Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

5 September 2012*

(Schengen Borders Code — Decision 2010/252/EU — Surveillance of the sea external borders — Introduction of additional rules governing border surveillance — Commission's implementing powers — Scope — Application for annulment)

In Case C-355/10,

ACTION for annulment under Article 263 TFEU, brought on 12 July 2010,

European Parliament, represented by M. Dean, A. Auersperger Matić and K. Bradley, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by Z. Kupčová and R. Szostak, acting as Agents,

defendant,

supported by:

European Commission, represented by C. O'Reilly and M. Wilderspin, acting as Agents, with an address for service in Luxembourg,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and A. Prechal, Presidents of Chambers, R. Silva de Lapuerta, K. Schiemann, E. Juhász, G. Arestis, T. von Danwitz (Rapporteur), M. Berger and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 25 January 2012,

after hearing the Opinion of the Advocate General at the sitting on 17 April 2012,

gives the following

* Language of the case: English.

Judgment

1 By its action, the European Parliament seeks the annulment of 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 (OJ 2010 L 111, p. 20, 'the contested decision').

2 In support of its action, the Parliament submits, inter alia, that that decision exceeds the limits of the implementing powers laid down in Article 12(5) of 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) (OJ 2006 L 105, p. 1), as amended by Regulation (EC) No 296/2008 of the European Parliament and of the Council of 11 March 2008 (OJ 2008 L 97, p. 60, 'the Schengen Borders Code' or 'the SBC'). The Parliament submits that the provisions of the contested decision ought to have been adopted by the ordinary legislative procedure and not by the comitology procedure based on Article 12(5) of the SBC.

I – Legal context

A – *Decision 1999/468/EC*

3 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 17July 2006 (OJ 2006 L 200, p. 11, the 'second "comitology" decision') was adopted on the basis of Article 202 EC.

4 As regards the regulatory procedure with scrutiny, recital 7a of the second 'comitology' decision is worded as follows:

'It is necessary to follow the regulatory procedure with scrutiny as regards measures of general scope which seek to amend non-essential elements of a basic instrument adopted in accordance with the procedure referred to in Article 251 of the [EC] Treaty, inter alia by deleting some of those elements or by supplementing the instrument by the addition of new nonessential elements. This procedure should enable the two arms of the legislative authority to scrutinise such measures before they are adopted. The essential elements of a legislative act may only be amended by the legislator on the basis of the Treaty.'

5 Article 2(2) of the second 'comitology' decision provides:

'Where a basic instrument, adopted in accordance with the procedure referred to in Article 251 of the Treaty, provides for the adoption of measures of general scope designed to amend non-essential elements of that instrument, inter alia by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements, those measures shall be adopted in accordance with the regulatory procedure with scrutiny.'

6 The conduct of the regulatory procedure with scrutiny is governed by Article 5a of the second 'comitology' decision. In the course of that procedure, a Regulatory Procedure with Scrutiny Committee is also involved, composed of the representatives of the Member States and chaired by the representative of the Commission (the 'Committee'), which delivers its opinion on a draft of the measures to be taken. The procedure varies according to whether, on the one hand, the measures envisaged are in accordance with the opinion of the Committee or, on the other, are not in accordance with such an opinion or if that committee has not delivered an opinion.

7 If the measures envisaged are not in accordance with the opinion of the Committee, or if the Committee has not delivered an opinion, Article 5a(4) of the second 'comitology' committee provides that the following procedure is to apply:

'(a) the Commission shall without delay submit a proposal relating to the measures to be taken to the Council and shall forward it to the European Parliament at the same time;

(b) the Council shall act on the proposal by a qualified majority within two months from the date of referral to it;

(c) if, within that period, the Council opposes the proposed measures by a qualified majority, the measures shall not be adopted. In that event, the Commission may submit to the Council an amended proposal or present a legislative proposal on the basis of the Treaty;

(d) if the Council envisages adopting the proposed measures, it shall without delay submit them to the European Parliament. If the Council does not act within the two-month period, the Commission shall without delay submit the measures for scrutiny by the European Parliament;

(e) the European Parliament, 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 their 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;

(f) if, within that period, the European Parliament opposes the proposed measures, the latter shall not be adopted. In that event, the Commission may submit to the Committee an amended draft of the measures or present a legislative proposal on the basis of the Treaty;

(g) if, on expiry of that period, the European Parliament has not opposed the proposed measures, the latter shall be adopted by the Council or by the Commission, as the case may be.'

