# OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 30 June 1989 *

*Mr President,*
*Members of the Court,*

1. In bringing an action for a declaration that Article 6(4) of Council Regulation (EEC) No 3252/87 of 19 October 1987 on the coordination and promotion of research in the fisheries sector [1] is void, the Commission has asked the Court to resolve a difficult dispute between itself, supported by the Parliament, and the Council. The issue at the heart of this dispute is the scope of the power to implement the budget which Article 205 of the EEC Treaty confers on the Commission. Reference must be made to a number of provisions in order to ensure a proper understanding of the foundation of the dispute.

2. Title II of Regulation No 3252/87, covering Articles 5 and 6, is headed 'Community research and research coordination programmes'.

3. Article 5, which concerns the drawing up of those programmes, is worded as follows:

'Acting on a proposal from the Commission, the Council shall adopt, in accordance with the procedure laid down in Article 43 of the Treaty:

(a) Community research programmes in areas of special importance for the common fisheries policy;

(b) Community research coordination programmes designed to enable the resources employed to be organized rationally, the results to be used effectively and work to proceed in line with the objectives of the common fisheries policy.'

I should also mention that, by a decision of the same date as Regulation No 3252/87 and referring to Article 5 thereof, the Council adopted Community research and coordination programmes in the fisheries sector for the period 1988-92. [2]

4. Article 6 of Regulation No 3252/87, which concerns the implementation of the programmes referred to in Article 5, is worded as follows:

'1. The Commission shall ensure that the Community research programmes are carried out by concluding cost-sharing research contracts with research centres and institutes.

* Original language: French.

1 — OJ L 314, 4.11.1987, p. 17.

2 — Decision No 87/534/EEC adopting Community research and coordination programmes in the fisheries sector for the period 1988-92 (OJ L 314, 4.11.1987, p. 20)

2. The Commission shall ensure that the Community research coordination programmes are carried out by organizing seminars, conferences, study visits, exchanges of researchers and working meetings of scientific experts and by collating, analysing and publishing, if necessary, the results.

3. For the purposes of applying paragraphs 1 and 2, the Commission may call on high-level experts.

4. Decisions concerning the execution of Community research programmes referred to in paragraph 1 and community research coordination programmes referred to in paragraph 2 shall be adopted by the Commission under the procedure laid down in Article 47 of Council Regulation (EEC) No 4026/86.'

Inasmuch as the Commission's action seeks the annulment of paragraph 4 of that article, on account of the reference to the procedure provided for in Article 47 of Regulation (EEC) No 4028/86 of 18 December 1986,[3] the latter provision must be set out in full. It reads as follows:

'1. Where the procedure laid down in this article is to be followed, matters shall be referred to the Standing Committee for the Fishing Industry, by its chairman, either on his own initiative or at the request of the representative of a Member State.

2. The representative of the Commission shall submit a draft of the measures to be taken. The Committee shall deliver its opinion within a time-limit to be set by the chairman according to the urgency of the matter. Opinions shall be adopted by a majority of 54 votes, the votes of the Member States being weighted as laid down in Article 148 (2) of the Treaty. The chairman shall not vote.

3. The Commission shall adopt the measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the Committee, the Committee shall forthwith communicate them to the Council. In that event the Commission may defer their application for not more than one month from the date of such communication. The Council, acting by a qualified majority, may adopt different measures within one month.'

5. It thus follows from Article 6(4) of Regulation No 3252/87, together with these other provisions, that the decisions adopted by the Commission for the implementation of the Community programmes referred to in Article 5 of that regulation may, if they are not in accordance with the opinion of the Standing Committee for the Fishing Industry, be replaced, within one month, by a decision of the Council adopted by a qualified majority. Let me add here that the Standing Committee, established by Council Regulation (EEC) No 101/76 of 19 January 1976,[4] is, according to Article 11, composed 'of representatives of each Member State' and chaired by 'a representative of the Commission'.

3 — Regulation (EEC) No 4028/86 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ L 376, 31.12.1986, p. 7).

4 — Regulation (EEC) No 101/76 laying down a common structural policy for the fishing industry (OJ L 20, 28.1.1976, p. 19).

6. The Court has acknowledged that the procedure laid down in Article 47 of Regulation No 4028/86 and extended to measures implementing fisheries research programmes constitutes a 'management committee' procedure. That is the usual designation for a procedure whereby the Commission must, before adopting measures implementing a Council regulation, consult a committee consisting of representatives of the Member States, and the Council may, in the event of an unfavourable opinion on the part of the committee, substitute its own decision for that of the Commission within a certain period. It is, in a way, a system whereby the Council, whilst conferring on the Commission the power to implement provisions which it has laid down by regulation, sets certain limits to such implementation by reserving a right to deal with a matter itself on condition that the management committee provided for by it has given an adverse opinion. As the Court is aware, the management committee procedure does not constitute an innovation. Over a number of years, provision has frequently been made for it in various Council regulations, in particular on the common agricultural policy. In 1970, Mr Advocate General Dutheillet de Lamothe considered that the management committee procedure had been used to draw up over 2 000 Community regulations.[5] This gives some idea of the frequency with which the procedure has been used, and recourse to it, whether successfully or otherwise, seems not to have diminished since 1970.

