

OPINION OF ADVOCATE GENERAL
MENGOZZI

delivered on 17 April 2012 (1)

Case C-355/10

European Parliament

v

Council of the European Union

(Action for annulment – Decision 2010/252 – Implementing powers – Limits – Regulation No 562/2006 – Schengen Borders Code – Border surveillance)

1. In the present proceedings, the European Parliament requests the Court to annul Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code (2) 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 ('the contested decision'). (3) If the action should be upheld, Parliament requests that the effects of the contested decision be maintained until it shall have been replaced.

I – Legal context and contested decision

2. The Schengen Borders Code ('the SBC') establishes, inter alia, rules governing border control of persons crossing the external borders of the Member States of the European Union (second paragraph of Article 1). Under Article 3(b) thereof, it is to apply 'without prejudice to ... the rights of refugees and persons requesting international protection, in particular as regards non-refoulement'.

3. The term 'external borders' is defined in Article 2(2) as 'the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders'. Article 2(10) defines 'border checks' as 'checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it'. As regards the term 'border surveillance', it is defined in Article 2(11) as 'the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks'.

4. Title II of the SBC, entitled 'External Borders', is made up of four chapters. Chapter II lays down provisions governing border checks on persons by border guards, border surveillance and refusal of entry.

5. The provisions on border surveillance are contained in Article 12. Paragraphs 1 to 4 thereof, which define the scope of the surveillance, the powers of the border guards, and the arrangements for exercising surveillance, and are worded as follows:

'1. The main purpose of border surveillance shall be to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.

2. The border guards shall use stationary or mobile units to carry out border surveillance.

That surveillance shall be carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points.

3. Surveillance between border crossing points shall be carried out by border guards whose numbers and methods shall be adapted to existing or foreseen risks and threats. It shall involve frequent and sudden changes to surveillance periods, so that unauthorised border crossings are always at risk of being detected.

4. Surveillance shall be carried out by stationary or mobile units which perform their duties by patrolling or stationing themselves at places known or perceived to be sensitive, the aim of such surveillance being to apprehend individuals crossing the border illegally. Surveillance may also be carried out by technical means, including electronic means.'

6. Article 12(5), as amended by Article 1(1) of Regulation No 296/2008, (4) states:

'5. Additional measures governing surveillance may be adopted. Those measures, designed to amend non-essential elements of this Regulation by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 33(2).' (5)

7. Article 33(2) of the SBC, which too was amended by Regulation No 296/2008, provides:

'Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC [laying down the procedures for the exercise of implementing powers conferred on the Commission ('the comitology decision')], (6) shall apply, having regard to the provisions of Article 8 thereof.'

8. Article 5a of the comitology decision, introduced by Decision 2006/512, (7) lays down a new type of procedure for the exercise of implementing powers, called 'the regulatory procedure with scrutiny'. This procedure is followed when adopting measures of general scope designed to amend non-essential elements of a basic instrument adopted in accordance with the procedure referred to in Article

251 EC, where necessary by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements (recital (3) of Decision 2006/512 and Article 2(2) of the comitology decision).

9. The contested decision was adopted on the basis of Article 12(5) of the SBC, in accordance with the procedure provided for in Article 5a(4) of the comitology decision, which applies in cases where the measures proposed by the Commission are not in accordance with the opinion of the committee established pursuant to paragraph 1 of that article, or where the committee delivers no opinion. (8) Following that procedure, the Commission is to submit a proposal relating to the measures to be taken to the Council and forward it to the Parliament at the same time [Article 5a(4)(a)]. If the Council envisages adopting the proposed measures, it is to submit them to the Parliament [Article 5a(4)(d)], which, 'acting by a majority of its component members within four months from the forwarding of the proposal in accordance with point (a), may oppose the adoption of the measures in question, justifying its opposition by indicating that the proposed measures exceed the implementing powers provided for in the basic instrument or are not compatible with the aim or the content of the basic instrument or do not respect the principles of subsidiarity or proportionality' [Article 5a(4)(e)]. If the Parliament opposes the measures, they are not to be adopted [Article 5a(4)(f)]. If it has not, the measures are to be adopted by the Council [Article 5a(4)(g)].

10. According to recitals (2) and (11) of the contested decision, its principal objective is the adoption of additional rules for the surveillance of the sea borders by border guards operating under the coordination of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union ('the Agency' or 'Frontex'), established by Regulation 2007/2004 ('the Frontex Regulation'). (9) It consists of two articles and an annex divided into two parts entitled 'Rules for sea border operations coordinated by the Agency' and 'Guidelines for search and rescue situations and for disembarkation in the context of sea border operations coordinated by the Agency'. Under Article 1, '[t]he surveillance of the sea external borders in the context of the operational cooperation between Member States coordinated by the ... Agency ... shall be governed by the rules laid down in Part I to the Annex. Those rules and the non-binding guidelines laid down in Part II to the Annex shall form part of the operational plan drawn up for each operation coordinated by the Agency.'

11. Point 1 of Part I to the Annex lays down certain general principles intended, inter alia, to guarantee that maritime surveillance operations are conducted in accordance with fundamental rights and the principle of non-refoulement. Point 2 contains detailed provisions on interception and lists the measures that may be taken in the course of the surveillance operation 'against ships or other sea craft with regard to which there are reasonable grounds for suspecting that they carry persons intending to circumvent the checks at border crossing points' (point 2.4). The conditions for taking such measures vary depending on whether the interception takes place in the territorial waters and contiguous zone of a Member State (point 2.5.1) or on the high seas (point 2.5.2). Point 1 of Part II to the Annex lays down provisions on units participating in the surveillance operation in search and rescue situations, including with regard to communicating and forwarding information to the rescue coordination centre responsible for the area in question and the coordination centre of the operation, and defines certain conditions for the existence of an emergency (point 1.4). Point 2 lays down guidelines on the modalities for the disembarkation of the persons intercepted or rescued.

II – Procedure before the Court and forms of order sought

12. By act lodged at the Registry of the Court of Justice on 12 July 2010, the Parliament brought the action which forms the subject-matter of the present proceedings. The Commission intervened in support of the Council. At the hearing of 25 January 2012, the agents of the three institutions presented oral argument.

13. The Parliament claims that the Court should annul the contested decision, rule that the effects thereof be maintained until it is replaced, and order the Council to pay the costs.

14. The Council contends that the Court should dismiss the application as inadmissible or, in the alternative, as unfounded and order the Parliament to pay the costs.

15. The Commission requests the Court to dismiss the application and order the Parliament to pay the costs.

III – Application

A – Admissibility

16. The Council pleads, primarily, that the application is inadmissible. It contends that, by refraining from exercising its veto as provided for in Article 5a(4)(e) of the comitology decision, the Parliament forfeited the right to challenge the contested decision before the Court. Although it is not an act of the Parliament, the contested decision is to a certain degree attributable to that institution, for it was adopted in part as a result of the latter's non-veto. The Parliament has, therefore, no interest in bringing the present action, which is based on the same grounds – exceeding implementing powers – that allowed it to oppose the adoption of the contested decision in the regulatory procedure with scrutiny.

