

## Judicial Review of the Budgetary Authority during the enactment of the European Union's Budget

**Dimitrios V. Skiadas**

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### Keywords

judicial review, budgetary procedure, budget, European Court of Justice, law

### Abstract

This article considers the problems arising during the judicial review of the budgetary procedure in the European Union. Matters such as the jurisdiction of the ECJ, the identity of the reviewable acts, the standing of all applicants as well as the grounds of review are examined in detail. Some problems of the budgetary procedure are also highlighted and there are some proposals aiming to improve the current situation.

### Kurzfassung

Der Artikel analysiert die Probleme, die während der gerichtlichen Nachprüfung des Haushaltsverfahrens in der Europäischen Union auftauchen. Im Detail werden folgende Angelegenheiten untersucht: der Zuständigkeit des EuGH, die Art der überprüfbaren Akte, die Stellung aller Prozeßbeteiligten sowie die Überprüfungsgründe. Dabei werden einige Probleme des Haushaltsverfahrens aufgezeigt sowie Vorschläge zur Verbesserung der aktuellen Situation gemacht.

### The author

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## **I. Introduction** <sup>↑</sup>

The enactment of the European Union's budget, otherwise known as the "Budgetary Procedure", has been seen as an inter-institutional dimension within the institutional framework of the European Union (Craig, De Búrca, 1998, at 99). Given the complexity of this framework it is anticipated to have conflicts between the various institutions. The inter-institutional nature of the Budgetary Procedure makes it certain that there are conflicts within this procedure. The conflict for the control over the budget is completely understandable, if someone considers the rights included in this power: a) the right to create revenue, b) the right to authorize expenditure, c) the right to approve the budget as a total and d) the right to control the implementation of the budget (Strasser, 1980, at 1).

The Budgetary Procedure is described in Art. 272 [ex 203] of the EC Treaty and Art. 12-18 of the Financial Regulation (OJ 1977, L 356/1). There are seven stages in this procedure.

### First stage

the Commission sets the maximum rate of increase in non compulsory expenditure

### Second stage

the Commission adopts the preliminary draft budget

### Third stage

the Council examines the preliminary draft budget (first reading of the Council) and it establishes the draft budget, which is sent to the Parliament

### Fourth stage

the Parliament examines the draft (first reading of the Parliament). If it makes no amendments the budget is considered adopted. If it makes amendments, the draft budget is sent back to the Council

Fifth stage

the Council examines the amendments of the Parliament (second reading of the Council). If it does not modify the draft any more the budget is considered to be adopted. If it modifies the draft, this is sent once more to the Parliament

Sixth stage

the Parliament examines the amendments made by the Council (second reading of the Parliament). It can modify provisions regarding the non compulsory expenditure

Seventh stage

the President of the Parliament declares that the budget has been adopted

## II. Institutional Conflicts about the Budget

During the 1980s almost all the conflicts about the control over the Community Budget, despite their intensity, were always resolved through political settlements. All cases that reached the European Court of Justice (ECJ) were removed from the Register after political compromises (Case 48/81, *Federal Republic of Germany v Commission*, not reported, Case 72/82, *Council v Parliament*, not reported, Case 73/82, *Council v Commission*, not reported, Case 377/87, *European Parliament v Council*, ECR [1988] 4017, Case 383/87, *Commission v Council*, ECR [1988] 4051). The major actors in these conflicts were the Council, the Parliament and to a lesser extent the Commission. The first two institutions constitute the “Budgetary Authority”, the authority which is responsible for the Budgetary Procedure.

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Their conflicts did not result in judicial review for two possible reasons, a legal and a political (Advocate General Mancini in Case 34/86, *Council v. Parliament*, ECR [1986] 2155 at 2157, para 2). The legal reason comprised two factors. The first was the Council’s awareness that the Budgetary Procedure established by the EC Treaty was so complicated that the Council had to lay down an internal code of rules in order to make this procedure operate more smoothly. The second factor was the uncertainty, which existed till 1986, about the ECJ’s power under Art. 230 [ex 173] to review the legality of acts of Parliament (Mancini, op. cit.). The political reason was based on the background of the two institutions’ (Parliament and Council) involvement in the Budgetary Procedure. (Mancini, op. cit.). That of the Parliament was based on the historically established role of parliamentary institutions in determining budgets (see Trotabas, Cotteret, 1995, at 16-23 for more details) aiming at the same time to intensify its requests for new legislative powers and more democracy in the Community. That of the Council was based on the fact that it was the Member States, which gather and place the Community’s own resources at the Community’s disposal. The Member States are practically financing the Community, in the Council’s opinion, therefore the institution which represented them (Council) is entitled to the greater share of decision making power over the budget (Mancini, op. cit.). It has been noted that there was a discrepancy between the rhetoric and the practice of the Member States which publicly encouraged the Parliament to become more involved in all the decision making procedures of the Community but privately they took steps constraining the Parliament’s greater ambitions (Wallace, 1986, at 266).

