OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 30 November 1989 *

Mr President,
Members of the Court,

1. This case raises once again the question whether the Parliament may bring an action for annulment before this Court under Article 173 of the EEC Treaty and/or the identically worded Article 146 of the EAEC Treaty. [1]

For more details concerning the precise subject-matter of the action, the circumstances in which it was brought and — following the recent judgment of this Court in the 'Comitology' case [2] — the course of the procedure as well as a summary of the arguments of the parties I refer to the Report for the Hearing. In view of the Court's decision to consider the question of admissibility first and independently of the substance of the case, my opinion will naturally also deal exclusively with that question.

2. In the 'Comitology' judgment the Court held that an application for annulment brought by the Parliament against a Council decision of general application was inadmissible. I shall consider in this Opinion whether the approach adopted in that judgment is applicable without qualification to a case such as this one. In this case the Parliament is challenging a Council regulation [3] on the ground that the regulation was adopted without resorting to the cooperation procedure, thus breaching the Parliament's prerogatives. Although argument was put forward in the 'Comitology' case, and answered by the Court, concerning the breach of the Parliament's prerogatives (in particular its right of supervision over the Commission), the emphasis in that case was principally on the Parliament's role as defender of Community law, and more particularly of the institutional balance laid down in the Treaties.

In this case the emphasis is entirely on the Parliament's defence of its own prerogatives, and that in a very particular fashion in view of the fact that the Parliament stands unsupported in its case and is therefore wholly reliant *on itself* to defend its prerogatives. The argument put forward by the Parliament concerns the (allegedly) inappropriate legal basis adopted for the regulation at issue, namely Article 31 of the Euratom Treaty instead of Article 100a of the EEC Treaty, which has the consequence that the Parliament has been prevented from participating, as provided for in the latter

* Original language: Dutch.

1 — For the sake of convenience I shall refer henceforth solely to Article 173 of the EEC Treaty.

2 — Judgment of 27 September 1988 in Case 302/87 *Parliament* v *Council* [1988] ECR 5615.

3 — Council Regulation (Euratom) No 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of radiological emergency (the so-called Chernobyl regulation, OJ 1987, L 371, p. 11).

article under the cooperation procedure laid down in Article 149(2) of the EEC Treaty, in drafting the regulation. Since the Commission does not agree with the Parliament as regards the choice of the legal basis, it cannot reasonably be the spokesman for the Parliament when it comes to defending the latter's prerogatives. The circumstances were different in the 'Comitology' case, where the Commission and the Parliament shared the same view *vis-à-vis* the Council.

In view of that special situation the Court must consider to what extent the earlier decision may serve as a precedent, and if necessary qualify it, as regards the Parliament's right to take the initiative in defending its privileges by bringing an action for annulment before the Court (see paragraph 7, below).

Before examining the case itself I would like to draw your attention briefly to two important aspects: in the first place, the manner in which the EEC Treaty makes the institutional structure subject to judicial control and in the second place the position given to the Parliament in the case-law of this Court.

Division of powers between the institutions also subject to judicial review

3. There is no doubt that in Article 169 *et seq.* of the EEC Treaty (and in Article 136 *et seq.* of the Euratom Treaty) the intention was to have powers divided between the institutions referred to in the first paragraph of Article 4(1) of the EEC Treaty (and Article 3(1) of the Euratom Treaty) in such a way as to be subject to not only political, but also judicial review. Such a system is based on the idea that both the institutions and the Member States, which each have their own task to fulfil within the institutional structure set up by the Treaty and which each represent a particular aspect of the Community interest, may, if they wish, bring disputes regarding conflict of powers before the Community court. That also applies to the legislature itself, that is to say the Council, to which was granted at the outset the legislative powers which in a classical constitutional system would normally belong to the parliament.

That feature enabling the division of powers to be safeguarded by the courts affects, in particular, the selection of the legal basis for acts adopted by one of the institutions. The Court has held that that choice must be based on objective factors capable of being reviewed by the Court.[4] In fact ensuring that the legal basis is the correct one (the subject of this case) is crucial to preserving the balance of powers laid down in the Treaties as between the Community and the Member States and as between the Community institutions *inter se*.

The choice made in the Treaties of having the scope of powers subject to review also by the courts, even when the legislature itself is affected thereby, is a choice which departs from that adopted in more than a few Member States — especially those

4 — Judgment of 26 March 1987 in Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 11, judgment of 23 February 1988 in Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 24

where there is no federal structure — but is one which is undoubtedly well established in the Community legal order. In its judgment of 22 May 1985 on the common transport policy the Court pointed out, moreover, that the manner in which conflicts are to be settled by political means can have no influence on the manner in which conflicts may be settled by judicial means.[5]

The fact that I have commenced by emphasizing this point does not mean that it will form the corner-stone of my Opinion. I merely wish to underline the fact that there is nothing in the institutional structure laid down by the Treaty which justifies the conclusion a priori that there should be no judicial review of the powers of a single organ or institution when other considerations are there to show that the Treaty provisions require such a review.

