

JUDGMENT OF THE COURT (Full Court)
18 January 2005*

In Case C-257/01,

APPLICATION for annulment under Article 230 EC, brought on 3 July 2001,

Commission of the European Communities, represented by D. Maidani and C. O'Reilly, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by:

Kingdom of the Netherlands, represented by H.G. Sevenster, acting as Agent,

intervener,

* Language of the case: English.

Council of the European Union, represented by E. Finnegan and I. Díez Parra,
acting as Agents,

defendant,

supported by:

Kingdom of Spain, represented by R. Silva de Lapuerta, acting as Agent, with an
address for service in Luxembourg,

intervener,

THE COURT (Full Court),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and
K. Lenaerts, Presidents of Chambers, C. Gulmann, J.-P. Puissochet, R. Schintgen
(Rapporteur), N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2004,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities is seeking annulment of Council Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications (OJ 2001 L 116, p. 2) and Council Regulation (EC) No 790/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance (OJ 2001 L 116, p. 5; together 'the contested regulations').

- 2 By orders of the President of the Court of Justice of 10 October and 8 November 2001, the Kingdom of Spain and the Kingdom of the Netherlands were granted leave to intervene, the former in support of the form of order sought by the Council of the European Union and the latter in support of that sought by the Commission.

Legal framework

Relevant provisions of the EC Treaty

3 Article 202 EC provides:

‘To ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty:

— ...

— ...

- confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.’

- 4 Article 62 EC, which is in Title IV of the Treaty, entitled ‘Visas, asylum, immigration and other policies related to free movement of persons’, provides:

‘The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

...

- (2) measures on the crossing of the external borders of the Member States which shall establish:

(a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders;

(b) rules on visas for intended stays of no more than three months, including:

(i) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;

(ii) the procedures and conditions for issuing visas by Member States;

(iii) a uniform format for visas;

(iv) rules on a uniform visa;

...'

5 Article 64(1) EC states:

'This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.'

6 Article 67(1) EC provides:

'During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.'

The Convention implementing the Schengen Agreement, the Common Manual and the Common Consular Instructions

7 Article 1 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty

establishing the European Community by the Treaty of Amsterdam ('the Protocol'), authorised 13 Member States to establish closer cooperation among themselves within the scope of the Schengen *acquis*, as set out in the annex to the Protocol.

- 8 The Schengen *acquis* thus defined includes inter alia the Agreement, signed in Schengen on 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 13; 'the Schengen Agreement') and the Convention implementing the Schengen Agreement (OJ 2000 L 239, p. 19; 'the CISA'), which was signed on 19 June 1990, including the decisions of the Executive Committee set up by the CISA.

- 9 Chapters 2 and 3 of Title II of the CISA set out the rules concerning the crossing of external borders and visas respectively.

- 10 The practical procedures for the application of those rules are laid down, as regards border checks, by the Common Manual ('the CM') and, as regards visa applications, by the Common Consular Instructions for the diplomatic missions and consular posts (OJ 2002 C 313, p. 1; 'the CCI'). The definitive versions of the CCI and the CM were adopted by the Executive Committee, under Article 132 of the CISA and also on the basis of Articles 3(1), 5(1), 6(3), 8, 12(3) and 17 of the CISA by decision of 28 April 1999 on the definitive versions of the Common Manual and the Common Consular Instructions (SCH/Com-ex (99) 13) (OJ 2000 L 239, p. 317; 'Decision 99/13').

- 11 The CM and the CCI contain both detailed normative provisions and practical instructions and are intended for officials who carry out checks at the external borders of the Contracting Parties and for the consular agents of those parties in the daily handling of visa applications.
- 12 As regards certain aspects of the CCI, reference should also be made to a number of decisions of the Executive Committee. Those are the decisions of 16 December 1998 (SCH/Com-ex (98) 56) (OJ 2000 L 239, p. 207; 'Decision 98/56') and of 28 April 1999 (SCH/Com-ex (99) 14) (OJ 2000 L 239, p. 298; 'Decision 99/14') concerning the compilation of a manual of documents to which a visa may be affixed. In addition, Executive Committee Decision SCH/Com-ex (94) 15 rev. of 21 November 1994 (OJ 2000 L 239, p. 165; 'Decision 94/15') introduced a computerised procedure for consulting the central authorities referred to in Article 17(2) of the CISA.
- 13 The first subparagraph of Article 2(1) of the Protocol provided that from the date of entry into force of the Treaty of Amsterdam the Schengen *acquis* was to apply immediately to the 13 Member States referred to in Article 1 of the Protocol. The same provision also laid down that the Council would replace the Executive Committee in the exercise of its functions.
- 14 Acting under the second sentence of the second subparagraph of Article 2(1) of the Protocol, the Council adopted on 20 May 1999 Decision 1999/436/EC determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* (OJ 1999 L 176, p. 17). It is clear from Article 2 of the decision, in conjunction with Annex A thereto, that Articles 62 EC and 63 EC form the new legal bases for Decision 99/13, whilst Article 62(2)(b)(ii) EC, Article 62 EC and Article 62(2)(b) EC form the new legal bases for Decisions 98/56, 99/14 and 94/15 respectively.

