Where Human Rights Meet Administrative Law: Essential Elements and Limits to Delegation

European Court of Justice, Grand Chamber

C-355/10: *European Parliament* v. *Council of the European Union*

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Introduction

Case C-355/10 deals with institutional questions and with the delicate issue of intercepting migrants at sea, and thus with fundamental rights. The European Parliament had sought the annulment of a decision of the Council, adopted under the regulatory procedure with scrutiny (PRAC), on the grounds that it exceeded the scope of the implementing power in Article 12(5) of the Schengen Borders Code. The decision laid down rules and guidelines for Frontex maritime operations.

The Court annulled the contested decision because it considered that the provisions on interception measures and search and rescue involved important political choices, and that these provisions contain elements that call for the use of legislation instead of an implementing act. However, the Court maintained the effects of the decision until it is replaced by new rules within a reasonable time. In response to the judgment, the Commission presented a fresh proposal for a regulation on 12 April 2013.[1]

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[1] Proposal for a regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union of 12. April 2013 (COM(2013) 197 final).

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The ruling touches on three notable points. The most evident one is the Court's clarification regarding limits to delegation. The question of the place and form of these limits has acquired renewed relevance after the coming into force of the Lisbon Treaty and the introduction of delegated acts in Article 290 TFEU. Paragraph 1 of that provision stipulates that delegated acts may only supplement or amend non-essential elements of a legislative act, raising the question of how 'essential elements' are to be understood. Although the present case concerns a measure adopted under the pre-Lisbon Comitology system, the Court's interpretation of what constitutes 'essential elements' helpfully informs the new system for delegating acts under Article 290 TFEU.

A second point of interest concerns the action's admissibility. Can Parliament challenge an act before the Court if it failed to veto its adoption? The Court answered this question in the affirmative, but nevertheless leaves important points open on the role of the veto procedure. Thirdly, the case raised the issue of whether an implementing instrument may have a *de facto* impact on a legislative act other than the act on which the implementing instrument is based (the basic act). Parliament raised the argument that the contested decision was also unlawful because it in effect broadened the powers of the EU Frontex agency as laid down in the Frontex Regulation.[2] This commentary deals with these issues in chronological order, after explaining the background to the case and summarizing the Court's considerations.

The background

Council Decision 2010/252/EU of 26 April 2010, supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereafter the decision or contested decision), was adopted on the basis of Article 12(5) of the Schengen Borders Code.[3] The decision lays down rules regarding the surveillance of the sea external borders in the context of operational cooperation coordinated by the Frontex agency. Frontex is responsible for coordinating member states' actions in the sphere of external border

[2] Council Regulation (EC) No. 2007/2004 of 26 Oct. 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union as amended by Reg. No. 1168/2011 of the European Parliament and of the Council of 25 Oct. 2011.

[3] Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

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control and surveillance. The Schengen Borders Code, which provides for the absence of internal border controls and lays down common rules for external border controls, distinguishes between measures of 'border checks' and measures of 'border surveillance'. Border checks are the checks on persons carried out at border crossing points to ensure that persons fulfil the conditions for entry.[4] The purpose of border surveillance is to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.[5] The Commission, considering the decision as being an additional measure governing border surveillance, found the implementing power conferred by Article 12(5) to be a sufficient basis for the measure.

The contested decision is a non-legislative act adopted by the Council. The Treaty provides for two types of non-legislative acts: delegating acts (Article 290 TFEU) and implementing acts (Article 291 TFEU). Powers conferred under Article 290 TFEU enable the Commission to 'amend or supplement certain non-essential elements of the legislative act.'[6] Under Article 291 TFEU, the legislature can confer implementing powers on the Commission where uniform conditions for implementation are needed. The contested decision, however, was not adopted under this system, but under the pre-Lisbon Comitology system.[7] In this system, there was no differentiation between delegated and implementing acts. All non-legislative acts were commonly called 'implementing acts'[8] and were categorised according to the Comitology procedure that had led to their adoption. According to the amended second Comitology regulation,[9] there were five different procedures with divergent levels of involvement and powers of Comitology Committees (staffed by member state representatives at the administrative level), namely the 'advisory procedure' (Article 3), the 'management procedure' (Article 4), the 'regulatory procedure' (Article 5), the 'regulatory procedure with scrutiny' (Article 5a) and the 'safeguard procedure' (Article 6).

The contested decision was adopted under the regulatory procedure with scrutiny. This procedure provided in its first stage for the involvement of a Comitol-

[4] Arts. 2(10), 6 and 7 Schengen Borders Code (*see supra* n. 3).

[5] Art. 3. 2(11) and 12 Schengen Borders Code (*see supra* n. 3).

[6] Art. 290(1) TFEU.

[7] Even though it was adopted after the entry into force of the Lisbon Treaty, its basic act (the Schengen Borders Code) was adopted pre-Lisbon and therefore provided for the adoption of non-legislative acts under the old system.

[8] To avoid confusion with the different acts according to pre- and post-Lisbon denominations, all pre-Lisbon implementing acts and post-Lisbon delegated and implementing acts are called 'non-legislative acts' in this article. Only where specific reference is made to post-Lisbon delegated or implementing acts, the precise terminology is used.

[9] *See* Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, as amended by Council Decision 2006/512/EC of 17 July 2006.

