Judgment of the Court of Justice, Commission v EIB, Case 85/86 (3 March 1988)

Caption: According to the Court of Justice of the European Communities, the granting to the European Investment Bank (EIB) of operational and institutional autonomy in order to perform the tasks assigned to it on the financial markets is not incompatible with its inclusion in the Community structure so that it may contribute towards the attainment of the Community's objectives.

Source: Reports of Cases before the Court. 1988. [s.l.].

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Judgment of the Court of 3 March 1988
Commission of the European Communities v Board of Governors of the European Investment Bank

(Tax withheld from the salaries and pensions of staff of the European Investment Bank)

Case 85/86

[…]

Summary of the Judgmenty

Privileges and immunities of the European Communities — Officials and other servants of the Communities — Community tax on salaries paid by the European Investment Bank — Levied for the benefit of the Communities

(EEC Treaty, Art. 130; Protocol on the Privileges and Immunities of the European Communities, Arts 13 and 22; Council Regulation No 260/68)

In the interests of the Communities' independence and equal treatment of their officials and other servants Article 13 of the Protocol on the Privileges and Immunities of the European Communities is to replace national taxes by a Community tax which is applicable to the Communities' staff on the basis of uniform conditions. It does not follow from that provision, which is applicable to the staff of the European Investment Bank by virtue of Article 22 of the Protocol, that the proceeds of the Community tax should be allotted to the bodies in which the staff concerned are employed.

Since the rights and privileges arising out of the Protocol were conferred on the European Investment Bank only in its capacity as a body which, according to Article 130 of the Treaty, acts in the interest of the Communities, Articles 13 and 22 of the Protocol must be interpreted as meaning that the tax on salaries paid by that body is levied for the benefit of the Communities in accordance with the conditions and procedure laid down by the Council in Regulation No 260/68. The Bank's operational and institutional autonomy does not mean that it is totally separated from the Communities and exempt from every rule of Community law, since it is clear in particular from Article 130 of the Treaty that the Bank is intended to contribute towards the attainment of the Community's objectives and forms part of the framework of the Community.

Report for the hearing delivered in Case 85/86 *

I — Summary of the facts

1. Under the first paragraph of Article 28 of the Treaty establishing a Single Council and a Single Commission of the European Communities (hereinafter referred to as 'the Merger Treaty'), 'the European Communities shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of their tasks', under the conditions laid down in the Protocol on the Privileges and Immunities of the European Communities (hereinafter referred to as 'the Protocol'), which is annexed thereto. The paragraph adds that: 'The same shall apply to the European Investment Bank'.

Article 13 of the Protocol is worded as follows:

'Officials and other servants of the Communities shall be liable to a tax for the benefit of the Communities on salaries, wages and emoluments paid to them by the Communities, in accordance with the conditions and procedure laid down by the Council, acting on a proposal from the Commission.

They shall be exempt from national taxes on salaries, wages and emoluments paid by the Communities.'

The first paragraph of Article 22 provides as follows:

'This Protocol shall also apply to the European Investment Bank, to the members of its organs, to its staff and to the representatives of the Member States taking part in its activities, without prejudice to the provisions of the Protocol on the Statute of the Bank'.

Pursuant to Article 13 of the Protocol, the Council adopted Regulation No 260/68/EEC of 29 February 1968 laying down the conditions and procedure for applying the tax for the benefit of the European Communities (Official Journal, English Special Edition 1968 (I), p. 37). Articles 1 to 10 thereof establish the rules governing the tax on salaries, wages and emoluments paid by the Communities to their officials.

According to Article 8 thereof,

'Tax shall be collected by means of deduction at source.'

Article 9 provides that:

'The tax proceeds shall be entered as revenue in the budgets of the Communities.'

By virtue of Article 12 thereof, Regulation No 260/68

'… shall apply to members of the organs of the European Investment Bank, and to members of its staff and recipients of the pensions it pays, who are included in the categories determined by the Council in application of the first paragraph of Article 16 of the Protocol on the Privileges and Immunities, with regard to salaries, wages and emoluments and to disability, retirement and survivors' pensions paid by the Bank.'

The provisions cited above replace Articles 12 and 21 of the Protocol on the Privileges and Immunities of the European Economic Community of 17 April 1957, envisaged by Article 218 of the EEC Treaty, and also Articles 8, 9 and 12 of Council Regulation No 32/61(EEC)/12/61(EAEC) of 18 December 1961 laying down the conditions and procedure for applying the tax for the benefit of the Community pursuant to the first paragraph of Article 12 of the Protocols on the Privileges and Immunities of the European Economic Community and of the European Atomic Energy Community (Journal Officiel 45 of 14 June 1962, p. 1461), the content of which was identical.

During the drafting of Regulation No 32/61(EEC)/12/61(EAEC), the, European Investment Bank (hereinafter referred to as 'the Bank'), in the person of the President of its Management Committee, asserted that its Board of Governors was empowered to lay down the conditions and procedure for applying the tax to the Bank's staff. However, the Council of the Communities disagreed with that contention, taking the view that the power to adopt legislative measures should be exercised exclusively by Community institutions holding such a power and that the Bank, in spite of its legal personality, was not separate from the Community and could not be dissociated from it. An entry in the minutes of a meeting of the Permanent Representatives' Committee held on 9 and 10 February 1961 records that the President of the Management Committee of the Bank, at a meeting on 8 February 1961 with the President of the Permanent Representatives' Committee, had finally agreed that the regulation should apply to the staff of the Bank and that the tax proceeds should be entered in the revenue of the Community; however, he wished special provision to be made to guarantee the Bank's staff pension scheme.

