

JUDGMENT OF THE COURT

2 March 1994 ^{*}

In Case C-316/91,

European Parliament, represented initially by Jorge Campinos, juriconsult, then by José Luis Rufas Quintana, a member of its Legal Service, acting as Agents, assisted by Roland Bieber, Professor of European Law at the University of Lausanne, with an address for service at the Secretariat of the European Parliament, Kirchberg,

applicant,

v

Council of the European Union, represented by Arthur Alan Dashwood, Director of the Legal Service, and Jürgen Huber, Legal Adviser, acting as Agents, with an address for service at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

^{*} Language of the case: French.

supported by

Kingdom of Spain, represented by Alberto Navarro González, Director General for Community Legal and Institutional Coordination, and Rosario Silva de Lapuerta, State Attorney in the Legal Department for Matters before the Court of Justice, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

intervener,

APPLICATION for the annulment of Financial Regulation 91/491/EEC of 29 July 1991 applicable to development finance cooperation under the Fourth ACP-EEC Convention (Official Journal 1991 L 266, p. 1),

THE COURT,

composed of: O. Due, President, G. F. Mancini and J. C. Moitinho de Almeida (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn (Rapporteur) and J. L. Murray, Judges,

Advocate General: F. G. Jacobs,
Registrar: R. Grass,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 September 1993,

after hearing the Opinion of the Advocate General at the sitting on 10 November 1993,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 6 December 1991 the European Parliament brought an action under Article 173 of the EEC Treaty for the annulment of Financial Regulation 91/491/EEC of 29 July 1991 applicable to development finance cooperation under the Fourth ACP-EEC Convention (Official Journal 1991 L 266, p. 1).

- 2 The Fourth ACP-EEC Convention was signed at Lomé on 15 December 1989 (Official Journal 1991 L 229, p. 3). Financial cooperation is governed by Part Three of the Convention, Title III, Chapter 2. Article 231 refers to the Financial Protocol to the Convention for the overall amount of the financial assistance. That amount was set at ECU 12 000 million. The representatives of the Governments of the Member States of the European Economic Community, meeting within the Council, adopted on 16 July 1990 Internal Agreement 91/401/EEC on the financ-

ing and administration of Community aid under the Fourth ACP-EEC Convention (Official Journal 1991 L 229, p. 288). By that agreement the Member States established a seventh European Development Fund (1990, hereinafter the 'EDF').

- 3 Under Article 32 of the Internal Agreement the provisions for implementing the Agreement are to be the subject of a financial regulation adopted by the Council acting by the qualified majority laid down in Article 21 (4) on the basis of a Commission draft and after an opinion has been delivered by the European Investment Bank on the provisions of concern to it and by the Court of Auditors. That financial regulation, the annulment of which is sought by the European Parliament, was adopted by the Council on 29 July 1991.
- 4 In its application the Parliament seeks a declaration that the expenditure provided for as development aid in the Fourth ACP-EEC Convention is Community expenditure and must accordingly be governed by financial regulations made pursuant to Article 209 of the EEC Treaty.
- 5 In a separate document the Council requested the Court to dismiss the application as inadmissible on the grounds that first no act of the Council within the meaning of Article 173 of the Treaty is in issue and secondly the Parliament has no standing in this case. By order of 30 September 1992 the Court decided to reserve its decision on that objection for the final judgment in the matter.

Admissibility

- 6 The Council and the Spanish Government dispute the admissibility of the application on two grounds.

7 First, the Council submits that the financial regulation is not an act which may be contested under Article 173 of the Treaty. Although the act is an act of the Council, it is an act adopted not pursuant to the Treaty provisions but pursuant to a power conferred on the Council by a provision of an internal agreement to which all the Member States are parties.

8 It should be noted that it is settled law that an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (see the judgment in Case 22/70 *Commission v Council* [1971] ECR 263, at paragraph 42).

9 It follows that an action by the Parliament against an act of an institution intended to have legal effects is admissible irrespective of whether the act was adopted by the institution pursuant to Treaty provisions.

