

# JUDGMENT OF THE COURT (Grand Chamber)

5 September 2023 (\*)

(Action for failure to act – Regulation (EU) 2018/1806 – Point (f) of the first paragraph of Article 7 – List of third countries whose nationals must be in possession of visas when crossing the external borders of the Member States – List of third countries whose nationals are exempt from that requirement – Principle of reciprocity – Request to adopt a delegated act temporarily suspending the visa exemption for a 12-month period for nationals of the United States of America)

In Case C-137/21,

ACTION under Article 265 TFEU for failure to act, brought on 4 March 2021,

**European Parliament**, represented by S. Alonso de León, P. López-Carceller and J. Rodrigues, acting as Agents,  
applicant,

v

**European Commission**, represented by A. Azéma and L. Grønfeldt, acting as Agents,  
defendant,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Prechal, K. Jürimäe, C. Lycourgos, M. Safjan and M.L. Arastey Sahún, Presidents of Chambers, M. Ilešič, J.-C. Bonichot, I. Jarukaitis (Rapporteur), A. Kumin, N. Jääskinen, M. Gavalec, Z. Csehi and O. Spineanu-Matei, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2022,

gives the following

## Judgment

- 1 By its application, the European Parliament asks the Court to declare that, by failing to adopt a delegated act pursuant to point (f) of the first paragraph of Article 7 of Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2018 L 303, p. 39), the European Commission has failed to fulfil its obligations under the FEU Treaty.

### Legal context

- 2 Regulation 2018/1806 repealed and replaced, with effect from 18 December 2018, Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1), as amended by Regulation (EU) 2017/850 of the European Parliament and of the Council of 17 May 2017 (OJ 2017 L 133, p. 1). According to recital 1 thereof, Regulation 2018/1806 codifies Regulation No 539/2001 which it has repealed and replaced; references to Regulation No 539/2001 are to be construed as references to Regulation 2018/1806 and to be read in accordance with the correlation table in Annex IV to the latter regulation. According to that annex, Article 1(4) of Regulation No 539/2001 corresponds to Article 7 of Regulation 2018/1806.
- 3 Recital 14 of Regulation 2018/1806 states:

‘Full visa reciprocity is an objective which the [European] Union should pursue in a proactive manner in its relations with third countries, thus contributing to improving the credibility and consistency of the Union’s external policy.’

4 Recital 15 of that regulation is worded as follows:

‘Provision should be made for a Union mechanism enabling the principle of reciprocity to be implemented if one of the third countries included in the list in Annex II decides to make the nationals of one or more Member States subject to a visa requirement. That mechanism should provide for a Union response as an act of solidarity, if such a third country applies a visa requirement for nationals of at least one Member State.’

5 Recital 17 of that regulation states:

‘In order to ensure the appropriate involvement of the European Parliament and of the Council [of the European Union] in the second phase of application of the reciprocity mechanism, given the particularly sensitive political nature of the suspension of the exemption from the visa requirement for all the nationals of a third country included in the list in Annex II and its horizontal implications for the Member States, the Schengen associated countries and the Union itself, in particular for their external relations and for the overall functioning of the Schengen area, the power to adopt acts in accordance with Article 290 [TFEU] should be delegated to the Commission in respect of certain elements of the reciprocity mechanism. ...’

6 Article 1 of Regulation 2018/1806 provides:

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

7 Under Article 4(1) of that regulation:

‘Nationals of third countries on the list in Annex II shall be exempt from the [visa] requirement ... for stays of no more than 90 days in any 180-day period.’

8 Article 7 of that regulation lays down:

‘Where a third country listed in Annex II applies a visa requirement for nationals of at least one Member State, the following provisions shall apply:

(a) within 30 days of the implementation by the third country of the visa requirement, the Member State concerned shall notify the European Parliament, the Council and the Commission thereof in writing.

That notification shall:

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

Information relating to that notification shall be published without delay by the Commission in the *Official Journal of the European Union*, including information on the date of implementation of the visa requirement and the types of travel documents and visas concerned.

