OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 24 June 2010 [1]

1. By this action the United Kingdom requests the Court to annul Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences [2] ('the contested decision').

2. The United Kingdom was not permitted to take part in the approval of the contested decision, for the latter was considered to constitute a development of a sector created by the Schengen agreements (the visa sector) in which that Member State does not take part. The United Kingdom maintains, however, that the contested decision constitutes a measure falling within the sector of police cooperation, and not within that of visas.

1 — Original language: Italian.

2 — OJ 2008 L 218, p. 129.

I — Legislative context

A — *The Schengen agreements*

3. As is well known, the first Schengen agreements were concluded in 1985 by France, Germany, Belgium, Luxembourg and the Netherlands, in order to create a space (what is known as 'the Schengen area') without internal borders. Other Member States have subsequently acceded to those agreements and, in 1997, with the Treaty of Amsterdam, the body of rules concerned was incorporated into the European Union. That was done, in particular, by means of a specific protocol annexed to the Treaty [3] ('the Schengen Protocol'), which authorised the creation of closer cooperation in that sphere.

3 — Protocol (No 2) integrating the Schengen *acquis* into the framework of the European Union. With the entry into force of the Treaty of Lisbon, the Schengen Protocol, now No 19, was slightly amended. Nevertheless, the version to be referred to in this case is the earlier version.

4. Article 4 of the Schengen Protocol provides:

'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.'

5. In accordance with the provisions of the Schengen Protocol, the United Kingdom requested, and was permitted, to take part in some parts of the Schengen *acquis*. By Decision 2000/365/EC, [4] the Council defined the areas in which that Member State takes part. It is established, and has not been disputed in these proceedings, that within the ambit of the Schengen *acquis* the United Kingdom does not take part in cooperation on visas. [5]

B — *The visa information system*

6. The visa information system ('the VIS') was established by Decision 2004/512/EC [6] in order to create a system common to the Member States in the sphere of visas, so as to make it possible, in particular, for the competent national authorities to have a databank available in that sector.

7. Decision 2004/512 was adopted on the legal basis of Article 66 EC, [7] which, forming part of Title IV of Part Three of the Treaty, provides that 'the Council … shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by this title, as well as between those departments and the Commission'. The areas governed by the Title in question are defined as 'visas, asylum, immigration and other policies related to free movement of persons'.

8. Recital 11 in the preamble to Decision 2004/512 is worded as follows:

'This Decision constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/

4 — Council Decision 2000/365/EC of 29 May 2000 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).

5 — The United Kingdom, as that Member State notes in its written observations, takes part in much of the Schengen *acquis* in fields relating to police or security, but does not take part in anything concerning the abolition of internal frontiers or freedom of movement for persons.

6 — Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS) (OJ 2004 L 213, p. 5).

7 — The corresponding provision is now Article 74 TFEU.

EC... [T]he United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.'

9. Decision 2004/512 was then followed, in particular in order to provide detailed rules for the VIS, by Regulation No 767/2008. [8] That regulation too finds its legal basis in Title IV of Part Three of the EC Treaty. As is stated in recital 29 in its preamble, the United Kingdom did not take part in its adoption and is not bound by it.

C — *The contested decision*

10. The purpose of the contested decision is to allow Europol and the competent authorities of the Member States access to the VIS, in certain specific circumstances, in order to prevent and investigate certain particularly serious offences. Given that the VIS of itself has no functions linked to the prevention and punishment of crimes, that specific access is treated as exceptional by the contested decision. In particular, it is access 'for consultation', as stated in Article 1, limited, moreover, to cases in which the purpose of access is the prevention of terrorist or other serious offences.

11. The legal basis of the contested decision is found in Article 30(1)(b) EU and Article 34(2)(c) EU. [9]

12. In the recitals in the preamble to the contested decision, it is stated:

'1. … The establishment of the VIS represents one of the key initiatives within the policies of the European Union aimed at establishing an area of freedom, security and justice. The VIS should have the purpose of improving the implementation of the common visa policy and should also contribute towards internal security and to combating terrorism under clearly defined and monitored circumstances.

…

8 — Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) (OJ 2008 L 218, p. 60).

