JUDGMENT OF THE COURT (Grand Chamber)

18 December 2007 *

In Case C-77/05,

ACTION for annulment under Article 230 EC, brought on 14 February 2005,

United Kingdom of Great Britain and Northern Ireland, represented by E. O'Neill and C. Gibbs, acting as Agents, and A. Dashwood, Barrister,

applicant,

supported by:

Ireland, represented by D. O'Hagan, acting as Agent, assisted by A. Collins, SC, and P. McGarry, BL, with an address for service in Luxembourg,

Republic of Poland, represented by J. Pietras, acting as Agent,

* Language of the case: English.

Slovak Republic, represented by R. Procházka, J. Čorba and B. Ricziová, acting as Agents,

interveners,

v

Council of the European Union, represented by J. Schutte and R. Szostak, acting as Agents,

defendant,

supported by:

Kingdom of Spain, represented by J.M. Rodríguez Cárcamo, acting as Agent, with an address for service in Luxembourg,

Commission of the European Communities, represented by C. O'Reilly, acting as Agent, with an address for service in Luxembourg,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Tizzano, Presidents of Chambers, R. Schintgen (Rapporteur), J.N. Cunha Rodrigues, R. Silva de Lapuerta, J.-C. Bonichot, T. von Danwitz, A. Arabadjiev and C. Toader, Judges,

Advocate General: V. Trstenjak,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 13 March 2007,

after hearing the Opinion of the Advocate General at the sitting on 10 July 2007,

gives the following

Judgment

1 By its application the United Kingdom of Great Britain and Northern Ireland asks the Court, first, to annul Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ 2004 L 349, p. 1) and, second, to maintain the effects of that regulation until the adoption of a

new regulation to replace it, except in so far as Regulation No 2007/2004 excludes that Member State from participation in its application.

Legal context

Protocol on the position of the United Kingdom and Ireland

2 Title IV of Part Three of the EC Treaty ('Title IV') establishes the legal bases for the adoption of measures concerning visas, asylum, immigration and other policies related to free movement of persons.

3 The Protocol on the position of the United Kingdom and Ireland, annexed to the EU Treaty and the EC Treaty by the Treaty of Amsterdam ('the Protocol on Title IV'), concerns the participation of those Member States in the adoption of measures proposed pursuant to the provisions of Title IV.

4 Under Article 1 of the Protocol on Title IV, subject to Article 3 of that protocol, the United Kingdom and Ireland are not to take part in the adoption of proposed measures pursuant to Title IV, and under Article 2 of that protocol those measures are not to be binding on or applicable in those Member States.

5 Under Article 3 of the Protocol on Title IV:

'1. The United Kingdom or Ireland may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title IV ... that it wishes to take part in the adoption and application of any such proposed measure, whereupon that State shall be entitled to do so. ...

...

2. If after a reasonable period of time a measure referred to in paragraph 1 cannot be adopted with the United Kingdom or Ireland taking part, the Council may adopt such measure in accordance with Article 1 without the participation of the United Kingdom or Ireland. In that case Article 2 applies.'

6 Article 4 of the Protocol on Title IV confers on the United Kingdom and Ireland the right at any time to accept existing measures under Title IV. In that case the procedure provided for in Article 11(3) EC is to apply *mutatis mutandis*.

7 In accordance with Article 7 of the Protocol on Title IV, 'Articles 3 and 4 shall be without prejudice to the Protocol integrating the Schengen acquis into the framework of the European Union'.

The Protocol integrating the Schengen acquis into the framework of the European Union

8 Under Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union, annexed to the EU Treaty and the EC Treaty by the Treaty of Amsterdam ('the Schengen Protocol'), 13 Member States of the European Union are authorised to establish closer cooperation among themselves within the scope of the Schengen acquis as defined in the annex to the protocol.

9 The Schengen acquis thus defined includes the Agreement, signed in Schengen (Luxembourg) on 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 13, 'the Schengen Agreement') and the Convention implementing the Schengen Agreement signed, also in Schengen, on 19 June 1990 (OJ 2000 L 239, p. 19, 'the Implementing Convention'). Those two acts together constitute the 'Schengen Agreements'.

