

CERD—can as standard also be used by Russia as Russian jurists have complained about Ukraine’s educational and other policies regarding the Russian language.²⁹ And yet, even with these limitations and caveats, the Court’s interpretations, particularly on CERD and language of education (para. 357), will present interest to future litigants, also in human rights courts. CERD remains a living document, and some of its initial negotiators, if they were still alive, would be surprised by its current reach.³⁰

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Principle of reciprocity—visa exemption—principle of solidarity—EU-U.S. relations.

EUROPEAN PARLIAMENT V. EUROPEAN COMMISSION, Case C-137/21, Judgment. At <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CJ0137&qid=1695720681664>. Court of Justice of the European Union, Grand Chamber, September 5, 2023.

In a judgment delivered on September 5, 2023, the Grand Chamber of the Court of Justice of the European Union (CJEU) dismissed the action for failure to act brought by the European Parliament (Parliament) against the European Commission (Commission)¹ for declining to suspend the exemption for U.S. citizens from the visa requirement.² According to the Parliament, since the United States had not lifted the visa requirement for citizens of certain member states, the Commission was obliged to adopt a suspension measure in order to fulfill its obligations under the Treaty on the Functioning of the European Union (TFEU).³ The Commission contended that the adoption of such a measure was governed by criteria that allowed it not to adopt such a measure.

²⁹ See, e.g., A.I. Fomin, *Reshenie konstitutsionnogo suda Ukrainy o gosudarstvennom iazyke (Judgment of the Constitutional Court of Ukraine on the State Language)*, 87 GOSUDARSTVO I PRAVO (2003).

³⁰ On the history of CERD, see WILLIAM A. SCHABAS, *THE INTERNATIONAL LEGAL ORDER’S COLOUR LINE: RACISM, RACIAL DISCRIMINATION, AND THE MAKING OF INTERNATIONAL LAW* 244 et seq. (2023)

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¹ Treaty on the Functioning of the European Union, Consolidated Version, Oct. 26, 2012, OJ C 326, at <https://www.legislation.gov.uk/eut/teec/contents> [hereinafter TFEU]. Under TFEU Article 265, in the event that the Commission’s failure to act infringes the EU Treaties, the other EU institutions may bring an action before the CJEU to have the infringement established.

² Pursuant to Regulation (EU) 2018/1806 of the European Parliament and Council of November 14, 2018, Article 7(f), paragraph one listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2018 L 303, at 39) [hereinafter Regulation 2018/1806].

³ TFEU, *supra* note 1. TFEU Article 290 authorizes the European Parliament and the Council to delegate to the Commission the power to adopt act of general application (“delegated act”) to supplement or amend certain elements of a directive or a regulation.

The CJEU judgment on the dispute between the Parliament and the Commission is another episode in the long saga over the execution of the principle of visa reciprocity under European Union (EU) law.⁴ The mechanism enabling the implementation of visa reciprocity covers not only relations between the EU and third countries but also those between the institutions of the EU, and between the EU and its member states. The way the CJEU interpreted the provisions governing this mechanism shows that the application of the principle of reciprocity by the EU is hampered by the complex nature of its foreign policy. In its ruling, the CJEU shared the pragmatic view that the importance of the relationship of the EU, as a whole, with a strategic partner, like the United States, outweighs the strict adherence to the principle of loyalty to all member states. In a broader perspective, it is noteworthy that the judgment in *Parliament v. Commission* seems to be justified primarily by arguments of a political and economic nature, at the expense of a literal interpretation of EU law.

Of importance to the understanding of this case is in the evolving role of visas and how it has shaped the EU legal order over time. The political objective in establishing an internal market as an “area without internal frontiers”⁵ supported the abolition of border controls between member states.⁶ Consequently, the adoption of the Schengen Agreement in 1985—which introduced freedom of movement for all nationals of the signatory countries and removed controls at their internal borders and dispensed with the need for visas for the movement of persons across member states—was followed by the Schengen Implementing Convention of 1990.⁷ While the evolution cuts across various legal instruments,⁸ at present, TFEU Article 77(2)(a) covers rules on visa requirements and procedure. The EU legislature benefits from the discretion to determine which countries’ nationals require a visa for entry into the Schengen zone. Consequently, the EU visa reciprocity mechanism is a result of the continual integration of the Schengen *acquis* into the EU framework, and the increasing harmonization that EU law has brought to the field of visas.⁹

Visa reciprocity is a fundamental principle of the EU’s common visa policy and an objective that the EU actively pursues in its relations with third countries. This principle means that the EU, when deciding whether to lift visa requirements for citizens of a third country, takes into consideration whether this country reciprocally grants visa waivers to

⁴ See Robert S. Wilson, *Growing Dispute over Transatlantic Visa Reciprocity Could Lead to US vs. EU Legal Battle*, 3 S.C. INT’L L. & BUS. 147 (2007).

