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RIVISTA DEL CONTENZIOSO EUROPEO
REVUE DU CONTENTIEUX EUROPÉEN
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ON TIME LIMITS, POSITION DEFINITION AND "DISCRETIONARY SHALL": THE GRAND CHAMBER RULES ON THE ACTION FOR FAILURE TO ACT CONDITIONS IN AN INTERINSTITUTIONAL CONTEXT

Su termini, definizione della posizione e poteri discrezionali: La Grande Sezione si pronuncia sulle condizioni dell'azione in carenza in un contesto interistituzionale

Sur les délais, la définition de position et le pouvoir discrétionnaire : la Grande Chambre statue sur les conditions du recours en carence dans un contexte interinstitutionnel

Court of Justice, Judgment of 5 September 2023, Case C-137/21, *Parliament v Commission (Exemption de visa pour les ressortissants des États-Unis)*

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The action for failure to act, now enshrined in art. 265 TFEU, is of primary importance in ensuring the balance of powers established by the treaties and the judicial protection of individuals. Indeed, albeit being an independent action (on the relationship between the two actions, see K. LENAERTS, K. GUTMAN, J. T. NOWAK, *EU Procedural Law*, Oxford, II ed., 2023, 416-417), it «serves to complete the system of remedies by complementing the action for annulment» (A. G. TOTH, *The Law as it stands on the appeal for failure to act*, in *Legal Issues of Economic Integration*, 1975, 65 ff). Nevertheless, it is no secret that the action for failure to act is not one of the most popular actions brought before the Court of Justice of the European Union ("CJEU" or "Court"). In the five-year period 2018-2022, approximately 16 actions per year were lodged with the General Court (see CJEU, Annual Report 2022 - Statistics concerning the judicial activity of the General Court, 3), significantly fewer with the Court of Justice, despite some proclamations issued in that regard (which understandably attracted the attention of the scholarship, see, e.g., S. PLATON, 2021; and M. LANOTTE, 2021). Moreover, as is well known, it is not uncommon for an action for failure to act to be declared inadmissible due to the procedural

 ISSN 2975-1306

conditions set in art. 265 TFEU, under which «[t]he action shall be admissible only if the institution […] concerned has *first been called upon to act* [and] [i]f, within two months of being so called upon, [it] has not *defined its position*, the action may be brought *within a further period of two months*» (emphasis added). Such a pre-litigation procedure is inherently linked to the peculiar nature of the action for failure to act, namely the "silent inaction" of the EU institution, body, office or agency (in this vein, see R. BARENTS, *Remedies and Procedures Before the EU Courts*, Alphen aan den Rijn, II ed., 2020, 343 ff; G. PALMISANO, *Commento all'articolo 265 del Trattato sul funzionamento dell'Unione europea*, in A. TIZZANO (a cura di), *Trattati dell'Unione europea*, Milan, II ed., 2014, 2085 ff).

The above explains why the judgment in *European Parliament v European Commission (Exemption de visa pour les ressortissants des États-Unis)*, rendered by the Court on 5 September 2023, is of particular importance. Indeed, this judgment, which lies among the handful of judgments delivered by the Grand Chamber in relation to an action for failure to act, involves some allegations – brought by the Parliament – on the violation of an EU law provision having a particularly sensitive political nature and profound implications for the Union's external relations as well as for the functioning of the Schengen area, namely the suspension of visa exemption for third-country nationals under art. 7 of the regulation (EU) 2018/1806. Such a Union's response, which is inspired by the principle of visa reciprocity vis-à-vis third countries where those countries decide to introduce or reintroduce visa requirements for one or more Member States, also serves as an «act of solidarity» with the Member States concerned (regulation 2018/1806, Recital 15).

