



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

16 July 2015*

(Actions for annulment — Regulation (EU) No 1289/2013 — Article 1(1) and (4) — Regulation (EC) No 539/2001 — Article 1(4)(f) — Article 290 TFEU — Suspension of exemption from the visa requirement — Insertion of a footnote — Amendment of the legislative act)

In Case C-88/14,

ACTION for annulment under Article 263 TFEU, brought on 21 February 2014,

European Commission, represented by B. Smulders, B. Martenczuk and G. Wils, acting as Agents,
applicant,

v

European Parliament, represented by L. Visaggio, A. Troupiotis and A. Pospíšilová Padowska, acting as Agents,

Council of the European Union, represented by K. Pleśniak and K. Michoel, acting as Agents,
defendants,

supported by

Czech Republic, represented by M. Smolek, D. Hadroušek and J. Škeřík, acting as Agents,
intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts (Rapporteur), Vice-President, A. Tizzano, R. Silva de Lapuerta, T. von Danwitz and J.-C. Bonichot, Presidents of Chambers, A. Rosas, A. Arabadjiev, C. Toader, M. Safjan, D. Šváby, M. Berger, E. Jarašiūnas, C.G. Fernlund and J.L. da Cruz Vilaça, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 March 2015,

after hearing the Opinion of the Advocate General at the sitting on 7 May 2015,

* Language of the case: English.

gives the following

Judgment

- 1 By its application, the European Commission seeks the annulment of Article 1(1) and (4) of Regulation (EU) No 1289/2013 of the European Parliament and of the Council of 11 December 2013 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2013 L 347, p. 74), in so far as those provisions confer on the Commission a delegated power in accordance with Article 290(1) TFEU rather than an implementing power within the meaning of Article 291(2) TFEU.

Legal context

Regulation (EC) No 539/2001

- 2 Recital 5 in the preamble to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1), ('Regulation No 539/2001') reads as follows:

'The determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating inter alia to illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity. Provision should be made for a Community mechanism enabling this principle of reciprocity to be implemented if one of the third countries included in Annex II to this Regulation decides to make the nationals of one or more Member States subject to the visa obligation.'

- 3 Article 1(1) and (2) of Regulation No 539/2011 provides:

'1. Nationals of third countries on the list in Annex I shall be required to be in possession of a visa when crossing the external borders of the Member States.

...

2. Nationals of third countries on the list in Annex II shall be exempt from the requirement set out in paragraph 1 for stays of no more than 90 days in any 180-day period.

...'

- 4 Article 1(4) of that regulation laid down a mechanism for implementing the principle of reciprocity which could be set in motion in response to the introduction by a third country listed in Annex II of a visa requirement for nationals of a Member State.

Regulation No 1289/2013

- 5 Article 1(1)(a) of Regulation No 1289/2013 amends Article 1(4) of Regulation No 539/2001 to read as follows:

‘Where a third country listed in Annex II applies a visa requirement for nationals of at least one Member State, the following provisions shall apply:

- (a) within 30 days of the implementation by the third country of the visa requirement or, in cases where the visa requirement existing on 9 January 2014 is maintained, within 30 days of that date, the Member State concerned shall notify the European Parliament, the Council and the Commission thereof in writing.

...

Information about that notification shall be published without delay by the Commission in the *Official Journal of the European Union*, including information on the date of implementation of the visa requirement and the types of travel documents and visas concerned.

...

- (e) if the third country concerned has not lifted the visa requirement, the Commission shall, at the latest six months of the date of the publication referred to in the third subparagraph of point (a) and subsequently at intervals not exceeding six months within a total period which may not extend beyond the date on which the delegated act referred to in point (f) takes effect or is objected to:

- (i) adopt, at the request of the Member State concerned or on its own initiative, an implementing act temporarily suspending the exemption from the visa requirement for certain categories of nationals of the third country concerned for a period of up to six months. ...

...

- (f) if within 24 months of the date of the publication referred to in the third subparagraph of point (a), the third country concerned has not lifted the visa requirement, the Commission shall adopt a delegated act in accordance with Article 4b temporarily suspending the application of Annex II for a period of 12 months for the nationals of that third country. The delegated act shall determine a date, within 90 days of its entry into force, on which the suspension of the application of Annex II is to take effect, taking into account the available resources in the consulates of the Member States and shall amend Annex II accordingly. That amendment shall be made through inserting next to the name of the third country in question a footnote indicating that the exemption from the visa requirement is suspended with regard to that third country and specifying the period of that suspension.

