SBC (C-355/10) vs Europol (C-363/14): What does the Court do with fundamental rights and essential elements?
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A little while ago, the judgement in case C-355/10 (Schengen Borders Code (SBC)) received much attention. In this judgement the Court appeared to find an act’s interference with human rights to be an objective factor determining whether it regulated ‘essential elements’ – something that non-legislative acts must not do under Union law. Last week’s judgement in case C-363/14 (Europol) calls into question that case law. Indeed, it appears to be an almost literal reversal of the argumentation of the Court in SBC.

I am not very concerned here with the facts of these cases. It is interesting, but an aside, that both involved EU executive agencies – Frontex in the SBC case and Europol in the Europol case. It is even more interesting that in both cases it was the Council that adopted the implementing measure – but this is likewise not the topic I would like to raise here. What I am concerned with is how the Court understands the essential elements doctrine as a bar to what the institutions can do in delegated or implementing acts.

This essential elements doctrine states that the EU must adopt matters of political salience (i.e. essential elements) through legislative acts and may not make salient political choices through delegated and implementing acts (which would then happen largely without the involvement of Parliament). It is a bar to circumventing the legislative procedure through outsourcing important choices to more ‘administrative’ rules.

In the SBC case the Court held that “provisions which, in order to be adopted, require political choices falling within the responsibilities of the EU legislature cannot be delegated” (para 65). It found it “important to point out that provisions on conferring powers of public authority […] mean that fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the EU legislature is required”(para 77).

The case introduces the rule that it is an objective matter which political choices constitute ‘essential elements’ and is largely thought to rule that interference with human rights is generally connected to essential elements – although it is admittedly somewhat vague on what this connection precisely is.
In the *Europol* case the Court now announces that “even if a decision […] involves certain compromises with technical and political dimensions, such a decision cannot be regarded as requiring political choices falling within the responsibility of the EU legislature” (para 51). And it goes on: “The Parliament’s argument that an amendment to the list is liable to have serious consequences for the fundamental rights of citizens cannot change that analysis” (para 52).

Admittedly, there is a case to be made in that Council Implementing Decision 2014/269/EU (in question in the *Europol* case) was less far going than Council Decision 2010/252/EU (the *SBC* code). In particular, the Court argues that the Europol decision puts enough safeguards in place so as not to let Council Implementing Decision 2014/269/EU amount to any real interference with fundamental rights. However, given that the *SBC* code also did not stand alone, but that there was a framework of numerous provisions in place further regulating how vulnerable persons were to be treated (many in international law), this difference appears relatively fragile.

In any case the difference in framing is the most notable difference between the two cases – not necessarily the outcome. In the *SBC* case, the Court placed high weight on the political nature of choices and on the fact that human rights were involved. In the *Europol* case, the Court summarily dismissed the argument of political salience and nonchalantly went over the fundamental rights claims.

There are many reasons to find this unfortunate. Reasons of coherence of law (the Court in *Europol* should take better care to explain how *SBC* was followed or overruled), reasons of the protection of fundamental rights and the recognition of their relevance, and last but not least reasons of clarity of the essential elements doctrine. This doctrine is an important instrument in delimiting the legislative from the non-legislative sphere of regulation and in safeguarding the institutional balance in the EU.

In the end, we will see which case has the greater staying power. Seeing how the *SBC* case was decided by a Grand Chamber, and the *Europol* case was decided by a normal five-judge panel, there may be hope that it is the *SBC* case that will remain with us.

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