Decision 1999/468/EC

- 15 In the words of the first subparagraph of Article 1 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23; ‘the second comitology decision’):

‘Other than in specific and substantiated cases where the basic instrument reserves to the Council the right to exercise directly certain implementing powers itself, such powers shall be conferred on the Commission in accordance with the relevant provisions in the basic instrument. These provisions shall stipulate the essential elements of the powers thus conferred.’

The contested regulations

- 16 Following the adoption of Decision 1999/436, it was considered expedient to define in a Community act the procedures in accordance with which measures implementing and updating the CM and the CCI should be taken.
- 17 To that end, the Council enacted Regulations Nos 789/2001 and 790/2001 on the basis of Article 62(2) and (3) EC and Articles 62(2)(a) and (b) EC and 67(1) EC.
- 18 According to recitals 2 to 4 in the preamble to Regulation No 789/2001 and recital 2 in the preamble to Regulation No 790/2001, certain ‘detailed provisions and practical procedures’ relating to both the examination of visa applications and the

carrying-out of border checks and surveillance at the external borders, contained in the CCI and the CM respectively and the annexes thereto, must be 'regularly amended and updated in order to meet the operational requirements' of the relevant authorities.

- 19 For that purpose, the contested regulations establish two procedures. First, Article 1 of each of them provides that some of the provisions listed therein may be amended by the Council acting unanimously. Second, Article 2 of each of the regulations establishes a procedure by which the Member States are to communicate such amendments as they wish to make to certain provisions of, or parts of the annexes to, the CCI and the CM to the Secretary-General of the Council, who then communicates those amendments to the members of the Council and to the Commission.

Regulation No 789/2001

- 20 Recital 8 in the preamble to Regulation No 789/2001 states:

'Since the Member States have an enhanced role in respect of the development of visa policy, reflecting the sensitivity of this area, in particular involving political relations with third countries, the Council reserves the right, during the transitional period of five years referred to in Article 67(1) of the Treaty, to adopt, amend and update the detailed provisions and practical procedures referred to above by unanimity, pending a review by the Council of the conditions under which such implementing powers would be conferred on the Commission after the end of that transitional period.'

21 Paragraphs 1 and 2 of Article 1 of Regulation No 789/2001 provide:

1. The Council, acting unanimously, at the initiative of one of its members or on a proposal from the Commission, shall amend, as necessary, Parts II, III, V, VI, VII and VIII of the CCI, as well as Annex 2 (with the exception of Schedule B and excepting the visa requirements relating to those countries mentioned in Schedule A which do not need to be the subject of prior consultation) and Parts I and III of Annex 3 as well as Annexes 6, 10, 11, 12, 13, 14 and 15 thereto.

2. The Council, acting unanimously, at the initiative of one of its members or on a proposal from the Commission, shall amend, as necessary, the introduction and Parts I, II and III of the Schengen Consultation Network (Technical Specifications), as well as Annexes 2, 2A, 3, 4, 5, 7 and 8 thereto.'

22 The provisions of the CCI which the Council may amend pursuant to Article 1 of Regulation No 789/2001 concern the following matters:

- the diplomatic mission or consular post responsible for visa applications for a visit not exceeding three months (Part II of the CCI);

- initiation of the application procedure for a visit not exceeding three months (Part III of the CCI);

- examination of the application and the decision relating thereto (Part V of the CCI);

- how to fill in visa-stickers (Part VI of the CCI);

- administrative management and organisation of the visa sections (Part VII of the CCI);

- consular cooperation at local level (Part VIII of the CCI);

- regulations governing the movement of holders of diplomatic, official duty and service passports, and holders of laissez-passers which certain international intergovernmental organisations issue to their officials (Annex 2 to the CCI other than Schedule B and visa requirements relating to the countries referred to in Schedule A for which prior consultation is not necessary);

- the joint list of third countries whose nationals are subject to airport visa requirements by all Member States which are Contracting Parties to the Schengen Agreement ('the Schengen States'), holders of travel documents issued by these third countries also being subject to this requirement (Annex 3, Part I, to the CCI);

- the list of residence permits of the States of the European Economic Area for which the holders are exempt from the airport transit visa requirement (Annex 3, Part III, to the CCI);

- the list of honorary consuls authorised, in exceptional cases and on a temporary basis, to issue uniform visas (Annex 6 to the CCI);

- the instructions concerning entries in the electronically scanned section (Annex 10 to the CCI);

- criteria for determining whether a travel document may bear a visa (Annex 11 to the CCI);

- the fees to be charged, in euro, corresponding to the administrative costs of processing the visa application (Annex 12 to the CCI);

- details of how to complete the visa-stickers (Annex 13 to the CCI);

- rules and procedures governing information to be sent by Contracting Parties when issuing visas with limited territorial validity, when cancelling, revoking and reducing the duration of validity of uniform visas and when issuing national residence permits (Annex 14 to the CCI);

- model harmonised forms providing proof of invitation, sponsorship and accommodation drafted by the Contracting Parties (Annex 15 to the CCI).