10 Under Article 4 of the Schengen Protocol:

'Ireland and the United Kingdom of Great Britain and Northern Ireland, which are not bound by the Schengen acquis, may at any time request to take part in some or all of the provisions of this acquis.

The Council shall decide on the request with the unanimity of its members referred to in Article 1 and of the representative of the Government of the State concerned.'

11 Article 5 of the Schengen Protocol provides:

'1. Proposals and initiatives to build upon the Schengen acquis shall be subject to the relevant provisions of the Treaties.

In this context, where either Ireland or the United Kingdom or both have not notified the President of the Council in writing within a reasonable period that they wish to take part, the authorisation referred to in Article 11 of the Treaty establishing the European Community or Article 40 of the Treaty on European Union shall be deemed to have been granted to the Member States referred to in Article 1 and to Ireland or the United Kingdom where either of them wishes to take part in the areas of cooperation in question.

2. The relevant provisions of the Treaties referred to in the first subparagraph of paragraph 1 shall apply even if the Council has not adopted the measures referred to in Article 2(1), second subparagraph.'

12 Article 8 of the Schengen Protocol provides:

'For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission.'

The declarations relating to the Schengen Protocol

13 In Declaration No 45 on Article 4 of the Protocol integrating the Schengen acquis into the framework of the European Union ('Declaration No 45'), the High Contracting Parties invite the Council to seek the opinion of the Commission of the European Communities before it decides on a request under that article. Those parties also 'undertake to make their best efforts with a view to allowing Ireland or the United Kingdom of Great Britain and Northern Ireland, if they so wish, to use the provisions of Article 4 of the said Protocol so that the Council may be in a position to take the decisions referred to in that Article upon the date of entry into force of that Protocol or at any time thereafter'.

14 According to Declaration No 46 on Article 5 of the Protocol integrating the Schengen acquis into the framework of the European Union ('Declaration No 46'), the High Contracting Parties 'undertake to make all efforts in order to make action among all Member States possible in the domains of the Schengen acquis, in particular whenever Ireland and the United Kingdom of Great Britain and Northern Ireland have accepted some or all of the provisions of that acquis in accordance with Article 4 of the [Schengen Protocol]'.

Decision 2000/365/EC

15 Pursuant to the second paragraph of Article 4 of the Schengen Protocol, the Council on 29 May 2000 adopted Decision 2000/365/EC concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis (OJ 2000 L 131, p. 43).

16 Article 1 of that decision lists the provisions of the Schengen acquis in which the United Kingdom is to participate.

17 Article 8(2) of the decision provides:

'From the date of adoption of this Decision the United Kingdom of Great Britain and Northern Ireland shall be deemed irrevocably to have notified the President of the Council under Article 5 of the Schengen Protocol that it wishes to take part in all proposals and initiatives which build upon the Schengen acquis referred to in Article 1. Such participation shall cover the territories referred to in Article 5(1) and (2) respectively, to the extent that the proposals and initiatives build upon the provisions of the Schengen acquis to which those territories become bound.'

Regulation No 2007/2004

18 As stated in the citations in its preamble, Regulation No 2007/2004 was adopted on the basis of Article 62(2)(a) EC and Article 66 EC.

19 Recitals 1 to 4 in the preamble to the regulation read as follows:

'(1) Community policy in the field of the EU external borders aims at an integrated management ensuring a uniform and high level of control and surveillance, which is a necessary corollary to the free movement of persons within the

European Union and a fundamental component of an area of freedom, security and justice. To this end, the establishment of common rules on standards and procedures for the control of external borders is foreseen.

(2) The efficient implementation of the common rules calls for increased coordination of the operational cooperation between the Member States.

(3) Taking into account the experiences of the External Borders Practitioners' Common Unit, acting within the Council, a specialised expert body tasked with improving the coordination of operational cooperation between Member States in the field of external border management should therefore be established in the shape of a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereinafter referred to as the Agency).

(4) The responsibility for the control and surveillance of external borders lies with the Member States. The Agency should facilitate the application of existing and future Community measures relating to the management of external borders by ensuring the coordination of Member States' actions in the implementation of those measures.'