B – *The SBC*

8 As is apparent from the second paragraph of Article 1 thereof, the SBC establishes rules governing the border control of persons crossing the external borders of the Member States of the European Union.

9 As stated in recital 6 of the SBC, such border control is intended to 'help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations'.

10 Recital 17 of the SBC states, '[p]rovision should be made for a procedure enabling the Commission to adapt certain detailed practical rules governing border control. In such cases, the measures needed to implement [the SBC] should be taken pursuant to … Decision 1999/468/EC …'

11 Article 2(9) of the SBC defines 'border control' as consisting of border checks and border surveillance and includes 'the activity carried out at a border, in accordance with and for the purposes of [the SBC], in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration'.

12 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'.

13 Articles 6 to 11 of the SBC lay down rules on border checks at external borders.

14 As regards border surveillance, Article 12 of the SBC states:

‘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.

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).’

15 Third-country nationals are to be refused entry to the territories of the Member States by a substantiated decision which, pursuant to Article 13(2) of the SBC, must be given by means of a standard form set out in Annex V, Part B of that code.

16 Article 33(2) of the SBC provides:

‘Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.’

C – Regulation (EC) No 2007/2004

17 Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2004 L 349, p. 1), as amended by Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 (OJ 2007 L 199, p. 30, the ‘Frontex Regulation’), establishes, inter alia, the tasks to be performed by that European agency (the ‘Agency’).

18 As set out in Article 2(1) of the Frontex Regulation, the Agency is to perform, inter alia, the following tasks:

‘(a) coordinate operational cooperation between Member States in the field of management of external borders;

…

(e) assist Member States in circumstances requiring increased technical and operational assistance at external borders;

…

(g) deploy Rapid Border Intervention Teams to Member States …'

19 If the Executive Director of the Agency decides, at the request of a Member State, to deploy one or more Rapid Border Intervention Teams to the external borders of that Member State, the Agency and the requesting Member State are to draw up an operational plan pursuant to Article 8d(5).

20 Article 8e of the Frontex Regulation, entitled 'Operational plan', provides:

'1. The Executive Director and the requesting Member State shall agree on an operational plan detailing the precise conditions for deployment of the teams. The operational plan shall include the following:

(a) description of the situation, with modus operandi and objectives of the deployment, including the operational aim;

(b) the foreseeable duration of deployment of the teams;

(c) the geographical area of responsibility in the requesting Member State where the teams will be deployed;

(d) description of tasks and special instructions for members of the teams, including on permissible consultation of databases and permissible service weapons, ammunition and equipment in the host Member State;

(e) the composition of the teams;

(f) the names and ranks of the host Member State's border guards responsible for cooperating with the teams, in particular those of the border guards who are in command of the teams during the period of deployment, and the place of the teams in the chain of command;

(g) the technical equipment to be deployed together with the teams in accordance with Article 8.

2. Any amendments to or adaptations of the operational plan shall require the agreement of both the Executive Director and the requesting Member State. A copy of the amended or adapted operational plan shall immediately be sent by the Agency to the participating Member States.'

21 As regards implementation of the operational plan, Article 8g(2) of the Frontex Regulation provides:

'The coordinating officer shall act on behalf of the Agency in all aspects of the deployment of the teams. In particular, the coordinating officer shall:

…

(c) monitor the correct implementation of the operational plan;

…'

D – *The contested decision*

22 The contested decision was adopted on the basis of Article 12(5) of the SBC in the context of the regulatory procedure with scrutiny as laid down in Article 5a of the second 'comitology' decision. Since the Committee did not deliver an opinion on the Commission's initial proposal, the Commission submitted – in accordance with that Article 5a(4) – a proposal relating to the measures to be taken to the Council and forwarded it to the Parliament. As the latter did not oppose that proposal, the Council adopted the contested decision.

