OPINION OF ADVOCATE GENERAL LÉGER delivered on 27 April 2004 [1]

1. In this case the Court is called upon for the first time to consider and review the limits of the power of the Council of the European Union to reserve the right to exercise implementing powers itself. The Commission of the European Communities is applying, pursuant to Article 230 EC, for annulment of Council Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications [2] and of Council Regulation No 790/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance [3] (together referred to as 'the contested regulations').

I — Legal background

2. Following an examination of the legal framework in which implementing powers are conferred, I shall consider the area in which, in this instance, the Council reserved such powers to itself.

A — *The Council's reservation of implementing powers*

3. As Community law currently stands, two provisions of the EC Treaty concern the conferral of implementing powers in the Community context, namely Articles 202 EC and 211 EC.

1 — Original language: French.
2 — OJ 2001 L 116, p. 2.
3 — OJ 2001 L 116, p. 5.

4. Section 2 of the part of the Treaty governing the institutions, entitled 'The Council', provides at the third indent of Article 202 EC:

'To ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty:

...

— confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.'

5. Section 3 of the part of the Treaty governing the institutions, which is entitled 'the Commission', provides at Article 211 EC, fourth indent:

'In order to ensure the proper functioning and development of the common market, the Commission shall:

...

— exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.'

6. In addition, Council Decision 1999/468/EC lays down the procedures for the exercise of implementing powers conferred on the Commission [4] ('the second comitology decision').

7. The first subparagraph of Article 1 of the decision provides that: '[o]ther than in specific and substantiated cases where the basic instrument reserves to the Council the right to exercise directly certain implementing powers itself, such powers shall be conferred on the Commission in accordance with the relevant provisions in the basic instrument. These provisions shall stipulate the essential elements of the powers thus conferred.'

4 — Decision of 28 June 1999 (OJ 1999 L 184, p. 23).

B — *The relevant area: Title IV of the Treaty*

8. The contested regulations were adopted on the basis of certain provisions of Title IV of the Treaty, entitled 'Visas, asylum, immigration and other policies related to free movement of persons'. This new title brings together various provisions already found in the EC Treaty [5] and also brings within the framework of the Community areas which were previously subject to the intergovernmental method.

9. The Schengen Agreement and its implementing Convention, [6] signed on 19 June 1990 ('the CISA'), enabled five Member States to instigate the actual abolition of checks at the European Community's internal borders, as had been advocated by the Commission in its White Paper on Completion of the Internal Market. [7] So the Schengen Agreement and the CISA followed bilateral and multilateral initiatives between those Member States in that regard.

10. Chapters 2 and 3 of Title II of the CISA set out the main rules concerning the crossing of external borders and visas respectively. The practical procedures for the application of those rules are laid down, as regards border checks, in the Common Manual [8] ('the CM') and, as regards visas, in the Common Consular Instructions on visas for the diplomatic missions and consular posts [9] ('the CCI'). Those documents must be regularly updated by the Executive Committee [10] because they are in the nature of day-to-day operational instructions intended for officials.

11. Article 2(1) of the Protocol integrating the Schengen *acquis* [11] into the framework of the European Union [12] provides, first, that the CISA, including the decisions of the Executive Committee, are to apply to the 13 Member States referred to in Article 1 of the Protocol from the date of entry into force of the Treaty of Amsterdam [13] and, second, that

5 — See Article 100c of the EC Treaty (repealed by the Treaty of Amsterdam), whose contents were transferred to Article 62 EC.

6 — Schengen *acquis* — Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19).

7 — COM/85/310 final.

8 — The CM is a guide intended for officials who carry out external border checks. It contains both normative provisions and practical instructions (OJ 2002 C 313, p. 97).

9 — The CCI is intended for consular agents for use in the daily handling of visa applications. It contains provisions from CISA as well as practical instructions and incorporates a number of Executive Committee Decisions (OJ 2002 C 313, p. 1).

10 — Title VII of the CISA sets up an Executive Committee, which is a body on which each Contracting Party to the CISA has one representative who is a Minister. The Committee takes its decisions unanimously.

11 — The Schengen *acquis* includes the Schengen Agreement, the CISA and all the acts adopted under them.

12 — The Protocol is annexed by the Treaty of Amsterdam to the Treaty on European Union and to the Treaty establishing the European Community.

13 — That is to say, 1 May 1999.

the Council will substitute itself for the Executive Committee in the exercise of its functions.

