JUDGMENT OF THE COURT
10 June 1997 *

In Case C-392/95,

European Parliament, represented by Johann Schoo, Head of Division at the Legal Service, and José-Luis Rufas Quintana, Principal Administrator in the same service, acting as Agents, with their address for service in Luxembourg at the General Secretariat, Kirchberg,

applicant,

v

Council of the European Union, represented by Jean-Paul Jacqué, Director of the Legal Service, and Michael Bishop, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendants,

supported by

French Republic, represented by Catherine de Salins, Deputy Director at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Anne de

* Language of the case: French.

Bourgoing, Special Adviser in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

intervener,

APPLICATION for annulment of 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 frontiers of the Member States (OJ 1995 L 234, p. 1),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini and J. L. Murray (Presidents of Chambers), P. J. G. Kapteyn (Rapporteur), C. Gulmann, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann, M. Wathelet and R. Schintgen, Judges,

Advocate General: N. Fennelly,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 4 February 1997,

after hearing the Opinion of the Advocate General at the sitting on 20 March 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 15 December 1995, the European Parliament brought an action under Article 173 of the EC Treaty for annulment of 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 (OJ 1995 L 234, p. 1, hereinafter 'the Regulation').

2 The Regulation is based on Article 100c of the EC Treaty and originated in a proposal for a regulation determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States which the Commission submitted to the Council on 10 December 1993 (OJ 1994 C 11, p. 15).

3 That proposal was worded as follows:

'The Council of the European Union,

Having regard to the Treaty establishing the European Community, in particular Article 100c thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Whereas Article 100c of the Treaty requires the Community to determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States; whereas its place in the Treaty shows that this Article forms an integral part of the provisions relating to the internal market;

Whereas, according to the third paragraph of Article 3b of the Treaty, action taken by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty; whereas the mutual recognition by Member States of visas issued by each other, which is necessary to give full effect to Article 100c, is an essential accompanying measure for the achievement of the objective set out in Article 7a as regards the free movement of persons;

Whereas third countries should be classified according to their political and economic situation and according to their relations with the Commission and the Member States, taking into account the degree of harmonization achieved at Member State level;

Whereas the purpose of Article 100c is to harmonize the regulations and practices of the Member States in this regard; whereas divergences between the regulations and practices of Member States should be authorized for a limited period as a transitional measure, on the understanding that they may not give rise to controls contrary to Article 7a; whereas it should be stipulated that this transitional regime shall expire on 30 June 1996 and that prior to that date the Council shall decide with respect to each third country whether its nationals are to be subject to a visa requirement or are to be exempted from that requirement;

Whereas, with a view to ensuring that the system is administered openly and that the persons concerned are informed, measures taken by Member States pursuant to this transitional and exceptional regime must be notified to the other Member States and to the Commission; whereas for the same reasons this information must also be published in the *Official Journal of the European Communities*;

Whereas the information provided for in Article 1(3) of this Regulation must be published before Articles 1(1) and (2) and 2 become applicable; whereas it is therefore necessary to defer the application of those provisions until one month after the Regulation has come into force,

Has adopted this Regulation:

Article 1

1. Nationals of third countries listed in the Annex to this Regulation shall be required to be in possession of a visa when crossing the external frontiers of the Member States.

2. Until 30 June 1996 Member States shall decide whether to require visas of nationals of third countries not listed in the Annex. Prior to that date the Council shall decide according to the procedure laid down in Article 100c either to add each of those countries to that list or exempt its nationals from visa requirements.

3. Within 10 working days of the entry into force of this Regulation, Member States shall notify the other Member States and the Commission of their measures

taken pursuant to paragraph 2. Any fresh measures taken pursuant to paragraph 2 shall be similarly notified within five working days. The Commission shall publish the information notified pursuant to this paragraph in the *Official Journal of the European Communities*.

Article 2

A Member State shall not be entitled to require a visa of a person who seeks to cross its external frontiers and who holds a visa issued by another Member State, where that visa is valid throughout the Community.

Article 3

(...)

Article 4

(...)'

