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

[Introduction 1](#_Toc493496741)

[Two-leveled judicial scrutiny of the essentiality and specificity requirements of Article 290 TFEU 2](#_Toc493496742)

[The General Court overruled by the Court of Justice 3](#_Toc493496743)

[Dyson v. Commission 3](#_Toc493496744)

[DK Recycling und Roheisen 4](#_Toc493496745)

[Czech Republic v. Commission 6](#_Toc493496746)

[Discussion 8](#_Toc493496747)

[Testing the essentiality requirement – top down and bottom up approaches 8](#_Toc493496748)

[Specificity vs. essentiality 10](#_Toc493496749)

[Interpretation of the legislature’s mandate and Commission discretion 11](#_Toc493496750)

[Pincer movements and litigation strategy 12](#_Toc493496751)

[Conclusion 13](#_Toc493496752)

# Introduction

As noted by Xhaferri in an earlier volume of the Journal, the Treaty of Lisbon, pursuant to Articles 290 and 291 TFEU, created a new legal regime governing the ‘delegation’ of rule-making powers to the European Commission that left many questions unanswered.[[1]](#footnote-1) Despite the adoption of the Comitology regulation (pursuant to Article 291 (3) TFEU)[[2]](#footnote-2) and an inter-institutional agreement on delegated acts (as such not required under Article 290 TFEU),[[3]](#footnote-3) 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.

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*),[[4]](#footnote-4) but also the question when rule-making ceases to be implementation and instead should be seen as supplementation (*Eures Network*);[[5]](#footnote-5) 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*);[[6]](#footnote-6) the question on the domaine reservé of the legislature (*SBC*, *Europol*, *Multiannual cod plan*);[[7]](#footnote-7) the question how the reference to ‘uniform conditions’ in Article 291 TFEU ought to be understood (*Spain v. Parliament and Council*)[[8]](#footnote-8) and the question whether Articles 290 and 291 TFEU form an exhaustive system of executive rule-making (*Short-selling*).[[9]](#footnote-9) These last two actions were brought by Member States while the others resulted from inter-institutional conflicts. Since 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.

# 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 scrutinized. 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. At a lower level, acts adopted pursuant to a delegated power may be scrutinized in light of the enabling act and the constitution (i.e. the EU Treaties). Looking at the US experience shows how the focus of judicial scrutiny has shifted from the first to the second level. In US constitutional law, the nondelegation doctrine prohibits the legislature from delegating its legislative powers. Since the 1930’s 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 u*ltra vires* rather than the legislative provision pursuant to which delegated powers are exercised.[[10]](#footnote-10)

This US experience suggests that we should perhaps first focus on those cases where an executive act, adopted pursuant to delegated powers, is scrutinized. For the EU this means that the jurisprudence of the General Court merits special attention, since under the EU’s judicial system that is where actions against decisions by the Commission are typically brought. Incidentally, the Lisbon Treaty facilitated such judicial scrutiny by broadening access to the EU judge for natural and legal persons.[[11]](#footnote-11) 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 which *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 the present 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*.”[[12]](#footnote-12) 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 since it provides that the objectives, content, scope and duration of a delegation of power shall be explicitly defined in the legislative act. Both requirements apply to both the legislature and the Commission but they cannot be subsumed by each other: (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.[[13]](#footnote-13) As noted by Kollmeyer however, the specificity requirement has often been neglected in the Court’s past jurisprudence when it was asked to scrutinize delegation clauses.[[14]](#footnote-14)

# 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 scrutinized 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.

