Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 7 June 2016*

Joined Cases C-14/15 and C-116/15

European Parliament
v

Council of the European Union

(Action for annulment — Legal basis — Police and judicial cooperation in criminal matters — Council Decisions 2014/731/EU, 2014/743/EU, 2014/744/EU and 2014/911/EU — Automated exchange of information — Registration of vehicles — Dactyloscopic data — Decision-making procedure — Impact of the entry into force of the Treaty on the Functioning of the European Union — Transitional provisions — Article 9 of Protocol No 36 — Concepts of 'basic acts' and 'implementing measures' — Secondary legal basis — Consultation of the Parliament — Initiative of a Member State or of the Commission — Voting rules)

1. The present actions for annulment brought by the European Parliament concern four decisions** ('the contested decisions') pertaining to EU cooperation in the area of police and criminal justice (former Title VI of the EU Treaty; 'the third pillar') that the Council has adopted after the Treaty of Lisbon entered into force. As is well known, the entry into force of that treaty had an unprecedented effect on the institutional and legal landscape for the adoption of measures concerning the third pillar: with the process of 'Lisbonisation', which that treaty brought about, the third pillar was incorporated into the supranational EU framework.

2. To ensure a smooth transition from largely intergovernmental decision-making to a new EU legal framework in that field, Protocol No 36 on transitional measures was annexed to the Treaties. The contested decisions were adopted on the basis of an act falling within the scope of Article 9 of Protocol No 36.*** In accordance with that provision, the legal effects of measures adopted under the third pillar prior to the entry into force of the Treaty of Lisbon are to be preserved until the relevant acts are repealed, annulled or amended.

* Original language: English.

** Council Decision 2014/731/EU of 9 October 2014 on the launch of automated data exchange with regard to Vehicle Registration Data (VRD) in Malta (OJ 2014 L 302, p. 56), Council Decision 2014/743/EU of 21 October 2014 on the launch of automated data exchange with regard to vehicle registration data (VRD) in Cyprus (OJ 2014 L 308, p. 100), Council Decision 2014/744/EU of 21 October 2014 on the launch of automated data exchange with regard to Vehicle Registration Data (VRD) in Estonia (OJ 2014 L 308, p. 102) (Case C-14/15) and Council Decision 2014/911/EU of 4 December 2014 on the launch of automated data exchange with regard to dactyloscopic data in Latvia (OJ 2014 L 360, p. 28) (Case C-116/15).

*** Protocol on transitional provisions, annexed to the Treaties. Article 9 of that protocol is laid down under its Title VII, which concerns acts adopted on the basis of Titles V and VI of the pre-Lisbon version of the Treaty on European Union.

3. In recent cases, the Court has already resolved a number of fundamental issues that arise from the application of that transitional rule.**** Notwithstanding that fact and the close link that the present actions have with those cases, the actions brought by the Parliament also raise issues that the Court has not yet dealt with, such as the nature of the contested decisions in circumstances where those decisions appear to have been adopted pursuant to a 'hybrid' decision-making procedure and the lawfulness of such a procedure.

I – Legal framework

A – *Relevant Treaty provisions (prior to the Treaty of Lisbon)*

4. Article 34(2) EU provides:

'The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this Title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:

…

(c) adopt decisions for any other purpose consistent with the objectives of this Title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union. …'

5. Article 39(1) EU provides:

'The Council shall consult the European Parliament before adopting any measure referred to in Article 34(2)(b), (c) and (d). …'

B – *Protocol No 36*

6. Article 9 of Protocol No 36 provides:

'The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union.'

**** Judgments of 16 April 2015 in *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223; in *Parliament* v *Council*, C-540/13, EU:C:2015:224; 10 September 2015 in *Parliament* v *Council*, C-363/14, EU:C:2015:579; and 23 December 2015 in *Parliament* v *Council*, C-595/14, EU:C:2015:847.

