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Subject: **Judgment of the Court of Justice of 5 September 2012 in Case C-355/10
(European Parliament v. Council of the European Union)
- notion of essential and non-essential elements**

Introduction

1. By judgment of 5 September 2012, the Court (Grand Chamber) annulled 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 Union¹ ("the contested Decision") on the grounds that it contains essential elements and that only the European Union legislature would have been entitled to adopt such a decision.

¹ OJ 2010 L 111, p.20.

2. The contested Decision was adopted by the Council in the course of the regulatory procedure with scrutiny governed by Article 5a (4) of the second "comitology" Decision² after the measures envisaged by the Commission did not reach the required majority in the "comitology" Committee. The contested decision was based on Article 12 (5) of the Schengen Borders Code ("SBC") which provides that "*additional measures governing surveillance may be adopted [...] in accordance with regulatory procedure with scrutiny [...]*". At the time of the examination of the contested Decision, the Council considered that draft measures regarding the surveillance of the sea external borders in the context of the Frontex operations were measures of general scope designed to amend non essential elements of the SBC by supplementing it. Although the European Parliament considered that the draft measures exceeded the implementing powers of the Council, it did not oppose the adoption of the draft measures in accordance with Article 5a (4) (e) of the second "comitology" Decision. Only after their adoption by the Council, the Parliament brought an action for their annulment before the Court.

3. In substance, the measures set out in the contested Decision contain rules on interception of ships at sea, including the high seas, and guidelines, qualified expressly as "non-binding", on search and rescue situations and disembarkation, in the context of Frontex border surveillance operations.

4. Although the European Parliament asked the Court to annul the contested Decision on the basis that it exceeded implementing powers, and asked it therefore to maintain its effects until a new instrument was adopted in the ordinary legislative procedure, a number of issues raised in the case were also linked to the content of the contested Decision. One of the issues on the content was whether the rules on interception of ships in the high seas and those on search and rescue situations and disembarkation fell within the scope of surveillance, and consequently within the scope of the external borders policy, governed by Article 77 TFEU.

² Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), as amended by Council Decision 2006/512/EC of 17 July 2006 (OJ 2006 L 200, p. 11).

5. The judgment might have implications for the Council's future practice regarding the definition of what is an essential and a non essential element when examining draft delegated or implementing acts and when examining proposals containing provisions on delegated and implementing powers. Those implications go beyond the specific field concerned by the judgment. As regards the notion of "border surveillance", it seems that the Court allows for a broad interpretation of its scope, leaving it for the legislator to adopt a new instrument on sea border surveillance operations under Article 77 TFEU. Accordingly, this note will, after summarising the main considerations underlying the judgment, including the issue on admissibility of the EP's claim (II), examine the consequences that it might entail for the Council (III) .

II. Summary of the judgment

6. As regards the inadmissibility of the European Parliament's claim raised by the Council, the Court confirmed the applicability of its case law³, which provides essentially that the right of action of the Parliament is not conditional on proof of an interest in bringing proceedings to the case at stake. It concluded that the fact that under Article 5a(4)(e) of the second "comitology" Decision, the Parliament has had the possibility of opposing the adoption of contested measures is not capable of excluding that institution's right in bringing proceedings. The possibility to scrutinise a measure before it is adopted cannot be a substitute for a review by the Court (paragraphs 37-41 of the judgment).

7. The main question raised by the present case is whether the measures at stake could be adopted in the 'comitology' procedure or whether they should have been adopted by the Union legislature.

³ See, to that effect, Case 166/78 *Italy v Council* [1979] ECR 2575, paragraph 6; Case 45/86 *Commission v Council* [1987] ECR 1493, paragraph 3; Case C-378/00 *Commission v Parliament and Council* [2003] ECR I-937, paragraph 28; Case C-370/07 *Commission v Council* [2009] ECR I-8917, paragraph 16; and Joined Cases C-463/10 P and C-475/10 P *Deutsche Post and Germany v Commission* [2011] ECR I-0000, paragraph 36.