The *jus standi* of the Parliament in the case-law of the Court of Justice

It is generally considered that the Parliament was not given such express recognition in the system of powers subject to judicial review as were the Council and the Commission because it originally enjoyed few real powers. Had the Parliament been given mandatory powers at the start, it would probably have been given as much express recognition in the system of judicial review under the Treaty as the others. An indication of that is to be found in the fact that where the Parliament does enjoy powers capable of having legal effects on others or has obtained them subsequently, the conflicts of powers which might arise in connection therewith are to be subject to review by the Court of Justice.[6]

4. Another point I would like to remind you of, and of which you are doubtless already aware, is that the case-law of the Court of Justice shows a tendency to extend the Parliament's right to bring actions. The stages in which that has been achieved are so well known that I need merely summarize them:[7] acts of the Parliament may be the subject of a reference for a preliminary ruling seeking their interpretation or a review of their validity; the Parliament is generally entitled to intervene in cases before the Court of Justice; it may bring an action for failure to act under Article 175 of the EEC Treaty; it may be asked to provide information to the Court both in direct actions and in the course of references for preliminary rulings; actions may be brought to have acts of the Parliament declared void. In the 'Comitology', case Advocate General Darmon rightly pointed out that in all those cases

5 — Judgment of 22 May 1985 in Case 13/83 *Parliament* v *Council* [1985] ECR 1513, at p. 1556, paragraph 18: 'The fact that the European Parliament is at the same time the Community institution whose task is to exercise political review of the activities of the Commission, and to a certain extent those of the Council, is not capable of affecting the interpretation of the provisions of the Treaty on the right of action of the institutions.'
But see also paragraph 12 of the *Comitology* judgment, which seems to conflict with this, or at least reduces its impact.

6 — The following consideration in the judgment of the Court of 10 July 1986 in Case 149/85 *Wybot* [1986] ECR 2403 is relevant to the kind of dispute before us today: 'In accordance with the balance of powers between the institutions provided for by the Treaties, the practice of the European Parliament cannot deprive the other institutions of a prerogative granted to them by the Treaties themselves' (paragraph 23).

7 — For references and a general discussion, see most recently the Opinion of Advocate General Darmon of 26 May 1988 in the 'Comitology' case, [1988] ECR 5615, at p. 5627.

except the last there was some relevant indication in the Treaty provisions which enabled the Court of Justice to extend their application to the Parliament by means of an interpretation of them. As far as applications to have acts of the Parliament declared void are concerned, however, the Court was not able to refer to such a provision but found that no obstacle to its interpretation: see the judgment in *Les Verts*.[8]

To that summary there may now be added the (unrestricted) right of appeal which the Parliament has against judgments of the Court of First Instance. The Statute of the Court of Justice, as amended, provides that an appeal may be brought against final decisions of the Court of First Instance *inter alia* by 'Community institutions', regardless of whether they intervened in the proceedings before that Court.[9] The Court of Justice has always refused to interpret the term 'institutions' in the Treaty or in its statute otherwise than as including the Parliament: such an interpretation, it has said, would harm the institutional status (of the Parliament) laid down by the Treaty, in particular in Article 4(1) thereof.[10]

It should be noted that in the aforementioned cases in which the Parliament was acknowledged to have a *jus standi*, the Court of Justice construed the division of powers between the institutions laid down in the Treaties in such a manner as to ensure that the legal procedures and remedies available under the Treaties were as coherent and efficient as possible. Admittedly, it regarded itself, in so doing, as bound by the principle of restrictive attribution of judicial powers, pursuant to which the Court may not extend its powers by creating new remedies: see the judgment of 17 February 1977 in *CFDT*.[11] This case, however, is clearly distinguishable from the *CFDT* case, which concerned an association which could not possibly be entitled to bring an action under the ECSC Treaty, having regard to the restricted material scope of that Treaty. This case is different: as we have seen, the Parliament has already been recognized as having *jus standi* before the Court of Justice, and is asking in this case to be allowed to bring an action to safeguard the prerogatives accorded to it by the Treaty.

The 'Comitology' judgment

5. Anyone who has followed the case-law of the Court of Justice from the moment of the entry into force of the EEC Treaty will undoubtedly have noticed to what extent

8 — Judgment of 23 April 1986 in Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraphs 24 and 25, confirmed in the judgment of 3 July 1986 in Case 34/86 *Council* v *Parliament* [1986] ECR 2155, paragraph 5.