23 Furthermore, in the words of recital 10 in the preamble to Regulation No 789/2001:

'It is also necessary to provide for a procedure whereby the members of the Council and the Commission are informed without delay of all amendments to the manual of documents to which a visa may be affixed, to the manual concerning the issuance of Schengen visas in third States where all the Schengen States are not represented, to Annexes 6 and 9 [to] the Schengen Consultation Network (Technical Specifications), and to those Annexes to the CCI which consist, in whole or in part, of lists of factual information which must be provided by each Member State in accordance with the rules which it currently applies, and which therefore do not fall to be adopted, amended or updated by an act of the Council.'

24 Article 2 of the regulation provides:

'1. Each Member State shall communicate to the Secretary-General of the Council such amendments as it wishes to make to the CCI concerning Part III of Annex 1 thereto, Schedule A of Annex 2 thereto (with the exception of the visa requirements relating to the countries mentioned in that Schedule which must be the subject of prior consultation) and Schedule B of Annex 2, Part II of Annex 3, and to Annexes 4, 5, 7 and 9 thereto, to the manual of documents to which a visa may be affixed, to the manual concerning the issuance of Schengen visas in third States where all the Schengen States are not represented, and to Annexes 6 and 9 [to] the Schengen Consultation Network (Technical Specifications).

2. Any Member State wishing to make an amendment to Annex 4, 5B, 5C, 7 or 9 to the CCI shall first submit a proposal for amendment to the other Member States and afford them an opportunity to comment on the proposal.

3. Amendments made pursuant to paragraphs 1 and 2 shall be deemed to take effect as from the date on which the Secretary-General communicates such amendments to the members of the Council and to the Commission.'

25 The provisions of the CCI which, in accordance with Article 2 of Regulation No 789/2001, may be amended by the Member States concern the following matters:

- the list of countries whose nationals are not subject to a visa requirement in one or more Schengen States when they are holders of diplomatic, official or service passports, but who are subject to this requirement when they are holders of ordinary passports (Annex 2, Schedule A, to the CCI, with the exception of the visa requirements relating to the countries mentioned in that schedule which must be the subject of prior consultation);

- the list of countries whose nationals are subject to visas in one or more Schengen States, when they are holders of diplomatic, official or service passports, but who are not subject to this requirement when they are holders of ordinary passports (Annex 2, Schedule B, to the CCI);

- the joint list of third countries whose nationals are subject to an airport visa requirement by some Schengen States only, with holders of travel documents issued by these third countries also being subject to this requirement (Annex 3, Part II, to the CCI);

- the list of documents entitling holders to entry without a visa (Annex 4 to the CCI);

- the list of visa applications which must be the subject of prior consultation with the central authorities of the Member State with which the application is lodged in accordance with Article 17(2) of the CISA (Annex 5A to the CCI);

- the list of visa applications which must be the subject of prior consultation with the central authorities of other Contracting Parties, in accordance with Article 17(2) of the CISA (Annexes 5B and 5C to the CCI);

- the reference amounts (that is to say, adequate means of subsistence) required for crossing borders fixed annually by the national authorities (Annex 7 to the CCI);

- information which, in certain cases, must be given by the authorities in the 'Remarks' section of the visa-sticker (Annex 9 to the CCI);

- certain aspects of the computerised procedure for consultation for the purposes of issuing visas (Annexes 6 and 9 to the 'Schengen Consultation Network (Technical Specifications)').

Regulation No 790/2001

- ²⁶ Recital 5 in Regulation No 790/2001, which is worded in almost identical terms to recital 8 in Regulation No 789/2001, states:

'Since the Member States have an enhanced role in respect of the development of border policy, reflecting the sensitivity of this area, in particular involving political relations with third countries, the Council reserves the right, during the transitional period of five years referred to in Article 67(1) of the Treaty establishing the European Community, to adopt, amend and update the detailed provisions and practical procedures referred to above by unanimity, pending a review by the Council of the conditions under which such implementing powers would be conferred on the Commission after the end of this transitional period.'