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ogy Committee, and in a second stage for the possibility of both Council and Parliament to veto a prospective act. This required a qualified majority in the Council and for Parliament, a majority of its component members. Although Annex VI(3) of the Schengen Borders Code provides for specific checking procedures on maritime traffic, the Commission and the Council felt a need to put an additional legal framework into place that would specifically deal with Frontex operations at sea. These operations raise specific issues of international maritime law, human rights and refugees' rights, the division of competences between Frontex and member states and the delicate issue of where to disembark intercepted migrants. The European Council, in the Stockholm Programme, had called upon the Commission to put forward proposals to clarify the mandate and enhance the role of Frontex, including 'clear common operational procedures containing clear rules of engagement for joint operations at sea.'[10]

After the Commission had produced a study on the international law instruments in relation to illegal immigration by sea in May 2007,[11] it commissioned an informal working group consisting of representatives of member states, Frontex, the UN High Commissioner for Refugees (UNHCR) and the International Organisation for Migration (IOM) to produce guidelines for Frontex' maritime operations. The group failed to agree, however, on the implications of refugee law, the role of Frontex and the question of where to disembark intercepted migrants. On the basis of these informal consultations, the Commission then prepared a draft decision on the basis of Article 12(5) of the Schengen Borders Code, which allows for the adoption of additional rules governing surveillance in accordance with the regulatory procedure with scrutiny.[12] The proposal aimed to make explicit the duties to respect fundamental rights and the rights of refugees in Frontex operations, created a legal basis in EU law in accordance with international maritime law for searching and intercepting vessels, and provided modalities for disembarking intercepted or rescued persons.

The draft failed to acquire the requisite support in the relevant Comitology Committee, i.e., the Schengen Borders Code Committee, but was nevertheless forwarded to Parliament and the Council on 27 November 2009 in accordance with Article 5a(4) of the *Comitology* decision.[13] Under Article 5a(4)(e) of that

[10] The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, *OJ* [2010] C115/01, § 5.1.

[11] SEC(2007) 691.

[12] This procedure is usually known by its French acronym PRAC (Procédure de Réglementation avec Contrôle). The procedure is described in the *Comitology* decision (*see supra* n. 9).

[13] Proposal for a Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of 27 Nov. 2009 (COM(2009) 658 final).

decision, Parliament may exercise a veto if it considers the proposed measure to exceed the implementing powers of the basic act. Although a motion for a resolution, tabled by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) with the aim of opposing the draft decision acquired a majority of 336 to 253 votes, with 30 abstentions, it did not muster the absolute majority required for blocking the decision, i.e., that of the component members of Parliament.[14] The Council, as the body charged with implementing the Schengen Borders Code, subsequently adopted the proposal on 26 April 2010 with some amendments. The most pertinent one was that it divided the decision into binding rules on interception and non-binding guidelines on search and rescue situations and disembarkation.

Upon unanimous request of Parliament's LIBE Committee, however, the President of Parliament decided to bring an action for annulment of the decision before the Court on 23 June 2010. Parliament argued that the implementing power of Article 12(5) of the Schengen Borders Code was exceeded because 1) the decision introduced rules on 'interception', 'search and rescue' and 'disembarkation' which cannot be considered to be within the scope of 'surveillance' as defined by Article 12 of the Schengen Borders Code and which cannot be considered to be non-essential elements and 2) the decision modified the obligations of the member states relating to Frontex operations, which are not laid down in the Schengen Borders Code but in the Frontex regulation. Parliament did, however, ask the Court to maintain the effects of the decision in accordance with Article 264(2) TFEU.

Decision of the Court

The Court delivered its decision in Grand Chamber on 5 September 2012, after hearing the opinion of Advocate-General Mengozzi on 17 April. The question of admissibility arose from the specific procedure under which the act was adopted, namely the PRAC under which Parliament has the possibility to veto an implementing act. In its motion for inadmissibility, the Council maintained that, as Parliament had not objected to the contested decision during the adoption procedure, it should now not be allowed to bring an action before the Court on the basis of the same grounds that it could have used to veto it.

[14] Motion for a resolution on the Draft Council Decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational coordination coordinated by the European Agency for the Management of Operational Cooperation at the External Borders, B7-0227/2010, 17 March 2010. *See* further procedural file 2009/2755(RPS).

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The Advocate-General refuted this position on the basis of three arguments. Firstly, that PRAC gave Parliament the possibility, but not the obligation, to oppose implementing acts where it has grounds to do so.[15] Secondly, the veto is a political tool, and not a legal assessment. It is not, therefore, an alternative to judicial review.[16] Lastly, the Advocate-General drew attention to differences in Parliamentary procedures that apply to a veto and the decision to bring an action before the Court. The right to ask for judicial review can be seen as a means of protection of Parliamentary minorities, as it does not require a vote by the Parliamentary Assembly but only a decision of the President of Parliament.[17]

The Court bases its rejection of the claim of inadmissibility partially on different arguments. It reiterates that Parliament, as a privileged party before the Court, does not have to show an interest in the action.[18] Furthermore, it recalls its previous case-law that the right to sue is not conditional on the position of the party taken at the time of adoption.[19] The Court concludes:

> [a]lthough […] the regulatory procedure with scrutiny enables the Parliament to scrutinise a measure before it is adopted, that procedure cannot be a substitute for review by the Court. Thus, the fact that the Parliament did not oppose the adoption of a measure in the course of such a procedure cannot render inadmissible an action for annulment calling in question the lawfulness of the measure thereby adopted.[20]

It therefore finds the action to be admissible.

Parliament contested the decision before the Court mainly because it claimed the decision to go beyond the scope of the implementing powers delegated to the Council, as explained in section 1 above. In Parliament's view, the Council, as the body adopting the non-legislative measure, had acted outside its mandate. Both the Advocate-General and the Court agreed with the assessment of the Parliament in this regard and held that the implementing act was illegal as it contained 'essential elements' reserved for legislation. Yet, their definitions of 'essential elements' differ slightly.

According to the Advocate-General, 'essential elements' are options which are either likely to affect personal freedoms and fundamental rights, including the

[15] Opinion of the AG Mengozzi of 17 April 2012, Case C-355/10, *European Parliament* v. *Council of the European Union*, (in the following *SBC*), § 20.

[16] AGs Opinion in *SBC* (*see supra* n. 15),§ 20.