2. By virtue of the provisions quoted above, the Bank has, since 1962, withheld the aforesaid tax from the salaries, wages, pensions and emoluments which it pays to its staff. Every year it has shown the sums deducted amongst the liabilities on its balance sheet, under the heading 'Miscellaneous', where by 31 December 1984 they were shown as totalling ECU 34 million.

The sums deducted have never been entered as revenue in the Communities' budgets, nor have they been paid over by the Bank. Proposals made by the Commission since 1982 during the preparation of the preliminary draft budgets of the Communities seeking to create a new chapter, Chapter 49 (Article 490), to account for the proceeds of the tax withheld from the salaries of Bank staff were not approved by the Council of the European Communities in the course of the adoption of successive Community budgets.

Between 1981 and 1985 the Commission approached the Bank's Board of Governors on a number of occasions in order to secure payment of the sums withheld into the general budget of the Communities. Those approaches came to nothing.

3. On 30 December 1985 the Bank's Board of Governors adopted a decision whereby:

'1. The proceeds of the tax withheld by the Bank from the salaries, wages, pensions and emoluments of any kind paid by the Bank between 1962 and the end of 1985, entered on the liabilities side of the EIB's balance sheet under "Miscellaneous", shall be transferred to the reserves.

2. As from [the] 1986 financial year, amounts withheld by the Bank from salaries, wages, pensions and emoluments of any kind paid by the Bank shall be accounted for each month as Bank income under the heading "Financial and other income", and entered as such on the profit and loss account.'

The above decision was communicated to the Commission by a letter of the President of the Board of Governors (received by the Commission on 24 January 1986) in which the President informed the Commission that the Board of Governors did not subscribe to the legal, economic and political arguments put forward by the Commission, most recently in a letter of 21 November 1985, according to which the proceeds of the tax should be paid by the Bank into the general budget of the Communities.

II — Written procedure and conclusions

1. By an application lodged at the Court Registry on 21 March 1986 the Commission brought the present action under Article 180 (b) of the EEC Treaty, claiming that the Court should:

Declare void the decision of the Board of Governors of the European Investment Bank of 30 December 1985 on the 'Disposal of the proceeds of the income tax withheld by the Bank from salaries and pensions paid to its staff' on the ground that the amounts withheld as income tax since 1962 should be paid over to the Communities;

Order the European Investment Bank to pay the costs.

2. Because the application cited the defendant as 'the European Investment Bank', the latter raised an objection of inadmissibility under Article 91 of the Rules of Procedure, on the ground that the application did not comply with an essential condition laid down in Article 38 (1) thereof, namely that it should state the name of the party against whom the action is brought. By an order of 3 July 1986 the Court dismissed the objection of inadmissibility; it held that, whilst it was correct that the action under Article 180 (b) of the EEC Treaty had to be brought against the Bank's Board of Governors and not against the Bank itself, the wording of the application in fact indicated clearly that such was the case.

3. In its defence the Bank's Board of Governors claims that the Court should

Declare the application inadmissible or at least unfounded;

Order the applicant to pay the costs.

4. In the course of the written procedure the parties exchanged statements of reply and rejoinder.

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

III — Submissions and arguments of the parties presented during the written procedure

The submission put forward by the Commission in support of its action is in two parts: It argues firstly that the disputed decision infringes Article 13 of the Protocol inasmuch as it determines the allocation of a tax introduced for the benefit of the Communities, and provides that it shall be allocated exclusively for the benefit of the Bank. The first paragraph of Article 22 of the Protocol extends the scope of the Protocol to the Bank and its staff, as is stated in the sole recital of the preamble thereto. In accordance with the first

paragraph of Article 13, which is thus made applicable to Bank staff, the tax withheld is intended to accrue to the Communities, and the Bank is not entitled to enter it in its profit and loss account. The Commission argues secondly that the contested decision infringes Article 9 of Regulation No 260/68 by determining the allocation of a tax which is required to be entered as revenue in the budgets of the Communities and by assigning it entirely to the benefit of the Bank.

In its defence the Bank's Board of Governors puts forward a different interpretation of Article 13 of the Protocol with respect to the Bank; it contends that the privileges and immunities set out in the Protocol are conferred on the Bank and its staff by the first paragraph of Article 22 on the same footing as they are granted to the Communities, with the result that the tax is created for the benefit of each of the legal entities involved, namely the Communities and the Bank. As far as Regulation No 260/68 is concerned, it contains no obligation on the Bank's part to pay the tax proceeds to the Communities, but confines itself to requiring the Bank to collect the tax from the persons in question. Furthermore, the Council of the Communities is not empowered to adopt detailed rules for applying the tax levied by the Bank under Article 13 of the Protocol.