4 By letter of 11 January 1994 the Council consulted the European Parliament on the Commission's proposal. In its legislative resolution embodying the opinion of the European Parliament of 21 April 1994 (OJ 1994 C 128, p. 350), the Parliament proposed 14 amendments and asked to be consulted again if the Council intended to make substantial modifications to the Commission proposal.

5 In amendment 3, the Parliament insisted that the determination of the third countries on the negative list should be based on clearly understood, objective and

publicly stated criteria and that Member States should not be able to impose visa requirements on countries which for objective reasons have been excluded from the list. In amendments 5 and 15, it included a definition of the different categories of visa referred to in the proposed Regulation. In amendment 7, the Parliament shortened the period which the Member States could decide whether to require visas of nationals of third countries not appearing in the annexed list and called for consultation upon each dating. In amendment 8, it strengthened the provision prohibiting a Member State from requiring a visa of a person who holds a uniform visa or who holds an authorization issued by another Member State who applies to stay for a short time within its territory. Finally, in amendments 9 and 10, it proposed clarifying the conditions for the issue of visas and providing for a right of appeal in the event of a refusal to grant a visa.

6 On 25 September 1995 the Council adopted the Regulation, which is worded as follows:

'The Council of the European Union,

Having regard to the Treaty establishing the European Community [and in particular Article 100c thereof],

Having regard to the proposal from the Commission ...,

Having regard to the opinion of the European Parliament ...,

Whereas Article 100c of the Treaty requires the Council to determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States;

Whereas the drawing up of the common list annexed to this Regulation represents an important step towards the harmonization of visa policy; whereas the second paragraph of Article 7a of the Treaty stipulates in particular that the internal market shall comprise an area without internal frontiers in which the free movement of persons is ensured in accordance with the Treaty; whereas other aspects of the harmonization of visa policy, including the conditions for the issue of visas, are matters to be determined under Title VI of the Treaty on European Union;

Whereas risks relating to security and illegal immigration should be given priority consideration when the said common list annexed hereto is drawn up; whereas, in addition, Member States' international relations with third countries also play a role;

Whereas the principle that a Member State may not require a visa from a person wishing to cross its external borders if that person holds a visa issued by another Member State which meets the harmonized conditions governing the issue of visas and is valid throughout the Community or if that person holds an appropriate permit issued by a Member State is a matter that should be determined under Title VI of the Treaty on European Union;

...

Whereas when adding new entities to the list it is necessary to take account of diplomatic implications and guidelines adopted on the matter by the European Union; whereas, at all events the inclusion of a third country on the common list is entirely without prejudice to its international status;

Whereas the determination of third countries whose nationals must be in possession of visas when crossing the external borders of the Member States should be achieved gradually; whereas Member States will constantly endeavour to harmonize their visa policies with regard to third countries not on the common list; whereas the present provisions must not prejudice the achievement of free movement for persons as provided for in Article 7a of the Treaty; whereas the Commission should draw up a progress report on harmonization after five years;

Whereas, with a view to ensuring that the system is administered openly and that the persons concerned are informed, Member States must communicate to the other Member States and to the Commission the measures which they take pursuant to this Regulation; whereas for the same reasons that information must also be published in the *Official Journal of the European Communities*;

Whereas the information provided for in Articles 2(4) and 4(2) must be published before the other provisions of this Regulation come into force; whereas Articles 2(4) and 4(2) must therefore become applicable one month before the other provisions of the Regulation,

Has adopted this Regulation:

Article 1

1. Nationals of third countries on the common list in the Annex shall be required to be in possession of visas when crossing the external borders of the Member States.

2. Nationals of countries formerly part of countries on the common list shall be subject to the requirements of paragraph 1 unless and until the Council decides otherwise under the procedure laid down in Article 100c of the Treaty.

Article 2

1. The Member States shall determine the visa requirements for nationals of third countries not on the common list.

2. The Member States shall determine the visa requirements for stateless persons and recognized refugees.

3. The Member States shall determine the visa requirements for persons who produce passports or travel documents issued by a territorial entity or authority which is not recognized as a State by all Member States if that entity or territorial authority is not on the common list.

4. Within ten working days of the entry into force of this paragraph, Member States shall communicate to the other Member States and the Commission the measures they have taken pursuant to paragraphs 1, 2 and 3. Any further measures taken pursuant to paragraph 1 shall be similarly communicated within five working days.