[17] AG's Opinion in *SBC, supra* n. 15, § 22. For an elaboration of this point, *see also infra*, section on admissibility in the commentary.

[18] CJEU 5 Sept. 2012, Case C-355/10, *European Parliament* v. *Council of the European Union* (in the following *SBC*) § 37.

[19] *SBC*, *supra* n. 18, § 38.

[20] *SBC*, *supra* n. 18, § 40.

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opportunity of relying on and obtaining protection of these rights, or likely to affect the relation between member states and third countries.[21] Furthermore, 'essential elements' pertain to sensitive or controversial issues,[22] or options which the legislature has reserved for itself.[23]

The Court first repeats its settled case-law, according to which the adoption of rules essential to the subject-matter envisaged is reserved to the Union legislature and that as a consequence, 'provisions which require political choices falling within the responsibilities of the Union legislature cannot be delegated.'[24] The Court next observes that the categorization of 'essential elements' is not for the assessment of the EU legislature alone, but must be based on objective factors amenable to judicial review.[25] After having reviewed the specific nature of the powers laid down in the contested decision, the Court concludes that:

> […] the adoption of rules on the conferral of enforcement powers on border guards […] entails political choices falling within the responsibilities of the European Union legislature, in that it requires the conflicting interests at issue to be weighed up on the basis of a number of assessments.[26]

Two factors appear especially relevant in defining what 'essential elements', and thus measures that require political choices, are. First, the Court connects the political nature of the choice with the international effects of a measure by referring to the potential of the powers conferred on border guards to interfere with the sovereign rights of third countries.[27] Secondly, the Court sees a connection between a measure containing 'essential elements' and fundamental rights, as it states that

> provisions on conferring powers of public authority on border guards ... mean that the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required.[28]

This observation is supported by the fact that the powers conferred include the stopping and apprehension of persons, the use of force and conducting the persons apprehended to a specific location.[29]

[21] AG's Opinion in *SBC, supra* n. 15, § 61.
[22] AG's Opinion in *SBC, supra* n. 15, § 64.
[23] AG's Opinion in *SBC, supra* n. 15, § 65.
[24] *SBC*, *supra* n. 18, § 65.
[25] *SBC*, *supra* n. 18, § 67.
[26] *SBC*, *supra* n. 18, § 76.
[27] *SBC*, *supra* n. 18, § 76.
[28] *SBC*, *supra* n. 18, § 77.
[29] *SBC*, *supra* n. 18, § 77.

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The Court concludes that, because the conferral of such powers on border guards amends essential elements of external maritime border surveillance, the decision must be regarded as requiring political choices and therefore goes beyond the scope of the additional measures within the meaning of Article 12(5) of the SBC and, in the context of the European Union's institutional system, is a matter for the legislature.[30]

It is noteworthy that neither Advocate-General Mengozzi nor the Court saw any problem in some of the offending provisions being contained in a part of the decision that consisted of non-binding guidelines. Even though this appeared to have been one of the main arguments of the defence,[31] the Court simply finds that:

> The mere fact that the title of Part II to the Annex of the contested decision contains the word 'guidelines' and that the second sentence of Article 1 of that decision states that the rules and guidelines in Part II are 'non-binding' cannot affect their classification as essential rules.[32]

This is because, as the Court considers in line with the Advocate-General, regardless of the title of that part of the decision, it intended to produce legal effects as well, since the decision obliged the guidelines to be included in Frontex operational plans.[33]

Having considered the decision unlawful, the Court did not need to address the question of whether the contested decision could also be annulled on the grounds that it in effect interfered with an act that was not its basic instrument, namely the Frontex Regulation.[34] The Advocate-General had treated this question rather briefly, even though it touches on an important issue in the sphere of determining the legal limits of delegation. The Advocate-General argued that an implementing act may not have the effect of amending a legislative act other than the basic act, especially if the 'third' instrument on which effects can be asserted is founded on a different legal basis.[35] The Advocate-General declared that:

> the measures to define the practical arrangements for maritime operations coordinated by Frontex continue in fact to be regulated by reference to an act implementing a different legal instrument, itself founded on a legal basis that would not alone have permitted the adoption of those measures. In laying down those provisions, the

[30] *SBC*, *supra* n. 18, §§ 78-79.
[31] AG's Opinion in *SBC, supra* n. 15, § 51.
[32] *SBC*, *supra* n. 18, § 80.
[33] AGs Opinion in *SBC, supra* n. 15, § 83 and *SBC*, *supra* n. 18, §§ 81-82.
[34] Council Regulation (EC) No. 2007/2004, *supra* n. 2.
[35] AG's Opinion in *SBC, supra* n. 15, § 76.

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contested decision exceeded the implementing powers conferred by Article 12(5) of the SBC.[36]

The Court thus followed up on most of Parliament's arguments and annulled the contested decision. As asked by Parliament, it did, however, uphold the effects of the decision until the entry into force of a new legislative act.

Commentary

Admissibility

The current case is the first one in which the question of the legal consequences of the possibility of a parliamentary veto for non-legislative acts was reviewed by the Court.[37] The Comitology system as described above was only instated in 2006 and had already been displaced in 2009 by the new Lisbon system of Articles 290 and 291 TFEU.

The question of admissibility centres on the relationship between parliamentary oversight and judicial review. If parliamentary oversight is also a form of review of legality, than surely it would make no sense if Parliament would first establish an act's legality and subsequently ask the Court to annul the act on grounds of illegality. This was the logic put forth by the Council in its pleadings. However, if parliamentary oversight is primarily conceived of as based on a political assessment, there is no reason to make an action for annulment conditional on Parliament not having exercised its veto power.

