only for collecting the resources and making them available but not for their management, are under a duty to bring forward the entry of own resources as requested without expressing their agreement or disagreement.

That finding is not affected by the fact that Article 12 (2) of that regulation gives the Commission an alternative means of resolving any cash-flow problems, since it is for the Commission alone to choose between the two alternatives.

2. The very wording of Article 11 of Regulation No 2891/77 shows that default interest is payable in respect of 'any delay' in crediting own resources to the Commission's account, regardless of the reason for the delay, and hence a Member State cannot escape paying that interest by pleading that it was not satisfied that an invitation to bring forward the payment of own resources pursuant to Article 10 (2) of the regulation was binding.

The rate of that default interest is set at a flat rate by Article 11 with regard to all the Member States at a level which cannot be varied according to the particular circumstances of each individual case.

REPORT FOR THE HEARING
delivered in Case 93/85 *

I — Facts and procedure

By an application lodged at the Court Registry on 11 April 1985, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that the United Kingdom of Great Britain and Northern Ireland had failed to fulfil its obligations under that treaty by failing to comply with the invitation addressed to it by the Commission pursuant to the first subparagraph of Article 10 (2) of Council Regulation No 2891/77 of 19 December 1977 (Official Journal 1977, L 336, p. 1), and by subsequently refusing to pay interest under Article 11 of that regulation.

The purpose of Regulation No 2891/77 is to implement the 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 replaces Regulation No 2/71 of the Council of 2 January 1971 (Official Journal, English Special Edition 1971 (I), p. 3).

The first subparagraph of Article 9 (1) of Regulation No 2891/77 provides that the amount of 'traditional' own resources, which include agricultural levies and similar amounts, together with Common Customs Tariff duties and similar amounts (see Article 2 of the abovementioned Decision of

* Language of the Case: English.

21 April 1970), 'shall be credited by each Member State to the account opened for this purpose in the name of the Commission with its Treasury or with the body it has appointed'.

Under Article 10 (1), 'the entry referred to in Article 9 (1) shall be made at the latest by the 20th day of the second month following the month during which the entitlement was established'.

In derogation of the rule under Article 10 (1), Article 10 (2) provides as follows:

'If necessary, Member States may be invited by the Commission to bring forward by one month the entering of resources other than VAT resources on the basis of the information available to them on the 15th of the same month.

Each entry brought forward shall be adjusted the following month when the entry mentioned in paragraph 1 is made. This adjustment shall entail the negative entry of an amount equal to that given in the entry brought forward.'

Article 11 further provides as follows: 'Any delay in making the entry in the account referred to in Article 9 (1) shall give rise to the payment of interest by the Member State concerned at a rate equal to the highest rate of discount ruling in the Member States on the due date. That rate shall be increased by 0.25 of a percentage point for each month of delay. The increased rate shall be applied to the entire period of delay.'

In the spring of 1983 agricultural expenditure reached such a high level that, for the first time, the Commission saw fit to resort to the provisions of Article 10 (2), quoted above. To that end it sent telex messages to the Member States on 28 April 1983, inviting them to bring forward to 20 May their entries for own resources established in April and normally due by 20 June.

The United Kingdom did not act on that invitation and did not pay the resources in question until a month later.

By letters of 31 May and 8 July 1983, the Commission noted the delay in the entering of the resources, and requested the United Kingdom to pay it default interest calculated in accordance with Article 11 of Regulation No 2891/77.

By letters dated 30 June and 16 September 1983 the United Kingdom rejected the Commission's request for payment of interest.

On 6 January 1984 the Commission sent the United Kingdom a letter inviting it pursuant to Article 169 of the EEC Treaty to submit its observations.

The observations of the United Kingdom were submitted by letter of 26 March 1984. The United Kingdom contended that Article 10 (2) did not impose any obligation on Member States to act on invitations addressed to them by the Commission pursuant thereto. It further argued that the payment of interest under Article 11 could apply only where there was delay in entering own resources in accordance with Article 10 (1).

On 20 September 1984 the Commission delivered a reasoned opinion pursuant to Article 169 of the Treaty.

By letter of 26 November 1984 the United Kingdom declared that it maintained its position.

