

# Limits to delegation under Article 290 TFEU

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# Limits to delegation under Article 290 TFEU: The specificity and essentiality requirements put to the test

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## I. Introduction

As noted by Z. Xhaferri in an earlier volume of the Journal, the Treaty of Lisbon, pursuant to Articles 290 and 291 Treaty on the Functioning of the European Union (TFEU), created a new legal regime governing the ‘delegation’ of rule-making powers to the European Commission that left many questions unanswered.<sup>1</sup> Despite the adoption of the Comitology regulation (pursuant to Article 291(3) TFEU)<sup>2</sup> and an inter-institutional agreement on delegated acts (as such not required under Article 290 TFEU),<sup>3</sup> the EU institutions did not fully manage to find a *modus vivendi* to put the new legal regime into practice. As a result, the Court of Justice was called upon in a number of cases to settle the contested questions.

1. Z. Xhaferri, ‘Delegated Acts, Implementing Acts, and Institutional Balance Implications Post-Lisbon’, 20 *Maastricht Journal of European and Comparative Law* (2013), p. 557–575.
2. Regulation No. 182/2011/EC of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, [2011] OJ L 55/13.
3. An original Common Understanding (CU) on Delegated Acts was adopted by the three political institutions in 2011. This CU has been replaced in 2016 with a new one. For the 2011 CU, see Council of the European Union, Doc. 8640/11; for the 2016 CU, see Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, [2016] OJ L 123/1 (the IIA). As is foreseen in paragraph 28 of the IIA, the institutions will also define non-binding criteria for demarcating Articles 290 and 291 TFEU. The inter-institutional negotiations on these criteria were kicked off on 12 September 2017.

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A number of these questions has been (partially) addressed by the Court, the most prominent one being how the legislature may choose between granting an implementing or a delegated power to the Commission (*Biocides & Visa reciprocity*).<sup>4</sup> There is also the question when rule-making ceases to be implementation and instead should be seen as supplementation (*Eures Network*);<sup>5</sup> the question what the implications are of the distinction in Article 290 TFEU between the amendment and the supplementation of a legislative act (*Connecting Europe Facility*);<sup>6</sup> the question on the *domaine réservé* of the legislature (*SBC, Europol, Multiannual Cod Plan*);<sup>7</sup> the question how the reference to 'uniform conditions' in Article 291 TFEU ought to be understood (*Spain v. Parliament and Council*);<sup>8</sup> and the question whether Articles 290 and 291 TFEU form an exhaustive system of executive rule-making (*Short-selling*).<sup>9</sup> These last two actions were brought by Member States whereas the others resulted from inter-institutional conflicts. Because these cases were ruled by the Court of Justice and saw privileged parties facing each other, they also constitute the most visible cases on the new delegation regime.

## 2. Two-leveled judicial scrutiny of the essentiality and specificity requirements of Article 290 TFEU

It should be noted, however, that there are two levels at which delegation issues may be legally scrutinised. Firstly, there is the review of a legislative act in light of the constitution, or in the case of the EU, the Treaties. All of the above cases (apart from *Eures Network*) fall in this category. Secondly, at a lower level, acts adopted pursuant to a delegated power may be scrutinised in light of the enabling act and the constitution (that is the EU Treaties). Looking at the experience in the USA shows how the focus of judicial scrutiny has shifted from the first to the second level.<sup>10</sup> In US constitutional law, the nondelegation doctrine prohibits the legislature from delegating its legislative powers. Since the 1930s, however, the US Supreme Court has never struck down legislative acts for violation of the nondelegation doctrine. Instead, a doctrine of constitutional avoidance is applied whereby enabling clauses in legislative acts are interpreted narrowly and possible delegation problems are resolved by finding the executive act *ultra vires* rather than the legislative provision pursuant to which delegated powers are exercised.<sup>11</sup>

This US experience suggests that we should perhaps first focus on those cases where an executive act, adopted pursuant to delegated powers, is scrutinised. For the EU this also means that the jurisprudence of the General Court merits special attention, because under the EU's judicial system that is where actions against decisions by the Commission are typically first brought. Incidentally, the Lisbon Treaty facilitated such judicial scrutiny by broadening access

4. Case C-427/12 *Commission v. Parliament and Council*, EU:C:2014:170; Case C-88/14 *Commission v. Parliament and Council*, EU:C:2015:499.

5. Case C-65/13 *Parliament v. Commission*, EU:C:2014:2289.

6. Case C-286/14 *Parliament v. Commission*, EU:C:2016:183.

7. Case C-355/10 *Parliament v. Council*, EU:C:2012:516; Case C-363/14 *Parliament v. Council*, EU:C:2015:579; Joined Cases C-124 and C-125/13 *Parliament and Commission v. Council*, EU:C:2015:790.

8. Case C-146/13 *Spain v. Parliament and Council*, EU:C:2015:298.

9. Case C-270/12 *United Kingdom v. Council and Parliament*, EU:C:2014:18.

10. This is simply an empirical observation and not a normative prescription. It is not claimed here that all delegation issues can be addressed by limiting judicial scrutiny to executive acts.

11. See US Supreme Court, *Mistretta v. US*, 488 US 361 (1989), p. 373 at footnote 7; see J. Loshin and A. Nielson, 'Hiding Nondelegation in Mouseholes', 62 *Administrative Law Review* (2010), p. 57-59.

to the EU judge for natural and legal persons.<sup>12</sup> Post-Lisbon, the General Court may therefore more easily be seized by private parties (rather than just the Member States) asking for the annulment of a Commission delegated or implementing act. In such cases, the General Court may be confronted with arguments that, in fine, go to the core of the legal framework set up by Articles 290 and 291 TFEU, thus touching on issues of constitutional importance.