9 — See Article 49 of the Statute of the Court of Justice (EEC, Euratom, ECSC) as last amended by Council Decision (ECSC, EEC, Euratom) 88/591 of 24 October 1988 (OJ 1989, C 215, p. 1).

10 — Particularly as regards the Parliament's right to intervene in proceedings before the Court of Justice and to bring an action for failure to act. See the judgments of 29 October 1980 in Cases 138/79 *Roquette Frères* and 139/79 *Maïzena* [1980] ECR 3333 and 3393, paragraph 19, and of 22 May 1985 in Case 13/83, cited in footnote 5, at paragraph 17.

11 — Judgment of 17 February 1977 in Case 66/76 *CFDT* v *Council* [1977] ECR 305, paragraph 8 (regarding applications by individuals for the annulment of decisions of the Council under the ECSC Treaty). The decision was confirmed in the judgment of 11 July 1984 in Case 222/83 *Municipality of Differdange* v *Commission* [1984] ECR 2889 (in which it was held that local authorities have no right of action under Article 33 of the ECSC Treaty).

the Court has concentrated, and still does concentrate, on ensuring, in many different ways, that there is an adequate and coherent system of legal protection. In that context, the 'Comitology' judgment is somewhat surprising.[12] The Court rejected in its judgment both the arguments relating to the parallelism of legal remedies, in particular that of the action for failure to act and the action for annulment — although in a previous judgment the Court had emphasized the close link between them[13] — and those regarding the connection between the Parliament's capacity to be sued and its capacity to sue. What was particularly surprising was that the Court based its rejection of the argument that the Parliament's right to bring an action for failure to act was paralleled by a right to bring an action for annulment on a very broad interpretation of Article 175 — that is to say, by equating (paragraph 17 of the decision) an express refusal to act with a prolonged failure to act — in order to fill (to some extent) a gap in the system of legal protection. That interpretation went further than the Court's previous case-law would have led one to suppose and also departs from the rules contained in the ECSC Treaty (on which the Court relied, however, to draw argument by analogy on the question of the link between the capacity to sue and the capacity to be sued).[14]

Is one to conclude that the Court has abandoned in the 'Comitology' judgment its preoccupation with ensuring an adequate and coherent system of legal protection? Certainly not, as is already apparent from the deliberate decision I have just described to give Article 175 an extremely broad interpretation. Subsequently, moreover, the judgment refers (in paragraph 20) as regards the relationship between the Parliament's capacity to sue and its capacity to be sued, expressly to the judgment in *Les Verts*, recalling that the interpretation given in that case was based on the need for a complete system of legal remedies for individuals as regards acts of Community institutions which are capable of having legal effects for them.

I see the judgment in the 'Comitology' case rather as constituting a refusal to accede to the Parliament's request to alter the institutional balance in its favour in the context of the capacity to bring an action for annulment (and, in connection therewith, to establish a link between its capacity to sue and its capacity to be sued) (paragraph 19). Had the Court accepted that proposal it might have been interpreted as interference by the Court in the very delicate question of institutional balance as between the Community institutions endowed with legis-

12 — An example: in the second English version (just published, revised by L. W. Gormley) of the standard work by P. J. G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, 1989, the authors describe the natural development of the principle of the Parliament's *jus standi* before the Court, on pp. 143 *et seq*, with the conclusion (obviously drafted prior to the judgment in the 'Comitology' case) that: 'there is no escaping the fact that bringing cases before the Court is both a manifestation and consequence of active parliamentary participation in the political life of the Community' (p. 145). As a result of the judgment in the 'Comitology' case the authors were obliged to add a qualifying note to that footnote at the last minute.

13 — See the judgment of 18 November 1970 in Case 15/70 *Chevalley* [1970] ECR 975, paragraph 6. Admittedly, the Court expressed that consideration in connection with the definition of an act which could be the subject-matter of an application under Articles 173 and 175.

14 — For a thoroughgoing analysis of the 'Comitology' judgment, on this point and others, and of the previous case-law of the Court, see M. Thill, 'Le défaut de qualité du Parlement européen pour agir en annulation au titre de l'article 173 du traité CEE: l'arrêt de la Cour de Justice du 27 septembre 1988 et ses implications sur d'autres aspects du contentieux communautaire', *Cahiers de droit européen*, 1989, p. 367, at pp. 375 to 382.

lative powers or prerogatives and thus as interference in the political decision-making process, even though the Court had previously stated — although it impliedly contradicted that in the 'Comitology' case — that the judicial settlement of conflicts must be considered separately from the political means of settling them (see paragraph 3, above, and footnote 5). The risk of appearing to interfere was all the more real, as the Court pointed out (in paragraph 26), in view of the fact that the powers of the Parliament were considerably extended by the approval of the Single Act without there being a parallel alteration in the rules governing the right of action under Article 173 of the EEC Treaty. When the Treaties were revised, the Council refused expressly, in fact, to approve a proposal by the Commission to grant the Parliament the same unlimited right to bring actions for annulment as that enjoyed by the Council and the Commission. [15] [16]