12. Following this incorporation of a part of the Schengen *acquis* into the Community framework, Decision 1999/436/EC [14] incorporated the CM and the CCI as well as all the Executive Committee's decisions relating thereto into the Community framework. [15] The legal basis for the Decision of the Executive Committee on the definitive versions of the CM and the CCI and the annexes thereto was determined to be Articles 62 EC and 63 EC. [16] Amendment and updating of those documents were from then on to be carried out in conformity with the procedures provided for by Community law.

13. It was specifically in order to provide a framework for amendments to the CM and the CCI and the annexes thereto that the Council adopted the contested regulations. Article 62(2) and (3) EC, [17] and Article 62(2)(a) and (b) EC and Article 67(1) EC, [18] constitute the legal basis for those regulations.

14 — Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* (OJ 1999 L 176, p. 17).

15 — In Title IV of the Treaty.

16 — Decision of 28 April 1999 (SCH/Com-ex (99) 13) (OJ 2000 L 239, p. 317).

17 — Regulation No 789/2001 concerns amendments to the CCI and the annexes thereto.

18 — Regulation No 790/2001 concerns amendments to the CM and the annexes thereto.

14. Article 62 EC provides:

'The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

(1) measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;

(2) measures on the crossing of the external borders of the Member States which shall establish:

(a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders;

(b) rules on visas for intended stays of no more than three months, including:

(i) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;

(ii) the procedures and conditions for issuing visas by Member States;

(iii) a uniform format for visas;

(iv) rules on a uniform visa;

(3) measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.'

15. Article 67 EC provides:

'1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

2. After this period of five years:

— the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council,

— the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice.

3. By derogation from paragraphs 1 and 2, measures referred to in Article 62(2)(b)(i) and (iii) shall, from the entry into force of the Treaty of Amsterdam, be adopted by the Council acting by a qualified majority on a

proposal from the Commission and after consulting the European Parliament.

4. By derogation from paragraph 2, measures referred to in Article 62(2)(b)(ii) and (iv) shall, after a period of five years following the entry into force of the Treaty of Amsterdam, be adopted by the Council acting in accordance with the procedure referred to in Article 251.'

C — *The contested regulations*

16. The purpose of Regulation No 789/2001 is to reserve implementing powers to the Council for the purpose of amending and updating certain provisions of the CCI and the annexes thereto. Recital 6 in the preamble to the regulation refers to Article 17 of the CISA [19] under which certain amendments to the CCI require the Executive Committee to adopt implementing decisions. It also states that, since the Council has substituted itself for the Executive Committee and since the institutional rules are henceforth to apply to the CCI and the CM, it is appropriate to determine the Community procedure for adopting those decisions.

19 — 'The Executive Committee shall adopt common rules for the examination of visa applications, shall ensure their correct implementation and shall adapt them to new situations and circumstances.'

17. Recital 8 in the preamble to Regulation No 789/2001 explains the reasons why implementing powers should be reserved to the Council in the area of visa applications:

'Since the Member States have an enhanced role in respect of the development of visa policy, reflecting the sensitivity of this area, in particular involving political relations with third countries, the Council reserves the right, during the transitional period of five years referred to in Article 67(1) of the Treaty, to adopt, amend and update the detailed provisions and practical procedures referred to above by unanimity, pending a review by the Council of the conditions under which such implementing powers would be conferred on the Commission after the end of that transitional period.'

18. Article 1 of Regulation No 789/2001 lists the provisions of the CCI and the annexes thereto which the Council may accordingly amend, acting unanimously.

19. The regulation also establishes, in Article 2, a procedure by which the Member States are to communicate to the Secretary-General of the Council such amendments as they wish to make to certain parts of the annexes to the CCI.

20. Finally, those elements of the CCI and the annexes thereto which are not subject to amendment by one of the procedures provided for in Regulation No 789/2001 are to be amended in accordance with Title IV of the Treaty, in particular with Articles 62(2) and (3) EC and 67 EC.

21. The purpose of Regulation No 790/2001, which is identical in structure to Regulation No 789/2001, is to reserve implementing powers to the Council for the purpose of amending and updating certain provisions of the CM and the annexes thereto. Recital 3 in the preamble thereto refers to Article 8 of the CISA, [20] which sets out, as regards border checks, the procedures for amending and updating the CM and the annexes thereto.