C – Relevant decisions

1. Decision 2008/615/JHA*****

7. Article 1 of Decision 2008/615 states:

‘By means of this Decision, the Member States intend to step up cross-border cooperation in matters covered by Title VI of the Treaty, particularly the exchange of information between authorities responsible for the prevention and investigation of criminal offences. To this end, this Decision contains rules in the following areas:

(a) provisions on the conditions and procedure for the automated transfer of DNA profiles, dactyloscopic data and certain national vehicle registration data (Chapter 2);

…’

8. Chapter 6 of Decision 2008/615 sets out the general provisions on data protection in the context of information exchanges that take place on the basis of the decision.

9. Article 25(2) of Decision 2008/615 provides:

‘The supply of personal data provided for under this Decision may not take place until the provisions of this Chapter have been implemented in the national law of the territories of the Member States involved in such supply. The Council shall unanimously decide whether this condition has been met.’

10. Article 33 of Decision 2008/615 provides:

‘The Council, acting by a qualified majority and after consulting the European Parliament, shall adopt measures necessary to implement this Decision at the level of the Union.’

2. Decision 2008/616/JHA******

11. Article 20 of Decision 2008/616 provides:

‘1. The Council shall take a decision as referred to in Article 25(2) of Decision 2008/615/JHA on the basis of an evaluation report which shall be based on a questionnaire.

2. With respect to the automated data exchange in accordance with Chapter 2 of Decision 2008/615/JHA, the evaluation report shall also be based on an evaluation visit and a pilot run that shall be carried out when the Member State concerned has informed the General Secretariat in accordance with the first sentence of Article 36(2) of Decision 2008/615/JHA.

3. Further details of the procedure are set out in Chapter 4 of the Annex to this Decision.’

***** Council Decision of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ 2008 L 210, p. 1).

****** Council Decision of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ 2008 L 210, p. 12).

3. The contested decisions

12. Recitals 1 to 3 of the contested decisions, which were taken on the basis of Decision 2008/615 and Decision 2008/616, explain:

‘(1) According to [Protocol No 36], the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted prior to the entry into force of the Treaty of Lisbon are preserved until those acts are repealed, annulled or amended in implementation of the Treaties.

(2) Accordingly, Article 25 of Decision [2008/615] is applicable and the Council must unanimously decide whether the Member States have implemented the provisions of Chapter 6 of that Decision.

(3) Article 20 of Decision [2008/616] provides that decisions referred to in Article 25(2) of Decision [2008/615] are to be taken on the basis of an evaluation report based on a questionnaire. With respect to automated data exchange in accordance with Chapter 2 of Decision [2008/615], the evaluation report is to be based on an evaluation visit and a pilot run.’

13. Article 1 of Decision 2014/731 provides:

‘For the purposes of automated searching of vehicle registration data (VRD), Malta has fully implemented the general provisions on data protection of Chapter 6 of Decision [2008/615] and is entitled to receive and supply personal data pursuant to Article 12 of that Decision as from the day of the entry into force of this Decision.’

14. Article 1 of Decision 2014/743 provides:

‘For the purposes of automated searching of vehicle registration data (VRD), Cyprus has fully implemented the general provisions on data protection of Chapter 6 of Decision [2008/615] and is entitled to receive and supply personal data pursuant to Article 12 of that Decision as from the day of the entry into force of this Decision.’

15. Article 1 of Decision 2014/744 provides:

‘For the purposes of automated searching of vehicle registration data (VRD), Estonia has fully implemented the general provisions on data protection of Chapter 6 of Decision [2008/615] and is entitled to receive and supply personal data pursuant to Article 12 of that Decision as from the day of the entry into force of this Decision.’

16. Article 1 of Decision 2014/911 provides:

‘For the purposes of automated searching of dactyloscopic data, Latvia has fully implemented the general provisions on data protection of Chapter 6 of Decision [2008/615] and is entitled to receive and supply personal data pursuant to Article 9 of that Decision as from the day of the entry into force of this Decision.’

II – Procedure before the Court and forms of order sought

17. By written pleadings of 14 January and 6 March 2015, the Parliament brought the present actions for annulment under the second paragraph of Article 263 TFEU.

18. By order of the President of the Court of 8 April 2015, the two cases were joined for the purposes of the written and oral procedures and the judgment. By decisions of the President of the Court of 24 June 2015, the Federal Republic of Germany and the Kingdom of Sweden were granted leave to intervene in support of the Council in those two cases. Despite having been granted leave to intervene, the German Government has not presented observations in the present procedure.