23 According to recital 9 of the contested decision:

'In order to provide for better coordination among the Member States participating in the operations with regard to such situations and to facilitate the conduct of such operations, non-binding guidelines should be included in this Decision. This Decision should not affect the responsibilities of search and rescue authorities, including for ensuring that coordination and cooperation is carried out in such a way that the persons rescued can be delivered to a place of safety.'

24 Article 1 of the contested decision provides:

'The 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.'

25 Paragraph 1 of Part I to the Annex of the contested decision sets out general principles for sea border operations coordinated by the Agency and paragraph 2 of Part I lays down specific measures to be taken during such operations. Paragraphs 2.1 to 2.3 of Part I prescribe the conduct to be adopted for the approach and survey of ships detected and the communication to the competent authorities of information about those ships. Paragraph 2.4 of Part I concerns measures which are to be taken against ships detected and persons on board, and paragraph 2.5 sets out the conditions that must be complied with when taking those measures. Those conditions vary according to whether the measures are to be taken in territorial waters and contiguous zone, on the one hand, or on the high seas, on the other.

26 As regards the measures to be taken against ships detected or persons on board, paragraph 2.4 of Part I provides:

'Measures 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 may include:

(a) requesting information and documentation on ownership, registration and elements relating to the voyage, and on the identity, nationality and other relevant data on persons on board;

(b) stopping, boarding and searching the ship, its cargo and persons on board, and questioning persons on board;

(c) making persons on board aware that they are not authorised to cross the border and that persons directing the craft may face penalties for facilitating the voyage;

(d) seizing the ship and apprehending persons on board;

(e) ordering the ship to modify its course outside of or towards a destination other than the territorial waters or contiguous zone, escorting the vessel or steaming nearby until the ship is heading on such course;

(f) 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;

(g) conducting the ship or persons on board to the host Member State or to another Member State participating in the operation.'

27 Part II to the Annex of the contested decision is entitled 'Guidelines for search and rescue situations and for disembarkation in the context of sea border operations coordinated by the Agency'.

28 Part II provides, at paragraph 1.1 thereof, inter alia, that '[t]he obligation to render assistance to the persons in distress at sea shall be carried out [by Member States]' and that '[p]articipating units shall provide assistance to any vessel or person in distress at sea'. Paragraphs 1.2 to 1.5 of Part II relate to the assessment of the situation, the communication of that assessment and other information to the Rescue Coordination Centre and the taking of appropriate or necessary measures to ensure the safety of the persons concerned. Paragraph 1.6 of Part II states that the operation should, under certain conditions, be resumed in accordance with Part I to the Annex of the contested decision.

29 In addition, the first sentence of the first subparagraph of paragraph 2.1 of Part II to the Annex provides, in particular, that '[t]he operational plan should spell out the modalities for the disembarkation of the persons intercepted or rescued, in accordance with international law and any applicable bilateral agreements'. As set out in the second sentence of that subparagraph, that operational plan 'shall not have the effect of imposing obligations on Member States not participating in the operation'. As regards the second subparagraph of paragraph 2.1, this states that, unless otherwise specified in the operational plan, 'priority should be given to disembarkation [of the above persons] in the third country from where the ship carrying [them] departed or through the territorial waters or search and rescue region of which that ship transited'.

II – Forms of order sought by the parties and the procedure before the Court

30 The Parliament claims that the Court should:

— annul the contested decision;

— order that the effects of the contested decision be maintained until it is replaced, and

— order the Council to pay the costs.

31 The Council contends that the Court should:

— dismiss the Parliament's action as inadmissible;

— in the alternative, dismiss the action as unfounded, and

— order the Parliament to pay the costs.

32 By order of the President of the Court of 30 November 2010, the Commission was granted leave to intervene in support of the form of order sought by the Council and, in its statement in intervention, it requests the Court to dismiss the Parliament's action and to order the Parliament to pay the costs.