In 1986 however, the Council challenged the Communities’ budget before the ECJ and for the first time the ECJ actually delivered a judgement on this issue (Case 34/86, *Council v Parliament*, ECR [1986] 2155). This initialized a long series of occasions where the ECJ was asked to rule on the legality of the Communities’ and later the Union’s budget.

The most important conflict between the Council and the Parliament concerns the interpretation of the terms “compulsory and non compulsory expenditure”. This distinction in Community expenditure is of vital importance (see Kapteyn, Verloren van Themmat, 1998, at 379-382 for more details).

Within the framework of the Budgetary procedure, the Council has the final say about compulsory expenditure while the Parliament has the final say about non compulsory expenditure. These two categories of expenditure are defined in Art. 272(4) [ex 203(4)] of the EC Treaty. The compulsory expenditure is expenditure necessarily resulting from the Treaties or from acts adopted in accordance therewith. The non compulsory expenditure is all the other expenditure of the Union. These definitions are not satisfactory. The Parliament gave its own interpretation according to which only expenditure to which a third party has a legal claim may be regarded as compulsory expenditure (Dankert, 1983, at 705). The Council did not present a counter argument but it did not accept this definition either. However, in their Joint Declaration of 1982 on the Community Budgetary procedure (OJ 1982, C 194/1) the Council and the Parliament defined as compulsory expenditure the Community's legal obligations towards third parties, who may be either third countries or Member States, individuals or corporations (Dankert, *op. cit.*, at 707). This definition included for instance expenditure about the Common Agricultural Policy or the administrative expenditure of the institutions. In Art. 16 of the Interinstitutional Agreement of 1988 on Budgetary Discipline and Improvement of the Budgetary procedure (OJ 1988, L 185/33), the two institutions agreed to consider the expenditure incurred for the Structural Operations and the policies with multiannual allocations such as the Integrated Mediterranean Programmes and the research policies as non compulsory expenditure (see Zangl, 1989, at 675-685, for more details). Also the operational expenditure for the Common Foreign and Security Policy is non compulsory. Despite these arrangements, however, there have still been differences of opinion about some expenditure. For instance the UK's budgetary rebate is considered by the Council as compulsory expenditure while the Parliament considers it as non compulsory expenditure (Dankert, *op. cit.*, at 708).

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Another conflict, of a more procedural nature, concerns the interpretation of Art. 272(6), 272(8) and 272(9) [ex 203(6), 203(8) and 203(9)] of the EC Treaty. More specifically it involves the interpretation of the majorities mentioned in these articles (Sopwith, 1980, at 323-324). These majorities refer a) to the competence of the Parliament to amend or reject the modifications made by the Council to the draft budget regarding non-compulsory expenditure (Art. 272(6) [ex 203(6)]), b) the competence of the Parliament to participate to the increase of the maximum rate of non-compulsory expenditure included in the budget (this amount is established initially by the Commission and it may be amended by an agreement between the Council and the Parliament – Art. 272(9) [ex 203(9)]), and c) the competence of the Parliament to reject the draft budget (Art. 272(8) [ex 203(8)]). With regard to the first two cases (paras 6 and 9 of Art. 272 [ex 203]), the wording of the relevant provisions requires the majority of the Parliament's Members and three fifths of the votes cast. This generates the following dilemma: do both these limitations refer to the majority required for the adoption of the Parliament's decision or does the first limitation refer to the necessary quorum and the second (regarding the three fifths) to the majority required for the adoption of the decision? (Sopwith, *op. cit.*, at 323). It is obvious that the first method of calculation requires much bigger majorities than the second. Today the European Parliament has 626 members. If the first method is accepted (both limitations refer to the majority required for the adoption of the Parliament's decision) then that means that the decisive majority must consist of both a) a majority of 314 votes and b) three fifths of the overall number of votes cast. If the second method is adopted (the first limitation refers to the quorum and the second to the majority required for the adoption of the Parliament's decision) then that means that it would be sufficient to have 314 Members of the Parliament present at the time of the vote and, if all of them vote, then three fifths of the votes cast (ie 185 votes) will be enough to adopt the decision. The problem is similar for Art. 272(8) [203(8)] according to the wording of which, a majority of the Parliament's Members and two thirds of the votes cast are sufficient for the Parliament to reject the draft budget (Sopwith, *op. cit.*, at 323). In that case, according to the first method of calculation mentioned above (both limitations refer to the majority required for the adoption of the decision), the decisive majority will consist of at least 314 votes and of two thirds of