20 According to recitals 23 and 26 in the preamble to Regulation No 2007/2004, the regulation constitutes a development of the provisions of the Schengen acquis, with the consequence that:

— the delegations of the Republic of Iceland and the Kingdom of Norway are to participate as members of the Management Board of the Agency, albeit with limited voting rights;

— the Kingdom of Denmark, which is not taking part in the adoption of the regulation and is not bound by it or subject to its application, has a period of six months from the adoption of the regulation in which to decide whether it will implement it in its national law or not;

— the United Kingdom and Ireland are not taking part in the adoption of the regulation and are not bound by it or subject to its application.

21 Recital 25 in the preamble to Regulation No 2007/2004, relating to the United Kingdom, reads as follows:

'This Regulation constitutes a development of provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with [Decision 2000/365]. The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.'

22 Under Article 1 of Regulation No 2007/2004:

'1. [An Agency] is hereby established with a view to improving the integrated management of the external borders of the Member States of the European Union.

2. While considering that the responsibility for the control and surveillance of external borders lies with the Member States, the Agency shall facilitate and render more effective the application of existing and future Community measures relating

to the management of external borders. It shall do so by ensuring the coordination of Member States' actions in the implementation of those measures, thereby contributing to an efficient, high and uniform level of control on persons and surveillance of the external borders of the Member States.

3. The Agency shall also provide the Commission and the Member States with the necessary technical support and expertise in the management of the external borders and promote solidarity between Member States.

4. For the purposes of this Regulation, references to the external borders of the Member States shall mean the land and sea borders of the Member States and their airports and seaports, to which the provisions of Community law on the crossing of external borders by persons apply.'

23 Article 2 of Regulation No 2007/2004 describes the main tasks of the Agency, which are in particular to coordinate operational cooperation between Member States in the field of management of external borders, to assist Member States on training of national border guards, including the establishment of common training standards, to follow up on the development of research relevant for the control and surveillance of external borders, to assist Member States in circumstances requiring increased technical and operational assistance at external borders, and to provide Member States with the necessary support in organising joint return operations.

24 Under Article 2(2), without prejudice to the competencies of the Agency, Member States may continue cooperation at an operational level with other Member States and/or third countries at external borders, where such cooperation complements the action of the Agency. Member States must, however, refrain from any activity

which could jeopardise the functioning of the Agency or the attainment of its objectives, and are to report to the Agency on these operational matters at the external borders outside the framework of the Agency.

25 Under Article 3 of Regulation No 2007/2004, the Agency is also to evaluate, approve and coordinate proposals for joint operations and pilot projects made by Member States, and may itself launch such initiatives in cooperation with Member States. It may also decide to co-finance joint operations and pilot projects.

26 Under Article 5 of the regulation, the Agency is to establish and further develop a common core curriculum for border guards' training and provide training at European level for instructors of the national border guards of Member States. It is also to offer additional training courses and seminars on subjects related to the control and surveillance of the external borders and return of third country nationals for officers of the competent national services of Member States.

27 Under Article 7 of the regulation, the Agency is to set up and keep centralised records of technical equipment for control and surveillance of external borders belonging to Member States, which they, on a voluntary basis, are willing to put at the disposal of other Member States for a temporary period following a needs and risks analysis carried out by the Agency.

28 According to Article 12 of the regulation:

'1. The Agency shall facilitate operational cooperation of the Member States with Ireland and the United Kingdom in matters covered by its activities and to the extent required for the fulfilment of its tasks set out in Article 2(1).

2. Support to be provided by the Agency pursuant to Article 2(1)(f) shall cover the organisation of joint return operations of Member States in which Ireland or the United Kingdom, or both, also participate.

3. The application of this Regulation to the borders of Gibraltar shall be suspended until the date on which an agreement is reached on the scope of the measures concerning the crossing by persons of the external borders of the Member States.'

29 Article 21(3) of the regulation provides:

'Countries associated with the implementation, application and development of the Schengen acquis shall participate in the Agency. They shall have one representative and an alternate each in the Management Board. Under the relevant provisions of their association agreements, arrangements will be developed which shall, inter alia, specify the nature and extent of, and the detailed rules for, the participation by these countries in the work of the Agency, including provisions on financial contributions and staff.'

