



Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 15 December 2022¹

Case C-137/21

European Parliament

v

European Commission

(Action for failure to act – Regulation (EU) 2018/1806 – List of third countries whose nationals must be in possession of visas when crossing the external borders of the Member States – List of third countries whose nationals are exempt from that requirement – Principle of reciprocity – Obligation to adopt a delegated act temporarily suspending the visa exemption for a 12-month period for nationals of the United States of America)

I. Introduction

1. By this action for failure to act, the European Parliament asks the Court to find that, by not adopting a delegated act, as provided for in point (f) of the first paragraph of Article 7 of Regulation (EU) 2018/1806,² the European Commission has failed to fulfil its obligations under the TFEU.

2. After establishing that the Commission enjoys some discretion in adopting, or not adopting, the act sought by the Parliament, I will show that that the latter's action for failure to act was initiated within a reasonable time, but that the Commission defined its position within the meaning of Article 265 TFEU, rendering that action inadmissible. In the alternative, I will examine the substance of the question of the Commission's failure to act.

¹ Original language: French.

² Regulation of the European Parliament and of the Council of 14 November 2018 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 2018 L 303, p. 39).

II. Legal context

A. Regulation (EC) No 539/2001

3. Article 1(4) of Regulation (EC) No 539/2001³ stated, before it was amended:

‘The establishment by a third country on the list in Annex II of the visa requirement for nationals of a Member State shall give rise to the application of the following provisions, without prejudice to the provisions of any agreement which the [European Union] may have concluded with that third country granting exemption from the visa requirement:

- (a) the Member State may notify the Commission and the Council in writing of the fact that the third country has established the visa requirement;
- (b) in the case of such notification, Member States’ obligation to subject the nationals of the third country concerned to the visa requirement shall be established provisionally 30 days after notification unless the Council, acting by qualified majority beforehand, decides otherwise;
- (c) provisional introduction of the visa requirement shall be published by the Council in the *Official Journal of the [European Union]* before it takes effect;
- (d) the Commission shall examine any request made by the Council or by a Member State that it submit a proposal to the Council amending the Annexes to this Regulation to include the third country concerned in Annex I and remove it from Annex II;
- (e) if, prior to the adoption by the Council of such an amendment to the Annexes to this Regulation, the third country repeals its decision to establish the visa requirement, the Member State concerned shall immediately notify the Commission and the Council in writing accordingly;
- (f) such notification shall be published by the Council in the *Official Journal of the [European Union]*. The provisional introduction of the visa requirement for nationals of the third country concerned shall be repealed 7 days after the date of publication.’

4. Article 1(1)(a) of Regulation (EU) No 1289/2013⁴ amended, with effect from 9 January 2014, Article 1(4) of Regulation No 539/2001 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:

...

³ Council Regulation 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).

⁴ Regulation of the European Parliament and of the Council of 11 December 2013 amending Council Regulation No 539/2001 (OJ 2013 L 347, p. 74).

- (d) the Commission shall, when considering further steps in accordance with point (e), (f) or (h), take into account the outcome of the measures taken by the Member State concerned with a view to ensuring visa-free travel with the third country in question, the steps taken in accordance with point (b), and the consequences of the suspension of the exemption from the visa requirement for the external relations of the Union and its Member States with the third country in question;

...

- (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;

...'

B. Regulation 2018/1806

5. Regulation No 539/2001 was repealed and replaced by Regulation 2018/1806, with effect from 18 December 2018; references to Regulation No 539/2001 are to be construed as references to Regulation 2018/1806 and to be read in accordance with the correlation table in Annex IV to the latter.⁵

6. Under Article 1 of Regulation 2018/1806:

‘This Regulation determines the third countries whose nationals are subject to, or exempt from, the visa requirement, on the basis of a case-by-case assessment of a variety of criteria relating, inter alia, to illegal immigration, public policy and security, economic benefit, in particular in terms of tourism and foreign trade, and the Union’s external relations with the relevant third

⁵ See Article 14 of that regulation.

countries, including, in particular, considerations of human rights and fundamental freedoms, as well as the implications of regional coherence and reciprocity.’

7. Article 7 of that regulation reads 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, the Member State concerned shall notify the European Parliament, the Council and the Commission.

That notification shall:

- (i) specify the date of implementation of the visa requirement and the types of travel documents and visas concerned;
- (ii) include a detailed explanation of the preliminary measures that the Member State concerned has taken with a view to ensuring visa-free travel with the third country in question and all relevant information.

Information relating to 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.

If the third country decides to lift the visa requirement before the expiry of the deadline referred to in the first subparagraph of this point, the notification shall not be made or shall be withdrawn and the information shall not be published;

- (b) the Commission shall, immediately following the date of the publication referred to in the third subparagraph of point (a) and in consultation with the Member State concerned, take steps with the authorities of the third country in question, in particular in the political, economic and commercial fields, in order to restore or introduce visa-free travel and shall inform the European Parliament and the Council of those steps without delay;
- (c) if within 90 days of the date of the publication referred to in the third subparagraph of point (a) and despite all the steps taken in accordance with point (b), the third country has not lifted the visa requirement, the Member State concerned may request the Commission to suspend the exemption from the visa requirement for certain categories of nationals of that third country. Where a Member State makes such a request, it shall inform the European Parliament and the Council thereof;
- (d) the Commission shall, when considering further steps in accordance with point (e), (f) or (h), take into account the outcome of the measures taken by the Member State concerned with a view to ensuring visa-free travel with the third country in question, the steps taken in accordance with point (b), and the consequences of the suspension of the exemption from the visa requirement for the external relations of the Union and its Member States with the third country in question;