9 — With the entry into force of the Treaty of Lisbon, those provisions were repealed, and the sphere of police cooperation was transferred to the TFEU, where it forms part of the same Title (Title V of Part Three) as the rules on which closer cooperation with regard to visas is based. This new position opens interesting perspectives, which were also referred to at the hearing: if the decision were to be adopted today, the Council maintained, it could be based on a different legal basis. Such observations are, however, irrelevant to the resolution of this dispute.

5. This Decision complements Regulation (EC) No 767/2008 of the European Parliament and of the Council … insofar as it provides for a legal base under Title VI of the Treaty on European Union authorising access to the VIS for designated authorities and for Europol.

6. … It is essential to ensure that the duly empowered staff with a right to access the VIS is limited to those who "have a need to know" and possess appropriate knowledge about data security and data protection rules.

…

13. This Decision constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part in accordance with Council Decision 2000/365/EC … The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.

…

15. However, in accordance with Council Framework Decision 2006/960/JHA, … information contained in the VIS can be provided to the United Kingdom and Ireland by the competent authorities of the Member States whose designated authorities have access to the VIS pursuant to this Decision. Information held in the national visa registers of the United Kingdom and Ireland can be provided to the competent law enforcement authorities of the other Member States. Any form of direct access for central authorities of the United Kingdom and Ireland to the VIS would, under the present state of their participation in the Schengen *acquis*, require an agreement between the Community and those Member States, possibly to be supplemented by other rules specifying the conditions and procedures for such access.

…'

II — Procedure before the Court

13. By its action, lodged at the Court Registry on 10 November 2008, the United Kingdom seeks annulment of the contested decision, in that it excludes that Member State from its adoption.

14. The Council, supported by the Commission, contends that the action should be dismissed as unfounded.

15. The parties were heard at the hearing of 14 April 2010. On that occasion, the Kingdom of Spain presented oral argument in support of the form of order sought by the Council.

III — Preliminary considerations

16. Before the arguments of the parties are examined in detail and their merits evaluated, it is necessary, as a preliminary point, to define precisely the ambit of the dispute. There are certain matters which, despite having been discussed during the proceedings, are not the subject of disagreement between the parties.

17. In the first place, it is common ground that the United Kingdom takes no part in that part of the Schengen *acquis* which concerns visas, including, in particular, the VIS.

18. In the second place, all the parties agree on the correctness of the legal basis used in adopting the contested decision (that is to say, as we have seen, Articles 30 EU and 34 EU).

19. From the legal point of view, the only matter on which the parties are not at one, and which must therefore be settled by the Court, is whether or not the contested decision was correctly classed as an act developing the Schengen *acquis* relating to visas.

IV — Arguments of the parties

A — *The United Kingdom's position*

20. The United Kingdom seeks annulment of the contested decision, in accordance with Article 35(6) EU, pleading infringement of essential procedural requirements and/or of the Treaty. In particular, its basic argument is that that decision is not a development of the common visa policy, but is rather a police cooperation measure, as is demonstrated by the legal basis used by the Council in its adoption.

21. The United Kingdom acknowledges that, in accordance with the Court's case-law, if the contested decision were to be considered to be a development of the Schengen *acquis* relating to visas, that Member State would have had no right to play a part in its adoption.

Given, however, that that possibility must be excluded, the United Kingdom, which does take part in police cooperation, ought to have been permitted to take part in the adoption of that measure.

22. The United Kingdom claims that the Commission itself, in its original proposal for a decision, recognised its right to take part in the mechanism for access to the VIS for reasons linked to combating terrorism and other serious offences.

23. As indicated in the Court's case-law, in order to ascertain to what sector of Schengen cooperation the contested decision belongs it is necessary to refer to its aim and content. However, neither the aim nor the content of the contested decision has anything to do with the common visa policy, for the sole objective of the measure is to enable more effective combating of certain forms of criminality.

24. According to the United Kingdom Government, the Council's decision to consider the contested decision as a development of Schengen cooperation in the sphere of visas is vitiated by a fundamental contradiction: the Council could not, at one and the same time, take as the legal basis the articles of Title VI of the EU Treaty, which refer to police cooperation, and classify the measure, for the purpose of its adoption, as a measure linked to visa policy. If the contested decision really fell within the sphere of visas, its legal basis ought to have been chosen from Title IV of Part Three of the EC Treaty.

