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Judgment of the Court of 12 May 1998.

Commission of the European Communities v Council of the European Union.

Act of the Council - Joint action regarding airport transit visas - Legal basis.

Case C-170/96.

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■ Keywords

1 Actions for annulment - Jurisdiction of the Court - Acts adopted on the basis of Article K.3(2) of the Treaty on European Union - Limits

(EC Treaty, Arts 100c and 173; Treaty on European Union, Arts K.3(2), L and M)

2 Approximation of laws - Article 100c of the EC Treaty - Scope - Airport transit arrangements - Excluded - Matter falling within the scope of joint action under Article K.3(2) of the Treaty on European Union

(EC Treaty, Arts 3(d) and 100c(1); Treaty on European Union, Art. K.3(2))

■ Summary

1 Article M of the Treaty on European Union makes it clear that a provision such as Article K.3 (2), which provides for the adoption of joint action by the Council in the areas referred to in Article K.1 does not affect the provisions of the EC Treaty. In accordance with Article L of the Treaty on European Union, the provisions of the EC Treaty concerning the powers of the Court of Justice and the exercise of those powers apply to Article M. It is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of Article K.3(2) do not encroach upon the powers conferred by the EC Treaty on the Community.

It follows that where an action is brought before the Court seeking a declaration that, in light of its objective, an act adopted by the Council on the basis of Article K.3(2)(b) of the Treaty on European Union falls within the scope of Article 100c of the EC Treaty, so that it should have

been based on that provision, the Court has jurisdiction to review the content of the act in the light of Article 100c of the EC Treaty in order to ascertain whether the Act affects the powers of the Community under that provision.

2 Construed in the light of Article 3(d) of the EC Treaty, which includes among the activities of the Community for the purposes set out in Article 2, 'measures concerning the entry and movement of persons in the internal market as provided for in Article 100c', the phrase 'crossing the external borders of the Member States' in Article 100c(1) refers, in the case of an airport, to the crossing of those borders at a border control point, permitting the holder of the visa to enter and to move within the internal market.

The airport transit visa, introduced by the joint action adopted by the Council on the basis of Article K.3(2) of the Treaty on European Union on airport transit visas, does not authorise its holder to cross the external borders of Member States in the sense contemplated by Article 100c of the EC Treaty. Consequently, the act does not fall within the ambit of that provision.

■ Parties

In Case C-170/96,

Commission of the European Communities, represented by Pieter van Nuffel, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

European Parliament, represented by Johann Schoo, Head of Division in the Legal Service, and José-Luis Rufas Quintana, of its Legal Service, acting as Agents, with an address for service in Luxembourg at its General Secretariat, Kirchberg,

intervener,

v

Council of the European Union, represented by Julian Schutte, Director of the Legal Service, and Michael Bishop, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Alessandro Morbilli, Director General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Kingdom of Denmark, represented by Peter Biering, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Danish Embassy, 4 Boulevard Royal,

French Republic, represented initially by Catherine de Salins, Head of Subdirectorates in the Legal Affairs Directorate of the Ministry of Foreign Affairs, then by Kareen Rispal-Bellanger, Head of Subdirectorates in the same Directorate, and Claude Chavance, Secretary for Foreign Affairs in the same Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II, and

United Kingdom of Great Britain and Northern Ireland, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent, with an address for service in Luxembourg at the United Kingdom Embassy, 14 Boulevard Roosevelt,

interveners,

APPLICATION for annulment of the Joint Action of 4 March 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on airport transit arrangements (96/197/JAI) (OJ 1996 L 63, p. 8),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm, M. Wathelet and R. Schintgen (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, P.J.G. Kapteyn (Rapporteur), J.L. Murray, D.A.O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann, L. Sevón and K. M. Ioannou, Judges,

Advocate General: N. Fennelly,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 9 December 1997,

after hearing the Opinion of the Advocate General at the sitting on 5 February 1998,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 15 May 1996, the Commission of the European Communities brought an action under Article 173 of the EC Treaty for annulment of the Joint Action of 4 March 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on airport transit arrangements (96/197/JAI) (OJ 1996 L 63, p. 8, 'the Act').