## Dyson v. Commission

In *Dyson v. Commission*, the Commission had adopted a delegated regulation supplementing Directive 2010/30 on energy labelling of vacuum cleaners. The Directive imposed an obligation on suppliers to provide information regarding energy consumption to consumers in the form of both an energy fiche and label and the Commission was to flesh out the detail of this in delegated acts. Dyson[[15]](#footnote-15) challenged the Commission’s subsequent delegated regulation on a number of grounds, the important one here being that the Commission lacked the competence to adopt the regulation in so far as the latter prescribed vacuum cleaners to be tested with empty receptacles.[[16]](#footnote-16) According to Dyson, this conflicted with the basic legislative directive which prescribes that consumers ought to be given information “*on the consumption of energy […] during use*.”[[17]](#footnote-17) According to Dyson this meant that (partially) filled receptacles should be used for testing. Before dealing with the pleas raised by Dyson, the General Court 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 Union Courts typically[[18]](#footnote-18) only perform a marginal review.[[19]](#footnote-19) 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*.”[[20]](#footnote-20)

Dyson lodged an appeal before the Court of Justice which in turn observed that in its action before the General Court “*Dyson essentially complained that in adopting the regulation the Commission had disregarded an essential element of the enabling act by taking as the method of calculating the energy performance of vacuum cleaners a method based on tests with an empty receptacle, whereas Article 10 of Directive 2010/30 required the method to reflect normal conditions of use*.”[[21]](#footnote-21) Although Dyson had indeed argued that the Commission had exceeded its competence, it had not framed its plea in constitutional terms linked to Article 290 TFEU. The argument was only put in constitutional terms by the Court of Justice’s reformulation. More importantly then, the Court of Justice observed that the General Court had committed an error of law by applying the Courts’ established jurisprudence on marginal judicial review of decisions adopted pursuant to a discretionary power to the legal question (allegedly) raised by Dyson, i.e. whether the Commission had “*infringed an essential element of the enabling act*.”[[22]](#footnote-22) The Court correctly pointed out that the question whether the Commission respects the limits of the powers delegated to it is different from the question of the discretion enjoyed by the Commission when exercising delegated powers.[[23]](#footnote-23) The former question indeed precedes the latter and cannot be left to a marginal review by the Union judge. Accepting a discretion on the part of the Commission to interpret the mandate granted by the EU legislature would even violate the institutional balance because it would detract from the EU legislature’s prerogative to define that mandate under Article 290 TFEU.

The Court of Justice then continued by addressing Dyson’s original plea from a constitutional point of view: in adopting the delegated regulation, the Commission could only supplement (or amend) the Directive on its non-essential elements. Subsequently, according to the Court, it needed to 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*.”[[24]](#footnote-24) 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.[[25]](#footnote-25) Since the state of the proceedings did not permit it to give final judgment itself, the Court referred the case back to the General Court.

## DK Recycling und Roheisen

In *DK Recycling und Roheisen*, the applicant, a German company, challenged the Commission’s refusal to authorize 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 which are reduced yearly for the entire EU.[[26]](#footnote-26) The directive further provides that part of the allowances are auctioned by the Member States while 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 implementing 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[[27]](#footnote-27) pursuant to the regulatory procedure with scrutiny (PRAC).[[28]](#footnote-28) 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 who 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 case of ‘undue hardship’ resulting from the allowance system in so far 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 decisions before the General Court, the latter concurred with the Commission in that the EU framework, i.e. 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 case of undue hardship.[[29]](#footnote-29) Yet, the applicants also invoked an exception of illegality against Commission Decision 2011/278 in so far as the Commission had failed to provide for a hardship clause in that Decision. Of course, this plea raised a question of constitutional nature, to wit whether, in the first place, the legislative directive had left the necessary scope to the Commission for including such a clause in its Decision.

On this the General Court observed, without referring back to the second comitology decision which defines the scope of application of the PRAC,[[30]](#footnote-30) that the Commission may supplement the legislative directive in so far as it does not amend the directive’s essential elements. The General Court then found that the Commission could have included a hardship clause while respecting this limit since (i) any additional allowances resulting from such a clause would be exceptional and would not undermine the directive’s general schema and because (ii) the Commission had been granted a certain discretion by the legislature to determine the specific rules for granting free allowances.[[31]](#footnote-31) Ultimately this finding did not advance the applicant’s cause, since the General Court equally found that while the Commission could have inserted a hardship clause in Decision 2011/278 it did not commit a manifest error of assessment in not doing so.