the overall number of the votes cast. According to the second method of calculation (the first limitation refers to the necessary quorum while the second refers to the majority required for the adoption of the decision), a quorum of 314 Member of Parliament is sufficient and if all those present vote a majority of two thirds of the votes cast (ie 209 votes) is required to reject the draft budget. The Council and the Commission consider the first method of calculation as more correct, arguing that if the second method of calculation is accepted, then according to Art. 272(4) [ex 203(4)] the Parliament can modify the non compulsory expenditure using obligatorily the absolute majority of its Members (314 votes) while according to Art. 272(8) [ex 203(8)] referring to the rejection of the draft budget -something much more important than amending the non compulsory expenditure- the Parliament will need only a two thirds majority of the votes cast, which is 209 votes out of 314 votes (since the first limitation would be considered to refer to the quorum). Consequently, rejecting the draft budget would require less votes than simply amending it (Sopwith, op. cit., at 323-324). The Parliament, nevertheless, has considered the second method of calculation of the votes as more correct, and it has applied it, whenever the provisions in question were used. It seems that the Parliament's approach is more correct. The wording of the relevant provisions seems to refer first to the quorum which will allow legally to the Parliament to adopt a decision and then to the percentage of the votes required for the actual adoption of the decision (three fifths or two thirds, depending on the provision used). That is the purpose of the use of different terms in the text of the provisions in question, as at first the Treaty refers only the Member of the Parliament and afterwards it refers to the votes cast.

### III. The jurisdiction of the ECJ to review the budget

The first question arising about the judicial review over the Budgetary Procedure is whether the ECJ has any jurisdiction to review the budget or not. This question can be answered in both a political and a legal context.

The political context was put forward by Advocate General Mancini in his Opinion in Case 34/86. He argued that it would be perilous to entrust the resolution of constitutional conflicts (such a conflict within the framework of the Budgetary Procedure) to the judiciary, which already had excessive powers within the Community's institutional framework (Mancini, op. cit.) Also, in his view, any judgments, which would effect the substance of the Budgetary procedure (he uses the example of the ECJ applying by analogy Art. 231 [ex 174] of the EC Treaty to the Budgetary procedure after annulling the parliamentary declaration of adopting the budget), would mean that the ECJ would substitute itself for one of the institutions comprising the Budgetary Authority. This would promote the ECJ to the rank of financial authority and would make credible all accusations against the ECJ that it is practically a government of judges. (Mancini, op. cit., at 2185, para 17).

The legal context was put forward by the ECJ itself in Case 34/86. The ECJ stated that it could not intervene in the process of negotiation between the Council and the Parliament during the Budgetary Procedure. It did not have to consider to what extent both institutions' attitude prevented them from reaching an agreement over the budget (Case 34/86, op. cit., at 2210-2211, paras 42 and 45). As it has been pointed out, the ECJ has only to verify the conformity of the budgetary operations with the provisions of the Treaty (Bazex, 1987, at 465). It is for the ECJ to ensure that the institutions comprising the Budgetary Authority keep within the limits of the powers conferred upon them by Community law (Case 34/86, op. cit., at 2210, para 42). More specifically it has to ensure that in the context of the dialogue, the Institutions (Parliament – Council) do not ignore the rules of law and do not exceed their discretionary power in a manifestly wrong or arbitrary way (Case 204/86, *Greece v. Council*, [1988] ECR 5323 at 5339).