The issue on which this contribution focuses is the limits to the Commission's power under Article 290 TFEU. Through this Article the Lisbon Treaty has firstly codified the well-known *Köster* judgment in which the Court ruled that the formal legislature should adopt 'the basic elements of the matter to be dealt with'.<sup>13</sup> Thus Article 290 TFEU now provides that the Commission may be empowered to supplement or amend the non-essential elements of legislation. In addition to this essentiality requirement, a specificity requirement is also enshrined in Article 290 TFEU because it provides that the objectives, content, scope and duration of a delegation of power shall be explicitly defined in the legislative act. Although they will be tested in a different manner depending on the author of a contested act, both requirements apply to both the legislature and the Commission: (i) the EU legislature can only leave the non-essential elements to the Commission; and (ii) it must define the mandate sufficiently precisely in regard to its objectives, content, scope and duration.<sup>14</sup> Inversely, (i) the European Commission cannot amend or supplement the essential elements of legislation; and (ii) its delegated acts have to respect the objectives, content, scope and duration of the delegation as defined by the legislature. As noted by Kollmeyer, however, the specificity requirement has often been neglected in the Court's past jurisprudence when it was asked to scrutinise delegation clauses.<sup>15</sup>

### 3. The general court overruled by the court of justice

Looking at the General Court's recent jurisprudence in this area reveals a remarkable trend: after the General Court scrutinised the Commission's compliance with both requirements, the Court of Justice on appeal overruled the General Court's interpretation of Article 290 TFEU. In addition to illustrating the esoteric character of the legal regime established by Article 290 TFEU, the Court of Justice correcting the General Court also offers us a much greater clarification of the essentiality and specificity requirements than any judgment in actions brought directly before the Court of Justice could. Before discussing the three cases, the factual context and the decisions of both the General Court and the Court of Justice will be summarily set out.

12. Private parties do not have to be the addressees of a contested act or be individually and directly concerned by it anymore. Under Article 263(4) TFEU they can now also challenge regulatory acts that are of direct concern to them and that do not entail implementing measures. For a discussion, see S. Peers and M. Costa, 'Judicial Review of EU Acts after the Treaty of Lisbon', 8 *European Constitutional Law Review* (2012), p. 82–104.

13. Case 25/70 *Köster*, EU:C:1970:115, para. 6.

14. See however Hofmann, who noted that under Article 290 TFEU 'the objectives, content, scope and duration of the delegation of power' belong to the essential elements and shall be explicitly defined in the legislative act'. See H. Hofmann, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality', 15 *European Law Journal* (2009), p. 488–489.

15. D. Kollmeyer, *Delegierte Rechtsetzung in der EU – Eine Analyse der Art. 290 und 291 AEUV* (Nomos, 2015), p. 264–265. Kollmeyer refers to the *Smoke Flavours* case as an exception, but even in this case it should be noted that the CJEU's assessment of the essentiality and specificity requirements was necessarily intertwined with and subordinate to the actual question posed to it by the UK, that is, whether Article 114 TFEU was the proper legal basis for the legislative act in question. See Case C-66/04 *UK v. Parliament and Council*, EU:C:2005:743, para. 48–49.

### A. *Dyson v. Commission*

In *Dyson v. Commission*, the Commission had adopted a delegated regulation supplementing the legislative Directive 2010/30 on energy labelling of vacuum cleaners. The Directive imposed an obligation on suppliers to provide information regarding energy consumption to consumers and the Commission was to flesh out the detail of this in delegated acts. Dyson<sup>16</sup> challenged the Commission's subsequent delegated regulation inter alia alleging that the Commission lacked the competence to adopt the regulation insofar as the latter prescribed vacuum cleaners were to be tested with empty receptacles.<sup>17</sup> According to Dyson, this conflicted with the basic legislative directive which referred to 'the consumption of energy (...) *during use*'<sup>18</sup> and therefore (partially) filled receptacles ought to be used for testing.

The General Court in its ruling recalled that the Commission enjoys a broad discretion when it is to make political, economic and social choices or when it has to undertake complex assessments and evaluations and that in such circumstances the EU Courts typically<sup>19</sup> only perform a marginal review.<sup>20</sup> On Dyson's specific plea, the General Court concluded that 'the Commission cannot be criticised for having failed to require tests conducted with a dust-loaded receptacle if, under its broad discretion, it decided that such tests were not yet reliable, accurate and reproducible.'<sup>21</sup>

In the appeal procedure the Court of Justice itself reframed Dyson's argument in constitutional terms, finding that Dyson effectively argued that the 'Commission had disregarded an essential element of the enabling act'<sup>22</sup> by prescribing tests with an empty receptacle when the Directive requires the testing method to reflect normal conditions of use.

The Court of Justice then found that the General Court had committed an error of law by applying the Courts' established jurisprudence on marginal judicial review to the question whether the Commission had 'infringed an essential element of the enabling act.'<sup>23</sup> The Court pointed out that the question on the extent of any discretion left to the Commission to exercise a mandate is different from ascertaining the limits set by that mandate.<sup>24</sup>

Subsequently the Court of Justice continued to address Dyson's original plea for which it needed to be determined 'whether the requirement that the information supplied to consumers

16. Note that Dyson, a non-privileged party, was not the addressee of the Commission regulation and neither was it directly and individually concerned by it. Dyson could only directly challenge the regulation because the Lisbon Treaty has broadened the locus standi of private parties under Article 263 TFEU.

17. It should be noted that the delegated regulation does not actually prescribe the use of empty receptacles. However, the regulation does require that test results are 'reliable, accurate and reproducible'. See Case T-544/13 *Dyson v. Commission*, EU:T:2015:836, para. 83. The problem for Dyson then was that the Commission found that only tests with empty receptacles, rather than partially filled receptacles, were reproducible.

