OPINION OF ADVOCATE GENERAL TRSTENJAK delivered on 10 July 2007 [1]

I — Introduction

1. The United Kingdom of Great Britain and Northern Ireland ('the United Kingdom') has brought an action under Article 230 EC for the annulment of Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States ('Regulation No 2252/2004). [2]

2. The proceedings are being conducted in parallel with Case C-77/05, in which the United Kingdom has brought a similar action for the annulment of 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 ('Regulation No 2007/2004). [3] The Court has not joined the two cases, but is treating them as cases dealing with the same issue. In both cases, a hearing was held on 13 March 2007.

3. In both cases the Court is asked, first and foremost, to give a ruling on the Protocol integrating the Schengen *acquis* into the framework of the European Union, which is one of the protocols annexed to the EU Treaty and the EC Treaty. In addition to that issue, the wider problem is raised of the scope of the system of closer cooperation within the structure of the European Union.

II — Legal background

A — *The Treaty establishing the European Community*

4. Articles 61 EC to 69 EC, which are in Part Three of Title IV of the Treaty, appear under

1 — Original language: Slovene.
2 — OJ 2004 L 385, p. 1.
3 — OJ 2004 L 385, p. 1.

the heading 'Visas, asylum, immigration and other policies related to free movement of persons'.

5. Article 62 EC provides: 'The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

...

2. measures on the crossing of the external borders of the Member States which shall establish:

(a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders'.

6. Article 69 EC provides as follows: 'The application of this title shall be subject to the provisions of the Protocol on the position of the United Kingdom and Ireland and to the Protocol on the position of Denmark and without prejudice to the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland.'

7. Article 311 EC states: 'The protocols annexed to this Treaty by common accord of the Member States shall form an integral part thereof.'

B — *Protocol integrating the Schengen* acquis *into the framework of the European Union*

8. Protocol (No 2) integrating the Schengen *acquis* into the framework of the European Union ('the Schengen Protocol') is one of the protocols annexed to the EU and EC Treaties and was made part of primary law by the Treaty of Amsterdam.

9. By virtue of Article 1 of the Schengen Protocol, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese

Republic, the Republic of Finland and the Kingdom of Sweden, signatories to the Schengen agreements, are authorised to establish closer cooperation among themselves within the scope of those agreements and related provisions, as they are listed in the annex to that protocol (hereinafter referred to as 'the Schengen *acquis*'). Such cooperation is to be conducted within the institutional and legal framework of the European Union and with respect for the relevant provisions of the Treaty on European Union and of the Treaty establishing the European Community.

10. Article 2(1) of the Schengen Protocol provides as follows: 'From the date of entry into force of the Treaty of Amsterdam, the Schengen *acquis*, including the decisions of the Executive Committee established by the Schengen agreements, which have been adopted before this date, shall immediately apply to the thirteen Member States referred to in Article 1, without prejudice to the provisions of paragraph 2 of this article. From the same date, the Council will substitute itself for the said Executive Committee.'

11. Article 3 of the Schengen Protocol provides as follows: 'Following the determination referred to in Article 2(1), second subparagraph, Denmark shall maintain the same rights and obligations in relation to the other signatories to the Schengen agreements as before the said determination with regard to those parts of the Schengen *acquis* that are determined to have a legal basis in Title IV of the Treaty establishing the European Community.'

12. Article 4 of the Schengen Protocol states:

'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.'

13. 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.'

14. Article 6 of the Schengen Protocol states 'The Republic of Iceland and the Kingdom of Norway shall be associated with the implementation of the Schengen *acquis* and its further development on the basis of the Agreement signed in Luxembourg on 19 December 1996 ...'.

15. Article 8 of that protocol provides that, 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 are to be regarded as an *acquis* which must be accepted in full by all States candidates for admission.

16. The Schengen *acquis* is defined in the Annex to the Schengen Protocol. According to that annex, the *acquis* comprises the agreement signed in Schengen 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; the Convention signed in Schengen on 19 June 1990 between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, implementing the Agreement on the gradual abolition of checks at their common borders, signed in Schengen on 14 June 1985, with related Final Act and common declarations; the Accession Protocols and Agreements to the 1985 agreement and the 1990 Implementation Convention with Italy, Spain and Portugal, Greece, Austria, and Denmark, Finland and Sweden, with related Final Acts and declarations; and, finally, the decisions and declarations adopted by the Executive Committee established by the 1990 Implementation Convention, as well as acts adopted for the implementation of the Convention by the organs upon which the Executive Committee has conferred decision-making powers.