7. However, it may be considered that the legal status of the management committee procedure has recently been modified as a result of the Single European Act. Although that procedure was originally the product of secondary legislation laid down by the Council, and its widespread use was based on precedents, it has to some extent been legally formalized since the entry into force of the Single European Act. It has gone from being a procedure repeatedly used in practice to being a standard procedural model defined in general and abstract terms. In the light of the third indent of Article 145 of the Treaty, according to which the Council, which 'confer[s] on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down', may 'impose certain requirements in respect of the exercise of these powers', it adopted on 13 July 1987 Decision 87/373/EEC laying down the procedures for the exercise of implementing powers conferred on the Commission,[6] known as the 'comitology' decision. According to Article 1 of that decision, the Council may impose requirements in respect of the exercise of implementing powers by the Commission 'which must be in conformity with the procedures set out in Articles 2 and 3'. Let me simply state briefly here that Article 2 of the decision provides for three procedures, entitled 'Procedure I', 'Procedure II' and 'Procedure III'. Procedure I, known as the 'advisory committee' procedure, merely requires the Commission to ask a committee to deliver an opinion which is not binding on it. Procedure II, of which there are two variants, is essentially a management committee procedure. Finally, Procedure III, known as the 'regulatory committee' procedure, of which there are also two variants, enables the Council in certain circumstances to adopt a decision in place of the Commission, and empowers it, where it does not do so, to prevent the Commission from adopting a decision. Those procedures in fact constitute a codification of the arrangements previously laid down by legislative practice.

8. Hence the management committee procedure now constitutes, like the advisory

5 — See the Opinion in Cases 11, 25, 26 and 30/70 [1970] ECR 1140, at p 1144

6 — OJ L 197, 18 7 1987, p 33

committee and regulatory committee procedures, a legal arrangement which is defined in general terms and is capable in principle of being used in an indefinite number of Council regulations.

9. In this case the Council laid down in Regulation No 3252/87 the procedure for the implementation of research programmes by the Commission by reference to a management committee procedure described in Article 47 of Council Regulation No 4028/86, which predates the 'comitology' decision. However, that procedure would not appear to differ substantially from Procedure II in Decision No 87/373.

10. In any event, the Commission's application does not give rise to any controversy on that point or, more generally, on the possibility in principle for the Council to provide that the Commission is to implement under a management committee procedure the rules which the Council lays down, in accordance with the third indent of Article 145 of the Treaty. What the Commission disputes is that a procedure of that type, applicable to the measures it adopts from the implementation of the rules which the Council lays down within the meaning of Article 145, also applies to the measures which the Commission adopts for the implementation of the budget in accordance with Article 205. In its view, those measures reflect a specific power directly conferred upon it by the Treaty and not a power conferred by the Council for the implementation of the rules which it has laid down. Accordingly, a measure for the implementation of the budget by the Commission cannot be made subject to procedural rules of the kind associated with management committees which, although in conformity with the third indent of Article 145, are inapplicable to measures adopted not under Article 145 but under Article 205.

11. The Commission considers that measures for the implementation of fisheries research programmes as laid down in paragraphs 1 and 2 of Article 6 of Regulation No 3252/87 are connected with the implementation of the budget and not with the implementation of the rules which the Council lays down within the meaning of the third indent of Article 145. That is why the Commission challenges the legality of Article 6(4), inasmuch as it provides that decisions concerning the implementation of fisheries research programmes 'shall be adopted by the Commission under the procedure laid down in Article 47 of Council Regulation (EEC) No 4028/86', and seeks its annulment.

12. It is unnecessary, in my view, to consider at this juncture every aspect of the arguments put forward in the proceedings by the parties and the intervener. As a result of the written procedure and the oral arguments presented at the hearing it is possible to define the issue more narrowly. In my view, it amounts essentially to the difference between the point of view held by the Commission and the Parliament, on the one hand, and the Council's point of view on the other, with regard to the dividing line between the implementation of the budget within the meaning of Article 205 and the implementation of the rules which the Council lays down within the meaning of the third indent of Article 145.

13. The Council has informed the Court that it did not hold an interpretation of the Treaty, as amended by the Single European Act, according to which the implementation

of the rules laid down by it would go so far as to encompass their budgetary aspects. In its view, no confusion can arise between the implementation of the budget and the implementation of rules, and it therefore acknowledges unreservedly that the requirements which it may, by virtue of the third indent of Article 145, impose in respect of the implementation of the rules which it has laid down cannot bind the Commission in its implementation of the budget. In my view, the Council's interpretation of the Treaty is correct in that respect. The power to implement the budget is directly conferred on the Commission by Article 205 and is distinct from the power to implement the rules laid down by the Council, referred to in the third indent of Article 145. The possibility of imposing requirements in respect of the implementation of those rules, as provided for in principle by the latter provision, cannot extend by analogy to the implementation of the budget. The power to lay down a framework for the implementation of the budget by imposing requirements similar to those provided for in respect of the implementation of rules could result only from an express Treaty provision to that effect. As we know, no such provision exists.

