was also in breach of its duties of cooperation in good faith under Article 5 of the EEC Treaty, especially in so far as it refused to revise the financial prospects in accordance with the procedures set forth in the Interinstitutional Agreement.

25. The *Council* rejects Parliament's premiss that the special aid for Bangladesh is expenditure chargeable to the General Budget of the Communities. It clearly emerges from the minutes of the Council session that the aid is to be financed in full by the Member States. Thus the finance falls outside the scope of the Community budget. The fact that the Member States meeting in the Council conceived that bilateral aid as a common action to be integrated with the general action of the Community and of its Member States in favour of Bangladesh cannot transform it *ipso jure* into expenditure chargeable to the budget. At no time did the Council receive a proposal from the Commission to implement the aid or a preliminary draft amending or supplementary budget. It cannot be argued that the Council amended of its own motion in the course of the financial year the forecast revenue and expenditure for the 1991 financial year, thereby infringing the rules relating to the unity and legality of the budget and the principles that the budget should cover all revenue and expenditure and be annual. In this connection, Parliament's arguments alleging that the Council disregarded the democratic principle and infringed its duties of cooperation in good faith under Article 5 of the EEC Treaty must also be rejected.

P. J. G. Kapteyn
Judge-Rapporteur

REPORT FOR THE HEARING
in Case C-248/91 *

I — Facts

1. In April 1991 Bangladesh was hit by a violent cyclone. After obtaining information, the Commission submitted a plan for special action in favour of Bangladesh to the Ministers of Finance meeting informally in Luxembourg on 11 May 1991. The plan was examined by the Council (General Affairs), which was holding an ordinary session on 13 and 14 May in Brussels. The question of aid for Bangladesh did not appear as a formal item of the Council's agenda. On 14 May it was agreed to grant special aid of ECU 60 million to Bangladesh, financed bilaterally by the 12 Member States, the distribution among them to be based on gross national product ('GNP'). The task of coordinating the whole of the aid was entrusted to the Commission.

2. The terms of the aid were published by means of a 'press release' drafted and put out

* Language of the case: French.

under the responsibility of the General Secretariat of the Council.

'Aid for Bangladesh — Council conclusions

The Member States meeting in the Council have decided, on the basis of a Commission proposal, to grant special aid of ECU 60 million to Bangladesh under a Community action. The distribution among the Member States will be based on GNP. The aid will be integrated into the Community's general action for Bangladesh. It will be provided either directly by the Member States or by means of an account administered by the Commission. The Commission will coordinate the whole of the special aid of ECU 60 million.'

3. On 11 July 1991 the European Parliament brought an action before the Court in particular for the annulment 'of the decision taken at the 1487th session of the Council (General Affairs) held in Brussels on 13 and 14 May 1991 under the chairmanship of Jacques F. Poos, Minister of Foreign Affairs of the Grand Duchy of Luxembourg, referred to in a "press release" ref: 6004/91 (Press 60) and entitled "Aid for Bangladesh — Council conclusions". Parliament subsequently asked the Commission for information on the action which it had taken on the decision granting special aid for Bangladesh. By letter dated 2 August 1991, Mr Schmidhuber, the member of the Commission responsible for budgets, replied as follows:

"In your letter dated 19 July 1991 you have requested further details of how special aid for Bangladesh is being handled in budgetary terms.

I informed you of the procedure which the Commission intended to follow in my letter of 22 May.

What has actually been done is as follows:

— *14 May*: Decision by the representatives of the Member States meeting in the Council that the Member States will either make aid available direct or will transfer it to an account administered by the Commission.

— *16 May*: The accounting officer of the Commission opens a special account with the BBL under the heading: CCE — Aide spéciale au Bangladesh (Cyclone).

— *23 May*: By telex from the Director-General for Budgets the Member States are requested to transfer their contributions to the special account by 31 May.

— *5 June*: Greece pays its contribution of ECU 716 775.45 into the special account.

The other Member States inform the Commission that they have made their contributions by way of bilateral aid.

— *10 June*: The Director of the Revenue Directorate in the Directorate-General for Budgets, as the authorizing office responsible, issues a recovery order for ECU 716 775.45, to be booked to Article 900 (Miscellaneous revenue).

— *13 June*: Under Article 2(4) of the Financial Regulation a supplementary heading for the same amount is opened on the expenditure side of the budget (Item 87-3000: Financial and technical cooperation with Asian developing countries).

This heading is shown and monitored separately in the accounts. It is also subject to the general rules applicable under the Financial Regulation (utilization is decided by the competent authorizing officer, approval has to be given by the Financial Controller, payments are made by the accounting officer, and proper implementation is monitored by the Court of Auditors and the budgetary authority).'