⁵ TFEU, *supra* note 1, Art. 26(2).

⁶ Daniel Thym, *Article 77 [Features and Measures of the Policy]*, in *THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION: A COMMENTARY*, VOL. 1, pmbll., Arts. 1–89, 1451, 1452 (Hermann-Josef Blanke & Stelio Mangiameli eds., 2021).

⁷ Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Their Common Borders, OJ 2000 L 239, at 19.

⁸ Certain aspects of visa policy have been subject to the EU competence since Article 100a of the Treaty of Maastricht was replaced by more extensive competences on visas in the Treaties of Amsterdam and Nice. The Treaty of Lisbon reaffirmed the conceptual autonomy of the area of freedom, security, and justice as a policy field in its own right what included policies of border controls and visas.

⁹ Marco Stefan, *The Transatlantic Dispute Over Visas: The Need for EU Action in the Face of US Non-reciprocity, Moving Targets and the Harvesting of EU Citizens’ Data*, 27 CEPS POL’Y INSIGHT 7 (2017).

nationals of all member states.¹⁰ Notably, a significant issue for EU external relations has been ensuring visa reciprocity as regards the granting of visa-free status under Regulation 539/2001.¹¹

Regulation 539/2001 was adopted on the basis of Article 62(2)(b) of the Treaty establishing the European Community, which empowered the Council to determine the list of those third countries whose nationals must be in possession of visas when crossing the external borders of the EU and those whose nationals are exempt from that requirement. Regulation 539/2001 explained that the determination of the countries subject to the visa requirement (Annex I) and those exempt from it (Annex II) needs to be made on a case-by-case basis, taking into account factors such as illegal immigration and reciprocity.¹² Initially, the introduction of a visa requirement by an exempted third country for the nationals of any member state led automatically to the reintroduction of a visa requirement for the nationals of the third country. Under the revised mechanism, if a visa-exempted third country introduces a visa requirement for nationals of a member state, this state shall notify this to the Commission, which shall take the necessary steps to re-establish the reciprocity. If it has not been re-established, the Commission should propose reintroduction of the visa requirement for the third country concerned. The dispute arose because of a contentious history regarding the interpretation and implementation of these procedures. It commenced in 2014, when the Commission published the non-reciprocity notifications submitted by Bulgaria, Croatia, Cyprus, Poland, and Romania in the *Official Journal of the EU*, and officially activated the procedure foreseen by the visa reciprocity mechanism. Despite growing pressure from the Parliament to act reciprocally against the United States, the Commission decided to hold off on making such a decision.

On October 22, 2020, the Parliament again called upon the Commission to adopt the delegated act seeking to suspend temporarily the exemption from the short-stay visa requirement for U.S. nationals.¹³ By the communication of December 22, 2020, the Commission set out the reasons why it still did not intend to adopt such an act.¹⁴ The Parliament declared that Regulation 2018/1806 does not confer on the Commission the power not to adopt a delegated act where the conditions for its adoption are satisfied, and brought the action before the CJEU.

The Parliament alleged that the Commission infringed TFEU Article 265 by failing to adopt a delegated act temporarily suspending the exemption from the visa requirement for U.S. nationals, since the obligation to adopt it depends only on one objective condition, that the third country has not lifted the visa requirement for nationals of at least one member state

¹⁰ Theodore Christakis & Fabien Terpan, *EU-US Negotiations on Law Enforcement Access to Data: Divergences, Challenges and EU Law Procedures and Options*, 11 INT'L DATA PRIVACY L. 88 (2021).

¹¹ Council Regulation (EC) No. 539/2001, OJ L 81, 21.3.2001, at 1 (Mar. 15, 2001; repealed by Regulation 2018/1806), 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.

¹² See STEVE PEERS, *EU JUSTICE AND HOME AFFAIRS LAW, VOL. I: EU IMMIGRATION AND ASYLUM LAW* 192 (4th ed. 2016).

¹³ European Parliament Resolution of Oct. 22, 2020 on Obligations of the Commission in the Field of Visa Reciprocity in Accordance with Article 7 of Regulation (EU) 2018/1806, 2020/2605(RSP).

¹⁴ Communication from the Commission to the European Parliament and the Council Defining the Position of the Commission Following the European Parliament Resolution of Oct. 22, 2020 on Obligations of the Commission in the Field of Visa Reciprocity and Reporting on the State of Play, COM(2020) 851 final.

during the twenty-four-month period commencing on the date of publication of the notification. In the present case, this condition was satisfied on April 12, 2016.

Before the Grand Chamber, the Parliament argued that, although Regulation 2018/1806 Article 7(d), paragraph one requires the Commission to take account of, *inter alia*, the consequences of the suspension of the exemption from the visa requirement for the external relations of the EU and its member states with the third country in question does not mean that this institution has discretion (paras. 44–46).