In the appeal brought by the applicant before the Court of Justice the Commission essentially requested a substitution of the grounds 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,[[32]](#footnote-32) another post-Lisbon case involving the pre-Lisbon PRAC, in which it found that ‘political choices’ are to be made by the EU legislature and that, as a result, when the Commission adopts implementing, (in the pre-Lisbon) sense, measures it cannot amend formal legislation on its essential elements.[[33]](#footnote-33)

In *SBC* the Court equally found that the identification of the essential elements of legislation must be based on objective factors amenable to judicial review, similarly to the test to determine the legal basis of an EU measure, and that this identification should take into account the characteristics and particularities of the domain concerned.[[34]](#footnote-34) Applied *in casu*, 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 not jeopardize economic development, employment and the preservation of the internal market.[[35]](#footnote-35) 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. Thus, the Court noted that when the Commission adopted Decision 2011/278 it had to ensure that the fully harmonized and sectoral (cf. supra) rules distorted competition in the internal market as minimally as possible. 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’*.”[[36]](#footnote-36)

The Court’s reading of Directive 2003/87, in so far as it prohibits the Commission from providing for a hardship clause, then evidently raises the question whether the Directive complies with EU primary law (in the first place the Charter) but this question need not be answered since the applicant raised an exception of illegality against the directive only for the first time before the Court, rather than initially before the General Court.[[37]](#footnote-37)

## Czech Republic v. Commission

In *Czech Republic v. Commission* the legality of two Delegated Regulations supplementing the 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 to allow maximal efficient use of road infrastructure.[[38]](#footnote-38) The Delegated Regulations laid down further rules governing the provisions of information to the users of the road network and parking places.[[39]](#footnote-39)

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, and contrary to the Court of Justice’s subsequent clarification in *Visa reciprocity*,[[40]](#footnote-40) the General Court observed that the Commission was granted a discretionary power, since “*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*.”[[41]](#footnote-41) While 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 which 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.[[42]](#footnote-42) 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), while Article 6 provided in “*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.[[43]](#footnote-43) Crucially, it additionally followed from this, the General Court noted, that such a requirement did not touch on the essential elements of directive either.[[44]](#footnote-44)

In its appeal before the Court of Justice, Czechia i.a. argued that the General Court had infringed Article 290 TFEU when it found that the discretion which the Commission enjoys allowed it to impose the contested requirement on the Member States. Instead Czechia argued (again) that since Article 6 of the Directive does not explicitly foresee the establishment of independent supervisory bodies, the Commission could not have introduced such a requirement pursuant to a delegated act without violating Article 290 TFEU.

The Commission on the other hand argued 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*.”[[45]](#footnote-45) Of course, even at face value this is clearly erroneous since it ignores the specificity requirement in Article 290 TFEU. In light of this the Court of Justice found that also 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.[[46]](#footnote-46)

Referring to *Biocides*, *Visa Reciprocity* and *Connecting Europe Facility* the Court then recalled the function of a delegated act (viz. the adoption of rules coming within the regulatory framework as defined by the basic legislative act). To apply the specificity test, the Court went back to its pre-Lisbon jurisprudence noting that the “*Court’s case-law requires in particular that the definition of the power conferred is sufficiently precise, in that it must indicate clearly the limits of the power and must enable the Commission’s use of the power to be reviewed by reference to objective criteria fixed by the EU legislature*.”[[47]](#footnote-47) The Court subsequently took care to clarify that the requirement that the EU legislature defines the objectives, content, scope and duration of a delegation does not preclude the Commission from exercising discretionary powers.[[48]](#footnote-48) Just as in *Connecting Europe Facility* the Court referred back to the Commission’s own guidelines on delegated acts in which it noted that the legislature ought to describe the powers it wishes to delegate to the Commission explicitly and precisely. The Court concluded that “*the General Court interpreted the delegation of power […] solely from the point of view of its objectives, without satisfying itself that the content and scope of the delegated power were also defined, that definition being left by the General Court to the Commission’s discretion*.”[[49]](#footnote-49)