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

(b) the Commission shall, immediately following the date of the publication referred to in the third subparagraph of point (a) and in consultation with the Member State concerned, take steps with the authorities of the third country in question, in particular in the political, economic and commercial fields, in order to restore or introduce visa-free travel and shall inform the European Parliament and the Council of those steps without delay;

(c) if within 90 days of the date of the publication referred to in the third subparagraph of point (a) and despite all the steps taken in accordance with point (b), the third country has not lifted the visa requirement, the

Member State concerned may request the Commission to suspend the exemption from the visa requirement for certain categories of nationals of that third country. Where a Member State makes such a request, it shall inform the European Parliament and the Council thereof;

- (d) the Commission shall, when considering further steps in accordance with point (e), (f) or (h), take into account the outcome of the measures taken by the Member State concerned with a view to ensuring visa-free travel with the third country in question, the steps taken in accordance with point (b), and the consequences of the suspension of the exemption from the visa requirement for the external relations of the Union and its Member States with the third country in question;
- (e) if the third country concerned has not lifted the visa requirement, the Commission shall, at the latest within six months of the date of the publication referred to in the third subparagraph of point (a) and subsequently at intervals not exceeding six months within a total period which may not extend beyond the date on which the delegated act referred to in point (f) enters into force or is objected to:
  - (i) adopt, at the request of the Member State concerned or on its own initiative, an implementing act temporarily suspending the exemption from the visa requirement for certain categories of nationals of the third country concerned for a period of up to six months. That implementing act shall fix a date, within 90 days of its entry into force, on which the suspension of the exemption from the visa requirement is to take effect, taking into account the available resources in the consulates of the Member States. When adopting subsequent implementing acts, the Commission may extend the period of that suspension by further periods of up to six months and may modify the categories of nationals of the third country in question for which the exemption from the visa requirement is suspended.

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

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

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

- (f) if within 24 months of the date of the publication referred to in the third subparagraph of point (a), the third country concerned has not lifted the visa requirement, the Commission shall adopt a delegated act in accordance with Article 10 temporarily suspending the exemption from the visa requirement for a period of 12 months for the nationals of that third country. The delegated act shall fix a date, within 90 days of its entry into force, on which the suspension of the exemption from the visa requirement is to take effect, taking into account the available resources in the consulates of the Member States and shall amend Annex II accordingly. That amendment shall be made by inserting next to the name of the third country in question a footnote indicating that the exemption from the visa requirement is suspended with regard to that third country and specifying the period of that suspension.

From the date when the suspension of the exemption from the visa requirement for the nationals of the third country concerned takes effect or when an objection to the delegated act is expressed pursuant to Article 10(7), any implementing act adopted pursuant to point (e) of this Article concerning that third country shall expire. Where the Commission submits a legislative proposal as referred to in point (h), the period of suspension of the exemption from the visa requirement referred to in the first subparagraph of this point shall be extended by six months. The footnote referred to in that subparagraph shall be amended accordingly.

Without prejudice to the application of Article 6, during the periods of that suspension the nationals of the third country concerned by the delegated act shall be required to be in possession of a visa when crossing the external borders of the Member States;

...

- (h) if within six months of the entry into force of the delegated act referred to in point (f) the third country in question has not lifted the visa requirement, the Commission may submit a legislative proposal to amend this Regulation in order to transfer the reference to the third country from Annex II to Annex I;

...'

‘6. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

7. A delegated act adopted pursuant to point (f) of Article 7 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of four months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.’

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

### **Background to the dispute**

11 On 12 April 2016, the Commission submitted to the Parliament and the Council a communication entitled ‘State of play and the possible ways forward as regards the situation of non-reciprocity with certain third countries in the area of visa policy’ (COM(2016) 221 final) (‘the communication of 12 April 2016’). It stated that the vast majority of cases of non-reciprocity, involving eight third countries, had been resolved, but that a situation of non-reciprocity continued in relation to three third countries. Those third countries included the United States of America, which at that time imposed a visa requirement on Bulgarian, Croatian, Cypriot, Polish and Romanian nationals.