The ruling of the Court in this matter follows established case-law. The Court has held before that the right of a member state to challenge a Union act does not depend on the position taken at the time of adoption,[38] and has also extended this reasoning to Union institutions.[39] However, in addressing the issue of admissibility, the Court leaves some questions unanswered. The first relates to the difference between *ex ante* and *ex post* oversight. Few would claim that parliamentary veto powers could be a substitute for a judicial review by the Court. However, there does seem to be some overlap between parliamentary oversight based on legality and judicial review. From a governance perspective, *ex ante* and *ex post*

[36] AG's Opinion in *SBC, supra* n. 15, § 87.

[37] There are relatively few occurrences of such a veto. *See* M. Kaeding and A. Hardacre, 'The European Parliament and the Future of Comitology after Lisbon', 19 *European Law Journal* (2013) p. 382.

[38] *See* ECJ 12 July 1979, Case 166/78, *Government of the Italian Republic* v. *Council of the European Communities,* § 6.

[39] *See* ECJ 21 Jan. 2003, Case C-378/00, *Commission of the European Communities* v. *Council of the European Communities*, § 28.

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checks would likely be related, whereby the strength of one may compensate for the weakness of the other.[40] Such recognition of the relationship between the right to veto and the right to judicial action would not necessarily result in a rejection of the right of action by Parliament. Instead, it could also affect Parliament's burden of proof or the intensity of judicial review. In the present ruling, the Court does not, however, recognise this possible relation. It is unclear whether the ruling is meant to simply not address this issue, or to implicitly deny the connection.

The second open question is whether the veto power of Parliament does not also give rise to a responsibility to make use of it in case Parliament considers a non-legislative act to be illegal. Parliament, according to its own rules of procedure, has a role in the scrutiny of legality of Union law.[41] Is it not problematic if Parliament does not act on the assessment that an implementing measure is illegal, even if it has the possibility of doing so? While it has now become clear that a failure to veto an act does not impair the right to bring an action before the Court, the question remains whether this failure has any legal consequences. Although it appears clear, on the one hand, that Parliament may not contribute to an illegal act, since that would amount to breaching Union law, a non-veto is, on the other hand, a very particular kind of 'contribution'. To draw an analogy: the Commission is not obliged to act on the illegality of member state action and to instate infringement procedures even where Union law is unquestionably breached. Instead, it has discretion in the matter. The open question is thus how far Parliament's discretion in not vetoing illegal Union acts goes.

Yet it should be pointed out that the above general discussion might give a misleading picture of the facts of the case. Parliament had indeed tried to issue a veto against the contested Council decision. It had failed to do so because, even though the majority of votes cast was in favour of vetoing the act, this did not result in an affirmative vote of the majority of Parliament's component members, as is necessary to result in a Parliament veto.[42] In this context, a point raised by the Advocate-General gains relevance, namely that of the protection of parliamentary minorities.[43] Even though Parliament is treated as one body in the constitutional framework, so that there is a parliamentary right to bring action, as opposed to individual standing for parliamentarians, Parliament is not actually such a unitary body. The right to bring an action resides in the President of Parliament mainly, with initiation rights to the decision procedure granted to relevant Com-

[40] Deirdre Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account', 13 *European Law Journal* (2007) p. 523 at p. 525.

[41] *See* rule 128 of the Rules of Procedure of Parliament.

[42] *See* Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission.

[43] AG's Opinion in *SBC, supra* n. 15, § 22.

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mittees and veto rights in some cases granted to the plenary acting by simple majority.[44] This creates the possibility for the Court to act, together with the President of Parliament, as a protector of parliamentary minorities and as a protector of the legality of Union acts. This protects the prerogatives of Parliament as much as those of the Court, which is only able to subject a measure to judicial review if an action is brought before it.

To what extent are these questions relevant after 'Lisbon'? Under the new system, Parliament no longer has to bring specific grounds for vetoing a delegated act (Article 290 TFEU). Hence, Parliament's review is formally no longer based on 'legality'.[45] However, many non-legislative acts are still based on the pre-'Lisbon' procedure, despite the Commissions efforts to review the acts constituting a basis for the delegation of powers and to adapt them to the post-Lisbon system.[46] Furthermore, Parliament remains likely to mention the grounds for exercising the right of veto and legality is the most probable ground to be referred to by Parliament in this respect. In connection with the new system under the Lisbon Treaty, the Commission has requested a veto to always be accompanied by reasons, and this is also stipulated in the standard clauses for delegation that Parliament and Council have agreed upon.[47] Although Parliament now formally has the possibility to veto an act without reference to the limits of delegation (and thus may use its veto for altogether different purposes), it is likely to continue to base is veto on an argument of illegality in practice – at least among other arguments.

Essential elements

The Court's interpretation of 'essential elements' comes with an important disclaimer. As Advocate-General Mengozzi notes, even though Parliament and Council appeared to expect the Court's ruling to clarify the term 'essential elements' with regards to delegated acts, the Lisbon Treaty reform of the system acts would not allow for easy transposition of the current case (and older cases) to a post-

[44] *See* Rule 128(3) of the Parliament's Rules of Procedure. The President can bring an action before the Court. If he acts according to the recommendations of the relevant committee, he may ask Parliament to decide on maintaining the action, if he does not act in accordance with the committee, he must ask Parliament for a vote. Parliament takes these decisions by majority of votes cast.

[45] *See* further European Commission, 'Communication from the Commission to the European Parliament and the Council. Implementation of Article 290 of the Treaty of the Functioning of the European Union' of 9 Dec. 2009 (COM(2009) 673 final).

[46] COM(2009) 673 final, *supra* n. 45.

[47] COM(2009) 673 final, *supra* n. 45, p. 9 et seq. and Council Document 8753/11 of 10 April 2011, 'Common Understanding – Delegated Acts'.

