OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 5 February 1998 *

1. In the present annulment action under Article 173 of the Treaty establishing the European Community (hereinafter 'the Treaty' or 'the EC Treaty'), the Court is invited, for the first time, to review the legality of a Council act which, on its face, was adopted under Title VI of the Treaty on European Union (hereinafter 'Title VI'). The proceedings, which relate to a Council Joint Action regarding airport transit visas, inevitably also raise the question of whether the Court has jurisdiction to decide such a dispute.

I — The contested act

2. Article 7a of the EC Treaty, originally inserted by Article 13 of the Single European Act, provides for the progressive establishment of the internal market in accordance with a number of listed provisions; the internal market is defined as comprising 'an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty'. Following the entry into force of the Treaty on European Union, the Commission submitted to the Council on 10 December 1993 two related proposals concerning the entry and movement of third-country nationals in the territory of the Member States. [1] The first was a proposal for a decision, based on Article K.3 of the Treaty on European Union, establishing the Convention on the crossing of the external frontiers of the Member States; the second was the proposal which, subject to a number of modifications, became Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (hereinafter 'Regulation No 2317/95' [2]). The proposed decision on the Convention has not been adopted.

3. Though included in the Commission's proposed regulation, airport transit visas were expressly excluded from the scope of Regulation No 2317/95. The subject of the present proceedings is the Joint Action of 4 March 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on airport transit arrangements

* Original language: English.

1 — OJ 1994 C 11, pp. 6 and 15 respectively.

2 — OJ 1995 L 234, p. 1; the Court annulled this regulation in Case C-392/95, for the Council's failure properly to consult the Parliament a second time before adopting a text which had been substantially modified compared to that on which the Parliament had given its opinion (*Parliament* v *Council* [1997] ECR I-3213).

(hereinafter 'the Joint Action'), [3] which is based on an initiative by the French Presidency of the Council in February 1995.

4. Article 1 defines 'airport transit visa' (hereinafter 'ATV') as 'the authorisation to which nationals of certain third countries are subject, as an exception to the principle of free transit laid down in Annex 9 to the Chicago Convention on International Civil Aviation, for transit through the international areas of the airports of Member States'. In accordance with Article 2(1) and (2), ATVs are to be issued by the consular services of the Member States under conditions determined by each Member State 'subject to adoption by the Council of criteria to the preliminaries for and issue of visas'. [4] Article 2(3) provides that, with effect from the entry into force of Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas (hereinafter 'the Uniform Format Regulation'), [5] Member States are to comply with that Regulation in issuing ATVs.

5. Article 3 obliges Member States to require an ATV of nationals of the third countries listed, except where such persons already hold an entry or transit visa. Member States may dispense certain categories of persons from the visa requirement, and 'in particular ... crew members of aircraft and ships, holders of diplomatic, official or service passports, holders of residence permits or equivalent documents issued by a Member State, [and] holders of visas issued by a Member State, or by a State which is a party to the Agreement on the European Economic Area'. The Member States are free to decide whether to require an ATV of nationals of third countries not included on the list, and to determine the ATV arrangements applicable to statutory stateless persons and refugees (Articles 5 and 6). Articles 7, 8 and 10 concern the notification of national measures to the other Member States and the Council and their publication in the Official Journal, reporting requirements and the entry into force of the Joint Action (1 October 1996 for 12 Member States and 1 October 1997 for Denmark, Finland and Sweden), while Article 9 provides that the Joint Action 'shall not prevent closer airport-transit harmonisation between some Member States, extending in scope beyond the joint list annexed' thereto. The Annex to the Joint Action lists the ten third countries [6] whose nationals require an ATV.

6. By an application registered at the Court on 15 May 1996, the Commission requested the Court to annul the Joint Action and to order the Council to pay the costs of the action. The European Parliament has intervened in support of the Commission, and the

3 — OJ 1996 L 63, p. 8.

4 — It appears from other language versions of this phrase that 'criteria relating to the examination of applications for, and the issue of, visas' was intended.

5 — OJ 1995 L 164, p. 1.

6 — Afghanistan, Ethiopia, Eritrea, Ghana, Iraq, Iran, Nigeria, Somalia, Sri Lanka and Zaïre.

Kingdom of Denmark, the French Republic and the United Kingdom of Great Britain and Northern Ireland have intervened in support of the Council.