In response, the Commission contended that point (f) does not impose on it an unconditional obligation to adopt a delegated act in the present case (para. 50). From the Commission's perspective, this provision should be read in the light of point (d), which provides that the Commission is to take into account: (1) the outcome of the measures taken by the Member State concerned; (2) the steps it has taken in particular in the political, economic, and commercial fields, in order to restore or introduce visa-free travel; and (3) the consequences of the suspension of the exemption from the visa requirement for the external relations of the EU and its member states with the third country in question (para. 51).

The CJEU upheld the Commission's argument that it enjoys discretion as to whether or not to adopt a delegated act based on point (f), which is governed by the three criteria set out in point (d) (paras. 60–61). As regards these criteria, the CJEU found that the Commission: (1) presented a detailed overview of the situation of member states concerned at that time by the visa requirement; (2) referred to several work meetings held by the Commission with its American counterparts; and (3) considered that the suspension of the exemption from the visa requirement for U.S. nationals would have significant negative impacts in a wide range of policy areas. Consequently, the CJEU ruled that the Commission took into account the indicated criteria before reaching the conclusion that it would not adopt the delegated act, and that it did not exceed its discretion (paras. 64–70).

* * * *

Reciprocity governs the relations between the EU and third countries.¹⁵ Advocate General Bot affirmed that reciprocity was “one of the guiding principles of the EU's external relations.”¹⁶ As such, it is important to situate the EU's visa rules in the broader external context in which it has been developing. Most obviously, the decision whether to impose or remove a visa requirement for third countries or reimpose visas for lack of reciprocity are significant political issues.¹⁷ The judgment in *Parliament v. Commission* corroborates that this issue raises particular implications within transatlantic relations.

According to Regulation 2018/1806 Recital 14, full visa reciprocity is an objective which the EU should pursue in a proactive manner in its relations with third countries, thus contributing to improving the credibility and consistency of the EU's external policy. As the CJEU assessed in previous case law, the implementation of the principle of reciprocity

¹⁵ Luigi Lonardo & Elisabet Ruiz Cairó, *The European Court of Justice Allows Third Countries to Challenge EU Restrictive Measures: Case C-872/19 P, Venezuela v. Council*, 18 EUR. CONST. L. REV. 124 (2022). An important body of the CJEU's case law in this regard concerns the review of legality of EU acts in light of World Trade Organisation agreements. See *Portugal v. Council*, C-149/96, ECLI:EU:C:1999:574, paras. 43–45 (Nov. 23, 1999).

¹⁶ See Opinion 1/17, ECLI:EU:C:2019:72, paras. 77, 82, (Jan. 29, 2019).

¹⁷ PEERS, *supra* note 12, at 225.

through the mechanism established under EU law is based on the adoption of measures of “increasing gravity and political sensitivity, to which instruments of different kinds correspond.”¹⁸ In the statement of twenty-one member states on the occasion of the amendment of Regulation 539/2001, they underlined that the EU institutions are obliged, prior to any proposal or decision in the reciprocity mechanism, to extensively scrutinize and take into account potential adverse political consequences that might arise from such proposals or decisions for the external relations of the EU and its member states, which applies in particular to external relations with strategic partners.¹⁹

The limits of the EU reciprocity mechanism are particularly visible in relation with one of these strategic partners—the United States. In this context, it is worth recalling that the U.S. Visa Waiver Program (VWP) began in 1986 and allowed citizens of third countries to visit the United States for up to ninety days without obtaining a visa. After September 11, 2001 the conditions to be admitted to and remain in VWP were increasingly perceived by U.S. authorities as a tool to achieve their internal security objectives in relations with the EU.²⁰ In 2007, the U.S. Congress passed a law that required VWP countries to provide data on airline passengers flying to or over the United States, and to participate in a new travel authorization system.²¹ Resultantly, the Commission continued discussion with the United States regarding visa reciprocity on issues falling under EU competence, and member states engaged in discussions with the United States regarding law enforcement issues. Under this bilateral track, numerous member states concluded bilateral memoranda of understanding regarding cooperation with the United States in the fields of anti-terrorism and information sharing.²² This has led some commentators to opine that the EU and United States are in an asymmetrical, and often incoherent, relationship.²³

The efficiency of reciprocity mechanisms is limited, specifically in relations with the United States, because their only sanction is the reintroduction of the visa requirement for the third country, which might in turn entail the reintroduction of such requirements on all member states.²⁴ As *Parliament v. Commission* illustrates, the Commission tends to be over-cautious when the possibility of U.S. retaliatory steps is at issue. Moreover, behind the disagreement regarding solutions to the lack of reciprocity on U.S. visas lies a struggle between the EU institutions regarding the distribution of competences under the common visa policy.²⁵ In this regard it can be noted that without the Commission's exercise of a delegated power, neither the Parliament nor the Council is entitled to take any action related to the suspension of the visa waiver for U.S. nationals.²⁶

¹⁸ *Commission v. Parliament and Council*, C-88/14, ECLI:EU:C:2015:499, Judgment, para. 39 (July 16, 2015).