27 Article 1(1) of Regulation No 790/2001 provides:

'The Council, acting unanimously, at the initiative of one of its members or on a proposal from the Commission, shall amend, as necessary, Part I points 1.2, 1.3, 1.3.1, 1.3.3, 2.1, 3.1.2, 3.1.3, 3.1.4, 3.2.4, 4.1, 4.1.1, 4.1.2, and Part II points 1.1, 1.3, 1.4.1, 1.4.1a, 1.4.4, 1.4.5, 1.4.6, 1.4.7, 1.4.8, 2.1, 2.2.2, 2.2.3, 2.2.4, 2.3, 3.1, 3.2, 3.3.1, 3.3.2, 3.3.3, 3.3.4, 3.3.5, 3.3.6, 3.3.7, 3.3.8, 3.4, 3.5, 4.1, 4.2, 5.2, 5.3, 5.4, 5.5, 5.6, 6.4, 6.5, 6.6, 6.7, 6.8, 6.9, 6.10 and 6.11 of the Common Manual as well as Annex 9 thereto.'

28 The provisions of the CM which the Council may amend pursuant to Article 1 of Regulation No 790/2001 deal with the following matters:

- crossing the border at authorised border crossing points (Part I, point 1.2, of the CM);

- crossing the border at places other than authorised border crossing points (Part I, points 1.3, 1.3.1 and 1.3.3, of the CM);

- the list, for each country, of documents recognised as valid for the crossing of external borders and of those which may bear a visa (Part I, point 2.1, of the CM);

- the technical description of the stick-in visa given in Annex 6 to the CM (Part I, point 3.1.2, of the CM);

- the specimen stick-in visas with examples of possible endorsements provided for in Annex 7 to the CM (Part I, point 3.1.3, of the CM);

- the rule that '[t]he endorsements printed on the stick-in visa are to be in English, French and the respective national languages' (Part I, point 3.1.4, of the CM);

- the rule that '[t]he rules and procedures governing information to be sent by Contracting Parties when issuing visas with limited territorial validity, when cancelling, revoking and reducing the duration of uniform visas and when issuing national residence permits are described in Annex 8a' (Part I, point 3.2.4, of the CM);

- the documentary evidence or information establishing the likelihood of the reasons given for entry which may be provided (Part I, points 4.1, 4.1.1 and 4.1.2, of the CM);

- the officers authorised to carry out checks and surveillance (Part II, point 1.1, of the CM);

- the procedures for checks (Part II, point 1.3, of the CM);

- certain detailed provisions concerning the procedures for refusing entry (Part II, points 1.4.1, 1.4.1a and 1.4.4 to 1.4.8, of the CM);

- the detailed provisions concerning the affixing of stamps (Part II, point 2.1, of the CM);

- certain detailed provisions concerning the surveillance of external borders at places other than crossing points and outside office opening hours (Part II, points 2.2.2, 2.2.3 and 2.2.4, of the CM);

- the information which must be entered in a register (Part II, point 2.3, of the CM);

- checks on road traffic (Part II, point 3.1, of the CM);

- checks on rail traffic (Part II, point 3.2, of the CM);

- the procedure determining the place where persons and hand baggage are checked with regard to international civil air traffic (Part II, point 3.3.1, of the CM);

- additional procedures for checking persons in relation to international civil air traffic (Part II, points 3.3.2, 3.3.3, 3.3.4 and 3.3.5, of the CM);

- the procedure for checks in aerodromes (Part II, point 3.3.6, of the CM);

- the rule that '[i]n order to prevent dangers, checks must be carried out, in airports and aerodromes, on passengers on internal flights, where uncertainty exists whether such passengers are exclusively coming from, or solely bound for, the territories of the Contracting Parties without landing on the territory of a third State' (Part II, point 3.3.7, of the CM);

- checks on maritime traffic, with the exclusion of regular ferry services, pleasure boating, coastal fisheries and inland waterway transport (Part II, point 3.4, of the CM);

- checks on inland waterway shipping (Part II, point 3.5, of the CM);

- exchange of information (Part II, point 4.1, of the CM);

- secondment of liaison officers (Part II, point 4.2, of the CM);

- the issue of visas at the border (Part II, points 5.2 to 5.6, of the CM);

- special rules on the checking of the pilots of aircraft and other crew members (Part II, point 6.4, of the CM);

- special rules on the checking of seamen (Part II, point 6.5, of the CM);

- special rules on the checking of holders of diplomatic, official or service passports (Part II, point 6.6, of the CM);

- special rules on the checking of cross-border workers (Part II, point 6.7, of the CM);

- special rules on the checking of minors (Part II, point 6.8, of the CM);

- special rules on the checking of group trips (Part II, point 6.9, of the CM);

- special rules on the checking of aliens who submit an application for asylum at the border (Part II, point 6.10, of the CM);

- special rules on the checking of members of international organisations (Part II, point 6.11, of the CM);

— the specimen long-stay visa (Annex 9 to the CM).

29 Recital 7 in Regulation No 790/2001, the wording of which is similar to that of recital 10 in Regulation No 789/2001, states:

‘It is also necessary to provide for a procedure whereby the members of the Council and the Commission are informed without delay of all amendments to those Annexes [to] the Common Manual which consist, in whole or in part, of lists of factual information which must be provided by each Member State in accordance with the rules which it currently applies, and which therefore do not fall to be adopted, amended or updated by an act of the Council.’