II — Analysis

(a) The jurisdiction of the Court

7. The United Kingdom submits that the action is 'plainly inadmissible' since it seeks the annulment of a measure purportedly adopted under Article K.3 of the Treaty on European Union, whereas the jurisdiction of the Court is limited to reviewing 'measures whose legal base is an article of the EC Treaty'. The Council and the other Member States have, on the other hand, accepted the jurisdiction of the Court, but the issue merits attention since it raises for the first time the relationship between the exercise of the Court's powers under the EC Treaty and the adoption of an act under provisions of the Treaty on European Union which are carefully removed from its scrutiny. In the event, I believe the matter can be resolved on the basis of the existing case-law and in the light of the provisions of Articles L and M of the Treaty on European Union.

8. Article L(c) provides, in effect, that '[the] provisions of the Treaty establishing the European Community ... concerning the powers of the Court of Justice ... and the exercise of those powers shall apply ... to ... Articles L to S' of the Treaty on European Union. Article M states that, apart from the provisions of the Treaty on European Union which expressly amend the Community Treaties, 'nothing in [the Treaty on European Union] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them'. The power of judicial review which the Court enjoys under the jurisdictional clauses of each of the Community Treaties is extended by Article L in conjunction with Article M, so as to ensure respect for the provisions of those Treaties. The Court must therefore be able to determine whether anything in 'this Treaty', being the Treaty on European Union, and including acts adopted thereunder, does 'affect' the Community Treaties. Indeed, in my view, Article M was inserted in the Treaty on European Union with the very purpose of ensuring that, in exercising their powers under Titles V and VI of that Treaty, the Council and the Member States do not encroach on the powers attributed to the Communities under the respective founding and amending Treaties.

9. It follows, in my view, from Article M that, however clear and unambiguous they may be, the provisions of Title VI may not be applied so as to restrict in any way the scope of the provisions of the EC Treaty, interpreted in accordance with the normal canons of construction of Community law. In particular, I do not agree with Denmark's

suggestion that the scope of application of each of the relevant provisions has 'movable boundaries', at least in so far as this may imply that the Council would have a discretion to resort to Article K.3 even when the conditions for the application of Article 100c of the Treaty were met.

10. The next question which arises is the extent to which the Court, when entertaining an annulment action such as the present, and, more particularly, when considering the issue of admissibility, may consider the content and scope of the contested act, in spite of the restrictions imposed on its power of interpretation. The Commission has relied upon the proviso in Article K.1 that the exercise of the Union's powers under that provision is 'without prejudice to the powers of the European Community'; the Council has expressly invited the Court, as it did in *Parliament* v *Council*, [7] to adopt a 'comparative reading' of the provisions of the respective Treaties, while the United Kingdom has submitted that 'the control on [ATV holders] is clearly for a purpose which falls within the wording of Article K.1 TEU'. In my opinion, the Court cannot rule authoritatively on any of these matters. A finding that the contested act is illegal can only be based on a breach of Article M (interpreted along with the relevant provision of a Community Treaty or principle of Community law). The adoption of a comparative reading would imply a direct substantive power to interpret Title VI which the Court does not enjoy. Nor can the Court authoritatively identify the purpose of Article K.1 of the Treaty on European Union; in *Grau Gomis and Others*, where a request for a preliminary ruling which was clearly intended to obtain a ruling on the obligations of the Member States under Article B of the Treaty on European Union was dismissed as inadmissible, the Court held that, by virtue of Article L, it 'clearly has no jurisdiction to interpret that article in the context of such proceedings'. [8]

11. These limitations on the Court's jurisdiction, however, do not deprive it of power to consider the content of the contested act for the purpose of the present action. The situation is to some extent analogous to that which arose in *Hurd* v *Jones*, where the Court had to decide, *inter alia*, whether, in interpreting the provisions of Article 3 of the Act concerning the conditions of accession and the adjustments to the Treaties of 22 January 1972 (hereinafter the '1972 Act of Accession'), it had jurisdiction, pursuant to Article 177 of the EEC Treaty and Article 150 of the EAEC Treaty, to interpret the Statute of the European School, the Protocol on the setting-up of the European schools and certain implementing decisions. Article 3 of the 1972 Act of Accession provides that the new Member States 'undertake to accede ... to all other agreements concluded by the original Member States relating to the functioning of the Communities

7 — Case C-392/95, cited in footnote 2 above, paragraph 12 of my Opinion.