8. The Court begins by recalling its settled case-law⁴ according to which "*the adoption of rules essential to the subject matter envisaged is reserved to the legislature of the [EU]*". As a consequence, such "*essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated*" (paragraph 64). According to the Court, the essential rules are "[those] which, in order to be adopted, require political choices falling within the responsibilities of the [EU] legislature" (paragraph 65) and "*the implementing measures cannot amend essential elements of basic legislation or supplement it by new essential elements*" (paragraph 66). In the Court's view, "*ascertaining which elements of a matter must be categorised as essential is not for (...) the assessment of the [EU] legislature alone, but must be based on objective factors amenable to judicial review*" (paragraph 67). The Court adds that "*in that connection, it is necessary to take account of the characteristics and particularities of the domain concerned*" (paragraph 68).

9. With these findings, the Court partially confirms, and partially supplements its case law cited above, in which "*the limits of implementing powers must be determined by reference among other things to the essential general aims of the legislation in question*"⁵. The Court allowed so far for a broad definition of the main policy objectives to be laid down in the basic instrument and did not exercise its control over the discretion of EU legislature to define these objectives. It only imposed some limits on the exercise of implementing powers, giving the power to the Commission to adopt "*all the measures which are necessary or appropriate for the implementation of the basic legislation, provided they are not contrary to it*"⁶.

⁴ See, to that effect, C-240/90 *Germany v Commission* [1992] ECR I-5383, paragraph 36; Case C-104/97 P *Atlanta v European Community* [1999] ECR I-6983, paragraph 76; and C-356/97 *Molkereigenossenschaft Wiedergeltingen* [2000] ECR I-5461, paragraph 21.

⁵ See case law cited in Fn. 4.

⁶ See to that effect *Germany v Commission*, cited above, paragraph 41-42; Case C-303/94 *Parliament v Council* [1996] I-2943, paragraph 23.

10. The provisions at stake listed in the contested Decision were to enable border guards to take measures against ships detected and persons on board, such as to stop, board and search the ship and seize the persons on board, and to conduct the ship or persons on board to another State. However, given that these provisions were mirroring the applicable provisions of international maritime law conventions and could be taken by border guards only within a Frontex operation, the Council argued that 1) the main objectives and definitions of border surveillance policy such as the objective to apprehend individuals crossing the border illegally and the empowerment to take measures against such individuals were set out in Article 12 of the SBC, 2) Article 12 of the SBC was thus sufficiently precise to be applied by border guards of the Member States without any further need to establish detailed provisions adopted at the EU level, 3) the added value of the contested provisions was only to ensure a coherent application of international maritime law conventions by border guards deployed during the Frontex operations in application of Article 12 of the SBC, and thus 4) the contested provisions would not provide for any new enforcement powers of border guards than those existing under Article 12 SBC.

11. The Court analysed Article 12 of the SBC and, even though it acknowledged the argument of the Council that it contained the main objectives and the definition of border surveillance policy such as the objective to apprehend individuals and to take measures against them, it nevertheless found that "*those provisions merely describe in an abstract manner the duties of border guards*" (paragraph 71 of the judgment) and "[do] *not contain any rules concerning the measures which border guards are authorised to apply against persons or ships when they are apprehended*" (paragraph 73 of the judgment). The Court did not consider any other arguments put forward by the Council.

12. The Court thus found that the adoption of measures containing detailed powers of border guards "[entailed] *political choices falling within the responsibilities of the [EU] legislature, in that it require[d] the conflicting interests at issue to be weighed up on the basis of a number of assessments. Depending on the political choices on the basis of which those rules are adopted, the powers of the border guards may vary significantly, and the exercise of those powers require authorisation, be an obligation or be prohibited, for example, in relation to applying enforcement measures, using force or conducting the persons apprehended to a specific location. In addition,*

where those powers concern the taking of measures against ships, their exercise is liable, depending on the scope of the powers, to interfere with the sovereign rights of third countries according to the flag flown by the ships concerned. Thus, the adoption of such rules constitutes a major development in the SBC system" (paragraph 76 of the judgment).

13. The second main line of reasoning supporting the conclusion of the Court outlined above is that *"provisions on conferring powers of public authority on border guards – such as the powers conferred in the contested decision, which include stopping persons apprehended, seizing vessels and conducting persons apprehended to a specific location – 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."* (paragraph 77 of the judgment).