¹⁹ Opinion of Advocate General, C-137/21, ECLI:EU:C:2022:989, para. 41.

²⁰ Stefan, *supra* note 9, at 2.

²¹ JEREMY SHAPIRO & NICK WITNEY, TOWARDS A POST-AMERICAN EUROPE: A POWER AUDIT OF EU-US RELATIONS 49 (2009).

²² Bernd Martenczuk, *Migration Policy and EU External Relations*, in EU MIGRATION LAW: LEGAL COMPLEXITIES AND POLITICAL RATIONALES 69, 88 (Loïc Azoulay & Karin de Vries eds., 2014).

²³ Ariadna Ripoll Servent & Alex MacKenzie, *The European Parliament as a “Norm Taker”? EU-US Relations After the SWIFT Agreement*, 17 EUR. FOR. AFFS. REV. 71 (2012).

²⁴ Martenczuk, *supra* note 22, at 88.

²⁵ Stefan, *supra* note 9, at 3.

²⁶ *Commission v. Parliament and Council*, *supra* note 18, para. 46.

Nevertheless, the argument regarding possible political or economic consequences in the wake of a suspension of transatlantic, visa-free travel does not exempt the Commission from the obligation to act in line with legal requirements.²⁷ A refusal to fulfill the duties deriving from the delegation of the power to act raises questions concerning the compatibility of the Commission's conduct with its role of "guardian of the Treaties." Suffice to mention that under Article 17 of the Treaty on European Union, the Commission shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them.²⁸

Additionally, it should be stressed that according to TFEU Article 80, policies on visas and their implementation shall be governed by the principle of solidarity. Regulation 2018/1806 Recital 15 reiterates that the mechanism of visa reciprocity should provide for the EU response as an act of solidarity, if such a third country applies a visa requirement for nationals of at least one member state. In turn, Recital 16 stipulates that upon receipt of a notification from a member state that a third country included in the list in Annex II applies a visa requirement for nationals of that member state, all member states should react in common, thus providing an EU response to a situation that affects the EU as a whole and subjects its citizens to different treatment. In *Parliament v. Commission*, the CJEU seems to omit this thread and focus entirely on the fulfillment of formal requirements by the Commission.

Finally, in strictly legal terms, the reasoning of the judgment lacks consistency. The CJEU asserted that the provision of point (f), which reads that the Commission "shall adopt a delegated act," is not tantamount to the obligation of its adoption because criteria listed in point (d) shall be taken into account while considering this step. In this respect, worthy of note is that according to point (h), if within six months of the entry into force of the delegated act referred to in point (f) the third country in question has not lifted the visa requirement, the Commission "may submit a legislative proposal" to amend Regulation 2018/1806.²⁹ What is essential when applying point (h) is that the Commission is obliged to take into account the criteria determined in point (d). Thus, it looks illogical that both provisions, addressed to the same institution, although formulated differently ("shall" versus "may") are to be interpreted identically as not imposing an obligation.

To conclude, the principle of visa reciprocity in EU-U.S. relations differs from the typical application of this principle in bilateral relations. The main reason for this is that the EU is not a monolith, since the interests of the member states, which do not fully converge, are at stake. Member states, whose citizens are admitted to visa-free travel, have no interest in reaching for the reciprocity mechanism, because this could trigger a reaction by the United States against the EU as a whole, which would negatively impact the status of these citizens. In turn, member states that are not in the visa-waiver program do not have enough clout to force the EU to strictly observe the principle of solidarity. Hence, the statement that the United States is the main player in the discussed issue remains valid.³⁰ Unfortunately, it perpetuates the situation in which the citizenship of some member states appears to be second-class, which may be qualified as a breach of TFEU Article 18, which prohibits any discrimination on grounds

²⁷ Stefan, *supra* note 9, at 10.

²⁸ *Id.* at 6.

²⁹ In order to transfer the reference to the third country from Annex II to Annex I.

³⁰ Dependency of the EU on the United States for recognition of its security role, fear of breaking the special relationship, or the shadow of bilateral negotiations lead to expect that the United States will remain in the driving seat for the foreseeable future. Servent & MacKenzie, *supra* note 23, at 86.

of nationality. On an intra-institutional level, the Parliament's attempt to activate a further stage of the reciprocity mechanism was not supported by the CJEU, which shared the Commission's position, even though its reasoning is not grounded on a literal interpretation of EU law, but rather on political and economic considerations. This raises the question of whether it was dictated solely by the circumstances of the case or it shows the CJEU's broader approach to interpreting EU law.

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