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'Lisbon' act.[48] He appears to view the pre-'Lisbon' system as significantly different from the current system. First of all, Mengozzi states that the term 'essential elements' has to be re-appraised in light of the differentiation between delegated and implementing acts. Second, he notes that under Article 290 TFEU, the legislature is obliged to state the objectives, content, scope and duration of the delegation of power, through which, according to the Advocate-General, the legislature would define the essential elements of the basic act. This would render the Court's interpretative leeway within the post-'Lisbon' system smaller. Nonetheless, the delineation between the legislative preserve and non-essential elements in the Court's ruling, as well as in the Advocate-General's opinion are based on very fundamental observations, making it hard to see why they would not be relevant for future cases.

In earlier case-law[49] the Court had mainly sought to establish whether a non-legislative act departed from the form and scope of the basic act in such a way as to effectively either modify or alter[50] or to disregard essential elements of it[51] or to change the 'general scheme'.[52] Accordingly, what was essential was determined by the already existing system as much as by the field in which the act was adopted.[53] Furthermore, the discretion of the Commission to adopt non-legislative acts differed in accordance with the extent to which the Union competence was 'exclusive'.[54] The Treaties could imply exclusiveness; or secondary Union law could as well by essentially covering an area through its pre-emptive effect. Where the Union generally had more competences, more discretion was granted to Commis-

[48] AG's Opinion in *SBC, supra* n. 15, § 29 (n. 32).

[49] For a broader description *see also* H. Hofmann, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality', 15/4 *European Law Journal* (2009) p. 482 at p. 490 and the extensive discussion in Y. Avgerinos, 'Essential and Non-Essential Measures: Delegation of Powers in the EU Securities Regulation', 8/2 *European Law Journal* (2002) p. 269 at p. 275 *et seq.*

[50] ECJ 13 July 1965, Case 39/64, *Société des Aciéries du Temple* v. *High Authority of the ECSC.*

[51] ECJ 18 June 1996, Case C-303/94, *European Parliament* v. *Council of the European Union,* § 31.

[52] ECJ 10 May 1995, Case C-417/93, *European Parliament* v. *Council of the European Union,* § 32.

[53] ECJ 29 June 1989, Case 22/88, *Industrie- en Handelsonderneming Vreugdenhil BV* v. *Gijs van der Kolk – Douane Expediteur BV*, § 17.

[54] A formal categorization of competences as exclusive only happened with the Lisbon treaties. However, it was commonly accepted before Lisbon that in some areas the Union possessed further reaching competences than in others. *See* AG's Opinion in *SBC, supra* n. 15, § 27.

sion or Council in adopting non-legislative acts.[55] In previous case-law, the definition of 'essential elements' thus seemed to be primarily a matter pertaining to the relationship between the non-legislative act and its basic act, and the area of substantive law the act took part in.[56] The 'essential elements' doctrine mainly served to protect the basic act from amendment through the back door.[57] In those cases where the Court did give a more general notion of the concept of 'essential elements', it had remained rather aloof, defining them as 'provisions which are intended to give concrete shape to the fundamental guidelines of Community policy.'[58] In the current case, however, the Court stresses the existence of 'universal', i.e. inherently 'legislative', limits, rather than focusing its assessment on whether or not the non-legislative act adds elements to the basic act.[59]

Accordingly, the present case turns not on the 'fit' of the non-legislative act with the basic instrument but rather on the question whether, despite the fit, the nature of the measure adopted forbids certain provisions to be contained in a mere non-legislative act.[60] Indeed, both the Advocate-General and the Court argue very much along the lines of a legislative preserve and an objective differentiation between legislative and non-legislative matters. This differentiation is arguably made only stronger under the Lisbon Treaty, since it has introduced the concept of legislation and its differentiation from non-legislation into primary law.[61]

The Court's ruling that essential elements must be categorised according to 'objective factors amenable to judicial review'[62] is crucial. Although this is a standard formula used by the Court,[63] it is now used for the first time in relation to

[55] Thus, wide powers were found especially in the agricultural sector. *See* case C-22/88, *supra* n. 53.

[56] *See also*, Hofmann, *supra* n. 49, and Case C-303/94, *supra* n. 51.

[57] *See* ECJ 27 Oct. 1992, Case C-240/90, *Federal Republic of Germany* v. *Commission of the European Communities* and Case C-417/93, (*supra* n. 52) in particular.

[58] Case C-240/90 (*supra* n. 57) § 37.

[59] The Court does refer to the contested decision as constituting a major development in the SBC system (*SBC, supra* n. 18*,* § 76). However, this assessment seems to be made in passing as the significance of the contested decision for the development of the system is not alluded to anywhere else.

[60] AG's Opinion in *SBC, supra* n. 15*,* § 60.

[61] *See* for example, Art. 290 TFEU. For an elaboration, *see* P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford University Press 2010), ch. 2.

[62] *SBC*, *supra* n. 18, § 67.

[63] This formula has been used to determine that the choice of legal base of a Union act is not open to the discretion of the legislature. Bast uses this formula in analogy to the determination of whether an act has to be adopted via legislative or non-legislative procedure. J. Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU law', 49 *Common Market Law Review* (2012) p. 885 at p. 895.

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the determination of 'essential elements'.[64] These elements are defined by the Court as those matters which require political choices. The Advocate-General does not give this rationale for a legislative preserve: his focus lies on substantive categories of essential elements as pertaining to fundamental rights and the protection thereof, as well as to international relations, i.e. the relations between member states and third countries.

The Court's statements are more abstract. It argues that 'essential elements' must be defined as those elements which contain political choices falling within the responsibilities of the Union legislature, because they involve a weighing of interests.[65] It next observes that the conferral of enforcement powers on border guards entails political choices falling within the legislative preserve because 1) the powers of border guards are likely to vary significantly depending on the political choices made, 2) they may interfere with the sovereign rights of third countries and 3) this means that fundamental rights could be interfered with to such an extent so as to require the involvement of the legislature.[66]

It is notable that the Court, in contrast to the Advocate-General, does not state that the decision in and of itself is liable to impinge on fundamental rights. Instead, it uses the language of public authorisation, which is new to this strand of case-law. It holds that through the contested decision, public bodies are conferred the powers to interfere with fundamental rights. This conferral of powers is then the aspect that requires a legislative, as opposed to delegated, decision-making process.