17. In my view, this objection must be dismissed.

18. As the Parliament correctly observed at the hearing, giving it as full a right of action as the Council and the Commission enjoy constitutes a key element of the Union's constitutional architecture and one of the stages in the process of democratising the institutional aspects thereof.

19. The Court has confirmed in clear terms that the exercise of the right to bring proceedings by 'privileged parties' is not conditional on proof of an interest in bringing proceedings (10) or the position taken by the Member State (11) or the institution (12) at the time when the contested act was adopted.

20. In the regulatory procedure with scrutiny the Parliament is not obliged to oppose the adoption of the act even where it considers that there are grounds relating to illegality that allow it to exercise its veto. Therefore, its position may depend also on considerations of a political nature, as appears to have happened in the case of the contested decision, (13) without that entailing the loss of its right to seek and obtain annulment of the act after it has been adopted. What is more, in that respect it is hardly worth pointing out that review of the lawfulness of an act by exercising a veto in the course of its adoption procedure may not be regarded as an alternative to judicial review, precisely because that procedure can be made subject to considerations of a political nature.

21. The Council states that the Parliament retains its right to bring an action against the act at issue, but not on the grounds allowing it to oppose its adoption. In practice, such a restriction obliges the Parliament to challenge that act on grounds relating to the substance of the implementing measures it contains without their having formed the subject-matter of normal political debate in the legislature.

22. Finally, I observe, for the sake of completeness, that for the Parliament's veto to be exercised in the regulatory procedure with scrutiny, there must be a majority (14) greater than that normally provided for in respect of deliberations in the Parliament (15) and that, under the Parliament's Rules of Procedure, the decision whether an action is to be brought before the Court of Justice by the President of the Parliament or on its behalf, where it is done on the recommendation of the committee responsible, may be made even without a vote by the Parliamentary Assembly. (16) To deny the Parliament the right to bring an action for annulment of an act adopted in the regulatory procedure with scrutiny, notwithstanding the position expressed in the course of that procedure, would therefore mean, *inter alia*, depriving the parliamentary minority of an instrument of protection.

23. For all the reasons set out above, the application must, in my view, be declared admissible.

B – *Substance*

24. The Parliament considers that the contested decision exceeds the implementing powers conferred by Article 12(5) of the SBC and therefore falls outside the ambit of its legal basis. In that context it raises three complaints. Firstly, the contested decision introduces new essential elements into the SBC. Secondly, it alters essential elements of the SBC. Thirdly, it interferes with the system created by the Frontex Regulation. These complaints are examined separately below.

25. Before carrying out that examination, it is necessary, however, to review briefly the stages of the Court's case-law on the scope and limits of the implementing powers of Community acts, in so far as is relevant in the present case.

1. Case-law on the scope and limits of the implementing powers of Community acts

26. The scope and limits of the Commission's implementing powers have been defined by the Court in case-law beginning with *Köster* in the 1970s. (17) In the case giving rise to that judgment, the Court was called upon to give a preliminary ruling on, *inter alia*, the legality of the management committee procedure established by an agricultural regulation. On that occasion, it made it clear that, according to the distinction drawn by the Treaty itself between measures that have their legal bases directly in the Treaty and provisions intended to implement them, the legislature is authorised to set out in the former the essential elements of the matter to be dealt with, leaving to the latter the adoption of implementing provisions aimed at implementing the principles contained in the basic act. (18) In *Rey Soda*, the Court held that the concept of implementation must be given a wide interpretation. (19) This finding follows, according to the Court, both from Article 155 TEU (now Article 211 EC) in force at that time and the scheme of the Treaty, and also from 'practical requirements'. According to the Court, in certain spheres, such as the Common Agricultural Policy, the Council may be led to confer on the Commission 'wide powers of discretion and action'. In such cases, when the Council has conferred extensive power on the Commission, the limits of this power must be judged, according to the Court, 'with regard to the basic general objectives of the [basic act] and less in terms of the literal meaning of the enabling word'. (20) In *Zuckerfabrik Franken*, (21) the Court found, in interpreting the limits of a delegation of powers to be exercised through the management committee procedure contained in a regulation on the common organisation of the market in agricultural produce, that according to that delegation, the Commission was authorised 'to adopt all the measures which are necessary (22) or appropriate for the implementation of the basic legislation, provided that they are not contrary to such legislation or to the implementing legislation adopted by the Council'. In other judgments, the Court held that the Commission is required to act within the limits that can be inferred from the overall system and the objectives of the basic act, (23) and the provisions thereof. (24)

27. As regards the Common Agricultural Policy, the Court has, since *Rey Soda*, recognised that the Commission possesses wide implementing powers, in view of the particular role it has in that sector, as the only body able to 'follow with attention trends on the agricultural markets and to act with urgency as the situation requires'. (25) Outside that sector, or similar sectors, the Court's case-law is, however, more restrictive. In *Vreugdenhil*, (26) concerning the Common Customs Tariff, the Court held that 'such a wide interpretation of the Commission's powers can be accepted only in the specific framework of the rules on agricultural markets.' (27)

28. In its judgment in *Germany v Commission* (28) the Court clarified the term 'essential elements' of a particular law, (29) which it was for the legislature to define. The case giving rise to that judgment

concerned an action contesting the lawfulness of a system of penalties to be applied in connection with a Community aid scheme introduced by the Commission under a power delegated by the Council. Germany contended that those penalties should be considered as essential features of the legislation governing the sphere at issue since they affected the fundamental rights of individuals. It further contended that the contested measures were not intended to enforce the basic legislation but to supplement it. The Court replied that the classification 'essential' should be regarded as 'reserved for provisions which are intended to give concrete shape to the fundamental guidelines of Community policy' and that, in that case, the classification 'essential' was not met by penalties intended to ensure the sound financial management of funds to implement those guidelines. In a sentence some years later the Court classified as 'non-essential' a provision contained in a Council regulation concerning the TACIS programme which permitted a threshold to be amended without consulting the Parliament since it did not '[affect] ... the general scheme' of the regulation at issue. (30) More recently, the Court upheld the action brought by the Parliament against a Commission decision approving a project relating to border security in the Philippines in connection with financial and technical assistance and economic cooperation with the developing countries in Asia. In that judgment, the Court held that the objective pursued by the contested decision, that is to say combating terrorism and international crime, was not included in the 'objectives' of the regulation implemented by the decision and did not have a 'direct connection' with them. (31)

29. It follows from the abovementioned case-law that the limits of the implementing powers must be defined above all by reference to the characteristics of the policy in question and the greater or lesser latitude enjoyed by the Commission in implementing it. Those limits are also to be identified by the wording of the delegating provisions, the content and purpose of the basic act, and the overall scheme thereof. The definition of those limits, like the determination of the essential or non-essential character of the basic legislation introduced or amended by the implementing act, (32) far from being simply a mechanical application of the formulae used by case-law, must result from an assessment carried out in the light of all the factors set out above.