14. Accordingly, the outcome of the action before the Court depends essentially on the scope of the power to implement the budget in relation to the scope of the power to implement rules. As in a system of communicating vessels, the wider the second is, the narrower the first becomes. That is illustrated by the arguments put forward by the Commission and the Council. Whilst the Commission justifies its action on the ground that the measures provided for in Article 6(1) and (2) of Regulation No 3252/87 for the implementation of fisheries research programmes come within the scope of the implementation of the budget, the Council maintains that those measures are connected with the implementation of rules which it has laid down, namely the programmes adopted by Council Decision 87/534 of 19 October 1987. That difference of opinion reflects two general approaches diametrically opposed to one another regarding the scope of the implementation of the budget on the one hand and the implementation of rules on the other.

15. The Commission's approach is based, to some extent, on a degree of specialization with regard to the functions primarily attributed to itself and the Council. It considers that the powers conferred upon it by the Council under the third indent of Article 145 can only be powers of *legislative implementation*, that is to say powers enabling it to determine the procedures for applying the rules laid down by the Council. Implementation, from this aspect, can consist only in laying down rules of a general and impersonal nature. Conversely, *administrative implementation*, that is to say the application to individual situations of rules laid down by the Council, and perhaps amplified by the Commission, is connected with the implementation of the budget. Thus the implementation of the budget extends in general to all individual *decisions* which entail the use of budget appropriations. The implementation of rules consists exclusively in laying down the procedures for their application, to the exclusion of any individual measure entailing the utilization of appropriations. Consequently, the framework of a management committee procedure can apply only to legislative implementation, that is to say the adoption of implementing rules, whilst individual measures involving the utilization of appropriations fall outside the scope of that procedure. According to the Commission, the measures contemplated by Article 6(1) and (2) of Regulation No 3252/87 fall within the latter category.

16. The Council disagrees entirely. Its point of view rests on a comprehensive view of the concept of the implementation of rules. The Council seems to suggest that the implementation of rules within the meaning of the third indent of Article 145 comprises all *implementation by means of decisions,* that is to say any measures involving the exercise of *discretion,* at both the legislative and the individual level, whereas the implementation of the budget covers only measures not involving the exercise of discretion, that is to say essentially measures consisting in the accomplishment of formalities governing the use, separately decided upon in advance, of appropriations. This is, in a sense, *formal implementation,* except in the case of decisions connected with 'specific actions' or acts of day-to-day administration inherent in the internal functioning of the Commission. Thus the framework of a management committee procedure can apply not only to the adoption by the Commission of implementing rules but also to the adoption of individual decisions or measures involving some degree of discretion. According to the Council, the measures provided for in Article 6(1) and (2) of Regulation No 3252/87 involve the exercise of discretion and therefore fall within the implementation of rules within the meaning of the third indent of Article 145.

17. It is necessary to decide between those two points of view. Moreover, I would point out that what is at stake here goes beyond the question of the limits to the role of committees. Alongside the normal legal situation in which the Council entrusts the Commission with the implementation of the rules which it lays down, the third indent of Article 145 provides for a situation in which the Council reserves the right, in specific cases, 'to exercise directly implementing powers itself'. Thus by determining the extent to which committees have a role to play we also delimit the possibility of direct implementation by the Council.

18. It must be acknowledged that, at first sight, this is a delicate decision. The third indent of Article 145 and Article 205 are fairly terse with regard to the scope of the implementation of rules on the one hand and the implementation of the budget on the other. Neither of those two concepts has an intrinsic meaning. Each is, in principle, relatively variable in scope. Neither the wording of the third indent of Article 145, nor that of Article 205, nor that of any other Treaty provision provides manifest and immediate support for the Commission's approach or that of the Council with regard to the scope of the provisions in question.

19. Furthermore, it is indisputable that the facts of the case, or, to put it another way, the background to the dispute concerning the different kinds of implementing powers enjoyed by the Commission, offer a permanent temptation to combine legal analysis with considerations that are not strictly of a legal nature. I am referring here essentially to the controversy, conducted more or less in undertones, concerning the attitude(s) adopted by the Commission with regard to this problem before it came before the Court. Neither the Council, in connection with this case, nor legal writers, in a more general context, have failed to observe that the Commission had not always been unequivocally hostile to the use of procedures involving recourse to committees in circumstances comparable to those of this case. There is an element of truth in that observation. It has also been emphasized from time to time that, in stating that it

would accept the use of advisory committee procedures in connection with the implementation of the budget, the Commission had adopted a position that ran counter to its own powers, which in principle exclude recourse to any committee, even an advisory one, and that this reflected the Commission's lack of assurance with regard to the position it has adopted before the Court.

20. There is no doubt that, since the introduction of implementing procedures involving recourse to committees, the Commission has submitted to the Council proposals for regulations involving the use of committee procedures. In its reply, the Council gave an example of a regulation which, on a proposal by the Commission, made the adoption by the latter of decisions granting aid from the Guidance Section of the European Agricultural Guidance and Guarantee Fund to individual projects subject to a management committee procedure. That regulation is Council Regulation (EEC) No 355/77 of 15 February 1977,[7] adopted on a proposal submitted by the Commission on 11 August 1975.[8] However, it must be conceded that amongst the regulations or proposals for a regulation referred to in the parties' pleadings instances of committee procedures associated with the drawing up of implementing rules by the Commission are more numerous than instances of procedures of the same type affecting the adoption of individual decisions.