By this the Court appears to imply that there is very little leeway for adopting non-legislative acts in the area of border security. It argues that, because the exercise of the powers of border guards, sensitive as it is in nature, requires authorisation, the choice about the width of these powers needs to be with the legislature.[67] This creates a stark contrast between this subject area and other areas such as the common agricultural policy, in which the Court generally has allowed that the Commission is accorded rather wide discretionary powers.[68] It could be the case that this novel development is restricted to the field of the former third pillar. However, it is just as possible that the current judgment marks a change in the Court's attitude towards wide implementing powers for the Commission and

[64] ECJ 17 Dec. 1970, Case 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* v. *Köster, Berodt &Co.,* ECJ 30 Oct. 1975, Case 23/75, *Rey Soda* v. *Cassa Conguaglio Zucchero,* ECJ 15 May 1984, Case 121/83, *Zuckerfabrik Franken GmbH* v. *Hauptzollamt Würzburg,* ECJ 29 June 1989, Case 22/88 (*supra* n. 53), Case C-240/90 (*supra* n. 57), Case C-417/93 (*supra* n. 52), ECJ 23 Oct. 2007, Case C-403/05, *European Parliament* v. *Commission of the European Communities.*

[65] *SBC*, *supra* n. 18, § 76.

[66] *SBC*, *supra* n. 18, §§ 76-77.

[67] *SBC*, *supra* n. 18, § 76.

[68] *See* ECJ Case C-22/88 (*see supra* n. 53)

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signifies a new willingness to apply universal limits to delegation, also in areas such as agricultural policies. However, it should also be noted that, in employing the term 'extent', the Court does point to a *de minimis* rule, where the degree or severity of the human rights interference is decisive for considering a measure to constitute an essential element.

It is notable that the Advocate-General and the Court are unanimous in their assessment that the act is liable to interfere with sovereign rights of third countries; both draw the conclusion that this militates in favour of the act containing an 'essential element'. Although this finding reflects the importance of respecting the sovereignty of third states, it is not necessarily intuitive in light of the fact that Parliament did not have very strong powers under the old second pillar. The Court's reasoning could hence be seen as an affirmation of the role of Parliament in this area. The effect of the Court's reasoning is that Parliament gains influence in this field by being put on a par with the Council in an area where the Council is traditionally much stronger.[69] Such an assessment is supported by the facts in the case, where the Council, and not, as usually, the Commission, was also the legal author of the non-legislative act, making the issue more of a struggle between Parliament and Council than between legislature and executive.

The above would support the view of the Court as endorsing Parliament in its struggle for greater powers.[70] However, it should be noted that this endorsement does not pertain to conducting international relations proper, but only where legislation has effects on the relations between the Union and its member states and third countries. Because legislation involves both Parliament and Council, this point could rather be seen as pulling the international effects of Union action more firmly within the ambit of Article 10 TEU. This provision, which prescribes the dual representative structure of the EU – declaring the direct representation through Parliament and the indirect representation through the Council both fundamental to democracy in the Union – is applicable to the Union generally. The judgment of the Court should be seen as operationalizing this general claim. Besides furthering the understanding of *non-legislative* acts, the criteria set forth by the Court might be taken to better understand *legislation*. The definition of legislation in the EU treaties is an entirely formal one: those acts are defined as legislative which are based on a provision in the Treaty which calls for legislation.[71]

[69] It should be noted that Parliament's powers are also historically weaker in the former third pillar than in the former first pillar. While Parliament's role has been strengthened post-Lisbon, this area is still a sensitive one. Thus, for example Art. 77 TFEU prescribes a special legislative procedure in which Parliament has to be consulted only.

[70] O. Costa, 'The European Court of Justice and Democratic Control in the European Union', 10/5 *Journal of European Public Policy* (2003) p. 740 at p. 752.

[71] Certain Treaty articles prescribe the use of the ordinary legislative procedure (defined in Art.294, *see*, for example, Art. 77(2) TFEU), other articles prescribe the use of a different

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While not defining the outer limits of legislation, the Court's ruling is a step towards describing its core through delineating a legislative preserve that at least pertains to fundamental rights and international relations. Whether there are more of such defining elements is a matter for future case-law to settle.

Effects of implementing acts

Parliament had claimed an additional ground of illegality, namely the fact that the contested decision also had effects on the Frontex agency and thus interfered with the Frontex Regulation.[72] This was the first time the Court was called upon to rule on the question whether an implementing instrument may have the effect of amending another act than the basic instrument.

The Advocate-General answered this question negatively in stating that the implementing body has no authority to implement or amend any other legislative act than the basic act. At first glance, this position is supported by previous rulings of the Court.[73] Earlier case-law shows that a non-legislative act may not derogate from its basic instrument and must be interpreted in its light.[74] Furthermore, the Court has held 'that [a] regulation could only be amended on a legal basis *equivalent* to that on which it had been adopted' [emphasis added].[75] Yet these judgements concerned the relation between a non-legislative act and its basic instrument.

There are two points to be made about the applicability of this case-law to the current case. Firstly, the question is whether the contested decision can really be seen to have 'amended' the Frontex regulation. Secondly, it is not clear whether the strictly hierarchical relation between a non-legislative act and its basic instrument can be extended to cover the relation between a non-legislative act and legislative instruments other than the basic instrument.[76]

procedure which is then in the article defined as a special legislative procedure (*see*, for example, Art. 77(3) TFEU). There are also Treaty provisions, which provide for the adoption of secondary acts without expressly stipulating that the adoption procedure is a legislative procedure (*see*, for example, Art. 74 TFEU). Such acts are not legislative acts. *See also* Bast, *supra* n. 63, at p. 893.

