



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 7 May 2015¹

Case C-88/14

European Commission
v
European Parliament
and

Council of the European Union

(Action for annulment — Articles 290 TFEU and 291 TFEU — Delegated acts and implementing acts — Regulation (EU) No 1289/2013 — Reciprocity mechanism)

1. In its application in these proceedings, the European Commission requests the annulment by the Court of Regulation No 1289/2013 ('the contested regulation')² in so far as it provides for recourse to delegated acts in the context of the reciprocity mechanism that is implemented in the event that a third country whose nationals are exempt from the visa requirement when crossing the external borders of the European Union, in accordance with Regulation No 539/2001,³ imposes a visa requirement on nationals of a Member State.

2. The arguments raised by the parties touch upon sensitive issues relating to the interpretation of Articles 290 TFEU and 291 TFEU and to the reciprocal fashion in which they are formulated. The concept of the 'amendment' of non-essential elements of a legislative act, referred to in the first subparagraph of Article 290(1) TFEU, and the scope of the discretion which, according to the Court's judgment in *Commission v Parliament and Council (C-427/12, EU:C:2014:170) ('Biocides')*, the EU legislature is entitled to exercise when deciding whether to have recourse to a delegated act or to an implementing act, are some of the questions which the Court is called upon to decide.

1 — Original language: Italian.

2 — Regulation of the European Parliament and of the Council of 11 December 2013 amending 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 2013 L 347, p. 74).

3 — Council Regulation of 15 March 2001 (OJ 2001 L 81, p. 1).

I – Legislative framework

A – Primary law

3. The Lisbon Treaty introduced a hierarchical aspect into the system of secondary sources of EU law. Within that system, Articles 290 TFEU and 291 TFEU, whose purpose is to enable secondary legal rules to be put into effect, give formal expression — along the same lines as Articles 1-36 and 1-37 of the Treaty establishing a Constitution for Europe⁴ — to the separation of the delegated regulatory function, formerly included, under Article 202 EC, in the implementing powers exercised through ‘comitology’,⁵ from the executive function.

4. In accordance with the first subparagraph of Article 290(1) TFEU ‘[a] legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act’.

5. In accordance with Article 291(1) TFEU, the power to adopt the measures necessary to implement legally binding Union acts lies with the Member States. In accordance with Article 291(2) TFEU, where uniform conditions for implementing such acts are needed, those acts confer implementing power on the Commission or, in specific cases, on the Council.

B – Regulation No 539/2001

6. Regulation No 539/2001 lists the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States (the first subparagraph of Article 1(1)) and the third countries whose nationals are exempt from that requirement for stays of no more than 90 days in any 180-day period (the first subparagraph of Article 1(2)).⁶ Those lists are set out in Annexes I and II to the regulation respectively.⁷

7. Article 1(4) of Regulation No 539/2001, in the version applicable before the entry into force of the contested regulation, provided for a Community mechanism which enabled the principle of reciprocity to be implemented in the event that a third country included in Annex II to the regulation decided to impose a visa obligation on nationals of one or more Member States. In accordance with that mechanism, as amended by Regulation No 851/2005,⁸ following notification by the Member State concerned, the Commission could submit to the Council a proposal for the temporary restoration of

4 — Signed in Rome on 29 October 2004 (OJ 2004 C 310, p. 1)

5 — See paragraph 36 of *Biocides*.

6 — As amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council (OJ 201 L 182, p. 1).

7 — In accordance with recital 5 of the preamble to Regulation No 539/2001, the compilation of the lists calls for a case-by-case assessment of a variety of criteria ‘relating inter alia to illegal immigration, public policy and security, and to the European Union’s external relations with third countries’ and for consideration to be given to the implications of regional coherence and reciprocity. The reference to those criteria was confirmed, and additional criteria were introduced by Regulation No 509/2014, which, with effect from 9 June 2014, inserted before Article 1 of Regulation No 539/2001 a new ‘Article -1’ worded as follows: ‘The purpose of this Regulation is to determine 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.’

8 — Council Regulation (EC) No 851/2005 of 2 June 2005 amending 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 as regards the reciprocity mechanism (OJ 2005 L 141, p. 3).

the visa requirement for nationals of the third country in question, on which the Council was to act by a qualified majority (Article 1(4)(c)). That procedure did not affect the Commission's right to present a proposal for the amendment of the regulation in order to transfer the reference to the third country concerned to Annex I (Article 1(4)(e)).

C – The contested regulation

8. The contested regulation made two major changes to Regulation No 539/2001. It reformed the reciprocity mechanism and introduced a 'safeguard mechanism' for the temporary suspension of an exemption from the visa requirement for nationals of a third country.

9. Article 1(1)(a) of the contested regulation amends Article 1(4) of Regulation No 539/2001, establishing a reciprocity mechanism comprising three stages, commencing, as before, with the notification by the Member State for whose nationals a visa requirement has been reintroduced by a third country listed in Annex II to the latter regulation.⁹

10. The first stage of this reciprocity mechanism, governed by Article 1(4)(e) of Regulation No 539/2001, as amended by the contested regulation, is initiated by the Commission within six months of the publication of the abovementioned notification either by adopting, 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, or by submitting a report assessing the situation and stating the reasons for which it has decided not to suspend the exemption. Implementing acts must be adopted in accordance with the examination procedure referred to in Article 4a(2) of Regulation No 539/2001, inserted by Article 1(4) of the contested regulation, which makes reference to Article 5 of Regulation No 182/2011.¹⁰

11. The second stage of the reciprocity mechanism starts 24 months after the date of the publication of the notification by the Member State concerned, if the third country in question has maintained its visa requirement. It is governed by Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation, which provides as follows: 'the Commission shall adopt a delegated act ... temporarily suspending the application of Annex II for a period of 12 months for the nationals of that third country. The delegated act shall determine a date, within 90 days of its entry into force, on which the suspension of the application of Annex II is to take effect ... 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.' The conditions applying to the conferral on the Commission of the power to adopt delegated acts are prescribed in Article 4b of Regulation No 539/2001, inserted by Article 1(4) of the contested regulation. The delegation of power is conferred for a period of five years from 9 January 2014 and is tacitly extended for periods of the same duration unless the European Parliament or the Council opposes such extension. It may be revoked at any time by the European Parliament or the Council. In accordance with Article 4b(5), '[a] delegated act adopted pursuant to point (f) of Article 1(4) shall enter into force only if no objection has

9 — It is interesting to note that, in so far as concerns the reciprocity mechanism, the Commission's proposal went no further than introducing an amendment to Article 1(4)(c) of Regulation No 539/2001 to remove the secondary legal base established in that provision and to replace the reference to a Council decision on the restoration of the visa requirement for nationals of the third country in question with a reference to an act of the EU legislature (COM(2011) 290 final/2).