Seeing the political and the legal context, someone may point out that they are complementary to each other. It is politically incorrect to have a judicial institution involved substantively in financial matters of constitutional nature such as the enactment of a budget, especially if this judicial institution, like the ECJ, is accused of having excessive powers. However it is perfectly legal (according to Community law) for the ECJ to examine whether the relevant procedural framework, as prescribed by the Treaty, has been adhered to. It is a political responsibility for the Council and the Parliament to behave in such a way that an agreement can be reached between them over the budget, but the actual agreement is a requirement prescribed by Community law and the reaching of it can be examined by the ECJ. Therefore the ECJ has jurisdiction to rule on disputes over the Union's budget.

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## IV. Legal basis of Judicial Review

As for every case of judicial review within Community law, the legal basis of reviewing judicially the Budgetary procedure is Art. 230 [ex 173] and 232 [ex 175] of the EC Treaty. With regard to the provisions that will be used by the ECJ during this judicial review, they include mainly Art. 268 [ex 199] – 280 [ex 209a] of the EC Treaty, Articles 28 [ex J.18] and 41 [ex K.13] of the EU Treaty, the provisions of the Financial Regulation regarding the enactment of the budget, and the various interinstitutional agreements (Joint Declaration by the Community Institutions of 30 June 1982 on the Community Budgetary Procedure, op. cit., Interinstitutional Agreement on Budgetary Discipline and Improvement of the Budgetary Procedure of 29 June 1988, op. cit., Interinstitutional Agreement on Budgetary Discipline and Improvement of the Budgetary Procedure of 29 October 1993, OJ 1993, C 331/1) reached by the Council, the Parliament and the Commission about or during the Budgetary procedure.

## V. Judicially Reviewable acts within the Budgetary Procedure

The first aspect of judicial review of the Budgetary procedure concerns the acts that can be reviewed by the ECJ. The provisions of Art. 230 [ex 173] of the EC Treaty stipulate that the reviewable acts are the acts adopted jointly by the Parliament and the Council, the acts of the Council, the Commission and the European Central Bank, and the acts of the European Parliament intended to produce legal effects vis-à-vis third parties.<sup>(1)</sup> Recommendations and opinions are not reviewable.

Within the Budgetary Procedure there are several acts of the Council and the Parliament. The preparatory measures such as the establishment and amendment of the draft budget have been found not to be susceptible to annulment (Case 302/87, *Parliament v. Council* (“Comitology”), [1988] ECR 5615, para 23). Therefore the only reviewable act within the Budgetary procedure is the adoption of the budget. This act has been examined in detail by Advocates General in cases regarding the budget. Advocate General Mancini in his Opinion in Case 34/86 said that the budget is simply an accounting document and the real reviewable act is the declaration of the Parliament's President that the budget has been adopted (Mancini, op. cit., at 2175, para 12). The budget, according to Mancini, is a document annexed to the act, which promulgates it, the declaration of the President of the Parliament. In order for the budget to create rights and obligations it has to be promulgated by the declaration of its adoption. Mancini considers as erroneous the concept of the budget as an independent act, open to challenge (Mancini, op. cit., at 2177, para 13). Advocate General La Pergola in his Opinion in Case 41/95 seems to have the same opinion. He argues that any claim against the budget itself is ancillary to the principal claim, which should be addressed against the declaration of the Parliament's President (Advocate General La Pergola in Case 41/95, *Council v. Parliament*, [1995] ECR I-4411, at 4417-4418, paragraph 7). Advocate General Jacobs in his Opinion in Case 284/90 takes a different view (Advocate General Jacobs in Case 284/90, *Council v. Parliament*, [1992] ECR I-2277 at 2279).

Based on the wording of Art. 272(6) and (7) [ex 203(6) and (7)] of the EC Treaty, he identifies a distinction between the Parliament's act to adopt the budget and the declaration of the Parliament's President that this adoption has taken place (Jacobs, op. cit., at 2317-2318, para 71). He acknowledges that the budget does not become legally binding until the declaration of the Parliament's President is made, but he suggests that an act can be the object of an action for annulment, even if a further condition must be fulfilled before the act can begin to have legal effects (Jacobs, op. cit., at 2317, para 63). Therefore, in his opinion, in order to annul the declaration of the budget's adoption, it is necessary to annul first the adoption of the budget itself (Jacobs, op. cit., at 2318, para 73).