The Czech Republic’s vindication on this point did not help it in the end, since the Court found that the Commission had also specified the content and scope of the delegation as defined in the legislative directive.[[50]](#footnote-50)

This left the question whether the requirement to set up a supervisory body could be qualified as an essential element which could only be imposed by the formal legislature in the Directive as Czechia claimed. On this issue, the Court again referred to its *SBC* ruling and also to its findings in *DK Recycling und Roheisen* discussed above. In light of this case law, the Court declared that the General Court had erred when it dismissed Czechia’s argument by noting that since it had already found that the contested requirement could be qualified as an organizational provision allowed by Article 6 of the Directive, the essentiality requirement was also met. The Court rightly noted that the question whether the contested provision touches on an essential element is a different question from whether the provisions of a delegated act are in compliance with the specificity requirement of Article 290 TFEU. Again however this did not advance Czechia’s case since 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 since under the Commission’s delegated regulations the supervisory bodies’ powers are limited to collecting information and drawing up reports.[[51]](#footnote-51) In addition, market operators are not significantly affected in their rights since the Delegated Regulations merely required them to provide their identification details, a description of the information service they provide, and declarations of compliance.[[52]](#footnote-52)

# 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 characterized, to the disappointment of some,[[53]](#footnote-53) by the Court of Justice 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 present cases since they raised issues at a different, lower, level (cf. supra): the actual exercise by the Commission of a delegated power had to be scrutinized, 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.

## Testing the essentiality requirement – top down and bottom up approaches

Firstly, the Court’s useful clarification of its test in *SBC* should be noted. In that case, the Court observed for the first time that identifying the essential elements of legislation is subject to an ‘objective’ assessment which is subject to judicial scrutiny and which is therefore not simply in the hands of the legislature.

*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.[[54]](#footnote-54) The Court tied this to its established jurisprudence by noting that the ‘fundamental guidelines of EU policy’[[55]](#footnote-55) are to be determined taking into account “*the characteristics and particularities of the domain concerned*.”[[56]](#footnote-56) Issues like human rights are always to be considered as fundamental (at the abstract level) but even more so in an areas coming under Justice and Home Affairs (like external border control; at the level of the domain concerned) compared to for instance the common agricultural policy.[[57]](#footnote-57) 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.[[58]](#footnote-58) *Czech Republic v. Commission* and *DK Recycling und Roheisen* further illustrate that while 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 the basic legislative act.

In *DK Recycling und Roheisen* both the Court and General Court agreed on rejecting the action albeit on different grounds. The General Court did so, finding that the Commission had the faculty but not the obligation to include a hardship clause while the Court found that the possibility to include such a clause simply did not exist and this because the Commission would otherwise alter the essential elements of the Directive. Both Courts identified 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.[[59]](#footnote-59) 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 harmonized on a sectoral basis.[[60]](#footnote-60) 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*.”[[61]](#footnote-61)

While 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.[[62]](#footnote-62) In its assessment, the Court followed a top down approach (starting from the legislative act), since 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.[[63]](#footnote-63) Instead, the Court would 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.[[64]](#footnote-64)

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, specifically the requirement which it imposed on the Member States 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 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 purely relying on the executive act. This in turn would suggest that certain requirements are inherently unpolitical, i.e. do not require political choices to be made. While this may well be the case, a more standardized 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.

## Specificity vs. 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. The General Court had made a direct link between the two. In essence it found that the Commission had respected its mandate since 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).[[65]](#footnote-65) It then noted that because the Commission “*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*.”[[66]](#footnote-66) The Court instead neatly distinguished the two, albeit to come to the same conclusion as the General Court: the Commission had not touched the essential elements of the Directive. To further illustrate the relation between the two requirements, we may imagine some alternative measures which 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, etc.). Arguably such measures might still fit the content, scope and objectives of the legislative mandate and therefore pass the specificity test but since they would entail political choices to be made, they would fail the essentiality test.