30 Article 2 of Regulation No 790/2001 provides:

‘1. Each Member State shall communicate to the Secretary-General of the Council such amendments as it wishes to make to point 1.3.2 of Part I and to Annexes 1, 2, 3, 7, 12 and 13 of the Common Manual.

2. Amendments made pursuant to paragraph 1 shall be deemed to take effect as of the date on which the Secretary-General communicates those amendments to the members of the Council and to the Commission.’

31 The provisions of the CM which, in accordance with Article 2 of Regulation No 790/2001, may be amended by the Member States concern the following matters:

- the rule that '[n]ationals of the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands shall be authorised to cross, at any point, the borders of the State whose nationality they hold' (Part I, point 1.3.2, of the CM);

- authorised border crossing points for the purposes of Part I, point 1.2, of the CM (Annex 1 to the CM);

- specimen stick-in visas for the purposes of Part I, point 3.1.3, of the CM (Annex 7 to the CM);

- specimen separate sheets (that is to say, authorisations replacing visas) (Annex 12 to the CM);

- specimen cards issued by the Ministry of Foreign Affairs (Annex 13 to the CM).

³² It is to be noted that Annexes 2 and 3 to the CM, to which Article 2(1) of Regulation No 790/2001 refers, were repealed by Council Decision 2002/352/EC of 25 April 2002 on the revision of the Common Manual (OJ 2002 L 123, p. 47).

The action

- 33 The Commission puts forward two pleas in law in support of its action. The first alleges infringement of Article 202 EC and Article 1 of the second comitology decision in that, in Article 1 of each of the contested regulations, the Council reserved the right to exercise implementing powers itself, improperly and without giving adequate reasons for doing so. The second plea alleges infringement of Article 202 EC in that Article 2 of the contested regulations confers power on the Member States to amend, first, certain parts of the CCI and certain Executive Committee decisions supplementing the CCI and, second, parts of the CM.

*First plea in law: reservation of powers to the Council***Arguments of the parties**

- 34 The first plea in law comprises two parts. By the first part of the plea, the Commission submits that the Council did not establish that the specific nature of the implementing measures provided for by the contested regulations was such as to justify the exercise of implementing powers by the Council. It is clear from recital 8 in Regulation No 789/2001 and from recital 5 in Regulation No 790/2001 that the Council provided a 'generic' statement of reasons which covers an entire area of the CCI or the CM rather than a specific measure.
- 35 Those recitals describe neither the nature nor the content of the implementing powers concerned, which would show why it is necessary for the Council to exercise

such powers itself, since the mere reference to visa policy and border surveillance in general terms is not sufficient to establish the specificity of the measures to be taken.

- ³⁶ Likewise, an explanation concerning both ‘the enhanced role of the Member States’, which, in the Commission’s submission, can refer only to the fact that under Title IV of the Treaty the Member States may take legislative initiatives, and the sensitivity, particularly as regards political relations with third countries, of questions concerning border surveillance and the issue of visas, which accounts precisely for the enhanced role of the Member States, could apply to any implementing measure adopted under Title IV of the Treaty.
- ³⁷ Finally, the reference to the transitional period of five years provided for in Article 67(1) EC and the Council’s undertaking to review the ‘conditions under which such implementing powers would be conferred on the Commission’ after the end of that period clearly shows that the reason for the Council’s reservation of implementing powers to itself lies not in the nature or content of the basic instruments but in the fact that the latter fall within the scope of Title IV of the Treaty.
- ³⁸ By the second part of its first plea in law, the Commission maintains that, quite apart from whether the implementing measures are specific in nature, the Council failed to comply with the obligation to state reasons laid down in Article 253 EC. Reasoning which is founded, first, on the specific institutional situation in Title IV of the Treaty, and secondly on the sensitive nature of the policies concerned cannot justify the Council’s decision to reserve to itself the implementing powers provided for by the contested regulations.
- ³⁹ As regards the specific institutional arrangements of Title IV of the Treaty, the Commission argues that matters such as external borders, asylum, immigration and

judicial cooperation in civil matters, which were formerly included in Title VI of the Treaty on European Union, have been brought within the Community framework.