19. By its actions, the Parliament claims that the Court should:

— annul the contested decisions;

— order the Council to pay the costs.

20. The Council contends — supported by the Swedish Government — that the Court should:

— dismiss the actions as unfounded as far as they relate to the first plea (legal basis) and the first part and the two first elements of the second part of the second plea (procedural requirements). As regards the third element of the second part of the second plea (consultation of the Parliament), the Council leaves that matter to the Court's determination;

— in the alternative, should the Court annul the contested decisions, maintain the effects of the contested decisions until they can be replaced by new decisions;

— order the Parliament to pay the costs.

21. Pursuant to Article 76(2) of the Rules of Procedure of the Court, no hearing has been held.

III – Analysis

A – *Preliminary observations*

22. In these actions for annulment, the Parliament contests the legality of the contested decisions adopted by the Council. Those decisions find, in essence, that certain Member States have implemented the general provisions on data protection laid down in Chapter 6 of Decision 2008/615 and authorise the reception and supply of data covered by Decision 2008/615 as from a specific date. Put simply, the practical consequence of the contested decisions is that the Member States concerned gain access to a system that enables exchange of information concerning DNA profiles, dactyloscopic data (fingerprints) and certain national vehicle registration data.*******

23. The Parliament claims, as its principal contention, that the Council has, in each case, used the wrong legal basis. In addition, it alleges that certain procedural requirements have been breached in the decision-making procedure leading to the adoption of those decisions.

24. The Council, for its part, considers that, in light of Article 9 of Protocol No 36, the contested decisions were adopted on the correct legal basis: Article 25(2) of Decision 2008/615. While contesting the majority of the arguments put forward by the Parliament related to procedural requirements, the Council concedes that it ought to have consulted the Parliament during the decision-making procedure.

******* That system was originally put in place by the so-called Prüm Treaty. Some of the provisions of that international treaty were later incorporated into EU law by Decision 2008/615.

25. To rule on the actions brought by the Parliament, the Court is called upon to determine, inter alia, the *nature* of the contested decisions, a point on which the parties disagree. That question has important ramifications on the way the plea of illegality, laid down in Article 277 TFEU and put forward by the Parliament in relation to Article 25(2) of Decision 2008/615, as well as the second plea alleging breach of procedural requirements are to be dealt with.

B – *Legal basis*

26. Under the first plea, the Parliament alleges that the Council used the wrong legal basis for adopting the contested decisions. In support of its claim, the Parliament relies upon several arguments.

27. On the one hand, it argues that the Council ought to have used a legal basis set out in the FEU Treaty. This is because, according to the Parliament, the contested decisions are basic acts, on a par with Decision 2008/615, and as such should have been adopted pursuant to the same legal basis as that decision, as amended by the Treaty of Lisbon. In its view, Article 82(1)(d) and Article 87(2)(a) TFEU ought to have been employed.

28. On the other hand, that institution considers that, in any event, if it were considered that the contested decisions are not basic acts but measures designed to implement Decision 2008/615, Article 25(2) of Decision 2008/615 constitutes an unlawful secondary legal basis. This is because, in its view, that provision provides for a decision-making procedure that is incompatible with primary law (Article 34(2)(c) EU read in conjunction with Article 39(1) EU) in force at the time of adoption of Decision 2008/615.

29. Before concluding on the first plea, it is necessary to address two other issues. The first one relates to Article 9 of Protocol No 36, the second to the nature of the contested decisions.

1. Article 9 of Protocol No 36

30. In the context of the first plea, the Parliament argues that Article 9 of Protocol No 36 covers only substantial acts, and not acts laying down procedural requirements for adopting other measures. In the Parliament's submission, Article 25(2) of Decision 2008/615 could not, therefore, form an independent legal basis for the contested decisions.