As of the date when the suspension of the application of Annex II for the nationals of the third country concerned takes effect or when an objection to the delegated act is expressed pursuant to Article 4b(5), any implementing act adopted pursuant to point (e) concerning that third country shall expire.

Where the Commission submits a legislative proposal as referred to in point (h), the period of suspension referred to in the first subparagraph of this point shall be extended by six months. The footnote referred to in that subparagraph shall be amended accordingly.

Without prejudice to the application of Article 4, during the periods of that suspension the nationals of the third country concerned by the delegated act shall be required to be in possession of a visa when crossing the external borders of the Member States;

...

- (h) if within six months of the entry into force of the delegated act referred to in point (f) the third country in question has not lifted the visa requirement, the Commission may submit a legislative proposal for amending this Regulation in order to transfer the reference to the third country from Annex II to Annex I;
- (i) the procedures referred to in points (e), (f) and (h) shall not affect the right of the Commission to submit at any time a legislative proposal for amending this Regulation in order to transfer the reference to the third country concerned from Annex II to Annex I;
- (j) where the third country in question lifts the visa requirement, the Member State concerned shall immediately notify the European Parliament, the Council and the Commission thereof. The notification shall be published without delay by the Commission in the *Official Journal of the European Union*.

Any implementing or delegated act adopted pursuant to point (e) or (f) concerning the third country in question shall expire seven days after the publication referred to in the first subparagraph of this point. ... The footnote referred to in the first subparagraph of point (f) shall be deleted upon expiry of the delegated act concerned. The information on that expiry shall be published without delay by the Commission in the *Official Journal of the European Union*.

...'

- 6 Article 1(4) of Regulation No 1289/2013 inserts in Regulation No 539/2001 Article 4b defining the conditions governing the Commission's power to adopt delegated acts conferred on it by Article 1(4)(f) of Regulation No 539/2001 as amended by Regulation No 1289/2013 ('Regulation No 539/2001, as amended'). Article 4b(2), (3) and (5) of Regulation No 539/2001, as amended, provides:

'2. The power to adopt delegated acts referred to in point (f) of Article 1(4) shall be conferred on the Commission for a period of five years from 9 January 2014. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

3. The delegation of power referred to in point (f) of Article 1(4) may be revoked at any time by the European Parliament or by the Council. ...

...

5. A delegated act adopted pursuant to point (f) of Article 1(4) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of four months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.'

Forms of order sought by the parties and procedure before the Court

- 7 The Commission claims that the Court of Justice should:
- annul Article 1(1) of Regulation No 1289/2013, and Article 1(4) of that regulation in so far as it inserts a new Article 4b in Regulation No 539/2001;
 - declare that the effects of the annulled provisions and any implementing measure derived therefrom are definitive pending their replacement within a reasonable time-frame by acts adopted in accordance with the FEU Treaty as interpreted by the judgment of the Court; and
 - order the defendants to pay the costs of the proceedings.
- 8 In the alternative, should the Court consider those provisions not to be severable from the remainder of Regulation No 1289/2013, the Commission asks the Court to annul that regulation in its entirety.
- 9 The Parliament and the Council contend that the Court should dismiss the action and order the Commission to pay the costs. Should the Court annul Regulation No 1289/2013 in part or in whole, the Council asks the Court, in the alternative, to maintain the effects of the provisions annulled, and of all acts adopted on the basis thereof, until the entry into force within a reasonable period of a new act intended to replace them.
- 10 The Czech Republic was granted leave to intervene in support of the form of order sought by the defendants.

The action

- 11 In support of its action, the Commission puts forward a single plea in law, alleging breach of Articles 290 TFEU and 291 TFEU. According to the Commission, Article 1(4)(f) of Regulation No 539/2001, as amended, wrongly grants it a delegated power. While the form of order sought in the application seeks also the annulment of Article 4b of that regulation, that claim follows, according to the Commission, from the inseparable link between Article 4b, which defines the conditions governing the delegated power conferred on the Commission by Article 1(4)(f) of that regulation, and Article 1(4)(f).

Admissibility of an argument raised for the first time in the reply

- 12 The Council pleads the inadmissibility of the Commission's argument, set out for the first time in its reply, that, even if the EU legislature enjoys a degree of discretion in determining whether a measure constitutes an amendment to the legislative act in question for the purposes of Article 290(1) TFEU, the grant of a delegated power to the Commission in Article 1(4)(f) of Regulation No 539/2001, as amended, is based on a manifest error.
- 13 As is apparent from Article 127(1) of the Court's Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. However, an argument which may be regarded as amplifying a plea made previously, whether directly or by implication, in the original application must be considered admissible (see, to that effect, judgments in *Italy v Commission*, C-66/02, EU:C:2005:768, paragraphs 85 and 86, and *Naipes Heraclio Fournier v OHIM*, C-311/05 P, EU:C:2007:572, paragraphs 58 and 59).