2. Application in the present case of the principles drawn from the case-law referred to above

30. The various factors mentioned in the preceding paragraph will be examined below in the context of the action that is the subject of the present proceedings.

a) Considerations concerning the sphere of which the basic act and the contested decision form part

31. In preparing instruments for external border control and combating illegal immigration, the Union legislature is called upon to make difficult choices that may have serious consequences for individual freedoms and affect respect for human rights, the international obligations of the Member States and their relations and those of the Union with third countries. That applies not only to establishing the essential guidelines for border management policy but also to the determining of measures intended to implement those guidelines. There is therefore a justification in this respect for the exercise of implementing powers being better defined with regard to more broadly technical spheres and, consequently, for the Commission's leeway being less wide. (33)

32. For these reasons, I consider that the Council's reference to the Court's case-law cited above and to the extent of the implementing powers it confers on the Commission must, in the present case, be considered with extreme caution.

b) Subject-matter and scope of the implementing powers laid down by Article 12(5) of the SBC

33. In this respect, it may usefully be noted, first of all, that the Italian version of Article 12(5) mentions the possibility of adopting '*misure di sorveglianza supplementari*' [additional surveillance measures], while other language versions contain wording that refers more specifically to additional measures governing surveillance. (34)

34. In those circumstances, and irrespective of the literal wording of the provisions in question, it would seem that the *subject-matter* of the authority provided for therein must in fact be taken as relating to the practical arrangements for carrying out surveillance. That view is supported by the preamble to both the SBC (35) and Regulation No 296/2008 (36) – which amended Article 12(5) of the SBC by introducing the reference to the regulatory procedure with scrutiny – and also the *travaux préparatoires* for the SBC. (37) Furthermore, there would appear to be substantial agreement between the Parliament and the Council on this point.

35. However, their positions differ not only as to whether it is possible to classify the measures contained in the contested decision as mere 'practical arrangements' but also, more generally, on the latitude conferred on the Commission, that is to say, on the *scope* of the authority. The Parliament essentially considers that Article 12(5) authorises only the adoption of measures of an essentially technical nature. The Council observes, on the other hand, that the legislature chose not to specify the content and nature of the rules to be adopted, thus conferring wide implementing powers on the Commission.

36. The argument put forward by the Parliament appears to me to interpret the scope of the authority in question in excessively restrictive terms. As the Council rightly states, both the use of general wording and the choice of a comitology procedure making it possible to adopt measures amending the basic act, although that involves more stringent checks on the arrangements for exercising the implementing powers, constitute indications of an intention to confer a degree of latitude on the Commission.

c) Objectives and general scheme of the basic legislation

37. The Council observes that, within the scheme of the SBC, border checks constitute the essential element of external border control policy and that for that reason the legislature decided, in the procedure referred to in Article 251 EC, to lay down exhaustive rules concerning them by providing that certain arrangements relating thereto could be adopted or amended only by means of the regulatory procedure with scrutiny. On the other hand, with regard to border surveillance the legislature merely laid down the objectives thereof and the basic arrangements, thus conferring on the Commission considerable latitude in the adoption of additional measures.

38. Various factors lead me to disagree with the point of view expressed by the Council.

39. Firstly, it is clear, in particular from the proposal for a Commission regulation, that the structure of the SBC is due in large part to the fact that rules already adopted in various legal instruments such as, in particular, the Schengen Convention (38) and the Common Manual on checks at the external borders, (39) are incorporated in it. These instruments had earlier laid down detailed rules on border checks and governed certain arrangements for applying them. All that legislation is incorporated in part in the SBC itself and in part in the annexes thereto.

40. Secondly, the argument that in the scheme of the SBC surveillance plays a somewhat ancillary or secondary role compared to border checks does not appear to be confirmed by the preamble to the SBC. In particular, recital 8, after stating that border control comprises checks on persons at border crossing points and surveillance between these border crossing points, deems it 'necessary to lay down the conditions, criteria and detailed rules governing checks at border crossing points and surveillance'. Recital 17, which relates to the conferring of implementing powers on the Commission, draws no distinction between checks and surveillance, but refers more generally to the opportunity for making provision 'for a procedure enabling the Commission to adapt certain detailed practical rules governing border control.'

41. Thirdly, it is clear from the acts which preceded and prepared for the adoption of the SBC, as well as, more generally, from various other instruments of border control policy, primarily the Frontex regulation about which I will say more below, that surveillance is one of the essential components of that policy. (40) Article 77(1)(b) TFEU provides that the Union is to develop a policy with a view to 'carrying out checks on persons and efficient monitoring of the crossing of external borders', thus lending equal weight to both aspects of that policy.

42. That said, I consider that it is necessary also to reject the argument, strongly defended by the Council's agent at the hearing, that in the light of the overall scheme of the SBC and the latitude enjoyed by the Commission, the latter is authorised, in exercising its implementing powers, to adopt any measure deemed to be advisable and useful in order to pursue the objectives assigned by the SBC to border surveillance, and not contrary to the provisions thereof.

43. This argument is based on the premise that, since they are intended to lay down certain practical arrangements for carrying out surveillance, the measures to be adopted pursuant to Article 12(5) of the SBC do not concern, almost by definition, essential elements of the basic legislation that are, as such, reserved to the legislature.

44. For the reasons that I have already had occasion to set out in part at point 38, I do not consider this premise to be tenable. Let it suffice to add here that practical implementation of the objective of preventing unauthorised crossing of the border can, in practice, entail choices capable of affecting profoundly the immigration policy of a particular legal order. Think, for example, of the scope of the powers conferred on border guards, authorisation for the use of force, whether or not account is to be taken of the individual situation of persons attempting, or suspected of attempting, to cross the border illegally, the nature of the measures to be adopted in relation to them once they have been apprehended, and the procedures for removing them, and, more generally, the requirement to make all measures to tackle illegal immigration in line with the provisions on human rights. (41)

45. Therefore, unlike the Council I do not consider that the implementing powers laid down in Article 12(5) of the SBC can be identified solely on the basis of the general objectives of surveillance set out in that provision.

46. The complaints formulated by the Parliament must now be examined in the light of all the foregoing considerations.

3. First complaint, alleging that the contested decision introduces new essential elements into the SBC

a) Arguments of the parties

47. Firstly, the Parliament asserts that point 2.4 of Part I to the annex to the contested decision, which concerns interception, provides for the adoption of measures which go beyond what is authorised by Article 12(5) of the SBC with regard to surveillance and confers on border guards, in that context, particularly wide powers which entail the exercise of broad discretion. By way of example, the Parliament mentions the possibility of 'seizing the ship and apprehending persons on board' or 'conducting the ship or persons on board to a third country or otherwise handing over the ship or persons on board to the authorities of a third country' [point 2.4(d) and (f)]. In the view of the Parliament, Article 12(5) of the SBC authorises only the adoption of technical or practical measures, as is evident in particular from recital (17) of the preamble to the SBC and the preamble to Regulation No 296/2008.