(e) if the third country concerned has not lifted the visa requirement, the Commission shall, at the latest within 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) enters into force 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. That implementing act shall fix a date, within 90 days of its entry into force, on which the suspension of the exemption from the visa requirement is to take effect, taking into account the available resources in the consulates of the Member States. When adopting subsequent implementing acts, the Commission may extend the period of that suspension by further periods of up to six months and may modify the categories of nationals of the third country in question for which the exemption from the visa requirement is suspended.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 11(2). Without prejudice to the application of Article 6, during the periods of suspension all the categories of nationals of the third country referred to in the implementing act shall be required to be in possession of a visa when crossing the external borders of the Member States; or

(ii) submit to the committee referred to in Article 11(1) a report assessing the situation and stating the reasons why it decided not to suspend the exemption from the visa requirement and inform the European Parliament and the Council thereof.

All relevant factors, such as those referred to in point (d), shall be taken into account in that report. The European Parliament and the Council may have a political discussion on the basis of that report;

(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 10 temporarily suspending the exemption from the visa requirement for a period of 12 months for the nationals of that third country. The delegated act shall fix a date, within 90 days of its entry into force, on which the suspension of the exemption from the visa requirement 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 by 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.

...

(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 to amend this Regulation in order to transfer the reference to the third country from Annex II to Annex I;

...'

8. The United States of America appears on the ‘list of third countries whose nationals are exempt from the requirement to be in possession of a visa when crossing the external borders of the Member States for stays of no more than 90 days in any 180-day period’, which is the subject of Annex II to Regulation 2018/1806.

III. Background to the dispute

9. On 12 April 2016, the Commission presented a communication assessing the situation of non-reciprocity with certain third countries in the area of visa policy.⁶ The United States of America was one of the countries mentioned with which non-reciprocity in relation to visas still persisted.

10. The Commission subsequently presented six follow-up communications on the situation.⁷ Since the communication of December 2017, the only remaining case of non-reciprocity still concerned the United States of America, which refused to grant visa-free entry to citizens of the Republic of Bulgaria, the Republic of Croatia, the Republic of Cyprus and Romania.

11. In view of the requirement imposed by the United States of America for nationals of those Member States, the Parliament, by a resolution of 2 March 2017,⁸ called upon the Commission to act, within the meaning of Article 265 TFEU, by adopting a delegated act pursuant to Article 1(4) of Regulation No 593/2001, as amended by Regulation No 1289/2013, temporarily suspending the short-stay visa exemption for nationals of Canada and the United States of America on account of the failure to comply with the criterion of reciprocity.

12. In response to that call to act, the Commission, by a communication of 2 May 2017,⁹ defined its position on the resolution of 2 March 2017, considering that the adoption of a delegated act temporarily suspending the exemption from the visa requirement for nationals of Canada and the United States of America would be counterproductive and would not serve to achieve the objective of visa-free travel for all EU citizens.

13. On 22 October 2020, the Parliament, by way of a new resolution,¹⁰ called upon the Commission to act, within the meaning of Article 265 TFEU, for a second time, by adopting a delegated act pursuant to point (f) of the first paragraph of Article 7 of Regulation 2018/1806, temporarily suspending the short-stay visa exemption for nationals of the United States of America, in view of the visa requirement imposed by that country on Bulgarian, Croatian, Cypriot and Romanian nationals.

⁶ Communication from the Commission to the European Parliament and the Council entitled ‘State of play and the possible ways forward as regards the situation of non-reciprocity with certain countries in the area of visa policy’ (COM(2016) 221 final) (‘the communication of 12 April 2016’).

⁷ Communications from the Commission to the European Parliament and the Council as regards the situation of non-reciprocity of 13 July 2016 (COM(2016) 481 final); of 21 December 2016 (COM(2016) 816 final); of 2 May 2017 (COM(2017) 227 final); of 20 December 2017 (COM(2017) 813 final); of 19 December 2018 (COM(2018) 855 final); and of 23 March 2020 (COM(2020) 119 final).

⁸ European Parliament resolution on obligations of the Commission in the field of visa reciprocity in accordance with Article 1(4) of Regulation (EC) No 593/2001 (2016/2986(RSP)) (‘the resolution of 2 March 2017’).

⁹ Communication from the Commission to the European Parliament and the Council defining the position of the Commission following the European Parliament resolution of 2 March 2017 on obligations of the Commission in the field of visa reciprocity and reporting on the progress achieved (COM(2017) 227 final).

¹⁰ European Parliament resolution on obligations of the Commission in the field of visa reciprocity in accordance with Article 7 of Regulation (EU) 2018/1806 (2020/2605(RSP)) (‘the resolution of 22 October 2020’).

14. The Commission, by a communication of 22 December 2020,¹¹ set out once again the reasons why it did not consider it necessary at that time to adopt a delegated act within the meaning of point (f) of the first paragraph of Article 7 of Regulation 2018/1806.

IV. Procedure before the Court and claims of the parties

15. By document of 4 March 2021, the Parliament brought an action for failure to act before the Court, taking the view that point (f) of the first paragraph of Article 7 of Regulation 2018/1806 does not allow the Commission to refrain from adopting a delegated act where the conditions for adopting such an act are satisfied.

16. The Parliament claims that the Court should:

- find that, by not adopting the delegated act pursuant to point (f) of the first paragraph of Article 7 of Regulation 2018/1806, the Commission infringed the Treaty; and
- order the Commission to pay the costs.