12 The Commission also noted, in that communication, that, if the third country concerned had not lifted the visa requirement by 12 April 2016 at the latest, it would be required, under Regulation No 539/2001, as amended by Regulation (EU) No 1289/2013 of the European Parliament and of the Council of 11 December 2013 (OJ 2013 L 347, p. 74), to adopt a delegated act suspending for 12 months the visa exemption for nationals of that third country. It also stated that Regulation No 539/2001, as amended, required it to take into account the consequences of the suspension of the visa exemption for the external relations of the European Union and its Member States.

13 Next, the Commission submitted six follow-up communications on the communication of 12 April 2016, the first and second in July and December 2016, the third and fourth in May and December 2017, the fifth in December 2018 and, lastly, the final one in March 2020.

14 Following the second follow-up communication of 21 December 2016, in which the Commission found that visa non-reciprocity concerned only two third countries, namely Canada and the United States of America, the Parliament adopted on 2 March 2017 the European Parliament resolution on obligations of the Commission in the field of visa reciprocity in accordance with Article 1(4) of Regulation (EC) No 539/2001 (2016/2986(RSP)) (‘the resolution of 2 March 2017’). By that resolution, the Parliament took the view that the Commission was ‘legally obliged to adopt a delegated act – temporarily suspending the exemption from the visa requirement for nationals of third countries which have not lifted the visa requirement for citizens of certain Member States – within a period of 24 months from the date of publication of the notifications in this regard, which [had] ended on 12 April 2016’, and called upon the Commission, on the basis of Article 265 TFEU, to adopt the delegated act which it considered necessary.

15 On 2 May 2017, by its third follow-up communication, submitted to the Parliament and the Council, the Commission replied to the resolution of 2 March 2017 and reported on the progress made (COM(2017) 227 final) (‘the communication of 2 May 2017’). It stated that the adoption of a delegated act temporarily suspending the exemption from the visa requirement for nationals of Canada and the United States of America would be ‘counterproductive at this moment’ and ‘would not serve to achieve the objective of visa-free travel for all citizens of the [European Union]’.

16 In its fourth follow-up communication of 20 December 2017, the Commission stated that the only remaining non-reciprocity case concerned the United States of America. As the Republic of Poland had joined the United States of America visa waiver programme in November 2019, the Commission stated, in its sixth follow-up communication of 23 March 2020, that that waiver programme had not been extended to all the Member States, since the United States of America was still refusing to lift the visa requirement for citizens of the Republic of Bulgaria, the Republic of Croatia, the Republic of Cyprus and Romania.

17 On 22 October 2020, by the European Parliament resolution on obligations of the Commission in the field of visa reciprocity in accordance with Article 7 of Regulation (EU) 2018/1806 (2020/2605(RSP)) (‘the resolution of 22 October 2020’), the Parliament called upon the Commission, on the basis of Article 265 TFEU, to adopt the delegated act which it considered to be required pursuant to point (f) of the first paragraph of Article 7 of Regulation 2018/1806 seeking to suspend temporarily the exemption from the short-stay visa requirement for

nationals of the United States of America on account of the visa requirement imposed by that third country on Bulgarian, Cypriot, Croatian and Romanian nationals.

18 On 22 December 2020, by the Communication from the Commission to the European Parliament and the Council defining the position of the Commission following the European Parliament resolution of 22 October 2020 on obligations of the Commission in the field of visa reciprocity and reporting on the state of play (COM(2020) 851 final) ('the communication of 22 December 2020'), the Commission set out the reasons why, at that stage, it still did not intend to adopt a delegated act temporarily suspending the exemption from the short-stay visa requirement for nationals of the United States of America.

19 The Parliament, taking the view that point (f) of the first paragraph of Article 7 of Regulation 2018/1806 does not confer on the Commission the power not to adopt a delegated act where the conditions for the adoption of such an act laid down by that provision are satisfied, brought the present action.

### **Forms of order sought and procedure before the Court**

20 The Parliament claims that the Court should:

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

21 The Commission contends that the Court should dismiss the action and order the Parliament to pay the costs.

22 By separate document lodged at the Court Registry on 18 May 2021, the Commission raised a plea of inadmissibility pursuant to Article 151(1) of the Rules of Procedure of the Court. The Parliament submitted its observations on that plea on 28 June 2021.