48. In its reply, the Parliament states that the rules on interception contained in the contested decision fall outside the scope, both material and geographical, of the term 'border surveillance' as

defined by Article 2(11) of the SBC. In particular, with reference to the definition of the term 'external maritime borders' contained in Decision 574/2007, (42) the Parliament observes that the SBC does not authorise the adoption of surveillance measures intended to be applied on the high seas.

49. Secondly, the Parliament asserts that the provisions of Part II to the annex, relating to search and rescue situations, also fall outside the scope of surveillance activity as defined by Article 12 of the SBC. Moreover, those provisions create new obligations or new rules in European Union law which cannot be described as 'non-essential elements' for the purposes of Article 2(2) of the comitology decision. In that respect, the Parliament mentions the duty of the participating units to 'provide assistance to any vessel or person in distress at sea' (point 1.1) and the rule that priority must be given to disembarkation in the third country from where the vessel carrying the persons departed (second paragraph of point 2.1). The Parliament further notes that, contrary to what seems to follow from Part II to the annex, the guidelines defined therein cannot be regarded as non-binding, for, under the second sentence of Article 1 of the contested decision, they are to 'form part of the operational plan drawn up for each operation coordinated by the Agency.'

50. The Council's response is that point 2.4 of Part I to the Annex to the contested decision lists measures that may be adopted in the course of surveillance operations or that otherwise conform to international agreements. Those measures are not contrary to the objectives of surveillance defined in Article 12 of the SBC. As regards the Parliament's assertion in the reply that the rules governing interception decision fall outside the material and geographical scope of the concept of surveillance, the Council objects above all that it is inadmissible in that it was formulated out of time. Those arguments are also unfounded. Firstly, the definition of 'external maritime border' contained in Decision 574/2007, to which the Parliament refers, is not applicable in the context of the SBC. Secondly, in the absence of an express definition, surveillance of maritime borders must be regarded as extending also to operations carried out on the high seas, for that interpretation alone, which is, moreover, compatible with the provisions of international law applicable, in particular the Palermo Protocol, (43) makes it possible to ensure the effectiveness of Article 12 of the SBC. In addition, the Parliament did not put forward adequate reasons for considering that surveillance on the high seas does not fall within the material scope of the concept of surveillance referred to in Article 12 SBC.

51. As regards the guidelines contained in Part II of the annex, the Council emphasises above all their non-binding nature, which may be clearly deduced from the wording thereof and from the contested decision as a whole. With regard to their scope, it observes that the Member States' obligations regarding search and rescue are governed by international agreements. The guidelines in question ensure a coherent interpretation of the provisions of those agreements, applicable whenever the need to provide assistance to a vessel in distress – an activity which the Council acknowledges cannot be classified as surveillance in the strict sense of the word – arises in during a surveillance operation coordinated by the Agency. However, the Member States are free not to follow this interpretation and to insert different measures into the operational plan agreed with the Agency.

52. The Commission considers that the power to supplement an act by adding new, non-essential elements implies authorisation to lay down additional obligations and regulate new activities, in so far as the latter are necessary to, or useful in, the implementing of the basic act and not contrary that act.

53. In the Commission's view, the contested decision is necessary to, or at least useful in, the attaining of the objective of preventing the unauthorised crossing of the borders mentioned in Articles 2 (11) and 12 of the SBS. Such is the purpose of the provisions of the contested decision concerning patrolling on the high seas. The Commission also points out that no provision of the SBC rules out the application thereof to surveillance operations in international waters. Furthermore, Annex VI to the SBC, which authorises border checks at the port of a third country or during crossing, confirms that the geographical scope of the SBC extends also to activities carried outside the territory of the Member States, provided that they fall within the material scope of that act, for example, within the concept of surveillance. In that respect, the Commission considers that the Parliament interprets excessively restrictively interpretation the 'concept of surveillance'. According to the Commission, interception falls within the concept of surveillance when it relates to vessels suspected of intending to enter Union territory by evading border controls. Surveillance is not, therefore, merely a passive activity as demonstrated, moreover, by Article 12(4) of the SBC which grants authorisation to 'apprehend individuals'. Likewise, the Commission considers that search and rescue activities carried out during surveillance operations fall within the concept of surveillance. In that context it observes that often it is the actual surveillance operation that gives rise to the search and rescue operations when the vessel is deliberately sunk following interception.

b) Appraisal

54. First of all, it is necessary to reject the objection of inadmissibility, raised by the Council, to the assertion in the reply that the rules on interception fall outside the material and geographical scope of the concept of surveillance. Contrary to what the Council contends, it is in fact an argument that gives breadth to the pleas already set out in the application by developing them further, and is not a new plea raised out of time. I would furthermore point out that grounds of lack of competence, as grounds involving a question of public policy, may be raised by the Court of its own motion. (44)

55. As regards the substance, it is necessary to examine whether, as the Parliament claims, in the contested decision the Council exceeded the implementing powers laid down in Article 12(5) of the SBC, by laying down rules on essential elements of the basic legislation. In particular, the Parliament

contends, primarily, that the contested decision provides for measures that do not fall within the material scope of surveillance for the purposes of the SBC.

56. 'Border surveillance' is defined in Article 2(11) of the SBC as 'the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks'. Article 12(1) of the SBC states 'the main purpose of border surveillance shall be to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.'

57. As the Council and the Commission rightly state, surveillance is defined in the SBC essentially through its objectives. That definition sets out a particularly broad concept, capable of encompassing any measure aimed at avoiding or preventing circumvention of border checks. On the other hand, for surveillance measures to be efficient, as required by Article 77(1)(b) TFEU, they must be adapted both to the type of border concerned and to the specific risk of illegal immigration, which varies depending on several factors (geographical, economic, geopolitical, climatic, etc.). It therefore follows that the concept of surveillance must be interpreted in a dynamic and flexible manner and that the range of measures that may prove necessary in order to pursue the objectives laid down in Article 12(1) of the SBC is extremely wide and variable.

58. The Parliament also submits that the SBC provides for essentially passive surveillance. However, this argument is not borne out by the wording of Article 12 of the SBC which, in listing among the objectives of surveillance the adoption of measures in respect of individuals entering the territory of the Union illegally, authorises interventions which go beyond simply border monitoring activity. (45) The same is true of the preventative or deterrent measures which appear to be limited only in the sense that they must be connected with a risk of border controls being circumvented.