18. See Article 1(1) of Directive 2010/30 of the European Parliament and of the Council on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, [2010] OJ L 153/1. The directive has now been replaced by Regulation No. 2017/1369/EU of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU, [2017] OJ L 198/1.

19. See P. Gilliaux, 'L'intensité du Contrôle de la Légimité par les Juridictions Communautaires', 17 *Journal de Droit Européen* (2009), p. 43.

20. Case T-544/13 *Dyson v. Commission*, para. 38–39.

21. Case C-44/16 P *Dyson v. Commission*, EU C:2017:357, para. 47.

22. *Ibid.*, para. 50.

23. *Ibid.*, para. 51.

24. *Ibid.*, para. 52.

must reflect energy consumption while the machine is in use (...) is an essential element of the directive'.<sup>25</sup> In light of the general scheme of the Directive, the Court answered that question in the affirmative and concluded that the energy performance of vacuum cleaners has to be determined in conditions as close as possible to actual conditions of use, which requires tests with receptacles that are partially filled rather than empty receptacles as required by the Commission.<sup>26</sup>

## B. *DK Recycling und Roheisen*

In *DK Recycling und Roheisen*, the applicant, a German company, challenged the Commission's refusal to authorise Germany to exceptionally grant it free emissions allowances pursuant to the German law transposing the EU's scheme for greenhouse gas emissions allowance trading.

The legislative framework governing the dispute may be explained in a nutshell as follows: the legislative Directive 2003/87 foresees a system of greenhouse gas allowances that are reduced yearly for the entire EU.<sup>27</sup> The directive further provides that part of the allowances are auctioned by the Member States whereas a decreasing proportion of allowances (to be extinguished by 2027) is granted free of charge to companies. Article 10a of the Directive provides that the Commission is to adopt EU-wide and fully harmonised implementation measures for the allocation of the free allowances, and this on a sector-per-sector basis. The Commission did so by adopting Decision 2011/278<sup>28</sup> pursuant to the regulatory procedure with scrutiny (PRAC).<sup>29</sup> The Commission's decision requires the Member States to adopt national implementing measures, setting out the installations that are eligible to receive free allowances and the amount thereof. Before adopting these measures, the Member States are to submit them to the Commission that can reject the Member State's proposed inscription of an installation or the amount of free allowances proposed.

In addition to what is foreseen under EU law, the German transposition law provides that companies may exceptionally be eligible for (additional) free allowances in the case of 'undue hardship' resulting from the allowance system insofar as the Commission agrees to this. Unfortunately for the applicant, the Commission had rejected Germany's proposal to grant it such additional free allowances, arguing that this possibility is not foreseen in the EU legal framework.

When the applicant challenged the Commission's decision before the General Court, the latter concurred with the Commission in that the EU framework, which is the legislative directive and Commission Decision 2011/278, exhaustively laid down the free allowances that could be granted and that it did not provide for additional free allowances in the case of undue hardship.<sup>30</sup> Yet, the

25. *Ibid.*, para. 60.

26. See *supra* n 17.

27. See Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003] OJ L 275/32 (Directive 2003/87).

28. Commission Decision 2011/278 determining transitional EU-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87, [2011] OJ L 130/1.

29. Directive 2003/87 is one of those legislative acts that still refers to the PRAC and that has not been updated yet to align with the Lisbon Treaty's reform of comitology. See M. Chamon, 'Dealing with a Zombie in EU Law: The Regulatory Comitology Procedure with Scrutiny', 22 *Maastricht Journal of European and Comparative Law* (2016), p. 721–723. The Commission has proposed to align the Directive's references to the PRAC with Article 290 TFEU in Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/987/EC to enhance cost-effective emission reductions and low-carbon investments, COM(2015) 337 final.

30. Case T-630/13 *DK Recycling und Roheisen v. Commission*, EU:T:2014:833, para. 43–45.

applicants also invoked an exception of illegality against Commission Decision 2011/278 insofar as the Commission had failed to provide for a hardship clause in that Decision.

To address this point, the General Court had to determine whether the legislative directive had left the necessary scope to the Commission for including such a clause in its Decision in the first place. Here the General Court held that the Commission may supplement the legislative directive insofar as it does not amend the directive's essential elements,<sup>31</sup> finding that the Commission could have included a hardship clause while respecting this limit because: (i) any additional allowances resulting from such a clause would be exceptional and would not undermine the directive's general schema; and (ii) the Commission had been granted a certain discretion by the legislature to determine the specific rules for granting free allowances.<sup>32</sup>

In the appeal brought by the applicant before the Court of Justice, the Commission essentially requested a substitution of the grounds<sup>33</sup> of the General Court's judgment: if the Court would rule that the General Court erred in law when finding that the Commission could have inscribed a hardship clause in Decision 2011/278, all the applicant's other pleas would automatically fail. To answer this point of law, the Court went back to its ruling in the *SBC* case,<sup>34</sup> in which it found that 'political choices' are to be made by the EU legislature and that, as a result, the Commission cannot amend formal legislation on its essential elements.<sup>35</sup>

Here the Court found that the main objective of Directive 2003/87 was to lower the emission of greenhouse gasses, the sub-objectives being that such a reduction should preserve the internal market and should not jeopardise economic development or employment.<sup>36</sup> The EU legislature's emphasis on the need to ensure that competition on the internal market would not be distorted was found to show this sub-objective's essential nature. According to the Court a hardship clause as advocated by the applicants would be incompatible with this requirement 'since it would necessarily have implied a case-by-case approach based on there being particular and individual circumstances peculiar to each operator affected by such "undue hardship"'.<sup>37</sup>

### C. Czech Republic v. Commission

In *Czech Republic v. Commission*, the legality of two Delegated Regulations supplementing the legislative Directive on Intelligent Transport Systems (ITS) in the field of road transport were at issue. The Directive creates a framework for the Member States to deploy ITS, the aim of which is

31. The General Court did so without referring back to the second comitology decision that defines the scope of application of the PRAC. This is remarkable, because the PRAC has a field of application that cannot be equated with that of the delegated act under Article 290 TFEU and neither can it be equated with a post-Lisbon implementing act. When faced with an action directed against an act adopted (by the Commission or the Council) pursuant to the PRAC, the Courts thus ought to scrutinize the act in light of Article 5a of the second comitology decision. The General Court also erroneously omitted doing so in Joined Cases T-261/14 and T-86/14 *Netherlands v. Commission*, EU:T:2015:671.

