OPINION OF ADVOCATE GENERAL FENNELLY
delivered on 20 March 1997 *

1. In this action the European Parliament claims that the text 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 [1] (hereinafter 'the Regulation') departs in substance from the text of the Commission proposal upon which it was consulted and, consequently, that the Council breached its prerogatives. The Council submits, in effect, that no new consultation is required whenever the initial consultation sufficiently acquaints it with the views of the Parliament.

I — Legal and factual background

2. The Regulation is based on Article 100c of the Treaty establishing the European Community (hereinafter 'the Treaty'), which is, so far as is relevant, worded as follows: [2]

'1. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States.

...

3. From 1 January 1996, the Council shall adopt the decisions referred to in paragraph 1 by a qualified majority. The Council shall, before that date, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, adopt measures relating to a uniform format for visas.

...

6. This Article shall apply to other areas if so decided pursuant to Article K.9 of the provisions of the Treaty on European Union which relate to cooperation in the fields of justice and home affairs, subject to the voting conditions determined at the same time.

* Original language: English.

1 — OJ 1995 L 234, p. 1.

2 — As inserted by Article G(23) of the Treaty on European Union.

7. The provisions of the conventions in force between the Member States governing areas covered by this Article shall remain in force until their content has been replaced by directives or measures adopted pursuant to this Article.'

A — *The proposed regulation and the Parliament's opinion*

3. On 10 December 1993, the Commission submitted a proposal to the Council with a view to establishing a list of third countries for the purpose of Article 100c(1). [3] This proposal was linked with a contemporaneous Commission proposal for a decision, based on Article K.3 of the Treaty on European Union, establishing a Convention on the crossing of the external frontiers of the Member States. [4] Article 1(1) of the first proposal provided that the nationals of the third countries listed in an annex (which the Commission describes as 'the negative list') would require a visa. Under Article 1(2), Member States were to be permitted, until 30 June 1996, to decide whether to require visas of nationals of other third countries. However, it provided that, before that date, the Council should 'decide according to the procedure laid down in Article 100c either to add each of those countries to that list or to exempt its nationals from visa requirements', thus creating a 'positive list'. In the interim period, Article 1(3) proposed obliging Member States 'to notify the other Member States and the Commission of their measures taken pursuant to paragraph 2'. Article 2 proposed to give effect to the principle, enunciated in the second recital in the preamble, that 'mutual recognition by Member States of visas issued by each other' is necessary 'to give full effect to Article 100c', and constitutes 'an essential accompanying measure for the achievement of the objective set out in Article 7a [of the Treaty] as regards the free movement of persons'. Accordingly, Article 2 of the proposal itself provided that: '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*' (emphasis added).

4. By letter of 11 January 1994 the Council consulted the Parliament on the Commission proposal, in conformity with Article 100c(1) of the Treaty. The Parliament's Committee on Civil Liberties and Internal Affairs reported to the Parliament on the proposal on 29 March 1994. [5] The legislative resolution embodying the opinion of the Parliament was adopted on 21 April 1994. [6] In that opinion, the Parliament proposed 14 amendments to the proposal, and, formally, called for reconsultation if the Council intended to make substantial modifications to the Commission proposal. The principal

3 — The text of this proposal was published in January 1994; see OJ 1994 C 11, p. 15.

4 — COM(93) 684 final, 10 December 1993, published in OJ 1994 C 11, p. 6.

5 — Document A3-0193/94.

6 — It was published on 9 May 1994 in OJ 1994 C 128, p. 346, at p. 350.

changes sought were the following: [7] (i) that Member States should not be permitted to impose visa requirements on countries which have for fair and objective reasons been excluded from the negative list, and that no third country whose nationals do not at present require a visa for entry to any Member State should be on the negative list (amendment 3); (ii) that the period allowed to Member States for determining whether to require visas of nationals of third countries not listed in the annex — i. e. the establishment of a positive list — should be shortened (amendment 7); (iii) that the prohibition on Member States' requiring that a person applying to stay for a short time hold a visa issued by its authorities, where he holds a uniform visa or a residence permit or authorization issued by another Member State, — that is, the principle of mutual recognition — should be strengthened (amendment 8); and; (iv) that the negative list be amended to conform to the principles laid down in the third paragraph of the first recital [8] (amendment 14).