The Commission shall publish the measures communicated pursuant to this paragraph and updates thereof in the *Official Journal of the European Communities* for information.

Article 3

Five years after the entry into force of this Regulation the Commission shall draw up a progress report of the harmonization of Member States' visa policies with regard to third countries not on the common list and, if necessary, submit to the Council proposals for further measures required to achieve the objective of harmonization laid down in Article 100c.

Article 4(...)

Article 5(...)

Article 6

This Regulation shall be without prejudice to any further harmonization between individual Member States, going beyond the common list, determining the third countries whose nationals must be in possession of a visa when crossing their external borders.

Article 7

This Regulation shall enter into force six months after its publication in the *Official Journal of the European Communities* except for Articles 2(4) and 4(2) which shall enter into force on the day following publication.'

Annulment of the Regulation

7 In support of its action the European Parliament claims that its right to participate in the Community legislative process has been infringed as a result of the Council failing to consult it a second time before adopting the regulation in question. In its view, reconsultation is necessary, under the procedure provided for by Article 100c

of the Treaty, where, as in the present case, the text adopted by the Council includes substantial amendments in relation to the Commission proposal.

8 The Parliament contends first of all that, whereas Article 1(2) of the Commission proposal provided for the drawing up, before 30 June 1996, of a definitive list of the countries whose nationals must be in possession of a visa when crossing the Community's external frontiers, Article 2 of the Regulation allows Member States to decide whether or not nationals of third countries not on the common list are to be subject to the visa requirement. The new system adopted leads to the drawing up of an explicit list, included in the annex to the Regulation, and implicit lists, since each Member State will be able to draw up its own list. The Regulation thus departs from the aim of harmonization in the matter of visas laid down in Article 100c of the Treaty.

9 The Parliament then observes that the list of countries appearing in the annex to the proposal has been considerably limited in the Regulation since the Council reduced the number of third countries appearing in it from 126 to 98.

10 Finally, the Parliament points out that Article 2 of the Commission proposal, which provided for mutual recognition of visas issued by the Member States, has been abandoned. It also points out that, according to the second and fourth recitals of the preamble to the Regulation, these aspects of harmonization of policies in the matter of visas come under Title VI of the Treaty on European Union.

11 The Council, on the other hand, supported by the French Government, considers, first of all, that Article 2(1) of the Regulation merely clarifies the scope of the Commission proposal, according to which, pending a Council decision as to the third countries not appearing in the annex, each Member State remains at liberty to decide whether or not to impose a visa requirement on nationals from those

countries. The Council adds that the only difference existing in this regard between the proposal and the Regulation resides in the fact that the latter provides for a longer transitional period during which the Member States will remain free to regulate visa requirements concerning third country nationals whose countries are not on the common list.

12 Secondly, the Council observes that the common list of third countries has been amended only in minor ways; only three countries have been added to it and the countries removed were former colonies of certain Member States with low migration.

13 Finally, the Council observes that mutual recognition of visas was not provided for by the Commission proposal. Article 2 of the proposal merely made clear that mutual recognition of a visa could apply only in so far as it was valid throughout the Community, without, however, determining the conditions under which a visa was to be valid throughout the Community. Since that provision had only declaratory effect, it was necessary, in the interests of legal certainty, to delete it.

14 It must be stated first of all that due consultation of the Parliament in the cases provided for by the Treaty constitutes an essential formal requirement breach of which renders the measure concerned void. Effective participation of the Parliament in the legislative process of the Community, in accordance with the procedures laid down by the Treaty, represents an essential factor in the institutional balance intended by the Treaty. This function reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly (see, in particular, the judgment in Case C-21/94 *Parliament* v *Council* [1995] ECR I-1827, paragraph 17).

15 It is settled law that the requirement to consult the European Parliament in the legislative procedure, in the cases provided for by the Treaty, means that it must be freshly consulted whenever the text finally adopted, taken as a whole, differs in

essence from the text on which the Parliament has already been consulted, except in cases in which the amendments substantially correspond to the wishes of the Parliament itself (see, in particular, the judgments in Case C-388/92 *Parliament* v *Council* [1994] ECR I-2067, paragraph 10 and in Case C-280/93 *Germany* v *Council* [1994] ECR 1-4973, paragraph 38).