Facts of the dispute

30 On 11 November 2003 the Commission put before the Council a proposal for a regulation establishing the Agency.

31 On 11 February 2004 the United Kingdom informed the Council of its intention to take part in the adoption of Regulation No 2007/2004. It referred to the notification procedure provided for in the second subparagraph of Article 5(1) of the Schengen Protocol and to the procedure mentioned in the Protocol on Title IV.

32 On 26 October 2004 the Council adopted Regulation No 2007/2004. Despite the notification of 11 February 2004 the United Kingdom was not allowed to take part in the adoption of the regulation, on the ground that it constituted a development of provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Decision 2000/365.

33 Since it considered that the Council's refusal to allow it to take part in the adoption of Regulation No 2007/2004 constituted a breach of Article 5 of the Schengen Protocol, the United Kingdom brought the present action.

Forms of order sought by the parties

34 The United Kingdom claims that the Court should:

— annul Regulation No 2007/2004;

— determine, pursuant to Article 231 EC, that, following the annulment of Regulation No 2007/2004 and pending the adoption of new legislation in the

matter, the provisions of the regulation should remain effective, except in so far as they have the effect of excluding the United Kingdom from participating in its application;

— order the Council to pay the costs.

35 The Council contends that the action should be dismissed and the United Kingdom ordered to pay the costs.

36 By order of the President of the Court of 17 August 2005, Ireland, the Republic of Poland and the Slovak Republic were given leave to intervene in support of the form of order sought by the United Kingdom, and the Kingdom of Spain and the Commission of the European Communities were given leave to intervene in support of the form of order sought by the Council.

The action

Arguments of the parties

37 The United Kingdom's principal submission is that, in excluding it from the procedure for the adoption of Regulation No 2007/2004, the Council relied on an incorrect interpretation of the Schengen Protocol and infringed Article 5 of that protocol.

38 According to the United Kingdom, it cannot be argued that the system established by Article 5 of the Schengen Protocol is subordinate to that established by Article 4 of the Protocol. Articles 4 and 5 are independent of each other, so that the United Kingdom is not required, in order to take part in measures adopted on the basis of Article 5, previously to have been allowed under Article 4 to take part in the corresponding Schengen acquis.

39 In support of its position, the United Kingdom argues in particular that the interpretation of Articles 4 and 5 of the Schengen Protocol proposed by the Council is contradicted by the structure and language of those two provisions, infringes the very nature of the mechanism set up by Article 5, and is incompatible with Declaration No 46.

40 That interpretation would moreover deprive Article 5 of the Schengen Protocol of its effect, which is to ensure maximum participation of the United Kingdom and Ireland in measures based on the Schengen acquis, and is not necessary either to safeguard the effectiveness of Article 7 of the Protocol on Title IV or to preserve the integrity of the Schengen acquis. In any case, such an interpretation would have effects that were grossly disproportionate to the aim pursued and, since the Council, as can be seen from its current practice, has a 'loose and ill-defined' conception of what is to be understood by 'proposals and initiatives to build upon the Schengen acquis', would have the consequence that the mechanism laid down in Article 5 could operate in a way that was incompatible with the principle of legal certainty and with the fundamental principles governing enhanced cooperation.

41 The United Kingdom submits, in the alternative, that if the interpretation of Articles 4 and 5 of the Schengen Protocol put forward by the Council is correct, the words 'proposals and initiatives to build upon the Schengen acquis' in the first subparagraph of Article 5(1) of that protocol should be understood as referring only to measures inextricably connected with the Schengen acquis ('Schengen-integral' measures), such as measures amending provisions in the acquis, which the

United Kingdom could not join in without first having accepted the provisions being amended. By contrast, that provision does not cover measures that are merely 'Schengen-related', namely those which, although designed to develop or complement certain objectives of the Schengen acquis, are not so intimately connected with that acquis that its integrity would be put at risk if a Member State not taking part in that acquis were nevertheless able to take part in the adoption of such measures. It follows that, when measures in the latter category are being adopted, the position of the United Kingdom is not governed by the provisions of that protocol but, depending on the case, by those of the Protocol on Title IV or the relevant provisions of the 'third pillar'. Since Regulation No 2007/2004 must be regarded as falling within that category of measures, the United Kingdom should not have been excluded from the adoption of that regulation.