B — *The Regulation*

5. On 25 September 1995 the Council adopted the Regulation, in a form which differs in a number of respects from the Commission proposal. Hence, the essential question which the Court must address is whether those differences are substantial, and, if so, whether that should result in the annulment of the Regulation.

6. Article 1(1), in conjunction with the Annex to the Regulation, establishes a 'common list' of third countries whose nationals 'shall be required to be in possession of visas when crossing the external frontiers of the Member States'. Article 1(2) provides that '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) provides that 'the Member States shall determine the visa requirements for nationals of third countries not on the common list'. This power, thus, is no longer stated to expire on 30 June 1996. Under Article 2(4), the national measures adopted in this respect must be communicated to the Commission, which shall cause them to be published in the Official Journal. The Regulation does not, however, provide for the mutual recognition of visas granted by other Member States. The second recital in the preamble to the Regulation states that, 'the drawing up of the common list ... represents an important *step* towards the harmonization of visa policy ... whereas other aspects of the harmonization ... are matters to be determined under Title VI of the Treaty on European

7 — This abbreviated list highlights those that, in my view, are relevant to the amendments made by the Council.

8 — The addition of which was recommended by the Parliament in the third of its proposed amendments.

Union' (emphasis added). This is highlighted by the fourth recital, which states that:

'... 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*' (emphasis added).

7. Furthermore, the Regulation no longer provides any deadline for the adoption of a positive list. Thus, Article 3 provides that:

'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.'

8. Under Article 4(1), Member States are permitted to 'exempt nationals of third countries subject to visa requirements under Article 1(1) and (2) from those requirements'. The definition of a 'visa' is contained in Article 5. Article 6 expressly authorizes individual Member States to undertake additional mutual harmonization 'going beyond the common list'. With the exception of the provisions obliging Member States to communicate their national measures concerning either third countries not on the common list or exemptions affecting nationals of countries on that list, the Regulation entered into force, in accordance with Article 7, on 3 April 1996.

II — Procedure and observations

9. The Parliament lodged its action for annulment with the Registry of the Court on 15 December 1995. The defendant, the Council, seeks a declaration that the action is unfounded and an order for costs. If, however, the Court is minded to annul the Regulation, the defendant requests it alternatively to preserve its effects until the adoption of a new visa regulation. By order of 23 May 1996, the French Republic was allowed to intervene in support of the forms of order sought by the Council.

10. Written and oral observations were submitted by both parties. The intervener submitted written observations, in respect of which the applicant, but not the defendant, submitted further written observations.

III — Summary of the observations

11. According to the Parliament, the Council incorporated at least three substantial amendments into the text of the Commission proposal so that the Council was obliged to reconsult the Parliament. [9] Firstly, although Article 1 of the proposal provided for the establishment by 30 June 1996 of a *definitive* list of the countries whose nationals would be required to be in possession of visas when crossing the external frontiers of the Community, Article 2 of the Regulation abandoned that principle by permitting the Member States 'to determine the visa requirements for nationals of third countries not on the common list'. Secondly, the applicant claims that the Council substantially reduced the scope of the proposed 'common list' from 126 to 98 third countries. Thirdly, the Parliament argues that the abandonment of the principle of mutual recognition of visas, described by the Commission as 'the cornerstone' of its proposal, [10] in favour of permitting Member States to decide whether they will recognize visas issued by other Member States, represents a substantial change. In the second recital in the preamble to its proposal, the Commission clearly stated its view that mutual recognition of visas was necessary in the context of Article 100c, so as to give effect to Article 7a of the Treaty.

12. In its defence, the Council contests the substantive character of these amendments. A comparative reading of Articles 3(d) and 100c of the Treaty, on the one hand, and Article K.1 of the Treaty on European Union, on the other, shows that the competence conferred on the Community by Article 100c is limited, firstly, to the establishment of a list of countries whose nationals must be in possession of visas when crossing the external frontiers of Member States and, secondly, the adoption of a uniform format for visas. The Council submits that it is obliged to reconsult the Parliament only if the importance of the amendments made to a Commission proposal is such that they affect the substance of the text *considered in its entirety*, which, in its view, is not the case here.

9 — The Parliament refers to Case C-65/90 *Parliament* v *Council* [1992] ECR I-4593 (hereinafter the 'goods-cabotage' case), Case C-388/92 *Parliament* v *Council* [1994] ECR I-2067 (hereinafter the 'passenger-transport cabotage' case) and Case C-21/94 *Parliament* v *Council* [1995] ECR I-1827 (hereinafter the 'road-taxes' case).