16 It must therefore be examined whether or not the amendments with which the Parliament takes issue concern the essence of the text considered as a whole.

17 Article 1(1) of the Commission proposal on which the Parliament gave its opinion provided that nationals of the third countries listed in an annex had to be in possession of a visa when crossing the external frontiers of the Member States. According to Article 1(2), until 30 June 1996 Member States were to decide whether to require visas of nationals of third countries not on the list referred to in paragraph (1). Prior to that date, the Council was to decide either to add each of those countries to that list or to exempt its nationals from visa requirements.

18 The Regulation, on the other hand, provides in Article 2(1) that the Member States are to determine the visa requirements for nationals of third countries not on the common list.

19 A comparison of the Commission proposal and the Regulation shows that, according to the Regulation, determination by the Member States of the third countries not on the common list whose nationals are obliged to obtain a visa is no longer subject to the time-limit in Article 1(2) of the proposal.

20 As the Advocate General observes in paragraph 28 of his Opinion, whereas after 30 June 1996 the Commission proposal provided only for a common list specifi-

cally designating the third countries whose nationals had to be in possession of a visa when crossing the Member State's external frontiers, the Regulation allows the Member States to maintain for an indefinite period their list of third countries not on the common list whose nationals are subject to visa requirements. Those amendments go to the heart of the arrangements established and must therefore be described as substantial.

21 The Council considers, however, that even if the text finally adopted, considered as a whole, departs in substance from the text on which the Parliament was consulted, it is not obliged to consult the Parliament again where, as in this case, it was quite aware of its wishes on the essential points in question.

22 As far as that argument is concerned, it must be recalled that, as the Court held in paragraph 26 of its judgment in Case C-21/94 *Parliament* v *Council*, cited above, proper consultation of the Parliament in the cases provided for by the Treaty constitutes one of the means enabling it to play an effective role in the legislative process of the Community; to accept the Council's argument would result in seriously undermining that essential participation in the maintenance of the institutional balance intended by the Treaty and would amount to disregarding the influence that due consultation of the Parliament can have on adoption of the measure in question.

23 Since the amendment examined above, which affects the whole of the planned arrangements, is sufficient to require fresh consultation of the Parliament, it is not necessary to examine the other arguments advanced by the Parliament.

24 It must therefore be concluded that the fact that the Parliament was not consulted a second time in the legislative procedure provided for by Article 100c of the EC Treaty constitutes an infringement of essential procedural requirements which must entail annulment of the Regulation.

Maintenance of the effects of the Regulation

25 In its defence, the Council asked the Court, in the event of the Regulation's annulment, to maintain its effects until the Council adopts new rules. In this regard, the Parliament has not submitted observations.

26 That request must be accepted. As the Advocate General points out in paragraph 40 of his Opinion, the necessity to avoid any discontinuity in the harmonization of national rules on visas and weighty reasons of legal certainty justify exercise of the power expressly conferred on the Court by the second paragraph of Article 174 of the EC Treaty provisionally to maintain the effects of an annulled regulation until the Council has adopted a new regulation.

27 However, the Council is reminded that it is under a duty to put an end within a reasonable period to the infringement committed (judgment in Case C-21/94 *Parliament* v *Council*, cited above, paragraph 33).

Costs

28 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the Council has been unsuccessful, it must be ordered to pay the costs. In accordance with the second paragraph of Article 69(4) of the Rules of Procedure, the French Republic, which has intervened, is to bear its own costs.

On those grounds,

THE COURT

hereby:

1. **Annuls Council Regulation 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;**

2. **Declares that the effects of the annulled Regulation are to be maintained until the Council of the European Union has adopted new legislation in the matter;**

3. **Orders the Council to pay the costs;**

4. **Orders the French Republic to bear its own costs.**

Rodríguez Iglesias Mancini Murray Kapteyn

Gulmann Edward Puissochet Hirsch

Jann Wathelet Schintgen

Delivered in open court in Luxembourg on 10 June 1997.

R. Grass G. C. Rodríguez-Iglesias

Registrar President