1. Preliminary observations

The *Commission* takes the view that the question of the taxation of staff salaries presents itself in similar terms both for the Bank and for those bodies which were created by a Community measure but have separate legal personality, such as the European Centre for the Development of Vocational Training (created by Regulation No 337/75 of 10 February 1975, Official Journal L 39, p. 1) or the European Foundation for the Improvement of Living and Working Conditions (created by Regulation No 1365/75 of 26 May 1975, Official Journal L 139, p. 1). The Protocol was made applicable to those bodies by the measures creating them, and their staff rules (Regulations Nos 1859 and 1860/76 of 29 June 1976, Official Journal L 214, pp. 1 and 24 respectively) provide that the proceeds of the tax deducted by them at source should be entered as revenue in the budgets of the Communities. The tax is, indeed, paid over by those bodies for the benefit of the Communities. Those parallel cases are relevant to an appraisal of the Bank's situation, because the entities in question likewise have a separate legal personality whose creation originates either in the Treaty or in a measure adopted thereunder, enjoy the benefits of the Protocol and apply by analogy the regulations laying down the conditions and procedure for applying the Community tax.

The *Bank's Board of Governors* considers that no parallels may be drawn between the Bank on the one hand and the abovementioned Centre and Foundation on the other, because the Bank originates under the EEC Treaty whereas those bodies came into being under regulations adopted pursuant to the Treaty. In support of its contention, the Board of Governors sets out details of the administrative and financial organization of those bodies, which, it claims, demonstrate that, unlike the Bank, they enjoy only a limited autonomy *vis-à-vis* the Communities. Whilst belonging to the Community 'family', the Bank is neither an 'institution' of the Communities nor a department created by the secondary legislation of a Community institution.

The Bank derives its legal basis direct from the EEC Treaty, which vests it with legal personality on the same footing as the Communities, and it is not subordinate to the Communities. In terms of legal status the Bank is an international organization made up of Member States which enjoys complete autonomy *vis-à-vis* the Communities by virtue of its composition, its procedure for appointing its organs and its decision-making powers, and also on account of its separate financial resources which are quite independent of the Community budget. The Bank could not perform its functions to the full unless its autonomy *vis-à-vis* the Communities and their institutions was safeguarded. The legal status of the Bank is closer to that of the European Patent Office, the European University Institute in Florence, the European Laboratory for Molecular Biology and the European Centre for Medium-Range Weather Forecasts, and to other international European organizations — whether specialized or general — which levy a tax for their own benefit on staff salaries pursuant to their internal regulations. The fundamental difference between the Bank and bodies created by a measure of secondary Community law adopted by the Council is expressly acknowledged in the context of budgetary matters by Article 206a of the EEC Treaty, under which the Court of Auditors is empowered to examine the accounts of all revenue and expenditure of the bodies set up by the Community, whereas the Bank is not subject to such examination by the Court.

The Board of Governors further maintains that its views are borne out by Article 20 of the Merger Treaty of 8 April 1965, which introduced a single budget for the Communities. Had the draftsmen of that Treaty intended to appropriate to the Community budget the revenue yielded by a tax levied on the salaries of employees who do not belong to the Community, they would have inserted a specific provision to that effect.

The *Commission* is of the opinion that the reference to Article 20 of the Merger Treaty is not relevant. The sole purpose of Article 20 was to merge budgets and budgetary procedures. It neither changed the relevant provisions of the Protocol nor limited the revenue accruing to the Communities, any more than the subsequent creation of other legal entities such as the aforesaid Centre and Foundation brought about any change to that article.

2. Admissibility

According to the Bank's Board of Governors, the application is inadmissible because it is directed against an act which does not adversely affect the Commission and has no legal effects as far as third parties are concerned.

The contested decision is an accountancy measure of a strictly internal nature, attributable to a remark of the Bank's Audit Committee. The decision has no effect on the content or scope of the Protocol, nor does it have the aim or effect of obstructing payment of the proceeds of the tax levied by the Bank. It does no more than alter the treatment of the tax proceeds in the Bank's accounts and draw the inferences of the Council's refusal to enter in the budget the proceeds of the tax collected by the Bank.

Unless the tax proceeds are entered in the budget the Commission cannot, in any event, seek recovery of an item of revenue neither envisaged nor authorized in the budget (see Articles 1 (1) and 4 of the Financial Regulation of 21 December 1977 applicable to the General Budget of the European Communities, Official Journal L 356, p. 1). The prior insertion of a revenue entry in the budget is an essential prerequisite for any payment under the budgetary law of the Communities. Article 400 of the 1986 Budget, entitled 'Proceeds of the tax on the salaries, wages and allowances of members of the institutions, officials, other servants and persons in receipt of a pension', does not cover the tax collected by the Bank because the Bank is not an institution and is not listed under 'Remarks'. The Commission's attempt to insert a specific article for the tax collected by the Bank was unsuccessful because the Council of the European Communities took the view that the revenue and the administrative expenditure of the Bank do not fall within the budget of the Communities. The absence in the budget of the Communities of any measure authorizing payment into the budget of the tax proceeds may be relied upon by the Bank as a third party in relation to the Communities.