- 40 Admittedly, the Member States have power to take legislative initiatives during a five-year transitional period laid down in Article 67(1) EC, and Article 68 EC contains derogations as regards the procedure laid down in Article 234 EC. However, use of the comitology procedure set up pursuant to Article 202 EC cannot be excluded by the special and derogating provisions of Title IV of the EC Treaty.
- 41 Furthermore, even if areas concerning border surveillance and the issue of visas were to be regarded as sensitive, the Commission submits that it is capable of dealing with such matters and that, in any event, it would not act without involving the Member States in the decision in accordance with the comitology procedure. The Commission draws attention to the institutional role conferred on it by the Treaty in respect of relations with non-member States, in particular at the stage of negotiating international agreements. It also points out that certain aspects of visa policy, in particular the determination of the States whose nationals must be in possession of a visa, already came within the Community framework before the Treaty of Amsterdam was adopted. Finally, the domains concerned are merely a matter of procedures and formalities.
- 42 The Council submits as a preliminary point that the CCI and the CM are hybrid documents in the sense that each of them contains provisions which are legislative, executive and factual in nature. The contested regulations take account of this particular feature by providing for three different procedures for amending the CCI and the CM. According to recital 11 in Regulation No 789/2001 and recital 8 in Regulation No 790/2001, the elements which are legislative in nature may be amended only in accordance with the relevant provisions of the EC Treaty; those

which are executive in nature may be amended only in accordance with the procedure laid down in Article 1 of each of the contested regulations and only amendments of those provisions may be regarded as implementing measures; finally, information of a factual nature may be amended only in accordance with the procedure set out in Article 2 of each of the contested regulations.

- 43 The Council also observes, as a preliminary point, that there is a considerable overlap between the CCI and the CM, which results from the fact that the competent consular authorities and the competent border authorities must often consult the same information in the course of their work, which explains the similarity of the procedures established by the contested regulations.
- 44 In respect of the first plea, the Council contends that recital 8 in Regulation No 789/2001 and recital 5 in Regulation No 790/2001 clearly indicate that the reservation of implementing powers relates specifically to the amendment of certain 'detailed provisions and practical procedures' set out in the CCI and the CM. The nature and content of those provisions are described in more detail in the preceding recitals, namely recitals 1, 2 and 5 in Regulation No 789/2001 and recitals 1 and 2 in Regulation No 790/2001. Accordingly, the reasons given are not generic in nature and cannot apply to all measures taken under Title IV of the Treaty. In that regard, the Council states that it has already adopted numerous acts under Title IV, some of which concern visa matters, without having reserved implementing powers to itself.
- 45 The considerations which led the Council to reserve the right, in this instance, to exercise implementing powers itself are the same as those which led the framers of the Amsterdam Treaty to give the Member States power to take initiatives under Title IV of the EC Treaty for an initial five-year period. The same reasons also led the Council to provide that amendments and updates of the measures in question should be agreed unanimously.

- 46 At the time of adoption of the contested regulations, the incorporation of the Schengen *acquis* into the framework of the European Union and the conferral on the Community of new competences in respect of visa policy and border control had taken place only a short time previously.
- 47 It is precisely because the decision to reserve the right to exercise implementing powers itself is the exception rather than the rule that the Council, despite the sensitivity of the area, indicated that it would review the conditions under which such implementing powers would be conferred on the Commission after the end of the five-year transitional period referred to in Article 67(1) EC. The Council submits that the three-year period still to run before expiry of the transitional period was a reasonable period of time for it to assess whether the considerations which led it initially to reserve implementing powers to itself were still valid.
- 48 The Council denies that it reserved the right to exercise implementing powers itself on the ground that the measures in question fell within Title IV of the Treaty. Since the Treaty of Amsterdam entered into force, it has in fact adopted many measures in the realm of Title IV, which contain comitology provisions.

Findings of the Court

- 49 As a preliminary point, it must be borne in mind that, under the first subparagraph of Article 1 of the second comitology decision, implementing powers are conferred on the Commission other than in specific and substantiated cases where the basic instrument reserves to the Council the right to exercise directly certain implementing powers itself. In that, the provision merely reproduces the requirements set out concurrently in Articles 202 EC, third indent, and 253 EC.

- 50 In that regard, as the Court held in its judgment in Case 16/88 *Commission v Council* [1989] ECR 3457, paragraph 10, following the amendments made to Article 145 of the EC Treaty (now Article 202 EC) by the Single European Act, the Council may reserve the right to exercise implementing powers directly only in specific cases, and it must state in detail the grounds for such a decision.
- 51 That means that the Council must properly explain, by reference to the nature and content of the basic instrument to be implemented or amended, why exception is being made to the rule that, under the system established by the Treaty, when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power.
- 52 In this instance, the Council specifically referred, in recital 8 in Regulation No 789/2001 and in recital 5 in Regulation No 790/2001, to the enhanced role of the Member States in respect of visas and border surveillance and to the sensitivity of those areas, in particular as regards political relations with non-member States.
- 53 It cannot be denied that such considerations are both general and laconic. However, assessed in their proper context, they are such as to show clearly the grounds justifying the reservation of powers to the Council and to allow the Court to exercise its power of review.
- 54 It is clear, in the first place, that prior to the entry into force of the Treaty of Amsterdam, which occurred two years before the contested regulations were adopted, visa policy — with the exception of the determination of the third countries whose nationals must be in possession of a visa when crossing the external borders

of the Member States, as provided for in Article 100c(1) of the EC Treaty (repealed by the Treaty of Amsterdam) — and external border policy were excluded in their entirety from the European Community's competence and were among the procedures established under Title VI of the Treaty on European Union.