22. Recital 5 in the preamble to Regulation No 790/2001 explains why implementing powers should be reserved to the Council in respect of border checks:

'Since the Member States have an enhanced role in respect of the development of border policy, reflecting the sensitivity of this area, in particular involving political relations with third countries, the Council reserves the right, during the transitional period of five years referred to in Article 67(1) of the Treaty establishing the European Community, to adopt, amend and update the detailed provisions and practical procedures referred to above by unanimity, pending a review by the Council of the conditions under which such implementing powers would be conferred on the Commission after the end of this transitional period.'

23. Articles 1 and 2 of Regulation No 790/2001 specify the two types of procedure set out in Regulation No 789/2001 and indicate that the procedure in Title IV of the Treaty is to be used for all other amendments and updating of the various elements of the CM and the annexes thereto. Thus, Article 1 lists the provisions of the CM and the annexes thereto which may be amended by the Council acting unanimously. Article 2 of Regulation No 790/2001 establishes a procedure by which the Member States are to communicate to the Secretary-General of the Council such amendments as they wish to make to certain parts of the annexes to the CM.

II — Procedure and claims of the parties

24. On 3 July 2001, the Commission brought before the Court an action under Article 230

20 — 'The Executive Committee shall take the necessary decisions on the practical procedures for carrying out border checks and surveillance.'

EC against the Council. It asks the Court to annul the contested regulations and to order the Council to pay the costs.

25. The Council contends that the action should be dismissed as unfounded and that the Commission should be ordered to pay the costs.

III — The Council's alleged infringement of Article 202 EC and of Article 1 of the second comitology decision

26. By orders of the President of the Court of 10 October and 8 November 2001, the Kingdom of Spain and the Kingdom of the Netherlands were granted leave to intervene, the former in support of the form of order sought by the Council and the latter in support of that sought by the Commission.

A — *Arguments of the parties*

27. The Commission puts forward two pleas in law in support of its application. Under the contested regulations the Council reserved to itself implementing powers in breach of Article 202 EC and Article 1 of the second comitology decision, improperly and without giving adequate reasons for doing so. [21]

28. In the alternative, the Commission submits that the procedure under Article 2 of the contested regulations, which confers power on the Member States to amend the CCI and the CM and to communicate such amendments to the Council's secretariat, infringes Article 202 EC.

29. The Commission observes that in the normal course of events it exercises implementing powers and the Council may reserve to itself such powers only exceptionally and provided that it puts forward reasons demonstrating that there is a specific situation which justifies such reservation. The Council has not established such specificity and has provided a 'generic' statement of reasons, which is too general and could just as well cover any part or all of Title IV of the Treaty. [22] Furthermore, the Council has provided no explanation either of the nature and content of the implementing powers with which the two contested regulations are concerned or of the consequent necessity for the Council to exercise those powers itself.

21 — Application, paragraph 11.

22 — Application (paragraph 25).

30. Considering more closely the various reasons put forward as justification by the Council, which it regards in this instance as unfounded, the Commission submits that it is difficult to know what is meant by the 'enhanced role of the Member States' in the preambles to the contested regulations. The only possible meaning, in its submission, is that in the context of the temporary exceptions to the Community method Title IV of the Treaty confers on Member States a right of initiative alongside that of the Commission. Such a meaning would not, however, encompass reservation of implementing powers by the Council. [23]

31. Similarly, the Commission submits that the sensitivity of visa policy and border policy does not in any way amount to an adequate reason for the Council to reserve implementing powers to itself. [24]

32. Finally, the Commission maintains that the Council's argument emphasising that the sensitivity involved is that of political relations with third countries is also unfounded. The Treaty confers an institutional role on the Commission in respect of such relations, particularly in commercial matters. [25] Thus, certain aspects of visa policy had, with Article 100c of the Treaty, fallen within the Community framework since the Treaty on European Union, and the Council had already conferred implementing powers on the Commission, in particular in areas in which secrecy is an absolute rule. [26]

33. The Netherlands Government supports the Commission's arguments and adds that it is not apparent why the decisions with which the contested regulations are concerned are so politically sensitive that they cannot be left to the Commission. [27]

34. The Council, supported by the Kingdom of Spain, contends in essence that the reservation of implementing powers to itself was entirely proper and was adequately reasoned, in accordance with the requirements of Article 202 EC. The reservation of implementing powers concerns specifically amendments to certain 'detailed provisions and practical procedures' set out in the CCI and the CM and not to amendments of other

23 — Also highlighted by the Netherlands Government in whose opinion such a statement is unclear and amounts to no more than a general statement of reasons (paragraphs 22 and 23 of its statement in intervention).