31. That matter has already been settled by the Court. The Court has held that interpreting Article 9 of Protocol No 36 restrictively would deprive it of any practical effect. This would be so if it were accepted that that provision merely implies that acts in the field of police and judicial cooperation in criminal matters are not automatically repealed following the entry into force of the Treaty of Lisbon.******** Indeed, a point that should not be overlooked is that Article 9 of Protocol No 36 must be understood as being intended, amongst other things, to ensure that acts adopted in the context of police and judicial cooperation in criminal matters may continue to be applied effectively, notwithstanding the changes that have taken place in the institutional framework for such cooperation.********* Accordingly, acts duly adopted on the basis of the EU Treaty before the entry into force of the Treaty of Lisbon that lay down rules for the adoption of other measures continue, therefore, to produce their legal effects.**********

******** Judgment of 16 April 2015 in *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 56.

********* Judgment of 16 April 2015 in *Parliament* v *Council*, C-540/13, EU:C:2015:224, paragraph 44.

********** Judgment of 16 April 2015 in *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 57.

32. Hence, pursuant to Article 9 of Protocol No 36, the effect of Article 25(2) of Decision 2008/615 (and, for that matter, Article 33 of Decision 2008/615) is maintained even after the repeal of Article 34 EU (on the basis of which Decision 2008/615 was adopted). That also means that the procedural requirements laid down in Article 25(2) (and Article 33) continue to exist and be effective, irrespective of the changes that have since taken place in the constitutional framework of the European Union.

33. Having said that, the question still remains whether the contested decisions are basic acts, as the Parliament argues, or implementing measures, as argued by the Council.

2. The nature of the contested decisions

34. The Parliament claims that the contested decisions are basic acts rather than implementing measures. In that regard, the Parliament points out that the procedure provided for by Article 25(2) of Decision 2008/615 requires unanimity in the Council to adopt the contested decisions. At the time of the adoption of Decision 2008/615, Article 34(2)(c) EU laid down two distinct procedures for adopting basic acts and implementing measures: only basic acts required unanimity in the Council. In addition, the Parliament considers indicative the fact that Article 33 of Decision 2008/615 includes a separate basis for adopting implementing measures. Despite the existence of that provision, the Council chose not to adopt the contested decisions on that basis. Bearing that choice in mind, the contested decisions cannot be regarded as implementing measures, but rather, as basic acts on a par with Decision 2008/615. In addition, the headings of the contested decisions do not mention the word 'implementing', which would also indicate that the contested decisions are in fact basic acts. According to the Parliament, the contested decisions supplement Decision 2008/615 as regards the date from which a Member State is allowed to access the system of automated data sharing.

35. The Council argues that Article 25(2) of Decision 2008/615 enables it to exercise implementing powers and that the contested decisions therefore constitute implementing measures. The Council considers that the wording of Article 25(2) and the fact that the contested decisions have as their sole purpose to implement the objectives of Decision 2008/615 clearly indicate that the contested decisions constitute implementing measures. In the Council's view, the Parliament's arguments disregard the Court's settled case-law according to which the legal basis determines the procedure to be followed, and not the reverse.

36. As I shall explain further below, I am not convinced by the arguments set forth by the Parliament.

37. The Court's case-law is useful for understanding the demarcation between 'basic acts' and 'implementing measures'. Basic acts belong to the prerogative of the legislature, because they contain rules essential to the subject matter in question and, in that sense, require political choices. Such essential rules may not be delegated.********** The case-law also tells us that those essential elements must be determined on the basis of objective factors open to judicial review and take into account the characteristics and particularities of the field concerned.********** Also, the legislative context should be taken into consideration.**********

********** Judgment of 5 September 2012 in *Parliament* v *Council*, C-355/10, EU:C:2012:516, paragraphs 63 to 65 and the case-law cited.

********** Judgment of 5 September 2012 in *Parliament* v *Council*, C-355/10, EU:C:2012:516, paragraphs 67 and 68. See also judgments of 6 May 2014 in *Commission* v *Parliament and Council*, C-43/12, EU:C:2014:298 paragraph 29; and 22 October 2013 in *Commission* v *Council*, C-137/12, EU:C:2013:675, paragraph 52 and the case-law cited.

********** Judgment of 8 September 2009 in *Commission* v *Parliament and Council*, C-411/06, EU:C:2009:518, paragraphs 64 and 65.