55 In the second place, Title IV of the EC Treaty includes, in Articles 67 EC and 68 EC, progressive special and derogating provisions concerning the procedure for adopting subordinate legislation and the preliminary ruling procedure. Thus, Article 67(1) and (2) EC provides for a transitional period of five years following the entry into force of the Treaty of Amsterdam, during which, as a general rule, the Council acts unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament. After that period, the Council legislates solely on a proposal from the Commission and may, acting unanimously, provide for all or parts of the areas covered by Title IV to be governed by the procedure referred to in Article 251 EC and adapt the provisions relating to the powers of the Court of Justice.

56 Provisions of this kind reflect the specific nature of the area covered by the contested regulations. Until 1 May 1999, that area fell, for the main part, within the procedures established under Title VI of the Treaty on European Union, since the framers of the EC Treaty did not wish to confer on the Commission a sole right of initiative in this area at the outset.

57 In the third place, the provisions exhaustively listed in Article 1 of the contested regulations concern clearly circumscribed matters. Although the provisions represent a major part of the CCI and the CM, it is none the less the case that they do not deal with all aspects of visas and external border control.

- 58 In the fourth place, it is clear from recital 8 in Regulation No 789/2001 and recital 5 in Regulation No 790/2001 that the Council undertook to review the conditions under which the implementing powers reserved by those regulations could be conferred on the Commission after a three-year transitional period.
- 59 For all those reasons, which are sufficiently clear from the preambles to the contested regulations and from the context in which they occur, it must be held that the Council could reasonably consider itself to be concerned with a specific case and that it duly stated the reasons, in accordance with Article 253 EC, for its decision to reserve to itself, on a transitional basis, power to implement a series of provisions exhaustively listed in the CCI and the CM.
- 60 The fact that recital 8 in Regulation No 789/2001 and recital 5 in Regulation No 790/2001 are worded almost identically is not, on its own, such as to call that finding into question, particularly given the close links which undoubtedly exist between the area of visas and that of border control.
- 61 In those circumstances, the first plea advanced by the Commission in support of its application must be rejected.

Second plea in law: implementing power conferred on the Member States

Arguments of the parties

- 62 By its second plea, the Commission maintains that the procedure for the Member States to amend and update the CCI and the CM, provided for in Article 2 of the

contested regulations, is contrary to Article 202 EC. That provision, which allows the Council only to reserve the right to exercise implementing powers itself or to confer them on the Commission, does not authorise such a procedure.

- 63 It adds that, even if the procedure concerns factual information in the possession of the Member States, that information is contained in instruments whose legal basis consists, by virtue of Decision 1999/436, of provisions of the EC Treaty and therefore amendments to those instruments must adhere to the normal institutional rules.
- 64 The Council's response is that the amendments to the CCI and the CM pursuant to Article 2 of the contested regulations cannot be classified as implementing measures but relate to a mechanism for exchanging information. It is evident from recital 10 in Regulation No 789/2001 and recital 7 in Regulation No 790/2001 that what is involved is factual information which can be provided only by each Member State. Accordingly, Article 202 EC is of no relevance.

Findings of the Court

- 65 It is quite clear from Article 2 of the contested regulations that, despite the use of the verb 'wish', each Member State may itself amend, sometimes in agreement with the other Member States, certain provisions of, or annexes to, the CCI and the CM. In the words of recital 10 in Regulation No 789/2001 and recital 7 in Regulation No 790/2001, 'members of the Council and the Commission are informed without delay of all amendments ...', which implies that it is the Member States which have the power to make amendments.

- 66 In that regard, it must be stated that, although Article 202 EC, third indent, governs the issue of uniform implementation of the basic instruments adopted by the Council or by the Council and the Parliament, and hence the division of implementing powers as between the Council and the Commission, the provision does not concern the division of powers as between the Community and the Member States.
- 67 It is necessary to consider whether, for the purposes of the implementation of certain provisions of, or annexes to, the CCI and the CM, the Council was required to use Community procedures or whether power to amend those provisions or annexes could be conferred on the Member States without infringing Community law.
- 68 In this instance, the Council maintains that the provisions which may be amended by the Member States cover only factual information which the Member States alone may effectively supply.
- 69 It is appropriate to bear in mind in that respect that the CCI and the CM were adopted by the Executive Committee at a time when the area concerned was a matter for intergovernmental cooperation. Their integration into the framework of the European Union with effect from the entry into force of the Treaty of Amsterdam did not, of itself, result in the Member States being immediately stripped of the powers which they were entitled to exercise under those instruments in order to ensure their proper implementation.
- 70 In that quite specific and transitional situation, prior to the evolution of the Schengen *acquis* within the legal and institutional framework of the European Union, no objection can be made to the Council having established a procedure for the transmission by the Member States of amendments which they are authorised to make, unilaterally or in collaboration with the other Member States, to certain

provisions of the CCI or the CM, the contents of which depend exclusively on information which they alone possess. Such a complaint could succeed only if it were established that the procedure thereby put into practice was such as to prejudice the effective or correct implementation of the CCI or the CM.