59. In the light of the foregoing, I consider that most of the interception measures listed in point 2.4 of Part I to the annex to the contested decision fall within the concept of surveillance as defined above. I do, however, harbour some doubt as to whether it is possible to consider that that concept includes the measures listed in subparagraphs (d) and (f) of that point – which authorise border guards respectively to '[seize] the ship and [apprehend] persons on board' and '[conduct] the ship or persons on board to a third country or otherwise handing over the ship or persons on board to the authorities of a third country' –, and also the provisions on search and rescue and disembarkation incorporated into Part II to the annex to the contested decision, for those measures and arrangements are merely intended to bring the surveillance operations to a successful conclusion or to address situations arising during those operations. (46)

60. However, it is not necessary to adopt a definitive position on that matter. As can be deduced from the considerations set out above, even if it should be found that the contested decision lays down practical arrangements for carrying out surveillance within the bounds of the definition of that concept for the purposes of the SBC, it would still be conceivable that that decision governs essential elements of the basic legislation, as the Parliament asserts.

61. Given both the sphere of which the legislation in question forms part and the objectives and general scheme of the SBC, in which surveillance is a fundamental component of border control policy, and notwithstanding the latitude left to the Commission by Article 12(5), I consider that strong measures such as those listed in point 2.4 of the annex to the contested decision, in particular those in subparagraphs (b), (d), (f) and (g), and the provisions on disembarkation contained in Part II to that annex, govern essential elements of external maritime border surveillance. These measures entail options likely to affect individuals' personal freedoms and fundamental rights (for example, searches, apprehension, seizure of the vessel, etc.), the opportunity those individuals have of relying on and obtaining in the Union the protection they may be entitled to enjoy under international law (this is true of the rules on disembarkation in the absence of precise indications on how the authorities are to take account of the individual situation of those on board the intercepted vessel), (47) and also the relations between the Union or the Member States participating in the surveillance operation and the third countries involved in that operation.

62. In my view, a similar approach is necessary with regard to the provisions of the contested decision governing interception of vessels on the high seas. On the one hand, those provisions expressly authorise the adoption of the measures mentioned in the preceding paragraph in international waters, an option which, in the context described above, is essential in nature, irrespective of whether or not the Parliament's argument is well founded, that the geographical scope of the SBC, with regard to maritime borders, is restricted to the external limit of the Member State's territorial waters or the contiguous zone, and does not extend to the high seas. (48) On the other hand, those provisions, intended to ensure the uniform application of relevant international law in the context of maritime border surveillance operations, (49) even if they do not create obligations for the Member States participating in those operations or confer powers on them, other than those that may be deduced from that legislation, do bind them to a particular interpretation of those obligations and powers, thereby potentially bringing their international responsibility into play. (50)

63. Two further observations militate in favour of the conclusions reached above.

64. Firstly, some provisions of the contested decision concern problems that, as well as being sensitive, are also particularly controversial, such as, for example, the applicability of the principle of non-refoulement in international waters (51) or the determination of the place to which rescued persons are to be escorted under the arrangements introduced by the SAR Convention. (52) The Member States

have different opinions on these problems, as is evident from the proposal for a decision submitted by the Commission. (53)

65. Secondly, a comparison with the rules on border checks contained in the SBC shows that the definition of the practical arrangements for carrying out those checks, in so far as they concern aspects comparable, *mutatis mutandis*, to those governed by the contested decision, was reserved to the legislature, and this is so notwithstanding the fact that the Commission expressed a different opinion in the proposal for a regulation. (54)

66. In the light of all the preceding provisions, I consider that the contested decision governs essential elements of the basic legislation within the meaning of the case-law set out in points 26 to 29 of this Opinion.

67. Therefore, the Parliament's first complaint must, in my opinion, be upheld.

4. Second complaint, alleging that the contested decision alters essential elements of the SBC

68. In its second complaint, the Parliament claims that, by providing that border guards may order the intercepted vessel to change its course towards a destination outside territorial waters and conduct it or the persons on board to a third country [point 2.4(e) and (f) of Part I to the annex], the contested decision alters an essential element of the SBC, that is to say, the principle set out in Article 13, under which '[e]ntry may only be refused by a substantiated decision stating the precise reasons for the refusal.'

69. The Parliament's argument is based on the premise that Article 13 is applicable to border surveillance too. This interpretation is opposed by both the Council and the Commission, which consider that the obligation to adopt a measure for which reasons are stated pursuant to that provision exists only when a person who has duly presented himself at a border crossing point and been subject to the checks provided for in the SBC has been refused entry into the territory of Union.

70. The Parliament's complaint must, in my view, be rejected, with no need to give a ruling, as to the substance, on the delicate question of the scope of Article 13 SBC on which the Court will, in all likelihood, be called to rule in the future.

71. As the Council observes, although it is true that this provision is not specifically mentioned in the contested decision, there is nothing to exclude its application in the context of the surveillance operations governed by it. Such application could give rise to practical difficulties, but is not impossible, even in the situations mentioned by the Parliament. In this respect, I would, moreover, point out that under point 1.2 of Part I to the annex to the contested decision, the measures referred to in subsequent 2.4 are to be adopted in observance of the principle of non-refoulement, even when interception occurs on the high seas. The arrangements for implementing those measures must therefore allow the border guards to carry out the controls necessary to ensure that that principle is not infringed. (55)

72. As regards the argument, put forward by the Parliament in its reply, that the contested decision at least extended the material and geographical scope of Article 13 by making it applicable to situations previously not covered by the SBC, it is indissociable from the arguments in support of the first complaint. In that context, I therefore refer to the considerations set out above in the examination of that complaint.

73. In the light of the foregoing, I consider that the Parliament's second complaint must be rejected as unfounded.

5. Third complaint, alleging that the contested decision amends the Frontex Regulation

a) Arguments of the parties

74. In its third complaint, the Parliament contends that the contested decision exceeds the scope of Article 12(5) which does not confer on the Commission or the Council the power to lay down rules applicable to operations coordinated by the Agency, whose tasks and functioning are governed by the Frontex Regulation. The sole objective of the contested decision is, however, to regulate those operations, thereby creating obligations not only for Member States but also for the Agency itself. By way of example, the Parliament observes that, under Article 1 of the contested decision, the rules laid down in Part I to the annex to that decision and the non-binding guidelines laid down in Part II are to 'form part of the operational plan drawn up for each operation coordinated by the Agency'. This provision amends Article 8e(1) of the Frontex Regulation, under which '[t]he Executive Director [of the Agency] and the requesting Member State shall agree on an operational plan detailing the precise conditions for deployment of the teams'. (56) Furthermore, it requires rules on the arrangements for disembarking intercepted or rescued persons to be incorporated into the operational plan and significantly alters the role of the border guards participating in the operation. In its reply, the Parliament adds that the contested decision extends the territorial scope of the Frontex Regulation, as defined in Article 1a(1) thereof.