17. The Commission contends that the action should be dismissed and the Parliament ordered to pay the costs.

18. By separate document of 18 May 2021, the Commission raised a plea of inadmissibility. The Parliament submitted its observations on that plea on 28 June 2021.

19. On 21 September 2021, the Court decided to join the plea of inadmissibility raised by the Commission to the substance of the case.

20. On the issue of admissibility, the Commission states that it duly defined its position, in response to the call to act made by the Parliament, adopting the communication of 22 December 2020 with a view to responding to that call. It argues that, by issuing a second call to act in the course of 2020 identical in content to that of 2017, the Parliament circumvented the time limit for bringing an action laid down in Article 265 TFEU, which is a mandatory time limit. It adds that, if, in line with the Parliament's interpretation, it were obliged to adopt a delegated act as early as 2017, there cannot be a second call to act based on what had been achieved via diplomatic channels or a continued failure to act justifying an action initiated within a reasonable time in the course of 2020.

21. Conversely, the Parliament considers that the Commission did not define its position within the meaning of the second paragraph of Article 265 TFEU, since it simply repeated parts of its previous communications. In addition, the Parliament explains that its second call to act is admissible because the Commission is responsible for a continued failure to act and the content of the second call differs from that of the first. It further states that, following the elections, the composition of the Parliament changed between the two resolutions.

¹¹ Communication from the Commission to the European Parliament and the Council defining the position of the Commission following the European Parliament resolution of 22 October 2020 on obligations of the Commission in the field of visa reciprocity and reporting on the state of play (COM(2020) 851 final) ('the communication of 22 December 2020').

22. As to the substance, the Parliament claims that point (f) of the first paragraph of Article 7 of Regulation 2018/1806 does not afford the Commission any leeway as regards the possibility of adopting, or of not adopting, a delegated act or as regards the choice of the time at which that delegated act suspending the exemption from the visa requirement for nationals of the United States of America must be adopted, since the conditions laid down in that provision are met. In its view, the only condition for action to be taken is the objective condition linked to the expiry of a period of 24 months following the publication of the notification provided for in point (a) of the first paragraph of Article 7 of Regulation 2018/1806. That sole condition is not called into question by point (d) of the first paragraph of Article 7 of that regulation, which cannot be viewed as a prerequisite for the adoption of the delegated act, without calling into question, *contra legem*, the obligation on the Commission to adopt that delegated act on expiry of the 24-month period and depriving the Parliament and the Council of their role in the implementation of the reciprocity mechanism by halting that mechanism at the first stage. The Parliament adds that the Commission cannot be released from its obligation to act because the Member States concerned have not requested the adoption of a delegated act.

23. The Commission argues that there is no unconditional obligation to act because the prerequisite laid down in point (d) of the first paragraph of Article 7 of Regulation 2018/1806 requires it, when considering further steps in accordance with point (e), (f) or (h) of that article, to take into account the outcome of the measures taken by the Member State concerned, the steps taken by the Commission itself in the political, economic and commercial fields in order to restore or introduce visa-free travel, and the consequences of the suspension of that exemption from the visa requirement for the external relations of the European Union and its Member States with the third country in question. That interpretation is consistent with the wording of Article 7 of Regulation 2018/1806 and with the intention of the 21 Member States expressed on the adoption of Regulation No 1289/2013, which introduced the reciprocity mechanism. It adds that diplomatic channels were successful in the case of Croatian and Polish nationals, and that none of the Member States still concerned has requested that it adopt the delegated act in question.

V. Analysis

A. Preliminary observations

24. In order to deal with the present action, I consider it necessary to address a general question of interpretation related to Regulation 2018/1806, namely the leeway available to the Commission as regards the reciprocity mechanism provided for in point (f) of the first paragraph of Article 7 of that regulation. That interpretation will help to shed light on the grounds of inadmissibility raised by the Commission relating, first, to the belated nature of the action given the existence of an earlier call to act made by the Parliament in the course of 2017 that is very similar in content to that referred to the Court by the present action and, secondly, to the existence of a definition of position by the Commission bringing to an end the procedure for failure to act.

25. As a reminder, Regulation 2018/1806, which incorporates, in this regard, the developments introduced by Regulation No 1289/2013 to Article 1(4) of Regulation No 539/2001, provides for a sliding scale of responses when a third country imposes visa requirements on the nationals of all or certain Member States, even though that country enjoys a visa exemption for its own nationals from all Member States: this is the reciprocity mechanism.

26. The first possible step consists in the adoption by the Commission of an implementing act suspending, for a renewable period of six months, the exemption from the visa requirement for certain categories of nationals of the third country concerned.¹²

27. The second conceivable measure is the adoption by the Commission of a delegated act suspending for twelve months the exemption from the visa requirement for all nationals of that third country.¹³

28. Finally, if a visa is still required by the third country concerned six months after the entry into force of that delegated act, the Commission may submit a legislative proposal to amend Regulation 2018/1806 with a view to moving the name of that third country from the list of countries exempt from the visa requirement provided for in Annex II to that regulation to the list of countries subject to the visa requirement laid down in Annex I thereto.¹⁴

29. The discretion enjoyed by the Commission to adopt the delegated act suspending for twelve months the exemption from the visa requirement for all nationals of a third country stems from the wording of point (d) of the first paragraph of Article 7 of Regulation 2018/1806, which sets out that, when considering implementing one of the measures referred to in points (e), (f) or (h) of that article, the Commission is to take into account:

- the outcome of the measures taken by the Member State concerned with a view to ensuring visa-free travel with the third country in question;
- the steps taken with the authorities of the third country in question, in particular in the political, economic and commercial fields, in order to restore or introduce visa-free travel;¹⁵ and
- the consequences of the suspension of the visa exemption for the external relations of the European Union and its Member States with the third country in question.