10 — See the Commission's Explanatory Memorandum to the Regulation, and especially its comments on the proposed Article 2, p. 4 of the memorandum, contained in COM(93) 684 final.

13. The Council maintains that the only legal difference between the Regulation and the proposal is that the former provides a longer transitional period during which the Member States will remain free to regulate visa requirements concerning third-country nationals whose countries are *not* included on the common list. Since the Council was 'well aware' of the Parliament's view (to wit, support for the Commission's proposal, save for suggesting a shorter transitional period to expire on 31 December 1995 instead of on 30 June 1996), it submits that it was unnecessary to reconsult it. [11] Regarding the amendments made by the Council to the content of the negative list proposed by the Commission, the defendant submits that they were wholly minor. They comprised merely the addition of three States or territorial entities to the proposed list, and the removal of a number of countries, which either are former colonies of certain Member States, or, in the Council's view, do not pose a significant risk of immigration for the Community.

14. As for the principle of mutual recognition, the Council alleges that it could only apply when visas issued by one Member State are regarded as being valid throughout the Community. However, the Commission's proposal contained no provisions to this effect, since the Commission has no competence to propose such measures on the basis of Article 100c of the Treaty. Thus, the Council claims that the proposed Article 2 could only have had *declaratory effect*, and its deletion was necessary in the interests of legal certainty, [12] and to avoid creating confusion. Consequently, it argues that there is no substantial *legal* difference between the effect of the proposal and the effect of the Regulation.

15. France emphasizes the politically sensitive nature of the process of determining the third countries whose nationals should be obliged to obtain visas. It submits that harmonization of visa policy can, therefore, only be progressive, and that the Council is entitled under Article 100c of the Treaty to establish a minimum common list. In respect of the supposed substantive amendments, France alleges that the proposed date for the achievement of complete harmonization was merely postponed by the Regulation. On the mutual recognition of visas, France submits that Article 2 of the proposal was drafted in the perspective of the concomitant adoption of the proposed Convention on controls on persons crossing external frontiers. [13] According to France, the political situation was such at the time of adopting the Regulation that an expeditious adoption of the Convention was not foreseeable. Hence, the Council was compelled to amend the proposal, since, France alleges, it had no competence to provide for the mutual recognition of visas on the basis of Article 100c of the Treaty. In these special circumstances, France considers that the removal of Article 2 of the proposal did not necessitate reconsultation.

11 — The Council cites notably the 'passenger-transport cabotage' case, paragraph 10 of the judgment.

12 — In this respect, the Council refers to point 7 of the Council Resolution of 8 June 1993 on the quality of drafting of Community legislation (OJ 1993 C 166, p. 1), which provides that 'provisions without legislative character should be avoided ...'.

13 — COM(93) 684, cited above in footnote 4.

IV — Analysis

A — *Introduction*

16. Although the observations submitted in this case expressly refer to the nature of the relationship between Article K.1 of Title VI of the Treaty on European Union and the competence of the Community legislator under Article 100c of the Treaty, it is important to bear in mind that the essential legal issue raised is whether the changes inserted by the Council upon adopting the Regulation were such as to require the reconsultation of the Parliament. If the Parliament's contentions are correct, the Regulation must be annulled, subject to any decision the Court may take to maintain in force its effects pending the adoption of a new regulation. In these circumstances, I do not think that it is necessary for me to express any conclusive view either on the scope of Article 100c of the Treaty, or on the extent of the Court's power, in the light of Article L of the Treaty on European Union, to respond to the Council's suggested comparative reading of Title VI of that Treaty when assessing the scope of Article 100c of the Treaty.

B — *The right of reconsultation*

17. The Court's case-law concerning the reconsultation of the European Parliament is now well established. I shall confine my comments to the principles which are of relevance in the present action.

18. In the 'road-taxes' case, the Court stated that: [14]

'17. It must first of all be borne in mind 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. [15] [...] The 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. Such power reflects the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly ... . [16]

18. The duty to consult the European Parliament in the course of the legislative procedure, in the cases provided for by the Treaty, implies the requirement that the Parliament should be reconsulted whenever the text finally adopted, viewed as a whole, departs substantially from the text on which

14 — Paragraphs 17 to 19 of the judgment.