21. In any event, it is appropriate in my view to regard the previous practice of the Community institutions with regard to committee procedures as of only relative importance. The essential factor, from the Court's point of view, is not to sift through several thousand regulations in order to designate a 'winner' based on the practice followed in the majority of cases, but to ascertain the legality from the point of view of Community law of recourse to committees in connection with the Commission's implementing powers. Although the constitutional law of the Community imposes certain restrictions on recourse to committee procedures in relation to one or other of the Commission's implementing powers, the fact that those restrictions may in the past have been disregarded to a greater or lesser extent does not mean that they have fallen into disuse and in no way precludes non-compliance therewith from being criticized once the matter has been raised before the Court. The previous practice of the Commission and the Council may with hindsight appear to have disregarded certain rules of the Treaty, to have complied with them, or to have disregarded some and complied with others, but this has no influence upon the effect to be given to those rules by the Court when they are relied upon before it. Besides, the Commission's attitude towards advisory committees must be viewed in the context of the search for a fresh compromise between the institutions, which presupposes concessions.

22. In that regard, it is difficult in my view to describe as ideal the circumstances in which, before the matter came before the Court, the drawing-up and adoption of a number of Council regulations constituted a pretext for the possibly unlawful use of committee procedures. Whilst I have no desire to trace the historical process which the various pleadings submitted to the Court have made it possible to reconstruct, it cannot be denied that recourse to committees under a number of regulations

7 — Regulation (EEC) No 355/77 on common measures to improve the conditions under which agricultural products are processed and marketed (OJ L 51, 23.2.1977, p. 1)

8 — OJ C 218, 24.9.1975, p. 4

was the result of an institutional compromise which became increasingly difficult with the passage of time. From the end of the 1970s the Commission and the Parliament expressed officially, if not effectively, certain reservations with regard to the application of committee procedures to measures for the implementation of the budget. Whilst I have no wish to devote too much space to considerations which, in contentious proceedings, may seem anecdotal, there is no reason to disbelieve the Commission's assertion that, having failed to find by means of a political compromise a solution to what, in its view, constituted an unbalanced use of committee procedures, it gave up the struggle and brought the matter before the Court. However, the end of the compromise and recourse to the Court also mark the end of what might be regarded as a tacit agreement to shelve the issue of law. The Court cannot be expected to draw up, in legal form, a better political compromise than that which has failed. It can only make a finding of law.

23. To summarize, those different observations lead me to conclude that the Commission's past attitude(s) have not affected the meaning — whatever it may be — of the provisions of the Treaty, and have in no way deprived the Commission of the right conferred upon it by the Treaty to ask the Court to review the observance of those provisions.

24. The fact remains that previous practices, and the more or less erratic attitudes in that regard on the part of one or other of the institutions, have made legal analysis of the problem raised in relation to Article 205 by recourse to committee procedures in connection with the Commission's implementing powers particularly difficult. That is borne out, in my view, by the generally tentative conclusions which legal writers have arrived at. The positions adopted in favour of one or other of the views in question represent adherence to those views more often than a justification of them, inasmuch as few novel or decisive legal arguments have been put forward. One must indeed ask whether certain writers have not, as it were, interpreted the Treaty in the light of an institutional compromise which at one time seemed well balanced, and accordingly taken the view that in the light of the prevailing consensus its conformity with the Treaty could be assumed. An interpretation of the Treaty in the light of the practice followed by the institutions may of course reflect the very laudable concern to place the law at the service of what is possible rather than let it express the impossible. But a shattered compromise can no longer be a substitute for the law. It is necessary in those circumstances to return to a strict reading of the Treaty. That is why I shall attempt in the remainder of this Opinion to confine myself essentially to its provisions and to those which it may refer.

25. In the arguments adduced by the parties before the Court, reference has been made to a budgetary term, namely 'commitment'. In the midst of proceedings in which at times lofty considerations have been relied upon, it may not have attracted much attention. I believe, however, that it is a concept of considerable interest with regard to the problems which have been raised before the Court, indeed one which is essential for the purpose of assessing the scope of the power to implement the budget within the meaning of Article 205.

26. In order to define the role of the term 'commitment' in the quest for a solution to this dispute, we must first recall that, according to the actual wording of the first

paragraph of Article 205, 'the Commission shall implement the budget, in accordance with the provisions of the regulations made pursuant to Article 209, on its own responsibility and within the limits of the appropriations'.

Article 209 provides that

'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and obtaining the opinion of the Court of Auditors, shall:

(a) make financial regulations specifying in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts;

...'.

In accordance with the procedure described in Article 209, on 21 December 1977 the Council adopted a 'financial regulation ... applicable to the general budget of the European Communities' (hereinafter referred to as 'the Financial Regulation').[9] I should point out here that the Council regulation one of whose provisions is criticized in this application was indeed adopted unanimously, but in accordance with a procedure which did not involve consulting the Court of Auditors. As a result of the principle of procedural parallelism, therefore, it was unable to derogate from the Financial Regulation.

