forthoming proceedings against the Council in the Court of Justice.'

3. *Procedure*

The originating application was received at the Court Registry on 18 December 1987.

The written procedure followed the normal course. However the Parliament waived its right to lodge a reply.

By letter of 22 December 1987 the Parliament requested that, having regard to the absence of a draft budget for the financial year 1988, the case should be given priority pursuant to the second subparagraph of Article 55 (1) of the Rules of Procedure.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without a preparatory inquiry. However it requested the Parliament to answer certain questions at the hearing.

II — Conclusions of the parties

The *European Parliament*, the applicant, claims in its application that the Court should:

(1) Declare that the Council of Ministers of the Community has failed to place before the Parliament, pursuant to Article 203 (4) of the EEC Treaty, not later than 5 October 1987 a draft general budget of the Communities for the financial year 1988 which it should have established in compliance with the provisions of the EEC Treaty, and in particular with Article 199 thereof;

(2) Order the Council to pay the costs.

The *Council of the European Communities*, the defendant, contends in its defence that the Court should:

(1) Dismiss the application as inadmissible;

(2) In the alternative dismiss the application as unfounded;

(3) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

Admissibility

The Parliament remarks that, pursuant to the second paragraph of Article 175 of the Treaty, the Council had 'first been called upon to act' by letter of 7 October 1987. In his statement at the plenary sitting of the Parliament of 13 October 1987, the President of the Council had admitted as much himself when he said: 'The President of the Parliament has . . . called upon the Council, pursuant to Article 175 of the Treaty, to establish a draft budget as quickly as possible'. The Parliament goes on to observe that the Council has not defined its position on that request to act. It considers that its application is therefore admissible.

The Council contends that it is not the absence of a draft budget but the absence of the budget itself for a given financial year that might, in appropriate circumstances, provide grounds for a declaration of failure to act. The establishment of a draft budget by the Council is not a final act but merely a step, and not even the initial step, in a

complex procedure. It follows in particular from Article 203 (7) of the Treaty according to which 'the President of the European Parliament shall declare that the budget has been finally adopted' that the budget remains an act in preparation so long as the budgetary procedure has not been terminated. From that point of view it is significant that the budget and the declaration of the President of the Parliament are published in the Official Journal whereas the draft budget is not.

The Council therefore requests that the application be declared inadmissible on the ground that the failure to establish a draft budget not later than 5 October 1987 does not constitute a 'failure to act' within the meaning of Article 175 of the Treaty.

Substance

The Parliament submits in the first place that the timetable for the budgetary procedure laid down in Article 203 must be considered and interpreted as a whole. It follows from the procedure for adopting the budget, and in particular from Article 203 (4), which provides that the first reading by the Parliament of the budget shall commence on 5 October and must be concluded 45 days later, that the date of 5 October is a date of primordial importance. It denotes the starting-point of a procedure which enables the Communities to function normally, on the basis of a properly adopted budget, from the beginning of the financial year concerned.

The Council contends that the date of 5 October, laid down in the first subparagraph of Article 203 (3), and the other dates laid down in that article, represent an indicative timetable. First, an absolute obligation to establish a draft budget before 5 October every year would be unrealistic. The establishment of a draft budget is not a matter of routine administration but a highly political act, influenced by, and having its own impact upon, the general political situation of the Communities. Secondly, where Article 203 intends a time-limit to be strictly applied, it spells out itself the legal consequences of exceeding that limit (third subparagraph of paragraph 4; third subparagraph of paragraph 5; paragraph 6). Lastly, by providing for the system of 'provisional twelfths', the Treaty itself recognizes that the Budget will not always be finally adopted by the beginning of the financial year. Moreover, the Parliament's power to reject the Budget is not compatible with an interpretation of Article 203 as imposing a rigid timetable for the initial phases of the budgetary procedure. The result of the exercise of the Parliament's power might be that the financial year would begin without a budget.