According to the Board of Governors, the application is inadmissible for the further reason that it is really aimed at a decision of the Council of the European Communities, namely the decision not to enter the tax as revenue in the budget. The Council is the institution against which the Commission should have brought its action, pursuant to Article 173 of the EEC Treaty, instead of proceeding against the Board of Governors of the Bank, which did no more than draw the appropriate inferences from the Council decision. As a third party the Bank cannot be made liable in law for any infringement by the Council of the Protocol during the drafting of the budget.

The *Commission* replies that neither Article 180 nor Article 173 of the EEC Treaty requires, as a condition of admissibility, that there should be an act adversely affecting the applicant. It is in any event clear that there is such an act, since the effect of the contested decision of the Board of Governors is that the revenue is not paid over for the benefit of the Communities but is permanently assigned to the Bank by its authorized body.

Moreover, whatever the attitude of the budgetary authorities may have been, it is not certain that Article 400 of the 1986 Budget ('Proceeds of the tax on the salaries, wages and allowances of members of the

institutions, officials, other servants and persons in receipt of a pension'), being expressed in such general terms, could not be construed as covering the tax levied by the Bank in the same way as it is shown under 'Remarks' to include the tax levied on the staff of the European Centre for the Development of Vocational Training and the European Foundation for the Improvement of Living and Working Conditions, which are not classified as institutions. The attempts to insert a specific article into the budget simply reflect the Commission's wish to make the budgetary authority aware of the problem, although the latter preferred to await the outcome of the present proceedings.

In dealings between the Commission and third parties a budget entry is not a precondition for the implementation of a measure determining the extent of those third parties' rights and obligations; that contention was indirectly confirmed by the Court's judgment of 17 May 1972 (Case 93/71 *Leonesio* v *Italian Ministry of Agriculture* [1972] ECR 287). It is not the business of third parties to inquire into whether budgetary provision has been made for actions of the Commission. To allow a third party to put forward arguments based on the budgetary position would be tantamount to making the applicability of measures adopted by the Community legislature conditional on action by the budgetary authority, and is therefore contrary to the principle of legal certainty.

Lastly, it is contrary to the principle of 'dual implementation' (that is to say, budgetary on the one hand and legislative or administrative on the other), which governs the budgetary law of the Community, to argue that, at an interinstitutional level, the Commission's right to submit a budgetary measure for review by the Court deprives it of any remedies against the implementation, or non-implementation, of the basic measure. The budgetary authority is, indeed, bound by basic measures and, as far as revenue is concerned, the function of the budget is merely to provide a forecast.

3. Substantive issues

In support of its position the Commission bases itself on the wording of the Protocol. To alter by analogy the recipient of the tax as provided for by Article 13 by means of an arbitrary substitution of 'Bank' for 'Communities' would be to exceed the limits of the extension *ratione personae* of Article 13 envisaged by Article 22. In view of the pains which the draftsmen of the Treaties and of the Protocol took in order to distinguish the Communities and the Bank as separate legal persons in Article 129 of the EEC Treaty and Article 28 of the Merger Treaty, such a substitution would be hard to understand. The fact that the Court has held Bank staff, to be 'employees of the Communities' (judgment of 15 June 1976, Case 110/75 *Mills* v *EIB* [1976] ECR 955) shows that such a substitution of terms was not necessary.

With regard to the general scheme of Article 13 of the Protocol, it is hard to imagine that the legislature would have introduced a tax in favour of the Bank whilst leaving the conditions and procedure relating thereto to be decided upon by the Council, acting on a proposal from the Commission.

The view put forward by the Bank, namely that, as part of a broader interpretation of Article 13, the administrative organs of the Bank should be treated as a legislative body entitled to adopt tax provisions for the Bank pursuant to Article 13, was expressly rejected during the drafting of Regulation No 32 of 18 December 1961 and is at odds with the view taken on that occasion by the President of its Management Committee. The Bank thereafter applied Regulation No 260/68. Regulation No 260/68 and Article 13 of the Protocol must be construed together. It is then clear that the Community tax imposed on Community officials and other servants applies equally to the staff of the Bank and that the recipient of the tax is the same.

As far as the nature and scope of Article 13 of the Protocol are concerned, it provides for the transfer of fiscal sovereignty from Member States to the Communities. The Bank's political, legal and financial structure is not such as to support the inference that Member States intended to transfer to it part of their fiscal prerogatives. If, on the other hand, the question is viewed in terms of internal taxation, it is necessary to determine the framework within which the principle of internal taxation is required to operate. Thus the proceeds of the tax collected by the Community institutions are not treated as revenue belonging to each

institution but are governed by the general principle that revenue should not be allocated for a specific purpose (second paragraph of Article 3 (1) of the Financial Regulation) and are used generally to cover all expenditure approved by the budgetary authority. The example of other international organizations is not relevant, since they undoubtedly have the power to make their own decisions concerning the imposition and application of such taxes and do not belong to the Community 'family'.