25. Lastly, the United Kingdom accepts that, if its position were to be upheld, problems might arise for the participation of Iceland, Norway and Switzerland in the system created by the contested decision. In fact, those countries take part in Schengen cooperation concerning visas, but not in police cooperation. The United Kingdom observes, however, on the one hand, that any consequences that the legal classification of the contested decision might have for non-member countries cannot alter the necessarily objective nature of the classification itself. On the other hand, that Member State declares that it is in favour of, and open to, seeking a solution that will in any event permit non-member countries to take part in the system.

B — *The Council's position*

26. The Council disputes each and every one of the United Kingdom's arguments.

27. As a preliminary point, the Council states that, on the basis of the legislative provisions

currently in force, it is already open to the United Kingdom to gain access to data contained in the VIS, on the basis of framework decision 2006/960/JHA: [10] the only difference is that, in the current system, that access is indirect, whereas the United Kingdom would wish, by taking part in the contested decision, to obtain direct access.

28. The Council contests the United Kingdom's argument that the procedure for the adoption of the contested decision was inconsistent. According to the Council, the fact that the legal basis of the measure is to be found in Title VI EU, rather than in Title IV EC, is of no importance for the purpose of establishing whether or not the contested decision constitutes a development of the Schengen *acquis* in the ambit of the common visa policy. No provision requires a necessary link between the choice of legal basis and the ambit of the Schengen *acquis* within which a given measure may fall.

29. The objective pursued by the contested decision is in fact that of supplementing the VIS rules with some specific rules on access to the visa databank for the purpose of preventing and combating crime. As a result, the choice of legal basis was correct, given that Article 30(1)(b) EU provides for cooperation including 'the collection, storage, processing, analysis and exchange of relevant information … in particular through Europol'.

30. The Council challenges the approach proposed by the United Kingdom, which is that the criteria for determining to which given sector of the Schengen *acquis* a measure belongs are exclusively those of the content and objective of the provision to be classified. The Court's case-law in this field does not demand such uniformity of approach. According to the Council, it is by contrast essential to take into consideration, in addition to the content and object of the measure, the criterion of the coherence of the Schengen *acquis* also. Attention was drawn to that criterion in, for example, Decision 2000/365.

31. According to the Council, the contested decision is connected to the VIS both from the point of view of function and from that of substance. The fact that the legal basis of the contested decision is different from that of the VIS regulation has no effect on whether it is possible to consider the measure in question to be a development of and a supplement to the VIS regulation. The Council acknowledges that the contested decision, viewed in isolation, could not be regarded as linked to the Schengen agreements: what is important, however, is the fact that that decision shows an objective connection to the

10 — Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (OJ 2006 L 386, p. 89).

provisions relating to the VIS. It is also to be borne in mind that the VIS is not, as the United Kingdom, it seems, would wish to present it, a system with two separate purposes, that is to say, the management of visa policy and the prevention of criminal activity. The VIS, the Council stresses, has a single principal aim, which is to enable the exchange of information relating to entry visas between the national authorities with responsibility for immigration and entry into the territory: the opportunity to gain access to that system for police purposes must be regarded as quite secondary and ancillary to the main objective. It is moreover significant, according to the Council, that such access for police purposes is a read-only access, without any possibility of entering or altering VIS data.

32. The Council notes also that, if the United Kingdom's approach were to be followed, then Iceland, Norway and Switzerland would be excluded from the ambit of the decision: the paradoxical consequence would be that those non-member countries, which with every right, however, play a part in the management and use of the VIS, would be unable to have access to the latter for the purpose of the prevention of crime. From that point of view, those States would be placed in an unfavourable position in relation to States (the United Kingdom and Ireland) which do not take part in the VIS.

C — *The Commission's position and that of the Kingdom of Spain*

33. The Commission has intervened in these proceedings in support of the form of order sought by the Council, and agrees with the latter's arguments. In particular, it stresses the principle of the coherence of the Schengen *acquis* and insists that the VIS cannot be regarded as a system with two purposes.

34. So far as concerns its original proposal that subsequently led to the adoption of the contested decision, the Commission states that that proposal did not envisage the possibility of its application in full to the United Kingdom: the proposal in fact provided merely for indirect access for the United Kingdom and Ireland.