14. Lastly, with respect to the argument of the Council that guidelines on search, rescue and disembarkation cannot be considered to be essential elements because they are expressly qualified as "non-binding" in nature, the Court replied without entering into the assessment of the very nature of those provisions, that *"the mere fact that (...) the contested decision contains the word guidelines and (...) states that the rules and 'guidelines' (...) are 'non-binding' cannot affect their classification as essential rules"*. (paragraph 80 of the judgement)

15. The Court therefore annulled the entire contested Decision and maintained its effects until the entry into force of new rules within reasonable time.

III. Consequences of the judgment for the Council's future practice

16. By concluding that the interception measures are "essential elements" the Court left unexamined many of the arguments raised by the Council in the course of the proceedings. As regards the determination of "essential elements", the Court for the first time gives a more detailed indication to the EU legislature on how to assess, on a case by case basis, whether an element is essential or not. Thus, this judgment is of general relevance regarding that assessment.

17. If, in the past, the Court has accepted that only provisions intended to give concrete shape to the fundamental guidelines of Union policy were to be classified as essential rules, and that it could therefore suffice for the basic act to define the main policy objectives while leaving a margin of discretion to the Commission to implement these objectives, it now appears that the Court requires the EU legislature to assess, based on objective criteria amenable to judicial review, such as the characteristics and particularities of the domain concerned, and the importance of the measure in question, whether there are conflicting interests involved, which would require political choices to be made by the EU legislature. This would seem to be particularly the case when "*the fundamental rights of the person concerned may be interfered to such an extent that the involvement of the EU legislature is required*" (paragraph 77 of the judgment). This means in principle that the EU legislature will be required to thoroughly examine the measure in question and determine whether it requires any (more) political choices to be made. Once that examination is carried out, it must also be reflected in the relevant measure in a way which allows a judicial review to be carried out. These requirements could in practice have the consequence of limiting the scope of possible future delegation of powers or attribution of implementing tasks to the Commission (or to the Council).

18. Secondly, as referred to in paragraph 77 of the judgment quoted above, in the oral hearing the Court insisted on the limitation for delegation of powers in case the fundamental rights of persons concerned are at stake. It concluded in the present case that the more the nature of the measure is such as to affect the fundamental rights of the persons concerned, the more can the conclusion be made that these rights may be interfered with to such an extent that the involvement of the EU legislature is required.

Therefore, the judgment might have set a milestone in the application of Articles 290 and 291 TFEU when it concerns the delegation of powers to adopt measures which would affect fundamental rights. This can have implications on the Council's practice regarding the determination of the scope of delegated and implementing acts, in the sense that where fundamental rights risk being affected by a delegated or an implementing act, the Council (with the European Parliament) shall consciously decide whether these rights may be interfered with to such an extent that they have to be regarded as essential elements which cannot be delegated.

19. As regards the classification of "non-binding" guidelines as essential elements, paragraph 80 of the judgment follows the same approach as previous case-law under which the Court looks at the substance rather than the denomination of acts in order to assess their legal effects, and more particularly whether they are binding or not. A different interpretation, under which non-binding measures could constitute essential elements of legally binding Union acts, is not to be retained.

20. Lastly, a positive message that can be taken from the judgment is that the Court upheld the effects of the contested decision until a new legislative instrument will be adopted in the near future. As mentioned above, although the Court did not enter into the analysis of the issues raised in substance, it could be considered that by upholding the contested decision it incidentally admitted the appropriateness of the legal basis for the adoption of the measures concerned. As argued on several occasions in the written submissions by the European Parliament who claimed that certain measures do not fall under the scope of border surveillance and thus do not fall under Article 77 TFEU governing external borders policy, the Court did not take up this argument and decided with regard to all measures listed in the contested decision, including the guidelines on search, rescue and disembarkation, that they constitute essential elements which are reserved for the adoption by the legislator. Would the Commission present a new legislative proposal in a near future, the discussions about the possibility to use Article 77 TFEU as the appropriate legal basis for such a proposal would be simplified.