10 — Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55 p. 13).

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.'

12. In accordance with Article 1(4)(h) of Regulation No 539/2001, as amended by the contested regulation, 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 for amending the regulation in order to transfer the reference to the third country from Annex II to Annex I, thereby initiating the third and final stage of the reciprocity mechanism.

13. Article 1(2) of the contested regulation, which inserted into Regulation No 539/2001 a new Article 1a, introduced a mechanism which, by way of derogation from Article 1(2) of the latter regulation, enables the temporary suspension, in emergency situations, of the exemption from the visa requirement for nationals of a third country listed in Annex II.¹¹ The relevant procedure is initiated upon notification by the Member State concerned. If after examining the notification by reference to the criteria listed in Article 1a(3), the Commission, taking into account the consequences of a suspension of the exemption for the external relations of the Union and its Member States with the third country concerned, decides that action is necessary, it must, within three months of receipt of the notification, adopt an implementing act, in accordance with the examination procedure referred to in Article 4a(2) of Regulation No 539/2001, temporarily suspending the exemption from the visa requirement for the nationals of the third country concerned for a period of six months. That suspension may be extended by a period not exceeding 12 months where, before the end of the period of validity of the implementing act, the Commission submits a legislative proposal for the amendment of Regulation No 539/2001 in order to transfer the reference to the third country in question from Annex II to Annex I.

II – Procedure and forms of order sought

14. By order of the President of the Court of 1 July 2014, the Czech Republic was granted leave to intervene in support of the forms of order sought by the defendant institutions.

15. The Commission requests the Court to annul Article 1(1) of the contested regulation, and Article 1(4) thereof too to the extent that it inserted into Regulation No 539/2001 a new Article 4b, and to maintain the effects of the annulled provisions and of all measures adopted under them pending their replacement, within a reasonable time, by acts adopted in accordance with the Treaty, and to order the defendant institutions to pay the costs. In the alternative, if the Court should find that the abovementioned provisions are not severable from the remainder of the regulation, the Commission requests the Court to annul the contested regulation in its entirety and to maintain its effects, and to order the defendant institutions to pay the costs.

16. The Parliament requests the Court to dismiss the action and order the Commission to pay the costs. It is in favour of the Commission's request for the effects of the contested regulation to be maintained if the Court should uphold the action.

17. The Council requests the Court to dismiss the action in its entirety and order the Commission to pay the costs or, in the alternative, if the Court should decide to annul the contested regulation in its entirety or in part, to maintain the effects of the contested regulation or of the provisions annulled and of all acts adopted on the basis thereof until the entry into force, within a reasonable time, of a new act to replace them.

¹¹ — The circumstances giving rise to such an 'emergency situation' are listed in Article 1a(2) of Regulation No 539/2001.

18. The Czech Republic requests the Court to dismiss the action and order the Commission to pay the costs or, in the alternative, if the action should be upheld, to maintain the effects of the annulled provisions of the contested regulation until such time as they are replaced by a new regulation.

19. The parties made oral submissions at the hearing on 9 March 2015.

III – The action

20. In support of its action, the Commission puts forward a single plea in law alleging infringement of Articles 290 TFEU and 291 TFEU. It observes that delegated acts and implementing acts each have a well-defined scope of application: the former must be used when it is necessary to supplement or amend non-essential elements of a legislative act, while the latter must be adopted when uniform conditions of implementation of legally binding Union acts are necessary. The question which of the two types of act should be chosen is a purely legal question and the decision must be based, in the same way as any choice of legal basis, on objective factors amenable to judicial review. In the present case, the possibility of recourse to delegated acts provided for by Article 1(4)(f) of Regulation No 539/2001, as amended, infringes Articles 290 TFEU and 291 TFEU, since any decision to suspend temporarily an exemption from the visa requirement is not an act which ‘supplements’ or ‘amends’ Regulation No 539/2001, within the meaning of Article 290(1) TFEU, but is instead to be regarded as a measure implementing that regulation, inasmuch as it constitutes the application to a specific situation of rules already set out in the regulation.

21. Before examining the individual arguments put forward by the Commission, or the counter-arguments raised by the defendant institutions, I believe it is necessary to address the questions which have been the subject of intense debate among the parties and relate to certain aspects of the separation between legislative delegation and the executive function brought about by the Lisbon Treaty, and thus touch upon the complex issue of the delimitation of the respective scopes of Articles 290 TFEU and 291 TFEU.

A – The Commission’s discretion as a criterion for distinguishing between the scope of application of Article 290 TFEU and that of Article 291 TFEU

22. One of the questions most extensively debated by the parties, both in the course of the written procedure and at the hearing, concerns the degree of importance to be ascribed, when a dividing line is between delegated acts and implementing acts, to the breadth of the discretion conferred on the Commission.

23. The Commission maintains that, when it has only limited latitude — as it does in the case of acts adopted on the basis of Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation — the role which it is required to perform, in principle, pertains purely to implementation. For its part, the Council observes that the conferring of discretion on the Commission is not among the conditions for the delegation of regulatory powers established by Article 290 TFEU. It is therefore not relevant to any decision choosing between delegated acts and implementing acts. Parliament, on the other hand, takes the view that it is a factor which the co-legislators should take into account when defining the type of powers conferred on the Commission in connection with actually giving effect to a legislative act, but that it comes into play only when the object of those powers is to supplement or further define the content of a legislative act, not when their purpose is the amendment of the legislative act. In the latter case, whether or not the Commission enjoys any degree of discretion is irrelevant, inasmuch as recourse to delegated acts is obligatory.

24. The delegation of regulatory powers necessarily implies — at least where the intention is to confer powers to supplement a basic act with additional rules or provisions — the transfer of a discretionary power from the legislature to the delegate. Although Article 290 TFEU does not expressly mention it, the power to adopt delegated acts of the kind that supplement a basic act is necessarily accompanied by the exercise of a certain discretion. It follows that, where there is no such discretion, the task which the Commission is called upon to perform does not lend itself, from the point of view of its substantive content, to being classified as a delegated regulatory function, but rather as an executive function.