42 The Council submits, first, that the object of Article 5 of the Schengen Protocol, contrary to the United Kingdom's submissions, is not to confer a right on that State but to reassure the Member States participating in the Schengen acquis in its entirety that their actions will not be jeopardised by the reluctance of other Member States to join in those actions. The wording of the provision moreover confirms that interpretation, in that, unlike the wording of Article 4 of that protocol and Article 3 of the Protocol on Title IV, it does not explicitly recognise such a right.

43 The interpretation of Article 5(1) of the Schengen Protocol proposed by the United Kingdom would deprive the vetting procedure in Article 4 of that protocol of its effectiveness, since, where a Member State had, on the basis of that article, been refused the right to take part in the adoption of a particular measure, that State could nevertheless take part in any measure developing the area in question by making use of the procedure provided for in Article 5. The integrity of the Schengen acquis would therefore no longer be guaranteed, and Article 7 of the Protocol on Title IV, which provides that Articles 3 and 4 of that protocol are to be without prejudice to the provisions of the Schengen Protocol, would likewise be deprived of effectiveness.

44 The Council submits, second, that the distinction drawn by the United Kingdom between 'Schengen-integral' and merely 'Schengen-related' measures finds no support in either primary or secondary law. In this respect, it observes that the United Kingdom's proposed definition of 'Schengen-related' measures is based on a misunderstanding of what could constitute a threat to the integrity of the Schengen acquis, and that the distinction in question creates unnecessary legal uncertainty in that it entails a discrepancy between what should be understood by 'measure developing the Schengen acquis' in relation to the adoption of a measure applicable to the Republic of Iceland and the Kingdom of Norway on the one hand and one applicable to the United Kingdom and Ireland on the other.

45 The Council says, third, that its position is altogether compatible with the principle of proportionality and the rules applicable to enhanced cooperation. In the first place, the authors of the Treaty are not bound by the principle of proportionality. In the second place, the provisions of the EU and EC Treaties governing enhanced cooperation are without prejudice to those of the Schengen Protocol.

46 Ireland submits that the interpretation of Articles 4 and 5 of the Schengen Protocol proposed by the United Kingdom is consistent with the wording of those articles and corresponds to the current practice of the Council relating to measures concerning the Schengen acquis in which the United Kingdom and Ireland have been allowed to take part. That interpretation is moreover supported by the declarations relating to the Schengen Protocol attached to the Final Act of the Treaty of Amsterdam. Furthermore, the Council is unable to show any actual risk of damage to the Schengen acquis if the United Kingdom were allowed to take part in the adoption of Regulation No 2007/2004.

47 According to the Republic of Poland, in view of the lack of clarity of the concept of the 'Schengen acquis', it cannot be clearly established whether Regulation No 2007/2004 forms part of that acquis or merely constitutes a development of it. It

considers, however, that that regulation constitutes a measure developing the acquis. The right of the United Kingdom to take part in measures developing the Schengen acquis flows directly from Article 5 of the Schengen Protocol and is not subject to the prior application of Article 4 of that protocol. Moreover, there is no obstacle to allowing the United Kingdom to take part in the adoption of that regulation, since its participation is not a threat to the integrity or the functioning of the Schengen acquis or to its implementation.

48 According to the Slovak Republic, the right of the United Kingdom to take part in the adoption of Regulation No 2007/2004 depends on the absence of any threat to the integrity and coherence of the Schengen acquis applied so far. It is for the Council, since it has denied that right to the United Kingdom, to prove that that Member State's participation in the application of that regulation would constitute such a threat. In the present case there is no threat.

49 The Kingdom of Spain submits that the United Kingdom's action is unfounded. First, the United Kingdom's principal claim is based on the conferral on that State by an article of the Schengen Protocol of a hypothetical right which the protocol does not grant. The interpretation put forward by the United Kingdom would entail a certain risk to the measures already adopted as a result of the closer cooperation established by that protocol, in that it would jeopardise the integrity and coherence of the Schengen acquis. Second, the United Kingdom's alternative claim disregards the fact that it is for the Council to determine which measures are to be regarded as measures to build upon the Schengen acquis, and it is not for a Member State which is not party to the Schengen Agreements to perform that determination.