30. In the Commission's view, it follows from the wording of point (d) of the first paragraph of Article 7 of Regulation 2018/1806 that it enjoys some discretion, since it is required to take account of those three factors, which constitutes a prerequisite for the adoption of the delegated act suspending for twelve months the exemption from the visa requirement for all nationals of the third country in question.

31. Conversely, the Parliament considers that the application of point (f) of the first paragraph of Article 7 of that regulation is not subject to any prerequisite and that the Commission's only discretion concerns the date on which the delegated act suspending the visa exemption takes effect, a date which must take into account the resources of the Member States' consulates.

32. It would appear to me that, contrary to the Parliament's claim, it is quite clear from a reading of point (d) of the first paragraph of Article 7 of Regulation 2018/1806 in conjunction with point (f) thereof that the Commission enjoys a measure of discretion in two respects, even though point (f) of the first paragraph of Article 7 of that regulation provides that 'the Commission shall adopt a delegated act'. First, as regards the principle of using a delegated act, the Commission is

¹² Point (e) of the first paragraph of Article 7 of Regulation 2018/1806.

¹³ Point (f) of the first paragraph of Article 7 of Regulation 2018/1806.

¹⁴ Point (h) of the first paragraph of Article 7 of Regulation 2018/1806.

¹⁵ Point (b) of the first paragraph of Article 7 of Regulation 2018/1806 by reference.

required, before adopting such an act, to take into account the factors mentioned in point (d) of the first paragraph of Article 7 of that regulation, and, secondly, in relation to the date on which the delegated act takes effect, it may push back that date within a 90-day period following the act's entry into force in order to take account of the consulates' resources, as the Parliament acknowledges.

33. In the first stage of the reciprocity mechanism, point (ii) of point (e) of the first paragraph of Article 7 of Regulation 2018/1806 provides that the Commission, if it decides not to suspend the exemption from the visa requirement for certain categories of nationals for a six-month period, is to submit a report to the committee referred to in Article 11(1) of that regulation, a report in which it is to take into account all relevant factors, including those referred to in point (d) of the first paragraph of the Regulation.

34. In addition, the circumstances in which that reciprocity mechanism was drawn up – a mechanism which involves the adoption of an implementing act or a delegated act suspending the visa exemption for a certain period – during the Regulation No 539/2001 revision procedure, which was started in the course of 2011,¹⁶ also support the view that that suspension of the exemption is not automatic.

35. Those delegated or implementing acts, corresponding to the first or second stage of the reciprocity mechanism, were not provided for in the 2011 proposal; that proposal simply stated, in its grounds, that 'the initial reciprocity mechanism of Regulation [No 539/2001] already contained a certain automatism: the notification of non-reciprocity cases was not mandatory; the Member State concerned was free to decide to notify or not. But if notification took place, then Member States were obliged to impose the visa requirement for nationals of the third country concerned provisionally and automatically, 30 days after the notifications, unless the Council decided otherwise. This automatism was considered to be the weakness of the initial reciprocity mechanism and thus it has been abandoned in 2005 as being counterproductive. There is no reason to believe that it would entail more efficiency now. The current reciprocity mechanism, as modified in 2005, is considered to be overall efficient, and the cases of non-reciprocity have been reduced considerably. The remaining non-reciprocity cases are mostly cases where some Member States are considered by third countries not to meet objective criteria for visa waiver set out by these third countries in their domestic legislation'.¹⁷ Thus, during the Regulation No 539/2001 revision procedure, the Commission clearly supported maintaining such non-automatism and proposed an amendment to Article 1(4)(c) of that regulation solely to take account of the consequences of the Treaty of Lisbon.

36. It was in the course of the discussions within the Council that the idea emerged of allowing the Commission, at the request of the Member State concerned or, after a certain time has passed, at its own initiative, to adopt an implementing act suspending the reciprocal visa exemption, taking into account the consequences for the external relations of the European Union; this mirrors, in essence, the first stage of the reciprocity mechanism that was ultimately adopted.¹⁸

¹⁶ See Proposal for a Regulation of the European Parliament and of the Council 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, presented on 24 May 2011 (COM(2011) 290 final) ('the 2011 proposal').

¹⁷ 2011 proposal, p. 6.

¹⁸ See minutes of the meeting of 7 February 2012 of the 'Visa' Working Party/Mixed Committee (EU-Iceland/Liechtenstein/Norway/Switzerland), Document 6807/12, available at the following internet address: <https://data.consilium.europa.eu/doc/document/ST-6807-2012-INIT/en/pdf>, in particular proposed amendment of Article 1(4)(c) of Regulation No 539/2001 (p. 9).

37. On that occasion, the Commission restated its view that the automatic nature of the suspension of the visa exemption would be counterproductive and certain Member States expressed differing views. For instance, one Member State regarded that compromise solution as interesting because it allowed for a demonstration of solidarity between Member States towards the outside world. Another argued that a Commission report could not be a sufficient signal to the third country and that the Commission should be obliged to find a solution, whether in relation to visas or in another field such as trade or transport. A third Member State criticised the approach adopted as too long and complex.¹⁹

38. In reality, Article 1(4)(d) of Regulation No 539/2001, as amended by Regulation No 1289/2013, which requires the Commission to take certain factors into account before adopting certain measures and provides for the splitting of the reciprocity mechanism into three stages, is essentially the result of the amendments made by the Committee on Civil Liberties, Justice and Home Affairs during the Parliament's examination of the 2011 proposal,²⁰ based on its rapporteur's assessment that the functioning of the reciprocity mechanism was unsatisfactory.²¹ However, the Parliament's Committee on Foreign Affairs, whose opinion had been sought, had on 24 November 2011 taken a stance in support of the status quo on the question of the development of the reciprocity mechanism, adopting the Commission's initial position.²²

39. It is clear from those discussions that there was a wide variety of views on the reciprocity mechanism, its automatism, its stages, the nature of the acts to be adopted by the Commission, the time limits for their adoption and the possibility of opening talks in other areas.