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

### **The action**

#### *Admissibility*

#### *Arguments of the parties*

24 The Commission claims that the present action is inadmissible on two grounds. First, in its defence, it submits that, by adopting the resolution of 22 October 2020, the Parliament circumvented the time limit for bringing an action for failure to act laid down in Article 265 TFEU. In its view, that resolution constitutes a second call to act, which in essence has the same content as that of 2 March 2017, at least as far as concerns nationals of the United States of America, whereas that earlier resolution was not followed by proceedings being brought before the Court. The Parliament is therefore time-barred from bringing such an action for failure to act. Second, in its plea of inadmissibility, the Commission submits that it defined its position, within the meaning of the second paragraph of Article 265 TFEU, by adopting the communication of 22 December 2020 in response to the call to act which the Parliament addressed to it on 22 October of that year.

25 The Parliament contends that the action is admissible. As regards a possible circumvention of the time limit for bringing an action for failure to act laid down in Article 265 TFEU, it observes, first, that the Commission, by failing to adopt the delegated act provided for in Regulation 2018/1806, has continuously infringed that regulation. Second, it submits that the resolution of 22 October 2020 contains two new recitals as compared with the resolution of 2 March 2017. Third, the Parliament maintains that its composition changed in the period between the two resolutions, as a consequence of the elections of June 2019. Fourth and last, it states, in essence, that the second call to act is based on an assessment of the evolution of the situation since the adoption of the first call to act, taking into account the Commission's last follow-up communication, namely that of 23 March 2020. As regards the plea of inadmissibility, the Parliament submits that the Commission did not define its position, within the meaning of the second paragraph of Article 265 TFEU, by adopting the communication of 22 December 2020. The question whether or not an institution has defined its position cannot be decided solely on the basis of the title of a document originating from the institution whose inaction is at issue. Moreover, it is not obvious that the Commission defined its position on the adoption of a delegated act by publishing the communication of 22 December 2020, which merely repeats information contained in its earlier communications and sets out the factual reasons for its inaction.

#### *Findings of the Court*

- 26 Under the second paragraph of Article 265 TFEU, an action for failure to act is admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, that institution, body, office or agency has not defined its position, that action may be brought within a further period of two months.
- 27 It is an essential procedural requirement for the applicant to call upon the institution, body, office or agency in question to act not only because it constitutes the starting point of the time prescribed to the person concerned, but also because, by calling into question the failure to act, that call to act requires that institution, body, office or agency to adopt a position on the legality of its inaction within a set period (judgment of 12 May 2022, *Klein v Commission*, C-430/20 P, EU:C:2022:377, paragraph 47).
- 28 As regards the plea of inadmissibility alleging that the present action was brought out of time, it is common ground that, by the resolution of 2 March 2017 and by that of 22 October 2020, the Parliament called upon the Commission to act, within the meaning of Article 265 TFEU. The Commission replied to those calls by its communications of 2 May 2017 and 22 December 2020, respectively. It is also common ground that, following the communication of 2 May 2017, the Parliament did not bring an action for failure to act.
- 29 The question whether the Parliament failed to comply with the time limit for bringing proceedings laid down in that provision, by bringing the present action for failure to act after having, by the resolution of 22 October 2020, issued a second call for the Commission to act, whereas it had not brought such an action following the resolution of 2 March 2017 in which the first call to act was made, therefore depends on whether that second call to act is, in the light of objective factors relating to its content or its context, distinct from the first.
- 30 In that regard, it is apparent from the communication of 2 May 2017, submitted to the Parliament in response to the resolution of 2 March 2017, that the Commission considered that the adoption of a delegated act temporarily suspending that exemption would be counterproductive ‘at this moment’ and would not serve to achieve the objective of visa-free travel for all EU citizens following an examination of all the relevant circumstances, in particular, the consequences of a possible suspension of the exemption from the visa requirement for the external relations of the European Union and its Member States with the United States of America.
- 31 By the resolution of 22 October 2020, the Parliament asked the Commission, after a period of more than three years had elapsed, to reconsider its approach in the communication of 2 May 2017, in the light of developments since that communication was adopted.
- 32 First, various reasons, both of a legal and political nature, may have led the Parliament, in the first instance, not to bring legal proceedings following the adoption of that communication by the Commission, and to give the Commission an opportunity to obtain, through diplomatic channels, results contributing to the objective of full visa reciprocity set out in recital 14 of Regulation 2018/1806. Second, the resolution of 22 October 2020 refers to Commission communications subsequent to that of 2 May 2017, which relate to the issue of the lack of visa reciprocity with the United States of America. It is thus apparent that, in the second instance, the Parliament adopted the resolution of 22 October 2020 – which, moreover, contains two additional grounds in support of the argument that the Commission is required to adopt the delegated act at issue – after having assessed the evolution of the situation since the adoption of the first call to act.
- 33 The distinct nature of the calls to act included in the resolutions of 2 March 2017 and 22 October 2020 is also confirmed by the fact that, in its communication of 22 December 2020, adopted following that resolution, the Commission reassessed the situation of visa non-reciprocity between the United States of America and the four Member States of the European Union concerned in the light of developments since 2017. After giving an overview of the contacts between the European Union and the United States of America on that subject, setting out the development of that third country’s visa waiver programme, its political context and its bilateral relations with the European Union, it concluded that the adoption of such an act remained inappropriate and that it would be ‘counterproductive, especially at this point in time’.
- 34 In those circumstances, the resolution of 22 October 2020 cannot be regarded as having been a means of circumventing the time limit for bringing proceedings laid down in the second paragraph of Article 265 TFEU, which had begun to run with the call to act included in the resolution of 2 March 2017, since the calls to act contained in those two resolutions were distinct in the light of both their content and the context in which they were adopted.
- 35 Consequently, the first plea of inadmissibility, alleging that the present action was brought out of time, must be rejected.
- 36 As regards the second plea of inadmissibility, alleging that the Commission had defined its position, it should be recalled that, under the first paragraph of Article 265 TFEU, the matter may be brought before the Court for a declaration that the Commission has failed to act, in infringement of the Treaties.