III – The action

A – *The admissibility of the action*

1. Arguments of the parties

33 The Council primarily argues that the Parliament's action is inadmissible. It contends that the Parliament does not have an interest in bringing proceedings or the right to challenge the contested decision because it did not exercise its right to oppose the adoption of that decision for infringement of the grounds listed in Article 5a(4)(e) of the second 'comitology' decision. If the Parliament had doubts as to the legality of the contested decision, it ought to have opposed it, in accordance with the regulatory procedure with scrutiny, and the contested decision could not have been adopted.

34 The present situation may be distinguished from that in Case 166/78 *Italy* v *Council* [1979] ECR 2575, in which the Court held that an action brought by a Member State which had voted within the Council in favour of the contested decision was admissible. The check carried out by the Parliament in order to ascertain whether a proposed measure exceeds the implementing powers provided for in the basic instrument is a formal procedural step in the adoption of the decision in question and does not require a political evaluation, but rather confirmation that the legal conditions are satisfied.

35 The Parliament contends that it is not necessary to prove an interest in bringing proceedings in accordance with the second paragraph of Article 263 TFEU and the case-law of the Court (see Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 3). Even if that proof were necessary, such an interest unquestionably exists in the present case since the legality of an act of the European Union having a binding effect is contested, and the prerogatives of the Parliament are called into question by the adoption of a legal act within the framework of an implementing mechanism instead of a legislative procedure (Case C-303/94 *Parliament* v *Council* [1996] ECR I-2943, paragraphs 19 and 20).

36 The verification by the Parliament of a proposed implementing measure, as provided for in Article 5a(4)(e) of the second 'comitology' decision, does not have the result of limiting the right of the Parliament to request the judicial review of such a measure. Furthermore, the Parliament submits that it is not obliged to exercise its right of veto when it has doubts as to the legality of a proposed implementing measure.

2. Findings of the Court

37 According to settled case-law of the Court, the right of action available to the Member States, Parliament, the Council and the Commission, provided for in the second paragraph of Article 263 TFEU, is not conditional on proof of an interest in bringing proceedings (see, to that effect, *Italy* v *Council*, paragraph 6; *Commission* v *Council*, 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-9639, paragraph 36).

38 It is also apparent from the case-law of the Court that the exercise of that right is not conditional on the position taken, at the time when the measure in question was adopted, by the institution or Member State bringing the action (see, to that effect, *Italy* v *Council*, paragraph 6, and *Commission* v *Parliament and Council*, paragraph 28).

39 The fact that, under Article 5a(4)(e) of the second 'comitology' decision, the Parliament has had the possibility of opposing the adoption of the contested decision, by acting by a majority of its component members, is not capable of excluding that institution's right to bring proceedings, as the Advocate General points out in paragraphs 20 and 22 of his Opinion.

40 Although, in accordance with recital 7a of the second 'comitology' decision, 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.

41 It follows from the above that the action for annulment must be declared to be admissible.

B – *Substance*

1. Arguments of the parties

42 The parties disagree in essence, firstly, over the principles governing the implementing powers and, secondly, over whether the contested decision could be adopted by virtue of the implementing powers.

(a) As regards the principles governing the implementing powers

43 The Parliament submits that the regulatory procedure with scrutiny can have as its subject-matter the modification or removal of non-essential elements of a basic instrument or the addition of new non-essential elements, but not the modification of the essential elements of such an instrument. Any exercise of implementing powers has to respect the essential elements of the content of the basic act. In addition, the Parliament takes the view that the Commission is not authorised to regulate activities which do not fall within the material scope of the basic legislation.

44 In the Parliament's view, the concept of 'essential elements' includes in particular the definitions laid down by basic legislation which delimit its material scope and it sets the framework within which that legislation applies; that legislation may also be supplemented by the addition of new non-essential elements. In order to determine the limitations on the implementing powers, the Parliament submits that regard must be had, in particular, to the material limitations on those powers which derive from the essential elements of the basic act and also to the provisions of the EC Treaty and the requirement to respect fundamental rights.