2 The objective of the Act, according to the second recital in the preamble thereto, is the harmonisation of Member States' policies as regards the requirement of an airport transit visa in order to improve control of the air route which, particularly when applications for entry or de facto entry are involved in the course of airport transit, represents a significant way in with a view in particular to illegally taking up residence within the territory of the Member States.

3 Article 1 of the Act defines the airport transit visa as 'the authorisation to which nationals of certain third countries are subject, as an exception to the principle of free transit laid down in Annex 9 to the Chicago Convention on International Civil Aviation [signed 7 December 1944 (United Nations Treaty Series, Volume 15, No 102)], for transit through the international areas of the airports of Member States'.

4 Article 2(1) of the Act provides: 'The airport transit visa shall be issued by the consular services of the Member States'. The second subparagraph of Article 2(2) of the Act lays down the principal conditions for the issue of airport transit visas. It is necessary above all to be 'satisfied that the application for an airport transit visa is justified on the basis of the documents submitted by the applicant, and that as far as possible these documents guarantee entry into the country of final destination, in particular by presentation of a visa where so required'.

5 Article 3 of the Act provides that 'Each Member State shall require an airport transit visa of nationals of third countries included on the joint list annexed hereto who do not already hold

an entry or transit visa for the Member State in question when passing through the international areas of airports situated within its territory.'

6 Article 4 of the Act permits Member States to provide for exceptions to the requirement for an airport transit visa; those who may benefit from an exception include not only 'crew members of aircraft and ships', and 'holders of diplomatic, official or service passports', but also 'holders of residence permits or equivalent documents issued by a Member State', and 'holders of visas issued by a Member State, or by a State which is a party to the Agreement on the European Economic Area'.

7 Article 5 of the Act provides: 'Each Member State shall decide whether an airport transit visa should be required of nationals of countries not included on the joint list annexed hereto' and Article 6 provides that '[E]ach Member State shall determine the airport transit arrangements applicable to statutory stateless persons and refugees.'

8 Finally, Article 7 of the Act prescribes the period within which measures taken after the entry into force of the Act are to be notified and Article 10 fixes the date on which the Act is to enter into force and also the further period allowed for those Member States which do not already have recourse to airport transit visas.

9 By its application to the Court the Commission seeks a declaration that, by adopting the Act on the basis of Article K.3(2)(b) of the Treaty on European Union, the Council acted in breach of Article 100c of the EC Treaty.

10 Article 100c provides as follows:

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

...

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

11 By order of the President of the Court of 13 November 1996, the Parliament was granted leave to intervene in support of the form of order sought by the Commission. By orders of 19, 20 and 27 November 1996, the President granted leave to the French Republic, the Kingdom of Denmark and the United Kingdom respectively to intervene in support of the form of order sought by the Council.

Jurisdiction of the Court

12 The United Kingdom submits that by virtue of Article L of the Treaty on European Union the Court does not have jurisdiction to hear and determine the Commission's application since the Act, having been adopted on the basis of Article K.3(2) of the Treaty on European Union, is not one of the measures which may be annulled by the Court pursuant to Article 173 of the EC Treaty.

13 It should first be noted that by its application the Commission seeks a declaration that, in light of its objective, the Act adopted by the Council falls within the scope of Article 100c of the EC Treaty, so that it should have been based on that provision.

14 Next, Article M of the Treaty on European Union makes it clear that a provision such as Article K.3(2), which provides for the adoption of joint action by the Council in the areas

referred to in Article K.1 of the Treaty on European Union, does not affect the provisions of the EC Treaty.

15 In accordance with Article L of the Treaty on European Union, the provisions of the EC Treaty concerning the powers of the Court of Justice and the exercise of those powers apply to Article M of the Treaty on European Union.

16 It is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of Article K.3(2) of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community.

17 It follows that the Court has jurisdiction to review the content of the Act in the light of Article 100c of the EC Treaty in order to ascertain whether the Act affects the powers of the Community under that provision and to annul the Act if it appears that it should have been based on Article 100c of the EC Treaty.