24 — Application (paragraph 31 et seq.).

25 — *Ibidem* (paragraph 32).

26 — See, for those purposes, Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas (OJ 1995 L 164, p. 1).

27 — Statement in intervention (paragraph 25).

aspects of visa policy or border policy.[28] Thus, it is not correct to claim that the statement of reasons is generic.

35. The reasons which prompted the Council to reserve implementing powers to itself were explained in Recital 8 in the preamble to Regulation No 789/2001 and recital 5 in the preamble to Regulation No 790/2001. Those recitals state that the Member States have an enhanced role in respect of the development of visa policy and of border policy, which reflects the sensitivity of those areas, in particular where political relations with third countries are involved.

36. In the Council's submission, the sensitivity of the matters concerned by the amendments can easily be seen from the contents of the CCI and the CM and, by way of example, it cites the amendments in question in certain parts of the two documents. Thus, Part II of the CCI sets out criteria for determining the Member State responsible for deciding on visa applications. The Council contends that changes to such criteria could obviously have an impact on the burden shouldered by the various Member States in that regard.[29] It continues with the example of the sensitivity of Part V of the CCI and, in particular, point 2.3, which sets out the procedure to be followed where an application for a visa cannot be dealt with only by the authorities of the Member State which has received the application, but must be subject to prior consultation with the central authorities of the other Member States.

37. Throughout the written procedure, the Council has stated repeatedly that the argument that visa policy and border policy involve 'political relations with third countries' does not require further justification. This reservation of implementing powers is thus, in its view, consistent with Article 202 EC and Article 1 of the second comitology decision, just as it is adequately reasoned. It is also limited in time to the transitional period of five years referred to in Title IV of the Treaty.

B — *Assessment*

38. It is common ground that as a general rule implementing powers are the preserve of the Commission and that those powers can also be applied in the context of the new Title IV of the Treaty. It is also common ground that the Council may exercise those powers in specific and substantiated cases.

39. In the present case, it is appropriate to examine the Council's decision to reserve

28 — Defence (paragraph 13).

29 — Defence (paragraph 16).

implementing powers to itself under the contested regulations. To that end, I shall first identify the conditions on which the Council may exercise implementing powers. I shall then establish the extent of the Court's review of those conditions. Finally, I shall apply that to the reservation of implementing powers in this instance.

1. The conditions on which the Council may reserve implementing powers

40. As Community law currently stands, the Treaty, as amended by the Single European Act, provides that implementing powers are to be exercised by the Commission but that the Council may decide to exercise them itself in specific cases.

41. Under the system laid down by the Treaty prior to its amendment by the Single European Act, the Council could, under Article 155 of the EC Treaty (now Article 211 EC), confer implementing powers on the Commission. [30] Use of that power was optional for the Council, not obligatory. [31] Advocate General Dutheillet de Lamothe had very correctly described the Community position in relation to implementing powers as follows: '(1) [t]he Council has institutionally not only a general and basic legislative power, but also the power itself to issue the implementing provisions which are necessary for the application of the general rules which it lays down. (2) This power of implementation may be exercised by the Council itself or conferred by it upon the Commission.' [32]

42. With the changes made by the Single European Act, a third indent has been added to Article 202 EC, by virtue of which implementing powers are to be exercised by the Commission, the Council being able to reserve the right to exercise such powers directly only in specific cases. [33]

43. Subsequently, two Council decisions, the 'comitology decisions', set out the procedures for the exercise of implementing powers conferred on the Commission. Article 1 of Decision 87/373/EEC, [34] 'the first comitology decision', reiterated the exact wording of the Treaty, by virtue of which, other than in

30 — Case 16/88 *Commission* v *Council* [1989] ECR 3457, paragraphs 10 and 12.

31 — Case 25/70 *Köster* [1970] ECR 1161, paragraph 9.

32 — Opinion in Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, at 1143.

33 — It is noteworthy that Article 211 EC was not amended by the Single European Act.