35. In its turn, the Kingdom of Spain, which has presented oral argument only, maintains that the Council's position is correct. In particular, that Member State takes the view that, even if the contested decision were to be examined on the basis solely of the criteria of content and objective, it could still be regarded as a development of the Schengen *acquis*: the content and objective of the contested decision in point of fact relate simply to certain detailed rules for access to a databank which, as everyone acknowledges, falls into a sector of enhanced Schengen cooperation in which the United Kingdom does not take part.

V — Assessment

A — *Preliminary observations*

1. The United Kingdom's application

36. The United Kingdom has formulated its application to the Court in an unusual manner. On the one hand, it seeks annulment of the contested decision. On the other, if requests the Court to maintain the provisions of that decision in force, except those provisions that exclude the United Kingdom from taking part in the mechanism provided for in the decision for access to the VIS.

37. From a formal point of view the second part of the United Kingdom's application can probably be understood as a request, made in accordance with Article 231 EC, to have certain effects of the contested decision maintained until the legislature shall have adopted another measure.

38. At the hearing, the United Kingdom maintained that its request for certain effects of the decision to be maintained is in fact to be understood as relating to the whole of the contested decision. The sole purpose of so maintaining it would, therefore, be to enable the present system to continue, without any alteration, until a new decision has been adopted by the Council.

39. I note a certain inconsistency between what the United Kingdom claims in its action (in particular, paragraph 116(b)) and what it argued at the hearing. In its application, the claim that the provisions of the contested decision should be maintained in force is expressly limited to those parts of the decision that do not exclude the United Kingdom from access to the VIS for police reasons, so that, in actual fact, that Member State seems to claim, provisionally, immediate access to the databank. On the other hand, at the hearing, as we have seen, the United Kingdom acknowledged that, even in the case of annulment, only after the adoption of a new measure would its police authorities be able to enjoy direct access to the visa databank.

40. Nevertheless, that point seems to me to be relatively secondary. The objective conditions necessary in order to annul the contested decision in part only have not been met in this case, nor, consequently, those necessary in order to maintain temporarily in force some parts only of that decision.

41. It is to be borne in mind that, in accordance with the Court's settled case-law, partial annulment of a Community act is possible only in so far as it concerns 'severable' parts

of that measure, and on condition that partial annulment does not alter the substance of the measure itself. [11]

42. Here, by contrast, the defects complained of by the United Kingdom do not affect only one specific part of the contested decision, but rather the decision as a whole. The decision whether or not some Member States are to take part in the adoption of an act clearly does not form a part of that act which may easily be severed from the remainder. It is plain that, if it were to be held that the United Kingdom and Ireland had the right to take part in the adoption of the contested act, those Member States must have had the right/duty to speak and vote on the measure in its entirety. As the Council rightly emphasised in its written observations, any unlawfulness of this kind would make it necessary to reconsider the entire contested decision. In other words, the Union legislature would have to start again from the beginning, so to speak.

43. In consequence, if the arguments raised by the United Kingdom should be upheld, the only decision that the Court could take would be to annul the contested decision in its entirety.

11 — Case C-295/07 P *Commission* v *Département du Loiret* [2008] ECR I-9363, paragraphs 105-106 and case-law cited.

2. The Commission's original proposal

44. As we have seen, the United Kingdom maintains that the proposal for the contested decision originally formulated by the Commission provided an opportunity for the United Kingdom's police authorities to have access to information. According to that Member State, that shows that its position is correct, for it confirms that the contested decision cannot be considered to be a development of the Schengen *acquis* in the sphere of visas.

45. In this regard, I would first of all note that it is plain that examination of the Commission's original proposal, for all that it may yield information helpful in clarifying the exact circumstances of the case, is in any event irrelevant in determining whether the contested decision may be unlawful.

46. The most important matter to be taken into account is, however, something different. The Commission's proposal was based on a perspective quite different from that of the contested decision. In addition to providing for direct access to the VIS for the police authorities of the Schengen States, it provided also for the sharing of the databanks by the States taking part in the VIS, on the one hand, and by the Member States not taking part in the VIS (the United Kingdom and Ireland), on the other. It is therefore perfectly logical that such a proposal should start from the assumption that the United Kingdom too must take part in the approval of the decision, for

that State would have had, in its turn, to allow access to its own visa databank.