10 Secondly, the Council submits that the Parliament may not plead that its prerogatives were infringed since it was in fact consulted, albeit as an optional step.

11 It should be noted at the outset that it is settled law (see, in particular, the judgment in Case C-70/88 *Parliament v Council* [1990] ECR I-2041, at paragraph 21) that the Treaties set up a system for distributing powers among the different Com-

munity institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.

- 12 It is for the Court to protect that institutional balance by ensuring the full application of the Treaty provisions concerning the distribution of powers. In paragraph 27 of its judgment in *Parliament v Council*, cited above, the Court accordingly held that an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement.
- 13 That condition is satisfied where the Parliament indicates in an appropriate manner the substance of the prerogative to be safeguarded and how that prerogative is allegedly infringed.
- 14 In this case the Parliament claims that its prerogative consisted in a requirement that it be consulted on the adoption of the financial regulation whose legal basis should have been Article 209 of the Treaty, which requires that the Parliament be consulted. By adopting that regulation on the basis of Article 32 of the Internal Agreement, which does not require such consultation, the Council infringed that prerogative.
- 15 The argument of the Council that there was no breach of the Parliament's prerogatives on the ground that it was in fact consulted cannot be accepted.

16 The right to be consulted in accordance with a provision of the Treaty is a prerogative of the Parliament. Adopting an act on a legal basis which does not provide for such consultation is liable to infringe that prerogative, even if there has been optional consultation.

17 Proper consultation of the Parliament where required by the Treaty is one of the means allowing it to play an actual part in the legislative process of the Community (see the judgments in the *Isoglucose* cases, Case 138/79 *Roquette Frères v Council* [1980] ECR 3333, at paragraph 33, and Case 139/79 *Maizena v Council* [1980] ECR 3393, at paragraph 34).

18 Moreover, a particular provision applies where the Parliament is consulted pursuant to Article 209 of the Treaty. Article 127 of the Financial Regulation of the Council of 21 December 1977 applicable to the general budget of the European Communities (Official Journal 1977 L 356, p. 1; updated text published in Official Journal 1991 C 80, p. 1) provides that any financial regulations amending that financial regulation are to be adopted by the Council only after recourse to the conciliation procedure if the European Parliament so requests.

19 It must accordingly be held that the action brought by the Parliament is admissible.

The substance

20 Title III of Part Three of the Convention governs development aid finance co-operation. For the purposes set out in that title a Financial Protocol to the

Convention sets, in the words of Article 231 of the Convention, the overall amount of 'the Community's financial assistance'.

21 The Parliament argues that it follows from the very words of Article 231 of the Convention, repeated in Article 1 of the Financial Protocol, that the Community as such has undertaken vis-à-vis the ACP States, in the framework of development finance cooperation, an obligation of international law distinct from those undertaken by the Member States.

22 In its view, the financial resources to be granted thus constitute Community expenditure which must be shown in the Community budget and which is subject to the provisions of the Treaty concerning its implementation, in particular Article 209.

23 That argument must be rejected.

24 The question as to who has entered into a commitment vis-à-vis the ACP States must be dissociated from the question whether it is for the Community or its Member States to perform the commitment entered into. The answer to the first question depends on an interpretation of the Convention and on how in Community law powers are distributed between the Community and its Member States in the relevant field, while the answer to the second question depends only on how those powers are distributed.

- 25 It is appropriate first to consider the distribution of powers between the Community and its Member States in the field of development aid.
- 26 The Community's competence in that field is not exclusive. The Member States are accordingly entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the Community.
- 27 As the Spanish Government has observed, that finding is supported by the new Title XVII of the EC Treaty, inserted by the Treaty on European Union, Article 130x of which provides for the Community and the Member States to coordinate their policies on development cooperation and to consult each other on their aid programmes and for the possibility of joint action.
- 28 It is appropriate next to interpret the Convention in order to identify the parties which have entered into commitments.
- 29 The Convention was concluded, according to its preamble and Article 1, by the Community and its Member States of the one part and the ACP States of the other part. It established an essentially bilateral ACP-EEC cooperation. In those circumstances, in the absence of derogations expressly laid down in the Convention, the

Community and its Member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance.