8 — Order in Case C-167/94 [1995] ECR I-1023, paragraph 6. See, however, Opinion 2/94 where the Court cited, *inter alia*, Article F(2), the fifth indent of Article J.1(2) and Article K.2(1) of the Treaty on European Union to show the importance attached to respect for human rights in the Community context: [1996] ECR I-1759, paragraph 32 of the Opinion.

or connected with their activities'. Noting that the provisions concerning the European Schools were neither Treaty provisions nor acts of the institutions, the Court held that it had no jurisdiction to interpret those provisions by way of a preliminary ruling. None the less, by virtue of its jurisdiction to interpret Article 3 it was empowered to 'interpret the measures covered by that provision only in order to determine its scope, and not for the purpose of defining Member States' obligations under such measures'. [9] By the same token, I consider that the Court may interpret acts purporting to be adopted under Title VI of the Treaty on European Union, in order to determine whether or not they deal with matters which more properly fall within the Community sphere of competence as determined by Article M. In so acting, the Court is neither interpreting provisions of the Treaty on European Union which are outside its jurisdiction nor deciding whether acts are validly adopted thereunder. It is considering such acts only in their relation to the Community Treaties, where the Court's powers are incontestable.

12. The jurisdiction of the Court to entertain the present annulment action is, in my view, not in doubt, nor is it affected by the fact that the contested act was, on its face, adopted pursuant to Title VI of the Treaty on European Union. The Commission claims, in effect, that, though ostensibly adopted within the framework of the Treaty on European Union, that act was, in reality, an exercise by the Council of a Community competence within Article 100c of the EC Treaty. Two general propositions emerge from the case-law. Firstly, neither the Member States nor the institutions of the Community may take action in respect of a matter within exclusive Community competence outside the Community framework. Secondly, in its judicial review of such claimed action, the Court adopts what Advocate General Jacobs has called a 'functional approach', [10] preferring to look at content and effect rather than form.

13. This line of cases begins with *Commission* v *Council* (the '*ERTA*' case), [11] which concerned proceedings within the framework of the Council coordinating Member State negotiations under the auspices of the United Nations Economic Commission for Europe of the European Road Transport Agreement. The Court, having reviewed the Community powers at their current stage of development, observed that they excluded 'the possibility of concurrent powers on the part of the Member States, since any steps taken outside the framework of the Community institutions would be incompatible with the unity of the Common Market and the uniform application of Community law'. [12] It rejected the argument of the Council that the coordination of policies 'imposed no obligations and did not modify any legal position', since 'Article 173 treats as acts open to review by the Court all measures

9 — Case 44/84 [1986] ECR 29, paragraphs 21 and 22.

10 — Joined Cases C-181/91 and C-248/91 *Parliament* v *Council and Commission* [1993] ECR I-3685, Opinion at paragraph 21.

11 — Case 22/70 [1971] ECR 263.

12 — Loc. cit., paragraph 31.

adopted by the institutions which are intended to have legal force'. [13] The action in question was treated, for purposes of the admissibility of the review, as an action of the Council.

14. Similar reasoning was applied by the Court in dealing with the admissibility of the Parliament's annulment action against the Council in '*Bangladesh I*', where, by contrast, Member State action was in issue. [14] There the contested act was a decision taken at a Council meeting to grant special aid to Bangladesh following a violent cyclone which had struck the country in April 1991; the decision subsequently published in a Council press statement was described as having been taken by '[the] Member States meeting in the Council'. The Parliament had argued that the decision was legally a decision of the Council. The Court first noted that 'acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court'. It continued that 'it makes no difference in this respect whether such an act is called an "act of the Member States meeting in the Council" or an "act of the representatives of the Governments of the Member States meeting in the Council"'. However, the Court recalled its ruling in the *ERTA* case 'that an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects', and went on to hold that:

'[it] is not enough that an act should be described as a "decision of the Member States" for it to be excluded from review under Article 173 of the Treaty. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council.

It follows that the assessment of the admissibility of the application is bound up with the assessment to be made of the complaints levelled against the contested act.' [15]

15. The Court adopted a similar position in the '*European Development Fund*' case, where the contested act had, like the Joint Action challenged in the present proceedings, indubitably been adopted by the Council; [16] as in the present case, the Council maintained it was acting outside the framework of the Treaty. The Court held that an action under Article 173 'against an act of an institution intended to have legal effects is

13 — Loc. cit., paragraph 39.

14 — Joined Cases C-181/91 and C-248/91, cited in footnote 10 above; '*Bangladesh I*' refers to the Parliament's action against the Council.

15 — Ibid., paragraphs 12 to 15.

16 — Case C-316/91 *Parliament* v *Council* [1994] ECR I-625.

admissible irrespective of whether the act was adopted by the institution pursuant to Treaty provisions'. [17] To accord acts purporting to be adopted under Title VI immunity from review on the sole basis of their denomination would, in my view, run contrary to the reasoning adopted by the Court in these cases and deprive Article M of its useful effect.