15 — The Court cites, by way of example, Case C-417/93 *Parliament* v *Council* (TACIS) [1995] ECR I-1185, paragraph 9 of the judgment.

16 — The Court cites, by way of example, Case C-65/93 *Parliament* v *Council* [1995] ECR I-643, paragraph 21 of the judgment.

the Parliament has already been consulted, except where the amendments essentially correspond to the wish of the Parliament itself ... .' [17]

19. The Court must therefore consider whether or not the amendments referred to by the Parliament affect the actual substance of the text, viewed as a whole.'

19. In applying these principles, the Court compares the text of the initial Commission proposal and that adopted by the Council. [18] In other words, 'the Court uses an objective test, namely a collation of the two texts'. [19] The Court has also stressed that, if the amendment adopted by the Council, albeit substantial in nature, 'correspond[s] broadly to the wishes expressed by the Parliament', [20] no obligation to reconsult arises. Such wishes may, as the agent for the Council has correctly argued, only be those expressed in the opinion annexed to the legislative resolution of the Parliament. Other parliamentary expressions of opinion are irrelevant to the consultation procedure. In this case, the Council has not disputed that the majority of its amendments are to the contrary of the Parliament's opinion.

20. The Council's most important argument is that, when it is clearly aware of the views of the Parliament on an aspect of a proposal, whether or not they accord with the final decision of the Council, it would be futile to reconsult the Parliament. Such reconsultation would only serve to delay the adoption by the Council of the final text. The agent representing the Council stressed at the hearing that 'the Treaty does not require that every time the Council disagrees with an opinion that has been expressed by the Parliament (...) there should be an obligation to reconsult'. If such were to be the case, he submitted, the consultation 'would become a purely formal obligation'. In contrast with other Community legislative procedures, the consultation procedure does not, in effect, give the Parliament 'the opportunity of having a second reading'. The same principle would, in the Council's view, apply where it amends a provision in respect of which the Parliament has expressed no opinion. In this case, the Council maintains that the Parliament's views on all the aspects of the proposal which it amended were unambiguously set out in its opinion and, hence, fresh consultation was unnecessary.

21. I do not subscribe to the proposition of the Council that reconsultation is rendered unnecessary where the Council is aware of the Parliament's views on the amendments it proposes to make. The agent for the Council states that the purpose of consultation is to have a parliamentary opinion on all the elements of the text. I fail to see how such an opinion can exist when the text is no longer that upon which the Parliament was asked to express its opinion. While there is in essence only one way to modify a text to correspond to the wishes of the Parliament, there are an

17 — By way of example, the Court cites the 'passenger-transport cabotage' case cited in footnote 9 above, paragraph 10 of the judgment, and Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 38 of the judgment.

18 — See the 'passenger-transport cabotage' case, paragraph 13 of the judgment.

19 — See paragraph 34 of the Opinion of Advocate General Léger in the 'road-taxes' case.

20 — Case 817/79 *Buyl* v *Commission* [1982] ECR 245.

infinite number of ways of modifying a text contrary to its wishes. Only where a Council modification corresponds essentially to the Parliament's wishes can the Council claim to be genuinely aware of the Parliament's views on that precise modification; otherwise, the Council could not be said to be acting 'after consulting the European Parliament' in regard to the modified parts of the text. Indeed, taken to its logical conclusion, the Council's view would mean that the reconsultation requirement would only ever arise where it added completely new elements to a legislative text, rather than simply modifying the Commission proposal.

22. I do not see the relevance of the Council's argument concerning modifications to a provision in respect of which the Parliament has expressed no opinion. This situation does not arise in the present case; it is clear that, in approving the proposal as a whole, the Parliament may be deemed to approve any provision which it has not sought to amend, and the duty to reconsult can arise in respect of any such provisions under the same conditions as for provisions which are the subject of Parliamentary amendments.

23. Even if there may be cases where the nature of the Parliament's opinion on the initial proposal is so clear that, at least politically speaking, it is well understood that the Parliament and the Council hold conflicting views, that fact would, on a legal level, be irrelevant. Where the Treaty provides for consultation, the Parliament is entitled to express its views both on the original proposal and again in the event of substantial amendment. Since, in the context of reconsultation, no definite or binding decision can, by definition, be adopted by the Council until the Parliament has expressed its opinion on the revised text, [21] it follows, in my opinion, that the legal value of the second opinion of the Parliament cannot be ignored. As the Court has put it, 'consultation ... [of the Parliament] is likely to affect the substance of the measure adopted'. [22] To dispense with consultation because of an a priori view that the attitude of the Parliament was known and was unacceptable to the Council presupposes closed minds and rigid postures on the part of both institutions and denies the usefulness of the process of consultation.