However, it must be emphasized immediately that that refusal is not to be understood as meaning that the Court will *in no case* grant the Parliament *jus standi* under Article 173 of the EEC Treaty. The Commission proposal to which I have just referred sought to have both the Parliament's capacity to sue and its capacity to be sued incorporated in the Treaty. The fact that it was not accepted (the Single Act was signed in February 1986) did not prevent the Court of Justice from recognizing in the judgment of 23 April 1986 in *Les Verts* that actions could be brought against the Parliament — and thus its *jus standi* as a defendant. [17]

The requirement that there be an adequate and coherent system of legal protection

6. The distinction I have just outlined between the interpretation of the Treaty with a view to ensuring that there is an adequate and coherent system of legal protection and its interpretation in a manner which might interfere with the delicate political balance between the institutions is in my view an essential one. Whereas the first is the inalienable task of the courts, the second falls to the (primary) legislature. That explains why the Court did not accept, in the 'Comitology' judgment, arguments seeking to have the institutional balance adjusted, particularly after the rejection of the Commission proposal to which I have just adverted, whereas in *Les Verts* it did in fact accept argument concerning the guarantee of legal protection by means, as it pointed out, of a complete system of legal remedies and procedures laid down by the Treaty for the benefit of third parties who consider that they have been harmed by mandatory acts of the Parliament. [18] The Court did so on the ground that

'the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the

15 — See the declaration made by Commission member Mr Ripa di Meana to the Parliament on 9 October 1986. The Commission's proposal was published in the Bulletin of the Parliament, OJ 100.805/Addendum 2 of 10.10.1985, p. 25

16 — According to a declaration made by Commission President Mr J. Delors subsequently to the Parliament, the Council was not *unanimous* on that point, some of the national delegations to the conference of representatives of the governments of the Member States pointed out during the discussion of the proposal that 'les institutions communautaires etaient sous l'emprise d'une constitution évolutive et qu'un jour la jurisprudence donnerait *de facto* ce droit au Parlement' See the Minutes of the sitting of 26 October 1988 (provisional edition), pp. 194 to 197.

17 — J. Weiler, 'Pride and Prejudice — *Parliament* v *Council*', *European Law Review*, 1989, p 334, at p 345

18 — See paragraphs 23 and 24 of the decision in *Les Verts*, cited in footnote 8, and in particular the interpretation given thereto in the 'Comitology' judgment, in paragraph 20.

question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'.[19]

In that context — and in this Opinion in general — I take *legal protection* to mean: the possibility for any holder of a right, a power or a prerogative[20] to have recourse to judicial authority on his own initiative, that is to say as and when he sees fit, in order to have that right, power or prerogative protected.

That distinction has important practical consequences. Whereas establishing (or re-establishing) an institutional balance between the Council, the Commission and the Parliament — a matter which I consider is *not* the province of the courts — entails giving the Parliament as full a right of action as the Council and the Commission enjoy, that is not the case if the aim is to ensure that the Parliament enjoys effective legal protection. All that requires is a limited right of action, inasmuch as it is only necessary for the Parliament's own rights, powers and privileges to be safeguarded, that is to say to the extent that the Parliament has an interest personal to it in bringing an action. I would point out — and will discuss this point later (see paragraphs 12 and 14, below) — that in the 'Comitology' judgment the Court of Justice also acknowledged the necessity for protection by the courts of the Parliament's prerogatives, but placed responsibility quite particularly on the Commission to invoke that protection by means of an action under Article 173 of the EEC Treaty (paragraph 27 of the judgment).

7. Since this case concerns the Parliament's power by itself and on its own initiative to bring an action for annulment in order to safeguard its own powers (of cooperation) and that alone, I shall restrict my consideration of the question whether it is desirable for the Court to qualify the 'Comitology' judgment to that context. Consequently, my Opinion will relate to paragraphs 25 to 27 inclusive of that judgment, and, subsequently, to paragraphs 8 to 10 thereof. I shall regard the remaining paragraphs of the judgment, to the effect that the Parliament has no *unlimited* right to bring actions for annulment, as beyond discussion.

The Parliament's capacity to bring an action in order to safeguard its powers

8. When I speak of (the Parliament's) capacity to bring an action ('la *qualité* pour ester en justice') I distinguish that from (the Parliament's) general legal capacity ('la *capacité* d'ester en justice'). The second of those phrases refers to the capacity to be invested with rights, which usually goes hand in hand, in the case of a party to proceedings, with (a more or less marked form of) legal personality (which I shall explain further in paragraph 17, below). The first has to do with the question whether a particular rule of law, in this case the Treaty, expressly or impliedly confers a

19 — *Les Verts* judgment, cited in footnote 8, at paragraph 23.