75. The Council and the Commission point out, first of all, that under Article 16(1) of the SBC surveillance operations must be carried out by the Member States in close collaboration with one another and that such cooperation is to be coordinated by the Frontex Agency, as stated in paragraph 2 of that article. A connection with the Frontex Regulation is therefore inevitable. However, they rule out the possibility that the contested decision may have the effect of amending that regulation. They observe that the inclusion of the rules contained in the contested decision in the operational plan does not entail such amendment since those rules, which lay down the surveillance arrangements, can easily form one of the elements of the plan listed in Article 8e(c) or (d) of the Frontex Regulation. (57) The Commission adds that the contested decision is addressed solely to the Member States, whose

responsibility it is to ensure, when they are called on to draw up an operational plan with the Agency, that the annex to the decision is included in that plan. The contested decision therefore has no effect on the functioning of the Agency. On the contrary, it is rather the Frontex Regulation that determines whether the obligation which the contested decision imposes on the Member States is to be extended. Finally, the Council asserts that even if the contested decision were to be found to have amended the provisions of Article 8e and 8g by adding new, non-essential elements, that decision would not for that reason be unlawful, given the complementary nature of the SBC and the Frontex Regulation as legal instruments for implementing external border management policy referred to in Article 77 TFEU.

b) Appraisal

76. It is necessary, first of all, to reject the argument, put forward in the alternative by the Council, that the contested decision is not unlawful even if it does amend the Frontex Regulation. As the Parliament correctly asserts, in exercising its implementing powers the Commission (or the Council) has no authority to amend a legislative act other than the basic act simply because the two legal instruments govern different aspects of the same matter and can in some respects be considered to be complementary. The Commission also agrees on this point.

77. Therefore, it is necessary to consider whether, as the Parliament maintains, the contested decision amends the Frontex Regulation or has the effect of amending elements of that regulation.

78. There is unquestionably a connection between the two acts, as both the Council and the Commission correctly observe. The SBC and the rules adopted to implement it are to be applied also to surveillance operations carried out by Frontex and the Agency's role in coordinating operational cooperation among the Member States in the field of external border management is expressly recognised in Article 16(2) of the SBC.

79. However, neither this nor any other provision of the SBC lays down rules, or authorises the adoption of measures, governing operational cooperation between the Member States in the field of management of the Community's external borders. Nor could this be otherwise, for Article 66 EC, which conferred on the Council the power to adopt those measures – and on which the Frontex Regulation is based – is not among the legal bases of the SBC. (58) Furthermore, the SBC requires Member States not to interfere with the functioning of Frontex. In authorising them to continue operational cooperation with other Member States and/or third countries at external borders, the first sentence of Article 16(3) of the SBC makes it a condition that such cooperation should complement the action of the Agency and is expressly without prejudice to the competences of the Agency. Furthermore, under the second sentence of that provision, 'Member States shall refrain from any activity which could jeopardise the functioning of the Agency or the attainment of its objectives'. (59)

80. In the light of the foregoing, the prime objective of the contested decision is to adopt, 'in the context of the operational cooperation coordinated by the Agency and the further strengthening of such cooperation', 'additional rules for the surveillance of the sea borders by border guards' (recitals 2 and 11) and provides, in Article 1 thereof, that this surveillance 'shall be governed by the rules laid down in Part I to the Annex', providing to that end that '[t]hose rules and the non-binding guidelines laid down in Part II to the Annex shall form part of the operational plan drawn up for each operation coordinated by the Agency'. (60)

81. It is true, as the Commission in particular observes, that the contested decision imposes obligations only on the Member States and not on the Agency and, in so far as the operational plan must be agreed between the latter and the requesting Member State, it might in practice happen that the provisions of the contested decision are not integrated into the plan. (61)

82. However, the fact remains that Article 1 of the contested decision substantially reduces the latitude of the requesting Member State and, consequently, that of the Agency, potentially interfering significantly with its functioning. An example of this is provided by the events connected with the Frontex intervention requested by Malta in March 2011 in the context of the Libyan crisis. The request by Malta, inter alia, not to integrate into the operational plan the guidelines contained in Part II to the annex to the contested decision met with opposition from various Member States and involved long negotiations between the Agency and the Maltese Government which prevented the operation from being launched. (62)

83. In actual fact, the annex to the contested decision as a whole, including the non-binding guidelines – whose mandatory force, given the wording of Article 1, it is difficult to contest – (63) is perceived as forming part of the Community measures relating to management of external borders whose application the Agency is required to facilitate and render more effective under Article 1(2) of the Frontex Regulation. (64)

84. Furthermore, the non-binding guidelines contained in Part II to the annex to the contested decision relating to search and rescue situations govern aspects of the operation that do not fall within Frontex's duties. As the Commission itself points out in the proposal on the basis of which the contested decision was adopted, Frontex is not an SAR agency (65) and 'the fact that most of the maritime operations coordinated by it turn into search and rescue operations removes them from the scope of Frontex'. (66) The same is true with regard to the rules on disembarkation. None the less, the contested decision provides for those guidelines to be incorporated into the operational plan.

85. On the basis of the foregoing considerations, I consider that, by regulating aspects relating to operational cooperation between Member States in the field of management of the Union's external borders that fall within the scope of the Frontex Regulation and, in any event, by laying down rules that

interfere with the functioning of the Agency established by that regulation, the contested decision exceeds the implementing powers conferred by Article 12(5) of the SBC.

86. Before concluding on this point, it is worth noting, however, that the legislative context to which the proceeding considerations apply was amended by Regulation No 1168/2011. (67) That regulation inter alia inserted in Article 1(2) a specific reference to the SBC, added to Article 2(1), which defines the Agency's tasks, a subparagraph (da) that provides for Agency assistance in 'situations [which] may involve humanitarian emergencies and rescue at sea', and laid down in subparagraph (j) of the new Article 3a and Article 8e, the elements to be included in the operational plan in the case of sea operations which include 'references to international and Union law regarding interception, rescue at sea and disembarkation'.

87. Even if it is assumed that such a change to the law must be taken into consideration in the present proceedings, that fact does not undermine the conclusions reached above. Even after the entry into force Regulation 1168/2011, 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 contested decision exceeded the implementing powers conferred by Article 12(5) of the SBC.

88. In conclusion, I consider that the Parliament's third complaint too should be upheld.

C – *Conclusions reached on the application*

89. In the light of the foregoing, the action must, in my view, be allowed and the contested decision annulled.

IV – **Parliament's request that the effects of the contested decision be maintained**

90. The Parliament requests the Court, should it order the annulment of the contested decision, to maintain the effects thereof until a new act be adopted, pursuant to the power conferred on it by the second paragraph of Article 264 TFEU. That provision, under which 'the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive' has also been used to maintain temporarily all the effects of such an act pending its replacement. (68)

91. In the present case, annulment pure and simple of the contested decision would deprive the Union of an important legal instrument for coordinating joint action by the Member States in the field of managing surveillance of the Union's maritime borders, and for making that surveillance more in keeping with human rights and the rules for the protection of refugees.

92. For the reasons set out, I consider that the Parliament's application should be granted and the effects of the contested decision maintained until an act adopted in accordance with the ordinary legislative procedure shall have been adopted.