24. In any event, the Court has already unequivocally rejected the Council's contention in this respect. In the 'road-taxes' case, a very similar argument was advanced by the Council in its rejoinder, to the effect that 'even if the text finally adopted, viewed as a whole, did depart substantially from the text on which the Parliament had been consulted, it was not required to reconsult that institution provided that ... the Council was sufficiently well informed as to the opinion

21 — See, in respect of the consultation procedure, *Parliament* v *Council* (TACIS), cited in footnote 15 above, paragraph 10 of the judgment.

22 — See Case 165/87 *Commission* v *Council* [1988] ECR 5545, paragraph 20 of the judgment.

of the Parliament on the essential points at issue'. [23] Having stated that the Council's argument 'must be rejected', the Court held that: [24]

'... 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.'

This reasoning seems to me to be equally applicable in the present case.

25. Nor do I see any force in the Council's general remarks comparing reconsultation with a legislative second reading. It is obvious that the Parliament's opinion on reconsultation is not attended with the same legal consequences as a second reading in the cooperation or codecision procedures. Furthermore, the reconsultation requirement as defined in the case-law of the Court only applies when certain objective criteria have been fulfilled; as it is restricted to amendments which substantially modify the text considered as a whole, it clearly does not arise on every occasion that the Council disagrees with the Parliament. It does however mean that the Council's margin for manoeuvre in considering legislative proposals is limited by the obligation to respect the Parliament's Treaty prerogatives, and that it may not set itself up as sole arbiter of the futility or otherwise of reconsulting the Parliament.

26. It follows that the qualification of the duty of reconsultation proposed by the Council must be rejected.

C — *The validity of the Regulation*

27. I agree with the applicant that the list referred to in Article 1(1) of the Commission proposal was intended to be a uniform and exclusive list, binding on all the Member States, and setting out exhaustively the third countries whose nationals 'shall be required to be in possession of visas when crossing the external borders of the Member States'. Article 1(2) is equally clear in according limited power to the Member States and the Council in the establishment of lists prior to 30 June 1996. I am satisfied that these provisions, read in conjunction particularly with the fourth recital in the preamble to the

23 — Paragraph 24 of the judgment; see also paragraph 61, and the accompanying footnote 72, of the Opinion of Advocate General Léger. See also the 'passenger-transport cabotage' case, cited in footnote 9 above, paragraph 17 of the judgment.

24 — Paragraphs 25 and 26 of the judgment.

proposal, which speaks of authorizing 'divergences between the regulations and practices of Member States' to continue '*for a limited period as a transitional measure*' (emphasis added), demonstrate that the Commission merely proposed permitting the Member States to maintain, for a limited time, national lists imposing visa requirements affecting third countries not on the common list. This was, in my view, an essential feature of the proposal. Thus, it is necessary to examine how the function of the list was affected by the Council's amendments.

28. Article 1(1) remains virtually unchanged in the Regulation, but its scope is radically restricted by Article 2(1), under which '*the Member States* shall determine the visa requirements for nationals of third countries not on the common list' (emphasis added). This is not subject to the time-limit (30 June 1996) contained in Article 1(2) of the proposal. The significance of this change is highlighted by Article 3 of the Regulation, which merely obliges the Commission to 'draw up a progress report of the harmonization of *Member States' visa policies* ...'. The Council has replaced a proposal for a common and exclusive Community visa policy with what the Parliament aptly described at the hearing as 'the lowest common denominator', namely, a common Community list with, in addition, the possibility of up to 15 additional national lists; such a modification is similar in scope to that condemned by the Court in the 'goods-cabotage' case.

29. I am therefore of the opinion that the abandonment by the Council of the Commission proposal for the establishment by 30 June 1996, at the latest, of a comprehensive Community-visa policy is, taken alone, such a substantial change, having regard to the text of the proposal viewed as a whole, that it would justify annulment of the Regulation for lack of consultation.