37 In the present case, the Commission claims that, by the communication of 22 December 2020, it defined its position, within the meaning of that provision, on the request for the adoption of a delegated act covered by point (f) of the first paragraph of Article 7 of Regulation 2018/1806, and set out the reasons why it did not comply with that request.

38 In that regard, it is true that the Court has held that the fact that the response of an institution to a call to act does not satisfy the person who addressed that call to the institution does not mean that that answer does not amount to a position defined by an institution, for the purposes of the second paragraph of Article 265 TFEU, the adoption of which puts an end to the failure to act (see, to that effect, *inter alia*, judgment of 1 April 1993, *Pesqueras Echebaster v Commission*, C-25/91, EU:C:1993:131, paragraphs 11 and 12).

39 Nevertheless, the solution referred to in the preceding paragraph cannot apply, in an interinstitutional context, in cases where the inadmissibility of an action for failure to act would enable the institution which has been called upon to act to persist in its failure to act.

40 That would be the case if the communication referred to in paragraph 37 of the present judgment were to be classified as a position defined by an institution, for the purposes of the second paragraph of Article 265 TFEU, resulting in the inadmissibility of the present action. In such a situation, the disagreement between the parties to the present dispute as regards the scope of point (f) of the first paragraph of Article 7 of Regulation 2018/1806 and, more specifically, as to the existence of any obligation to adopt the delegated act at issue, would continue to exist.

41 Thus, a refusal to act, however explicit, on the part of an institution, after the institution in question has been called upon to act pursuant to the second paragraph of Article 265 TFEU, can be brought before the Court on the basis of that article since it does not put an end to the failure to act (judgment of 27 September 1988, *Parliament v Council*, 302/87, EU:C:1988:461, paragraph 17).

42 In those circumstances, it must be held that, in an interinstitutional context, the response of an institution consisting – as in the present case – in a statement of the reasons why, according to that institution, it is appropriate not to adopt the requested measure, must necessarily be regarded as a refusal to act on the part of that institution, in accordance with the case-law referred to in the preceding paragraph, and must therefore be capable of being referred to the Court in the context of an action brought under Article 265 TFEU.