38. The recitals of Decision 2008/615 indicate that its objective is to incorporate the substance of the provisions of the Prüm Treaty********** into the legislative framework of the European Union. More particularly, that decision is intended to improve the exchange of information between the competent authorities of the Member States for the purposes of detecting and investigating criminal offences.

39. Article 25(2) of Decision 2008/615 establishes that the supply of personal data may not take place until data protection provisions are implemented in national law and the Council unanimously decides concerning every Member State and every category of data exchanged (DNA profiles, dactyloscopic data, vehicle registration data) whether this condition has been met. According to Article 20 of Decision 2008/616, the Council does so on the basis of an evaluation report which is prepared by experts from the already operational Member States. The report is based on a questionnaire, an evaluation visit and a pilot run of the relevant database. On the basis of that report, it can be concluded whether the Member State concerned has established a data protection system and technical and legal requirements for making automated searches and obtaining data from other Member States, and whether its database is compatible with the databases of other Member States.

40. In that light, the contested decisions in essence (i) find that the Member States in question have successfully completed the preliminary assessment phase, as specified in Article 20 of Decision 2008/616 and (ii) on the basis of that finding, allow those Member States access to the system of automated data sharing as from a specific date.

41. While the contested decisions constitute a necessary step before any exchange of information can take place, that does not, however, mean that they constitute basic acts similar to Decision 2008/615 itself. In my view, the content of the contested decisions cannot be said to have an impact on the policy choices involved in putting in place a system for the exchange of information.

42. Furthermore, as the Council correctly points out, it is the legal basis that determines the procedure to be followed, and not the other way around.********** In that sense, I am not convinced that far-reaching conclusions regarding the nature of the contested decisions can be drawn from the procedure prescribed in Article 25(2) of Decision 2008/615.

43. Moreover, if the Parliament's position were to be accepted, it would mean that every time a Member State has completed the preliminary evaluation and pilot stage necessary for the exchange of information provided for in Decision 2008/615, the legislature would be involved in deciding whether the data protection measures referred to in Chapter 6 of that decision have been complied with and in confirming that the Member State in question may be given direct access to data covered by Decision 2008/615. To me, such a broad understanding of the concept of a basic act would reduce the scope of implementation to virtually non-existent.

44. Lastly, the Parliament has not put forward any convincing argument to explain in what way the contested decisions could be seen as autonomous decisions with an objective that in one way or another differed from that of Decision 2008/615. On the contrary, as already explained, those decisions form an integral and necessary part of the procedure that leads to the realisation of the objectives of Decision 2008/615. In that context, failure to mention the word 'implementing' cannot in my view mean that the contested decisions are basic acts.

45. I therefore conclude that the contested decisions constitute implementing measures and that the Parliament's arguments to the contrary must be rejected. So also must be the arguments that the contested decisions could not be based on Decision 2008/615 and that, instead, the contested decisions ought to have been based on existing provisions of the FEU Treaty.

********** See footnote 7 above.

********** See, amongst others, judgments of 19 July 2012 in *Parliament* v *Council*, C-130/10, EU:C:2012:472, paragraph 80, and 24 June 2014 in *Parliament* v *Council*, C-658/11, EU:C:2014:2025, paragraph 57.

46. Keeping that conclusion in mind, I shall now address the plea of illegality that the Parliament has raised concerning Article 25(2) of Decision 2008/65.

3. The lawfulness of Article 25(2) of Decision 2008/615

47. The Parliament claims that Article 25(2) of Decision 2008/615 provides for a simplified procedure not envisaged by Article 34(2)(c) EU, which requires a prior initiative of a Member State or the Commission, as well as the consultation of the Parliament for the adoption of basic acts. Even if the Court were to consider that the contested decisions constitute implementing measures, the Parliament submits that the procedure set out in Article 25(2) of Decision 2008/615 differs from that laid down in Article 34(2)(c) EU: this would be so not only because Article 25(2) does not require the prior initiative of a Member State or the Commission or consultation of the Parliament, but also because that provision requires unanimity in the Council. As a consequence, the contested decisions should be annulled due to the unlawfulness of Article 25(2) of Decision 2008/615.