45 The Council contends, by contrast, that the European Union legislature can itself fix the limits of the delegation, define what the essential aims of the basic legislation are and also decide the essential elements which cannot be delegated to the Commission. The permissible scope of the delegation of implementing powers depends, inter alia, upon the discretion attributed to the Commission by the legislature, and in that connection the Court has authorised an extensive delegation of implementing powers to that institution.

46 The Commission contends that, as regards the concept of 'essential elements', the case-law of the Court should be relied on which states that those elements are the rules which are essential to the subject-matter envisaged (Case 25/70 *Köster, Berodt & Co.* [1970] ECR 1161, paragraph 6, and Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383, paragraph 36). The use in Article 2(2) of the second 'comitology' decision of the terms 'supplementing by the addition of new non-essential elements' allows the Commission to be granted the power to put flesh on the bones of the essential

elements which the co-legislators have chosen not to detail *in extenso*. It is authorised to supplement those elements and to regulate new activities within the scope of the essential subject-matter and of the essential rules.

(b) As regards the contested decision

47 Although the Parliament does not challenge the objectives of the contested decision, it takes the view that its content ought to have been adopted by means of a legislative act and not by an implementing measure. That decision goes beyond the scope of the implementing powers referred to in Article 12(5) of the SBC because it introduces new essential elements into that code and alters essential elements of the SBC as well as the content of the Frontex Regulation.

(i) Introduction of new essential elements into the SBC

48 As regards the introduction of new essential elements into the SBC, the Parliament submits that Parts I and II to the Annex of the contested decision lay down measures which cannot be considered to be within the scope of border surveillance as defined by the SBC or to be a non-essential element of that code.

49 Thus, contrary to Article 12(5) and recital 17 of the SBC, paragraph 2.4 of Part I to the Annex of the contested decision does not merely lay down detailed practical rules of border surveillance but grants border guards far-reaching powers. The SBC is silent as to the measures which might be taken against persons or ships. However, the contested decision lays down far-reaching enforcement measures, yet does not ensure the right of persons intercepted on the high seas to claim asylum and associated rights, whereas, in accordance with Article 13 of the SBC, returning the persons concerned to the country from where they came can only arise in the context of a formal refusal of entry.

50 In addition, the rules relating to activities such as search and rescue and disembarkation in Part II to the Annex of the contested decision do not, in the Parliament's view, fall within the concept of surveillance. Even though the title of Part II contains the word 'guidelines', Part II is binding and is intended to produce legal effects as against Member States which participate in an operation coordinated by the Agency, due to its wording, the fact that it is contained in a legally binding instrument, and the fact that it forms part of an operational plan provided for by the Frontex Regulation. The contested decision thus contains essential elements of the SBC and could not therefore be regulated in an implementing measure.

51 In addition, the Parliament submits that the contested decision exceeds the territorial scope of the SBC. In accordance with Article 2(11) of the SBC, surveillance is limited to the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, whereas, in accordance with paragraph 2.5 of Part I to its Annex, the contested decision applies not only to territorial waters, but also to contiguous zones and to the high seas.

52 The Council contends that the European Union legislature took the view that the border checks were the essential element of external border control that it extensively regulated. As for border surveillance, the Council contends that, by contrast, the legislature took the view that it was enough to define the general objectives and basic methods by granting the Commission the authorisation to adopt, in case of need, supplementary measures which are relevant to surveillance, and extensive implementing powers.

53 The Council contends that the measures listed in paragraph 2.4 of Part I to the Annex are not contrary to the policy aims of border surveillance defined in Article 12 of the SBC. The rules on coordination of surveillance operations during joint operations, set out in paragraph 2.5 of Part I to the Annex, are intended to facilitate the running of operations. The Council contends that the argument alleging an

extension of the territorial scope of the SBC is unfounded, since that code does not define the concept of a sea border, which must be understood as applying also to border surveillance carried out in the contiguous zones as well as on the high seas.