27. Title III of the Financial Regulation deals with the implementation of the budget. Section I of that title, which is headed 'General Provisions', contains Article 17, whose first two paragraphs provide as follows:

'The budget shall be implemented in accordance with the principle that the authorizing officers and accounting officers are different individuals.

The appropriations shall be administered by the authorizing officer who alone is empowered to enter into commitments regarding expenditure, establish entitlements to be collected and issue recovery orders and payment orders.'

It is immediately apparent that the authorizing officer, in his capacity as administrator of appropriations and the sole person empowered to enter into commitments regarding expenditure, carries out his tasks in connection with the implementation of the budget, that is to say in the exercise of the exclusive power vested in the Commission by Article 205.

28. Title III, which is headed 'Implementation of the budget', also contains a Section III entitled 'Commitment, validation, authorization and payment of expenditure'. That heading indicates that implementation of expenditure takes place in four stages, namely commitment, validation, authorization and payment. I must point out to the Court that the terms contained in the Financial Regulation are the same as those used in French budgetary law. Article 28 of Chapter II ('Expenditure') of Decree No 62.1587 of 29 December 1982 laying down general rules on public accounts,[10] provides as follows: 'Before being paid, expenditure shall be committed, validated and, if necessary, authorized'. Article 29 of the

9 — OJ L 356, 31.12.1977, p. 1; amended by Council Regulation (ECSC, EEC, Euratom) No 1252/79 of 25 June 1979 (OJ L 160, 28.6.1979, p. 1) and Financial Regulation 80/1176 (ECSC, EEC, Euratom) of 16 December 1980 (OJ L 345, 20.12.1980, p. 23).

10 — *Journal officiel de la Republique française*, 30.12.1962, p. 12828

decree defines 'commitment' ('engagement'), Article 30 defines 'validation' ('liquidation'), Articles 31 and 32 define 'authorization' ('ordonnancement') and Article 33 defines 'payment' ('paiement').

29. Taking the comparison between Community and French budgetary law a step further, let me deal first of all with the term 'commitment' as defined in French budgetary law. Article 29 of the Decree of 29 December 1962 provides as follows:

'Commitment is the act whereby a public entity undertakes or acknowledges an obligation resulting in a charge.

It may be entered into only by a qualified representative of a public entity acting in the exercise of his powers.

It must remain within the limits of budgetary authorizations and continue to be subject to such authorization, opinion or approval as is provided for by the laws and regulations applicable to each category of public entities.'

I should point out here that the State is a 'public entity' within the meaning of the decree in question. In the context of the State budget, commitment is a stage in the *implementation of expenditure*, which is a matter for the government and the administration under its authority. Within the machinery of government and administration, 'financial and accounting operations' resulting from the implementation of the budget 'are matters for which public authorizing and accounting officers shall be responsible'. [11] It is the authorizing officers who 'enter into commitments regarding expenditure'. [12] Notice, again, the similarity between the terms used in French budgetary law and those used in Community budgetary law.

30. French legal writers have sought to define the scope of the term 'commitment' with regard to the implementation of expenditure under the *State budget.* Thus, Pierre Lalumière states that in order to 'reconcile the "propriety of public expenditure" with the "expediency of public expenditure" the process of public expenditure has been broken down into four stages: commitment, validation, authorization and payment', adding that 'expediency is appraised at the stage of commitment'. Defining the term 'commitment', he goes on to point out that 'commitment consists . . . in a decision to place an order, to appoint an official and so on. It is a legal act which must be adopted by the minister or, by delegation, the heads of department at the ministry. Commitment, as a legal act, can therefore arise in the most diverse forms: draft decrees or orders, contracts, reports, agreements and so on'. [13] Let me also quote Paul-Marie Gaudemet and Joël Molinier, according to whom 'commitment consists of . . . two operations . . . : commitment for accounting purposes, whereby budget appropriations are allocated in the accounts to a given operation, . . . and commitment for legal purposes, which gives rise to a debt on the part of the State'. Those writers add that 'commitment for legal purposes generally takes the form of an administrative act such as the conclusion of a contract, an

11 — Article 3 of the Decree of 29.12.1962.

12 — Article 5 of the Decree of 29.12.1962.

13 — *Les finances publiques*, collection U, librairie Armand Colin, 3rd edition, p. 318.

appointment, the placing of an order or a decision granting a subsidy'. [14]

31. It is interesting to observe that according to the French approach, as reflected in the above extracts, commitment encompasses the adoption of legal decisions involving the utilization of appropriations. In particular, the award of a contract or a decision to grant a subsidy form part of a commitment. Thus, the power to enter into a commitment includes the power to adopt substantive individual decisions involving expenditure and is not limited to formal operations enabling expenditure to be recorded and effected. The power to adopt those substantive decisions is vested in the principal authorizing officers, that is to say the ministers, or in secondary authorizing officers. Legal writers are careful to point out that a commitment may also arise from a judicial decision making the State liable for a debt, or from a parliamentary decision. However, Maurice Duverger, who refers in that regard to the possiblity of a 'law granting an individual pension to one who has served his country well, or to his widow', emphasizes that a 'parliamentary commitment' is exceptional. [15] The normal pattern is that of a government or administrative commitment.