25. That executive function is, generally speaking, characterised by a discretion narrower than that attaching to the delegated regulatory function, and it is therefore possible to identify as a criterion for distinguishing between delegated acts and implementing acts the breadth of discretion, *greater* or *lesser*, that is conferred on the Commission. Although that criterion is not in itself decisive, both for the reason that it must necessarily be combined with a functional criterion, that is to say, the relationship between the rules to be adopted and the normative content of the basic act,¹² and because the limits imposed by the basic act on the objectives, content and scope of the delegation of power may significantly restrict the margin of discretion left to the Commission, thus lessening any real difference between delegation by legislative act and the exercise of implementing powers, it is, nevertheless, an important factor to be taken into consideration when a task is ascribed to one or other of the categories prescribed by Article 290 TFEU and 291 TFEU.¹³

26. Admittedly, the judgment in *Biocides*, in which the Court was for the first time called upon to define the respective scopes of Articles 290 TFEU and 291 TFEU,¹⁴ does not expressly refer to the discretion conferred on the Commission as a factor by reference to which it is possible to distinguish between delegated acts and implementing acts. Nevertheless, the conclusion that it was reasonable for the legislature to have taken the view that implementation of Article 80(1) of Regulation No 528/2012¹⁵ did not require the use of delegated acts¹⁶ — which the Court reached after a searching examination of that regulation's provisions¹⁷ — was based on its finding that the system of fees established in Article 80 was sufficiently detailed and defined in terms of legislation and thus, in essence, on the finding that the Commission had been left with little room for manoeuvre, which pointed to the executive nature of the powers conferred on it.

12 — This relationship was highlighted by the Court of Justice in paragraphs 38 and 39 of its judgment in *Biocides*, in which the Court stated that 'the purpose of granting a delegated power is to achieve the adoption of rules coming within the regulatory framework as defined by the basic legislative act', whereas, when the legislature 'confers an implementing power on the Commission ..., the Commission is called on to provide further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all Member States'. See also *Parliament v Commission* (C-65/13, EU:C:2014:2289, paragraphs 39 to 46) and the Opinion of Advocate-General Cruz Villalón in *Commission v Parliament and Council* (C-427/12, EU:C:2013:871, points 76 and 77).

13 — See, to that effect, section 2.3 of the Commission's Communication to the European Parliament and the Council — Implementation of Article 290 of the Treaty on the Functioning of the European Union (COM(2009) 673 final) ('the Communication on the implementation of Article 290 TFEU') and the European Parliament's Report on follow-up on the delegation of legislative powers and control by Member States of the Commission's exercise of implementing powers, of 4 December 2013 (A7-0435/2013), in which Parliament asserted, in the eleventh indent under paragraph 1, that, '[i]n general, delegated acts should be used where the basic act leaves a considerable margin of discretion to the Commission to supplement the legislative framework laid down in the basic act'. See also the Opinion of Advocate-General Cruz Villalón in *Commission v Parliament and Council* (C-427/12, EU:C:2013:871, point 62).

14 — In its judgment in *United Kingdom v Parliament and Council* (C-270/12, EU:C:2014:18, paragraphs 77 to 86), the Court adjudicated solely on whether Articles 290 TFEU and 291 TFEU establish a single legal framework under which certain delegated and executive powers may be attributed solely to the Commission or whether other systems for the delegation of such powers to Union bodies, offices or agencies may be contemplated by the Union legislature. In his Opinion in that Case (C-270/12, EU:C:2013:562), Advocate-General Jääskinen did, however, reflect upon the dividing line between the respective scopes of Articles 290 TFEU and 291 TFEU; see, in particular, points 75 to 88 of the Opinion.

15 — Regulation of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (OJ 2012 L 167, p. 1).

16 — See paragraph 52 of the judgment.

17 — See paragraphs 41 to 51 of the judgment.

27. Whilst, in my view, the breadth of discretion, greater or lesser, that is conferred on the Commission cannot a priori be dismissed as a relevant criterion when distinguishing between delegated acts and implementing acts, the relevance of that aspect is more debatable where, as in the present case, the Commission is empowered to adopt acts *amending* the basic act. Indeed, if it were to be established that, as asserted by the defendant institutions and the intervener, that power can arise only through delegation by legislative act, the question whether or not it entails a discretion is essentially irrelevant to the choice of an instrument under Article 290 TFEU or under Article 291 TFEU.¹⁸

28. The merits of the Commission's argument that the powers conferred on it by Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation, are materially in the nature of implementing powers, which the Commission bases on the fact that it has no margin of discretion, therefore depend on the meaning and scope that may be attributed to the concept of 'amendment of the legislative act' expressed in Article 290(1) TFEU.

29. Before that issue is examined, it is nevertheless necessary to address another matter that has been the subject of debate among the parties, that is to say, the latitude enjoyed by the legislature when deciding what type of power to confer on the Commission for the purposes of giving effect to a basic act.

B – The discretion of the legislature in choosing between recourse to delegated acts and recourse to implementing acts

30. In support of their respective positions, the defendant institutions, supported on this point by the intervener, have made various references to the discretion enjoyed by the legislature in choosing the method by which the legislative acts which it adopts should be given effect.

31. I would first of all observe, in this connection, that the legislature has complete political discretion, not amenable to judicial review, as regards whether or not to confer powers by way of legislative delegation.¹⁹ Delegation is not an obligation but an instrument, or rather an option which the legislature may choose to employ in order to simplify and accelerate the regulatory process in so far as concerns aspects that, within the framework of rules laid down by a basic legislative act, are not essential to that basic act. While the legislature is not obliged to delegate its own powers, when it chooses to do so it is bound to observe the conditions laid down by Article 290 TFEU, chief among which is the rule, expressed in the second subparagraph of Article 290(1) TFEU, that its essential political choices may not be delegated.²⁰

32. I would also recall that, in paragraph 40 of its judgment in *Biocides*, the Court confirmed that the legislature 'has discretion when it decides to confer a delegated power on the Commission pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU'.

18 — I would observe that, in various passages of its application, the Commission itself appears to regard the relevance of the criterion as limited to cases in which giving effect to the basic act entails supplementing, in some way, the provisions thereof.

19 — As stated in the Communication on the implementation of Article 290 TFEU, '[t]he legislator is entitled to enact full and comprehensive regulations governing a particular field of action, entrusting to the Commission the responsibility for ensuring their harmonised implementation through implementing acts; alternatively the legislator can choose to regulate the field in question only partially, leaving the Commission the responsibility for supplementing the regulations with delegated acts'.

20 — The principle that the definition of the essential elements of a basic act is reserved to the legislature has been confirmed by the Court of Justice since its judgment in *Köster, Berodt & Co.* (25/70, EU:C:1970:115).

33. Both the Council and Parliament refer in their pleadings to this passage in the judgment and the principle which it confirms.²¹ The Commission, however, calls into question their relevance to the present case, with arguments which must, in my view, be rejected. The wording and comprehensive tenor of that passage do not support the conclusion, propounded by the Commission, that the principle may be asserted only in cases, such as that which gave rise to the judgment in *Biocides*, in which it must be established whether a secondary measure supplements a basic legal act, within the meaning of Article 290 TFEU, and not in cases, such as the present, in which the issue is whether the secondary measure ‘amends’ the basic act, within the meaning of that provision.