It is remarkable in this regard that the Court itself in *Dyson* confuses the two tests again.[[67]](#footnote-67) As noted, 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, i.e. 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*.”[[68]](#footnote-68) However, this question misses the point. That the information must relate to consumption when appliances are *in use* is explicitly foreseen in the Directive itself. 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. Next, the Court found that it was indeed an essential element,[[69]](#footnote-69) 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 which 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*.”[[70]](#footnote-70) It is argued here however that the Court should actually have tested the Commission’s act in 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 distorted this objective by prescribing that tests should be conducted with empty receptacles (resulting in unrealistic information on consumption).

On this point, the Court seems still on a learning curve following the entry into force of the Treaty of Lisbon which codified the essentiality and specificity requirement for the first time in primary law. While 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.[[71]](#footnote-71) It should be clear however that the Court’s judicial scrutiny post-Lisbon should follow more rigorously the framework set out in Article 290 TFEU.

## 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 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,[[72]](#footnote-72) 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) 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. This 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.

The judgment of the General Court in *DK Recycling und Roheisen* confirms the above, given that it confirmed that the Commission had a choice to insert (or not) a hardship clause, since 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.

## 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*.[[73]](#footnote-73) In these cases the applicants limited themselves to challenging the legality of the Commission’s executive act in light of the legislative mandate. However, such a one-sided approach does not make 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 sufficiently precisely defined the objectives, content, scope and duration of the delegation. As a result, and in military parlance, litigants are well-advised not the limit themselves to a frontal attack on the legality of a Commission delegated act, since such an attack allows the Court to limit themselves in scrutinizing the contested act in light of the legislative mandate. Instead, to maximize their chances, litigants should pre-empt the possibility of a safe retreat in the legislative mandate by putting in place a pincer movement, i.e. consistently raising an exception of illegality of the legislative mandate in the alternative to the main claim.[[74]](#footnote-74)

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 that 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, since the applicants had not raised this point before the General Court, 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 since the latter allowed the Commission to adopt ‘specifications on organizational provisions that describe procedural obligations’ and 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*.”[[75]](#footnote-75) Although the Court did not explicitly rely on the definition of a specification (specifically 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.

# 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. 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. However the latter type of cases is also greatly instrumental in furthering our understanding of 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 a remarkable phenomenon whereby 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 (only when exercising it), that a structured approach for testing the essentiality requirements 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 in a delegated power for the Commission in their claim.