V – **Conclusion**

93. In the light of all the foregoing considerations, I propose that the Court:

- reject the Council's objection and declare the application admissible;
- allow the application and annul the contested decision;
- declare that the effects thereof are to be maintained until an act adopted in accordance with the ordinary legislative procedure shall have entered into force.
- order the Council to pay the costs and declare that the Commission is to bear its own costs.

1 – Original language: Italian.

2– 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 (OJ 2006 L 105, p. 1).

3– OJ 2010 L 111, p. 20.

4– Regulation (EC) No 296/2008 of the European Parliament and of the Council of 11 March 2008 amending Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), as regards the implementing powers conferred on the Commission (OJ 2008 L 97, p. 60 to 61).

5 – Recital (4) in the preamble to Regulation No 296/2008 states: 'The Commission should be empowered to adopt certain practical measures governing border surveillance and to amend certain annexes. Since those measures are of general scope and are designed to amend non-essential elements of Regulation (EC) No 562/2006, inter alia, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC'.

6– Council Decision 1999/468/EC of 28 June 1999 (OJ 1999 L 184, p. 23), adopted on the basis of the third indent of Article 202 EC. That decision was repealed by Regulation (EC) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of

implementing powers (OJ 2011 L 55, p. 13 to 18), adopted pursuant to Article 291(3) TFEU. Article 12 of that regulation provides that the effects of Article 5a of Decision 1999/468 are to be maintained for the purposes of existing basic acts making reference thereto.

7– Council Decision 2006/512/EC (OJ 2006 L 200, p. 11).

8 – In the present case, recital (18) in the preamble to the contested decision states that the Schengen Borders Code Committee, consulted on 19 October 2009, did not deliver an opinion. In the application, the Parliament states that in the committee only 8 Member States voted in favour of the measures proposed by the Commission, by a total of 67 votes, and therefore the 223-vote threshold required for the adoption of an option was not reached.

9 – Regulation (EC) No 2007/2004 (OJ 2004 L 349, p. 1). The substance of this regulation will be examined in greater detail below when examining the complaints raised by the Parliament.

10 – Case 45/86 *Commission v Council* [1987] ECR 1493, and Case C-370/07 *Commission v Council* [2009] ECR I-8917, paragraph 16.

11 – Case 166/78 *Italy v Council* [1979] ECR 2575.

12 – Case C-378/00 *Commission v Parliament and Council* [2003] ECR I-937.

13 – The Parliament explains that a considerable number of MEPs who voted in favour of the contested decision considered that it exceeded the implementing powers conferred by the SBC but that it was none the less preferable for the Union to create a legal instrument, however imperfect it might be, to address the increase in migration by sea expected in the summer of 2010.

14 – Majority of the component Members of the Parliament, under Article 5a(4)(e) of the comitology decision.

15 – Majority of the votes cast, under Article 231 TFEU.

16– See Article 128(3) of the Parliament's Rules of Procedure. This provision states that '[a]t the start of the following part-session, the President may ask the plenary to decide whether the action should be maintained. Should plenary rule against the action by a majority of the votes cast, he shall withdraw it.'

17 – Case 25/70 *Köster* [1970] ECR 1161.

18– Paragraphs 6 and 7.

19 – Case 23/75 *Rey Soda and Others* [1975] ECR 1279, paragraph 10.

20 – See also Case 27/85 *Vandemoortele v EEC* [1987] ECR 1129, paragraph 14.

21– Case 121/83 [1984] ECR 2039.

22 – See, to that effect, Case 808/79 *Pardini* [1980] ECR 2103, paragraph 16.

23 – See, in particular, Joined Cases 6/88 and 7/88 *Spain and France v Commission* [1989] ECR 3639, in which the Court ruled that the measures adopted by the Commission did not fall within the scope of the basic regulation, and Case 264/86 *France v Commission* [1988] ECR 973, and Case 192/83 *Greece v Commission* [1985] ECR 2791, in which the Court annulled implementing measures contested by the requesting Member States, which had been adopted in the sphere of fisheries and the Common Agricultural Policy respectively, on the grounds that they introduced methods of calculating the compensation due to operators in the sector which were not provided for in the exhaustive rules laid down in the basic regulation and were contrary to the principle of equal treatment of Community producers laid down in the Treaty. See also Case 46/86 *Romkes* [1987] ECR 2671; Case 61/86 *United Kingdom v Commission* [1988] ECR 431; and Case 230/78 *Eridania-Zuccherifici nazionali and Società italiana per l'industria degli zuccheri* [1979] ECR 2749.

24 – See inter alia Case C-156/93 *Parliament v Commission* [1995] ECR I-2019, paragraph 24, and Case C-303/94 *Parliament v Council* [1996] ECR I-2943, paragraph 23.

25– *Rey Soda*, cited above, paragraph 11.

26 – Case 22/88 *Vreugdenhil and van der Kolk* [1989] ECR 2049.

27– Paragraph 17. See also Case C-314/99 *Netherlands v Commission* [2002] ECR I-5521.

28 – Case C-240/90 *Germany v Commission* [1992] ECR I-5383.

29 – See also Case C-133/06 *Parliament v Council* [2008] ECR I-3189, paragraph 45.

30– Case C-417/93 *Parliament v Council* [1995] ECR I-1185, paragraphs 30 to 33.

31 – See Case C-403/05 *Parliament v Commission* [2007] ECR I-9045, in particular paragraphs 55, and 66 to 68.

32 – Incidentally, I note that the parties to the present proceedings appear to agree that the judgment to be given by the Court will have a bearing on the interpretation of the concept of ‘non-essential elements of a legislative act’ within the meaning of Article 290 TFEU, which is not applicable *ratione temporis* to the present dispute. In that respect, I observe that the abovementioned case-law, in the light of which this present case must be examined, leaves out of consideration the dichotomy between ‘delegated acts’ and ‘implementing acts’ introduced by the TFEU. The precise definition of the content and scope of such concepts, and identification of the correct relationship between the provisions of Articles 290 and 291(2) TFEU, will present the Court with new problems of interpretation which cannot be resolved merely by applying the case-law examined above. In support of the foregoing, it is sufficient to observe that, under the second paragraph of Article 290(1), the legislature is now required to explicitly define the objectives, content, scope and duration of the delegation of power, and thus to define the essential elements of the basic act. This reduces considerably the Court’s margin for interpretation by allocating roles more correctly between the legislature and the judiciary. These problems do not, however, concern the present case.

33 – Matters relating to legislative course of the SBC confirm this finding. In the proposal for a regulation, the Commission, on the basis of the distinction between ‘basic principles governing external border checks’ and ‘practical arrangements for implementing these checks, including the control arrangements specific to different types of border (land, air and maritime)’, suggested having the existing rules classified as ‘practical arrangements’ and inserted into the annexes to the SBC, subject in future to amendment via a committee procedure (see COM(2004) 391 final). That proposal was largely rejected at the adoption stage of the SBC, which provides that only some of the annexes are to be subject to a regulatory procedure with scrutiny; they do not include Annexes VI and VII which contain respectively ‘Specific rules for the various types of border and the various means of transport used for crossing the Member States’ external borders’ and ‘Special rules for certain categories of persons’, or Annex V entitled ‘Procedures for refusing entry at the border’.