34. That being said, it is appropriate to consider the scope of the legislature’s discretion, recognised in paragraph 40 of the judgment in *Biocides*. First of all, it seems clear to me that this discretion must be exercised in accordance with the conditions laid down in Articles 290 TFEU and 291 TFEU. The choice left open to the legislature does not give it power to treat as executive acts that in reality entail the exercise of delegated regulatory powers, and vice versa. Any such power would of course cancel out the distinction between delegated tasks and executive tasks and would alter the distribution of powers and upset the institutional balance reflected in that distinction. Articles 290 TFEU and 291 TFEU establish specific fields of competence for the co-legislators, on the one hand, and those who carry out executive functions (essentially the Member States and the Commission), on the other. Apart from adopting regulations to lay down the rules and general principles concerning mechanisms for the review by Member States of the Commission’s exercise of implementing powers, as provided for in Article 291(3) TFEU, the co-legislators have, in principle, no role to play in the drafting of measures falling within the scope of Article 291 TFEU²². Consequently, delegated acts adopted under the aegis of Article 290 TFEU may not contain executive measures within the meaning of Article 291 TFEU and executive measures adopted on the basis of Article 291 TFEU may not contain rules of general application falling within the scope of Article 290 TFEU.

35. Nor do I think that, in paragraph 40 of its judgment in *Biocides*, the Court intended implicitly to acknowledge the existence of a ‘grey area’ in which the dividing line between delegated acts and implementing acts tends to blur and within which the acknowledged discretion of the legislature is exercised. Following the suggestion made by Advocate-General Cruz Villalón in his Opinion, the Court in fact avoided expressing a position on the argument, put forward by the Commission, that the respective scopes of Articles 290 TFEU and 291 TFEU are mutually exclusive.

36. It does seem to me that the discretion to which the Court referred consists in the legislature’s freedom to choose the method by which (delegated act or implementing act) effect is to be given to the legislative act in question. Once that decision has been taken, the legislature will have to adapt the content and structure of the basic act accordingly, so as to create a relationship between the two levels of regulation (the legislative act and the secondary measure) appropriate to one or other source (delegated act or implementing act).

37. It will fall to the Court, without calling into question the appropriateness of the legislature’s choice, to determine whether the conditions laid down by Articles 290 TFEU and 291 TFEU have been satisfied, that is to say, to assess whether the content and structure of the legislative act in question are compatible with the normative instrument chosen to give effect to that act. That, in my view, is the approach to be taken to the apparent discrepancy between the assertion, in paragraph 40 of the judgment in *Biocides*, that judicial review of the legislature’s exercise of its discretion is limited and the extensive review which the Court carried out in paragraphs 41 to 51 of the judgment of

21 — It is impossible not to notice a certain contradiction in the Council’s and Parliament’s arguments: on the one hand they refer to the legislature’s discretion, as acknowledged in *Biocides*, and, on the other hand, they argue that, where the implementation of a legislative act calls for the modification of that act, recourse to Article 290 TFEU is the only possible option. That contradiction is, in fact, more evident in the Council’s pleading, Parliament focussing more on the legislature’s discretion in assessing the *necessity* of the amendment.

22 — Without prejudice to the case provided for in Article 291(2) TFEU of the conferring of implementing powers on the Council.

compliance with the conditions laid down in Article 291 TFEU. Following the interpretation thus suggested, judicial review of the legislature's choice between delegated act or implementing act is restricted to manifest errors of assessment, whereas the Court may fully review the matter of the legislature's compliance with the conditions laid down in Articles 290 TFEU and 291 TFEU.

38. I shall now go on to examine the meaning and scope that must be ascribed to the concept of 'amendment' of a legislative act for the purposes of Article 290(1) TFEU.

C – The concept of 'amendment' of a legislative act for the purposes of Article 290(1) TFEU

39. The debate among the parties involves the opposition of a 'formalistic' approach, taken by the defendant institutions, according to which any formal amendment of a basic act, however small or insignificant, requires a delegated act, and a 'substantive' approach, advocated by the Commission, according to which amendments that do not call for any exercise of discretion on its part and do not alter the normative content of a basic act do not fall within the scope of application of Article 290 TFEU. The former approach, like any approach founded on formalistic criteria, offers the advantages of simplicity of application and of predictability.²³ However, it poses the risk of inclusion within the domain of legislative delegation amending measures which, in substance, pertain to implementation. The latter approach reserves to the delegated regulatory function only those measures which, in substantive terms, fall within that category, but it renders the choice between delegated act and implementing act more complex and potentially contentious in cases where power is devolved on the Commission to make formal amendments to a basic act. To follow the Commission's approach also entails the admission that certain amendments to the text of a legislative act may be made by an implementing act.

40. Before endorsing one approach or the other, I must address another argument which seems to me to emerge from certain passages in the Commission's written submissions, according to which the concept of 'amendment' of the basic act, within the meaning of Article 290(1) TFEU, does not include the *addition* of (non-essential) elements to the content of that act.

41. I agree with the Parliament that, generally speaking, the 'amendment' of a legislative act covers any change made to the content of that act, whether it be the deletion, addition or replacement of any element thereof. The wording of Article 290 TFEU does not, in my view, admit of any other interpretation, including in the light of its legislative history.

42. I would recall in this connection that, under the comitology system established on the basis of Article 202 EC, the concept of 'amendment' of a basic act clearly included the function of supplementing legislation ('the addition of new ... elements') within the single category of 'implementing powers'. In accordance with Article 2(2) of Decision 1999/468,²⁴ the regulatory procedure with scrutiny — introduced by Decision 2006/512²⁵ in order to allow Parliament, as co-legislator, a measure of scrutiny over certain acts implementing legislation adopted under the co-decision procedure — had to be followed where power was conferred on the Commission to adopt measures of general scope designed to amend non-essential elements of a basic instrument by, *inter alia*, deleting some of those elements or *by supplementing the instrument by the addition of new*

23 — Predictability is one of the objectives mentioned by the Commission in its Communication on the implementation of Article 290 TFEU; see section 1, 'Introduction'.

24 — Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23). That decision, which remained in force until 28 February 2011, was repealed by Regulation No 182/2011, adopted on the basis of Article 291(3) TFEU.