1. Zamira Xhaferri, Delegated Acts, Implementing Acts, and Institutional Balance Implications Post-Lisbon, 20 *Maastricht Journal of European and Comparative Law* (2013), pp. 557-575. [↑](#footnote-ref-1)
2. Regulation 182/2011 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, O.J. 2011 L 55/13. [↑](#footnote-ref-2)
3. An original Common Understanding 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 IIA on Better Law-Making, O.J. 2016, L 123/1. [↑](#footnote-ref-3)
4. ECJ 18 March 2014, Case C-427/12, *Commission* v. *Parliament and Council*, EU:C:2014:170; ECJ 16 July 2015, Case C-88/14, *Commission* v. *Parliament and Council*, EU:C:2015:499. [↑](#footnote-ref-4)
5. ECJ 15 October 2014, Case C-65/13, *Parliament* v. *Commission*, EU:C:2014:2289. [↑](#footnote-ref-5)
6. ; ECJ 17 March 2016, Case C-286/14, *Parliament* v. *Commission*, EU:C:2016:183. [↑](#footnote-ref-6)
7. ECJ 5 September 2012, Case C-355/10, *Parliament* v. *Council*, EU:C:2012:516; ECJ 16 October 2015, Case C-363/14, *Parliament* v. *Council*, EU:C:2015:579; ECJ 1 December 2015, Joined cases C-124 &125/13, *Parliament and Commission* v. *Council*, EU:C:2015:790. [↑](#footnote-ref-7)
8. ECJ 5 May 2015, Case C-146/13, *Spain* v. *Parliament and Council*, EU:C:2015:298. [↑](#footnote-ref-8)
9. ECJ 22 January 2014, Case C-270/12, *United Kingdom* v. *Council and Parliament*, EU:C:2014:18. [↑](#footnote-ref-9)
10. See US Supreme Court, *Mistretta* v. *US*, 488 US 361 (1989), p. 373 at footnote 7; See Jacob Loshin & Aaron Nielson, Hiding Nondelegation in Mouseholes, 62 *Administrative Law Review* (2010), pp. 57-59. [↑](#footnote-ref-10)
11. 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 which are of direct concern to them and which do not entail implementing measures. For a discussion, see Steve Peers and Marios Costa, ‘Judicial Review of EU acts after the Treaty of Lisbon’, 8 *European Constitutional Law Review* (2012) pp. 82-104. [↑](#footnote-ref-11)
12. ECJ 17 December 1970, Case 25/70, *Köster*, EU:C:1970:115, para 6. [↑](#footnote-ref-12)
13. 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 Herwig Hofmann, Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality, 15 *European Law Journal* (2009), pp. 488-489. [↑](#footnote-ref-13)
14. Daniel Kollmeyer, *Delegierte Rechtsetzung in der EU - Eine Analyse der Art. 290 und 291 AEUV*, Baden-Baden, Nomos, 2015, pp. 264-265. Kollmeyer refers to the *Smoke Flavourings* case as an exception but even in this case it should be noted that the Court’s assessment of the essentiality and specificity requirements was necessarily intertwined with and subordinate to the actual question posed to it by the UK, i.e. whether Article 114 TFEU was the proper legal basis of the legislative act in question. See Case C-66/04, *UK v. Parliament and Council*, ECLI:EU:C:2005:743, paras 48-49. [↑](#footnote-ref-14)
15. 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 challenge the regulation since the Lisbon Treaty has broadened the locus standi of private parties under Article 263 TFEU (cf. supra). [↑](#footnote-ref-15)
16. 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 GC 11 November 2015, 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. [↑](#footnote-ref-16)
17. 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, O.J. 2010 L 153/1. The Directive has now been replaced by Regulation 2017/1369, O.J. 2017 L 198/1. [↑](#footnote-ref-17)
18. See Pascal Gilliaux, 'L’intensité du contrôle de la légalité par les juridictions communautaires', 17 *Journal de droit européen* (2009), p. 43. [↑](#footnote-ref-18)
19. GC 11 November 2015, Case T-544/13, *Dyson v. Commission*, EU:T:2015:836, paras 38-39. [↑](#footnote-ref-19)
20. ECJ 11 May 2017, Case C-44/16 P, *Dyson v. Commission*, EU:C:2017:357, para. 47. [↑](#footnote-ref-20)
21. *Ibid.*, para. 50. [↑](#footnote-ref-21)
22. *Ibid.*, para. 51. [↑](#footnote-ref-22)
23. *Ibid.*, para. 52. [↑](#footnote-ref-23)
24. *Ibid.*, para. 60. [↑](#footnote-ref-24)
25. See *supra* n 16. [↑](#footnote-ref-25)
26. See Directive 2003/87 of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community, O.J. 2003 L 275/32. [↑](#footnote-ref-26)