32. Case T-630/13 *DK Recycling und Roheisen v. Commission*, para. 50.

33. The General Court still rejected the case because the Commission had not committed a manifest error of assessment by not including a hardship clause in Decision 2011/278.

34. For a discussion of this case, see M. den Heijer and E. Tauschinsky, 'Where Human Rights Meet Administrative Law: Essential Elements and Limits to Delegation', 9 *European Constitutional Law Review* (2013), p. 513–533.

35. Case C-540/14 P *DK Recycling und Roheisen v. Commission*, EU:C:2016:469, para. 47.

36. *Ibid.*, para. 49.

37. *Ibid.*, para. 55.



to allow maximal efficient use of road infrastructure.<sup>38</sup> The Delegated Regulations laid down further rules governing the provisions of information to the users of the road network and parking places.<sup>39</sup>

According to Czechia, the Commission had violated Article 290 TFEU by requiring the Member States to designate national bodies independent from market operators to evaluate the latter's compliance with the relevant EU rules. It found that these requirements could not be qualified as specifications under Article 6 of the directive (which the Commission was entitled to adopt). Instead, Czechia argued that they should be seen as supplementing or amending an essential element of the directive.

Before scrutinizing the contested regulations, the General Court noted that the Commission had been granted a delegated power under Article 290 TFEU rather than an implementing power under Article 291 TFEU. In light of this, the General Court observed that the Commission was granted a discretionary power, because 'the powers of the Commission under a delegation differ from the implementing powers, in particular as regards the margin of discretion at its disposal' [*les compétences de la Commission au titre d'une délégation se distinguent des compétences d'exécution, notamment en ce qui concerne la marge d'appréciation dont elle dispose*].<sup>40</sup> Although the legislative directive did not explicitly foresee that the Commission could require Member States to designate independent supervisory bodies, the General Court noted that the specifications that the Commission was empowered to adopt could relate to the entirety of the directive and not just to the issues explicitly listed in its Article 6.<sup>41</sup> In this regard, the General Court observed that Article 4, point 17 of the directive provided that a specification 'means a binding measure laying down provisions containing requirements, procedures or any *other relevant rules*' (emphasis added), whereas Article 6 provided 'organisational provisions that describe the procedural obligations of the various stakeholders' and that the 'specifications shall, as appropriate, provide for conformity assessment'. Tying this together with the Commission's discretion, the General Court held that the Commission had a margin of appreciation in considering whether the requirement of establishing independent supervisory bodies was necessary for an effective enforcement and for the achievement of the directive's objectives.<sup>42</sup> Crucially, it additionally followed from this, the General Court noted, that such a requirement did not touch on the essential elements of directive either.<sup>43</sup>

In its appeal before the Court of Justice, Czechia inter alia argued that the General Court had infringed Article 290 TFEU when it found that the discretion that the Commission enjoys allowed it to impose the contested requirement on the Member States. Instead Czechia argued (again) that because Article 6 of the Directive does not explicitly foresee the establishment of independent

38. Directive 2010/40/EU of the European Parliament and of the Council on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport, [2010] OJ L 207/1.

39. Commission Delegated Regulation No. 885/2013/EU supplementing ITS Directive 2010/40/EU of the European Parliament and of the Council with regard to the provision of information services for safe and secure parking places for trucks and commercial vehicles, [2013] OJ L 247/1; Commission Delegated Regulation No. 886/2013/EU supplementing Directive 2010/40/EU of the European Parliament and of the Council with regard to data and procedures for the provision, where possible, of road safety-related minimum universal traffic information free of charge to users, [2013] OJ L 247/6.

40. See Joined Cases T-659/13 and T-660/13 *Czech Republic v. Commission*, EU:T:2015:771, para. 47.

41. *Ibid.*, para. 58.

42. *Ibid.*, para. 62–65.

43. *Ibid.*, para. 72.



supervisory bodies, the Commission could not have introduced such a requirement pursuant to a delegated act without violating Article 290 TFEU.<sup>44</sup>

The Court of Justice found that the General Court had erred in law when it held that it was sufficient that the Commission, under its wide discretion, found the contested requirement necessary in light of the objectives of the delegation. By focusing solely on the objectives, the General Court ignored the fact that Article 290 TFEU also limits a delegation as to its content, scope and duration.<sup>45</sup> The Czech Republic's vindication on this point did not help it in the end, because the Court found that the requirement of establishing a supervisory body also aligned with the content and scope of the delegation as defined by the legislature, because the latter foresaw 'organisational provisions' describing the 'procedural obligations' of the stakeholders.<sup>46</sup>

This left the question whether the requirement to set up a supervisory body could be qualified as an essential element that could only be imposed by the formal legislature in the Directive as Czechia claimed. On this issue, the Court declared that the General Court had erred when it held that the Commission's compliance with the essentiality requirement resulted from its compliance with the specificity requirement. Again, however, this did not advance Czechia's case because the Court found that the decision to establish independent supervisory bodies does not require a political choice to be made. This was so in casu because under the Commission's Delegated Regulations the supervisory bodies' powers are limited to collecting information and drawing up reports.<sup>47</sup> In addition, market operators are not significantly affected in their rights because the Delegated Regulations merely required them to provide their identification details, a description of the information service they provide, and declarations of compliance.<sup>48</sup>