25 — Council Decision of 17 July 2006 amending Decision 1999/468 (OJ 2006 L 200, p. 11).

non-essential elements.²⁶ Moreover, according to the logic underlying the framing of that rule, ‘supplementing’ an act by way of regulating detailed or technical aspects of the rules laid down in that act entailed amendment of the act even if the detailed or technical rules were not intended to form a substantive part of the act itself.²⁷

43. By contrast with Article 2(2) of Decision 1999/468, Article 290(1) TFEU, like Article 1-36 of the Treaty establishing a Constitution for Europe, draws a distinction between measures which ‘supplement’ and measures which ‘amend’ the basic act. Given the organisational intentions of the authors of the Lisbon Treaty when reforming the mechanism for legislative delegation within the Union, it is logical to assume that the choice of a different wording reflects a wish to identify two categories of delegated act functionally different one from the other. The first concerns measures designed to make *formal changes to the text* of the legislative act, the second relates to measures which supplement its normative content *without changing the text*. From that perspective, depending on the technique chosen, the *addition* to the basic act of new non-essential elements would constitute, for the purposes of Article 290 TFEU, an ‘amendment’, provided that those elements are inserted *into the text* of the act (either in its provisions or in its annexes), and a ‘supplement’ where they are not intended to be physically included in the basic act but instead remain the subject of a *separate normative measure*.²⁸ The choice between one technique or the other will depend on, amongst other things, the amount of new material in question: an amendment to the text of a basic act may be preferable where it is a question of a few isolated additions, for example to the annex to an act, but not where it is a question of drawing up a set of detailed rules.

44. That said, it is necessary to express a position on the ‘substantive’ approach propounded by the Commission, which, as I have indicated, is that amendments that do not call for the exercise of any discretion on its part or do not alter the normative content of a basic act are not amendments within the meaning of Article 290 TFEU.

45. As we have seen, the delegated regulatory function is characterised by the exercise, on the part of the delegate of the power, of a certain freedom of action, which, on the other hand, is not necessarily a feature of the executive function. The delegation to the executive of legislative powers is normally accompanied by mechanisms enabling the bodies ‘constitutionally’ entitled to carry out legislative functions to review the exercise of the powers delegated — and also, therefore, the exercise of discretion — and even to revoke the delegation of powers. The objective of such mechanisms is to counterbalance the derogation from the principle of the separation of powers (albeit limited to the more technical aspects of the legislation) inherent in the legislative act providing for the delegation, and thus to ensure strict observance of the principle of democracy affirmed, in EU law, in Articles 2

26 — The fact that the function of supplementing legislation is included within the concept of the ‘amendment’ of a basic instrument is quite clear from most of the language versions of Article 2(2) of Decision 1999/468 (see, for example, the English, Spanish, French and German versions). The wording of the Italian version, however, is less clear on this point, as well as being grammatically incorrect. Nevertheless, see, in the Italian version, recital 3 of the preamble to Decision 2006/512 and recital 7a of the preamble to Decision 1999/468, inserted by Decision 2006/512. Since the 1970s, the Court has confirmed the lawfulness of implementing measures designed to amend certain elements of a basic act, provided that the relevant powers are clearly and expressly provided for in the basic act (see *CAM v Commission* (100/74, EU:C:1975:152, paragraphs 26 to 29), which concerned the amendment, by way of Commission regulation, of prices applicable in the agricultural sector in 1974 and 1975 that had been fixed by the Council) and do not alter or contravene the essential principles laid down by the basic act (*Eridania-Zuccherifici nazionali and Società italiana per l’industria degli zuccheri* (230/78, EU:C:1979:216, paragraph 9) and *Parliament v Council* (C-417/93, EU:C:1995:127, paragraphs 28 to 33)). See, however, *Parliament v Council* (C-93/00, EU:C:2001:689), in which the Court annulled the regulation by which the Council, purportedly exercising its implementing powers, had extended the validity of the rules relating to the voluntary labelling system laid down by Regulation No 820/97, because its amendment of that regulation had not been made ‘on a legal basis equivalent to that on which [the regulation] had been adopted, that is to say, on the basis of the Treaty itself, and in conformity with the decision-making process provided for by the Treaty’ (paragraph 42)).

27 — See for example, pending cases C-506/14, C-389/14, C-391/14 and C-393/14.

28 — See, to that effect, the Communication on the implementation of Article 290 TFEU (section 2.3) and, even more explicit, the Commission’s 2011 document Implementation of the Treaty of Lisbon — Delegated Acts — Guidelines for the services of the Commission (‘Guidelines on delegated acts’), annexed to document SEC(2011) 855 of 24 June 2011, paragraph 34.

TEU and 10 TEU.²⁹ However, when no discretion is conferred on the delegate of the power, scrutiny by the legislature becomes devoid of purpose and there is no longer any justification for recourse to an Article 290 TFEU delegation of power, for the task in question can be performed simply by means of an executive measure. Following this line of argument, an amendment of the text of a legislative act that results from the Commission's exercise of a circumscribed power would fall outside the scope of Article 290 TFEU, as it would not fit within the framework of legislative delegation.

46. Similarly, an amendment to the text of a legislative act that does not affect its legal framework, by which I mean the entire body of legal provisions contained in the act, does not appear to require a legislative delegation, since it does not alter the *legislative elements* of the act.

47. The wording of Article 290(1) TFEU does not, however, offer any guidance on distinguishing between measures that amend a basic act and seems rather to rest upon a formal criterion, in accordance with which any formal change to the content of an act constitutes an 'amendment' for the purposes of that provision, with the result that the act of amending a basic act *by its very nature* falls within the domain of legislative delegation. In so far as amendment is concerned, there would then be a certain mismatch between a delegated act in substantive terms and a delegated act in the strictly formal sense, in that it would be possible, or even necessary, for a regulatory act that is, in fact, executive in nature to be adopted as a delegated act, given that it brings about an amendment.

48. It may legitimately be wondered whether such a broad interpretation of the concept of 'amendment', in accordance with which the legislature could, in essence, reserve to itself the right to scrutinise acts that are, in substance, executive, is compatible with the principle of conferred powers affirmed in Article 13(2) TEU and with the institutional balance intended by the Treaties. The executive function, which is normally performed outside the institutional framework of the Union, in that it falls principally to the Member States, is, when uniform conditions for implementing basic acts are necessary, devolved, except in specific cases, upon the Commission, subject to review by the Member States. On the other hand, Article 290 TFEU does not cover the amendment of parts of a legislative act by means of measures that are not of general application, such as the updating of an annex that does not contain measures of general application, and it does not, therefore, lay down any absolute principle that legislative acts are 'untouchable' outside the sphere of the legislature's supervision.