40. In the light of those factors, attention should be paid, in the first place, to the changes to the wording of Article 1(4)(d) of Regulation No 539/2001 between the Parliament's amendment, which merely states that 'the Commission shall, when considering other steps, take into account the outcome of the measures', and the following final wording: 'the Commission shall, when considering further steps in accordance with point (e), (f) or (h), take into account the outcome of the measures'.

41. In the second place, consideration should be given to the statement by 21 Member States on the adoption of Regulation No 1289/2013, by which they stated that 'the amendment of Regulation [No 539/2001] especially concerning the reciprocity mechanism (Article 1(1)) and also the suspension clause (Article 1(2)) could have far reaching implications for the external relations of the Union and its Member States. We therefore underline that according to the relevant provisions, the relevant Union institutions are obliged, prior to any proposal or decision, to extensively scrutinise and take into account potential adverse political consequences that might

¹⁹ See minutes cited in the previous footnote to this Opinion, in particular footnote 1 thereto (p. 8).

²⁰ See Report on the Proposal for a Regulation of the European Parliament and of the Council 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 (A7-0139/2013), available at the following internet address: https://www.europarl.europa.eu/doceo/document/A-7-2013-0139_EN.html#_section1.

²¹ See explanatory memorandum to the draft European Parliament legislative resolution, included in the report cited in the previous footnote to this Opinion: 'With regard to reciprocity itself, it is clear that, despite the Commission's statements, the current system amended by Regulation 851/2005 is not effective. Even though there is no need to reintroduce the automatic mechanism originally provided for in Regulation 539/2001, it is necessary to carry out an in-depth review of the current mechanism with the aim of guaranteeing united action and solidarity among the Member States. Other considerations such as the European Union's trade relations should not jeopardise the basic pillars of the common visa policy.'

²² See opinion of the Committee on Foreign Affairs on the 2011 proposal, included in the report cited in footnote 20 to this Opinion.

arise from such proposals or decisions for the external relations, both of the Union and its Member States. This applies in particular to external relations with strategic partners. In our view, the Council should ensure that, for its part, these obligations are carried out in full.’²³

42. In addition, it is my view that the stance adopted by the Commission when it brought an action for annulment against, *inter alia*, Article 1(1)(a) of Regulation No 1289/2013, amending, *inter alia*, Article 1(4)(f) of Regulation No 539/2001,²⁴ namely that it enjoys virtually no discretion to adopt the delegated act, which should have prompted the EU legislature to opt for an implementing act, is not decisive in these proceedings.

43. First, the Court deemed that issue irrelevant to determining whether the act to be adopted by the Commission came under Article 290 TFEU or Article 291 TFEU.²⁵

44. Secondly, since the Court’s confirmation that the act adopted on the basis of Article 1(4)(f) of Regulation No 539/2001, as amended by Regulation No 1289/2013 (now point (f) of the first paragraph of Article 7 of Regulation 2018/1806), was a delegated act, the Commission has been able to exercise the discretion afforded by the EU legislature.

45. Accordingly, the pleas of inadmissibility should be examined taking into account that discretion enjoyed by the Commission.

B. Admissibility

46. The Commission has raised two pleas of inadmissibility concerning, first, the possibility of initiating a second procedure for failure to act, even though the first call to act was not followed by an action before the Court, and, secondly, the existence of a definition of position bringing the procedure to an end.

1. The possibility of a fresh call to act following an initial call that did not culminate in an action before the Court

47. First of all, it is undeniable that the resolutions of 2 March 2017 and of 22 October 2020 are identical, with the exception of the addition of two recitals²⁶ to the latter. The first recital added (recital J) to the latter resolution merely reinforces the arguments put forward in the remainder of the resolution (solidarity between Member States,²⁷ depriving the Parliament and the Council of rights²⁸), without adding any new argument. As for the second recital added (recital K), it simply recalls the Commission’s role as the guardian of the Treaties and the risk of its inaction weakening that role. That general reminder does not appear to me to be capable of being regarded as an additional argument. In both resolutions, the Parliament does indeed therefore accuse the Commission of the same failure to act on the same grounds.

²³ Statement available at the following internet address:
<https://data.consilium.europa.eu/doc/document/ST-16088-2013-ADD-1-REV-1/en/pdf>.

²⁴ See case which gave rise to the judgment of 16 July 2015, *Commission v Parliament and Council* (C-88/14, EU:C:2015:499).

²⁵ See judgment of 16 July 2015, *Commission v Parliament and Council* (C-88/14, EU:C:2015:499, paragraph 32).

²⁶ Recitals J and K, recalling the issues at stake in terms of solidarity and institutional matters raised by the Commission’s failure to act.

²⁷ See recital C of the resolutions of 2 March 2017 and of 22 October 2020.

²⁸ See recitals E to G of the resolutions of 2 March 2017 and of 22 October 2020.

48. It is irrelevant, in that regard, that the composition of the Parliament changed between the two calls to act as far as the admissibility of the action for failure to act is concerned, since that action is an institutional action to which, as such, each institution concerned is party.