- 30 Although Article 231 of the Convention, like Article 1 of the Financial Protocol, uses the phrase ‘the Community’s financial assistance’, it is nonetheless the case that several other provisions use the term ‘Community’ in order to denote the Community and its Member States considered together.
- 31 Thus, Article 338 of the Convention provides, without distinction depending on the subject-matter of the proceedings, that the Council of Ministers of the Association is to act by agreement between the Community, on the one hand, and the ACP States, on the other. Furthermore, Article 367 of the Convention provides that it may be denounced by the Community, without being more specific.
- 32 Finally, Article 223 of the Convention provides, in the very field of development finance cooperation, that, unless otherwise provided in the Convention, all decisions requiring the approval of either contracting party are to be approved, or be deemed approved, within 60 days of notification by the other party.
- 33 It follows from the above that, in accordance with the essentially bilateral character of the cooperation, the obligation to grant ‘the Community’s financial assistance’ falls on the Community and on its Member States, considered together.

34 As for the question whether it is for the Community or for its Member States to perform that obligation, it should be noted, as stated above at paragraph 26, that the competence of the Community in the field of development aid is not exclusive, so that the Member States are entitled collectively to exercise their competence in that field with a view to bearing the financial assistance to be granted to the ACP States.

35 It follows that the competence to implement the Community's financial assistance provided for by Article 231 of the Convention and Article 1 of the Financial Protocol is shared by the Community and its Member States and that it is for them to choose the source and methods of financing.

36 That choice was made by the abovementioned Internal Agreement 91/401 on the financing and administration of Community aid under the Fourth ACP-EEC Convention, the provisions for implementing which are the subject of the contested financial regulation, adopted by the Council pursuant to Article 32 thereof.

37 Article 1 of the Internal Agreement provides that the Member States set up the EDF and specifies the contribution of each Member State to that Fund. Article 10 makes the Commission responsible for administering the EDF, while Article 33 (2) provides that the Court of Auditors is also to exercise its powers in respect of the EDF's operations and Article 33 (3) provides that the discharge for the financial management of the EDF is to be given to the Commission by the Parliament on the recommendation of the Council.

- 38 It follows that the expenditure necessary for the Community's financial assistance provided for in Article 231 of the Convention and Article 1 of the Financial Protocol is assumed directly by the Member States and distributed by a Fund which they have set up by mutual agreement, with the administration of which the Community institutions are associated by virtue of that agreement.
- 39 Consequently, that expenditure is not Community expenditure which must be entered in the Community budget and to which Article 209 of the Treaty must apply.
- 40 The Parliament has also argued before the Court that the fact that the expenditure is Community expenditure is apparent from all aspects of the procedure laid down for its administration and allocation. Thus, it appears from the origin, the external appearance, the decision-making procedure and the content of the financial regulation that it is very closely related to Community acts.
- 41 That argument cannot be accepted. No provision of the Treaty prevents Member States from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating the Community institutions with the procedure thus set up (see the judgment in Joined Cases C-181/91 and C-248/91 *Parliament v Council and Commission* [1993] ECR I-3685).
- 42 It follows from the foregoing that the financial regulation did not have to be adopted on the basis of Article 209 of the Treaty. Accordingly, no prerogative of the Parliament has been infringed. The application must therefore be dismissed as unfounded.

Costs

43 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. The Kingdom of Spain, intervener, must bear its own costs in accordance with the first paragraph of Article 69 (4) of the Rules of Procedure.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;
2. Orders the European Parliament to pay the costs. The Kingdom of Spain, intervener, is to bear its own costs.

Due	Mancini	Moitinho de Almeida	Kakouris
Joliet	Schockweiler	Rodríguez Iglesias	
Grévisse	Zuleeg	Kapteyn	Murray

Delivered in open court in Luxembourg on 2 March 1994.

R. Grass

O. Due

Registrar

President