43 Consequently, the present action is admissible.

### ***Substance***

#### *Arguments of the parties*

44 In support of its action, the Parliament raises a single plea in law, alleging that the Commission infringed the Treaties by failing to adopt, pursuant to point (f) of the first paragraph of Article 7 of Regulation 2018/1806, a delegated act temporarily suspending the exemption from the visa requirement for nationals of the United States of America.

45 The Parliament submits that that provision confers no discretion on the Commission, with the result that, in the present case, the Commission must adopt such an act. According to the Parliament, the obligation to adopt a delegated act pursuant to that provision is subject only to an objective condition, namely that the third country concerned has not lifted the visa requirement for nationals of at least one Member State during the 24-month period commencing on the date of publication of the notification referred to in point (a) of the first paragraph of Article 7. In the present case, as far as concerns the United States of America, that condition was satisfied on 12 April 2016.

46 The Parliament takes the view that the fact that point (d) of the first paragraph of Article 7 of that regulation requires the Commission to take account of the consequences of the suspension of the exemption from the visa requirement for the external relations of the European Union and its Member States with the third country in question does not mean that that institution has a discretion when applying point (f) of the first paragraph of Article 7 of that regulation, since the Commission is left with no option other than to adopt the delegated act.

47 In the Parliament's opinion, the interpretation of the latter provision advocated by the Commission turns Article 7 of Regulation 2018/1806 on its head, since it renders the obligation to take account of the consequences of the suspension of the exemption from the visa requirement for external relations the pivot of the reciprocity mechanism provided for in that article, thus making the obligation laid down in point (f) of the first subparagraph of that article subject to that pivot.

48 Consequently, that interpretation deprives the latter provision of its effectiveness and fails to take account of the design of the reciprocity mechanism. There is no conflict between, on the one hand, the Commission's obligation, laid down in point (f) of the first paragraph of Article 7 of that regulation, to adopt a delegated act suspending the exemption from the visa requirement once the conditions set out in that provision are satisfied and, on the other

hand, the requirement to take into account the consequences of that suspension for the external relations of the European Union and its Member States, referred to in point (d) of the first paragraph of Article 7 of that regulation. That requirement applies to all stages of the reciprocity mechanism and, as such, must be read in that light. Furthermore, point (f) of the first paragraph of Article 7 of Regulation 2018/1806 confers on the Commission only a limited discretion, which does not relate to the content of the act, that is to say, to the very suspension of the exemption from the visa requirement. That discretion concerns other aspects, such as the choice of the date on which the suspension of the exemption from the visa requirement must enter into force, within 90 days of the entry into force of that act.

49 Thus, the interpretation advocated by the Commission would render the obligation to adopt the delegated act laid down in point (f) of the first paragraph of Article 7 of that regulation where the third country concerned has not lifted the visa requirement within a certain period ineffective, in that by simply invoking the consequences of a suspension of the exemption from the visa requirement for the external relations of the European Union and of the Member States with that third country, that institution would circumvent the obligation laid down by the EU legislature and, in practice, put an end to the reciprocity mechanism at the very first stage of that mechanism.

50 The Commission contends that point (f) of the first paragraph of Article 7 of Regulation 2018/1806 does not impose on it an unconditional obligation to adopt a delegated act to suspend the visa exemption granted to third country nationals where that third country has not lifted its visa requirement for nationals of at least one Member State within 24 months of the publication of a notification such as that referred to in the third subparagraph of point (a) of the first paragraph of Article 7 of that regulation.

51 Point (f) of the first paragraph of Article 7 of that regulation should, in the Commission's view, be read in the light of point (d) of the first paragraph of Article 7 of that regulation, which provides that the Commission, when considering further steps in accordance with point (e), (f) or (h) of that paragraph, is to take into account, first of all, the outcome of the measures taken by the Member State concerned, next, the steps it has taken in particular in the political, economic and commercial fields, in order to restore or introduce visa-free travel and, lastly, the consequences of the suspension of the exemption from the visa requirement for the external relations of the European Union and its Member States with the third country in question.

52 The Commission does not dispute that the discretion which it enjoys when applying point (f) of the first paragraph of Article 7 of Regulation 2018/1806 is limited to taking into account the factors set out in point (d) of the first paragraph of that article. However, it is clear that Regulation 2018/1806 does indeed confer that discretion on it.