48. The Council, on the other hand, argues that in the light of the Court's case-law,********** the lawfulness of Article 25(2) of Decision 2008/615 is not called into question simply because of the admittedly unfortunate terminology employed in that provision. In the Council's view, the contentious provision can be reconciled with the relevant EU Treaty provisions (Article 34(2)(c) EU read in conjunction with Article 39(1) EU), even though it does not refer to the consultation of the Parliament or identify the different steps involved in the procedure leading to the inclusion of a Member State in the system put in place by Decision 2008/615.

49. In that regard, the Council reaffirms its view that the contested decisions are implementing measures and observes that, in any event, Article 34(2)(c) EU does not require a prior initiative by the Commission or by a Member State for the adoption of implementing measures. Similarly, as regards the requirement that the Parliament be consulted, the absence of an explicit requirement to that effect is not decisive, given that consistent interpretation is nevertheless possible according to the case-law of the Court.

50. Lastly, the Council addresses the requirement of unanimity set out in Article 25(2) of Decision 2008/615. It alleges that the wording of the decision: 'unanimously decides' instead of 'adopt a decision by unanimity' leaves room for interpretation and that accordingly account has to be taken of the context in which that provision occurs and its objects. According to the Council, the requirement of unanimity in reality incorporates two distinct steps in the decision-making procedure. First, the Member States unanimously ascertain (on the basis of the result from the preliminary assessments carried out, see point 39 above) whether the Member State in question has successfully completed the evaluation. Given the structure of the data sharing system, allowing participating Member States direct access to other Member States' national databases, a successful result of the preliminary assessments requires, of necessity, the consent by each Member State. Second, a formal decision is taken by qualified majority regarding the admission of the Member State and the date on which data sharing can begin. Under Article 25(2) of Decision 2008/615, the Council argues, those two steps are morphed into one decision.

********** Judgments of 16 April 2015 in *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, and *Parliament* v *Council*, C-540/13, EU:C:2015:224.

51. As both parties acknowledge, it is crucial that the rules setting out the manner in which the EU institutions reach their decisions are defined by the Treaties. Those rules are not within the discretion of the Member States or the EU institutions. Accordingly, secondary legal bases that strengthen or weaken the rules laid down in the Treaties may not be established.********** That important principle concerns the adoption of implementing measures too.**********

52. It should also be called to mind here that the legality of an EU measure is to be assessed on the basis of the facts and the law as they stood at the time of the adoption of that decision.**********

53. I have already concluded above that the contested decisions ought to be regarded as implementing measures. Accordingly, the legality of Article 25 of Decision 2008/615 should be assessed in the light of the provisions that governed, at the time of adoption of that decision, the adoption of implementing measures under the third pillar: Article 34(2)(c) EU and Article 39(1) EU.********** In accordance with those provisions, the Council may adopt, by qualified majority and after consulting the Parliament, the measures necessary for implementing decisions falling under the third pillar.

54. The wording of Article 25(2) of Decision 2008/615 does not require an initiative of the Commission or a Member State, nor does that provision impose an obligation on the Council to consult the Parliament. In addition, it deviates from Article 34(2)(c) EU by requiring a unanimous vote within the Council.

55. Although I do agree with the Council that Article 25(2) of Decision 2008/615 can be reconciled with Article 34(2)(c) and Article 39(1) EU as regards the issues of initiative********** and consultation of the Parliament,********** I am, nevertheless, not convinced that the same applies to the requirement of unanimity in Article 25(2) of Decision 2008/615. That requirement clearly diverges from Article 34(2)(c) EU, which prescribes qualified majority voting in the adoption of implementing measures.

56. It is certainly true, as the Council argues, that when interpreting a provision, its object and its legal context have to be taken into account.********** In addition, the Court has held that a provision must be interpreted, as far as possible, in such a way as not to affect its validity.********** However, these principles of interpretation may not be stretched too far, especially in a situation where another principle of fundamental importance is at risk, namely the principle that the Treaties define the decision-making procedure (see further point 51 above).**********

********** Judgments of 16 April 2015 in *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 42, and 6 May 2008 in *Parliament* v *Council*, C-133/06, EU:C:2008:257, paragraphs 54 to 56.