20 — Here, and elsewhere, I use this broad formulation in order to show that the nature of the 'rights', in the widest sense of the term, is irrelevant.

right to appear before the courts, either as a plaintiff or as a defendant. [21]

In the judgment delivered in *Les Verts*, the Court held that the first paragraph of Article 173 of the Treaty gave the Parliament a *locus standi* as defendant — although the Parliament is not expressly mentioned in that article — and based its decision on the need to provide the necessary legal protection for third-party individuals who considered that their interests had been damaged by an act of the Parliament having legal consequences for them. The question before us today is whether that legal protection — and, consequently, the Parliament's capacity to initiate an action itself — must be granted to an *institution* which considers that its powers have been encroached upon by an act of another Community institution.

9. I would like to point out that the emphasis in the question as I have just stated it lies *not* on the link between the Parliament's capacity to sue and its capacity to be sued (that is to say, between the Parliament as plaintiff and the Parliament as defendant) — a question which has to do with institutional equilibrium, a subject which I have already dealt with and to which I do not wish to revert here (see paragraphs 5 and 6, above) — but on the existence (or absence) of the Parliament's capacity to bring an action challenging the acts of other institutions in the light of the requirement of adequate legal protection. In other words, if the Parliament is recognized as having the capacity to bring an action in that case it is *not* because it must be permitted to bring actions now that the *Les Verts* judgment has confirmed that it has capacity to stand as a defendant, in order to put it on the same footing as the Council and the Commission; it is because the Parliament must be permitted to bring actions in order to be able to defend its rights, powers and prerogatives adequately itself, in the same way as other persons or institutions. [22]

The relevant comparison here, as regards the substance, is not that between the Parliament's capacity to sue and its capacity to be sued but that between its capacity to bring actions for the annulment of acts of other Community institutions and the right enjoyed by individuals *(inter alia)* to bring proceedings challenging acts of Community institutions, including the Parliament. In other words, the Parliament's capacity to sue is here compared to the capacity to sue enjoyed by *(inter alia)* individuals.

Admittedly, the issue of the Parliament's capacity to sue in this case raises the same difficulty of interpretation as there was in *Les Verts* regarding the Parliament's capacity to be sued, inasmuch as both as regards the capacity to sue under the second sentence of the first paragraph of Article 173 and as regards the capacity to be sued

21 — As to the distinction between *capacite* and *qualité* to appear before the courts under the EEC Treaty (and also *interêt*, a concept which in this case consists of defending the party's own right: see paragraph 6, above), see the no longer recent but still informative article by C Cambier, 'Le droit de procedure: principe et élement regulateur de l'autorité des juges dans les Communautes européenes', which appeared in *De individuele rechtsbescherming in de Europese Gemeenschappen*, 1967, p 117 Compare with the article by J Boulouis, 'La qualite du parlement européen pour agir en annulation', *Rev. M Comm.*, 1989, p 119

22 — A point already alluded to by Advocate General Darmon in his Opinion prior to the 'Comitology' judgment (paragraphs 32 and 33)

under the first sentence of that paragraph there is no express reference to the Parliament, nor even to 'other institutions' (besides the Council and the Commission).

The essential question which has arisen with perfect clarity in this case is therefore this: should the Parliament be offered less extensive legal protection than that enjoyed by individuals (leaving aside the further question whether the latter are directly or individually concerned, as to which more will be said in paragraph 17) whenever it is necessary to safeguard through the courts own rights, powers or prerogatives?

The need to interpret Article 173 of the EEC Treaty in the light of the requirement of legal protection

10. Let me say at once that I see no reason why the answer to that question should not be the same for an institution as it is for individuals.

Surely it should not differ just because the latter may be natural persons and only natural persons are to be entitled to rely on Articles 6(1) and 13 of the European Convention for the Protection of Human Rights, which provide that in civil and criminal matters there is a right to be heard by an independent judge and where rights or freedoms have been violated effective legal remedies must be available?[23] In any event, the Court of Justice has held that even legal persons of private law may rely on similar rights or freedoms, adapted to their special situation, if not under the Convention then under general principles of law.[24] The fact that it appears to be established that the Convention does not apply to public legal persons does not necessarily justify the conclusion *a contrario* that no legal remedy is available under the general legal principle of free access to the courts (see paragraph 12, below), provided that the institutional structure in the relevant legal order, like that in the Community (see paragraph 3, above), is not opposed in principle to the courts' upholding the rights, powers or prerogatives accorded to such persons by laws or the Treaty.