16. In providing that the Court 'shall review the legality of ... acts of the Council', Article 173 clearly intended to confer on the Court jurisdiction only in respect of Council acts adopted within the scope of the Treaty. However, in order to exercise this jurisdiction, the Court is, in my view, not merely empowered but obliged, in accordance with Article 164 of the Treaty, to rule on whether a contested Council act is within the scope of the Treaty or not.

17. It is common ground between the parties that the Joint Action is a binding instrument which is intended to have legal effects. In my view, the Council's citation of Article J.3(4) of Title V to illustrate this proposition is far from conclusive, as this provision is limited on its face to 'joint actions in matters covered by the foreign and security policy'. On the other hand, if the contested act had been adopted on the basis of Article 100c(1), as the Commission contends it should have been, then the terms in which it is phrased leave no doubt as to the intention to create binding obligations. I might add that, in any case, the Court may not in such circumstances apply more than a prima facie test regarding the character of the instrument; it could not at the stage of admissibility, for example, decide definitively that an act is binding, if on the merits it were to hold that it fell outside the scope of the Community Treaties.

18. I am therefore of the opinion that the Court has jurisdiction in the present proceedings, and that the admissibility of the Commission's action can only be examined in the light of the merits of the case.

(b) Merits

19. Before considering the merits of the dispute, it might be useful to attempt to identify the reasons the Community was granted the limited competence it enjoys by virtue of Article 100c of the Treaty, when policy matters concerning nationals of third countries generally fall outside the ambit of its regula-

17 — Ibid., paragraph 9.

tory powers. [18] Put at its simplest, the problem arises from the inevitably close relationship between the creation of an internal market, which seeks to allow the free movement of persons in a Community 'without internal frontiers', and the regulation of the entry and movement of third-country nationals in the territory of the Member States. In particular, the operation by Member States of visa controls on the movement of third-country nationals is, in practical terms, irreconcilable with the complete abolition of internal border controls. On the one hand, the maintenance of controls, designed to restrict the entry and movement of third-country nationals, would necessarily affect the free movement of Community nationals. [19] On the other hand, their abolition would render it impossible for any one Member State to enforce visa requirements. It is well known that the policies of the Members States in this regard, as they stood at the time the Treaty on European Union was concluded, varied greatly.

20. The Treaty on European Union sought to confront this situation by, *inter alia*, attributing to the Community legislative competence to determine a common list of third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States. The existence of such a common list should reduce the possibility of circumvention of visa requirements, and to that extent facilitate the relaxation and possible abolition of internal border controls. Given the potential importance of such a measure for the free movement of persons within the internal market, and the desirability of a rapid decision, Article 100c(3) provides that after 1 January 1996 the Council may act by a qualified majority; it is this voting requirement which will govern the adoption of the regulation to replace Regulation No 2317/95 which, as noted above, has been annulled.

21. The central question to be considered in this case is the meaning of the phrase 'crossing the external borders of the Member States' in Article 100c(1) of the Treaty. This, in effect, determines whether the ATV falls within the scope of Article 100c(1). If, as the Council maintains, this phrase only refers to crossing a border control point, and an ATV does not permit such a crossing, then the conditions for recourse to Article 100c(1) are not fulfilled, and the Commission must fail. As I have noted elsewhere, this provision must be interpreted in the light of its wording, scheme and purpose, and having regard

18 — In the '*migration policy*' cases, the Court recognised that, though only to the extent that it 'concerns the situation of workers from non-member countries as regards their impact on the Community employment market and on working conditions', migration policy was capable of falling within the scope of Article 118 of the Treaty (Joined Cases 281/85, 283/85 to 285/85 and 287/85 *Germany and Others* v *Commission* [1987] ECR 3203, paragraph 23).

19 — The compatibility with Article 7a of the Treaty of such internal border controls and the competence of the Community to require their complete abolition are matters of some dispute (see, in particular, Case C-445/93 *Parliament* v *Commission*, Order of 11 July 1996, not published in the ECR), though these questions are not directly germane to the present proceedings.

to the system and objectives of the Treaty. [20] I will, however, consider a number of textual references regarding visas, before returning to the interpretation of the Treaty.