34 — Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197, p. 33).

specific cases, the Council may not exercise implementing powers. The second comitology decision, which amends and repeals the first, is more specific about the conditions on which implementing powers may be reserved, incorporating the requirement for reasons to be given. It starts by referring to the general rule and the exception enshrined in the Treaty. It then states that the Council may reserve implementing powers to itself in specific *and substantiated* cases where the basic instrument so provides. The second comitology decision thus adds to the requirement of specificity the need to give reasons for the Council's reservation of powers. However, the decision does not explain further what is meant by those conditions. [35]

44. Accordingly, it is to be noted that, as Community law currently stands, the Council cannot exercise implementing powers other than exceptionally where it establishes that a specific case is involved and gives reasons for its decision. It is necessary to ask ourselves what is meant by 'specific cases'.

45. First, to my mind, the restriction to specific cases of the Council's reservation of implementing powers means that the Council would not be able to reserve those powers to itself generally.

46. There can be no reservation of powers in respect of an entire field, but only in respect of one or a number of particular aspects of an area, to which the Council must draw attention in the basic instrument. The instrument by which the Council effects such a reservation must therefore refer to the particular areas in which the reservation applies.

47. The fact that the situation must be specific also requires that the reservation of powers should apply for a fixed period of time. It would not be possible for the Council to reserve those powers to itself for an indefinite period. The exceptional nature of the decision to reserve powers means that it cannot be unlimited in time.

48. Thus, the Council must specify in the instrument by which it decides to reserve to itself implementing powers the particular area in which its reservation is to operate, taking into account the restrictions which I have identified above.

35 — On that point, see the Draft Treaty establishing a Constitution for Europe, adopted by consensus by the European Convention on 13 June and 10 July 2003, submitted to the President of the European Council in Rome — 18 July 2003, which, in Article 36, entitled 'Implementing Acts', reproduces those conditions in terms which in my view are a little more specific, since the Article provides that: '[w]here uniform conditions for implementing binding Union acts are needed, those acts may confer implementing powers on the Commission, or, *in specific cases duly justified* ... , on the Council of Ministers' (emphasis added).

49. It can be seen that the requirement for reasons seeks to impose a tighter framework on the reservation of implementing powers. In my view, this entails the Council explaining the reason which justifies such a reservation of powers.

50. The Court in its judgment in *Commission* v *Council*, cited above, has already had occasion to comment incidentally about the procedures for the reservation of implementing powers by the Council. The action concerned annulment of part of a regulation dealing with coordination and promotion in the fisheries sector, which combined the exercise of the Commission's decision-making powers with use of the management committee procedure, which, in the Commission's view, was inconsistent with its exclusive power in budgetary matters. In that case, the Court held that the Commission's power in relation to the budget is not such as to modify the division of powers resulting from the various provisions of the Treaty which authorise the Council and the Commission to adopt generally applicable or individual measures. [36]

51. The Court also stated that, 'after the amendments made to Article 145 by the Single European Act, the Council may reserve the right to exercise implementing powers directly *only in specific cases, and it must state in detail the grounds for such a decision*'. [37]

52. Thus, as early as 1989, the Court held that the Council can reserve implementing powers only exceptionally and provided that it gives detailed reasons for doing so. The second comitology decision thus reflected the Court's decision in the wording of Article 1. It is appropriate to examine the scope of that provision.

53. It must be borne in mind that Article 253 EC lays down a general obligation to state reasons, which applies to all measures taken by the institutions. The contested regulations are subject to that obligation. [38] However, since implementing powers are reserved only in exceptional cases, the statement of reasons must be detailed. In my view, the purpose of requiring a detailed statement of reasons is to establish a tighter framework for the Council's exceptional exercise of implementing powers and to provide an explanation as to why it is the exception rather than the rule regarding the conferral of powers which applies.

36 — Paragraph 16.

37 — *Commission* v *Council*, cited above (paragraph 10, emphasis added).

38 — See Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 17, and Case T-124/96 *Interporc* v *Commission* [1998] ECR II-231, paragraph 53. It is settled case-law that the statement of reasons serves a dual purpose. First, it enables the persons concerned to ascertain the reasons for the measure adopted in order to protect their rights and, second, it enables the Court to exercise its power of review as regards the legality of the measure.

54. Hence, Community law lays down an obligation to state detailed reasons, by virtue of which the Council must provide a statement of reasons in the instrument reserving implementing powers to itself. However, given that the reasons must be stated in detail, the statement must not only set out the factual and legal reasons which prompted the Council to take such a decision [39] but must also explain why it is important that it is the Council rather than the Commission which, exceptionally, is to exercise those powers.