34 – See, for example, the English version ‘additional measures governing surveillance’, the French version ‘*mesures supplémentaires applicables à la surveillance*’, the German version ‘*zusätzliche Überwachungsmodalitäten*’, the Spanish version ‘*medidas adicionales relativas a la vigilancia*’, the Romanian version ‘*măsurile suplimentare care reglementează supravegherea*’, and the Portuguese version ‘*medidas adicionais relativas à vigilância*’.

35– Recital (17).

36– Recital (4).

37 – See in particular the proposal for a Commission regulation cited in footnote 33.

38– The 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 signed at Schengen on 19 June 1990. The complete text of this Convention is published in OJ L 239 of 22 September 2000, p. 19.

39 – The decision of the Schengen Executive Committee which adopted that manual was published in OJ L 239 of 22 September 2000, p. 317.

40 – See, inter alia, the Commission Communication ‘Towards integrated management of the external borders of the Member States of the European Union’ incorporated in the ‘Plan for the management of the external borders of the Member States of the European Union’, approved by the Council on 13 June 2002 and endorsed by the Seville European Council on 21 and 22 June 2002 and by the Thessaloniki European Council on 19 and 20 June 2003.

41 – See the judgment of the Grand Chamber of the ECHR of 23 February 2012, ref. No 27765/09, *Hirsi and Others v Italy*.

42– Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme ‘Solidarity and Management of Migration Flows’ (OJ 2007 L 144, p. 22).

43 – Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, signed during the Palermo Conference on 12 to 15 December 2000.

44 – See, inter alia, Case C-210/98 P *Salzgitter v Commission* [2000] ECR I-5843, paragraph 56.

45 – Such as, for example, apprehending individuals, checking their identity, escorting them to the border post, etc. See, to that effect, the Schengen Manual, cited in footnote 39.

46 – Incidentally, I observe that, contrary to what the Council maintained at the hearing, the fact that those measures and arrangements are not included in the concept of surveillance within the meaning of the SBC does not mean that rules on them cannot be laid down at the level of European Union law. There is nothing to prevent the legislature from adopting a border concept of border surveillance than that in the SBC, possibly by using the objective of ‘efficient’ surveillance contained in Article 77(1)(b) TFEU. Moreover, Article 79(1) and (2)(c) provides a further legal basis for adopting measures aimed at ensuring the effective management of migratory flows.

47 – Although, as a whole, the contested decision does have the merit of making the conduct of surveillance operations more in line with human rights and the refugee protection regime.

48 – The principle which prevails on the high seas is that of freedom of navigation and of the exclusive jurisdiction of the Member State of which the vessel is flying the flag. Therefore, it follows, as the Commission rightly stated in a 2007 study of the instruments of international law against illegal immigration by sea, that *‘en principe, à part le droit de rapprocher le bateau aux fins de vérification de l’identité et de la nationalité, aucun État ne peut exercer de pouvoirs de puissance publique (tels que la visite, l’arraisonnement, la perquisition, y compris par l’examen des documents, la conduite à un port, l’arrestation ou la saisie) sur un navire naviguant en haute mer sous un pavillon étranger, même si ce navire transporte des immigrants illégaux vers les côtes de cet État et tant qu’il n’aurait pas pénétré dans la zone contiguë de celui-ci’*. SEC(2007) 691, point 4.3.1.2.

49 – See the preamble to the contested decision and proposal for a Commission decision COM(2009) 658 final.

50 – This is so notwithstanding the fact that recital (6) of the preamble to the contested decision states that implementation of the decision does not affect obligations of Member States under the relevant international law.

51 – See, in that respect, the judgment of the ECHR in *Hirsi* and the concurring opinion of Judge Pinto de Albuquerque.

52 – International Convention on search and rescue at sea, signed at Hamburg on 27 April 1979.

53 – Moreover, it would seem that it is precisely a difference of opinion and the impasse created by it which led to the Commission’s choosing to act through the committee mechanism under Article 12(5) of the SBC rather than the ordinary legislative procedure, as is clear also from the letter from Commissioner Malmström annexed to the reply. These differences persist. The provisions of the contested decision concerning search and rescue, for example, have not been applied in Frontex operations launched after the entry into force of the contested decision on account of opposition from Malta.

54– See footnote 33 above.

55 – See, to that effect, the *Hirsi* judgment of the ECHR, paragraph 201 et seq.

56 – In accordance with the subsequent amendments to the Frontex Regulation, Article 8e now applies only to rapid interventions.

57 – Subparagraphs (c) and (d) of Article 8e state respectively, as elements to be determined in the operational plan, ‘the geographical area of responsibility in the requesting Member State where the teams will be deployed’ and the ‘description of tasks and special instructions for members of the teams’.

58– Article 66 EC also forms the basis for Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border

Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers (OJ 2007 L 199, p. 30). Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 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 (OJ 2011 L 304, p. 1) is based on Article 74 TFEU, which replaced Article 66 EC, and on Article 77(2)(b) and (d). In particular, Article 77(2)(d) provides a specific legal basis for the adoption of 'any measure necessary for the gradual establishment of an integrated management system for external borders'.

59 – Article 16(2) and (3) of the SBC reproduces almost verbatim Article 2(2) of the Frontex Regulation.

60 – I note, incidentally, that until Regulation No 1168/2011 entered into force the definition of operational plan did not cover all the operations coordinated by the Agency, but only rapid interventions, which were brought under the Frontex Regulation by Regulation No 863/2007 cited above.

61 – Specific rules appear to have been agreed for Operation Hermes launched by Frontex in the Central Mediterranean on 20 February 2011.

62 – The event can be retraced at <http://migrantsatsea.wordpress.com/2011/04/03/maltese-conditions-for-hosting-frontex-mission-not-accepted-by-frontex/>

63 – The binding nature of the guidelines is acknowledged by the Commission itself in the present proceedings.

64 – See, to that effect, the letter from Commissioner Malmström to the Maltese Minister of Foreign Affairs dated 1 April 2011 in connection with the above-mentioned request for assistance submitted by Malta.

65 – Whose establishment is provided for in the SAR Convention cited in footnote 51.

66– COM(2009) 658 final.

67– Cited in footnote 56.

68 – See, inter alia, Joined Cases C-166/07 and C-402/05 *Parliament v Council* [2009] ECR I-7135, paragraph 373 [sic] et seq., pursuant to the second paragraph of Article 231 EC, and Case C-295/90 *Parliament v Council* [1992] ECR I-4193, paragraph 22 et seq., relating to Article 174(2) of the EEC Treaty.