II — Conclusions of the parties and procedure

The *Commission* claims that the Court should:

1. Declare that, by failing to comply with the invitation addressed to it by the Commission pursuant to the first paragraph of Article 10 (2) of Council Regulation (EEC/Euratom/ECSC) No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the

Communities' own resources and by refusing to pay interest under Article 11 of that Regulation, the United Kingdom of Great Britain and Northern Ireland has breached its obligations under the Treaty;

2. Order the Government of the United Kingdom and Northern Ireland to pay the costs of the proceedings.

The *United Kingdom* claims that the Court should:

1. Dismiss the Commission's application;

2. Order the Commission to pay the costs.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

III — Submissions and arguments of the parties

The *Commission* argues that Article 10 (2) carries an obligation on the part of the Member States to act on invitations by the Commission to bring forward the entering of the resources due from each Member State.

According to the Commission, excessive importance should not be attached to the fact that Article 10 (2) uses the term 'invited'. The Commission takes the view that the interpretation of that provision is governed by the opening words 'If necessary', and also by its general objective and the particular context in which it is to apply.

The purpose of Article 10 (2) is to enable the Commission to call for advance payment of own resources to cover a temporary shortfall in revenue for the month in question.

Since it has the task of determining what its income requirements will be, it is for the Commission to determine whether, in any given month, those requirements are met, and, if not, to decide whether it should resort to the options available under Article 10 (2). It follows that Member States enjoy no discretion as to whether or not they shall act on the Commission's invitations. To allow Member States the option of not acting on the Commission's invitations would be to deprive Article 10 (2) of its 'useful effect'.

The interpretation of that provision which the Commission advocates is borne out by Article 12 (2) of Council Regulation No 2891/77.

Article 12 (2) provides: 'If the cash resource requirements are in excess of the assets of the accounts, the Commission may draw in excess of the total of these assets. In this event, it shall inform the Member States in advance of any foreseeable excess requirements.'

According to the Commission it would be inconsistent to enable the Commission alone — if necessary — to draw in excess of the total assets of the accounts by virtue of the aforesaid Article 12 (2) whilst leaving it to the Member States, or one or more of them, to decide, at their discretion, whether they should act on the Commission's invitation pursuant to Article 10 (2) to bring forward their credit entries so as to ensure that the accounts are in credit.

Continuing its comparative study of Articles 10 (2) and 12 (2), the Commission denies that the two provisions are interchangeable, enabling the Commission to resort at any time to the second should the invitation to Member States under Article 10 (2) not be acted upon.

According to the Commission, the two provisions are separate, as is borne out by the fact that they fall under two different titles of the regulation. Article 10 (2) serves to cover a temporary cash shortage in the course of any given month by providing for the advance payment of the own resources due for the month in question. Furthermore, the second subparagraph of Article 10 (2) requires an adjustment to the accounts in the following month.

The Commission maintains that Article 12 (2), on the other hand, is concerned with long-term structural problems which might arise if, for instance, the revenue forecasts in the budget were not being realized in practice. If that were to happen there would be a continuing cash-flow problem which it could well not be possible to adjust in the following month, thereby ruling out the use of Article 10 (2).

The Commission also underlines the problems which would arise if some Member States acted upon an invitation under Article 10 (2) whilst others refused. The Commission asks how, in such a case, it could apply Article 12 (2) to Member States who had brought forward their payments as requested under Article 10 (2).

According to the Commission, the plea by the United Kingdom that it could not, on account of the dissolution of Parliament early in May 1983, obtain the parliamentary approval required by the constitutional law of the United Kingdom in order to pay the amounts requested by the Commission is hardly relevant, since the allocation of own resources to the Community is no longer a matter for the individual national parliaments.

Once it is established that Article 10 (2) entails an obligation on the part of the Member States, and not a mere option, to bring forward the payments demanded by the Commission, it follows, according to the Commission, that Article 11, which provides for the payment of default interest, also applies whenever a Member State fails to fulfil that obligation.

It further declares that it is prepared to concede that the default interest due under Article 11 should be paid on the provisional amount of the resources which should have been remitted as an advance in May 1983, and not on the amount subsequently paid by the United Kingdom in June 1983. In that regard the Commission accepts the figures put forward by the United Kingdom in its statement of defence.

The *United Kingdom* begins its observations by pointing out that when it received the Commission's request of 28 April 1983 to bring forward to 20 May the entering of own resources normally due on 20 June, a major practical difficulty arose because of the dissolution of the United Kingdom Parliament on 13 May 1983.