********** Judgment of 16 April 2015 in *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 43.

********** See, amongst many, judgment of 16 April 2015 in *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 45 and the case-law cited.

********** See, in that regard, judgments of 16 April 2015 in *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 45; *Parliament* v *Council*, C-540/13, EU:C:2015:224, paragraph 35; and 10 September 2015 in *Parliament* v *Council*, C-363/14, EU:C:2015:579, paragraph 59.

********** The Court has confirmed that in so far as implementing measures are concerned, Article 34(2)(c) EU does not require prior initiative from the Commission or a Member State, see judgment of 10 September 2015 in *Parliament* v *Council*, C-363/14, EU:C:2015:579, paragraphs 58 to 67.

********** The Court has held, in a case including a similar plea of illegality, that, by interpreting the provision in the light of Article 39(1) EU (pursuant to which the Parliament must be consulted), the fact that the provision in question does not specify that the Parliament must be consulted does not entail that it is unlawful, see judgment of 16 April 2015 in *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraphs 47 to 50 and the case-law cited.

********** Judgment of 21 May 2015 in *Rosselle*, C-65/14, EU:C:2015:339, paragraph 43 and the case-law cited.

********** Judgment of 16 April 2015 in *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 49 and the case-law cited.

********** Judgments of 16 April 2015 in *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223, paragraph 43, and 6 May 2008 in *Parliament* v *Council*, C-133/06, EU:C:2008:257, paragraphs 54 to 56.

57. First of all, the Council has held that the unanimity requirement in Article 25(2) of Decision 2008/615 should be understood as incorporating a two-step decision-making procedure resulting in *one* decision and that the unanimity requirement only applies to the first preliminary step. The formal decision is adopted by qualified majority. If the Council's interpretation of that article were to be accepted, that provision would, *de facto*, create a secondary legal basis that altered the rules laid down in the Treaty. That is because, as the Council has explained, the two-step procedure results in *one* decision, which means that the qualified majority voting requirement would be reduced to a theoretical one and that the Council in reality would adopt the implementing act by a unanimous vote.

58. Moreover, given that Article 25(2) of Decision 2008/615 expressly states that voting should be done by unanimity, it is in my view not possible, by way of consistent interpretation, to interpret that voting requirement as 'by qualified majority'. Such interpretation would clearly contravene the wording of Article 25(2) of Decision 2008/615.**********

59. The last point I wish to make is the following. I do understand the Council's arguments as to why there is a need for each Member State — as a *precondition* for adopting a subsequent implementing decision — to ascertain whether the acceding Member State has successfully completed the preliminary assessment phase. However, that cannot imply that the Council could adopt the subsequent implementing decision on the basis of Article 25(2) of Decision 2008/615, since that provision, by requiring unanimous voting, constitutes an unlawful secondary legal basis. As the Parliament has rightly pointed out, there is another provision in Decision 2008/615, namely, Article 33, which empowers the Council to take measures that may be necessary for the implementation of that decision.

60. Having regard to the above, I conclude that Article 25(2) of Decision 2008/615 prescribes a procedure that differs from that laid down in Article 34(2)(c) EU and hence constitutes an unlawful secondary legal basis. From this it follows that the first plea of the Parliament should be accepted in full and the contested decisions annulled.

61. In the event that the Court should disagree with me and find that the Parliament's first plea should be dismissed, I shall consider the Parliament's second plea relating to breach of essential procedural requirements.

C – *Essential procedural requirements*

62. In the context of the second plea, the Parliament reiterates that the contested decisions should have been adopted on the basis of Article 82(1)(d) and Article 87(2)(a) TFEU. I have already dealt with that issue above.

63. In the alternative, the Parliament submits that the procedure leading to the adoption of the contested decisions was contrary to Article 34(2) EU for three reasons. A combined reading of Article 34(2) EU and Article 39(1) EU sets out the following procedure: unanimous adoption by the Council (or by qualified majority in the case of implementing acts) upon prior initiative of the Commission or a Member State and after consultation of the Parliament. This procedure was not followed by the Council.