II — Written procedure and forms of order sought

4. Parliament's application was received at the Court Registry on 2 October 1991.

5. The *Parliament* claims that the Court should:

(a) annul, pursuant to Article 173 of the EEC Treaty, the measures taken by the Commission and its services following, and in implementation of, the decision taken at the 1487th session of the Council (General Affairs) held in Brussels on 13 and 14 May 1991 under the chairmanship of Jacques F. Poos, Minister of Foreign Affairs of the Grand Duchy of Luxembourg, referred to in a press release (Ref: 6004/91 (Press 60)) entitled 'Aid for Bangladesh — Council conclusions'.

(b) annul, in particular, in addition to the following measures:

— the decision of the Director General for Budgets, taken on 10 June 1991, to recover and to book to Article 900 on the revenue side of the General Budget of the Communities for 1991 the sum of ECU 716 775.45 held in the special account opened with Banque Bruxelles Lambert under the heading CCE Aide spéciale au Bangladesh (Cyclone) and

— the decision of 13 June 1991 appropriating that sum to a supplementary heading opened for the purpose on the expenditure side of the budget (Item B7-3000: Financial and technical cooperation with Asian developing countries),

any other budgetary implementation measures within the same context and for the same purpose of which the Parliament is not at present aware;

(c) order, pursuant to Article 21 of the Statute of the Court of Justice of the EEC and Article 45 of the Rules of Procedure, the production of all documents useful for deciding the present case, and in particular the text of the proposal initially submitted by the Commission to the Council; the proposal's existence is confirmed both by the letter from Mr Schmidhuber, a member of the Commission, of 22 May 1991 and by the actual wording of the decision adopted at the 1487th session of the Council, referred to above;

(d) order the defendant to pay the costs.

6. The *Commission* contends that the Court should:

— dismiss the action as inadmissible and in any event as unfounded;

— order the applicant to pay the costs.

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 — Pleas in law and arguments of the parties

7. The respective views of the Parliament and the Commission may be summarized as follows:

(a) *Admissibility*

8. The *Parliament* observes that the action is directed against the measures adopted by the Commission pursuant to and in implementation of the Council decision of 13 and 14 May on aid for Bangladesh. Those measures were neither published nor notified to Parliament. They were brought to its attention by a letter from Mr Schmidhuber dated 2 August 1991 which was received on 5 August. It is thus from communication of that letter that the period referred to in Article 173 of the EEC Treaty began to run.

9. By adopting those measures in question, the Commission is implementing, pursuant to its powers under Article 205 of the EEC Treaty, an alleged 'budget' which does not tally with the General Budget of the Communities for 1991. Parliament's powers have therefore been disregarded.

10. In the *Commission's* view, Parliament's action is inadmissible on the grounds that it has no *locus standi* and there is no measure or measures capable of being challenged.

11. None of the Commission's measures is such as to encroach on the Parliament's prerogatives. In this case the only possible encroachment on Parliament's prerogatives was constituted by the decision taken by the Member States meeting in the Council. In contrast, no such encroachment can arise as a result of measures adopted by the Commission in order to implement that decision. If it were to be supposed that, in acting as it did, the Commission was in breach of the budget,

any such irregularity in implementing the budget would not, as such, have constituted an encroachment on the Parliament's prerogatives. An unlawful measure does not *per se* encroach on Parliament's prerogatives. If it did, this would patently extend Parliament's right to bring proceedings, as recognized by the Court, beyond the limits clearly laid down in the case-law.

12. Next, the Commission argues that in an action for annulment it is not possible to draw a distinction between acts of the Commission and acts of its departments. The action is inadmissible in so far as it is directed, without further qualification, against the 'other measures' of budgetary implementation. The Statute of the Court of Justice requires the application to define precisely the subject-matter of the dispute. In any event, so far there have been no measures other than those of which the Parliament has been informed. As regards the recovery and entry under Article 900 of the Greek contribution to the special aid for Bangladesh and the crediting of it to Item B 7-3000, the Commission denies that those actions are capable of constituting measures having adverse effect and of being the subject of an application for annulment. They constitute in fact only mere accounting operations which are not capable in themselves of having any external legal effects. The Member States had every latitude either to administer their share of the aid for Bangladesh directly themselves or to entrust its administration to the Commission. The recovery order of 10 June 1991 could not in any way have compelled the Hellenic Republic to make its payment. It was not in the context of the Community legal system but pursuant to a mandate given to it by the Member States outside its Community tasks properly so called that the Commission acted in this matter. Accordingly, the rules relating to the legality of Community measures in the strict sense do not apply to those measures.