- 14 The argument put forward by the Commission in its reply is linked to the plea in law in the application alleging infringement of Articles 290 TFEU and 291 TFEU and amplifies that plea. The argument is intended to support that plea questioning the lawfulness of Article 1(4)(f) of Regulation No 539/2001, as amended, in so far as that provision grants the Commission a delegated power in accordance with Article 290(1) TFEU. The argument cannot therefore be regarded as a new plea in law.
- 15 The Council's plea of inadmissibility must therefore be rejected.

Substance

Arguments of the parties

- 16 The Commission submits that Article 1(4)(f) of Regulation No 539/2001, as amended, infringes Articles 290 TFEU and 291 TFEU, since it wrongly grants it a delegated power.
- 17 It submits in this respect, in the first place, that an act adopted on the basis of Article 1(4)(f) of that regulation does not supplement the regulation. Such an act forms part of the implementation of the regulation. It is the application to a specific situation of the rules which have already been stated in the legislative act. The Commission emphasises that Article 1(4)(f) gives it very little, if any, discretion.
- 18 If an act adopted on the basis of Article 1(4)(e) of Regulation No 539/2001, as amended, is accepted to be a measure implementing that legislative act, an act referred to in Article 1(4)(f) of that regulation should *a fortiori* be classified as such. When the Commission takes a decision on the basis of Article 1(4)(e) of the regulation, it enjoys a certain measure of discretion, which it does not appear to have when adopting a delegated act referred to in Article 1(4)(f) of the regulation.
- 19 In the second place, an act adopted on the basis of that latter provision does not amend the legislative act within the meaning of Article 290(1) TFEU.
- 20 The Commission submits that an amendment to a legislative act presupposes that the elements being amended are already present in the act. An amendment in accordance with Article 290(1) TFEU has the effect of changing the normative content of the legislative act. However, the adoption of an act on the basis of Article 1(4)(f) of Regulation No 539/2001, as amended, does not lead to the removal of the reference to the third country concerned from Annex II to the regulation and its insertion in Annex I to the regulation. That amendment to the legislative act would, in accordance with Article 1(4)(h) of that regulation, have to be done through the ordinary legislative procedure. Moreover, Regulation No 539/2001, as amended, does not contain any list of the third countries which are in a situation of suspension, the normative content of which is changed by the delegated act provided for in Article 1(4)(f) of that regulation. Instead, those countries are to be identified by application of the criteria laid down in that regulation. A delegated act which, on the basis of those criteria, suspends for a limited time the application of the exemption from the visa requirement merely implements the legislative act in question without supplementing or amending it.
- 21 Even if the insertion of a footnote in a legislative act in principle constitutes an amendment which could be the subject of a delegated act, the Commission considers that, in the present case, the insertion of the footnote provided for by that provision is a mere technical tool used abusively in order to disguise the implementing act as a delegated act.
- 22 Moreover, the insertion of the footnote also runs counter to the wish to make the mechanism for implementing the principle of reciprocity an automatic one, and will create numerous difficulties for the practical operation of the mechanism. Thus, in the case provided for in the third indent of Article 1(4)(f) of Regulation No 539/2001, as amended, of the submission of a legislative proposal by

the Commission, that provision does not specify how the amendment to the footnote provided for in that provision is to be made, or how that footnote is to be deleted if the legislative proposal is not successful. In addition, in the case provided for in Article 1(4)(j) of that regulation of the visa requirement being lifted by the third country concerned, the regulation does not specify the procedure for deleting the footnote inserted on the basis of Article 1(4)(f) of that regulation.