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This latter opinion of Jacobs is more convincing. The budget, as mentioned above, cannot be considered as a mere document containing financial forecasts. A budget is not only a financial statement, or a method of financial assumptions and forecasts, or a system of controlling expenditure, or an decision-making instrument, or a report aiming to the economic and financial development of a country, but all of the above (Lee, Johnson, 1973, at 2). Even in the definition of the Financial Regulation [Art. 1(1)] the budget is an instrument, which sets out forecasts of, and authorises in advance, the expected revenue and expenditure of the Communities for each year, so it has authorizing powers. Therefore its adoption must be considered as an independent act that can be individually challenged before the ECJ. The ECJ however seems to adopt another point of view, approaching more the opinions of Advocates General Mancini and La Pergola. In the Court's opinion the annulment of the declaration of the Parliament's President will deprive the budget of its validity, therefore there is no need to examine the act of adoption itself (Case 34/86, op. cit., at 2211, para 46, Case 284/90, op. cit., at 2326, para 12, Case 41/95, op. cit., at 4440, para 41). The Court avoids examining whether the act of the budget's adoption is reviewable and it seems satisfied with the fact that if it reviews the declaration of adoption, it can produce a judgement without having to examine any other action.

This approach of the Court does not seem correct. In order to prove that, the question of who actually adopts the budget must be examined first. The ECJ has pointed out that the budget is adopted only by the Parliament (Case 302/87, op. cit., at 5643, para 24). Advocate General La Pergola compared the co-decision procedure of Art. 251 [ex 189b] of the EC Treaty with the Budgetary Procedure and emphasized that while in the co-decision procedure the adopted measure is signed by the Presidents of both the Council and the Parliament, in the Budgetary procedure the declaration of the adoption of the budget is made only by the Parliament's President (La Pergola, op. cit., at 4427, para 21). These opinions however overlook the fact that the Council and the Parliament cooperate closely during the Budgetary Procedure. The Council has also the final say about the compulsory expenditure. A careful examination of the wording of Art. 272 [ex 203] proves that the budget is adopted by both institutions. It is stated in Art. 272(6) [ex 203(6)]: "...the European Parliament...shall adopt the budget...", but half of the expenditure section of this budget is determined by the Council. Additionally, according to Art 272(4), (5) and (6) [ex 203(4), (5) and (6)], the budget is considered adopted after either the Council or the Parliament have not amended the draft budget sent to them after a certain period of time. This demonstrates that the Treaty considers both institutions equally involved in the adoption (not only the drawing) of the budget. The Council is as much substantively involved in the Budgetary Procedure as the Parliament. Consequently, the adoption being a joint act of the Council and the Parliament, it is reviewable according to Art. 230 [ex 173] of the EC Treaty. It must be pointed out of course that only the adoption itself (as a separate act-see above) is considered a joint act of the Council and the Parliament. The declaration of the budget's adoption (which gives the budget its legal effects<sup>(2)</sup>) is of course an act of the Parliament's President. The practical result of this reasoning is that the decision of the budget's adoption is a reviewable act. The declaration of the Parliament's President is a part of the adoption's publication (the other being the publication of the

budget in the Official Journal). As with any legislative or administrative act which produces its legal effects upon publication, the budget's adoption produces its legal effects after the declaration and the publication in the Official Journal. And as any legislative or administrative act can be challenged after its publication, the budget's adoption can be challenged after the declaration of the Parliament's President and the adoption's publication in the Official Journal. It must be noted that when challenging a legislative or administrative act, the actual challenge refers to the adoption of the act, not the publication. Accordingly, when challenging the budget, the challenge should refer to its adoption and not the declaration of the Parliament's President, which is a part (indeed important) of the budget's publication procedure.