49. In light of the foregoing considerations, and without it being necessary, in the circumstances of the present case, to pursue this analysis any further, I conclude that recourse to delegated acts may be dispensed with solely in cases in which it is quite clear that the amendment requiring to be made leaves the Commission no leeway and will not affect the legislative elements of the basic act. To give an example, a change updating an annex to a legislative act, on the basis of information provided by a Member State, the content of which the Commission cannot call into question would, provided that it did not affect the legislative elements of the basic act, constitute such a case.³⁰

50. In light of all the foregoing considerations, I shall now examine, in the points that follow, the arguments made by the Commission in support of its contention that the provisions of the contested regulation of which it seeks annulment are unlawful.

29 — As emphasised by Advocate-General Jääskinen in point 85 of his Opinion in *United Kingdom v Parliament and Council* (C-270/12, EU:C:2013:562), this principle is also safeguarded by the delegation of such powers solely to the Commission, which is ultimately accountable to the Parliament.

30 — The example is taken from paragraph 37 of the Guidelines on delegated acts.

D – *The Commission's criticisms of the contested regulation*

1. The complaint based on the essentially executive nature of the delegated act referred to in Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation

51. The Commission argues that the temporary suspension provided for by Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation, which is decided upon by reference to criteria set out in the regulation, cannot be compared to an amendment of the basic act within the meaning of Article 290(1) TFEU. It observes that Article 290(1) TFEU requires the delegated act to amend 'certain non-essential elements' of the legislative act and it explains that, in order for that to happen, those elements must, logically, already appear in the basic act, the normative content of which will thus be amended by the delegated act. However, the contested regulation does not identify the third countries in respect of which the exemption from the visa requirement is to be suspended, but sets out the criteria by reference to which such countries are to be identified. It follows, according to the Commission, that the act introducing such a suspension does not change elements already contained in Regulation No 539/2001, but merely implements that regulation.

52. To the extent that that argument is to be understood as meaning that the insertion of the footnote in Annex II to Regulation No 539/2001 provided for by Article 1(4)(f) of that regulation, as amended by the contested regulation, does not constitute an 'amendment' within the meaning of Article 290 TFEU, because 'amendment' in that sense does not include the 'addition' of new non-essential elements to the content of the basic act, I would refer to points 41 to 43 of this Opinion. At this juncture, I would merely point out that the name of the third country in respect of whose nationals the delegated act provided for by Article 1(4)(f) temporarily suspends the more favourable regime provided for in the first subparagraph of Article 1(2) is already included in Annex II to the regulation. By inserting a footnote against the name of that country, the delegated act is further qualifying the legal regime applicable to nationals of that country and thus, in formal terms, 'amending' an element already present in the basic regulation.

53. The Commission's argument may, however, be interpreted as meaning that a measure by which the application of certain aspects of the legal system laid down in the basic act is temporarily suspended does not, by its nature, fall within the scope of Article 290 TFEU since it does not 'supplement' or 'amend' elements of that basic act, but merely applies the rules set out in that act and thereby adapts the act to circumstances and events which the legislature could not anticipate other than in the abstract. Understood in that sense, the Commission's argument raises what in my view is the most sensitive issue in this case, which is the question whether, *leaving aside the formal amendment* made to Annex II to Regulation No 539/2001 by the insertion of the footnote, the measure provided for by Article 1(4)(f) of the regulation, as amended by the contested regulation, pertains purely to implementation.

54. The Parliament and the Council do not expressly state their position on this point, but base their defence on the argument that the measure in question falls within the scope of Article 290 TFEU because of its vocation to amend Annex II to Regulation No 539/2001. The Commission infers from the defendant institutions' silence on this point a tacit admission that the measure in question pertains in substance to implementation. Leaving aside what appear to be some rather forced arguments, the Council admittedly acknowledges that it would have been possible to conceive of a different mechanism, one that did not require the adoption of a delegated act, and that the same result could have been achieved without formal amendment of Annex II.

55. Moreover, such a mechanism was in fact adopted in Article 1a of Regulation No 539/2001, inserted by the contested regulation. As mentioned in point 12 of this Opinion, Article 1a establishes a mechanism which, by way of derogation from Article 1(2) of Regulation No 539/2001, enables the suspension, in emergency situations, of the exemption from the visa requirement for nationals of a

third country listed in Annex II for a period of six months, which may be extended to twelve months. That suspension, which produces the same effects as those contemplated by Article 1(4)(f) of the regulation,³¹ but is not accompanied by any amendment of the text of the regulation, is made by the Commission by means of an implementing act adopted in accordance with the examination procedure provided for by Article 5 of Regulation No 182/2011. The urgent nature of the procedure established by Article 1a, to which the Parliament referred in response to a question posed by the Court, does not seem to me to be sufficient to justify recourse, in the context of that procedure, to implementing acts. It is in fact by reference to the nature and effects of the measures requiring to be adopted in order to give effect to the basic act that the correctness of the choice of normative instrument must be assessed. So, for example, political considerations relating to the sensitivity of the domain in which the measures are intended to take effect³² are not relevant to that assessment, as indeed the defendant institutions in this case have in the end admitted.³³ The same may be said of the potentially urgent nature of the measure at issue. Moreover, I would point out that Section VI of the common understanding on delegated acts, approved on 3 March 2011 by the Conference of Presidents of the European Parliament, which sets out the practical arrangements, definitions and preferences relating to delegations of legislative power under Article 290 TFEU, contemplates a specific urgency procedure, to be reserved for the adoption of delegated acts in exceptional cases in given fields, such as security, health protection and, significantly, external relations, including humanitarian crises. Acts adopted under this procedure enter into force immediately and apply as long as no objection is expressed by the Parliament or the Council within the period fixed in the legislative act.

56. On the other hand, if it were to be considered that, even leaving aside the alteration it makes to the basic act, the suspending measure provided for by Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation, is in the nature of a delegated act, it would have to be accepted, in light of the categorisation suggested earlier,³⁴ that it ‘supplements’, within the meaning of Article 290(1) TFEU, certain non-essential elements of Regulation No 539/2001. However, that depiction of the situation has been excluded by all the parties to the present proceedings.

57. On a more general note, I think that measures providing for the suspension of specific aspects of the legal regime established by a legislative act, like measures which provide for the extension of or derogation from such a regime, are, in principle and without prejudice to the need to determine case by case the classification of the powers actually conferred on the Commission, ascribable to the executive function. To use the words of the Court in paragraphs 38 and 39 of its judgment in *Biocides*, the purpose of measures of this kind seems to me to be ‘to provide further detail in relation to the content of the legislative act’ rather than to supplement it.

58. In conclusion, I agree with the Commission that, leaving aside the alteration of the basic act which it entails, the suspending measure provided for by Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation, is nothing more than an act applying the provisions contained in the basic act and therefore falls within the category of implementing acts, in the same way as the measures adopted in the first stage of the reciprocity mechanism and those decided upon pursuant to Article 1a mentioned above. In the present case, the limited margin of discretion left to the Commission in applying the suspension also militates in favour of this conclusion.