32. Are there any grounds for the view that the position is different with regard to commitment as defined under Community budgetary law? In other words does the similarity between the terms used reflect a similarity between legal systems or does the Community system embody a specific and narrower concept of commitment? I consider that the Financial Regulation does not contain any indication suggesting that the scope of the Community concept of commitment departs substantially from that of its counterpart under French budgetary law and does not cover the adoption of substantive individual decisions. It must be pointed out in the first place that the regulation does not contain a general definition of commitment. After stating, as I have pointed out, that the authorizing officer alone is empowered to enter into commitments regarding expenditure, the Financial Regulation provides, in Article 32(1), that 'all measures which may give rise to expenditure chargeable to the budget must be preceded by a proposal for commitment of expenditure from the relevant authorizing officer'. This provision draws the same distinction between the legal and accounting aspects of commitment as that made by Mr Gaudemet and Mr Molinier, although there is no indication whether the 'measure' of a legal nature comes within the scope of the authorizing officer's powers.

33. According to Article 32(2) of the Financial Regulation, 'the decisions taken by the Commission in accordance with the provisions authorizing it to grant financial aid from the various funds or similar operations shall constitute commitments of expenditure'. That provision cannot, in my view, be interpreted as implicitly distinguishing the adoption of the decisions to which it refers from the stage of budgetary commitment. Whilst it indicates that the decisions in question must be adopted in accordance with the provisions authorizing the grant of financial aid from the various funds, it also points out that it is for the Commission to adopt those decisions. Since the decisions are, according to the actual wording of Article 32(2), 'decisions taken by the Commission', there is nothing to suggest that this provision validates the procedures provided for in certain Council regulations, which enable the latter to

14 — *Finances publiques*, Vol 1, 'Budget/Trésor', Ed. Montchrestien, coll Domat, Droit public, 5th edition, 1989, p 389.

15 — *Finances publiques*, Themis, PUF, 8th edition, 1975, p 332

substitute its own decision for that of the Commission where a committee gives an adverse opinion. Accordingly, that provision is not to be regarded as ratifying the application to the adoption of those decisions of a system that is incompatible with the concept of commitment which, being connected with the implementation of the budget, presupposes that the Commission acts alone. There is nothing in Article 32(2) to preclude the view that the decisions referred to therein fall *by their nature* within the ambit of commitment. That provision may indeed be regarded as declaratory inasmuch as, if it did not exist, the incorporation of the decisions to which it refers within a budgetary commitment could still be envisaged.

34. Title VII of the Financial Regulation contains special provisions applicable to research and investment appropriations. They include Article 88(2), which provides in its first subparagraph that 'the commitment appropriations within each [multi-annual] tranche are intended to enable the Commission to meet all the legal obligations which it may contract' and specifies in the second subparagraph that those commitment appropriations 'constitute the upper limit of expenditure to which the Commission may commit itself during the financial year in question for the implementation of the operations to which the expenditure relates'. In my view, it is worth noting the reference in subparagraph 1 to the Commission's capacity to 'contract' in connection with a commitment.

35. It follows from the examination of the few relevant provisions of the Financial Regulation regarding the scope of the term 'commitment' that there is no evidence of any intention to give it a meaning differing substantially from or significantly narrower than the scope of a budgetary commitment under French law. At most, Article 32(2) may be regarded as somewhat ambiguous. In the absence of any general definition of commitment in Community budgetary law, however, that slight ambiguity cannot, on its own, constitute evidence that its scope is any different from that of its counterpart under French law. I think, therefore, that commitment, as a stage in the implementation of budgetary expenditure for the purposes of the Financial Regulation, encompasses substantive individual decisions or measures involving the utilization of appropriations. By the same token, in my view, the implementation of the Community budget, which must, according to Article 205, be carried out in accordance with the Financial Regulation, encompasses the same measures.

36. It seems useful to point out at this stage that quite aside from the place it occupies in French positive law commitment of expenditure is a classic concept. In France itself, the four stages of commitment, validation, authorization and payment have governed the implementation of expenditure under the budget since well before the adoption of the Decree of 29 December 1962. Furthermore, and its 'classicism' certainly has something to do with it, that concept has been applied in other national legal systems. In Belgium it forms part of an expenditure process broken down into five stages, namely commitment, the operative event, authorization, validation and payment. Under Belgian law, commitment would appear, so far as the State budget is concerned, to be virtually identical in scope to commitment under French budgetary law. Under Italian law too, the implementation of public expenditure is carried out in four stages entitled 'l'impegno', 'la liqui-

dazione', 'l'ordinazione' and 'il pagamento', [16] that is to say commitment, validation, authorization and payment. Furthermore, in Italy commitment may take two main forms, namely contractual commitment and administrative commitment, and it therefore covers the award of contracts or the adoption of unilateral decisions, in particular those granting allowances or subsidies.