#### 4. Discussion

The cases presented above are a veritable treasure-trove for academics and practitioners alike and reveal how the abstract requirements flowing from the constitutional framework of Article 290 TFEU are (not) to be applied in practice. The earlier case law on Articles 290 and 291 TFEU (referred to above) has been characterised, to the disappointment of some,<sup>49</sup> by the Court of Justice generally adopting a hands-off approach, largely leaving the new constitutional framework in the hands of the political institutions. The Court could not easily follow the same approach in the

44. The Commission went as far as arguing that under Article 290 TFEU the EU legislature has a 'latitude to define, generally or else in detail, the content of a delegation of power, the *only* restriction being that the delegation cannot relate to the essential elements of the basic act'. See Case C-696/15 P *Czech Republic v. Commission*, EU:C:2017:595, para. 38 (emphasis added).

45. Case C-696/15 P *Czech Republic v. Commission*, para. 46–48.

46. *Ibid.*, para. 59–60.

47. *Ibid.*, para. 86.

48. *Ibid.*

49. See D. Kollmeyer, *Delegierte Rechtsetzung in der EU – Eine Analyse der Art. 290 und 291 AEUV*, p. 357; D. Ritleng, 'La Nouvelle Typologie des Actes de l'Union: Un Premier Bilan Critique de son Application', 51 *Revue Trimestrielle de Droit Européen* (2015), p. 17–19; P. Craig, 'Delegated and Implementing Acts', in R. Schütze and T. Tridimas, *Oxford Principles of European Union Law* (Oxford University Press, 2018), p. 728–729. On the other hand, authors such as van der Mei and Bradley have been (more) congenial to the CJEU's jurisprudence on Articles 290–291 TFEU, see A.P. van der Mei, 'Delegation of Rulemaking Powers to the European Commission Post-Lisbon', 12 *European Constitutional Law Review* (2016), p. 543–548; K. Bradley, 'Delegation of Powers in the European Union: Political Problems, Legal Solutions?', in C.F. Bergström and D. Ritleng, *Rulemaking by the European Commission – The New System for Delegation of Powers* (Oxford University Press, 2016), p. 78–81.

present cases because they raised issues at a different, lower, level (compare *supra*): the actual exercise by the Commission of a delegated power had to be scrutinised, rather than the legislature's choice to grant the Commission delegated powers. This allowed (or required) the Court to go into the nitty gritty of the limits imposed by Article 290 TFEU on the Commission and the Court should be lauded for also taking up this opportunity. As noted, the fact that the Court thereby came to different conclusions on a number of points of law than the General Court is fortuitously helpful, as nothing elucidates more than contrastation.

### A. Testing the essentiality requirement: top-down and bottom-up approaches

First of all, the Court's useful clarification of its test in *SBC* should be noted. In *SBC*, the Court observed for the first time that identifying the essential elements of legislation is subject to an 'objective' assessment that is subject to judicial scrutiny, similarly to the choice of a legal basis, and which is therefore not simply in the hands of the legislature.<sup>50</sup>

*SBC* suggested that the essential elements of legislation could be identified in the abstract rather than being determinable only when a concrete executive act could be assessed in light of its basic legislative act. By noting that the 'fundamental guidelines of EU policy'<sup>51</sup> are to be determined taking into account 'the characteristics and particularities of the domain concerned',<sup>52</sup> the Court also tied this to its established jurisprudence. Issues like human rights are always to be considered as fundamental (at the abstract level) but even more so in areas such as external border control (at the level of the domain concerned) compared to, for instance, the common agricultural policy.<sup>53</sup> However, in *Europol* the Court threw out the European Parliament's suggestion that it followed (from *SBC*) that whenever a delegated or implementing act affects human rights, it touches on the essential elements of the basic legislative act.<sup>54</sup>

*Czech Republic v. Commission* and *DK Recycling und Roheisen* further illustrate that whereas the essential elements themselves may be identified without regard of ulterior executive acts, testing the essentiality requirement will normally necessitate also looking into the executive act. Determining whether an executive act alters the essential elements of legislation can rarely be done in the abstract. Instead, the most appropriate method is to follow a bottom-up approach, assessing the (relevant clause in the) executive act in light of its basic legislative act.

In *DK Recycling und Roheisen*, both Courts rejected the action, albeit on different grounds. The Court thereby held that the possibility to include a hardship clause simply did not exist because the Commission would otherwise alter the essential elements of the Directive. Both Courts identified

50. Case C-355/10 *Parliament v. Council*, para. 67–68. As noted by den Heijer and Tauschinsky, the identification of the essential elements of legislation had been casuistic in the CJEU's earlier jurisprudence, but in *SBC* it suggested that certain issues inherently belong to the *domaine réservé* of the legislature (e.g. human rights, third countries' sovereign rights). See M. den Heijer and E. Tauschinsky, 9 *European Constitutional Law Review* (2013), p. 524–525.

51. In *Germany v. Commission*, the CJEU ruled that it is these fundamental guidelines to which the 'essential elements' of legislation give shape. See Case C-240/90 *Germany v. Commission*, EU:C:1992:408, para. 37.

52. Case C-355/10 *Parliament v. Council*, para. 68. In *Vreugdenhil*, the CJEU ruled that the Commission's implementing (in the pre-Lisbon sense) powers were wider in the common agricultural policy than in other policy areas. See Case 22/88 *Vreugdenhil*, EU:C:1989:277, para. 17.