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With regard to omissions during the Budgetary Procedure, there are some discrepancies from what is generally accepted about failures to act under Community law. In general, it has been acknowledged that omissions reviewable under Art. 232 [ex 175] of the EC Treaty are the failures to adopt reviewable acts in the sense of Art. 230 [ex 173] (Craig, De Búrca, op. cit., at 491). Within the framework of the Budgetary procedure however this seems problematic. It has been stated above that the only reviewable acts in this procedure are the adoption of the budget and the declaration of its adoption. Failing to adopt the budget or to declare its adoption cannot happen unless the delay of these two acts is such that could be assimilated to omission. According to Art. 232 [ex 175] the time after which a delay can be considered failure to act is two months after the institution concerned has been called upon to act. Given that the provisions of the Budgetary procedure include specific time limits for the adoption of the budget, it must be accepted, by applying the principle *lex specialis derogat lex generalis*, that these latter time limits must be used in order to determine whether there has been any failure to act by any of the institutions involved.

The situation is more complicated with regard to the preparatory acts (establishment and amendment of draft budget) of the Budgetary procedure. It was noted above that these are not reviewable acts. However, because of the importance of the budgetary procedure, it could be argued that the failure to perform these acts in time would delay dangerously the adoption of the budget. Such a delay may be very hazardous for the operation of the European Union, despite the fact that there is Art. 273 [ex 204] of the EC Treaty regulating this case (Pipkom, 1981, at 141-167). A more complete picture of the situation is possible, if someone considers that there are no sanctions for the institution that does not act in time during the budgetary procedure. Therefore, the ECJ could review such delays, even if they concern non reviewable acts, and oblige the institution to act. That, after all, would be nothing more than a method of enforcement of Art. 272(10) [ex 203(10)] of the EC Treaty which states that every institution involved in the Budgetary procedure shall exercise its powers with due regard to the provisions of the Treaty. The ECJ has allowed the Parliament to challenge the failure of the Council to adopt a draft budget, which itself it is not a reviewable act (Case 302/87, op. cit., at 5641 para 16).

## **VI. Standing in Judicial Review of acts in the Budgetary Procedure** ↑

According to the second paragraph of Art. 230 [ex 173] of the EC Treaty the Member States, the Council and the Commission are always allowed to bring an action before the ECJ. Consequently there is no doubt of their standing to challenge an act adopted during the Budgetary procedure.

With regard to the European Parliament, the Court of Auditors and the European Central Bank, it is stipulated in the third paragraph of Art. 230 [ex 173] that they can bring actions before the ECJ in order to protect their prerogatives (see Case 70/88, *Parliament v. Council* ("Chernobyl"), [1990] ECR I-2041). For the Court of Auditors and the European Central Bank, the budgetary procedure is

interesting to the extent that its outcome, the budget, is affecting their operations, mainly through the appropriations about the administrative expenses of these institutions.

The Parliament, however, being one branch of the Budgetary Authority, is much more interested and involved in the Budgetary procedure. Therefore its prerogatives are most likely to be influenced during this procedure. In general it has been accepted that if a party has the ability to have an input in the making of a decision, it makes sense for this party to challenge this decision before the ECJ (Craig, De Búrca, op. cit., at 487). Arguing, for instance that its views, although listened in a formal sense, were in fact disregarded, is a reasonable argument on which to base an action against this decision. Since the Council has the final say about a substantial part of the budget's appropriations (those regarding compulsory expenditure), it is possible to affect the Parliament's prerogatives. The most obvious case would be for the Council not to consult the Parliament in establishing the compulsory expenditure by simply not taking into substantive consideration the Parliament's point of view. The right of the Parliament to be consulted properly, in accordance with the provision of the Treaties (or any other legislative provision such as the various interinstitutional agreements on budgetary procedure) has been found to be one of its prerogatives (Case 316/91, *Parliament v. Council*, [1994] ECR I-653, at 659, paragraphs 16-17). The problem arising however is that since the preparatory acts in the Budgetary procedure cannot be challenged, it would be difficult for the Parliament, despite its standing to challenge such an act of the Council. A possible solution to such a problem will be analyzed in the following section.

It is difficult to see the so called "non privileged" applicants (natural and legal persons) bringing an action against an act adopted in the Budgetary procedure. First of all, these applicants have no involvement in the Budgetary procedure. The budget itself does not meet the first requirement of the fourth paragraph of Art. 230 [ex 173] since it is not addressed to any person. Also, even though the budget's contents may eventually effect several people (either through the provisions about revenue which involve sums paid by European taxpayers or through the provisions about expenditure which involve sums given to all kinds of final beneficiaries), it is very difficult for someone to establish that he is directly and individually concerned. The test used to establish individual concern is included in the ECJ's judgement at the Plaumann case (Case 25/62, *Plaumann & Co. v Commission*, [1963] ECR 95). According to that (at p 107)

"Persons...may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually..."