[72] Regulation 2007/2004, *supra* n. 2.

[73] R. Schütze, '"Delegated" Legislation in the (New) European Union: A Constitutional Analysis', 75/5 *Modern Law Review* (2011) p. 661 at p. 671.

[74] ECJ 10 March 1971, Case 38/70, *Deutsche Tradex GmbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* § 10.

[75] ECJ 13 Dec. 2001, Case C-93/00, *European Parliament* v. *Council of the European Union,* § 42.

[76] Here, for example, also the more specialised nature of non-legislative acts could play a role, i.e., in the form of the *lex specialis* rule. The provisions of non-legislative acts, as the

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If non-legislative acts may not amend any legislative acts, the criteria for considering effects to constitute an 'amendment' become relevant. The Advocate-General states that the contested measure is illegal, because it 'potentially interferes significantly' with the Frontex regulation. Thus, the Advocate-General on the one hand employs the broad criterion of 'potential' and therefore not necessarily factually proven effects; and, on the other hand a *de minimis* threshold of 'significant' effects. This results in rather unclear criteria and the Advocate-Generals application of these criteria indeed raises some questions.

A complication for considering illegal the effects of the contested measure on the Frontex regulation is that there is a close connection between that regulation and the Schengen Borders Code. The role of Frontex in coordinating operational cooperation among the member states in the field of external border management is expressly recognised in Article 16(2) of the Schengen Borders Code. Conversely, according to Article 1(2) of the Frontex Regulation, Frontex 'shall facilitate and render more effective the application of existing and future Community measures relating to the management of external borders.' In the revised Frontex Regulation, specific reference in that provision is made to the Schengen Borders code, which was adopted after the original Frontex Regulation.[77]

Because the Frontex Regulation explicitly refers to future Community measures relating to the management of external borders, the argument could be brought forward that any supplementation of the Schengen Borders Code automatically informs the mandate of Frontex. The Advocate-General dismisses that argument for two reasons. He notes that first of all, the contested measure does not merely lay down rules on the management of external borders, but specifically purports to amend the competences of Frontex in relation to the member states, which are however circumscribed in the Frontex regulation.[78] The Council, acting in a non-legislative role under the Schengen Borders Code, has no power to make changes in the division of tasks between member states and Union regarding Frontex. Clearly, the Schengen Borders Code would not be the appropriate legal basis for such changes.[79]

Secondly, the Advocate-General notes that the contested measure enlivens a competence for Frontex to be involved in search and rescue situations, which are

more specialised acts, could in certain cases prevail over more general provision contained in legislative acts.

[77] Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 Oct. 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

[78] AG's Opinion in *SBC, supra* n. 15, § 82.

[79] On defining the appropriate legal basis, *see* ECJ 5 Oct. 2000, Case C-376/98, *Federal Republic of Germany* v. *European Parliament and Council of the European Union.*

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activities that currently fall outside Frontex's duties as defined in the Frontex regulation. In bringing this latter argument, the Advocate-General appears to suggest that search and rescue situations cannot be considered to fall within the ambit of border surveillance of Article 12 Schengen Borders Code.[80] After all, if they fell within the scope of the Schengen Borders Code, they would by virtue of Article 1(2) Frontex Regulation also inform the tasks and duties of the Frontex agency. However, if the Advocate-General had meant to argue that the provisions of the contested decision go beyond what can be understood as 'border surveillance', then this would turn back to the question of whether the contested measure went beyond the scope of delegation. Since the Schengen Borders Code authorised the adoption of non-legislative acts only for the operationalisation of border surveillance, any act going beyond this would automatically be *ultra vires.* An *ultra vires* act could certainly be understood, indeed, to also broaden the powers of Frontex to an impermissible degree. Nevertheless, it should be struck down because of its *ultra vires* character, not because of the effects it has on the Frontex regulation.

As an additional argument, the Advocate-General mentions that the fact that the basic act and the Frontex Regulation are based on different Treaty provisions excludes the possibility of any act implementing the Schengen Borders Code to affect Frontex.[81] It is logical that the legal base of a piece of legislation carries on the restrictions implied therein to all derived non-legislative instruments. Yet the Advocate-General appears to go further: he claims that the fact that the Frontex regulation is based on a different treaty provision than the one that the Schengen Borders Code is based on makes it impossible for a measure implementing the Schengen Borders Code to impinge on the functioning of the Frontex agency. He posits that the contested decision goes beyond the legal basis of the basic act, i.e., Article 62 EC, simply because it also has effects on an Article 66 EC measure.

This argument is, however, problematic, because it may ultimately imply that the linkage envisaged in the Frontex regulation with the Schengen Borders Code cannot result in valid non-legislative acts based on the Schengen Borders Code. These two pieces of legislation form an integrated system, as is also evident from the relation between the two Treaty provisions on which they are based. Article 62 EC (now Article 77 TFEU) provides for substantive competences, which are referred to in Article 66 EC (now Article 74 TFEU) when prescribing cooperation in matters of border protection. Because of this integration, any non-legislative act based on one piece of legislation will automatically have effects on the other

[80] In another part of the opinion, the AG states that he is doubtful whether search and rescue situation should indeed be included in the concept of 'border surveillance', but ultimately refrains from settling this question. *See* AG's Opinion in *SBC, supra* n. 15, §§ 59, 60.

[81] AG's Opinion in *SBC, supra* n. 15, § 79.

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piece of legislation. Thus, any non-legislative act based on Article 12(5) of the Schengen Borders Code will influence the working of Frontex.

The arguments of the Advocate-General are certainly an occasion to study and conceptualise the relation between non-legislative acts and legislation generally, especially where it concerns a non-legislative act and legislation other than its basic act. The Court has so far not clarified this relation in its case-law, and has also this time refrained from doing so. The arguments of the Advocate-General about the solution he presents should be taken as a starting point for this inquiry.