Since, on the interpretation favoured by the United Kingdom, Article 10 (2) of Regulation No 2891/77 does not place Member States under an obligation to act upon invitations from the Commission made pursuant to that provision, the United Kingdom could not draw the funds needed for giving effect to the Commission's invitation from the Consolidated Fund referred to in Section 2 (3) of the European Communities Act 1972, because that fund may be used by the government only for meeting Community obligations.

As the amount in question was payable, not on the basis of a Community obligation, but on the basis of an invitation from the

Commission to which Member States are not obliged to accede, the United Kingdom was, in conformity with Section 2 (3) (a) of the European Communities Act of 1972, obliged to ask Parliament to allocate to it the necessary funds.

However, the dissolution of Parliament rendered a parliamentary vote impossible, with the result that the United Kingdom, although genuinely willing to do so, was not able to bring forward the credits requested by the Commission.

According to the United Kingdom, it could not be said that it had thereby failed to fulfil its obligations under the EEC Treaty.

In support of its contentions, the United Kingdom argues that Article 10 (2) does not impose any obligations on Member States.

That is apparent from the wording of the provision in question ('Member States may be invited . . .'), which contrasts with the mandatory language used elsewhere in Regulation No 2891/77, and especially in paragraph (1), the second subparagraph of paragraph (2), and paragraphs (3), (4) and (5) of Article 10. That interpretation is confirmed by a study of all the other language versions of Article 10 (2).

As to the opening phrase of Article 10 (2), 'If necessary . . .', the United Kingdom maintains that it lays down a condition which must be satisfied before Member States may be invited by the Commission to credit their own resources to its account before the normal due date, but that it does not have the effect of converting an invitation into an obligation.

The United Kingdom claims that its interpretation of Article 10 (2) is borne out by a study both of the goals pursued by that provision and of the context in which they must be viewed.

In the opinion of the United Kingdom, Regulation No 2891/77 provides two possibilities for remedying the situation if the Community's cash needs exceed its available liquid assets. Those two possibilities are contained in Article 10 (2) and Article 12 (2). Whereas Article 10 (2) merely provides a means of accelerating the payment of own resources by one month, Article 12 (2) constitutes a general overdraft facility. The United Kingdom notes that while in the case of Article 10 (2) the amount of the credit brought forward must be equal to the amount of the own resources as disclosed by the information available by the 15th day of the month in question, in the case of Article 12 (2) the extent of the overdraft is determined by the Commission's actual cash requirements, so that it may vary its demand in accordance with its needs.

If, therefore, the amount of the own resources of which the Commission may request the advance payment on the basis of Article 10 (2) exceeds the actual cash needs of the Commission, it is inappropriate to resort to that provision. In those circumstances Member States may take the view that the Commission should make use of Article 12 (2) instead, and may therefore refuse to act on the Commission's invitation to them under Article 10 (2).

In the opinion of the United Kingdom, the Commission's thesis that the two provisions mentioned above are not alternatives but serve different purposes is refuted by the observation that the Commission itelf has resorted to Article 10 (2) as well as to Article 12 (2) in order to deal with the long-term structural problems which arose during the 1985 financial year.

As for the problems which would, according to the Commission, arise should some

Member States act on an invitation under Article 10 (2) whilst others refused, thereby making the application of Article 12 (2) indispensable, the United Kingdom contends that in conformity with Article 12 (3), which envisages an equitable apportionment among Member States of emergency funding for the Commission, it would be appropriate for any advances made under Article 10 (2) to be deducted from the amounts due under Article 12 (2).

In the alternative, the United Kingdom contends that, since it could reasonably take the view that there was no obligation to act on an invitation under Article 10 (2), it should not be required to pay default interest.

In that connection it stresses the uncertainty of the language used in Article 10 (2) itself, the fact that it acted in good faith, and the penal character of the rate of interest applied by the Commission (20.5%). It also pleads the principle of proportionality, since any infringement of a Community obligation was unintentional and its existence would have been made clear only by the Court's judgment in this case.

In the further alternative, the United Kingdom argues that the default interest should be calculated on the basis of the amount which, in conformity with the Commission's invitation, should have been credited on 20 May 1983, and not on the amount of the own resources subsequently paid in June 1983.

G. Bosco
Judge-Rapporteur