Furthermore, the general rule for direct concern is that if a Member State is granted any discretion to act under the disputed provisions, then the provision by its nature cannot give rise to direct concern (Case 41-44/70, *NV International Fruit Company v. Commission*, [1971] ECR 411, at 422-423, paras 25-28). In addition, it has been found (although in the context of Community liability under Art. 288 of the EC Treaty) that if the Community institutions have been granted broad discretion to act, then the applicants cannot claim that the provisions granting this discretion, concern them directly (Case T-113/96, *Édouard Dubois et Fils v. Council of the European Union and Commission of the European Communities*, [1998] ECR II-125, at II-146, II-147, paras 59-66). By applying these criteria to the provisions of the Budgetary procedure, it can be established that the requirements of Art. 230(4) [ex 173(4)] are not met. The same conclusion is reached if these criteria are applied to the budget itself. No provision of the budget is distinguishing a person individually (either by obliging this person to contribute to the revenue of the Union or by granting to this person the right to claim money from the Union's expenditure). Also the budget is implemented mainly by the Commission

with the Member States having a more secondary participation. The discretion granted to the Commission and the Member States as to the implementation of budget does not allow a person to put forward the argument of direct concern.

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## VII. Grounds of Judicial Review

According to Art. 230 [ex 173] of the EC Treaty, there are four reasons, which can be put forward to order to have an act annulled by the ECJ: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its applications and misuse of powers.

The competences of the institutions during the Budgetary procedure are clearly stipulated by the provisions of Art. 272 [ex 203] of the EC Treaty, therefore no problems can be raised regarding the first ground for annulment.

The Budgetary procedure, having a purely procedural nature, could provide several opportunities of invoking the second ground for annulment, the infringement of an essential procedural requirement. However, it must be pointed out once more that the preparatory acts of the Budgetary procedure cannot be challenged before the ECJ. Such a limitation does not leave too much margin for invoking this ground of judicial review. The fact that the infringement of an essential procedural requirement cannot be invoked for the review of preliminary acts of the Budgetary procedure demonstrates even more the importance of the above suggested alternative of the ECJ reviewing omissions (or extreme delays) of these preliminary acts. It must be said however that in case that the final act (adoption or declaration of adoption of the budget) is challenged, the infringement of a procedural requirement during the preparatory act stage can be used in the arguments of the challenge. When a final act is challenged, all the non reviewable preparatory acts are considered to be challenged with it.

The third ground of judicial review is the most general of all. It covers every violation of the Treaties and any law relating to their application. This ground of annulment can provide a solution of the above identified problem that the Parliament, despite having legal standing, cannot challenge the Council's preliminary acts during the Budgetary procedure for not having considered properly the former's opinion about the compulsory expenditure of the Union. The solution is that the Parliament could challenge the adoption of the budget (made jointly by itself and the Council), claiming that the Council, during the Budgetary procedure, violated its obligation under Art. 272 [ex 203] of the EC Treaty and the various interinstitutional agreements on Budgetary procedure.<sup>(3)</sup> Since the compulsory expenditure is set by the Council, the Parliament could challenge the adoption as to that part of the budget. Such an action should be found admissible by the Court because it would be put forward by an institution having legal standing, it would be addressed against a reviewable act (as established above) and it would include a valid reason for annulment. Whether the action would be successful in its substance depends of course on the actual facts. If it is successful, the ECJ can annul the adoption of the budget and, in order not to interfere furthermore in the Budgetary Procedure as established in the section about its jurisdiction, it will ask the Council and the Parliament to renegotiate the compulsory expenses section of the budget. Finally it will declare all transactions till that moment to be valid, as it has done so far by using its power according to Art. 231 [ex 174] (Case 34/86, op. cit., at 2213, para 51, Case 41/95, op. cit., at 4441, para 45).