37. Thus at the time of the adoption of the Financial Regulation the concepts of commitment, validation, authorization and payment existed in the law of three Member States and commitment included the adoption of decisions involving the utilization of appropriations. I should also mention that the same concepts would appear to exist in Greek law, particularly in Decree Law No 321 of 17 and 18 October 1969 on public accounts, and that the scope of commitment would appear to be the same there. Under Spanish law, on the other hand, while the implementation of the budget is defined as consisting of four stages also entitled commitment, validation, authorization and payment, the first stage is conceived in narrower terms inasmuch as it does not include substantive decisions involving the utilization of appropriations and thus has a strictly financial character. [17] However, under most of the legal systems of the Member States in which the implementation of expenditure is carried out in four stages entitled commitment, validation, authorization and payment, commitment goes beyond a strictly financial or accounting operation and encompasses substantive decisions as well. I therefore propose that the Court refer to the majority view amongst the Member States taken into consideration for the purpose of ascertaining the scope of commitment under Community law.

38. Furthermore, going beyond questions of terminology, it seems to me that the view according to which it is for the national authority which implements the budget under the constitution actually to adopt decisions involving the utilization of appropriations is fairly widely held in Europe, regardless of the terms used in budgetary law. Once again we may use the word 'classic' in speaking of the system whereby Parliament, the legislative body, approves the State budget and thus authorizes appropriations, and the government, the executive body, implements the budget in conjunction with the administration, and in doing so adopts individual decisions and measures involving the utilization of the appropriations. In my view, Parliament is not often involved in the adoption of those individual decisions and measures, since it is unsuited to the task of management or joint management except with regard to its own offices.

39. Admittedly, it is an equally classic objection that the Community is based on an institutional system *sui generis*, whose workings are not based in principle on national constitutional models and cannot therefore be interpreted by analogy. In my view, that objection is valid, in general, as long as the rules regulating that institutional system do not themselves expressly refer to one or other category of national constitutional models. However, where those rules do contain such references, they must be given effect unless in that particular instance they infringe Community law itself. By referring to commitment of expenditure, the Financial Regulation to which Article 205 refers has embodied in the Community system an approach to the implementation of the budget which corresponds on the

16 — Antonio Bonnati *Manuale di contabilità di stato*, 10th edition, Casa Editrice, Dott Eugenio Jovene, Naples, 1983, p 427 *et seq.*

17 — Jose Juan Ferreiro Lapatza *Curso de derecho financiero español*, Marcial Pons, Madrid, 10th edition, 1988, p 802

whole to that adopted, I believe, by the majority of the Member States in their legal systems. In line with that approach, the authority responsible for the implementation of the budget adopts, within the limits of the appropriations authorized by the budget, substantive individual decisions and measures involving the utilization of the appropriations, a process with which the authority responsible for the adoption of the budget is not normally associated.

40. I am well aware that such an interpretation of the concept of implementation of the budget runs counter to the arguments consistently advanced by the Council, and which the latter has again put forward in these proceedings. Nevertheless, I consider that the resultant division of powers is extremely well balanced and is capable by and large of meeting the Council's legitimate concerns. Although careful scrutiny of the applicable provisions must lead to the conclusion that the implementation of the budget, as a power vested in the Commission, covers *any* measure which involves entering into an individual commitment, it is equally clear that it covers *only* such measures. This means that when we arrive at the legislative stage, that is to say the level at which rules or criteria are laid down, we are no longer involved in the implementation of the budget. Any adoption of rules, in my view, comes in principle within the scope of the third indent of Article 145. After laying down basic rules in a given field, the Council entrusts the Commission with the task of determining the procedures for their implementation, with the possibility of setting limits to such legislative implementation by means of a committee procedure. This means that the Council is thus in a position to supervise the entire legislative process and to be involved to a certain extent in establishing the legislative framework as a whole within which the Commission, in its capacity as the institution responsible for implementing the budget, adopts individual measures. In my view, the concern to ensure the proper management of budgetary appropriations at the level of individual measures which lie outside the Council's direct supervision can be met by indirect supervision on its part, exercised by ensuring, for example, through a committee procedure, that specific criteria are laid down for the selection of contracting parties or recipients of Community aid.

41. Turning now to the Council regulation one of whose provisions is directly criticized in this application, there is a point I wish to make regarding the origin of the actual dispute before the Court. I believe that, to some extent, it was inevitable that the Council should adopt the attitude which came to be embodied in Article 6(4) of Regulation No 3252/87.