59. There is, nevertheless, a ‘qualitative’ difference between the measures suspending the exemption from the visa requirement adopted pursuant to Article 1(4)(e) and those adopted in accordance with Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation. That difference resides in the fact that the latter measures entail a formal amendment to a part of the regulation. It is

31 — The suspension relates to all nationals of the third country in question, not merely certain categories of those nationals, as is the case under the implementing acts adopted pursuant to Article 1(4)(e) of Regulation No 539/2001, as amended by the contested regulation.

32 — See paragraph 33 of the Guidelines on delegated acts.

33 — Earlier on, however, such considerations may have an effect on the definition of the structure and content of the basic act.

34 — See point 42 above.

therefore necessary, at this point, to assess, on the basis of the arguments put forward by the Commission in support of its application, first, whether that difference alone justifies the application of Article 290 TFEU to the adoption of the measures provided for by Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation, notwithstanding the fact that they pertain, in substance, to implementation, and, secondly, whether, by requiring the Commission simultaneously to amend the text of the basic act, the legislature has not exceeded the discretion allowed in determining the structure and content of that act.

2. The argument that the provision for the insertion of a footnote in Annex II to Regulation No 539/2001 does not justify recourse to delegated acts

60. The Commission maintains that the insertion of the footnote provided for by Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation, against the name of the relevant third country listed in Annex II to that regulation does not constitute an 'amendment' within the meaning of Article 290(1) TFEU because it does not affect the legal regime established by the basic act.

61. I would point out in this connection that measures adopted pursuant to Article 1(4)(f) do not merely identify third countries which no longer offer reciprocity, in terms of visas, to Union citizens, in response to circumstances contemplated, generally and in the abstract, by the basic regulation. They in fact temporarily suspend the more favourable regime established by the first subparagraph of Article 1(2) of Regulation No 539/2001 for the benefit of nationals of such countries. They therefore have a direct effect on certain aspects of the regulatory scheme laid down by Regulation No 539/2001, namely, the inclusion of the third country in question in Annex II and the full application to nationals of that country of the exemption from the visa requirement.

62. Admittedly, as the Commission observes, such a suspension would come into effect even if there were no requirement to insert a footnote or if the decision to suspend the exemption were adopted in an implementing act, as is the case with the measures adopted in the first stage of the reciprocity mechanism and those adopted under Article 1a of Regulation No 539/2001, as amended by the contested regulation. Indeed, as is clear from the very wording of Article 1(4)(f) of the regulation, the footnote merely indicates the suspension of the exemption from the visa requirement and the duration thereof. It therefore merely provides information. As the Council itself observed in its written submissions, and as is clear from recital 11 of the preamble to the contested regulation, the footnote pursues objectives of transparency and of legal certainty.

63. However, I concur with the statement made by the Parliament at the hearing that the amendment of Annex II to Regulation No 539/2001 by the insertion of the footnote cannot be considered independently from the decision to suspend the exemption.

64. More specifically, I take the view that, by making provision for that amendment, the legislature intended for *the decision to suspend the exemption to be incorporated into the body of the basic act*. Thanks to that action, the decision to suspend the exemption becomes an integral part of the act and thus, from the formal perspective of the 'hierarchy of laws', takes on a different configuration from measures adopted in the first stage of the reciprocity mechanism and from those provided for under the safeguard mechanism, even though they all share the same normative form and structure.

65. In those circumstances, given the link between the decision to suspend the exemption and the text of Regulation No 539/2001 created by the footnote, it does not seem possible to me to affirm, as the Commission asserts, that the alteration made to Annex II to the regulation by the insertion of the footnote does not affect legislative elements of the regulation. The situation is thus different from the case described in point 48 of this Opinion, in which the power to amend the basic act conferred on the Commission could fall outside the scope of Article 290 TFEU.

66. Equally, I think it necessary to reject the Commission's argument that, in the present case, there can be no amendment within the meaning of Article 290 TFEU because the powers which it is exercising are circumscribed. I would observe in this connection that the second stage of the reciprocity mechanism introduced by the contested regulation is unquestionably automatic to a degree. That is clear both from the very wording of Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation, and from the fact that the temporary suspension of the exemption from the visa requirement is, under that provision, subject only to the condition that the third country in question has not lifted the visa requirement within a period of 24 months. However, as the Commission itself notes, point (d) of Article 1(4) provides that, 'when considering further steps', inter alia, under Article 1(4)(f), 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, 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'. Thus, it is clear from that provision that, notwithstanding the tendency of the second stage of the reciprocity mechanism to apply automatically, the Commission does have a certain, albeit limited, degree of discretion in the adoption of a decision temporarily suspending exemption, as referred to in Article 1(4)(f). From this perspective also, the situation is therefore different from the case described in point 48 of this Opinion.

67. In conclusion, I take the view that, despite the fact that the measure suspending exemption under Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation, pertains, in substance, to implementation, recourse to the legal instrument provided for by Article 290 TFEU is, in this case, justified by the alteration which the measure under Article 1(4)(f) makes to the basic act.

3. The argument alleging an 'abuse of form'

68. In its application the Commission maintains that the provision for the insertion of a footnote in Annex II to Regulation No 539/2001 to indicate the suspension of the exemption from the visa requirement for a given third country is not an 'amendment' within the meaning of Article 290(1) TFEU, but merely a technical device which the legislature has employed in order to justify recourse to delegated acts. Consequently it is an 'abuse of form'. That argument, stated only cursorily in the application and not taken up in the reply, seems to me to suggest an allegation of misuse of powers.

69. According to the case-law, a measure is vitiated by misuse of powers only if it appears on the basis of objective, relevant and consistent evidence to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.³⁵ However, leaving aside all other considerations, I do not think that the points made by the Commission in its application regarding the substantially executive nature of the suspending measure referred to in Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation, constitute such evidence or support the conclusion that the legislature prescribed the insertion of the footnote mentioned in that provision with the exclusive or main purpose of precluding recourse to implementing acts.

4. The argument alleging a manifest error of assessment

70. In its reply, the Commission argues that, if the Court were to apply the principles laid down in its judgment in *Biocides* to the present case,³⁶ the legislature's decision in this case to have recourse to delegated acts is vitiated by a manifest error of assessment.

35 — *Walzstahl-Vereinigung and Thyssen v Commission* (140/82, 146/82, 221/82 and 226/82, EU:C:1984:66, paragraph 27), *Lux v Court of Auditors* (69/83, EU:C:1984:225, paragraph 30) and *Fedesa and Others* (C-331/88, EU:C:1990:391, paragraph 24).