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This interpretation seems more correct and it is substantively connected with the above mentioned suggestion to consider the budget jointly adopted by the Parliament and the Council. If the adoption of the budget was considered an act only of Parliament and the Parliament wished to challenge it, that would be impossible since the Parliament could not challenge one of its own acts or an act of its President ie the declaration of adoption (Jacobs, op. cit., at 2314, para 60). The Parliament could not rely upon the Commission bringing an action against the adoption of the budget since the Commission and the Parliament do not always agree on issues over the budget. And since the preparatory acts would be non reviewable, that would lead to a situation where, during the Budgetary Procedure, the Council could make errors which could not be rectified or challenged by the Parliament. At the same time though the Council would be perfectly capable of challenging the Parliament's acts (adoption of budget, declaration of adoption). Such an outcome would not be a satisfactory distribution of powers between the two branches of the Budgetary Authority (Jacobs, op. cit., at 2315, para 60).

The fourth ground of annulment, the misuse of powers, involving not only legal but also political aspects, can be invoked if one of the institutions involved in the Budgetary procedure is found to use its competences to achieve an end other than that stated or evading a procedure specifically prescribed by the Treaties for enacting the measure in question (Case 84/94, *United Kingdom v. Council* (“*Working time Directive*”), [1996] ECR I-5755, at 5814, para 69), here the budget. An example would be for the Parliament to reject constantly the draft budget, since it can do that according to Art. 272 (8) [ex 203 (8)], in order to oblige the Council to accept its views.

## VIII. Conclusion

The budget is one of the major instruments of European integration. Its structure and contents (drawing of revenue, allocation of expenditure) form a “global expression” of the political and financial ideology of the European Union (Ioakimidis, 1988, at 45). It is therefore the trial field of the balance between the institutions (Ioakimidis, op. cit., at 46), because of the different levels of political sensitivity demonstrated by these institutions with regard to the various community issues (Seremetis, 1995, at 318). Consequently, the judicial review of the Budgetary Procedure is the safeguard that this Procedure will operate properly, maintaining the necessary institutional balances. The suggestions put forward above aim to be a step towards this direction. The equality between both branches of the Budgetary Authority along with their joint competence (and consequently responsibility) over the adoption of the budget, is perhaps the safest method to avoid conflicts which could endanger the integrating process, as this process is carried forward through the activities financed by the Union's budget. However, amending the relevant legislative provisions alone cannot solve the problem. The legislative provisions have been characterized as a mask behind which a different reality exists (Kapteyn, Verloren van Themaat, op. cit., at 374). This reality is the practice created during the implementation of these provisions. Only if the institutions involved in the relevant proceedings maintain good contacts and try to find solutions for continually recurring problems, is there a possibility for the complex budgetary procedure to work properly.

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## Endnotes

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(1) Before the EU Treaty, the acts of Parliament were not mentioned in Art. 230 (ex 173) of the EC Treaty. The ECJ however had ruled in the Case 294/83, *Parti Ecologiste "Les Verts" v. Parliament*, [1986] ECR 1339 that it could review the acts of the Parliament.

(2) The ECJ in its judgement on Case 34/86, op. cit., at 2201, paragraph 6, ruled that the budget, after the declaration of the Parliament's President on its adoption, produces legal effects because of its nature as an instrument of setting out forecasts and authorizing in advance revenue and expenditure. Also the Joint Declaration of 1982 on the Community Budgetary procedure included an agreement of the participating institutions (Commission, Council, Parliament) that the utilization of appropriations

for significant Community action required a legal basis independent of the budget, while less important measures could be implemented directly on the basis of the budget. See P. Dankert, *op. cit.*, at 709. This indicates that even when an additional legal basis is deemed necessary, the budget is always a basis for all Community measures.

(3) These agreements have been acknowledged as very important legislative instruments which even though they do not supplement the provisions of the Treaty, they serve to implement them. See Jacobs, *op. cit.*, at 4427, paragraph 21. The legislative nature of such agreements, that are not mentioned explicitly by the Treaties, has been examined by Mönar, 1998, at 698-700, who considers them *sui generis* acts, having a legal status somewhere “in between” a political undertaking and a legal obligation. Usually they described by the term “soft law”. He states that especially the agreements on budgetary discipline, because of their form and content, are on the edge between “hard law” and “soft law”. Mancini, *op. cit.*, at 2178, para 14 and La Pergola, *op. cit.*, at 4422, paras 14-15 claim that only these agreements must be used in order to distinguish between compulsory and non compulsory expenses expenditure, and that the Court should refrain from establishing itself such criteria.

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