53 Moreover, the interpretation of Article 7 which the Commission advocates does not render the obligation to adopt the delegated act referred to in point (f) of the first paragraph of that article 'completely [ineffective]'. The Commission notes, in that regard, that the obligation to take account of the consequences for the external relations of the European Union and the Member States, when considering further steps in accordance with point (e), (f) or (h) of the first paragraph of Article 7, is expressly provided for in point (d) of that paragraph, which precludes that interpretation from being regarded as *contra legem*. The Commission further observes that it did not confine itself to invoking the consequences of a suspension of the exemption from the visa requirement for the external relations of the European Union and of the Member States with the third country in question, but, as required by the EU legislature, assessed those consequences when examining whether to adopt a suspension measure.

#### *Findings of the Court*

54 In the present case, it is common ground that the United States of America did not waive the visa requirement for nationals of at least one Member State after the expiry of the 24-month period commencing on the date of publication of the notification referred to in point (a) of the first paragraph of Article 7 of Regulation 2018/1806.

55 Thus, it is necessary to examine whether, as the Parliament maintains, that fact put the Commission in a situation in which it was required, pursuant to point (f) of the first paragraph of Article 7 of Regulation 2018/1806, to adopt a delegated act temporarily suspending the exemption from the visa requirement for nationals of that third country, without having any discretion in that regard.

56 In interpreting a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part.

57 In that regard, it should be noted that point (f) of the first paragraph of Article 7 of Regulation 2018/1806 provides that the Commission 'shall adopt' a delegated act temporarily suspending the exemption from the visa requirement where, as in the present case, the third country concerned has not lifted the visa requirement at issue within the time limit laid down by that provision. It would therefore appear from the wording of that provision that the Commission is required to adopt such an act where the conditions required for its adoption are satisfied.