30. In addition, the content of the 'common list' differs from the scheme proposed by the Commission, under which the 'negative list' was intended to govern the degree of initial harmonization of national visa policies, with complete harmonization being postponed until 30 June 1996 at the latest. In adopting the Regulation, the Council deleted a number of third countries from the list, and added three others. The Parliament and the Council are fully in agreement that the establishment of the common list is the very object of Article 100c and of the Regulation. The Council agrees that it would have been bound to reconsult the Parliament if it either removed or added a significant number of third countries. None the less, the resulting 'classification' of the third countries concerned is a highly political matter on which the institutions may have diverging views, and which may profoundly affect the relationship between the Community and those

countries. The annex to the Regulation is its most important provision, and I consider that the Council is therefore not entitled to amend this list unless the Parliament has been given the opportunity to give its opinion on such changes. In the present case, I do not consider the modifications to the list to be so minor as to release the Council from its express duty to consult the Parliament on the determination of the list of third countries concerned by the visa requirement.

31. In any event, it seems to me that the 'substantial modification' test was developed by the Court as a criterion for the sufficiency of the consultation of the Parliament in policy areas, principally transport, where the Council enjoys a wide margin of discretion. This test may not, in my view, be appropriate where the Treaty requires that the Parliament be consulted on a discrete choice between two alternatives. Article 188b(3) of the Treaty, for example, requires the Council to consult the Parliament on the appointment of Members of the Court of Auditors; if, having received the Parliament's approval for a list of eight candidates, the Council wished to replace one candidate, it could not escape the duty to reconsult the Parliament on the grounds that the new candidate, if appointed, would only comprise one-fifteenth of the entire membership of the Court of Auditors and, hence, that the modification was not substantial. Similarly in the present case, Article 100c of the Treaty specifically requires that the Parliament be consulted on the determination of 'the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States'. In respect of each individual country, the choice is between inclusion in and exclusion from the list; while the 'substantial modification' test may apply to the other provisions of the Regulation, I am not at all sure that it can be applied to qualify the application of the specific Treaty requirements regarding the list annexed thereto. This does not in any way affect the Council's substantive discretion as to the choice of countries which should feature on the list of third countries, but merely seeks to ensure that the procedure defined in Article 100c(1) for establishing this list is properly respected.

32. The Council seeks to justify the deletion from the list of 28 countries on the basis that they did not, for the greater part, carry a risk of serious migration towards the Community, both because of their distant situation and their small population. Its reaction to the Parliament's drawing attention to the presence of the Republic of South Africa, of Zimbabwe and Botswana in this category and the fact that any evaluation of the danger of migration is likely to be valid for a short period of time was to accept the latter proposition but to emphasize the recent positive political developments in South Africa. It remarks that 'one could suppose that the Parliament was in agreement about' these political developments. Perhaps so, but this is a political assessment which the Council could not make alone.

33. The Council argued for the first time in its rejoinder that, though it had removed these countries from the negative list in Annex 1, this was in response to the view of the Parliament that '... no third country *whose nationals do not require a visa for entry to a Member State*' (amendment 3, emphasis added) should be on that list. The Council says that all of these countries fall within this description as former colonies of certain Member States, particularly the United Kingdom. I do not think it either necessary or possible to express an opinion on this, in view of the incompleteness of the information and the ambiguity in the proposed amendment as quoted above. In any event, the *addition* of three countries is, in my view, decisive.

34. The defence of the Council regarding the addition to the proposed Commission list of Peru, the Former Yugoslav Republic of Macedonia and the Federal Republic of Yugoslavia (Serbia and Montenegro) is that, having regard to the number of countries included on the proposed list (126), the inclusion of these three countries should be classified as a mere change of detail. I cannot agree with the Council's approach. The addition or removal of even one country without consultation of the Parliament seems to me, in principle, to constitute a substantial change. In a political process, it is for the participants alone to decide which countries should or should not be included. The Court cannot make any assessment of the largely political arguments of the Council and cannot decide on a merely numerical basis whether change in the list is substantial. Thus, the additions made must be regarded as substantial.

