



**COUNCIL OF
THE EUROPEAN UNION**

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INFORMATION NOTE

from : Council Legal Service
to : Coreper 2

Subject : Case before the Court of Justice of the European Union
– C-88/14 Commission v. European Parliament and Council
– action for annulment of the visa reciprocity mechanism as laid down by
Regulation 1289/2013 amending Regulation 539/2001

1. By letter dated 24 February 2014, received the same day, the Council was notified of the Commission's application (dated 21 February 2014) before the Court of Justice seeking the annulment of Regulation 1289/2013¹, to the extent that that Regulation foresees the use of delegated acts in order to temporarily suspend the visa exemption with regard to the nationals of a third country which does not provide for reciprocal treatment of nationals of Member States (reciprocity mechanism).
2. In its application, the Commission contends that the use of delegated acts for the purpose of that suspension would be contrary to Articles 290 and 291 TFEU. In the Commission's view, that suspension would fall in reality under "implementation" of Regulation 539/2001 as it constitutes simple application of the provisions of that Regulation to a specific case. This would be supposedly confirmed by the fact that that suspension does not involve any significant room for manoeuvre for the Commission when it adopts the delegated act pursuant to that Regulation.

¹ Regulation (EU) No 1289/2013 of the European Parliament and of the Council of 11 December 2013 amending Council Regulation (EC) No 539/2001 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 L 347, 20.12.2013, p. 74.

3. The Commission claims further that that delegated acts cannot be considered neither to "supplement" nor to "amend" Regulation 539/2001. In particular it claims that the insertion of a footnote in the annexes to Regulation 539/2001 would be an "abuse of form" in disregard of the content of that Regulation and therefore cannot be regarded as an amendment within the meaning of Article 290 TFEU. The use of delegated acts would in its view lead to evident contradictions in the application of that Regulation and hamper the functioning of the reciprocity mechanism.
4. This case involves questions of horizontal interest. The Court's decision in this case may help to clarify some aspects of the delimitation between Articles 290 and 291 TFEU, and thereby bring more legal certainty for the co-legislators when making their choices as to using one or the other type of delegation. It focusses primarily on the question of when an act can be considered to be "amending" the legislative act, questions that are therefore different from those arising in the pending case C-427/12 concerning the use of implementing acts within Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products.
5. The Commission seeks primarily the annulment of the provisions providing for the use of delegated acts. In the event that the Court should consider that these provisions are not separable from the other provisions of Regulation 1289/2013, the Commission seeks the annulment of that Regulation in its entirety. In either event, the Commission requests that the legal effects of the annulled provisions be maintained pending their replacement within a reasonable time-frame by acts adopted in accordance with the Treaties.
6. The Council may, according to Article 124(1) of the Rules of Procedure of the Court of Justice, lodge a statement of defence within two months after service of the application.
7. The Director-General of the Council Legal Service has appointed Mr Krzysztof PLEŚNIAK and Ms Kristien MICHOEL, members of the Legal Service, as the Council's agents for this case.