The provisions governing the existence and operation of the Bank cannot be reconciled with any interpretation of Article 13 which awards the benefit of the tax to the Bank. The funds and resources made available to the Bank are set out in the Protocol on its statute, annexed to the EEC Treaty, and no provision therein refers to the proceeds of the tax or deals with how the Bank is to make use of those sums. Moreover, the Bank's financial and commercial independence in no way necessitates its being allocated the proceeds of the tax. The cumulative amount of the tax proceeds collected by the Bank is absolutely negligible by comparison with its balance sheet total (ECU 35 million as compared with approximately ECU 25 000 million). Interested third parties are, furthermore, quite aware that many of the Bank's operations are guaranteed by the Community budget.

Regulation No 260/68 fully bears out the contention that the proceeds of the tax deducted by the Bank are designed to benefit the Communities. Article 9 of the regulation specifies how the tax is to be allocated, namely by being 'entered as revenue in the budgets of the Communities'. Article 12 makes the regulation applicable to the staff of the Bank, thereby extending its ambit *ratione personae*, but is not concerned with the allocation of the tax and certainly does not authorize the Bank to adopt its own fiscal provisions. In that context the Commission points out that the Bank does not have a budget as referred to in Article 9 of the regulation, that is to say a measure authorizing future income and expenditure, but rather has a balance sheet, which is an accounting document reflecting the Bank's financial situation at the time of its adoption. It is hard to imagine that something as essential as the allocation of the tax would not have induced the legislature to express itself with greater precision when drafting Regulation No 260/68, and to word those articles quite differently had it wished to assign the proceeds of the tax to the Bank.

The Bank's Board of Governors bases its contentions in the first place on an exegetical interpretation of Article 13 of the Protocol. Article 129 of the EEC Treaty draws a clear distinction between the Community and the Bank. The preamble to the Protocol and Article 22 thereof, together with the second paragraph of Article 28 of the Merger Treaty, the repealed provisions of the Protocol on the Privileges and Immunities of the European Economic Community and Article 28 of the Protocol on the Statute of the Bank, expressly granted privileges and immunities, on the same footing as those conferred on the Communities, direct to the Bank itself and not only to its staff. Article 22 of the Protocol is therefore quite different in its scope from Articles 20 and 21 thereof (which extend the application of the articles cited therein to certain persons) inasmuch as it confers on the Bank the privilege of arranging its internal taxation. If the first paragraph of Article 13 is construed *mutatis mutandis*, the tax must be regarded as a privilege vested in the Bank, just as it is vested in the Communities. To construe Article 13 in any other way would lead to distortions and inconsistencies in the provisions.

Those contentions are, moreover, borne out by a teleological interpretation of Article 13. The tax on staff salaries is not an expression of royal prerogative or fiscal sovereignty, designed to create resources for the Community budget; like other systems of internal taxation instituted by international organizations, its purpose is to put all the officials of the Communities and of the Bank in an identical tax position within their respective organizations.

To award the Communities the benefit of the tax levied by the Bank would also disturb the institutional balance and the functioning of the Bank. The result would be that the Bank would be the only organization created by the Treaties which could not use the proceeds of the levy in order to cover its administrative expenses or operating costs, and would suffer discrimination by comparison with the Communities. There is nothing in the wording or *travaux preparatoires* of the Protocol to support the contention that the aim of the Protocol was to 'tax' the Bank for the benefit of the Communities and thereby increase its operating costs and the burden borne by Member States in making the necessary funds available to the Bank. Since the rights of Member States over the Bank's assets, ascertained in accordance with the subscription ratio

governing its capital, differ from the pecuniary rights and obligations of the Member States *vis-à-vis* the Communities, it is only by allocating to the Bank the proceeds of the tax that the ratio is safeguarded. The Member States have exclusive rights over the Bank's capital, and any transfer of the tax proceeds to the Communities would therefore affect those rights.

Lastly, any transfer to the Communities of the tax proceeds might encroach on the autonomy of the Bank, which is essential for the proper performance of the task of developing the common market assigned to it by Article 130 of the EEC Treaty. For its operations on the capital markets, where it enjoys a first-class credit rating and the most favourable terms granted only to the leading banking institutions, the Bank has to have complete autonomy. Any risk of confusion between the Bank and the Communities, which also resort to the capital market, might weaken the Bank's borrowing powers, since its independence and freedom from subordination to the Communities in tax matters are considered an essential criterion on the capital market. Any confusion between the Bank and the Communities due to fiscal subordination would also adversely affect the Bank's role as a lending institution, because its participation in the financing of a project proves that the project in question is worthwhile and encourages the intervention of other lenders. This catalytic effect is attributable to the principle that the Bank's intervention is dictated by strictly objective considerations and not by the considerations of political expediency which are more likely to influence the Communities. At a legal level, the Bank's autonomy is emphasized by the fact that Article 14 of its Statute makes its operations subject to verification by the Audit Committee, and that Article 206a of the EEC Treaty does not authorize the Court of Auditors to exercise its powers in relation to the Bank.

Regulation No 260/68 was adopted solely for the purpose of giving effect to the first phrase of the first paragraph of Article 13 of the Protocol. The Protocol does not empower the Council of the Communities to decide whether the proceeds of the tax are to be allocated to the Communities or the Bank but only to lay down the detailed rules for applying that tax. As regards the powers of the Council of the Communities to adopt the detailed rules for applying the tax in so far as it applies to staff of the Bank under Article 22 of the Protocol, those powers were accepted only with great misgivings. During the drafting of Regulation No 32/61(EEC) the Bank consistently maintained that the authority to prescribe the conditions and procedure for applying the tax to its staff lay with its Board of Governors, even if it was appropriate to adopt the same rules as those enacted by the Council. That essentially organic and formal issue was, however, left in abeyance on account of the urgent need to adopt the regulation. Thus the Bank applied the conditions and procedure for applying the tax envisaged by Regulation No 32/61(EEC), especially as that regulation could not have any bearing on how the tax was allocated.