55. Any reservation of power by the Council which does not comply with those mandatory requirements undermines, to my mind, the institutional balance deriving from the Treaty as regards the conferral and exercise of implementing powers.

2. Review by the Court of the conditions on which the Council reserves implementing powers

56. It is now appropriate to consider the scope of the review which the Court may carry out of the Council's decision to reserve implementing powers to itself. The Court's review must relate to the two cumulative conditions identified above: specificity and substantiation.

57. Community law confers a discretion on the Council to reserve implementing powers to itself in specific cases in respect of which it must provide a detailed statement of reasons. In my view, it is for the Council, as part of its discretion, to determine which are those specific cases to which the Treaty and the second comitology decision refer. On that account, neither the Court nor any other Community institution can determine in place of the Council which are those specific cases in which the Council may exercise those implementing powers itself.

58. However, such a decision cannot be exempt from judicial review. [40] Indeed, 'where the Community institutions have such a power of appraisal, respect for the

39 — In other words 'the essential objective pursued by the institution' (see Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 26).

40 — Particularly since the Council has established a system of checks and balances known as comitology in relation to the Commission's exercise of implementing powers. That system, which has become part of the institutional framework and been endorsed by the Court, lends further weight to the principle that, as Community law currently stands, institutional balance requires implementing powers to be exercised by the Commission, in accordance with the requirements laid down in Article 1 of the second comitology decision.

rights guaranteed by the Community legal order ... is of ... fundamental importance'. [41]

59. Like the Commission, I infer from that that the Court's review must therefore relate to whether the Council's exercise of that discretion complies with Community law. [42] In particular, the Court must, by means of its review, satisfy itself that the Council, in the exercise of its discretion, does not negate the substance and purpose of the rule that implementing powers are conferred on the Commission.

60. It should be recalled that the Court's power of review varies depending on the matters at issue. In this instance, the contested regulations fall within the institution's political discretion. [43] By virtue of the Court's well-established case-law, judicial review is limited where it concerns the exercise of the discretion of the institution concerned. The Court has held in various spheres that its review cannot concern either the evaluation of economic facts or circumstances or the economic policy decisions [44] in the light of which contested measures were taken. [45]

61. To my mind, the same is true of political matters. [46] The Court has jurisdiction to verify whether measures are lawful but not to carry out a full-scale review relating to the

41 — Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14.

42 — Application (paragraph 21).

43 — I should point out that Article 7 EC states that: '[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty'. As regards the powers of each of the institutions, the courts cannot substitute themselves for the legislature in the political choices made by the latter. See, to that effect, Hamilton, A., *Federalist No 78*: 'It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body'.

44 — See, to that effect, Article 33 ECSC which authorised the Court to impose penalties in the normal way in respect of any infringement of the provisions of the Treaty or of any rule of law relating to its application, but which restricted its powers on review to censuring only a manifest failure to comply with those provisions or rules in cases in which the review entailed an examination of the evaluation of an overall economic situation. See, in particular as regards safeguard measures, Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, and the decision of the Court of First Instance in relation to dumping in Case T-118/96 *Thai Bicycle* v *Council* [1998] ECR II-2991.

45 — In Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545 the Court held that '[a]lthough as a general rule the Court undertakes a comprehensive review of the question whether or not the conditions for the application of Article 85(1) are met, it is clear that in determining the permissible duration of a non-competition clause incorporated in an agreement for the transfer of an undertaking the Commission has to appraise complex economic matters. The Court must therefore limit its review of such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decisions is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers' (paragraph 34).

46 — See the case-law of the Court concerning the common agricultural policy and, in particular, the judgment in Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, as well as, in relation to common commercial policy, Case 187/85 *Fediol* v *Commission* [1988] ECR 4155, in which the Court held that concerning 'the possible limits of judicial review of the decision, it should be noted that the Court has already held (see, in particular, the judgment of 4 October 1983 in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, ["the Court is required to exercise its normal powers of review over a discretion granted to a public authority", paragraph 30]) that, even though a discretion has been conferred on the Commission in the matter at issue, the Court is required to verify whether or not it has observed the procedural guarantees granted to complainants by the Community provisions in question, has committed manifest errors in its assessment of the facts' (paragraph 6).

merits of their adoption.[47] That review covers whether there has been a manifest error of assessment, infringement of essential procedural requirements or misuse of powers. The Court's review of whether the specificity of the situation has been established, which is one of the conditions for the reservation of implementing powers, is a review of whether there has been a manifest error of assessment. It is with those considerations in mind that that review must be carried out in this instance.