54 As regards Part II to the Annex of the contested decision, not only the language used in recitals 7 to 9 of that decision, but also the difference in the titles of the two Parts to the Annex and the manner in which the guidelines are formulated demonstrate the drafter's intention not to grant binding force to Part II. Admittedly, helping ships in distress is not a surveillance measure in the narrow sense. However, if such a situation were to occur during a surveillance operation coordinated by the Agency, it would be indispensable to coordinate in advance how the search and rescue was conducted by various participating Member States. In those circumstances, the Council takes the view that the contested decision does not introduce new elements into the SBC.

55 The Commission contends that border surveillance is an essential element of the SBC, but that the essential rules governing that matter are found in Article 12 of the SBC which lays down provisions regarding the content as well as the object and purpose of the surveillance without serving to regulate that surveillance extensively and exhaustively. The co-legislators conferred on the Commission the power to supplement those essential elements. The power to regulate new activities allows the Commission to regulate the content of border surveillance and to define what that activity entails.

56 The Commission contends that the contested decision does not introduce new essential elements into the SBC. Surveillance must, in the light of its purpose, not only encompass the detection of attempts to gain illegal entry into the European Union but also extend to positive steps such as intercepting ships which are suspected of trying to gain entry to the Union without submitting to border checks. Article 12(4) of the SBC specifically mentions one of the purposes of surveillance as being to apprehend individuals. In order to assess whether 'search and rescue' falls within the concept of surveillance, it is important to take into consideration the factual circumstances in which attempted illegal entries arise. In many instances, the surveillance operation will prompt the search and rescue situation, and it is not possible to draw a sharp distinction between those operations. The issue of whether or not the guidelines are binding does not arise, given that the measures which they lay down fall within the concept of surveillance.

(ii) Modification of essential elements of the SBC

57 As regards the modification of the essential elements of the SBC, the Parliament contends, in particular, that the contested decision alters Article 13 of the Code. Since that article applies to any form of interception, persons who have entered illegally into the territorial waters and contiguous zones cannot be forced back or asked to leave without a decision pursuant to Article 13 of the SBC. However, paragraph 2.4 of Part I to the Annex of the contested decision confers on border guards the power to order the ship to modify its course outside of the territorial waters, without a decision within the meaning of Article 13 being taken or without the persons concerned having the possibility to challenge the refusal of entry.

58 In that connection, the Council and the Commission contend that Article 13 of the SBC does not apply to border surveillance activities so that the contested decision does not amend that article.

(iii) Amendment of the Frontex Regulation

59 As regards the amendment of the Frontex Regulation, the Parliament contends that Article 12(5) of the SBC does not grant the Commission the power to lay down rules which amend the powers and obligations set out by the Frontex Regulation for the operations co-ordinated by the Agency. The contested decision is not the appropriate legal instrument for creating obligations in relation to those operations or for modifying the provisions of the Frontex Regulation.

60 However, the contested decision is intended to apply only within the context of operations coordinated by the Agency and is obligatory not only for the Member States but also for the Agency, in light of the fact that its Annex forms part of the operational plan for each operation, whilst Article 8e of the Frontex Regulation determines the main elements of that plan. The mandatory inclusion in the operational plan of the rules and guidelines set out in the Annex of the contested decision significantly amends the list of necessary elements for the implementation of that plan, such as the roles of border guards, the participating units and the Rescue Coordination Centre, respectively.

61 In that connection, the Council contends that the contested decision does not amend the tasks of the Agency, even though the Annex of that decision forms part of the operational plan. The modalities of border surveillance are subsumed within the necessary elements of the operational plan listed in Article 8e of the Frontex Regulation. Even if the contested decision were to add new non-essential elements to the provisions of Article 8e of the Frontex Regulation, that would not, however, result in that regulation's illegality. The SBC together with its implementing measures, on the one hand, and the Frontex Regulation, on the other, are complementary. Both basic acts are legal instruments for the implementation of the external border policy as set out in Article 77 TFEU and coordination with the system implemented by the Frontex Regulation is regulated in the SBC. Consequently, the new non-essential elements added by the contested decision are compatible with the Frontex Regulation and the SBC.