Article 12 of Regulation No 260/68 does not extend the scope of the regulation to the Bank itself but only to its staff. The obligation imposed on the Community institutions by Article 9 of Regulation No 260/68, namely to pay the tax proceeds into the budget of the Communities, does not therefore apply to the Bank.

IV — Oral procedure

At the hearing on 18 June 1987 the defendant gave its views on the documents relating to the discussions held prior to the adoption of Regulation No 32/61 (EEC)/12/61(EAEC) of 18 December 1961 which the Commission provided following the submission of the rejoinder and which were included among the documents before the Court on the authority of the President of the Court.

The defendant argued that at the time the Council had not taken a stand on the question raised in the documents. It drew attention to the unilateral nature of the documents, which had been drawn up by the General Secretariat of the Council and which, moreover, referred merely to informal meetings between the President of the Permanent Representatives Committee and the President of the Bank. Furthermore, the latter had no authority to commit the Bank with regard to a matter which was likely to affect, not only the Bank, but also the Member States. Besides, except by using the procedure provided for in Article 236 of the EEC Treaty neither the Board of Governors of the Bank nor the Council of the European Communities could amend the Protocol, of which only the interpretation was at issue in this case. The defendant therefore suggested that the documents ought not to be taken into account on the ground that they lacked probative value and relevance.

U. Everling
Judge-Rapporteur

[…]

Judgment of the Court
3 March 1988 *

In Case 85/86

Commission of the European Communities, represented by Bernard Paulin, Principal Adviser, and Hendrik van Lier, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, also a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

Board of Governors of the European Investment Bank, represented by Jörg Käser, Manager of the Legal Directorate of the Bank, acting as Agent, assisted by Michel Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Secretariat of the Board of Governors of the Bank, 100 boulevard Konrad-Adenauer,

defendant,

APPLICATION for a declaration that the decision of the Board of Governors of the European Investment Bank of 30 December 1985 on the disposal of the proceeds of the income tax withheld by the Bank from salaries and pensions paid to its staff is void,

THE COURT,

composed of: G. Bosco, President of Chamber, acting as President of the Court, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. Kakouris, R. Joliet, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: G. F. Mancini

Registrar: D. Louterman, Administrator

having regard to the Report for the Hearing and further to the hearing on 18 June 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 24 November 1987,

gives the following

Judgment

1 By an application lodged at the Court Registry on 21 March 1986, the Commission of the European Communities brought an action under Article 180 (b) and Article 173 of the EEC Treaty for a declaration that the decision of the Board of Governors of the European Investment Bank (hereinafter referred to as 'the Board of Governors') of 30 December 1985 on the disposal of the proceeds of the income tax withheld by the Bank from salaries and pensions paid to its staff is void.

2 The proceedings arise from a disagreement between the parties concerning the application of the provisions of the Protocol on the Privileges and Immunities of the European Communities of 8 April 1965 (Journal Officiel 1967, 152, p. 13) ('the Protocol') as regards the tax on the remuneration of staff of the Communities and the application of that tax to staff of the European Investment Bank ('the Bank').

3 The first paragraph of Article 13 of the Protocol provides as follows:

'Officials and other servants of the Communities shall be liable to a tax for the benefit of the Communities on salaries, wages and emoluments paid to them by the Communities, in accordance with the conditions and procedure laid down by the Council, acting on a proposal from the Commission'.

Article 22 provides that:

'This Protocol shall also apply to the European Investment Bank, to the members of its organs, to its staff and to the representatives of the Member States taking part in its activities, without prejudice to the provisions of the Protocol on the Statute of the Bank'.

4 Pursuant to Article 13 of the Protocol, the Council of the European Communities adopted Regulation No 260/68 of 29 February 1968 laying down the conditions and procedure for applying the tax for the benefit of the European Communities (Official Journal, English Special Edition 1968 (I), p. 37). Article 9 of that regulation provides that the proceeds of the tax are to be entered as revenue in the budgets of the Communities. According to Article 12, the regulation is to apply to members of the organs of the Bank, and to members of its staff and recipients of the pensions it pays, with regard to salaries, wages, emoluments and pensions.

5 The aforementioned provisions replace the corresponding articles of the Protocol of 17 April 1957 on the Privileges and Immunities of the European Economic Community and of Council Regulation No 32/61/EEC and 12/61/EAEC of 18 December 1961 (Journal Officiel 1962, p. 1461), the content of which was identical.

6 Since 1962 the Bank has withheld the aforesaid tax from the salaries, wages, pensions and emoluments which it pays to its staff and each year has entered the sums deducted on the liabilities side of its balance sheet under the heading 'Miscellaneous'.