********** A distinction could here be made to the situation described above in footnote 22, where the provision under consideration was *silent* on the fact that the Parliament had to be consulted, cf. judgment of 16 April 2015 in *Parliament* v *Council*, C-317/13 and C-679/13, EU:C:2015:223.

64. The Council submits that the Parliament's principal argument is based on an erroneous understanding of the correct legal basis for the contested decisions. The Council adds that it lawfully adopted the contested decisions under Article 25(2) of Decision 2008/615, which requires unanimity of the Council, but not a prior initiative or consultation of the Parliament. However, the Council also concedes that in the light of the judgment of the Court in *Parliament* v *Council*,********** it should have consulted the Parliament before adopting the contested decisions.

65. In the light of the analysis above concerning the legality of Article 25(2) of Decision 2008/615, suffice it to observe the following.

66. As the Council admits, it should have consulted the Parliament. The failure to consult the Parliament necessarily means that the decisions should be annulled.********** By adopting the contested decisions by unanimity, the Council has also infringed the voting rules laid down in Article 34(2)(c) EU. However, the Parliament's argument concerning prior initiative in the context of the second plea must be rejected. That is because, as was explained above, Article 34(2)(c) EU does not require the prior initiative of a Member State or the Commission.

67. Accordingly, I conclude that the second plea of the Parliament must also be allowed. As a consequence, the contested decisions must be annulled.

D – *The effects of the contested decisions*

68. The Council, supported by the Kingdom of Sweden, asks the Court to maintain the effects of the contested decisions in the event of annulment in accordance with Article 264(2) TFEU. The Parliament has not objected to that request.

69. I have concluded above that the contested decisions ought to be annulled. However, to annul those decisions without providing that their effects are to be maintained would undoubtedly have important ramifications for cross-border cooperation to combat terrorism, serious crime and illegal migration. Indeed, it would significantly hamper the access of enforcement authorities (both in the Member States concerned by the contested decisions as well as those in other participating Member States) to DNA profiles, fingerprints and vehicle registration data. In that sense, *not* maintaining the effects of the contested decisions would jeopardise the maintenance of public order and compromise the effectiveness of cross-border cooperation in this field.********** That is because the annulment of the contested decisions will cause the foundation for that cooperation to disappear for the Member States involved. In my view, that is reason enough to maintain the effect of the contested decisions in force until they have been replaced by new acts. Additionally, I must remark that while the Parliament seeks the annulment of the contested decisions, it does not contest the purpose or content of the decision.

70. That is why I consider it necessary to maintain the effects of the contested decisions until the entry into force of the new acts that are to replace them.

********** Judgment of 16 April 2015, C-540/13, EU:C:2015:224, paragraph 53.

********** See, most recently, judgment of 23 December 2015 in *Parliament* v *Council*, C-595/14, EU:C:2015:847, paragraphs 35 to 43.

********** See, similarly, judgments of 16 April 2015 in *Parliament* v *Council*, C-540/13, EU:C:2015:224, paragraphs 61 to 64, and 23 December 2015 in *Parliament* v *Council*, C-595/14, EU:C:2015:847, paragraphs 45 to 49.

IV – Costs

71. Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party. In these two cases, the Parliament has applied for costs and the Council has been unsuccessful.

72. In accordance with Article 140(1) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs. The Federal Republic of Germany and the Kingdom of Sweden therefore ought to bear their own costs.

V – Conclusion

73. Having regard to all the above considerations, I propose that the Court:

— annul the four contested decisions: Council Decision 2014/731/EU of 9 October 2014 on the launch of automated data exchange with regard to Vehicle Registration Data (VRD) in Malta, Council Decision 2014/743/EU of 21 October 2014 on the launch of automated data exchange with regard to vehicle registration data (VRD) in Cyprus, Council Decision 2014/744/EU of 21 October 2014 on the launch of automated data exchange with regard to Vehicle Registration Data (VRD) in Estonia and Council Decision 2014/911/EU of 4 December 2014 on the launch of automated data exchange with regard to dactyloscopic data in Latvia;

— maintain the effects of the contested decisions until the entry into force of new acts that are to replace them;

— order the Council to pay the costs;

— order the Federal Republic of Germany and the Kingdom of Sweden to bear their own costs.