49. In addition, the fact that, as I have previously stated, the Commission does enjoy some leeway does not allow the application by analogy of the case-law of the General Court finding that the Commission failed to act because it did not adopt a delegated act, even though the obligation to adopt such an act, no later than the date indicated in the legislative act, was clear, precise and unconditional.²⁹

50. In the judgment of 16 December 2015, *Sweden v Commission*,³⁰ the General Court relied on the wording of the first subparagraph of Article 5(3) of Regulation (EU) No 528/2012,³¹ which states that, ‘no later than 13 December 2013, the Commission shall adopt delegated acts ... specifying scientific criteria for the determination of endocrine-disrupting properties’, to find that ‘it must be stated that it is explicitly clear from that provision that the Commission was subject to a clear, precise and unconditional obligation to adopt delegated acts specifying scientific criteria for the determination of endocrine-disrupting properties no later than 13 December 2013’.³²

51. In the present case, paradoxically, the Parliament relies on that case-law to criticise the Commission for its inaction, but without drawing conclusions from the abandoning of, or the failure to initiate, its first procedure for failure to act, following the Commission’s response to its call to act. If the Commission had been under an obligation to act because that obligation was clear, precise and unconditional, the Parliament should have continued the procedure for failure to act and brought an action before the Court within the period stipulated in the second paragraph of Article 265 TFEU, failing which its fresh call to act could be regarded as a circumvention of that time limit.

52. Since the obligation to act is not, in the present case, clear, precise and unconditional for the reasons that I have set out, it is necessary to examine, first, whether the period of time between the two calls to act is relevant vis-à-vis the admissibility of the action and, secondly, whether a fresh call to act, similar to a previous one, was possible.

53. With regard, in the first place, to the period within which a call to act must be made, it seems necessary to provide a few reminders of the timeline.

54. The publication provided for in the third subparagraph of Article 1(4)(a) of Regulation No 539/2001, as amended by Regulation No 1289/2013 (now the third subparagraph of point (a) of the first paragraph of Article 7 of Regulation 2018/1806), took place on 12 April 2014.³³ The two-year period at the end of which the Commission may adopt a delegated act pursuant to point (f) of the first paragraph of Article 7 of Regulation 2018/1806 must be calculated from that date. Thus, from 11 April 2016, the Commission was able to adopt a delegated act.

²⁹ See judgment of 16 December 2015, *Sweden v Commission* (T-521/14, not published, EU:T:2015:976, paragraph 53).

³⁰ T-521/14, not published, EU:T:2015:976.

³¹ Regulation of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (OJ 2012 L 167, p. 1).

³² Judgment of 16 December 2015, *Sweden v Commission* (T-521/14, not published, EU:T:2015:976, paragraph 53).

³³ Information from the Commission about notifications by the Member States of cases of non-reciprocity in accordance with Article 1(4)(a) of Council Regulation (EC) No 539/2001 as amended by Regulation (EU) No 1289/2013 of the European Parliament and of the Council (OJ 2014 C 111, p. 1).

55. However, the Commission concluded its communication of 12 April 2016 by inviting the Parliament and the Council ‘to urgently launch discussions and to take a position on the most appropriate way forward, in the light of the assessment provided by this Communication. The ... Parliament and the Council are invited to inform the Commission on their respective positions not later than 12 July 2016’.

56. Thus, on expiry of the 24-month time limit, the Commission made clear that it was not considering adopting a delegated act in the immediate future and that, on the contrary, it was waiting for the Parliament and the Council to define their positions on that question before a specific date.

57. On 13 July 2016, and then on 21 December 2016,³⁴ the Commission adopted two further follow-up communications to that of 12 April 2016, in which it reported on the diplomatic efforts undertaken to secure the visa exemption for the nationals of the Member States concerned wishing to travel to the United States.

58. It was only on 2 March 2017 that the Parliament adopted the first resolution containing a call to act addressed to the Commission with a view to the adoption of a delegated act.

59. As a reminder, Article 265 TFEU does not provide for a period within which an action for failure to act must be brought between the finding of the inaction and the call to act. However, according to the case-law of the Court, the call to act must be addressed to the relevant institution within a reasonable time limit from the finding of the inaction, failing which an action will be time-barred.³⁵

60. Whilst it is quite clear that the first call to act was made within a reasonable time, it was not, however, followed by any further action by the Parliament, which settled for the communication from the Commission of 2 May 2017³⁶ recalling the diplomatic efforts made and the results achieved and stating that the adoption of a delegated act ‘would be counterproductive at this moment and it would not serve to achieve the objective of visa-free travel for all EU citizens’. Accordingly, the choice to use diplomatic channels to attempt to resolve the issue was – at the very least implicitly – approved by the Parliament. However, is that acceptance of the use of diplomatic channels to the detriment of the adoption of a delegated act definitive?

61. Taking into account solely the period of time concerned, it appears to me that, in the present case, guidance can be found in the case-law of the Court, according to which an applicant cannot be alleged to have failed to act within a reasonable time if, during the entire period in question, there were frequent contacts between the parties, with the result that the applicant had grounds for believing that the problem was going to receive a favourable solution.³⁷

62. Similarly, the General Court has allowed calls to act made 26 or 47 months after the lodging of complaints in State aid cases, thus taking the view that the Commission’s delay in investigating those complaints could not be prejudicial to the applicants in respect of time limits.³⁸

³⁴ See footnote 7 to this Opinion.

³⁵ See judgment of 6 July 1971, *Netherlands v Commission* (59/70, EU:C:1971:77, paragraph 19).

³⁶ See footnote 9 to this Opinion.