This *segnalazione* will not deal in detail with all the multifaceted constitutional issues raised by the case under investigation. Instead, after outlining the background to the dispute and the main arguments put forward by the parties, I will instead focus on three aspects of the decision that touch upon the procedural and substantive conditions of the failure to act procedure, namely (*i*) the compliance with the time limit to bring an action, (*ii*) the existence of a «position» defined by the institution concerned within the meaning of art. 265, and (*iii*) whether the expression «shall adopt» (an act suspending the visa exemption) can coexist with some discretion left to the Commission as to whether or not to adopt that act. Overall, the CJEU, on the one hand, provides a broad interpretation of the time limit and inaction condition, which marks a sharp contrast with the prevailing understanding as of today of the concept of «position of the institution» – proof of this being the dissonant notes in this regard laid down in the Opinion delivered by Advocate General de la Tour in the case –. I will argue that such a generous interpretation can profoundly impact

the use of the action for failure to act, both in an interinstitutional context and, potentially, beyond it. On the other hand, however, the Court holds that the term *shall* does not necessarily preclude a degree of discretion being left to the institutions – in this case, the Commission –. In particular, there may be a margin of discretion where the decision has to be taken in the context of a multi-stage structured procedure (para. 58), which requires an assessment of elements and implications of a particularly sensitive political nature (para. 61). Even in this respect, it is argued that the principles laid down in this judgment are likely to be of paramount importance for the future of this procedure.

The background of the case can be outlined as follows. On 12 April 2016, the Commission reported that non-reciprocity issues with visa policies were mostly resolved except with three countries, including the USA, which still required visas for certain EU nationals. In that communication, the Commission also held that – under regulation 539/2001 (now regulation 2018/1806) – it was required to enact a delegated act suspending visa exemptions for these countries if they did not lift visa requirements by the deadline. During the following years, the Commission issued six follow-up communications on the one of April 2016. Following the second one adopted on 21 December 2016, in which the Commission found that visa non-reciprocity concerned only two third countries (Canada and the USA), the Parliament adopted on 2 March 2017 a resolution taking the view that the Commission was «legally obliged to adopt a delegated act […] temporarily suspending the exemption from the visa requirement for nationals of [those] third countries [by] 12 April 2016» and calling upon the Commission, on the basis of art. 265 TFEU, «to adopt the delegated act» (the "2017 resolution"). The Commission did not adopt the requested act, but the Parliament did not bring an action before the CJEU. In the sixth update, issued in March 2020, it was reported that only the USA remained non-reciprocal. Despite Poland joining the USA's Visa Waiver Program in November 2019, the USA had not extended this to all EU members, still requiring visas from Bulgaria, Croatia, Cyprus, and Romania. On 22 October 2020, considering the foregoing, the European Parliament urged the Commission to suspend visa exemptions for the USA under regulation 2018/1806 (the "2020 resolution"). On 22 December 2020, following the 2020 resolution, the Commission adopted a communication setting out the reasons behind its decision not to temporally suspend, at that stage, the visa exemption for USA nationals.

Against this backdrop, the Parliament brought an action under art. 265 TFEU claiming that the Court should declare that the Commission has infringed EU law by not adopting the delegated act pursuant to art. 7,

c. 1, lett. f) of regulation 2018/1806. According to this provision, if a third country whose nationals are exempt from the visa requirement for entering the Union applies a visa requirement for nationals of at least one Member State and does not lift within a certain period, « the Commission shall adopt a delegated act […] suspending the exemption from the visa requirement for a period of 12 months for the nationals of that third country». This provision does not operate in a vacuum but within the context of a composed procedure outlined in the previous paragraphs of the same article. For the purposes of this analysis, suffices it to recall art. 7, c. 1, lett. b), under which the Commission shall take steps with the political, economic and commercial authorities of the third country in question in order to restore or introduce visa-free travel, and art. 7, c. 1, lett. d), which prescribes that the Commission «shall […] take into account», inter alia, «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».

Now, let us turn our attention to the three procedural aspects referred to above. The first two of them concern the admissibility of the action, following the plea of inadmissibility raised by the Commission, which was based on two grounds. In particular, with the first claim the Commission argues that the Parliament is *time-barred* from bringing an action for failure to act since the 2017 resolution, which already called upon the Commission to adopt the delegated act (aka "formal notice"), was not followed by proceedings being brought before the Court. Secondly, in its plea of inadmissibility, the Commission also argues that it defined its position pursuant to art. 265 TFEU by issuing the 22 December 2020 communication referred to above. It is worth reading the observations submitted by the Parliament (para. 25), although the Court's reasoning departs from them, and it is thus not necessary to illustrate them here.