The Parliament submits in the second place that the Council should have established not later than 5 October 1987 a draft budget which conformed with the principles laid down in Article 199 of the Treaty and the Council cannot plead any justification for having failed to do so. According to the Parliament, the draft budget is a contingent budget and it is forwarded to the Parliament, in particular because, according to Article 203 of the Treaty, the budget is to be deemed to be finally adopted if the Parliament has not amended the draft budget or proposed any modifications thereto within 45 days. The Council is therefore required by Article 199 of the Treaty to establish a draft budget covering all expenditure and to balance the expenditure by corresponding revenue. Furthermore, Article 203 (10) of the Treaty provides that 'Each institution shall exercise

the powers conferred on it by this Article, with due regard for the provisions of the Treaty . . . , in particular those relating to the Communities' own resources and to the balance between revenue and expenditure.' In the Parliament's opinion the difficulties in balancing revenue and expenditure for the financial year 1988 were not insurmountable. The Council had a number of options. First, it could have adopted in good time the provisions necessary in order to increase the Communities' own resources in conformity with Article 201 of the Treaty. Secondly, it could have obtained, as the Commission had pointed out in its preliminary draft budget, an intergovernmental agreement. Thirdly, it could have had recourse to national contributions by applying Article 200 (3) of the Treaty. The Parliament is of the view that that article still applies, alongside the system of the Communities' own resources. Lastly, the Parliament states that the Council could have relied on the principle of continuity, to which the Court referred in its judgment of 14 December 1971 in Case 7/71 (*Commission* v *French Republic* [1971] ECR 1003) and the duty of cooperation between Member States under Article 5 of the Treaty.

The Council argues that the Parliament is misinterpreting the first paragraph of Article 199 of the Treaty. The question whether the budget contains estimates of all the revenue and expenditure and whether the revenue and the expenditure shown there are in balance can be examined only in relation to an established draft budget.

In that respect the Council observes in the first place that the Court stated in its judgment of 3 July 1986 in Case 34/86 (*Council* v *Parliament* [1986] ECR 2155) that 'the determination of the exigencies posed, for the budget of the Communities, by special situations such as the accession of new Member States or the absorption of the "cost of the past" is not a matter for the Court but for the Council and the Parliament, acting in concert.' This means, according to the Council, that it is for the budgetary authority, and it alone, to make a judgment as to what expenditure will be necessary in a given year and what is capable of being postponed for the time being. Secondly, in attempting to treat the failure to adopt the provisions needed to increase own resources as an infringement of Article 199, the Commission has ignored the separation between legislative power and budgetary power. Under the institutional system of the Community the Community legislature provides resources and creates the legal basis for expenditure, while the budgetary authority determines the appropriate level and distribution of expenditure in a given year, subject to available revenue.

As regards the various arguments put forward by the Parliament in support of its claim that the Council could well have established the draft budget covering all the revenue and expenditure of the Community for 1988, the Council makes the following observations. The Council's dilemma was that, whatever decisions might be taken about particular aspects of the preliminary draft budget submitted to it by the Commission, it was clear that 'expected' expenditure in 1988 would exceed the revenue available under the 1985 Decision, with its ceiling of 1.4% own resources from VAT. A draft budget established within the 1.4% VAT ceiling, and accompanied by a declaration of intent to establish a draft supplementary budget during the course of 1988 once a new own resources decision

was in place, would have been liable to be rejected by the Parliament on the ground that, in its view, it was contrary to the principle of annuality. Nor could a decision on own resources have been adopted so as to accord chronologically with the timetable for the final adoption of the 1988 Budget. The procedure laid down in Article 201 takes more than six months. The Commission's proposal for a new decision on own resources was submitted to the Council on 4 August 1987. It was only on 18 November 1987 that the European Parliament gave its Opinion and the Opinion of the Economic and Social Committee was not given until 27 January 1988. An intergovernmental agreement on a provisional method of financing expenditure, as envisaged by the Commission, was scarcely conceivable before an agreement in principle had been reached on the different elements in the Commission's proposal on own resources.

Finally, the Council does not accept that it would have been possible to resolve these difficulties by having recourse to Article 200 (3). The system of financial contributions by the Member States under that article is not capable of applying alongside the system of own resources. In the Council's opinion the coexistence of the two systems would be incompatible with the object of Article 201 of the Treaty. That object is not simply to provide an additional source of revenue. Such coexistence would also be incompatible with the VAT ceiling of 1.4% imposed by the 1985 Decision. Lastly, the avowed intention of the institutions of the Community completely to replace national contributions by own resources runs counter to the coexistence of the two systems. That intention emerges clearly from the 1970 and 1985 Decisions on own resources which provide that 'the budget of the Communities shall, irrespective of other revenue, be financed completely from the Communities' own resources'. The possibility that the national contributions provided for in Article 200 of the Treaty might fall under the heading 'other revenue' seems to be excluded.

T. Koopmans
Judge-Rapporteur