47. It is, moreover, to be observed that the Commission's original proposal did not provide for Member States not taking part in the VIS any opportunity of direct access to that databank: Article 6 of that proposal in fact envisaged a mechanism allowing indirect access, based on a request made through the authorities of one of the States taking part in the VIS.

48. The contested decision represents, as it were, a 'downsizing' of the ambitions originally contained in the Commission's proposal: the contested decision is in fact a measure dealing only with access to the VIS for activities related to the investigation and prevention of crime, and it contains no provision on the exchange of data between States taking part and those not taking part in the VIS.

49. In conclusion, it seems to me that examination of the Commission's original proposal does not yield any evidence that could be decisive in ruling on the lawfulness of the contested decision.

B — *The classification of the contested decision*

50. The issue to be resolved by the Court in these proceedings is solely to determine whether or not the contested decision may be regarded as an act developing the Schengen *acquis* in the sphere of visas.

51. The parties agree on the fact that, if the answer is in the affirmative, the United Kingdom would rightly have been excluded from the adoption of the contested decision. The Court's case-law has unequivocally declared that the participation of a Member State in a measure falling within one of the sectors of the Schengen *acquis* is reserved to those Member States taking part in that sector. This was stated in two judgments, both given on 18 December 2007, in cases in which the United Kingdom and the Council were again the parties. [12]

52. In those cases, the Court used *by analogy*, in order to establish whether a measure was related to the Schengen *acquis*, the criteria applicable to the choice of the legal basis of an act of the European Union. In particular, the Court declared that it must be concluded that 'the classification of a Community act as a proposal or initiative to build upon the Schengen *acquis* … must rest on objective factors which are amenable to judicial review,

12 — Case C-77/05 *United Kingdom* v *Council* [2007] ECR I-11459, paragraph 62, and Case C-137/05 *United Kingdom* v *Council* [2007] ECR I-11593, paragraph 50.

including in particular the aim and the content of the act.' [13]

53. In the present case, if reference had to be made only to the aim of the contested decision, the United Kingdom would probably obtain the annulment sought. In fact, as is also demonstrated by the Council's choice of legal basis (which is, I would recall, the provisions in Title VI EU), the decision is intended to attain an objective which is, undoubtedly, typical of acts of police cooperation. The Council itself recognises that fact.

54. By contrast, the argument concerning the content of the act is different and, to some extent, less clear. It could be considered that, because the content of the contested decision is made up of a series of provisions enabling access to the VIS for police reasons, the criterion referring to the content of the measure also works in favour of classifying that act as a provision falling within the ambit of Title VI EU.

55. It must, however, be noted that the contested decision does not in actual fact concern the exchange of personal data for police purposes *in general terms*. [14] On the contrary, it lays down the detailed rules for enabling, exceptionally and in specific circumstances, access for police purposes to a databank (the VIS) which was not conceived for such ends. The parties all agree that the predominant general use of the VIS is linked to the control of borders and entry, and not to the prevention or prosecution of criminal activity. In other words, the legislature has chosen to make of the contested decision merely a *measure for operating the VIS*, which allows that system to be used, in certain cases, for ends other than those for which it may normally be used.

56. As a result, the content of the contested decision is made up of a body of measures concerning the operation of the VIS, that is to say, of a visa databank, established on the basis of Title IV of the EC Treaty and forming part of a Schengen enhanced cooperation sector, rather and more than part of a series of provisions intended to bring about police cooperation.

57. Application by analogy of the criteria that may be used to define the legal basis of an act

13 — Case C-77/05 *United Kingdom* v *Council*, cited at footnote 12, above (paragraph 77). Here the Court cited several 'classic' cases concerning the choice of legal basis: 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.

14 — As we have seen, such a system already existed, introduced by Decision 2006/960 (footnote 10 above): on that basis, as noted, the nature of the access to information was indirect and not direct as under the contested decision.

does not, therefore, make it possible to settle unequivocally the question whether or not it is possible to classify the contested decision as building on the Schengen *acquis* in the sphere of visas.

58. Furthermore, I consider that, in general, isolated and abstract consideration of the purpose and content of the decision is insufficient when the question does not concern the choice of legal basis but, as here, the connection with the Schengen *acquis*.