As regards the first claim, the CJEU acknowledges that both the 2017 resolution and the 2020 resolution called upon the Commission to act within the meaning of art. 265 TFEU and that the Commission replied to them by communication. The fact that no action had been brought after the first resolution was also undisputed. To determine whether Parliament circumvented the prescribed time limit envisaged in the treaty, it is necessary to assess whether the 2020 resolution is, «in the light of objective factors relating to its content or its context», distinct from the first 2017 resolution (para. 29). In this regard, the Court notes that the 2020 resolution refers to some Commission's communications issued after 2017, thus reflecting the evolution of the situation since the first request to act was adopted, including a reassessment by the Commission (paras. 32-33). Therefore, the two letters of formal notice have a distinct nature

and have been adopted in different contexts. Accordingly, the first plea of inadmissibility was rejected (para. 35).

Moving on with the second plea, as recalled above, the action for failure to act is admissible only if the institution does not *define its position* in response to the request to act within a two-month period (art. 265, para. 2 TFEU). Did the communication adopted on 22 December 2020 define the Commission's position? In this regard, the Court first recalls its established case law that provides for a broad interpretation of that concept, which also encompasses the responses of the institutions that «d[o] not satisfy the person who addressed that call to the institution» (para. 38). Nonetheless, the Court then distinguishes the case at issue from those in which that line of jurisprudence has been developed. Most notably, it holds that those principles «*cannot apply, in an interinstitutional context*, in cases where the inadmissibility of an action for failure to act *would enable the institution* which has been called upon to act *to persist in its failure to act*» (para. 39, emphasis added). This is precisely what would happen here. Indeed, the Court adds that «the disagreement between the parties to the present dispute […] as to the existence of any obligation to adopt the delegated act at issue […] would continue to exist» (para. 40). By relying on a sort of *obiter dictum* rendered some forty years ago in para. 17 of *European Parliament v Council of the European Communities*, the Grand Chamber then affirms that «*a refusal to act, however explicit*, on the part of an institution, after the institution in question has been called upon to act pursuant to the second paragraph of article 265 TFEU, can be brought before the Court on the basis of that article *since it does not put an end to the failure to act*» (para. 41). Therefore, it holds that «[i]n those circumstances, […] in an interinstitutional context, *the response of an institution* consisting – as in the present case – in a statement of the reasons why, according to that institution, it is appropriate not to adopt the requested measure, *must necessarily be regarded as a refusal to act* on the part of that institution, in accordance with the case-law referred to in the preceding paragraph [i.e., of *European Parliament v Council of the European Communities*], and must therefore be capable of being referred to the Court in the context of an action brought under art. 265 TFEU» (para. 42). Accordingly, the second plea in law is rejected. The action brought by the Parliament is therefore held to be admissible.

As mentioned above, the Court's conclusion in relation to this second procedural requirement does not match the prevailing understanding as of today of the concept of "position of the institution". According to the literature, it generally suffices that the «institution reacts in an explicit manner to the invitation to act, thus making it clear whether or not it intends to act» to rule out the admissibility of the action for failure to act

(R. BARENTS, *op. cit.*, 345). Such a reaction, in other terms, shall merely contain «an explanation of the stance of the Union institution, body, office, or agency with regard to the act requested» (K. LENAERTS, K. GUTMAN, J. T. NOWAK, *op. cit.*, 425 ff) to be subsumed under the notion of a «position» defined within the meaning of art. 265 TFEU (Cf G. PALMISANO, *op. cit.*, 2094-2096). This line of case law forms the basis of AG de la Tour's assessment in this respect (Opinion, paras. 68-80), the departing point of which is that «any measure adopted by that institution may, where appropriate, be equated with a definition of its position» (Opinion, para. 71). Most notably, he held that – according to the CJEU – a «position» defined by the institution called upon to act exists even where that institution «initiates a decision-making process, without necessarily completing it» (Opinion, para. 73) or provides a «partial or indirect» solution (Opinion, para. 74). In applying these principles to the case at hand, the AG considers «clear» that the communication of 22 December 2020 defined the Commission's position, which was «continuing to prioritise the use of diplomatic channels to secure reciprocity from the United States of America and that the adoption of the delegated act sought would be counterproductive to obtaining the visa exemption for all EU citizens wishing to travel to that country», rendering the action inadmissible (Opinion, paras. 79-80).