53. Merijn Chamon, *supra* n 34, p. 853.

54. Case C-363/14 *Parliament v. Council*, EU:C:2015:579. See also M. Chamon, 'Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty', 53 *Common Market Law Review* (2016), p. 1512.

the main and sub-objectives of the legislative Directive as being the reduction of greenhouse gas emissions and the preservation of the internal market, economic development and employment in the EU.<sup>55</sup> For the General Court, the introduction of an exception (in the form of a hardship clause) could not affect these objectives. The Court, on the other hand, stressed that the scheme for free allowances was intended to be fully harmonised on a sectoral basis.<sup>56</sup> The latter was an essential element of the legislation according to the Court and in a remarkably curt reasoning it found that a hardship clause 'would have conflicted with the principle of the harmonised and sectoral allocation of [free] allowances'.<sup>57</sup>

Although it may be supported that the decision on whether and on which basis free allowances are granted is subject to a political choice and therefore constitutes an essential element, it seems difficult to postulate, as the Court did, that any kind of hardship clause would necessarily have conflicted with this essential element.<sup>58</sup> In its assessment, the Court followed a top-down approach (starting from the legislative act), because it was reviewing a hypothetical act of the Commission, to answer the question whether the essential elements of the Directive would have been altered had the Commission included a hardship clause in its Decision 2011/278. It may be argued, however, that the answer to this question actually depends on how the Commission would have worked out such a clause. A simple top-down approach in testing the essentiality requirement will suffice only in exceptional cases.<sup>59</sup> Instead, the Court could have ruled that regardless whether a hardship clause could be devised in line with the Directive, the Commission would not have manifestly erred in not foreseeing in one.<sup>60</sup>

The other extreme may be found in the Court's judgment in *Czech Republic v. Commission*. Here the Courts were asked to review an actual decision of the Commission and more precisely the requirement to establish independent monitoring bodies. This allowed the Court to follow a bottom-up approach, starting from the contested requirement. The Court noted that the modalities

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55. Case T-630/13 *DK Recycling und Roheisen v. Commission*, para. 77; Case C-540/14 P *DK Recycling und Roheisen v. Commission*, para. 49.

56. See Article 10a(1) of Directive 2003/87/EC.

57. Case C-540/14 P *DK Recycling und Roheisen v. Commission*, para. 55.

58. Advocate General Mengozzi, in his Opinion, was more elaborate on this question. Just like the CJEU, he found that '[i]t would be in manifest contradiction with the choice of [an approach based on the determination of ex ante objective parameters applied without distinction to all installations in the sector concerned] if free allocation of allowances could be influenced by the specific situation of an individual installation'. On the General Court's reasoning that exceptional free allowances would not impact on the scheme, the Advocate General noted that even 'a provision applying only to exceptional cases may affect the general scheme of the enabling act and be incompatible with essential objectives of that act stemming from a political choice by the legislature'. Although the Advocate General is undeniably right on the latter point, the finding that arguably should have been proven (by the Advocate General and the CJEU) is that exceptional free allowances granted on a case by case basis are per se incompatible with the objective of ensuring equal competition. See the Opinion of Advocate General Mengozzi in Joined Cases C-540/14 P, C-551/14 P, C-564/14 P and C-565/14 P *DK Recycling und Roheisen e.a. v. Commission*, EU:C:2016:147, para. 56, 61.

59. Think of a hypothetical scenario in which the legislature sets out the substantive requirements that commercial banks need to respect in order to operate in the internal market without, however, explicitly setting out the procedural requirements. Based on a top-down approach, it would still be possible for the Court to rule out the possibility that the Commission could allow potential operators to set up activities by merely fulfilling a notification requirement (rather than a license requirement).

60. This would have brought the CJEU's finding closer to that of the General Court, the only difference being that the General Court explicitly confirmed that a hardship clause could have been inserted, whereas the CJEU would have left this open.

opted for by the Commission were so modest that they did not require the Commission to take any political decisions. Where the Court in *DK Recycling und Roheisen* applied the essentiality test purely based on the basic legislative act, in *Czech Republic v. Commission* it did so by purely relying on the executive act. This, in turn, would suggest that certain requirements are inherently unpolitical; that is that they do not require political choices to be made. Although this may well be the case, a more standardised approach for testing the essentiality requirement seems nonetheless advisable. This would include assessing: (i) the objectives, aims and content of the basic legislative act; (ii) the content of the executive act; and (iii) the interrelation of both acts.

### C. Specificity versus essentiality

As noted above, the specificity and essentiality requirements should be distinguished from each other. It is to be welcomed in this regard that the Court in *Czech Republic v. Commission* corrected the General Court's confusing of the two at first instance. In essence the General Court found that the Commission had respected its mandate because the requirement of an independent monitoring body was an 'organisational provision describing the procedural obligations of the various stakeholders' (content) in one of the 'priority actions' listed in Article 3 of the Directive (scope) to 'ensure the compatibility, interoperability and continuity for the deployment and operational use of ITS' (objective).<sup>61</sup> It then concluded that because the Commission

has not exceeded the powers conferred on it (...) [i]t follows that the Czech Republic is wrong to argue that the obligations imposed on the Member States (...) complement or modify an essential element of the directive. [*n'a pas dépassé l'habilitation qui lui est conférée (...) [i]l s'ensuit que c'est à tort que la République tchèque soutient que les obligations imposées aux États membres (...) complétaient ou modifiaient un élément essentiel de la directive.*]<sup>62</sup>

The Court instead neatly distinguished the two, albeit to come to the same conclusion as the General Court: the Commission had not touched on the essential elements of the Directive. To further illustrate the relation between the two requirements, we may imagine some alternative measures that the Commission could have adopted in casu. Rather than foreseeing monitoring bodies that can only request information and a concomitant duty for stakeholders to provide information, the Commission could also have prescribed the establishment of independent enforcement bodies with investigative and enforcement powers (e.g. searches in premises, power to fine, power to order the suspension of activities, and so on). Arguably such measures might still fit the