C — The Protocol on the position of the United Kingdom and Ireland

17. The Protocol on the position of the United Kingdom and Ireland ('the Title IV

Protocol'), which is also annexed to the EU Treaty and the EU Treaty, governs cooperation by those two States in the event of proposals being submitted within the scope of Title IV of the EC Treaty.

18. According to Article 1 of that protocol: 'Subject to Article 3, the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title IV of the Treaty establishing the European Community ...'.

19. Article 2 of the Title IV Protocol states:

'In consequence of Article 1 and subject to Articles 3, 4 and 6, none of the provisions of Title IV of the Treaty establishing the European Community, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Community pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland; and no such provision, measure or decision shall in any way affect the competences, rights and obligations of those States; and no such provision, measure or decision shall in any way affect the *acquis communautaire* nor form part of Community law as they apply to the United Kingdom or Ireland.'

20. Article 3 of the Title IV Protocol states:

'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 of the Treaty establishing the European Community, 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.'

21. Article 4 of the Title IV Protocol provides 'The United Kingdom or Ireland may at any time after the adoption of a measure by the Council pursuant to Title IV of the Treaty establishing the European

Community notify its intention to the Council and to the Commission that it wishes to accept that measure. In that case, the procedure provided for in Article 11(3) of the Treaty establishing the European Community shall apply *mutatis mutandis*.'

22. Article 7 of the Title IV Protocol provides that Articles 3 and 4 are to be without prejudice to the Protocol integrating the Schengen *acquis* into the framework of the European Union.

D — *The Protocol on the position of Denmark*

23. Article 5 of the Protocol on the position of Denmark, also annexed to the EC Treaty and the EU Treaty, provides as follows:

'1. Denmark shall decide within a period of six months after the Council has decided on a proposal or initiative to build upon the Schengen *acquis* under the provisions of Title IV of the Treaty establishing the European Community, whether it will implement this decision in its national law. If it decides to do so, this decision will create an obligation under international law between Denmark and the other Member States referred to in Article 1 of the Protocol integrating the Schengen *acquis* into the framework of the European Union as well as Ireland or the United Kingdom if those Member States take part in the areas of cooperation in question.

2. If Denmark decides not to implement a decision of the Council as referred to in paragraph 1, the Member States referred to in Article 1 of the Protocol integrating the Schengen *acquis* into the framework of the European Union will consider appropriate measures to be taken.'

E — *Declarations annexed to the Treaty of Amsterdam*

24. The Declaration on Article 4 of the Protocol integrating the Schengen *acquis* into the framework of the European Union (Declaration No 45) states as follows:

'The High Contracting Parties invite the Council to seek the opinion of the Commission before it decides on a request under Article 4 of the Protocol integrating the

Schengen *acquis* into the framework of the European Union by Ireland or the United Kingdom of Great Britain and Northern Ireland to take part in some or all of the provisions of the Schengen *acquis*.

They 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.'

25. The Declaration on Article 5 of the Protocol integrating the Schengen *acquis* into the framework of the European Union (Declaration No 46) states as follows:

'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 protocol integrating the Schengen *acquis* into the framework of the European Union.'

F — *Regulation No 2252/2004*

26. The second recital in the preamble to Regulation No 2252/2004 states as follows:

'Minimum security standards for passports were introduced by a Resolution of the representatives of the Governments of the Member States, meeting within the Council, on 17 October 2000 ... It is now appropriate to upgrade this Resolution by a Community measure in order to achieve enhanced harmonised security standards for passports and travel documents to protect against falsification. At the same time biometric identifiers should be integrated in the passport or travel document in order to establish a reliable link between the genuine holder and the document.'

27. The third recital in the preamble to Regulation No 2252/2004 states:

'The harmonisation of security features and the integration of biometric identifiers is an important step towards the use of new elements in the perspective of future developments at European level, which render the travel document more secure and establish a more reliable link between the holder and

the passport and the travel document as an important contribution to ensuring that it is protected against fraudulent use. The specifications of the International Civil Aviation Organisation (ICAO), and in particular those set out in Document 9303 on machine readable travel documents, should be taken into account.'