62 According to the Commission, the contested decision does not affect the operation of the Frontex Regulation. The requirement in Article 1 of the contested decision that both Parts to the Annex are to be part of the operational plan imposes a requirement not upon the Agency, but rather the Member States as the persons to whom that decision is addressed and responsible for ensuring that the Annex forms part of that plan. In those circumstances, the contested decision does not amend the Frontex Regulation.

2. Findings of the Court

63 It is to be noted that the enabling provision at issue in the present case – Article 12(5) of the SBC – provides that 'Additional measures governing surveillance [may be adopted] … designed to amend non-essential elements of [the SBC] by supplementing it'. That provision, read in conjunction with Article 33(2) of the SBC refers, as regards the procedure to be followed, to the second 'comitology' decision, itself based on the third indent of Article 202 EC.

64 According to settled case-law, the adoption of rules essential to the subject-matter envisaged is reserved to the legislature of the European Union (see, to that effect, *Germany* v *Commission*, 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). The essential rules governing the matter in question must be laid down in the basic legislation and may not be delegated (see, to that effect, Case C-156/93 *Parliament* v *Commission* [1995] ECR I-2019, paragraph 18; *Parliament* v *Council*, paragraph 23; Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 34; and Case C-133/06 *Parliament* v *Council* [2008] ECR I-3189, paragraph 45).

65 Thus, provisions which, in order to be adopted, require political choices falling within the responsibilities of the European Union legislature cannot be delegated.

66 It follows from this that implementing measures cannot amend essential elements of basic legislation or supplement it by new essential elements.

67 Ascertaining which elements of a matter must be categorised as essential is not – contrary to what the Council and the Commission claim – for the assessment of the European Union legislature alone, but must be based on objective factors amenable to judicial review.

68 In that connection, it is necessary to take account of the characteristics and particularities of the domain concerned.

69 As to whether the Council was empowered to adopt the contested decision as a measure implementing Article 12 of the SBC on border surveillance, on the basis of Article 12(5) of that code, it is first of all necessary to assess the meaning of that article.

70 Article 12(1) and (4) of the SBC provides that 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 and to apprehend such persons. Recital 6 of the SBC states, in addition, that border control is intended to help to 'combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations'.

71 As regards border surveillance operations, Article 12(2) to (4) of the SBC contains provisions relating to certain aspects of the functioning of surveillance operations, although those provisions merely describe in an abstract manner the duties of border guards. In particular, the second subparagraph of Article 12(2) provides that surveillance is to be 'carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points'. Similarly, the first sentence of Article 12(3) provides that '[s]urveillance 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'.

72 As to whether the institution concerned is empowered to take the implementing measures relating to border surveillance, Article 12(5) of the SBC states, in accordance with the case-law cited in paragraph 64 above, that 'Additional measures governing surveillance [may be adopted] … designed to amend non-essential elements of [the SBC] by supplementing it'. In addition, in accordance with recital 17 of the SBC and recital 4 of Regulation No 296/2008, the delegation of implementing powers relates only to certain detailed practical rules governing border control.

73 Although the SBC, which is the basic legislation in the matter, states in Article 12(4) thereof, that the aim of such surveillance is to apprehend individuals crossing the border illegally, it does not contain any rules concerning the measures which border guards are authorised to apply against persons or ships when they are apprehended and subsequently – such as the application of enforcement measures, the use of force or conducting the persons apprehended to a specific location – or even measures against persons implicated in human trafficking.

74 That said, paragraph 2.4 of Part I to the Annex of the contested decision lays down the measures which border guards may take against ships detected and persons on board. In that connection, paragraph 2.4 (b), (d), (f) and (g) allows, inter alia, ships to be stopped, boarded, searched and seized, the persons on board to be searched and stopped, the ship or persons on board to be conducted to another Member State, and thus enforcement measures to be taken against persons and ships which could be subject to the sovereignty of the State whose flag they are flying.