61. Properly distinguishing the components making up the specificity requirement is far from straightforward. In this regard it should be noted that the Commission itself in its internal guidelines on Article 290 TFEU only dedicates a separate subsection to the 'duration' component (at section III.C), whereas another section (III.B) is dedicated to the 'objectives, content and scope of the delegation' without distinguishing among these three. See European Commission, Guidelines on Delegated Acts, SEC(2011) 855 final, p. 15–17. Nettesheim notes that the content and scope components may overlap, see M. Nettesheim, 'AEUV Art. 290 Delegation von Rechtssetzungsbefugnissen auf die Kommission', in E. Grabitz, M. Hilf and M. Nettesheim (eds.), *Das Recht der Europäischen Union* (Beck, 2017), § 48. Kollmeyer goes as far as to find that regardless whether 'scope' is understood *ratione materiae*, *personae* or *loci*, it is already covered by the 'content' of the delegation if the latter component is understood in a broad sense. See D. Kollmeyer, *Delegierte Rechtssetzung in der EU – Eine Analyse der Art. 290 und 291 AEUV*, p. 268.

62. Joined Cases T-659/13 and T-660/13 *Czech Republic v. Commission*, para. 72–73.

content, scope and objectives of the legislative mandate and therefore pass the specificity test, but because they would entail political choices to be made, they would fail the essentiality test; that is, such enforcement bodies would have to be foreseen by the EU legislature itself.

It is remarkable in this regard that the Court itself in *Dyson* confuses the two tests again.<sup>63</sup> The Court rightly found that the General Court could not rely on the established jurisprudence on the Courts' marginal review in relation to the question whether the Commission respects the limits of Article 290 TFEU when exercising a delegated power. When testing these limits, however, the Court only seemed to have the essentiality requirement in mind and did not even mention that the Commission should also respect the objectives, content, scope and duration of the delegation as defined by the legislature. As a result, coming to *Dyson's* point of critique, which is whether the Commission could require the tests to be conducted with empty receptacles, the Court then necessarily squeezed this question in the framework of the essentiality test. The Court thus found that '[i]t must be determined (...) whether the requirement that the information supplied to consumers must reflect energy consumption while the machine is in use (...) is an essential element of the directive'.<sup>64</sup> However, this question seems to miss the point. That the information must relate to consumption when appliances are *in use* is explicitly foreseen in the Directive itself. As a result, even if it does not constitute an essential element of the Directive, the Commission would not be able to adopt a delegated act in conflict with this provision (unless the latter is formally amended). Next, the Court found that it was indeed an essential element,<sup>65</sup> subsequently noting that the Commission was thus obliged, in order not to disregard an essential element of Directive 2010/30, to adopt in the regulation at issue a method of calculation that makes it possible to measure the energy performance of vacuum cleaners in conditions as close as possible to actual conditions of use, requiring the vacuum cleaner's receptacle to be filled to a certain level.<sup>66</sup>

It is argued here that the Court should actually have tested the Commission's act against the specificity requirement. After all, the legislature had clearly instructed the Commission in Article 10(1) of the Directive to ensure that the information on the energy fiches and labels reflected the consumption of energy in use. This may be qualified as one of the objectives in the legislature's mandate and the argument properly construed would then be that the Commission ignored this objective by prescribing that tests should be conducted with empty receptacles (resulting in unrealistic information on consumption).

On this point, the Court still seems to be on a learning curve following the entry into force of the Treaty of Lisbon that codified the essentiality and specificity requirement for the first time in primary law. Although both requirements had been worked out by the Court itself pre-Lisbon, the lack of a framework meant that they were not properly distinguished or applied in all cases involving a delegation.<sup>67</sup>

63. Although formally assigned to different chambers, the three judges deciding on *Dyson* also formed part of the chamber of five deciding on *Czech Republic v. Commission*, although the judge-rapporteurs were different.

64. Case C-44/16 P *Dyson v. Commission*, para. 60.

65. *Ibid.*, para. 63.

66. *Ibid.*, para. 68.

67. For instance, Advocate General Kokott in her Opinion in the pre-Lisbon *Philippines Border* case treated the essentiality requirement as a corollary to the specificity requirement. See Opinion of Advocate General Kokott in Case C-403/05 *Parliament v. Commission*, EU:C:2007:290, para. 64–83.

### D. Interpretation of the legislature's mandate and Commission discretion

In *Dyson and Czech Republic v. Commission*, the Court of Justice corrected the General Court's findings on the Commission's margin of appreciation when adopting delegated acts.

In *Dyson*, the General Court had broadened the Commission's discretion to cover also the legal limits to the delegation. The Court in contrast rightly distinguished more precisely the Commission's discretion in exercising a mandate from the legal question whether the Commission stays within the bounds of its mandate: the Commission's undisputed discretion must be exercised within its mandate but it cannot affect the interpretation of the legislative act (containing the mandate). The practical result for the EU judges is that they will have to differentiate their review whenever they are seized with a question on the validity of a delegated act: the objective question what the Commission's mandate is and what the essential elements of the legislation are, should be solved by the Court without deferring to the view of the Commission. On the other hand, judicial deference will be appropriate when the Court assesses the Commission's choices adopted pursuant to its mandate. The fact that the difference between the two questions may be blurred in practice,<sup>68</sup> does not detract from properly distinguishing the two as a matter of principle.

A similar issue plagued the General Court's judgment in *Czech Republic v. Commission*. Without explicitly noting that the Commission enjoys a broad discretion at the outset, as in *Dyson*, the General Court did (erroneously)<sup>69</sup> observe that the Commission exercises greater discretion when adopting delegated acts as compared to when it adopts implementing acts. This understanding of the Commission's delegated power may have played in the background when the General Court assessed Czechia's pleas and may explain why the General Court was content with the finding that the requirement to establish independent monitoring bodies could be seen as necessary to further the specifications' objectives of compatibility, interoperability and continuity for the deployment of ITS. Such a finding indeed seems sufficient if one is only looking for a manifest error on the part of the Commission but the Court set the record straight and noted that the specificity requirement in Article 290 TFEU also requires the legislature to lay down (and the Commission to respect) the content, scope and duration of the delegation, not just the latter's objectives.