27. Commission Decision 2011/278 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87, O.J. 2011 L 130/1. [↑](#footnote-ref-27)
28. Directive 2003/87 is one of those legislative acts which still refer to the PRAC and which has not been updated yet to align with the Lisbon Treaty’s reform of comitology. See Merijn Chamon, 'Dealing with a zombie in EU law: the regulatory comitology procedure with scrutiny', 22 *Maastricht Journal of European and Comparative Law* (2016), pp. 721-723. The Commission has propose to align the Directive’s references to the PRAC with Article 290 TFEU in COM (2015) 337. [↑](#footnote-ref-28)
29. GC 26 September 2014, Case T‑630/13, *DK Recycling und Roheisen v. Commission*, EU:T:2014:833, paras 43-45. [↑](#footnote-ref-29)
30. This is remarkable, since 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 to do this in Netherlands v. Commission, see Joined Cases T-261/13 and T-86/14 *Netherlands v. Commission*, EU:T:2015:671. [↑](#footnote-ref-30)
31. GC 26 September 2014, Case T‑630/13, *DK Recycling und Roheisen v. Commission*, EU:T:2014:833, para. 50. [↑](#footnote-ref-31)
32. For a discussion of this case see Maarten den Heijer and Eljalill Tauschinsky, 'Where Human Rights Meet Administrative Law: Essential Elements and Limits to Delegation', 9 *European Constitutional Law Review* (2013), pp. 513-533; Merijn Chamon, 'How the concept of essential elements of a legislative act continues to elude the Court', 50 *Common Market Law Review* (2013), pp. 849-860. [↑](#footnote-ref-32)
33. Case C-540/14 P, *DK Recycling und Roheisen v. Commission*, EU:C:2016:469, para. 47. [↑](#footnote-ref-33)
34. Case C-355/10, *Parliament v. Council*, ECLI:EU:C:2012:516, paras 67-68. As noted by den Heijer and Tauschinsky, the identification of the essential elements of legislation had been casuistic in the Court’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 Maarten den Heijer and Eljalill Tauschinsky, *supra* n 32, pp. 524-525. [↑](#footnote-ref-34)
35. Case C-540/14 P, *DK Recycling und Roheisen v. Commission*, EU:C:2016:469, para. 49. [↑](#footnote-ref-35)
36. *Ibid.*, para. 55. [↑](#footnote-ref-36)
37. See Opinion of AG Mengozzi in 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. 72. [↑](#footnote-ref-37)
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, O.J. 2010 L 207/1. [↑](#footnote-ref-38)
39. Commission Delegated Regulation (EU) 885/2013 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, O.J. 2013 L 247/1; Commission Delegated Regulation (EU) 886/2013 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, O.J. 2013 L 247/6. [↑](#footnote-ref-39)
40. The Court in *Visa reciprocity* 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. [↑](#footnote-ref-40)
41. See Joined Cases T-659/13 and T-660/13, *Czech Republic v. Commission*, ECLI:EU:T:2015:771, para. 47. [↑](#footnote-ref-41)
42. *Ibid*., para. 58. [↑](#footnote-ref-42)
43. *Ibid*., paras 62-65. [↑](#footnote-ref-43)
44. *Ibid*., para. 72. [↑](#footnote-ref-44)
45. Case C-696/15 P, *Czech Republic v. Commission*, EU:C:2017:595, para. 38 (emphasis added). [↑](#footnote-ref-45)
46. *Ibid.*, paras 46-48. [↑](#footnote-ref-46)
47. *Ibid.*, para. 49. [↑](#footnote-ref-47)
48. *Ibid.*, para. 52. [↑](#footnote-ref-48)
49. *Ibid.*, para. 55. [↑](#footnote-ref-49)
50. *Ibid.*, paras 59-60. [↑](#footnote-ref-50)
51. *Ibid.*, para. 86 [↑](#footnote-ref-51)
52. *Ibid.* [↑](#footnote-ref-52)
53. See Daniel Kollmeyer, *supra* n 14, p. 357; Dominique Ritleng, La nouvelle typologie des actes de l'Union : Un premier bilan critique de son application, 51 *Revue trimestrielle de droit européen* (2015), pp. 17-19. On the other hand, authors such as Van der Mei and Bradley have been (more) congenial to the Court’s jurisprudence on Articles 290-291 TFEU, see Anne Pieter van der Mei, Delegation of rulemaking powers to the European Commission post-Lisbon, 12 *European Constitutional Law Review* (2016), pp. 543-548; Kieran Bradley, Delegation of Powers in the European Union: Political Problems, Legal Solutions?, in: Bergström & Ritleng, *Rulemaking by the European Commission – The New System for Delegation of Powers*, Oxford, OUP, 2016, pp. 78-81. [↑](#footnote-ref-53)