- 23 In the third place, the Commission submits in its reply that, even if the EU legislature enjoys a margin of discretion when deciding whether a measure constitutes an ‘amendment’ of the legislative act in question for the purposes of Article 290(1) TFEU, the grant of a delegated power to the Commission in Article 1(4)(f) of Regulation No 539/2001 proceeds from a manifest error.
- 24 It submits in this respect, first, that the political sensitivity or gravity of an act adopted on the basis of that provision is alien to the question whether the act amends the legislative act concerned within the meaning of Article 290(1) TFEU.
- 25 Secondly, given that Article 1(4)(f) of Regulation No 539/2001, as amended, confers only a restricted discretion, if any, on the Commission, the question arises of what the purpose is of the right of objection given to the EU legislature under Article 290 TFEU. That right of objection resembles, in the present case, a right to veto an implementing measure, which is not consistent with the purpose of Article 290 TFEU.
- 26 Thirdly, the Commission notes that, in accordance with Article 4b(2) and (3) of Regulation No 539/2001, as amended, the duration of the delegation of power in question is limited in time, and the delegation may be revoked. However, since the adoption of the delegated act provided for in Article 1(4)(f) of that regulation is an integral part of the overall mechanism for implementing the principle of reciprocity established by Article 1(4) of Regulation No 539/2001, as amended, the Commission submits that that mechanism can no longer function after the delegation in question has expired or been revoked.
- 27 The Parliament and the Council, supported by the Czech Republic, submit that Article 1(4)(f) of Regulation No 539/2001, as amended, confers power on the Commission to amend that regulation within the meaning of Article 290(1) TFEU. Consequently, the EU legislature did not commit a manifest error or act unreasonably by conferring a delegated power on the Commission. On the contrary, it stayed within the bounds of its discretion.

Findings of the Court

- 28 According to the case-law, the EU legislature has discretion when it decides to confer on the Commission a delegated power pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU (judgment in *Commission v Parliament and Council*, C-427/12, EU:C:2014:170, paragraph 40). However, that discretion must be exercised in compliance with the conditions laid down in Articles 290 TFEU and 291 TFEU.
- 29 With respect to the conferral of a delegated power, Article 290(1) TFEU states that a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. In accordance with the second subparagraph of that provision, the objectives, content, scope and duration of the delegation of power must be explicitly defined in the legislative act granting the delegation. That requirement implies that the purpose of granting a delegated power is to achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act (judgment in *Commission v Parliament and Council*, C-427/12, EU:C:2014:170, paragraph 38).

- 30 With respect to the conferral of an implementing power, Article 291(2) TFEU states that legally binding Union acts are to confer such power on the Commission or, in duly justified specific cases and the cases provided for in Articles 24 TEU and 26 TEU, on the Council, where uniform conditions for implementing those acts are needed. In the exercise of the implementing power conferred on it, the institution concerned must provide further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all the Member States (see judgment in *Commission v Parliament and Council*, C-427/12, EU:C:2014:170, paragraph 39).
- 31 It also follows from the Court's case-law that, in exercising an implementing power, the Commission may neither amend nor supplement the legislative act, even as to its non-essential elements (judgment in *Parliament v Commission*, C-65/13, EU:C:2014:2289, paragraph 45).
- 32 Contrary to the Commission's arguments, neither the existence nor the extent of the discretion conferred on it by the legislative act is relevant for determining whether the act to be adopted by the Commission comes under Article 290 TFEU or Article 291 TFEU. It follows from the wording of Article 290(1) TFEU that the lawfulness of the EU legislature's choice to confer a delegated power on the Commission depends solely on whether the acts the Commission is to adopt on the basis of the conferral are of general application and whether they supplement or amend non-essential elements of the legislative act.
- 33 In the present case, the Commission does not dispute that Article 1(4)(f) of Regulation No 539/2001, as amended, confers power on it to adopt acts of general application which relate only to non-essential elements of the legislative act. Moreover, the defendants do not contest the correctness of the Commission's argument that those acts are not such as to supplement the legislative act in question within the meaning of Article 290(1) TFEU.
- 34 In those circumstances, it must be examined whether the EU legislature remained within the bounds of its discretion, referred to in paragraph 28 above, when conferring on the Commission in Article 1(4)(f) of that regulation the power to 'amend', within the meaning of Article 290(1) TFEU, the normative content of that regulation (see, to that effect, judgment in *Commission v Parliament and Council*, C-427/12, EU:C:2014:170, paragraphs 40 and 52).
- 35 It must be recalled that, as stated in recital 5 in the preamble to Regulation No 539/2001, that regulation aims to make provision for a mechanism enabling the principle of reciprocity to be implemented if one of the third countries included in Annex II to the regulation decides to make the nationals of one or more Member States subject to the visa obligation. The mechanism consists essentially of three stages.
- 36 Article 1(4)(e) of Regulation No 539/2001, as amended, provides, as the first response of the European Union to the action of the third country concerned, the adoption by the Commission of an implementing act suspending the exemption from the visa requirement for certain categories of nationals of the third country concerned for a period of six months, which may be extended.
- 37 Article 1(4)(f) of Regulation No 539/2001, as amended, relates to the second stage of the mechanism for implementing the principle of reciprocity. Where, despite the selective suspension of the visa exemption under the implementing act adopted on the basis of Article 1(4)(e) of that regulation, the third country concerned maintains its visa requirement for the nationals of at least one Member State, Article 1(4)(f) of that regulation provides for the adoption by the Commission of a delegated act suspending for all nationals of that third country, for 12 months, the exemption from the visa obligation deriving from its inclusion in Annex II to that regulation and inserting in that annex 'a footnote indicating that the exemption from the visa requirement is suspended with regard to that third country and specifying the period of that suspension'.