59. It must in the first place be noted that, as we have seen, the Court has not in this respect referred purely and simply to its own case-law on the choice of legal basis. It has, in fact, expressly declared that the use of those criteria was made *by analogy*: it is not, therefore, to be taken for granted that it is necessary to do so in the same way.

60. Nor, in the second place, does the case-law on the choice of legal basis state that reference must be made *exclusively* to the aim and content of the measure. Instead, that case-law declares that it is necessary to refer to objective factors allowing judicial review of the legislature's choices. Typically, aim and content are included among those objective factors, and they are frequently mentioned by the Court; they are not, however, by any means the only factors that may possibly be taken into account. [15]

61. It seems to me that in the present case there is a further objective factor to be taken into account: as we have seen, the contested decision concerns, *factually*, a databank (the VIS) set up within the ambit of Schengen cooperation, in a sector (visas) in which the United Kingdom does not take part. That factor shows, without a shadow of a doubt, that there exists a close link between the contested decision and Schengen cooperation concerning visas.

62. In the third place, the Court has observed that, as is moreover settled case-law, a provision is never to be interpreted in isolation, but always in the specific context of which it forms part. [16]

63. In the fourth and last place, the wholly special nature of Schengen cooperation, being enhanced cooperation involving some only of the Member States of the Union, makes it necessary to take account of another principle, which is that of the integrity and

15 — Compare, for example, Case 45/86 *Commission* v *Council* [1987] ECR 1493, paragraph 11; *Titanium dioxide*, cited at footnote 13, paragraph 10; and Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 25. See also Opinion 2/00 [2001] ECR I-9713, paragraph 22.

16 — Case C-77/05 *United Kingdom* v *Council*, cited at footnote 12, paragraph 55.

coherence of the Schengen *acquis*.[17] That principle is reflected, in particular, in recital 2 of the preamble to Decision 2000/365.[18]

64. The Court's case-law, while not, however, explicit on this point, has taken into consideration the need to avoid the possibility that the Schengen *acquis* might be fragmented or distorted by allowing excessively 'easy' means of participation for Member States which do not fully participate in Schengen cooperation. The Court has, in particular, stated that measures developing the Schengen '*acquis*' 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.[19]

65. The passage just cited does not concern a situation identical to the present: indeed, in that case, the Court started from the premiss that, beyond a doubt, the measure to be assessed was a development of the Schengen *acquis*, whereas in this case it is precisely that classification which is at issue. To my mind, however, the citation clearly demonstrates the need to ensure that the Schengen *acquis* cannot be the subject of interpretation whose final result is to alter, in a manner apparently superficial but in reality considerable, its scope and features.[20]

66. I believe that, in general, the principle of the integrity and coherence of the Schengen *acquis* requires *every measure that could not actually exist without that acquis* to be regarded as a development of it. In this case, access to the data in the VIS presupposes, as is quite obvious, the existence of such a system, which is based solely on Schengen cooperation in the sphere of visas.

67. Consequently, the principle of integrity and coherence leads to the consideration that the contested decision is a development of the Schengen *acquis* in the sphere of visas.

68. We find ourselves, therefore, in a situation in which the application of differing criteria of interpretation produces two contrasting results. On the one hand, examination of the aim of the contested decision favours its classification as a 'normal' police cooperation

17 — On this principle compare, in general, the Opinion of Advocate General Trstenjak in Case C-137/05 *United Kingdom* v *Council*, cited at footnote 12, points 108-112.

18 — That recital states, in particular: 'Whereas the Schengen *acquis* was conceived and functions as a coherent ensemble which has to be fully accepted and applied by all States supporting the principle of the abolition of checks on persons at their common borders'.

19 — Case C-77/05 *United Kingdom* v *Council*, cited at footnote 12, paragraph 61.

20 — On the nature of the concept of coherence in legal debate, see my Opinion in Case C-429/07 *X* [2009] ECR I-4833, point 28 and footnote 6.

measure. On the other, application of the principle of the integrity and coherence of the Schengen *acquis* leads, instead, to its classification as a measure developing enhanced cooperation in the sphere of visas, and so of the Schengen *acquis* itself. Examination of the content of the contested decision, for its part, may, as we have seen, lead to either of those two classifications.