22. Neither the wording of Article 100c(1) itself nor the language used in other instruments appears to me to be conclusive. According to the Commission 'crossing the external borders' means physical entry onto the territory of the Member State concerned, while the Council would restrict it to the crossing of a border control point. It seems to me that the terminology employed in the various instruments cited is not always consistent. The Council in particular has relied heavily on the text of the Joint Consular Instruction adopted by the Contracting Parties to the Schengen Convention, defining in particular the conditions for the issue of a uniform visa which is valid for the territory of all the Contracting Parties. Paragraph 2.1 of this text defines the term 'uniform visa' as being the authorisation or decision of a Contracting Party affixed to a passport, travel ticket or other valid document which allows the holder to cross borders, yet it includes within the scope of this term the ATV, which, according to paragraph 2.1.1, does not allow the holder to accede to the national territory of the country concerned. It seems to me, however, that in the present proceedings the Council is defending a definition of ATV which, as regards the terminology used, is at variance with that which arises from the Consular Instruction, even if this document were recognised as having some interpretative value, in that the ATV would, according to the Council, allow the holder to accede to the national territory of the country concerned but not to cross borders.

23. In Article 5 of the Uniform Format Regulation the Council defined 'visa' to include 'an authorisation ... required for entry into its territory with a view to ... transit through the territory or airport transit zone of that Member State or several Member States'. It was thus using the expression 'entry into [the] territory' of a Member State to mean physical entry.

24. Two aspects of border crossing must in my view be distinguished. The first is that of entering the territory of a country in the physical sense, without necessarily crossing a border control point; the second is that of entering the territory in the legal sense of crossing a border control point. On first impression a visa requirement relates primarily to the holder's legal rights of entry rather than his geographical location. Visa policy as generally understood is a means of controlling the crossing of legal, rather than physical, borders. In the case of air travel, the country of destination may not even be

20 — See my Opinion in Case C-392/95, cited in footnote 2 above, at paragraph 36.

able to prevent persons from physically entering their territory; [21] a visa requirement, however, enables it to refuse legal entry at the border control point.

25. It is in this sense that 'visa' has been understood in Community law to date. Council Directive 68/360 of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families [22] at Article 3(2) provides that '[no] entry visa or equivalent document' may be imposed on workers covered by Article 3(1) of the Directive when entering the territory of a Member State. The Court, in *Regina* v *Pieck*, and again in *Commission* v *Belgium*, interpreted this expression as covering 'any formality for the purpose of granting leave to enter the territory of a Member State which is coupled with a passport or identity card check at the frontier, whatever may be the place or time at which that leave is granted and in whatever form it may be granted'. [23] The coupling in this passage of the formalities of entry with incidental physical entry onto the territory of the Member State is persuasive of the view I take, that a visa, for the purposes of Article 100c(1), is an authorisation for the holder to pass a border control and not merely the geographical borders of a Member State.

26. Similarly, Article 5 of Regulation No 2317/95 [24] provides that: '"visa" shall mean an authorisation given or a decision taken by a Member State which is required for entry into its territory with a view to ... an intended stay ... of no more than three months in all [or] transit through the territory of that Member State or several Member States, except for transit through the international zones of airports and transfers between airports in a Member State'. Once again, it is clear that the visa envisaged by this Regulation is a legal document allowing passage through a border control point.

27. Furthermore, the meaning of the phrase 'crossing the external borders of the Member States', which was generally accepted at the time of the drafting of the Treaty on European Union, was precisely that on which the Council now relies. Thus, in submitting its proposal for a Council Decision establishing a Convention on controls on persons crossing external frontiers, [25] the Commission proposed that the 'external frontiers' of a Member State be defined as either its land or maritime frontiers *or* its airports or seaports. As airports can be hundreds of kilometres

21 — The Council explained at the oral hearing that in any case the ATV requirement was enforced by imposing fines on the airline responsible for the physical entry without an ATV, rather than against the individual concerned.

22 — OJ, English Special Edition, First Series 1968 (II), p. 485.

23 — Case 157/79 *Regina* v *Pieck* [1980] ECR 2171, paragraph 10; Case 321/87 *Commission* v *Belgium* [1989] ECR 997, paragraph 9.

24 — While it is true, as was observed at the oral hearing, that this Regulation has been annulled, its terms can assist the interpretation of Article 100c(1).

25 — Cited in footnote 1 above.

from the territorial border of a given Member State, it follows that, in respect of air travel formalities, the concept of legally crossing borders does not correspond to the geographical crossing of territorial boundaries. This is confirmed by several other provisions of the same proposal, notably Article 2(1), which deals expressly with 'Crossing external frontiers'; it provides that '[all] persons crossing the external frontiers shall do so at authorised crossing points permanently controlled by the Member States'. It also follows from this draft provision, as well as from Articles 3 and 4 of the same proposal, that, contrary to the view taken by the Commission and the Parliament in the present proceedings, the notion of legally crossing external frontiers, which is the form of crossing to which Article 100c(1) refers, has generally been treated as being co-terminous with crossing a border control point.