42. The Commission had at first submitted to the Council in 1980 an initial proposal for a regulation according to which the implementing rules, relating in particular to the scientific priorities to be respected within the framework of the common research programmes, the criteria for the selection of research centres and institutes invited to take part in specific actions and the guidance of programmes during their implementation, were adopted in accordance with a management committee procedure, whilst the actual implementation of the programmes by the Commission was not made subject to such a procedure but involved the assistance of an advisory committee.[18] In 1985 the Commission withdrew that proposal and submitted a fresh proposal to the Council, according to which the latter was to adopt Community research programmes and research coordination programmes whilst the Commission

18 — OJ C 243, 22.9.1980, p. 12.

was to ensure that the programmes were carried out by concluding contracts and organizing seminars, conferences and study trips with merely the assistance of an advisory committee.[19] Since that new scheme deprived it of the possibility of supervising, by means of a management committee procedure, the establishment of criteria for the implementation of those programmes, it was natural that the Council should be tempted to exercise such supervision at the level of actual implementation. It succumbed to that temptation by introducing the contested provision. In my view this was inappropriate because it was unlawful, but it was foreseeable. I am not aware of the precise context in which Regulation No 3252/87 was drawn up, but I cannot help wondering whether in this case the Commission made the most judicious use of its power to submit proposals.

43. The fact remains that it is necessary, at this point, to give a specific ruling on the legality of Article 6(4) of the regulation. The aim of that provision, I would remind the Court, is to make decisions adopted by the Commission under paragraphs 1 and 2 of Article 6 subject to a management committee procedure. Article 6(1) provides for the conclusion of cost-sharing research contracts with research centres and institutes. Article 6(2) provides for the organization of seminars, conferences, study visits, exchanges of researchers and working meetings of scientific experts and for the collation, analysis and, if necessary, publication of the results. The award of the contracts referred to in paragraph 1 undoubtedly falls within the scope of the implementation of the budget, as defined above. As for the measures referred to in paragraph 2, they consist largely of decisions or measures which also come within the scope of the implementation of the budget, even though it cannot be said that any action taken under that provision directly involves the utilization of appropriations. However, there is no reason to draw a distinction here since any individual decisions not involving the utilization of appropriations fall within the ambit of management pure and simple and the involvement of a committee therefore serves no purpose whatever.

44. As we have seen, the Commission, as the body responsible for implementing the budget, has its own powers, which are incompatible with a management committee procedure that enables that Council in certain circumstances to take the Commission's place. It would seem, therefore, that the Council could not, without infringing Article 205 of the Treaty — as amplified by the Financial Regulation to which it refers — and the third indent of Article 155 of the Treaty, provide that the adoption of decisions for the implementation of the research programmes referred to in paragraphs 1 and 2 of Article 6 should be made subject to a procedure of that kind. In my view, therefore, the applicant's claims should be upheld.

45. Shorn of paragraph 4, Article 6 will to a certain extent constitute a declaratory provision conferring upon the Commission a power to carry out programmes which it derives directly from Article 205. That situation may seem unusual but does not in fact adversely affect the Commission, whose application, moreover, is directed only at paragraph 4. In my view, that provision does not have to be considered indissociable from the rest of Article 6. I therefore suggest that the Court confine itself to declaring that paragraph void.

46. In the light of the foregoing analysis, I have not found it necessary to consider the argument put forward by the Commission

19 — OJ C 312, 3.12.1985, p. 5.

and the Parliament relating to the excessive narrowing of the latter's supervisory power, the result of a restrictive view of the concept of implementation of the budget. Since the Parliament, it has in substance been asserted, can supervise only action taken by the Commission in budgetary matters, such supervision may be rendered wholly ineffective whenever the Council retains a power of substitution by means of a management committee procedure. Any 'substitute' decision taken by the Council would then escape the supervision of the Parliament and the latter would be deprived of the role conferred upon it by the Treaty with regard to the implementation of the budget.

47. I consider that argument to be highly significant in view of the questions of principle which it raises. However, in so far as it focuses not so much on a direct and manifest infringement of a provision of the Treaty as on a certain disregard of its implications, I consider that the finding of illegality on the basis of Article 205 and the third indent of Article 155, concentrating on the scope of the concept of budgetary commitment, makes it unnecessary to ascertain whether or not that argument is well founded.

48. I wish to make a final observation which is connected more, in a way, with the values expressed by the institutional law of the Communities than with its procedural rules. It seems to me that, from that point of view, there is a fundamental difference between the Council's argument and that of the Commission. The Commission's argument involves recognizing that it enjoys a sphere of activity which is shielded from interference, whether direct or indirect, by the Council. For its part, the Council's argument leads to the consequence that the determination of the extent of the Commission's actual decision-making power is left entirely to the discretion or the will of the Council itself. According to the latter view no genuine decision-making is involved in the implementation of the budget and thus there is no further scope for the exercise by the Commission of a power to take substantive decisions with regard to the utilization of authorized appropriations except in cases in which the Council may consider it appropriate to confer upon it, pursuant to the third indent of Article 145, an implementing power which is not subject to a committee procedure, or to provide merely that the Commission is to be assisted by an advisory committee. In arriving at its conclusion, the Court must, I think, consider whether it is possible to uphold an interpretation of the Treaty that gives rise to a sort of 'potestative' situation in which one institution would ultimately have the power to empty of their substance the powers of the other in the field in question. For my part, I cannot imagine that the authors of the Treaty could at one and the same time have intended such a situation to come into existence and have provided that the Commission should have 'its own power of decision' in this sphere.

49. In conclusion, I propose that the Court:

(i) declare void Article 6(4) of Regulation (EEC) No 3252/87 of 19 October 1987;

(ii) order the Council to pay the costs.