7 Since the 1960s the Commission had repeatedly made it clear in contacts with representatives of the Bank that it intended to assert the Communities' rights. Between 1981 and 1985 it made various approaches to the Board of Governors with a view to securing payment of the sums withheld into the general budget of the Communities. Its approaches were unsuccessful.

8 On 30 December 1985 the Board of Governors adopted the contested decision providing that the proceeds of the tax withheld by the Bank up until the end of 1985 and entered on the liabilities side of its balance sheet were to be transferred to the reserves. The decision further provided that as from the 1986 financial year amounts withheld by the Bank from salaries, wages, pensions and emoluments paid by the Bank were to be accounted for as Bank income and entered as such on the profit and loss account.

9 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility

10 Since the Commission's action was brought against the Bank and not against the Bank's Board of Governors as provided for in Article 180 (b) of the Treaty, the Bank raised an objection of inadmissibility under Article 91 of the Rules of Procedure on the ground that the application did not comply with the conditions of Article 38 of those rules in so far as it did not name the right defendant.

11 By order of 3 July 1986 the Court rejected that objection of inadmissibility on the ground that it was clear from the actual wording of the application that it was directed against the Board of Governors as the relevant organ of the Bank.

12 The Board of Governors further argues that the application is inadmissible on the ground that the Commission has no interest in bringing the action since it is directed against an act which does not adversely affect the Commission and which has no legal effects as far as third parties are concerned.

13 In that regard it is sufficient to observe that the contested decision of the Board of Governors definitively to transfer to the Bank's reserves the tax proceeds withheld up until the end of 1985 might affect the Commission's rights since it constitutes an implied rejection of its request that those amounts be paid into the Communities' budget, which the Commission is responsible for administering.

14 Lastly, the Board of Governors argues that the Commission cannot claim to recover the proceeds of the tax in question without those proceeds first having been entered in the Community budget.

15 In reply to that objection it must be stated that the Communities' right to the amounts in question cannot depend on whether they are entered in the Communities' budget, since that right cannot be affected by such a formality.

16 Consequently, the application is admissible.

Substance

17 In support of its application the Commission argues in the first place that by providing for the transfer to the Bank's reserves of the proceeds of the tax levied on the remuneration of its staff for the benefit of the Communities, the contested decision infringes Article 13 of the Protocol and Articles 9 and 12 of Regulation No 260/68. In its view, Article 22 of the Protocol extends the class of persons covered by the Protocol so as to include the Bank and its staff but without changing the intended purpose of the tax.

18 The Board of Governors contends that under the first paragraph of Article 22 of the Protocol the privileges and immunities set out in the Protocol are granted to the Bank and its staff and to the Communities alike. Without adopting a definitive position on the question whether the Board of Governors was itself empowered to determine the conditions for collecting the tax in question, the Board of Governors considers that the tax should be collected for the benefit of the Bank in any event. In its view, Regulation No 260/68 must be interpreted to that effect.

19 In order to assess the merits of the application it must be observed in the first place that the conditions and procedure for applying the tax for the benefit of the European Communities are laid down in Council Regulation No 260/68, which is based on the Protocol and in particular on Article 13 thereof. According to its preamble, the regulation is intended to subject to the Community tax not only officials and other servants of the Communities but also persons to whom Article 13 of the Protocol is also applicable, those persons including, *inter alios*, the staff of the Bank.

20 As far as wages and salaries paid by the Communities to their officials and other servants are concerned, Article 9 of the regulation provides that the tax proceeds are to be entered as revenue in the budget of the Communities, which, under Article 20 of the Treaty establishing a Single Council and a Single Commission of the European Communities, took the place of the budgets of the individual Communities. Article 12 of the regulation provides that the regulation is to apply to members of the organs of the Bank and to members of its staff and recipients of the pensions it pays 'with regard to salaries, wages and emoluments and to disability, retirement and survivors' pensions paid by the Bank'. Consequently, the regulation unequivocally appropriates to the Communities' budget the proceeds of the tax withheld by the Bank from the wages and salaries paid to its staff.

21 The defence submitted by the Board of Governors raises the question whether the Council was empowered under the Protocol to determine the conditions and procedure for taxing the wages and salaries paid by the Bank and to allot to the Commmunities' budget the sums so withheld.

22 In order to answer that question it is necessary to consider the scope of Article 13 of the Protocol and the effect of its application to the Bank having regard to Article 22 of the Protocol.

23 The second paragraph of Article 13 of the Protocol provides that salaries, wages and emoluments (hereinafter abbreviated to 'salaries') paid by the Communities are to be exempt from national taxes. However, the first paragraph of Article 13 subjects those salaries to a tax for the benefit of the Communities, in accordance with the conditions and procedure which are to be laid down by the Council, acting on a proposal from the Commission. It follows from the relationship between those two paragraphs that in the interests of the Communities' independence and equal treatment of their staff Article 13 is to replace national taxes by a Community tax which is applicable to the Communities' staff on the basis of uniform conditions.