28. The Council refers to the legislation of the United Kingdom as illustrative of the practice of the Member States in this regard. Section 11(1) of the Immigration Act 1971 provides that '[a] person arriving in the United Kingdom by ... aircraft shall for the purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at [an airport] shall further be deemed not to enter the United Kingdom so long as he remains in any such area (if any) at the [airport] as may be approved for this purpose by an immigration officer'. The Council further argues that a person who is refused permission to enter at a border control post is not thereby considered to be illegally present on the territory of the State in question.

29. The Parliament describes the Council's approach as being based on a fiction, while the Commission considers that the United Kingdom legislation actually supports its thesis, in that, in the absence of this express exception, the person disembarking from an aircraft would be considered present on the territory of the United Kingdom. Of course, the legislation of a single Member State is of very limited value in interpreting a Treaty provision. The relevance of the United Kingdom legislation lies only in the fact that it exemplifies how entry onto the national territory may be treated as a legal concept distinct from the physical act of crossing a boundary, particularly in the case of air travel. If this is a fiction, then it is one of a legal character, that is, that the concept of crossing a border must be interpreted in accordance with legal, and not necessarily geographical or physical, standards.

30. As regards the general scheme of the Treaty, Article 100c is to be found in Chapter 3 ('Approximation of laws') of Title V ('Common rules on competition, taxation and approximation of laws'). Unlike the immediately preceding Articles 100a and 100b, it is not mentioned expressly in Article 7a as being one of the provisions in accordance with which the internal market

would progressively be established by 31 December 1992, presumably because Article R.2 of the Treaty on European Union envisaged that Treaty coming into force only after that date. In its explanatory memorandum to the proposal for a Regulation determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, [26] the Commission took the view that Article 100c 'has been placed squarely amongst the internal market provisions of the Treaty' and claimed that '[the] necessary inference from this is that it is designed to contribute towards achieving the free movement of persons within the Internal Market, as specified in Article 7a EC'. This view is echoed in its pleadings in the present proceedings.

31. As I will explain shortly, I agree that Article 100c is designed to contribute to the establishment of the internal market, but this fact does not, in my opinion, support the position the Commission has taken in the present case. Accepting that Article 100c should be interpreted in the light of Article 7a of the Treaty, as the Commission suggests, then measures adopted on the basis of Article 100c should in some way be designed to contribute to the establishment of the free movement of persons *within* the internal market. The Commission has not shown how the adoption by the Community of a measure regulating the necessarily brief transit through the international zone of a Member State airport of nationals from a small group of third countries would so contribute. At the oral hearing the Commission argued that, whether or not the travellers crossed the border control point, they were literally in the internal market, on the grounds that the international zone of airports was part of the internal market, because the survival of duty-free shops depended on Community regulation. This seems to me to be a very slender basis for maintaining that the transit between flights effected by ATV holders partakes of the free movement of persons as envisaged in Article 7a. The transient presence of such holders is only minimally connected with any commercial activity in the Member State. Unless it is shown that ATV holders cross external borders, in the sense of legally crossing a border control point with a view to moving within the internal market, I fail to see how a measure establishing a common regime for ATVs can contribute to the attainment of this objective.

32. In my view, Article 100c(1) cannot be interpreted without regard to Article 3(d) of the Treaty, which includes among the activities of the Community: 'measures concerning the entry and movement of persons in the internal market as provided for in Article 100c'. The Commission seeks to minimise the interpretative value of this provision by describing it as merely 'programmatic in character', while Article 100c is described as 'precise and detailed'. This ignores the fact that Article 3(d), alone among the provisions listing Community activities in Article 3, refers to a specific legal

26 — COM(93) 664 final, p. 40.

basis. Since the pursuit of all the enumerated activities is, furthermore, subject to the introductory proviso, 'as provided in this Treaty', the reference to Article 100c appears designed to preclude reliance on any other legal basis, and, in particular, Article 235, to achieve the objective of the entry and movement of third-country nationals in the internal market. The expression 'entry and movement' in Article 3(d) is a single term, where the two words are to be construed conjunctively and not disjunctively. The measures envisaged by this provision, and, accordingly, by Article 100c, are also related to the establishment of the single market.