11. Nor is there any written provision which may be relied upon as against the Parliament, since the judgment in *Les Verts*. As I mentioned before, the first paragraph of Article 173 does not refer to the Parliament, whether as one of the institutions subject to review by the Court of Justice or as one of those with a right of appeal, and does not even contain a general reference which could be interpreted as including the Parliament. As regards the institutions subject to the Court's powers of review, the Court saw no reason not to include acts of the Parliament among the

23 — See, for example, the judgment of 15 October 1987 in Case 222/86 *Heylens* [1987] ECR 4097, in particular paragraph 14.

24 — See for example the recent judgments of 21 September 1989 in Joined Cases 46/87 and 227/88 *Hoechst* [1989] ECR 2859, paragraph 17 *et seq.*, of17 October 1989 in Case 85/87 *Dow Benelux* [1989] ECR 3137, paragraph 28 *et seq.* and of18 October 1989 in Case 374/87 *Orkem* [1989] ECR 3283, paragraph 30 *et seq.*

acts subject to its review under the principle of legal protection for injured third parties.[25] In other words, where the provisions are silent the Court has interpreted them in the light of the overriding requirement that the most suitable legal protection be provided. Should not that approach also be applied, when seeking to remedy a similar gap in a provision, whenever the aim is to give institutions a degree of legal protection similar to that enjoyed by individuals, and whenever that means that they must be able to defend their own rights, powers and prerogatives? It should also be noted that the association concerned in *Les Verts* was a political party, in other words an association with a public law vocation, and that the rights at issue there were also not merely 'subjective rights', but claims to electoral funds.

12. In my view, a more convincing argument than the preceding observations is that in a community of law it must be possible for anyone with the capacity to perform legal acts to assert their individual rights, powers and prerogatives *themselves*, as and when they see fit, before the courts. That appears to me to be a general principle of law, that is to say, the expression of the fundamental right to legal protection (as defined above, paragraph 6) which, as just indicated, extends to public authorities and institutions provided that the institutional framework allows, as it does in the European Community, conflicts regarding the distribution of powers between the institutions to be brought before the courts.

I am aware that in saying that I am (in one limited, but important, respect — see paragraph 14, below) in conflict with what the Court held in the 'Comitology' case, but it is precisely on that limited point that I would invite the Court to reconsider its position. The Court stated in that case that the Parliament was not entirely without protection in the matter of safeguarding its rights, powers or prerogatives. In the first place, as provided for by Article 155 of the EEC Treaty, the Commission has a duty to ensure that the Parliament's prerogatives are respected and must itself, if necessary, bring an action for annulment. Secondly, not only the Member States but also individuals may bring an action before the Court or have a request for a preliminary ruling submitted to it. I will not examine here the 'technical' objections to that view.[26] I shall merely point out that the legal protection that that represents is limited and incomplete, inasmuch as the initiative for safeguarding the rights and prerogatives of the Parliament lies in the hands of the Commission, the Member States or individuals; in other words, as regards the enforcement of its own rights the Parliament is subject to a sort of tutelage. That is a situation which I consider to be highly unsatisfactory as regards the requirement of adequate legal protection.

13. In support of their argument that the Parliament has the capacity to bring an action for annulment, the institution's representatives and those of the Commission rightly emphasized during the oral

25 — See footnote 18.

26 — Read the comments by Thill referred to in footnote 14, at p. 387. In the absence of anything better, he mentions the possibility for the Parliament, by means of an action for failure to act brought against the Commission, to force that institution if necessary (that is, if it has failed to initiate one itself) to bring an action for annulment in order to safeguard the Parliament's rights and prerogatives. That one must resort to such tortuous and, from the point of view of procedural economy, undesirable stratagems is sufficient to show that the Parliament should be allowed to bring actions for annulment itself.

procedure that if political negotiations have been unsuccessful in settling a legal conflict of powers, it is essential to be able to bring the matter before the courts. In a community such as the European one (especially since the adoption of the European Act), where there is a subtle balance between on the one hand the powers of the Community institutions as between themselves and on the other the powers of the Community and of the Member States, which gives rise, and will continue to give rise, to delicate questions regarding the distribution of powers, the definitive resolution of such conflicts should be a matter for the Court. Were the Court to decline such jurisdiction, even in part, it would be failing in its duty as ultimate guardian of the law, a duty which the Treaties have conferred on the Court, not on the Commission (compare Article 164 and the first indent of Article 155 of the EEC Treaty).

The Commission's representatives were also correct in pointing out that any other approach would be incompatible with the Commission's autonomous right of decision as to whether or not to initiate proceedings. It would also present the Commission with a conflict of interest whenever it was in disagreement with the Parliament as to the manner in which a conflict of powers was to be resolved: must it in such a case, in order to safeguard the Parliament's prerogatives, bring an action for annulment against the Council (or even against itself) challenging a solution which it regards as correct and for which it may even have been responsible? I do not think that that would be in the interests of the administration of justice, which should avert conflicts of interest.