35. The third principal complaint of the Parliament concerns the removal from the proposal of the principle of mutual recognition, and in particular the deletion of the proposed provision in Article 2 that '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'. The Council claims that the removal of all references to the principle of mutual recognition was necessary in the interests of legal certainty, since the measures required to give effect to such a principle can only, in its view, be adopted under Title VI of the Treaty on European Union, entitled 'Provisions on cooperation in the fields of justice and home affairs', in effect Articles K to K.9. It says that the competence of the Community is limited to drawing up a list of countries for the purposes of Article 100c(1) of the Treaty and the preparation of a uniform model for the visa, and that everything else, including mutual recognition, comes under Article K. In effect, therefore, it says that the removal of mutual recognition arose from the Council's view that its inclusion in the Regulation would not have been lawful.

36. The Council's argument, if followed, would present very difficult problems for the Court. The first concerns the role of the Court in interpreting the Treaty on European Union. Article L of that Treaty [25] precludes the Court from exercising its powers under the (EC) Treaty in relation to Title VI of the Treaty on European Union and, consequently, it is not permitted, in my view, to interpret that Title. The Court, however, must interpret the provisions of Article 100c of the Treaty, if that is relevant to its decision. In doing so, it will follow its established practice of considering 'the spirit, general scheme and wording' of the provision at issue 'as well as the system and objectives of the Treaty'. [26] In reaching a conclusion about the scope of Community competence under Article 100c of the Treaty, the Court will look at that provision in its Treaty context and cannot, in my view, qualify or restrict that interpretation by reference to a provision which it is expressly prohibited from interpreting. However, assuming that the Court were entitled to have regard in a general way to the existence and content of Title VI of the Treaty on European Union, it is apparent that Title VI concerns cooperation between Member States, which is an activity which should not restrict Community competence. Furthermore, Article M of the Treaty on European Union provides that nothing in it — which includes Title VI — 'shall affect the Treaties establishing the European Communities ...'. Article M itself falls within the purview of the Court's powers. In short, I believe that the Court, when it interprets Article 100c, must do so without regard to the contents of Title VI and on the basis that the contents of that Title cannot affect Article 100c itself other than the third subparagraph of Article K.3(2)(c).

37. The second difficulty is more closely related to the nature of the present application, namely that it is brought by the Parliament, in a legal context where the Court's jurisdiction exists only for the purpose of protecting the Parliament's prerogatives, to wit, its right to consultation. In most circumstances, the Parliament may not avail of the general right of Member States, the Council and the Commission under Article 173 to challenge the validity of, *inter alia*, an act of the Council on the ground of lack of competence. The Council relies, in effect, on its own lack of competence. A response to this would necessarily require the Parliament to enter indirectly into a debate on competence, in a context where the Parliament is concerned only to protect its prerogatives. The consultation procedure represents an essential part in the institutional balance, reflecting the democratic nature of the Parliament. The Court demands, at the legal level, that it be respected, but is not concerned to decide, retrospectively, which institution's views on legal competence were correct.

25 — Article L provides that the provisions of the various Treaties establishing the European Communities '... concerning the powers of the Court of Justice ... and the exercise of those powers ...' shall apply only to certain provisions of the Treaty on European Union, including Article L, but excluding all of Article K, save for Article K.3(2)(C), which is not relevant to this case.

26 — Case 6/72 *Europemballage and Continental Can* [1973] ECR 215, paragraph 22 of the judgment.

38. I think that the answer to both points lies in following the text-based approach of the Court in its case-law. If there is a substantial change in the scope and meaning of the text, including one necessitated by a view as to lack of competence, which the Parliament is known not to share, then the Parliament must be reconsulted. In any case, the fact that a particular modification is dictated by the Council's interpretation of the applicable legal rules does not suffice to absolve it from the duty of reconsultation. After all, in proposing, examining and adopting any Community legislation, each of the political institutions of the Community is at the same time adopting an interpretation of the applicable Treaty provisions, which may or may not be shared by the other institutions. In this regard, an analogy may be drawn with a modification by the Council of the legal basis of Community legislation proposed by the Commission and approved by the Parliament; where the modification has the effect of amending the legislative procedure to one which guarantees the Parliament a lesser degree of participation than that originally proposed, the Council has always, rightly in my opinion, taken the view that such a modification affects the substance of the proposal and hence gives rise to a duty of reconsultation. [27]