69. It is therefore necessary to identify a criterion that will allow one or other of those two possible views to prevail.

70. The specific circumstances of the present case do not, to my mind, allow the application by analogy of the criteria which, so far as concerns the choice of legal basis, are formulated in the Court's case-law for a situation of uncertainty between two possible approaches.

71. In the first place, it is not possible to apply the principle that when there are several possible legal bases for a measure of the European Union, that base must be used which corresponds to the main aim pursued. [21] That principle is applicable, as its formulation by the Court clearly shows, only when there are several possible bases because the measure to be classified pursues several ends. In this case, however, the issue is not so much that there are several *aims*, as that opposite results are yielded by two different *criteria* for the legal classification of the provision (on the one hand, that of consideration of the aim and, on the other, that of the integrity and coherence of the Schengen *acquis*).

72. Nor, in the second place, is it possible to apply the principle, which is moreover recognised in the Court's case-law to be exceptional, that permits the possibility of founding a measure on two different bases. [22] In this case, application of the two criteria referred to above produces two mutually incompatible results. It is inconceivable that an act may at one and the same time be adopted as an ordinary police cooperation measure and as a measure developing the Schengen *acquis* in the sphere of visas: those are two situations which, by definition, concern two different groups of States (the Member States of the European Union in the first case, and some of the States of the Union and certain non-member States in the second).

21 — Case C-91/05 *Commission* v *Council* [2008] ECR I-3651, paragraph 73 and case-law cited.

22 — For example, Case C-211/01 *Commission* v *Council* [2003] ECR I-8913, paragraph 40, and Case C-94/03 *Commission* v *Council* [2006] ECR I-1, paragraph 36.

73. It seems to me that a possible solution to the problem must be found by referring to the 'specific weight', as it were, of the conflicting criteria. These are criteria that are, in principle, of equal importance and value, but that can be ranked hierarchically, one being regarded as prevailing over the other on the basis of the specific circumstances of each particular situation. The logic to follow is in fact the same as the Court follows in determining the legal basis for a measure, when the latter has two distinct elements: in such cases, the legal basis to be used is that linked to the main element. In this case, of the two criteria, that one must be made to prevail which, in the specific circumstances, appears more appropriate having regard to the content of the measure which is the subject-matter of the dispute.

74. In the present case, the criterion of purpose rests on the 'police' function of the contested decision. The criterion of the integrity and coherence of the Schengen *acquis*, on the other hand, refers to the substantive elements of the measure in question, which uses a databank (the VIS) to administer visas.

75. I take the view that, in the specific case submitted to the Court's examination, the weight of the 'Schengen factor', that is to say, of the VIS databank, is greater than that of the 'police cooperation element', whose nature is both ancillary to and dependent on the former. That is because, from the point of view chosen by the legislature, the contested decision is, above all, a measure for operating the VIS databank. That is to say, the content of the contested decision is not only a body of rules whose purpose is the prevention and prosecution of offences, but also, and above all, a body of rules relating to consultation of the VIS.

76. Here, the fact is not to be disregarded that, as it itself acknowledged at the hearing, the United Kingdom could not, as matters now stand, have direct access to the VIS even if it were given the opportunity. That Member State does not, in fact, possess the necessary infrastructure ('physical' connection to the VIS). Such infrastructure can certainly not be created on the basis of the contested decision: for the latter in fact contains no provision of a technical kind, confirming that it is ancillary to the legislative corpus which regulates the VIS, adopted on the basis of Title IV of the EC Treaty.

77. As the Council has repeatedly emphasised in its written observations, if the contested decision were to be classified as a 'normal' police cooperation measure, the paradoxical result would be that access to the VIS would be permitted, for the purpose of preventing and prosecuting certain particularly serious offences, to countries (the United Kingdom and Ireland) that do not contribute to the operation of that databank, while such access

would be denied to countries (Switzerland, Norway and Iceland) that do contribute to the operation and funding of the VIS, which they use daily for its 'ordinary' purposes (that is to say, in essence, border control).