50 The Commission states that the principal characteristic of closer cooperation in general and the Schengen acquis in particular is its integrity. The preservation and

protection of that integrity and the coherence of the Schengen acquis are therefore essential concerns. The Schengen Protocol indeed contemplates partial participation by a Member State that is not party to the Schengen Agreements, but does not go so far as to provide for a system of 'pick and choose' by the Member States concerned, resulting in a patchwork of participation and obligations.

51 According to the Commission, the interpretation of Articles 4 and 5 of the Schengen Protocol put forward by the United Kingdom is contrary to the scheme and logic of that protocol and may harm the coherence and integrity of the Schengen acquis.

52 It submits, moreover, that the words 'to build upon the Schengen acquis' in the first subparagraph of Article 5(1) of the Schengen Protocol do not refer to a 'loose and ill-defined' conception of measures which can be adopted by the Member States taking part in an enhanced cooperation initiative, while a decision to classify a proposal as a measure 'to build upon the Schengen acquis' is not very different from a decision as to the proper legal basis for the adoption of a Community measure.

53 Finally, the Commission observes that, in view of the particular nature of the Agency, its setting up is a 'Schengen-integral' measure in the sense in which the United Kingdom understands that expression, and is inextricably linked to the Schengen acquis. Moreover, the Agency is linked to an area of that acquis in which the United Kingdom has decided not to take part. It is therefore legitimate that the United Kingdom was not allowed to take part in the adoption of Regulation No 2007/2004.

Findings of the Court

54 In order to decide on the United Kingdom's principal argument, the Court must examine whether the second subparagraph of Article 5(1) of the Schengen Protocol must be interpreted as applicable only to proposals and initiatives to build upon an area of the Schengen acquis in which the United Kingdom and/or Ireland have been allowed to take part pursuant to Article 4 of that protocol, or whether those two provisions must, on the contrary, as the United Kingdom submits, be regarded as independent of each other.

55 Account should be taken not only of the wording of the provisions in question but also of their scheme, context, purpose and effectiveness.

56 It is apparent that Article 1 of the Schengen Protocol authorised 13 Member States to establish closer cooperation among themselves in areas within the scope of the Schengen acquis as binding on those States. In addition, it follows from Article 2 of that protocol that all measures adopted within the framework of the implementation of that closer cooperation must be regarded as an integral part of that acquis, which must moreover be accepted in full by the States candidates for admission, in accordance with Article 8 of the protocol.

57 In so far as the United Kingdom and Ireland were the only Member States which were not parties to the Schengen Agreements that constitute the foundation of that closer cooperation, those two States were in a special situation, which the Schengen Protocol took into account in two respects.

58 First, as Article 4 of the Schengen Protocol provides, that protocol reserves to those two Member States the right to apply at any time to take part in only certain provisions of the acquis in force on the date of the application to take part. Second, that protocol reserves to those Member States, under the second subparagraph of Article 5(1), the option of not taking part in proposals and initiatives to build upon that acquis.

59 While those two provisions thus relate to two different aspects of the Schengen acquis, it cannot however be inferred from that circumstance alone that they must be read independently of each other.

60 As follows from the use by the first subparagraph of Article 5(1) of the Schengen Protocol of the words 'proposals and initiatives to build upon the Schengen acquis', the measures referred to in that provision are based on the Schengen acquis within the meaning of Article 4 of that protocol, of which they constitute merely an implementation or further development.

61 Logically, such measures must be consistent with the provisions they implement or develop, so that they presuppose the acceptance both of those provisions and of the principles on which those provisions are based.

62 It follows that the participation of a Member State in the adoption of a measure pursuant to Article 5(1) of the Schengen Protocol is conceivable only to the extent that that State has accepted the area of the Schengen acquis which is the context of the measure or of which it is a development.

63 In those circumstances, since Article 4 of the Schengen Protocol provides for the possibility of the United Kingdom and Ireland joining in the Schengen acquis, those Member States cannot be allowed to take part in the adoption of a measure under Article 5(1) of that protocol without first having been authorised by the Council to accept the area of the acquis on which that measure is based.