14. I have already referred (in paragraph 6, above, *in fine*) to the fact that in the 'Comitology' case the Court did not reject the argument that the Parliament's prerogatives should be protected by the courts. To that extent, what I suggest does not conflict with the Court's previous judgment. In fact for the reasons stated above I do not think that the approach suggested in that judgment, of leaving to others the right to obtain that protection by means of an action for annulment — that is, the most effective form of legal protection — is a good solution. As I have already said that solution would also encourage endeavours to find ways of bringing a conflict before the courts by other means, ways which would make extreme interpretations (as in the case of an action for failure to act: above, paragraph 5) or undesirable distortions of the procedure (footnote 26) unavoidable. In my view, the direct approach, according to which the Parliament should enjoy a limited right to bring proceedings under Article 173 of the EEC Treaty in order to safeguard its own rights, powers and prerogatives, is certainly the most acceptable one from the point of view of providing adequate legal protection and the administration of justice. It is also the only solution which can provide a complete remedy where there has been failure to fulfil an essential procedural requirement.

15. For those reasons I have come to the conclusion that the Parliament must be recognized as having the capacity to bring an action for annulment before the Court under Article 173 of the EEC Treaty (or Article 146 of the EAEC Treaty) whenever it is necessary to safeguard its rights, powers

or prerogatives (see also paragraph 19, below).

The legal basis for the Parliament's capacity to bring an action

16. The question which must be answered now is whether the Parliament's capacity to bring an action under Article 173 to safeguard its rights, powers or privileges, in favour of which I have just argued, derives from the first or from the second paragraph of Article 173.

In favour of the first paragraph it may be argued that it concerns the right of recourse of public law bodies (Member States and the Community institutions); in favour of the second paragraph it may be said that it confers a limited right of recourse solely where the applicant is directly concerned. Let me say straight away that my preference is for the first paragraph of Article 173. The Parliament can most appropriately be assigned to the category of bodies of public law having a *locus standi* who — even if they are seeking to safeguard their own interests — do so for certain reasons of general concern. However, I would first like to point out that in the light of the development of the case-law of the Court of Justice the second paragraph of Article 173 is no less apt to found the Parliament's *jus standi*. That will enable me best to explain how that *jus standi* is covered by the first paragraph of Article 173.

17. The fact that under the second paragraph of Article 173 only legal (and natural) persons are entitled to bring actions and that only such persons are deemed to have general capacity — as distinct from the capacity to bring an action (see paragraph 8, above) — does not seem to me to constitute a real obstacle. There is, after all, in many legal systems evidence of a general tendency to interpret the concept of 'legal person' in a pragmatic way, allowing the courts to decide on the basis of the way in which positive law structures the legal sphere of a particular organ or institution that within a specific legal relationship that organ or institution has (to a greater or lesser degree) legal personality.

There is also clear evidence of that tendency in the case-law of this Court. As early as 1974, in *Union syndicale*,[27] the Court held that a staff trade union federation could not be denied the capacity to bring an action, in so far as its internal structure gave it the necessary autonomy to be a responsible party to a legal relationship, and in so far as the union had been recognized by the Community institutions as a negotiating party in consultations on collective staff matters. On similar grounds the Court held in *Groupement des agences de voyages*[28] that a company in the course of formation, which under national law did not have legal personality, could bring an action under the second paragraph of Article 173; and in *Fediol I*[29] a trade union without legal personality was permitted to bring an action because the regulation which was being

27 — Judgment of 8 October 1974 in Case 175/73 *Union syndicale* v *Council* [1974] ECR 917

28 — Judgment of 28 October 1982 in Case 135/81 [1982] ECR 3799.

29 — Judgment of 4 October 1983 in Case 191/82 [1983] ECR 2913.

challenged accorded to it a well-defined legal position.[30]

Article 210 of the EEC Treaty, which states that the Community shall have legal personality, does not conflict with that approach: it enables the Community to claim legal personality within a limited category of legal relationships, that is to say, in the international legal order. That article does not prevent the recognition of legal capacity, in the Community internal legal order, for an institution or body which has been given a specific legal position by rules of substantive, procedural or institutional law.