75 In addition, paragraph 1.1 of Part II to the Annex of the contested decision lays down, inter alia, the obligation of the units participating in sea external border operations coordinated by the Agency to provide assistance to any vessel or person in distress at sea. Paragraph 2 of Part II lays down rules on the disembarkation of the persons intercepted or rescued, the second subparagraph of paragraph 2.1 stating that priority should be given to disembarkation in the third country from where the ship carrying the persons departed.

76 First, the adoption of rules on the conferral of enforcement powers on border guards, referred to in paragraphs 74 and 75 above, 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. 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.

77 Second, it is important to point out 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.

78 Thus, the adoption of provisions such as those laid down in paragraph 2.4 of Part I, and paragraphs 1.1 and 2.1 of Part II, of the Annex to the contested decision, requires political choices to be made as referred to in paragraphs 76 and 77 above. Accordingly, the adoption of such provisions 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.

79 In those circumstances, it must be found that, as the Advocate General observed in points 61 and 66 of his Opinion, Parts I and II to the Annex of the contested decision contain essential elements of external maritime border surveillance.

80 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.

81 In accordance with the second sentence of Article 1 of that decision, Part II of that annex forms part of the operational plan drawn up for each operation coordinated by the Agency. As laid down in Article 8e of the Frontex Regulation, that plan details 'the precise conditions for deployment of the teams', the monitoring of the 'correct implementation' of which is a matter for the coordinating officer, pursuant to Article 8g of that regulation.

82 Since the conditions provided for by that plan must therefore be complied with, it necessarily follows that the rules in paragraphs 1.1 and 2.1 of Part II to the Annex of the contested decision are intended to produce binding legal effects.

83 Lastly, even though the contested decision also contains provisions governing the practical arrangements for carrying out border surveillance, it must be found that the entirety of the rules laid down in Parts I and II to the Annex of the contested decision, respectively, are connected due to the fact that they relate to the conduct of surveillance operations and rescue operations in turn.

84 In those circumstances, the contested decision must be annulled in its entirety because it contains essential elements of the surveillance of the sea external borders of the Member States which go beyond the scope of the additional measures within the meaning of Article 12(5) of the SBC, and only the European Union legislature was entitled to adopt such a decision.

85 Consequently, the Parliament's arguments to the effect that the contested decision amends the essential elements of the SBC and also the Frontex Regulation do not require to be examined.

IV – The application for the effects of the contested decision to be maintained

86 The Parliament requests the Court, should it annul the contested decision, to maintain its effects, pursuant to the second paragraph of Article 264 TFEU, until that decision is replaced.

87 The Parliament submits that it is necessary to maintain the effects of the contested decision, in the light of the importance of the objectives of the proposed measures in the context of the European Union's policy on border control operations.

88 Under the second paragraph of Article 264 TFEU, the Court may, if it considers it necessary, state which of the effects of the act which it has declared void are to be considered as definitive.

89 The annulment of the contested decision without maintaining its effects on a provisional basis could compromise the smooth functioning of the current and future operations coordinated by the Agency and, consequently, the surveillance of the sea external borders of the Member States.

90 In those circumstances, there are important grounds of legal certainty which justify the Court exercising the power conferred on it by the second paragraph of Article 264 TFEU. In the present case, the effects of the contested decision must be maintained until the entry into force, within a reasonable time, of new rules intended to replace the contested decision annulled by the present judgment.

V – Costs

91 Under the first subparagraph of Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Parliament has applied for costs and the Council has been unsuccessful, the Council must be ordered to pay the costs. The Commission, which intervened in support of the form of order sought by the Council, must be ordered to bear its own costs, in accordance with the first subparagraph of Article 69(4) of the Rules of Procedure.

On those grounds, the Court (Grand Chamber) hereby:

1. **Annuls 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;**

2. **Maintains the effects of Decision 2010/252 until the entry into force of new rules within a reasonable time;**

3. **Orders the Council of the European Union to pay the costs;**

4. **Orders the European Commission to bear its own costs.**

[Signatures]