It is against this backdrop that it can be fully appreciated how the Court's conclusion could represent a paradigm shift in the use of art. 265 TFEU in interinstitutional disputes. Indeed, as a result of the softening of this procedural condition, it will be more likely that this procedure will be used (or threatened to be used) as a "tool of political pressure" (as happened, for example, in relation to the conditionality regulation, as briefly mentioned above). To my knowledge, the present judgment is the first and only judgment by the Grand Chamber of the Court to "revive" the principle established in para. 17 of that 1988 precedent in relation to the "interistitutional context". Nonetheless, the General Court has used the same reasoning in relation to failure to act actions brought by Member States at least in two cases, namely *Italy v Commission* (para. 60) and *Sweden v Commission* (para. 44; only available in French and Swedish).

Although such a development may serve the interest of ensuring the balance of powers established by the treaties, my reflections on the matter are bittersweet. Firstly, it is clear that the judgment in *European Parliament v Council of the European Communities* was delivered at a very different stage in the European integration process, when the European Parliament did not have the capacity to bring actions for the annulment of acts of the Council or the Commission. The entire reasoning of that precedent – including the broad interpretation of requirements to bring an action for

failure to act just described – was indeed based on the fact that the Parliament was precluded from seeking the annulment of Community acts. The General Court's judgments in *Italy v Commission* and *Sweden v Commission* are characterised by a minimalist approach and add nothing to the reasoning laid down in *European Parliament v Council of the European Communities* many years ago. Can we really "copy and paste" this principle into the current state of EU law? The Grand Chamber seems to have done so in this case.

Secondly, it is not entirely clear why the same reasoning should not be extended *beyond* the interinstitutional context «in cases where the inadmissibility of an action for failure to act would enable the institution which has been called upon to act to persist in its failure to act» (para. 39, cited above). Although it seems reasonable and in line with the system set up by the treaties to require natural or legal person to have an "interest" in bringing proceedings in order to be able to bring the action in question (see art. 265, para. 3 TFEU), here the Court's reasoning focuses exclusively on the "legal consequences" of possible inadmissibility, i.e., the fact that it «would enable the institution [...] to persist in its failure to act». In this regard, the position of natural or legal persons does not differ significantly from that of institutional actors: is the objective of ensuring the judicial protection of individuals – underpinning art. 265 TFEU – really less important than the objective of guaranteeing the balance of powers set forth by the treaties? In my opinion, the extension to the non-interinstitutional scenario of the principles upheld in this case – if confirmed in subsequent cases – can be postponed, but not avoided.

The third and final aspect concerns the Court's reasoning on the crux of the matter, namely whether the Commission enjoys discretion to suspend the exemption from the visa requirement under art. 7, c. 1, lett. f) of regulation 2018/1806. The Court first recalls that, in interpreting a provision of EU law, «it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part» (para. 56). Now, although the wording of that provision («shall adopt») would suggest that the Commission is required to adopt such an act if the necessary conditions are met, such an interpretation must be ruled out «*in the light of the general scheme of the first paragraph of art. 7*, characterised in particular by the multi-stage structure of the reciprocity mechanism which it establishes» (para. 58). Indeed, art. 7, c. 1, lett. b) and d) require the Commission to take into account various circumstances before lifting the visa exemption (as mentioned above) and such an obligation would serve no purpose if it were automatically required to adopt the act (para. 60). Such an interpretation is confirmed by recital 17 (paras. 61-62) and supported by the *travaux préparatoires* (para. 63). It is *not*, however, an

"unbridle discretion". On the contrary, «that discretion is governed by the three criteria set out in point (d) of that paragraph» (para. 62), namely (*i*) the outcome of the measures taken by the Member State concerned, (*ii*) the steps taken by the Commission with the authorities of the third country with a view to restoring or introducing visa-free travel, and (*iii*) the consequences of the suspension for the external relations of the EU and its Member States with the third country concerned. The Court then carried out a detailed examination of each of these criteria (paras. 65-68) and concluded that the Commission had duly taken into account all three criteria (para. 69). The action was therefore dismissed as unfounded because «the Commission did not exceed the discretion it enjoys in taking the view […] that it was not required to adopt the delegated act in question» (paras. 70-71). In essence, this means that the Commission was not obliged to act in the specific case before the Court.