³⁷ See judgment of 16 February 1993, *ENU v Commission* (C-107/91, EU:C:1993:56, paragraph 24). In the case which gave rise to that judgment, the period of time in question was sixteen months.

³⁸ See judgment of 15 September 1998, *Gestevisión Telecinco v Commission* (T-95/96, EU:T:1998:206, paragraph 80).

63. If, for the sake of argument, the first call to act of 2 March 2017 is disregarded, a period of more than four-and-a-half years between the communication of 12 April 2016 – referred to in the Parliament’s application – and the resolution of 22 October 2020 could, in the light of the very specific circumstances of the case, be viewed as allowing an action for failure to act still to be brought. Here, those very specific circumstances would be the Commission’s choice to use diplomatic channels, the outcome of which can be assessed only after a rather lengthy period of time; the Parliament’s acceptance of that option by not bringing an action for failure to act in 2017; the holding of regular tripartite working meetings followed by positive outcomes for certain EU nationals; the regular communications from the Commission to the Parliament and the Council on the progress achieved; and the COVID-19 pandemic in 2020 which made transatlantic travel impossible.

64. In the second place, I would be inclined to agree with that notion that the action for failure to act is not time-barred, especially in a situation in which the call to act is made further to an initial call, which was not followed by the initiation of proceedings, more than three-and-a-half years beforehand in those specific circumstances.

65. The Parliament’s first attempt cannot constitute an implicit renunciation of the possibility of bringing an action for failure to act at a later stage in view of the specific context of the case because, as I have already set out, the use of diplomatic channels to resolve the question of the visa exemption is a lengthy process.

66. In fact, it would even be conceivable to go further and take as the starting point for determining whether the call to act was made within a reasonable time each new communication by which the Commission informs the Parliament and the Council that it considers the adoption of a delegated act to be counterproductive and that priority should be given to the use of diplomatic channels.

67. Accordingly, I am of the view that the second call to act was made within a reasonable time having regard to the specific features of the case as set out in point 63 of this Opinion, whether the period of time that elapsed before that second call to act is deemed to be the time since the first call to act or since the latest communication from the Commission of 23 March 2020.³⁹

2. The existence of a definition of position

68. Secondly, the question arises whether the communication from the Commission of 22 December 2020 constitutes a definition of its position for the purposes of the second paragraph of Article 265 TFEU.

69. It is settled case-law that the adoption by the institution called upon to act of a measure different from that desired by the applicant does not constitute a failure to act.⁴⁰

70. In the present case, the fact that the Commission adopted a communication advocating the use of diplomatic channels instead of the adoption of a delegated act may be akin to the definition of its position, which would render the present action inadmissible.

³⁹ See footnote 7 to this Opinion.

⁴⁰ See judgments of 1 April 1993, *Pesqueras Echebastar v Commission* (C-25/91, EU:C:1993:131, paragraph 12 and the case-law cited), and of 7 October 2009, *Vischim v Commission* (T-420/05, EU:T:2009:391, paragraph 255 and the case-law cited).

71. The Court has recognised that the institution called upon to act is not obliged to adopt an act of the Union within the meaning of Article 288 TFEU for the definition of its position to be valid and an action for failure to act inadmissible.⁴¹ With that in mind, any measure adopted by that institution may, where appropriate, be equated with a definition of its position. In the present case, subject to compliance by the communication of 22 December 2020 with the substantive conditions concerning what may constitute a definition of position, the fact that that communication is not an act provided for by primary law, as regards its form, is not sufficient to satisfy the conditions for bring an action for failure to act.⁴²

72. As far as concerns the substantive conditions relating to classification as a ‘definition of position’, the Court has adopted a particularly broad definition of what constitutes a definition of position for the purposes of the second paragraph of Article 265 TFEU. Two comments must be made in that regard.

73. First, the fact that the institution called upon to act initiates a decision-making process, without necessarily completing it, nevertheless constitutes the definition of its position and renders an action for failure to act inadmissible.⁴³ Here, the fact that the Commission adopted the communication of 22 December 2020 before potentially adopting a delegated act may be regarded as forming part of the overall process of defining a position and could, where appropriate, depending on the content of that communication, be regarded as a definition of its position for the purposes of the second paragraph of Article 265 TFEU.

74. Secondly, even a partial or indirect definition of position constitutes a definition of position for the purposes of the second paragraph of Article 265 TFEU.⁴⁴ In other words, if the institution meant to adopt an act resolves the matter only partially or indirectly, without providing a complete solution, this still constitutes a definition of its position, as the act in question may be supplemented at a later stage. Here, depending on the interpretation given to the content of the communication of 22 December 2020, it may be that, even if that communication resolves the question of the suspension of the visa exemption only indirectly or partially, without providing an exact solution, the action for failure to act is inadmissible.

75. There are, in my view, two further points specific to the present case that are significant.

76. First, after the first call to act of 2 March 2017, the Parliament settled for the communication from the Commission of 2 May 2017⁴⁵ and did not continue its proceedings for failure to act by bringing an action before the Court. It therefore acknowledged, at the very least implicitly, that that communication constituted a definition of position.

77. Secondly, there is a precedent in which an applicant brought proceedings for failure to act against the Commission for not adopting the delegated act provided for in Article 1(4) of Regulation No 539/2001.

⁴¹ See judgment of 18 October 1979, *GEMA v Commission* (125/78, EU:C:1979:237, paragraphs 17 and 18).

⁴² Cazet, S., *Le recours en carence en droit de l’Union européenne*, Bruylant, Brussels, 2012, paragraphs 101 and 102, pp. 76 to 78.