24 Those considerations are equally valid as regards the application of Article 13 of the Protocol to the staff of the Bank pursuant to Article 22 of the Protocol. In its judgment of 15 June 1976 in Case 110/75 (*Mills* v *European Investment Bank* [1976] ECR 955) the Court held that the Bank was a Community body established and endowed with legal personality by the Treaty. Consequently, the Bank's staff had to be exempted from national taxes just like the Community's staff and be subjected to a Community tax. Since the Protocol contains no provisions to the contrary, the result of the application of Article 13 to the staff of the Bank must be that the Council has the power to extend the scope of the conditions and the procedure adopted pursuant to that article so as to cover the staff of the Bank.

25 As regards the intended purpose of the tax to which staff of the Communities are subject, Article 13 of the Protocol provides that the tax is to be collected 'for the benefit of the Communities'. Article 22 of the Protocol is silent as to the purpose to which the tax withheld from staff of the Bank is to be put but merely provides that Article 13 is to apply, in particular, to the Bank.

26 It should be observed in this context that it does not follow from the aim of Article 13 of the Protocol, which is that the national taxes which would normally be applicable to the salaries of staff of the Communities should be replaced by a uniform tax, that the proceeds of that tax should be allotted to the bodies in which the staff concerned are employed. Since the rights and privileges arising out of the Protocol were conferred on the Bank only in its capacity as a body which, according to Article 130 of the Treaty, acts in the interest of the Communities, Articles 13 and 22 of the Protocol must be interpreted as meaning that the tax on salaries paid by the Bank is also levied for the benefit of the Communities.

27 The Bank opposes that interpretation, arguing that it is neither an institution nor a department of the Communities; rather, it enjoys autonomy *vis-à-vis* the Communities by virtue of its legal status, its composition and its institutional structure, as well as by virtue of the nature and origin of its resources, which are absolutely independent of the Communities' budget.

28 It is true that under Article 129 of the Treaty the Bank has legal personality distinct from that of the Community and that it is administered and managed by organs of its own in accordance with its statute. In order to perform the tasks assigned to it by Article 130 of the Treaty the Bank must be able to act in complete independence on the financial markets, like any other bank. Indeed, the Bank is not financed out of the budget but from its own resources, which consist in particular of the capital subscribed by the Member States and funds borrowed on the financial markets. Lastly, the Bank draws up annual accounts and a profit and loss account which are audited annually by a committee appointed by the Board of Governors.

29 Nevertheless, the fact that the Bank has that degree of operational and institutional autonomy does not mean that it is totally separated from the Communities and exempt from every rule of Community law. It is clear in particular from Article 130 of the Treaty that the Bank is intended to contribute towards the attainment of the Community's objectives and thus by virtue of the Treaty forms part of the framework of

the Community.

30 The position of the Bank is therefore ambivalent inasmuch as it is characterized on the one hand by independence in the management of its affairs, in particular in the sphere of financial operations, and on the other by a close link with the Community as regards its objectives. It is entirely compatible with the ambivalent nature of the Bank that the provisions generally applicable to the taxation of staff at the Community level should also apply to the staff of the Bank. This is true in particular of the rule that the tax in question is collected for the benefit of the Communities' budget. Contrary to the contentions of the Board of Governors, the fact that the tax is allotted to that purpose is not liable to undermine the operational autonomy and reputation of the Bank as an independent institution on the financial markets since it does not affect the capital or the actual management of the Bank.

31 The Board of Governors resists that conclusion by adducing a number of arguments based on the fact that the payment of the proceeds of the tax in question to the Communities' budget would diminish the Bank's assets, which are intended to cover its operating costs and in particular the salaries of its staff and which the Member States would be entitled to claim in the event of the winding-up of the Bank.

32 Those arguments cannot be accepted. The transfer of the proceeds of the tax to the Communities' budget affects only the sums withheld from salaries paid by the Bank to its staff and not the Bank's own resources or the capital amounts which would be payable to the Member States if the Bank's activities were suspended or it went into liquidation. Consequently, the collection by the Bank of tax on the gross salaries of its staff for the benefit of the Communities has a neutral effect on the Bank's financial position.

33 It follows from the foregoing that the Council had the power, under the combined provisions of Articles 13 and 22 of the Protocol, to determine in Regulation No 260/68 the conditions and procedure for levying the tax on the salaries of the staff of the Bank and to allot the proceeds of that tax to the Communities' budget. In those circumstances, it is unnecessary to consider the significance of the agreement which the President of the Bank is said to have given to the entry of the tax proceeds as revenue in the Communities' budget on which the Commission relies in support of its argument.

34 The decision of the Board of Governors of the European Investment Bank of 30 December 1985 on the disposal of the proceeds of the income tax withheld by the Bank from salaries and pensions paid to its staff must therefore be declared void.

Costs

35 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Board of Governors of the Bank has been unsuccessful in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1) Declares that the decision of the Board of Governors of the European Investment Bank of 30 December 1985 on the disposal of the proceeds of the income tax withheld by the Bank from salaries and pensions paid to its staff is void;

2) Orders the Board of Governors of the European Investment Bank to pay the costs.

Bosco
Moitinho de Almeida
Rodríguez Iglesias

Koopmans
Everling
Bahlmann
Galmot
Kakouris
Joliet
O’Higgins
Schockweiler

Delivered in open court in Luxembourg on 3 March 1988.

J.-G. Giraud
Registrar

A. J. Mackenzie Stuart
President

* Language of the Case: French.