33. According to the well-established case-law of the Court, Article 3 may be relied upon to interpret the scope of the more specific provisions under which the Community carries out the activities listed therein. Thus in *Levin*, to take an example in the area of the free movement of persons, in order to decide on the scope of the terms 'worker' and 'activity as an employed person', used in Article 48 of the Treaty and the relevant legislative provisions respectively, the Court took into consideration the objectives of the Treaty as set out in Articles 2 and 3. [27] I also agree with the view expressed by the former President of the Court, Baron Mertens de Wilmars, writing extra-judicially, that 'the most obvious function of Article 3 is to serve — on the same basis as the other preliminary provisions but with a particular relevance — as an instrument of the interpretation of the other provisions of the Treaty'. [28]

34. In my opinion, the addition of a new paragraph (d) to Article 3 of the Treaty demonstrates that the powers of the Community to establish 'an internal market' to which Article 3(c) refers do not encompass 'measures concerning the entry and movement of persons in the internal market', which according to the text of Article 100c applies only to third-country nationals; if such measures were held to be within the scope of paragraph (c), the inclusion of paragraph (d) would be otiose. The two matters are dealt with separately: the abolition of obstacles to the free movement of persons already within the internal market is covered by Article 3(c) and those Articles cited in Article 7a, while the specific problem of the entry and movement of third-country nationals is to be dealt with in accordance with Articles 3(d) and 100c. I therefore conclude that the expression 'crossing the external borders of the Member States' in Article 100c, interpreted in the light of Article 3(d), must be taken as referring to the entry onto the territory of a Member State by crossing a border control point, rather than the mere physical entry for the purposes of onward travel.

27 — Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035, paragraph 15.

28 — Commentary on Article 3 in Constantinesco et al., *Traité instituant la CEE Commentaire article par article*, Economica, Paris, 1992, p. 41 (free translation).

35. It remains to be considered whether the ATV regime established by the contested Joint Action falls within the scope of Article 100c(1) as I have interpreted it, with a view to assessing whether that action, having been adopted outside the Treaty, should be annulled.

36. The European Parliament has referred to the Court's case-law on the choice of legal basis for legislative measures as establishing that this choice is governed in particular by the material content and the objectives of the measure in question. This seems to me to be the correct approach to establishing whether the contested act falls within the Community's competence under Article 100c(1) of the Treaty. Both the Commission and the Parliament have sought to show that the objectives of the ATV regime are the same as those of the regime for ordinary and other transit visas. At the oral hearing, the Commission listed a number of objectives which a Member State's visa policy might seek to attain, such as preventing the entry onto their territory of aliens who might present a danger to public order or national security, or undertake irregular employment, or submit manifestly unacceptable requests for asylum. For its part, the Council has identified the objective of the Joint Action as being to avoid the risk that nationals of certain third countries take advantage of their presence in the international zone of a Member State airport in order to submit abusive requests for asylum, or even enter the territory illegally by avoiding immigration control at a border post.

37. While it is possible to imagine a case where the stated objectives of a measure do not in fact match those which arise from an examination of its material content, failing any contrary indication the recitals in the preamble are generally a sufficiently reliable guide to the objectives a measure seeks to achieve. In the present case, it arises from the first recital that the Joint Action seeks to regulate, at least in part, 'the conditions of entry and movement by nationals of third countries into and within the territory of Member States', and to combat 'unauthorised immigration by nationals of third countries'. [29] The second recital notes in this regard that 'the air route, particularly when it involves applications for entry or *de facto* entry, in the course of airport transit, represents a significant way in with a view in particular to illegally taking up residence within the territory of the Member States'. The fourth recital notes that 'the harmonisation of Member States' policies in this field is [in] accordance with the objectives of security and control of illegal immigration of the Treaty'. [30]

29 — For the reasons given in paragraph 10, the fact that both of these expressions appear in Article K.1 is not relevant to the present action.

30 — The fourth recital also mentions that such harmonisation would 'contribut[e] to harmonising the conditions of competition between airlines and airports in the Member States'. Any such effect would at best be ancillary, and no party to the present proceedings has ventured to argue that it would bring the matter regulated within the scope of the EC Treaty.

38. It has not been shown, in my view, that the objectives of the Joint Action imposing the ATV requirement, as they arise from the preamble thereto, differ substantially from those which motivate the imposition of the requirement to possess the other types of visa which incontestably do fall within the scope of Article 100c. These objectives are in turn confirmed by the second subparagraph of Article 2(2) of the Joint Action, which requires the consular services of the Member States issuing ATVs to 'ascertain that there is no security risk or risk of illegal immigration'. I am therefore of the opinion that the stated objectives of the ATV do not demonstrate that it does not fall within Article 100c.