⁴³ See judgment of 26 February 2003, *CEVA v Commission* (T-344/00 and T-345/00, EU:T:2003:40, paragraphs 82 to 84).

⁴⁴ See judgment of 14 December 1962, *Acciaierie San Michele and Others v High Authority* (5/62 to 11/62 and 13/62 to 15/62, EU:C:1962:46, p. 449).

⁴⁵ See footnote 9 of the present Opinion.

78. The Commission's response, which the applicant considered to be unsatisfactory, was based on three points. First of all, the Commission argued that it had adopted a number of reports and communications in the field of the reciprocal lifting of the visa requirement for nationals of the Member States in relation to several third countries, and had also actively undertaken to guarantee such reciprocity, without any limitations, with the United States of America. Secondly, it explained that it was not responsible for the restrictions on access to the United States to which the applicant was subject and that his situation would not be improved by the lifting of the visa exemption for nationals of the United States of America. Finally, the Commission concluded that any future action for failure to act would be inadmissible since the delegated act sought was not of direct and individual concern to the applicant. The General Court held that the Commission had thus defined its position, rendering the action for failure to act brought by the applicant inadmissible.⁴⁶

79. It therefore seems clear to me that, in the present case, the Commission defined its position, within the meaning of the second paragraph of Article 265 TFEU, by its communication of 22 December 2020, namely that it was continuing to prioritise the use of diplomatic channels to secure reciprocity from the United States of America and that the adoption of the delegated act sought would be counterproductive to obtaining the visa exemption for all EU citizens wishing to travel to that country.

80. For those reasons, I consider the action for failure to act brought by the Parliament to be inadmissible.

C. The existence of a failure to act

81. I do, however, consider it necessary, in the alternative, to examine the substantive question of whether or not there was a failure to act on the part of the Commission.

82. As I have set out in points 32 to 45 of this Opinion, I am of the view that the Commission enjoys some discretion in adopting, or not adopting, a delegated act on the basis of point (f) of the first paragraph of Article 7 of Regulation 2018/1806. Exercise of that discretion is governed by the three criteria set out in point (d) of that article.

83. It is therefore in the light of those three criteria that the existence, or absence, of a failure to act on the part of the Commission must be examined.

84. The first criterion is the Commission's obligation to take into account the outcome of the measures taken by the Member State concerned with a view to ensuring visa-free travel with the third country in question.

85. The communication of 22 December 2020 is particularly detailed on that point and states that the four Member States still concerned by the visa requirement on their nationals travelling to the United States will henceforth be subject to tailored work-plans targeting the steps to be taken by each of them in order to comply with the United States Visa Waiver Program.

86. In addition, the Commission sets out the developments in terms of the visa refusal rate for each of those Member States and the security requirements which are crucial factors for the United States of America.

⁴⁶ Order of 16 October 2017, *Salehi v Commission* (T-773/16, not published, EU:T:2017:739, paragraphs 5 and 15 to 18).

87. The second criterion is the obligation to take into account the steps taken with the United States of America, in particular in the political, economic and commercial fields, in order to restore or introduce visa-free travel.

88. The Commission provides a detailed report on the three bilateral or tripartite working meetings held in 2020, pointing out that the bilateral meeting in May 2020 was a Ministerial meeting.

89. The Commission also explains in its communication of 22 December 2020 that, on account of the post-election transition period in the United States and pending the establishment of the new administration following the inauguration of the new president which was scheduled for 20 January 2021, it had to settle for drawing up, together with the European External Action Service (EEAS), a proposal for a new transatlantic plan recalling the importance of transatlantic ties.

90. In so doing, the Commission provides proof of the steps taken at the political level to secure the visa exemption for the final four Member States concerned. However, the related developments set out in the Commission's pleadings before the Court have no bearing on the assessment of whether or not there was a failure to act because they post-date the Commission's definition of its position on the Parliament's call to act.

91. The third criterion relates to the consequences of the suspension of the exemption from the visa requirement for the external relations of the European Union and its Member States with the United States of America.

92. Unlike the communication of 12 April 2016, which dealt in great detail with the consequences and the impact of the suspension of the visa exemption for EU citizens and undertakings, the communication of 22 December 2020 simply refers to that first communication in the section concerned with the background. The Commission goes on to state, in its conclusions, that it takes into account that suspending the exemption from the visa requirement for nationals of the United States of America 'would have significant negative impacts in a wide range of policy areas and sectors, as well as adversely affect trans-Atlantic cooperation and ... external relations with a strategic partner. It may also endanger visa-free travel to the United States for all other EU citizens, if the United States would follow up on indications repeatedly given that the mere adoption by the Commission of a delegated act on the suspension of the visa waiver for United States' citizens would immediately result in the United States adopting retaliatory measures, reintroducing a visa requirement for all EU citizens'. It should be observed that that threat of restoring the visa requirement is linked to the mere adoption by the Commission of a delegated act and not the entry into force of such an act, which is however conditional on an objection not being raised by the Parliament and the Council.⁴⁷

93. I am therefore of the view that the Commission has sufficiently demonstrated that it had complied with the provisions of point (f) of the first paragraph of Article 7 of Regulation 2018/1806. It follows that the action for failure to act should be dismissed on the merits if the Court considers that action to be admissible.

⁴⁷ See Article 10(7) of Regulation 2018/1806: 'A delegated act adopted pursuant to point (f) [of the first paragraph] of Article 7 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.'

VI. Conclusion

94. In the light of all the foregoing considerations, I propose that the Court should:

- declare the action inadmissible;
- in the alternative, dismiss the action;
- order the European Parliament to pay the costs.