64 Furthermore, the above interpretation is in keeping with the purpose both of Article 4 of the Schengen Protocol and of Article 5 of that protocol, and is such as to ensure the full effectiveness of each of those provisions.

65 That interpretation does not in any way interfere with the possibility, reserved to the United Kingdom and Ireland by the second subparagraph of Article 5(1) of the Schengen Protocol, of choosing, even when those Member States have been authorised to accept part or all of the Schengen acquis, not to take part in the adoption of measures implementing or developing the parts of the acquis which they have been authorised to accept.

66 Moreover, such an interpretation makes it possible to take into account both the wording and the objective of Article 4 of the Schengen Protocol, since the flexibility thus given by Article 5 of that protocol to the two Member States concerned as regards their free choice whether or not to join in measures implementing and developing the Schengen acquis is capable of overcoming their possible reluctance, in the absence of such a choice, to accept provisions of the Schengen acquis, and of thereby encouraging them to make as much use as possible of the possibility reserved to them by Article 4.

67 By contrast, the interpretation proposed by the United Kingdom would have the consequence of depriving Article 4 of the Schengen Protocol of all effectiveness, in

that the United Kingdom and Ireland could take part in all proposals and initiatives to build upon the Schengen acquis, under Article 5(1) of that protocol, even though they had not accepted the relevant provisions of that acquis or had not been authorised to take part in them under the second paragraph of Article 4 of that protocol. As is apparent from Declaration No 45, Article 4 is of essential importance in the system established by the Schengen Protocol in that it seeks to ensure the maximum participation of all Member States in the Schengen acquis.

68 In the light of those considerations, the conclusion must be that the interpretation of the second subparagraph of Article 5(1) of the Schengen Proposal put forward by the United Kingdom cannot be accepted and that provision must be understood as applicable only to proposals and initiatives to build upon an area of the Schengen acquis which the United Kingdom and/or Ireland have been authorised to take part in pursuant to Article 4 of that protocol.

69 That interpretation is moreover borne out by Article 8(2) of Decision 2000/365, from which it also follows that participation in proposals and initiatives which build upon the Schengen acquis is possible only if the provisions of that acquis to which those proposals or initiatives relate apply in the Member State wishing to participate, which implies that that Member State has previously accepted that acquis.

70 It is common ground in the present case that the United Kingdom has not accepted the area of the Schengen acquis which forms the context of Regulation No 2007/2004, namely that relating to the crossing of external borders.

71 In those circumstances, it must be held that, by refusing to allow the United Kingdom the right to take part in the adoption of Regulation No 2007/2004, on the ground that that Member State had not first been authorised to take part in the area of cooperation which formed the context of that regulation, the Council did not misinterpret and misapply the second subparagraph of Article 5(1) of the Schengen Protocol.

72 It follows that the United Kingdom's principal argument in support of its action for annulment must be rejected as unfounded.

73 As regards the United Kingdom's alternative argument, it should be observed, to begin with, that the distinction drawn by that Member State between what it calls 'Schengen-integral' measures and what it regards as merely 'Schengen-related' measures has no basis either in the EU and EC Treaties or in secondary Community law.

74 It should be observed, next, that although the United Kingdom contests the classification performed by the Council, it admits itself that Regulation No 2007/2004 is linked with the provisions of the Schengen acquis, since it considers that it is none the less a 'Schengen-related' measure.

75 Despite those considerations and the fact that in the present case the Council's allegedly incorrect classification is not directly linked to the choice of legal basis for the adoption of Regulation No 2007/2004, namely Articles 62(2)(a) EC and 66 EC, it must be stated that, like the choice of the legal basis of a Community act, the classification by the Council of Regulation No 2007/2004 as a measure developing the provisions of the Schengen acquis had a direct effect on the determination of the provisions governing the procedure for the adoption of that regulation, and consequently also on the possibility of the United Kingdom being able to take part in that procedure.