- 71 It must none the less be stated that the Commission, which has not disputed either that the information given in the provisions which may be amended by the Member States is factual or the fact that the information can be provided effectively only by the Member States, has not shown, or even attempted to establish, in respect of each of those provisions, that it was appropriate to use a uniform updating procedure for the CCI and the CM in order to ensure their proper implementation. It merely examined by way of example, in its reply, Annexes 4 and 5 to the CCI.
- 72 In those circumstances, the Court considers that its review must be limited to an assessment of the legality of Article 2 of Regulation No 789/2001 in so far as it applies to Annexes 4 and 5 to the CCI, alone examined by the Commission in its pleadings.
- 73 In that regard, Article 2(2) of Regulation No 789/2001 provides that when a Member State wishes to make an amendment to Annex 4, 5B or 5C to the CCI, in particular, it first submits a proposal for amendment to the other Member States, which may comment on the proposal.
- 74 As regards, first, Annex 4 to the CCI, which includes a list of documents issued by each Member State and entitling the holder to entry without a visa, the Commission submits that, by virtue of Article 21(1) and (2) of the CISA, nationals of third countries who hold valid residence permits or provisional residence permits issued

by a Contracting Party may, on the basis of that permit and a valid travel document issued by the same Contracting Party, move freely for up to three months within the Schengen territories.

- 75 Although it is true that amendment of the list in Annex 4 to the CCI has an immediate impact on the conditions under which Article 21(1) and (2) of the CISA applies, it is none the less the case that, under Article 21(3), '[t]he Contracting Parties shall send the Executive Committee [for which the Council has substituted itself, in accordance with Article 2(1) of the Protocol] a list of the documents that they issue as valid travel documents, residence permits or provisional residence permits within the meaning of this Article'.
- 76 There is nothing to suggest, in the wording of that provision and in the absence of any other Community provision amending in that respect the rules in the CISA prior to the adoption of the contested regulations, that, once the list of documents in question has been communicated to the Executive Committee (or to the Council), the Member States are no longer competent to determine the nature of the documents valid as residence permits or provisional residence permits.
- 77 Consequently, the Commission has not established that the amendment of Annex 4 to the CCI required use of a uniform updating procedure.
- 78 As regards, second, Annex 5 to the CCI, concerning the cases referred to in Article 17(2) of the CISA, in which the issue of a visa is subject to consultation with the central authority of the Contracting Party with which the application is lodged and, where appropriate, the central authorities of other Contracting Parties, it must be stated, in the first place, that in accordance with point 2.1 of Part II of the CCI, consultation of the national central authority by the diplomatic mission or consular post examining the application is provided for 'in [the cases], and in accordance with the arrangements and deadlines, laid down by national law and practice'. Annex 5A to the CCI mentions precisely those cases.

- 79 The Commission has not succeeded in showing why the use of a uniform procedure for the updating of Annex 5A to the CCI was necessary for the proper implementation of point 2.1 of Part II of the CCI, account being taken of the reference in that provision to national law and practice.
- 80 In the second place, point 2.2 of Part II of the CCI concerns cases in which the diplomatic mission or consular post with whom a visa application is lodged must seek authorisation from its central authority, which must first consult the competent central authorities of one or more of the other Contracting Parties. Point 2.2 provides that 'until the final list of cases of mutual consultation has been approved by the Executive Committee [for which the Council has substituted itself], the list annexed to these Common Consular Instructions shall apply'. That list is in fact in Annex 5B.
- 81 The Commission, which does not dispute that each Member State is responsible for determining visa applications in respect of which prior consultation of the central authorities of the other Contracting Parties is required, has not established why, until a final list of cases of mutual consultation has been established by the Council, use of a uniform procedure was necessary for the proper implementation of point 2.2 of Part II of the CCI and, in particular, for the updating of Annex 5B to the CCI.
- 82 In the third place, point 2.3 of Part II of the CCI, which refers to the list in Annex 5C to the CCI, concerns cases in which visa applications are lodged at an embassy or a consular post of a Schengen State, representing another Schengen State.
- 83 The Commission has not demonstrated, or even tried to establish, why use of a uniform procedure was necessary for the proper implementation of point 2.3 of Part II of the CCI, and, in particular, for the updating of Annex 5C to the CCI.

- 84 As a consequence, the second plea put forward by the Commission in support of its application must be rejected.
- 85 Having regard to all of the foregoing considerations, the Commission's application must be dismissed in its entirety.

Costs

- 86 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has asked for costs to be awarded against the Commission and since the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Full Court) hereby:

- 1. Dismisses the action;**
- 2. Orders the Commission of the European Communities to pay the costs.**

[Signatures]