18. A more serious objection to the use of the second paragraph of Article 173 is the requirement it lays down that the decision or act challenged must be of direct and individual concern to the applicant. Precisely on that point, however, there has been a marked change of emphasis in the case-law of the Court of Justice. In the past the requirement was always that persons other than those to whom a measure is addressed may claim to be individually concerned only if the measure affected them personally in the same way as the addressee by reason of certain attributes or circumstances special to them.[31] Subsequently, however, the Court explained, in cases concerning subsidies and dumping, competition and government aid, that the requirement of legal protection constituted the principal basis for determining who may bring an action for annulment: it applies in fact to those who have participated in the procedure which led to the adoption of the contested act. Thus in *Timex* the Court considered that regulations introducing an anti-dumping duty, in so far as they were applicable generally to all the traders affected by the provisions, were indeed 'legislative in nature and scope' but that at the same time such a regulation 'is a decision which is of direct and individual concern' to the applicant, having regard to the part played by it in the procedure which led to the adoption of the regulation.[32] In a later case, *Cofaz*,[33] this time to do with government aid, the Court clarified its position in the following terms:

'Where a regulation accords applicant undertakings procedural guarantees entitling them to request the Commission to find an infringement of Community rules, those undertakings should be able to institute proceedings in order to protect their legitimate interests' (paragraph 23 of the decision).

In the light of those decisions it may be possible for the Parliament to rely on the second paragraph of Article 173. As I have pointed out already, however, that (limited) right of action is also based on the requirement of legal protection necessary in order to safeguard one's rights or powers,

30 — For further cases see the commentary by Mr Thill already referred to in footnote 14, at pp. 371 and 372.

31 — See for example the judgments of 15 July 1963 in Case 25/62 *Plaumann* [1963] ECR 925, at p. 107 and of 14 July 1983 in Case 231/82 *Spijker* [1983] ECR 2559, paragraph 8.

32 — Judgment of 20 March 1985 in Case 264/82 [1985] ECR 849, paragraphs 12 and 16. For a brief but accurate review of the cases see R. Lauwaars and C. Timmermans, *Europees Gemeenschapsrecht in kort bestek*, 1989, pp. 115 to 118.

33 — Judgment of 28 January 1986 in Case 169/84 *Cofaz* v *Commission* [1986] ECR 391.

and in this case the Parliament is seeking to defend its right of cooperation under Article 100a(1). If in that context the Parliament argues that it was not sufficiently involved in the adoption of the regulation (the Parliament claims that it was entitled to cooperate, not merely to be consulted), then it must be able to bring an action to protect its 'legitimate interests', in the words of the judgment in *Cofaz* — just as the undertakings could, in the cases just discussed, in connection with 'procedural guarantees'. That also applies when the contested act is a regulation which is also, as stated in *Timex*, at the same time a decision of direct and individual concern to the applicant in view of the part the latter is called upon to play in the procedure leading to the adoption of the regulation.

Admittedly, the cases just discussed concerned undertakings which considered that their material interests had been harmed by the contents of the decision or by the refusal of the competent authorities to initiate a procedure. It seems to me that for an institution of public law the breach of an essential procedural requirement affecting it is just as important or fundamental as is harm to the material interests of an undertaking.

19. Although I am therefore of the opinion that the second paragraph of Article 173 may serve to provide the Parliament with a *jus standi*, I nevertheless consider the first paragraph of Article 173 to be more appropriate, inasmuch as that paragraph deals with the right of action of bodies of public law. If the Court shares that preference, the result will be that a special 'category' of Community institutions, that is to say, the Parliament, must be included under that provision whose right to bring an action may be exercised only for the purpose of safeguarding their rights, powers or prerogatives. In fact I do not see why that 'restrictive' interpretation of the first paragraph of Article 173 should present more difficulties than the 'extensive' one given by the Court to the second paragraph of Article 173 in the cases discussed in the preceding paragraph.

If that approach is adopted, there will certainly be difficulty — as often happens — in defining in practice the cases in which the Parliament may be regarded as acting in order to safeguard its own sphere of competence — even if there is no such difficulty in this case, I think, because it is clear that the Parliament's own interests are affected by the alleged breach. If the Court allows the Parliament's main action to succeed, the Council will of course be obliged to have recourse to the procedure for cooperation with the Parliament; but there will certainly not always be such a direct interest in the annulment of a contested act. One has only to consider, for example, the possibility of the Parliament's arguing in a case that a Council regulation has no legal basis in the Treaty.[34] In the 'Comitology' case, too, as I have mentioned (paragraph 2, above), the Parliament's own interest was not so evident.

34 — Another example of a case in which the Parliament's own powers were not at issue is the case on the common transport policy (cited in footnote 5), in which the Parliament asked the Court (admittedly under Article 175 of the EEC Treaty) to declare that the Council's failure to introduce a common transport policy was in breach of the Treaty.

Conclusion

20. On those grounds I conclude that the Parliament's action must be declared admissible under Article 173 of the EEC Treaty and/or Article 146 of the EAEC Treaty, pursuant to the first (or alternatively the second) paragraph thereof. Costs should be reserved.