39. The principal parties to the present action, however, provide contrasting interpretations of the material provisions of the Joint Action. The Commission argues that the Joint Action is limited to drawing up a list of third countries whose nationals must present an ATV, which is merely a specific type of visa, before crossing the external border of a Member State. The Council contends that the scope of the Joint Action extends beyond the mere establishment of the list of third countries concerned.

40. The main obligation imposed on the Member States is that contained in Article 3, namely that they require the nationals of the third countries listed in the Annex to the Joint Action to possess an ATV in order physically to enter their territory. The list of optional exemptions provided in Article 4 merely clarifies the scope of application *ratione personae* of Article 3. These provisions must, however, be read in the light of Articles 1 and 2, which lay down other substantive obligations. Thus, as noted above, Article 2(2), while leaving the Member States free to determine the conditions of issue of ATVs, none the less requires, as a minimum, that they ensure that the applicant present no security risk or risk of illegal immigration and that, on the basis of the documentary evidence presented, the applicant is entitled to enter his country of final destination. Furthermore, this provision both enjoins and empowers the Council to adopt criteria relating to the examination of applications for, and the issue of, visas. While there is some force in the Commission's view that many of the provisions of the Joint Action are either essentially declaratory in character or merely ancillary to the principal obligations, I do not consider this to be material to the question of whether the Joint Action falls within the scope of Article 100c(1).

41. More significantly, Article 1 of the Joint Action provides a common definition of 'airport transit visa' as 'the authorisation to which nationals of certain third countries are subject ... *for transit through the international areas of the airports of Member States*' (emphasis added). The instrument thus defined does not permit the holder to enter the territory of the Member State in the legal sense of crossing a border control point, or to move freely within that territory. It follows, in my view, that the ATV is not a visa for the purposes of Article 100c(1) of the Treaty.

42. There is some dispute between the Commission and the Council as to whether an ATV holder may transfer between international airports situated in the territory of the same Member State. While the Commission contends that he may, the Council, supported on this point by France, argues that, in the exceptional case of an ATV holder being obliged to transfer between airports, he will be obliged either to procure an ordinary transit visa or other authorisation to enter the national territory, or to be escorted between the airports by the officials of the border control service.

43. Nothing in the Joint Action, and in particular in Article 1, suggests that the holder of an ATV may transfer between the airports of a Member State. The explicit exclusion of transit between airports in the definition of 'visa' provided by Article 5 of Regulation No 2317/95, adopted more than five months before the Joint Action, would appear to indicate that the omission of transfers between airports from the ATV regime was deliberate. It therefore follows that third-country travellers in this situation are not covered by either the Regulation or the Joint Action. This point does not seem to me to be decisive in any case. While the traveller transferring between airports in a single Member State might well be present on the territory for a longer period than one who remains in the international zone of one airport, he still does not enjoy the benefits of the free movement of persons within the internal market, or even within the host Member State. Even if it were to be shown that the ATV covered this category of air traveller, this would not suffice to bring the ATV within the scope of Article 100c.

44. It was contended, particularly at the oral hearing, that the Council's position in the present case was inconsistent with the definitions of 'visa' contained in the Uniform Format Regulation and in Regulation No 2317/95. As noted above, Article 5 of the former Regulation includes transit through the international zone of airports within its scope, though the Council is now arguing that this is outside the scope of Article 100c(1). The Council submits that this difference of definition is justified by the different wording of Article 100c(1), which explicitly applies only to visas required when the holder is 'crossing the external borders of the Member States', and Article 100c(3), the legal basis of the Uniform Format Regulation, which refers to visas without further specification. On the other hand, the explicit exclusion of air transit from the scope of the definition of visa in Article 5 of Regulation No 2317/95, according to the Council's position in this case, would strictly speaking be superfluous.

45. In my view, the interpretation of Article 100c(1) as it arises from its wording, scheme and purpose cannot be overturned by any possible inconsistencies which might

appear from its application in previous legislative acts which, furthermore, are not being challenged in the present proceedings.

46. I am therefore of the opinion that the Council is correct in maintaining that the ATV does not entitle the holder to 'cross the external borders of the Member States', and that the subject-matter of the contested Joint Action is consequently outside the scope of Article 100c(1). In these circumstances, the Commission's action is inadmissible, as the Court has no jurisdiction under Article 173 of the Treaty to review the legality of a Council act which falls outside the sphere of the Community's competence.

III — Conclusion

47. In the light of the foregoing, I recommend that the Court:

(1) Dismiss the application as inadmissible;

(2) Order the Commission to pay the costs of the action;

(3) Order the European Parliament, the Kingdom of Denmark, the French Republic and the United Kingdom of Great Britain and Northern Ireland to pay their own costs.