36 — As mentioned in point 32 of this Opinion, the Commission maintains that those principles are not applicable to the circumstances of the present case.

71. The objection raised by the Council that this argument is inadmissible must, in my view, be dismissed. Contrary to the Council's assertion, it is not a new plea in law put forward, out of time, in the reply, but is a further development of the single plea in law put forward in support of the action, alleging infringement of Articles 290 TFEU and 291 TFEU. Moreover, even if it were a new plea, the Commission would be justified in putting it forward late, since it was prompted by the principles laid down by the Court in its judgment in *Biocides*, which was delivered after the Commission had lodged its application.

72. As regards the merits, I would begin by recalling that, in that judgment, the Court acknowledged that the legislature 'has discretion when it decides to confer a delegated power on the Commission pursuant to Article 290(1) TFEU or an implementing power pursuant to Article 291(2) TFEU'.³⁷ In point 36 of this Opinion, I reached the conclusion that that discretion consists in the legislature's freedom to choose the method by which effect is to be given to the legislative act in question, adapting the content and structure of the basic act accordingly.

73. For the reasons I have stated, in particular in points 60 to 67 above, I think that, given the vocation to amend of acts adopted under Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation, the conditions for the application of Article 290 TFEU are met in the present case. However, it remains to be ascertained whether the legislature's decision that the second stage of the reciprocity mechanism should be initiated by delegated acts effecting an amendment in that stage of the mechanism exceeds the discretion which it may exercise when defining the structure and content of the basic act. That might be so if the provision for the insertion of a footnote were to be found to be arbitrary, irrational or yet inconsistent with the normative system of which it forms a part.

74. According to the Commission, as I have already mentioned a number of times, one inconsistency lies in the fact that it is unable to exercise any discretion when suspending the exemption from the visa requirement under Article 1(4)(f) of Regulation No 539/2001, as amended by the contested regulation, whereas it has broad discretion when adopting, by implementing act, measures falling within the scope of the first stage of the reciprocity mechanism. Furthermore, the fact that the powers conferred on it by Article 1(4)(f) are circumscribed renders nugatory the right of objection allowed the legislature under Article 4b of Regulation No 539/2001, as amended by the contested regulation.

75. Admittedly, the Commission enjoys a broader discretion in the first stage of the reciprocity mechanism, but discretion is not totally lacking in the second stage of the mechanism, as I have already had occasion to point out.³⁸

76. However, as the defendant institutions point out, the decision to have recourse to delegated acts in the second stage of the mechanism, and not in the first, is justified by the broader scope of the measure suspending exemption that is adopted in the second stage, the effects of which are essentially identical, apart from their temporary nature, to the effects of the removal of the third country in question from the list set out in Annex II to Regulation No 539/2001, which occurs in the third and final stage of the reciprocity mechanism and is brought about by legislative act. That mechanism was designed as a single process involving various measures of increasing intensity to which the various legal instruments, each at a different level in the hierarchy of laws, correspond. From that point of view, I do not regard as any real indication of confusion between the regulatory functions prescribed by Articles 290 TFEU and 291 TFEU respectively the fact alluded to by the Commission that, given the

³⁷ — Paragraph 40.

³⁸ — See point 66 above.

circumscribed nature of its powers in the second stage of the mechanism, the power of veto provided for in Article 4b of Regulation No 539/2011 over acts adopted under Article 1(4)(f) amounts to a form of indirect legislative scrutiny of the exercise by the Commission of its discretion in the first stage of the mechanism.

77. In so far as concerns the Commission's argument that the conditions to which the delegation of power is subject under Article 4b(2) of Regulation No 539/2001, as amended by the contested regulation, namely, the possibility of the revocation of that power and its limitation in time, are further indications of the irrationality of recourse to delegated acts, because it is unclear how the mechanism could still function without the measures provided for by Article 1(4)(f) of the regulation, I would merely observe that those conditions are the same as those expressly mentioned in Article 290(2) TFEU and that there is therefore nothing abnormal in their being laid down in this case, given the legislature's decision to have recourse to the legal instrument provided for in Article 290 TFEU. I would also point out that, in accordance with Article 1(4)(i) of Regulation No 539/2001, as amended by the contested regulation, the procedure referred to in Article 1(4)(f) does not affect the Commission's right to submit at any time a legislative proposal for amending the regulation so as to transfer the reference to the third country concerned from Annex II to Annex I. It follows that the third stage of the reciprocity mechanism can still be reached even if the second stage is not completed.

78. Lastly, the Commission points to a series of technical difficulties that arise from the insertion of the footnote,³⁹ which further demonstrate the irrationality of the legislature's decision. Whilst it is unquestionable that the insertion of the footnote leaves not a few points unresolved in relation to the procedure to be followed in the circumstances mentioned by the Commission — as indeed is evidenced by the differing solutions proposed by the defendant institutions — I do not think that such difficulties can have a bearing on the lawfulness of recourse to delegated acts in the present case.

79. On the basis of the foregoing considerations, I take the view that the arguments raised by the Commission do not support the conclusion that, by deciding that measures adopted in the second stage of the reciprocity mechanism should effect an amendment and by deciding that, for the adoption of those measures, recourse should be had to the instrument provided for by Article 290 TFEU, the legislature exceeded the discretion which it enjoys in the definition of the structure and content of the basic act. Moreover, I would add that the possibility of inserting footnotes against the names of third countries listed in Annex II to Regulation No 539/2001 is an important feature of the structure of the annex, in that the legislature will make frequent use of the annex in order to clarify the scope of the exemption from the visa requirement for nationals of a given country and to indicate any conditions to which that exemption may be subject.

E – Conclusions regarding the merits of the action

80. In the light of all the foregoing considerations, I am of the opinion that the action is unfounded. The Commission's applications for annulment, including the claim which it makes in the alternative, ought therefore to be dismissed on the merits. Were the Court to decide otherwise and find that the action is well founded, I am of the view that the Commission's application for partial annulment must be declared admissible, the provisions of the contested regulation of which it seeks the annulment being, as all the parties to these proceedings agree, clearly severable from the remainder of the regulation.

³⁹ — According to the Commission, it is unclear what procedure could be used to alter or delete the footnote where that is required by Article 1(4) of Regulation No 539/2001, as amended by the contested regulation, that is to say, in the event that the Commission submits a proposal to transfer the reference to the third country in question from Annex II to Annex I to the regulation, or in the event that the third country re-establishes reciprocity.

IV – **Conclusion**

81. On the basis of all the foregoing, I propose that the Court should dismiss the action, order the Commission to pay the costs and order the Czech Republic to bear its own costs.