76 In so far as the exercise by the United Kingdom of the option to take part in the adoption of a proposal presented pursuant to the provisions of Title IV is not, in accordance with Article 3(1) of the Protocol on Title IV, subject to compliance with any condition other than the notification period laid down by that provision, the classification of Regulation No 2007/2004 as a measure developing provisions of the Schengen acquis had a direct effect on the rights of that Member State.

77 Consequently, and by analogy with what applies in relation to the choice of the legal basis of a Community act, it must be concluded that in a situation such as that at issue in the present case the classification of a Community act as a proposal or initiative to build upon the Schengen acquis within the meaning of the first subparagraph of Article 5(1) of the Schengen Protocol must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the act (see Case C-300/89 *Commission* v *Council* [1991] ECR I-2867 ('*Titanium dioxide*'), paragraph 10; Case C-176/03 *Commission* v *Council* [2005] ECR I-7879, paragraph 45; and Case C-440/05 *Commission* v *Council* [2007] ECR I-9097, paragraph 61).

78 It is in the light of those considerations that it must be examined whether, as the United Kingdom submits, the Council was wrong to classify Regulation No 2007/2004 as a measure developing provisions of the Schengen acquis.

79 As to the purpose of Regulation No 2007/2004, it is apparent from the first three recitals in the preamble and from Article 1(1) and (2) that it was intended to improve the integrated management of external borders and to facilitate and render more effective the application of the common rules on standards and procedures for the control of those borders.

80 As to the content of Regulation No 2007/2004, it must be observed that the Agency set up by that regulation has the task, as may be seen from recital 3 and Article 2, in particular of coordinating operational cooperation between Member States in the field of management of external borders, assisting Member States in the training of national border guards, and providing Member States, where circumstances require, with increased technical and operational assistance at external borders.

81 In this respect, it is clear, first, that the common rules referred to by Regulation No 2007/2004 which are to be applied in connection with the integrated management of external borders were laid down in the Common Manual adopted by the Executive Committee established by the Implementing Convention (OJ 2002 C 313, p. 97).

82 As appears from recital 1 in the preamble to Council Regulation (EC) No 790/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance (OJ 2001 L 116, p. 5), that manual was established with a view to implementing the provisions of Chapter 2, 'Crossing external borders', of Title II of the Implementing Convention and forms part of the Schengen acquis as referred to in Article 1 of the Schengen Protocol, in accordance with Article 1 of Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis (OJ 1999 L 176, p. 1).

83 It should be recalled, second, that both the title of the Schengen Agreement and the fourth recital in its preamble and Article 17 of the agreement show that its principal objective was the abolition of checks on persons at the common borders of the Member States and the transfer of those checks to their external borders. The importance of that objective in the context of the Schengen Agreements is underlined by the place occupied in the Implementing Convention by the provisions

on the crossing of external borders, and by the fact that, under Articles 6 and 7 of that convention, checks at external borders are to be carried out in accordance with uniform principles, with the Member States having to implement constant and close cooperation in order to ensure that those checks are carried out effectively.

84 It follows that checks on persons at the external borders of the Member States and consequently the effective implementation of the common rules on standards and procedures for those checks must be regarded as constituting elements of the Schengen acquis.

85 Since, as stated in paragraphs 79 and 80 above, Regulation No 2007/2004 is intended, as regards both its purpose and its content, to improve those checks, that regulation must be regarded as constituting a measure to build upon the Schengen acquis within the meaning of the first subparagraph of Article 5(1) of the Schengen Protocol.

86 In those circumstances, the Council was right to classify Regulation No 2007/2004 as a measure developing the provisions of the Schengen acquis.

87 It follows that the United Kingdom's alternative argument cannot be accepted either.

88 Accordingly, the United Kingdom's claim for the annulment of Regulation No 2007/2004 cannot be upheld, and there is consequently no need for the Court to rule on that Member State's application concerning the maintenance of the effects of the regulation.

89 The action brought by the United Kingdom must therefore be dismissed.

Costs

90 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Council has applied for costs and the United Kingdom has been unsuccessful, the United Kingdom must be ordered to pay the costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings must bear their own costs.

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

1. **Dismisses the action;**

2. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs;**

3. **Orders the Kingdom of Spain, Ireland, the Republic of Poland, the Slovak Republic and the Commission of the European Communities to bear their own costs.**

[Signatures]