18 It must therefore be held that the Court has jurisdiction to consider the Commission's application.

Substance

19 According to the Commission, supported by the Parliament, the words 'crossing the external borders of the Member States' used in Article 100c of the EC Treaty refer to nationals of third countries physically entering the territory of the Member States. It submits in this connection that transit through the international area of an airport in a Member State must be regarded as entry into the territory of that Member State, since passengers in the international area must necessarily have crossed the border of that Member State. It follows, according to the Commission, that so far as concerns transit through the international area of an airport, the criterion of crossing an external border, contained in Article 100c, is satisfied, with the result that by virtue of that provision the Community has the power to draw up rules concerning airport transit arrangements.

20 By contrast, the Council and the Danish, French and United Kingdom Governments contend that Article 100c contemplates the crossing of a border control point. Since, as the Act makes clear, an airport transit visa does not permit the holder to cross the borders of the State of transit with a view to entering the territory of that Member State and moving within it, it follows that the power to draw up rules relating to airport transit does not fall within the ambit of Article 100c of the Treaty.

21 In order to determine its scope, the phrase 'when crossing the external borders of the Member States' in Article 100c(1) of the EC Treaty must be construed in the light of Article 3 (d) of that Treaty, which includes among the activities of the Community for the purposes set out in Article 2, 'measures concerning the entry and movement of persons in the internal market as provided for in Article 100c'.

22 It is clear from that provision that Article 100c applies to measures concerning the crossing of Member States' external borders by nationals of third countries only in so far as they relate to the entry into and movement within the internal market by those nationals who must, for that purpose, be in possession of a visa.

23 Entry into and movement within the internal market by a national of a third country necessarily implies that that person is not only present on the territory of a Member State but has also been duly authorised to move within that territory. As regards entry into a Member State through an airport, that authorisation means that the person concerned is authorised to pass the border control point in the international area of the airport in that Member State.

24 It follows that Article 100c(1) of the EC Treaty applies only to visas which permit their

holders to cross the external borders of a Member State at such crossing points in order to stay or travel in the internal market during the period and subject to the conditions prescribed by the visas.

25 It is not inconsistent with that interpretation that, as Community law now stands, a visa within the meaning of Article 100c of the Treaty does not confer on its holder the right to move freely throughout the internal market and that the Member State issuing the visa is even permitted to restrict that right to movement within its own territory or, pursuant to agreements it has concluded with other Member States, within the entirety of their respective territories.

26 It follows that, construed in the light of Article 3(d) of the Treaty, the phrase 'crossing the external borders of the Member States' in Article 100c(1) refers, in the case of an airport, to the crossing of those borders at a border control point, permitting the holder of the visa to enter and to move within the internal market.

27 The question whether the Act should have been adopted on the basis of Article 100c must be examined in the light of those considerations.

28 According to Article 1 of the Act, an airport transit visa is the authorisation to which nationals of certain third countries are subject for transit through the international areas of the airports of Member States.

29 According to the wording of Article 1 of the Act and the third recital in its preamble, the requirement of an airport transit visa constitutes an exception to the principle of free transit through international areas of airports laid down in Annex 9 to the Chicago Convention, cited above.

30 The airport transit visa is concerned with the situation of a passenger arriving on a flight from a third country and remaining in the airport of the Member State in which the aircraft landed in order to take off in the same or another aircraft bound for another third country. The requirement of such a visa under Article 1 of the Act therefore presupposes that the holder will remain in the international area of that airport and will not be authorised to move within the territory of that Member State.

31 That interpretation is borne out by Article 3 of the Act, which provides that nationals of third countries are not required to have an airport transit visa when passing through the international areas of airports in Member States if they already hold an entry or transit visa.

32 It follows that an airport transit visa does not authorise its holder to cross the external borders of Member States in the sense contemplated by Article 100c of the EC Treaty. Consequently, the Act does not fall within the ambit of that provision.

33 It follows that the application must be dismissed.

Decision on costs

Costs

34 Under Article 69(2) of the Rules of Procedure, 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 been unsuccessful, it must be ordered to pay the costs.

35 The Kingdom of Denmark, the French Republic, the United Kingdom and the Parliament, which have intervened in the proceedings, shall bear their own costs in accordance with Article 69(4) of the Rules of Procedure.

Operative part

On those grounds,

THE COURT,

hereby:

1. Dismisses the application; 2. Orders the Commission of the European Communities to pay the costs;

3. Orders the Kingdom of Denmark, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the Parliament to bear their own costs.

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