Proposal for a new regulation

On 12 April 2013, the Commission presented a proposal for a regulation that is to replace the annulled decision.[82] Although it covers the same subject matters, the proposal is responsive to some of the key criticisms of the earlier decision.[83] In the first place, the provisions on search and rescue situations (Article 9) embody a much wider understanding of situations of distress and concomitant duties to engage in search and rescue operations.

Secondly, instead of merely alluding to the *non-refoulement* principle as was done in Decision 2010/252/EU, the proposal sets forth a number of substantive and procedural guarantees with a view of ensuring that disembarkation of intercepted or rescued persons complies with relevant human rights standards. The Commission could rely in this respect on the landmark judgment in *Hirsi* v. *Italy* that was rendered by the European Court of Human Rights (ECtHR) in February 2012, at the time the action for annulment was still pending.[84] In that judgment, the ECtHR found the summary return to Libya by Italy of a group of migrants from Eritrea and Somalia without having examined their personal circumstances to violate the prohibitions of inhuman treatment and collective expulsion (Articles 3 ECHR and 4 Protocol No. 4 ECHR). The new guarantees, among other things, see to the obligation to take account of the human rights situation in the third country and to assess the personal circumstances before disembarkation is effectuated.[85]

Thirdly, the proposal explicitly embraces a broad concept of 'border surveillance', by indicating that it not only covers the detection of irregular border crossings, but also interception measures, search and rescue situations and the return of persons to a third country.[86] However, it can be disputed whether the regulation

[82] COM(2013) 197 final, *supra* n. 1. The legal basis is Art. 77 TFEU (ex Art. 62 EC).

[83] *See* extensively M. den Heijer, *Europe and Extraterritorial Asylum* (Oxford, Hart Publishing 2012), p. 200-203, 245-246.

[84] ECtHR 23 Feb. 2012, *Hirsi Jamaa a.o.* v. *Italy*, No. 27765/09.

[85] Art. 4 of COM(2013) 197 final, *supra* n.1.

[86] Arts. 5-10 of COM(2013) 197 final, *supra* n.1.

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settles these issues satisfactorily. The guarantees against the summary return of migrants contained in Article 4 of the proposal arguably fall short of those laid down in the *Hirsi* v. *Italy* judgment. In *Hirsi*, the ECtHR not only underlined the importance of interviewing intercepted persons and allowing them the opportunity to express reasons for refraining from return, but also considered that effective remedies should be in place, including the presence on ships of interpreters and legal advisors. Further, the ECtHR held that migrants should be given access to legal remedies before removal is enforced. That the proposal is silent on these more specific procedural guarantees, including the key issue of a right to appeal with suspensive effect, highlights the tension that still exists between the EU framework on maritime border controls and fundamental rights.

Further, maintaining a broad concept of border surveillance risks putting into place a highly divergent set of rules applicable to maritime border controls as opposed to 'ordinary' border controls. Whilst controls at the border must follow the strict provisions of the Schengen Borders Code pertaining to entry conditions and refusals of entry (including the right of appeal), the proposal would codify the possibility of subjecting migrants to a range of highly intrusive coercive measures, not on the basis of a failure to meet the entry conditions of the Borders Code, but on the basis of 'reasonable grounds to suspect that a ship intends to circumvent border checks.'[87] Accordingly, the right to remove persons does not depend on verification of the question of whether a person meets the conditions for entry and residence in the EU, but on the rather vague notion of a suspicion of circumventing border checks. This results in a state of affairs where persons who may in fact be entitled to cross the external border are turned away on the basis of ill-defined suspicions. The broad conception of border surveillance, moreover, raises the issue of how the new regulation relates to other Union instruments on combatting illegal migration, such as the Returns Directive (2008/115/EC), which lays down specific rules on the detention and return of illegally staying third-country nationals. Whilst the Schengen Borders Code has been conceived as merely setting forth common rules on border control, thus reserving matters of asylum, detention and return to other instruments, the current proposal aims to set forth a specific system in respect of all those issues for persons who are intercepted at sea.

In view of the above, the Court's annulment of the decision is a particularly welcome one, as it ensures that these controversial matters will now be subjected to a full legislative scrutiny.

[87] Arts. 6(1) and 7(1) of COM(2013) 197 final, *supra* n. 1.

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Conclusion

The Court's ruling in Case C-355/10 must be welcomed for reinforcing the constitutional checks and balances within the Union. The controversial subject matter of the annulled decision and the proposal for a new regulation illustrate the importance of maintaining the divides between the different institutions and tasks within the Union. Sensitive matters such as border surveillance require the involvement of the legislature and cannot easily be delegated to executive decision making structures. Where such delegation is foreseen, it must happen within strict limits.

The process of establishing operational rules for border surveillance in the Schengen area may also serve as an interesting case study in the future. The new proposal for a regulation on Frontex maritime operations would allow for a substantive as well as procedural comparison with the annulled decision, because it functions as its direct substitute. It would allow more insight into the material difference in outcome of legislative and non-legislative procedures. Such differences could come to be highlighted in this very case study – or otherwise could come to be glaringly absent.

The key contribution of this ruling is, however, the Court's development of the 'essential elements' doctrine. Even with the significant changes that the system of Union acts has undergone through 'Lisbon', this ruling rather shows what we can expect to see more of. The Court departs from earlier case-law in showing an increased willingness to patrol the legislative/non-legislative divide in substantive terms. It also redefines the grounds on which 'essential elements' have to be determined by introducing objective criteria, most importantly the effects a measure has on fundamental rights. Some of the relevance of fundamental rights in this judgment is certainly owed to the field in which the contested measure is to be located, namely of the area of freedom, security and justice. Thus fundamental rights might play a markedly smaller role in judgments pertaining to, for example, the common agricultural policy. However, the introduction of objective, generally applicable factors certainly opens the door to a broader recognition of human rights as being actually fundamental to Union legislation.

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