- 58 That interpretation of point (f) of the first paragraph of Article 7 of Regulation 2018/1806 must, however, be ruled out in the light of the general scheme of the first paragraph of Article 7, characterised in particular by the multi-stage structure of the reciprocity mechanism which it establishes.
- 59 More specifically, point (d) of the first paragraph of Article 7 of Regulation 2018/1806 expressly provides that the Commission, when considering further steps in accordance with point (e), (f) or (h) of that paragraph, is to take into account, in the first place, the outcome of the measures taken by the Member State concerned with a view to ensuring visa-free travel with the third country in question, in the second place, the steps that the Commission has taken in accordance with point (b) of that paragraph with the authorities of the third country in question, in particular in the political, economic and commercial fields, in order to restore or introduce visa-free travel and, in the third place, the consequences of the suspension of the exemption from the visa requirement for the external relations of the European Union and its Member States with the third country in question.
- 60 The obligation to take those various circumstances into account would serve no purpose if the Commission were automatically required to adopt the delegated act referred to in point (f) of the first paragraph of Article 7 of Regulation 2018/1806 where the third country concerned has not lifted the visa requirement at issue within the time limit prescribed by that provision.
- 61 In that regard, it is apparent from recital 17 of Regulation 2018/1806 that the conferral on the Commission of the power to adopt delegated acts under the reciprocity mechanism established by Article 7 of that regulation is intended to establish an institutional framework which makes it possible, before the possible suspension of the exemption from the visa requirement for all nationals of a third country, which is of a particularly sensitive political nature, to assess the implications of such a measure for external relations and for the overall functioning of the Schengen area.
- 62 It is thus apparent from a combined reading of the provisions set out in the first paragraph of Article 7 of Regulation 2018/1806, read in the light of recital 17 thereof, that the Commission enjoys discretion as to whether or not to adopt a delegated act based on point (f) of the first paragraph of Article 7 of that regulation; that discretion is governed by the three criteria set out in point (d) of that paragraph.
- 63 As the Advocate General observed, in essence, in points 34 to 40 of his Opinion, that interpretation is also supported by the *travaux préparatoires* for Regulation No 1289/2013, which introduced the reciprocity mechanism into EU law. It is apparent from those *travaux préparatoires* that the EU legislature did not intend to provide for an automatic suspension of the exemption from the visa requirement where a situation of non-reciprocity persists.
- 64 It follows that, contrary to what the Parliament submits, the Commission is not obliged to adopt a delegated act pursuant to point (f) of the first paragraph of Article 7 of Regulation 2018/1806 after the expiry of the 24-month period commencing on the date of publication of the notification referred to in point (a) of the first paragraph of Article 7 of that regulation. By contrast, in order to determine whether it is appropriate, in the light of the objective of full reciprocity set out in recital 14 of that regulation, to suspend the exemption from the visa requirement for nationals of the third country concerned or whether, on the contrary, it is appropriate to refrain from taking such a measure, in the light of interests relating, in particular, to the external relations of the Member States, the countries associated with the Schengen area and the European Union, the Commission must take account of the three criteria laid down in point (d) of the first paragraph of Article 7 of that regulation, set out in paragraph 59 of this judgment.
- 65 It is necessary to ascertain, in the present case, whether, in the light of those factors, the Commission exceeded the limits of its discretion in taking the view that it was justified in refusing to act.
- 66 As far as concerns the first criterion, according to which, before considering the adoption of a delegated act temporarily suspending the exemption from the visa requirement for nationals of a third country imposing a visa requirement for nationals of at least one Member State, the Commission must take into account the outcome of the measures taken by the Member State concerned with a view to ensuring visa-free travel with the third country in question, it should be noted that the communication of 22 December 2020 contains a detailed overview of the situation of the four Member States concerned at that time by the visa requirement. The Commission described changes in the visa refusal rate for each of those Member States and stated that they had been the addressees of ‘tailor-made work plans’ drawn up by the United States of America, in order that they could meet the requirements necessary to comply with the United States visa waiver programme. That communication also refers to the fact that the discussion initiated on the basis of those work plans, which contain guidance specific to each of the Member States concerned, constituted a significant improvement compared to the previous approach, based on a more general assessment of security requirements, and to the fact that the assessment of the implementation of those plans by those Member States had revealed progress on a range of work strands.
- 67 As regards the second criterion, namely the obligation on the Commission to take into account the steps it took, in the present case, with the United States of America, in particular in the political, economic and commercial fields, in order to restore or introduce visa-free travel, it referred, in its communication of 22 December 2020, first, in

detail, to several work meetings held with its American counterparts. Second, it also explains that, on account of the post-election transition period in the United States of America and pending the establishment of the new administration following the inauguration of the new president which was scheduled for 20 January 2021, it had to settle for drawing up, together with the European External Action Service (EEAS), a proposal for a new transatlantic plan recalling the importance of transatlantic ties.

68 As for the third criterion, namely the need for the Commission to take account of the consequences of the suspension of the exemption from the visa requirement for the external relations of the European Union and its Member States with, in the present case, the United States of America, the Commission, in its communication of 22 December 2020, referred to the detailed explanations on that subject already set out in the communication of 12 April 2016. It also stated, in conclusion, that the suspension of the exemption from the visa requirement for nationals of the United States of America would have significant negative impacts in a wide range of policy areas and sectors.

69 It is apparent from those factors that the Commission took into account the three criteria set out in point (d) of the first paragraph of Article 7 of Regulation 2018/1806 before reaching the conclusion that it would not adopt the delegated act requested.

70 It follows from all the foregoing that the Commission did not exceed the discretion it enjoys in taking the view, following the call to act which the Parliament had addressed to it on 22 October 2020, that it was not required to adopt the delegated act in question, with the result that it cannot be criticised for failing to act in the present case.

71 It follows that the present action for failure to act must be dismissed as unfounded.

### **Costs**

72 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Parliament has been unsuccessful, the Parliament must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the European Parliament to pay the costs.**

Lenaerts

Bay Larsen

Prechal

Jürimäe

Lycourgos

Safjan

Arastey Sahún

Ilešič

Bonichot

Jarukaitis

Kumin

Jääskinen

Gavalec

Csehi

Spineanu-Matei

Delivered in open court in Luxembourg on 5 September 2023.

A. Calot Escobar

K. Lenaerts

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\* Language of the case: English.