The judgment of the General Court in *DK Recycling und Roheisen* confirms the above. The General Court found that the Commission had a choice to insert (or not) a hardship clause, because such a clause would not alter the essential elements of the legislation in question. The point here of course was that the Court of Justice overruled the General Court on the question whether a hardship clause would have altered the essential elements. Finding that this would be the case, the question on the Commission's discretion to insert such a clause evidently did not pose itself anymore.

### E. Pincer movements and litigation strategy

A last point of interest is the remarkable litigation strategy by the applications in *DK Recycling und Roheisen* and *Czech Republic v. Commission*.<sup>70</sup> In these cases the applicants limited themselves to

68. See also the Opinion of Advocate General Jääskinen in Case C-270/12 *UK v. Parliament and Council*, EU:C:2013:562, para. 78.

69. Shortly before the publication of the General Court's judgment, the CJEU in *Visa reciprocity* had rejected the idea that the Commission's margin of discretion is greater when adopting delegated acts compared to when it adopts implementing acts. See Case C-88/14 *Commission v. Parliament and Council*, EU:C:2015:499, para. 32.

70. Another interesting point on litigation strategy is *Dyson* not framing its plea in constitutional terms but instead the CJEU rephrasing it this way. Given the CJEU's emphasis on an absence of executive discretion in interpreting a



challenging the legality of the Commission's executive act in light of the legislative mandate. However, such a one-sided approach does not make much sense in cases involving delegated powers under Article 290 TFEU. As noted above, the essentiality and specificity requirements, which litigants will typically invoke when challenging delegated acts, do not impose limits solely on the Commission. Instead they are as much a limit to the legislature, which has to ensure that it has defined the essential elements and that it has defined the objectives, content, scope and duration of the delegation with sufficient precision. As a result, and in military parlance: litigants are well-advised not to limit themselves to a frontal attack on the legality of a Commission-delegated act, because such an attack allows the Courts to limit themselves in scrutinizing the contested act in light of the legislative mandate. Instead, to maximise their chances, litigants should pre-empt the possibility of a safe retreat into the legislative mandate through a pincer movement, by consistently raising an exception of illegality of the legislative mandate as a subsidiary plea, alternative to the main claim directed against the Commission act.<sup>71</sup>

After all, the Court's finding in *DK Recycling und Roheisen* that a hardship clause would have been incompatible with the legislative directive, begged the question whether the directive itself was compatible with the fundamental rights under the Charter (e.g. the right to conduct a business, the right to property) and the principle of proportionality. However, because the applicants had not raised this point before the General Court,<sup>72</sup> the Court rightly held it to be inadmissible on appeal. Similarly, in *Czech Republic v. Commission*, the Court held that the requirements in the Commission's delegated acts were covered by legislative mandate because the latter allowed the Commission to adopt 'specifications on organisational provisions that describe procedural obligations' and because it defined a specification as 'a binding measure laying down provisions containing requirements, procedures or any other relevant rules' (emphasis added). This should have prompted Czechia to also raise an objection of illegality against the legislative directive. After all, the mandate being so vaguely defined could be problematic under Article 290 TFEU. As the Commission noted in its internal guidelines (to which the Court itself referred in *Czech Republic v. Commission*): 'The legislator must explicitly and precisely describe the powers it intends to delegate to the Commission. Vague formulations (...) are not possible'.<sup>73</sup> Although the Court did not explicitly rely on the definition of a specification (more precisely that it may lay down 'any other relevant rules') to uphold the Commission's delegated acts in casu, the importance of raising an objection of illegality against the basic legislative act in delegation cases should be clear.

## 5. Conclusion

In the eight years following the entry into force of the Lisbon Treaty, the Court of Justice has greatly clarified the new framework for delegation in Articles 290 and 291 TFEU. The Court has primarily done so at the occasion of actions for annulment brought between the EU's institutions.

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legislative mandate (allowing only a discretion in exercising a mandate), it would also seem advisable for future parties to frame their pleas in light of the wording of Article 290 TFEU.

71. That Member States, as privileged applicants under Article 263 TFEU, could have brought proceedings against the basic legislative act should not be a bar to them invoking an objection of illegality, see K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law* (Oxford University Press, 2014), p. 448–450.

72. See the Opinion of Advocate General Mengozzi in Joined Cases C-540/14 P, C-551/14 P, C-564/14 P and C-565/14 P *DK Recycling und Roheisen e.a. v. Commission*, para. 72.

73. European Commission, Guidelines on Delegated Acts, SEC(2011) 855 final, p. 16.




However, such cases mainly deal with problems at the level of the legislative delegation, rather than at the level of the exercise of the delegation. Yet the latter type of cases is also greatly instrumental in furthering our understanding of the actual requirements flowing from Articles 290 and 291 TFEU.

Under the rules on the division of jurisdiction between the Court of Justice and the General Court, it is the latter that is ordinarily seized when a party challenges the legality of a specific delegated act adopted by the Commission. Looking at this case law shows how in a remarkable number of cases the General Court has been overruled by the Court of Justice (on appeal) in regards to its scrutiny of the essentiality and specificity requirements under Article 290 TFEU.

In overruling the General Court, the Court of Justice has confirmed, or illustrated, that the essentiality and specificity requirements should be distinguished; that the Commission cannot be accorded a discretion in interpreting its delegation mandate; that a structured approach for testing the essentiality requirement so far remains forthcoming; and that when challenging delegated acts, litigants are well advised to keep the bigger picture in mind and include the legislative act that provides a delegated power for the Commission in their claim.

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