39. As to the substantial nature of the removal of mutual recognition, there can be no doubt that the fact that the Parliament proposed (see its amendment 8 summarized at paragraph 4 above) to supplement the obligation of mutual recognition imposed by Article 2 of the Commission proposal, with provisions concerning the extent of the obligation and the conditions under which 'uniform visas' were to be issued, demonstrates the importance attached to this principle. The Council's claim is not that the removal of mutual recognition does not, as such, amount to a substantial change. On the contrary, the Council says that the achievement of mutual recognition was not possible on the basis of the Treaty, since, in its view, it could not be enacted on the basis of Article 100c, but presupposed the contemporaneous adoption by the Member States, under Article K.3 of the Treaty on European Union, of the Convention on the crossing of external frontiers. The agent for the Council alluded at the hearing to an element of political naïvety in the Commission's proposal, upon which, naturally, I express no view. When that Convention was not, in the event, adopted, the Council says, the idea of a 'visa valid throughout the Community', as in Article 2 of the proposal, became devoid of meaning and the retention of this reference in the Regulation as enacted would have given a misleading impression contrary to the principle of legal certainty. As is apparent from its mere recital, this argument continues to depend on a particular view about the scope of Community competence under Article 100c of the Treaty rather than a denial that, ostensibly, an important change has been made between the proposal and the Regulation. Apart from the Council's restrictive interpretation, at first sight, Article 100c(1) of the Treaty would appear to

27 — See, for example, the facts in Case C-300/89 *Commission* v *Council* [1991] ECR I-2867, paragraph 3 of the judgment, Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193, paragraph 19 of the Opinion of Advocate General Jacobs, page I-4221, and Case C-271/94 *Parliament* v *Council* [1996] ECR I-1689, paragraph 7 of the judgment.

be equally open to the interpretation that the visa granted to a national of a third country listed in a Community act adopted thereunder either must be granted recognition in all Member States or may be so recognized, if the act so provides. It is not necessary, in this case, to choose between these interpretations. In effect, however, different views may realistically have been entertained not only by the Parliament and the Council but also by the Commission. [28] It is sufficient to say that, if Article 100c(1) implies mutual recognition, the substantial nature of the change is beyond argument and the Parliament and the Commission appear to have adopted this view of the Article. Since the correct approach to the assessment of substantial change is based on a comparison of texts rather than a resolution of issues of competence, the Council should have reconsulted the Parliament. In these circumstances, I am satisfied that the application brought by the Parliament should be upheld.

D — *The preservation of the effects of the Regulation*

40. In its defence, the Council asked the Court, pursuant to Article 174 of the Treaty, to limit the effects of any ultimate annulment of the Regulation. The Parliament has submitted no observations on this request. The defendant maintains that considerable legal uncertainty would ensue for nationals of those third countries contained in the common list annexed to the Regulation if its legal effects were not maintained until it has adopted new legislation. Since the adoption of that list represents a 'step' towards the eventual complete harmonization of the third countries whose nationals will require visas to enter the Community, to annul without limitation the effects of the Regulation would, paradoxically, restore the *status quo ante* where Member States were free to apply whatever visa policies they wished. Thus, though the current function of the common list may be no more than informative, it does remove the need for those nationals whose countries are covered to inquire of potentially 15 separate national authorities whether a visa will be necessary if they travel to the Community. Hence, I am satisfied that, in the interests of legal certainty, the effects of the Regulation should be maintained. However, in making this recommendation, I think that it is important to stress the obligation of the Council, in particular, to act with due expedition in adopting a new regulation, in accordance with the procedure laid down in Article 100c of the Treaty. It may be recalled that, although the Court rejected the Parliament's request, in the 'road-taxes' case, to impose a time-limit on the Council, the Court stated that the Council was 'under a duty to put an end within a reasonable period to the infringement it has committed'. [29]

28 — See also, for example, the views expressed in: O'Keeffe, 'The New Draft External Frontiers Convention and the Draft Visa Regulation' in J. Monar & R. Morgan eds., *The Third Pillar of the European Union*, (Brussels, 1994), p. 135 et seq.; Hailbronner, 'Visa Regulations and Third-Country Nationals in EC Law', (1994) 31 *CMLRev* 969; Peers, 'The Visa Regulation: Free Movement Blocked Indefinitely' (1996) 21 *ELRev* 150.

29 — Paragraph 33 of the judgment.

V — Conclusion

41. For the reasons set out above, I recommend that the Court should:

(1) annul 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;

(2) declare that the effects of the annulled regulation shall be preserved until the Council has adopted new legislation in the matter;

(3) order the Council to pay the costs of the action;

(4) order the French Republic to bear its own costs.