- 38 The third stage of the mechanism for implementing the principle of reciprocity relates to the permanent reinstatement of the visa obligation, and hence the transfer of the reference to the third country concerned from Annex II to Annex I to Regulation No 539/2001, as amended, which involves the use of the ordinary legislative procedure. Thus Article 1(4)(h) of that regulation provides that, if within six months of the entry into force of the delegated act the third country in question has not lifted the visa requirement, the Commission may submit a legislative proposal for amending the regulation in order to effect that transfer. If the Commission takes such a legislative initiative, the period of suspension resulting from an act adopted on the basis of Article 1(4)(f) of that regulation is extended by six months.
- 39 The mechanism for implementing the principle of reciprocity is thus characterised by measures of increasing gravity and political sensitivity, to which instruments of different kinds correspond.
- 40 Contrary to the Commission's claims, the fact that the act adopted in the first stage of the mechanism for implementing the principle of reciprocity is classified as an implementing measure cannot, as such, have the consequence that the act adopted in the second stage of the mechanism must also be classified as an implementing measure.
- 41 As to the question whether Article 1(4)(f) of Regulation No 539/2001, as amended, confers power on the Commission to amend that regulation within the meaning of Article 290(1) TFEU, it should be recalled that, pursuant to Article 1(1) of Regulation No 539/2001, nationals of the third countries on the list in Annex I to that regulation must be in possession of a visa when crossing the external borders of the Member States. Pursuant to Article 1(2) of that regulation, nationals of the third countries on the list in Annex II to the regulation are exempt from that requirement for stays of no more than 90 days in any 180-day period.
- 42 An act adopted on the basis of Article 1(4)(f) of Regulation No 539/2001, as amended, has the effect of reintroducing for a period of 12 or 18 months a visa obligation for all nationals of a third country listed in Annex II to that regulation for stays which, in accordance with Article 1(2) of that regulation, are exempt from that obligation. For all those nationals, the act adopted on the basis of Article 1(4)(f) of that regulation thus has the effect of amending, if only temporarily, the normative content of the legislative act in question. Apart from their temporary nature, the effects of the act adopted on the basis of that provision are identical in all respects with those of a formal transfer of the reference to the third country concerned from Annex II to Annex I of Regulation No 539/2001, as amended.
- 43 The insertion in Annex II to that regulation of a footnote next to the name of the third country concerned, provided for by that provision, demonstrates, as the Advocate General observes in point 64 of his Opinion, the intention of the EU legislature to insert the act adopted on the basis of that provision in the actual body of Regulation No 539/2001, as amended.
- 44 In those circumstances, the EU legislature conferred power on the Commission to amend the normative content of that legislative act within the meaning of Article 290(1) TFEU.
- 45 That conclusion is not called in question by the Commission's argument relating to the difficulties that might arise from the need for a subsequent change to the footnote inserted in Annex II to Regulation No 539/2001, or from the characteristics inherent in a delegation of power, such as its limited period, the possibility of revocation and the power of objection of the Parliament and the Council.
- 46 Such difficulties have no bearing on whether the power conferred on the Commission in Article 1(4)(f) of Regulation No 539/2001, as amended, is intended to amend the normative content of that legislative act within the meaning of Article 290(1) TFEU, an amendment which, as follows from the case-law cited in paragraph 31 above, can only be done in the exercise of a delegated power.

- 47 The single plea in law put forward by the Commission in support of its action must consequently be rejected as unfounded.
- 48 The action must therefore be dismissed.

Costs

- 49 Under Article 138(1) 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 Parliament and the Council have asked that the Commission be ordered to pay the costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs. In accordance with Article 140(1) of the Rules of Procedure, under which Member States which have intervened in the proceedings are to bear their own costs, the Czech Republic must be ordered to bear its own costs.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the European Commission to pay the costs;**
- 3. Orders the Czech Republic to bear its own costs.**

[Signatures]