(b) *Substance*

First complaint: Infringement of the financial provisions of the EEC Treaty and of the Financial Regulation

13. After referring to the budgetary provisions of the EEC Treaty, *Parliament* observes that the revenue side of the 1991 budget did not provide for the Member States to 'make available' sums of money and the expenditure side did not provide for an appropriation item corresponding to the special aid from Bangladesh. Title 9, Chapter 90 and Article 900 are all headed: Miscellaneous Revenue. Contrary to the requirements of Article 20(1) of the Financial Regulation there are no remarks showing its nature. 'Miscellaneous Revenue' can only mean revenue which does not clearly come under any other budgetary heading. The General Budget for 1991 as adopted by the Parliament did not provide for the entry of sums of that nature as revenue. Likewise, no budgetary item under Title B7-3000 of the General Budget of expenditure entitled Cooperation with Asian and Latin-American developing countries provided for expenditure corresponding to the special aid for Bangladesh. By entering in Article 900 of the General Budget as revenue and in Article B7-3000 of the General Budget as expenditure sums paid by a Member State as part of the aid for Bangladesh, the Commission

implemented a budget which was not that adopted by Parliament for 1991. In the absence of an amending or supplementary budget, the Commission infringed Parliament's powers under Article 203(5), (6) and (7) of the EEC Treaty and also Article 205 of the Treaty and Article 22 of the Financial Regulation.

Second complaint: the effect of the unlawfulness of the initial decision underlying the Commission's implementing measures

14. *Parliament* also raises an objection of illegality under Article 184 of the EEC Treaty. The contested decisions constitute the budgetary implementation by the Commission of the Council decision adopted at the 1487th session of the Council (General Affairs), held in Brussels on 13 and 14 May 1991 under the chairmanship of Jacques F. Poos, Minister of Foreign Affairs of the Grand Duchy of Luxembourg, which was the subject of a 'press release' (reference: 6004/91 (Press 60) entitled 'Aid for Bangladesh — Council conclusions'.

That measure, which is in some way the legal basis for the Commission decisions, is unlawful.

15. In Parliament's view, the decision in question, albeit allegedly adopted by 'the Member States meeting in the Council', was in fact adopted by the Council acting as an institution within the meaning of Article 4 of the EEC Treaty, for the following reasons:

(a) Its title and form. The contested measure forms an integral part of the decisions adopted at the 1487th session of the Council (General Affairs).

(b) Its procedure of adoption. The contested measure was adopted on the basis of a Commission proposal.

(c) Its structure. The countries contributed 'according to their GNP', that is to say, on the basis of a Community concept.

16. The Council measure infringes the financial provisions of the EEC Treaty and Parliament's budgetary powers.

17. Assuming that the measure is not an act of the Council, the Commission has implemented, as part of the General Budget and according to the rules on administration and supervision referred to in the EEC Treaty, an act which is not of a Community nature. Accordingly, the Commission could not have duly incurred the expenditure in question for the purposes of Article 6(4) and Article 28 of the Financial Regulation. In common with all the institutions, the Commission exercises only the powers conferred on it by the EEC Treaty. Still on the basis of that assumption, for the sole reason that the

Commission decisions are based on an act which was not adopted by a Community institution they should be declared void.

18. In the *Commission*'s view, Parliament's action is based on the unacceptable proposition that the institutions can act only within the Community framework. Where a particular action does not fall within the sphere of the tasks conferred on the institutions by the EEC Treaty there is nothing to prevent third parties or the Member States from giving a mandate to the institutions. The only restriction is that those instructions should not be incompatible with the fulfilment of their Community tasks. In areas which fall within the exclusive competence of the Community, the only actions conceivable are those which the Community institutions may undertake. The Community's competence in areas of emergency or humanitarian aid and, more generally, in that of external financial aid is not exclusive. Member States, acting collectively or individually, whether or not on the initiative of the Commission, retain their power to intervene at any time in parallel to any action by the Community or on their own initiative. Since the Member States decided to grant external aid there was nothing to prevent them from entrusting the Commission with the task of ensuring its general coordination along with the task conducted at the Community level proper. It is for the Commission to decide whether or not to accept such a task. The work of coordinating national aid for Bangladesh, responsibility for which the Commission accepted, lies outside the Community legal order.

19. Finally, the Commission argues that it was entitled to encash sums which were not provided for in the budget. Although it received the Greek contribution outside the Community framework, the Commission had to show that resource in the accounts in the interests of sound financial management and transparency. In that respect Article 900 ('Miscellaneous revenue') was appropriate. The opening of an appropriation under Item B 7-3000 of an amount corresponding to the Greek contribution constitutes simply an accounting operation intended to enable the computer to effect commitments and monitor the operation in conditions similar to those which obtain for implementation of the Community budget. The Commission applied Article 4(2) of the Financial Regulation by analogy. The complaint that the Commission infringed Article 203(5), (6) and (7) of the EEC Treaty is irrelevant, on the ground that the operation is not part of the implementation of the Community budget.

20. As regards Parliament's second plea, the Commission observes that the contested act cannot be attributed to the Council. It is an act adopted collectively by the Member States outside the Community framework.

P. J. G. Kapteyn

Judge-Rapporteur