78. The United Kingdom endeavours to present the contested decision as an information exchange measure, maintaining that, if the United Kingdom and Ireland could take part in it, those Member States would make available the data they possess in the sphere of visas. To my mind, however, that reasoning contains an incorrect perspective. It would be correct if the contested decision had in fact been conceived by the legislature as a measure concerning the exchange of data, in accordance with the Commission's original proposal. However, because, as we have seen, the contested decision is as a matter of fact a measure relating to the operation and organisation of the VIS databank, I consider to be more correct the view that confines the right to approve such a measure solely to those by whom that databank has been created and is operated.

79. It is, of course, most desirable that it should be possible to arrive at a sharing, at least for some purposes, of the information concerning visas contained in the VIS, on the one hand, and in the corresponding databanks of the United Kingdom and Ireland, on the other. That can, however, happen only in a perspective quite different from that of the contested decision, that is to say, by means of a measure specifically aimed at the sharing or exchange of such data.

C — *The legal basis chosen by the Council*

80. Nonetheless, in conclusion, there remains one last problem which cannot be ignored and perhaps constitutes the most delicate and awkward point of this case. I refer to the possible role that must be given to the legal basis used by the Council in order to adopt the act in question.

81. In particular, as was seen in the summary of the parties' arguments, the United Kingdom insists that the use of a legal basis in Title VI EU means that the contested decision does not constitute a development of the Schengen *acquis* in the sphere of visas but rather a police cooperation measure in which the United Kingdom ought, in consequence, to have been allowed to take part.

82. In substance, the argument set out in the previous paragraph starts from the idea that

there is an incompatibility between basing a decision on Title VI EU and classifying it as a development of the Schengen *acquis* in the sphere of visas.

83. It must, however, be borne in mind that the Schengen *acquis* also includes measures concerning police cooperation. [23] It is true that the United Kingdom participates, at least in part, in that sector of Schengen cooperation, unlike the situation with regard to visas: [24] that shows, however, that a police cooperation measure may in itself fall within the ambit of Schengen cooperation, and that there is no impediment in principle to classifying a measure based on Title VI EU as falling within the Schengen *acquis*.

84. The fact that the legal basis of the contested decision is formed by Articles 30 EU and 34 EU does not, therefore, mean that the decision itself cannot be a development of the Schengen *acquis*.

85. However, what the United Kingdom denies is that the contested decision can be regarded as *a development of the Schengen* acquis *in the sphere of visas*, rather than of the Schengen *acquis* in general. In this connection, however, I would note that, having regard to my observations above, the fact that the aim of the measure is a 'police' aim does not alter the fact that, from the point of view of its content, this is in essence a decision relating to the procedure for operating the VIS.

86. In addition, it is to be recalled that the United Kingdom does not automatically play a part even in the Schengen measures concerning police cooperation. Its participation is confined to those situations in which it is expressly provided for.

87. As a result, I take the view that the choice made by the Council in considering the contested decision to be at one and the same time a measure developing the Schengen *acquis* in the sphere of visas and an act based on Title VI of the EU Treaty was correct, if unusual. The contested decision is a measure falling within the ambit of Schengen cooperation, and whose legal basis is formed by the rules of the European Union governing police cooperation. Nevertheless, because the contested decision is an act that concerns the operation of the VIS, it was adopted by the 'VIS countries'. The United Kingdom's action must therefore, in my opinion, be dismissed.

23 — See, for example, Article 39 et seq. of the Schengen Convention (OJ 2000 L 239, p. 1).

24 — Cf. Article 1 of Decision 2000/365.

88. To conclude, I should wish to stress an important factor, which is the quite special nature of this case. Dismissal of the United Kingdom's action by the Court would by no means entail calling in question the importance of the part played by the legal basis in the field of European Union law. It is clear that, as a matter of principle, it is the indication of the legal basis of an act that determines the procedure by which it is to be adopted. It has, however, to be considered that enhanced Schengen cooperation constitutes a sort of parallel body of rules in European Union law. The rules of law of the European Union are still applicable within the ambit of Schengen cooperation, the only limit (which operated in the present case) stemming from the fact that, in certain situations, the number of States taking part in decisions is not typical of the 'ordinary' acts of the European Union.

VI — Conclusion

89. Having regard to the foregoing considerations, I therefore propose that the Court should:

— dismiss the application;

— order the United Kingdom to pay the costs;

— order the Commission and the Kingdom of Spain to bear their own costs.