3. The Court's review of the Council's reservation of implementing powers in the present case

62. I shall now consider whether the Council stayed within or exceeded the limits of its discretion when it decided to reserve to itself implementing powers for the purpose of amending the CCI and the CM and the respective annexes thereto.

63. Both the Commission and the Council refer to recital 8 in the preamble to Regulation No 789/2001 and recital 5 in the preamble to Regulation No 790/2001, which, they submit, constitute the reason and justification for the Council's reservation of implementing powers.

64. As a preliminary point, I should point out that, even if the reservation of implementing powers concerns only certain specific aspects of the CCI and the CM, the requirement for specificity imposed by Community law does not concern the provisions to be amended but the particular context in which such a reservation of powers occurs. The fact that the Council has reserved to itself implementing powers only in respect of the amendment of certain aspects of the contested regulations has no impact on the requirement to comply with the rule concerning specificity. Thus, under Community law, it is not the amendments which must be specific but the situation in which the Council reserves implementing powers to itself.

65. It is clear from reading recital 8 in the preamble to Regulation No 789/2001 and recital 5 in the preamble to Regulation No 790/2001 that the recitals are almost identical in content. The reason put forward by the Council for reserving to itself implementing powers in the area of visa policy is identical to the reason put forward in the area of border policy. Thus, those recitals suggest that what we have is a standard form of wording in which the only thing to have changed is the subject-matter concerned. However, that similarity need not, in my view, preclude the content from being such as to establish that there is a specific

47 — In Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle Erling and Others* v *Council and Commission* [1981] ECR 3211, the Court held that: 'in determining their policy in this area, the competent Community institutions enjoy wide discretionary powers regarding not only establishment of the factual basis of their action but also definition of the objectives to be pursued, within the framework of the provisions of the Treaty, and the choice of the appropriate means of action' (paragraph 37).

situation, justifying the reservation of powers.

66. On further perusal of the identical parts of the preambles to the contested regulations, I see that the Council, having observed that implementing decisions must be taken for the purpose of amending and updating certain provisions of the CCI and the CM and the annexes thereto, states that '[i]t is therefore appropriate to set out in a Community act the procedure by which such implementing decisions should be taken'. [48]

67. By providing for a general procedure in a particular area, whether in respect of visa applications under Regulation No 789/2001 or in respect of border checks and surveillance under Regulation No 790/2001, the Council has not taken into account the Treaty requirement that the reservation of implementing powers is to occur in specific cases.

68. The Council decided to establish a general framework for the exercise of implementing powers in relation to the relevant amendments of the CCI and the CM. As has been seen above, it is incompatible with the very requirement of specificity for an entire area to be covered by a reservation of powers. In the present case, the general procedure favoured by the Council does cover all the amendments which require implementing measures in the areas of visa applications and border checks.

69. Finally, that approach is not in keeping with the institutional balance established following adoption of the Single European Act and recognition of the exceptional nature of the Council's reservation of implementing powers, since it enables the Council to take the relevant implementing measures in those two areas generally and not merely in exceptional cases.

70. Thus, the Council's decision to reserve to itself the implementing powers in the contested regulations infringes Article 202 EC and Article 1 of the second comitology decision since it fails to establish the specificity of the situation in which the implementing powers are to be reserved. It follows that the plea relied on by the Commission is well founded. There is therefore no need to consider the second plea in law.

71. It follows from the foregoing considerations that the contested regulations must be annulled.

48 — Recital 7 in the preamble to Regulation No 789/2001 and recital 4 in the preamble to Regulation No 790/2001.

C — *Costs*

72. The Council must be ordered to pay the costs in accordance with Article 69(2) of the Rules of Procedure. Under Article 69(4) of the Rules of Procedure, the Kingdom of Spain and the Kingdom of the Netherlands, as interveners, must be ordered to bear their own costs.

IV — Conclusion

73. In the light of those factors, I suggest that the Court should:

(1) annul Council Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications;

(2) annul Council Regulation (EC) No 790/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance;

(3) order the Council of the European Union to pay the costs; and

(4) order the Kingdom of Spain and the Kingdom of the Netherlands to bear their own costs.