54. See *supra* n 34. [↑](#footnote-ref-54)
55. In *Germany v. Commission* the Court 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. [↑](#footnote-ref-55)
56. Case C-355/10, *Parliament v. Council*, EU:C:2012:516, para. 68. In *Vreugdenhil* the Court had 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. [↑](#footnote-ref-56)
57. Merijn Chamon, *supra* n 32, p. 853. [↑](#footnote-ref-57)
58. Case C-363/14, *Parliament v. Council*, EU:C:2015:579. See also Merijn Chamon, 'Institutional balance and Community method in the implementation of EU legislation following the Lisbon Treaty', 53 *Common Market Law Review* (2016), p. 1512. [↑](#footnote-ref-58)
59. Case T‑630/13, *DK Recycling und Roheisen v. Commission*, EU:T:2014:833, para. 77; Case C-540/14 P, *DK Recycling und Roheisen v. Commission*, EU:C:2016:469, para. 49. [↑](#footnote-ref-59)
60. See Article 10a(1) of Directive 2003/87. [↑](#footnote-ref-60)
61. Case C-540/14 P, *DK Recycling und Roheisen v. Commission*, EU:C:2016:469, para. 55. [↑](#footnote-ref-61)
62. AG Mengozzi in his Opinion was more elaborate on this question. Just like the Court 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 AG 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*.” While the AG is undeniably right on the latter point, the finding that should have been proven (by the AG and the Court) is that exceptional free allowances granted on a case by case basis are per se incompatible with the objective of ensuring equal competition. See Opinion of AG Mengozzi in 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, paras 56 & 61. [↑](#footnote-ref-62)
63. Think of a hypothetical scenario in which the legislature sets out the substantive requirements which commercial banks need to respect, without explicitly setting out the procedural requirements. Based on a top down approach, it would 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). [↑](#footnote-ref-63)
64. This would have brought the Court’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, while the Court would have left this open. [↑](#footnote-ref-64)
65. 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) while another section (III.B) is dedicated to the ‘objectives, content and scope of the delegation’ without distinguishing between these three. See European Commission, Guidelines on Delegated Acts, SEC(2011) 855, pp. 15-17. Nettesheim notes that the content and scope components may overlap, see Martin Nettesheim, AEUV Art. 290 Delegation von Rechtssetzungsbefugnissen auf die Kommission, in: Grabitz, Hilf & Nettesheim (eds.) *Das Recht der Europäischen Union*, München, Beck, 61. EL April 2017, § 48. Kollmeyer goes as far 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 Daniel Kollmeyer, *supra* n 14, p. 268. [↑](#footnote-ref-65)
66. Joined Cases T-659/13 and T-660/13, *Czech Republic v. Commission*, ECLI:EU:T:2015:771, paras 72-73. [↑](#footnote-ref-66)
67. While 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 juge-rapporteurs were different. [↑](#footnote-ref-67)
68. Case C-44/16 P, *Dyson v. Commission*, EU:C:2017:357, para. 60 [↑](#footnote-ref-68)
69. *Ibid.*, para. 63. [↑](#footnote-ref-69)
70. *Ibid*., para. 68. [↑](#footnote-ref-70)
71. For instance AG 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 AG Kokott in Case C-403/05, *Parliament v. Commission*, EU:C:2007:290, paras 64-83. [↑](#footnote-ref-71)
72. See also Opinion of AG Jääskinen in Case C-270/12, *UK v. Parliament and Council*, EU:C:2013:562, para. 78. [↑](#footnote-ref-72)
73. Another interesting point on litigation strategy is Dyson not framing its plea in constitutional terms but instead the Court rephrasing it this way. Given the Court’s emphasis on an absence of executive discretion in interpreting a 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. [↑](#footnote-ref-73)
74. 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 Koen Lenaerts, Ignace Maselis, Kathleen Gutman, *EU Procedural Law*, Oxford, OUP, 2014, pp. 448-450. [↑](#footnote-ref-74)
75. European Commission, Guidelines on Delegated Acts, SEC (2011) 855, p. 16. [↑](#footnote-ref-75)