28. The fourth recital in the preamble to Regulation No 2252/2004 states:

'This Regulation is limited to the harmonisation of the security features including biometric identifiers for the passports and travel documents of the Member States. The designation of the authorities and bodies authorised to have access to the data contained in the storage medium of documents is a matter of national legislation, subject to any relevant provisions of Community law, European Union law or international agreements.'

29. Recital 11 in the preamble to Regulation No 2252/2004 is worded 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 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* ... The United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application.'

30. Article 1 of Regulation No 2252/2004 provides:

'1. Passports and travel documents issued by Member States shall comply with the minimum security standards set out in the Annex.

2. Passports and travel documents shall include a storage medium which shall contain a facial image. Member States shall also include fingerprints in interoperable formats. The data shall be secured and the storage medium shall have sufficient capacity and capability to guarantee the integrity, the authenticity and the confidentiality of the data.

3. This Regulation applies to passports and travel documents issued by Member States. It does not apply to identity cards issued by Member States to their nationals or to temporary passports and travel documents having a validity of 12 months or less.'

31. Article 2 of Regulation No 2252/2004 provides:

'Additional technical specifications for passports and travel documents relating to the following shall be established in accordance with the procedure referred to in Article 5(2):

(a) additional security features and requirements including enhanced anti-forgery, counterfeiting and falsification standards;

(b) technical specifications for the storage medium of the biometric features and their security, including prevention of unauthorised access;

(c) requirements for quality and common standards for the facial image and the fingerprints.'

32. Article 3 of that regulation provides:

'1. In accordance with the procedure referred to in Article 5(2) it may be decided that the specifications referred to in Article 2 shall be secret and not be published. In that case, they shall be made available only to the bodies designated by the Member States as responsible for printing and to persons duly authorised by a Member State or the Commission.

2. Each Member State shall designate one body having responsibility for printing passports and travel documents. It shall communicate the name of that body to the Commission and the other Member States. The same body may be designated by two or more Member States. Each Member State shall be entitled to change its designated body. It shall inform the Commission and the other Member States accordingly.'

III — Facts and procedure

33. On 18 February 2004 the Commission submitted the proposal for Regulation No 2252/2004 to the Council.

34. On 19 February 2004 the United Kingdom notified the Council in writing of its wish to participate in the adoption of the regulation on the basis of Article 5(1) of the Schengen Protocol.

35. Notwithstanding the notification from the United Kingdom, the Council adopted Regulation No 2252/2004 on 13 December 2004, having taken the view that the proposal for Regulation No 2252/2004 fell within the proposals and initiatives based on that part of the Schengen *acquis* in which the United Kingdom does not participate by virtue of Council Decision No 2000/365/EC. [4]

36. The United Kingdom contends that the fact that it was not able to participate in the adoption of Regulation No 2007/2004 constitutes an infringement of Article 5 of the Schengen Protocol and therefore, on 17 February 2005, it brought the present action for annulment.

37. In the course of the procedure in Case C-137/05, Ireland and the Slovak Republic intervened in support of the United Kingdom.

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).

38. The Commission, the Kingdom of Spain and the Kingdom of the Netherlands have intervened in support of the Council.

39. The United Kingdom claims that the Court should:

— annul Regulation No 2252/2004;

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

40. The Council contends that the Court should:

— dismiss the action;

— order the United Kingdom to pay the costs.

41. Ireland and the Slovak Republic seek the form of order requested by the United Kingdom.

42. The Commission and the Kingdom of Spain seek the form of order requested by the Council.

43. At the hearing on 13 March 2007, which was also the hearing for Case C-77/05, the United Kingdom, the Council, Ireland, the Slovak Republic, the Commission, the Kingdom of the Netherlands and the Kingdom of Spain presented their oral arguments and answered questions put to them by the Court.

IV — Arguments of the parties

A — *United Kingdom*

44. The ground of the United Kingdom's argument is that there are two different kinds of measure based on the Schengen *acquis*. The first comprises Schengen-integral measures, and the second Schengen-related measures. In its view, integral measures are inextricably linked to the Schengen *acquis*, such as, for example, measures which amend the provisions of that *acquis* in which the United Kingdom does not cooperate. Measures of the second kind, on the other hand, are not inextricably linked to the Schengen *acquis* but may be adopted for the attainment of its objectives. The integrity of the Schengen *acquis* would not be jeopardised if the United Kingdom were to participate in the adoption of measures of the second type. Regulations Nos 2007/2004 and 2252/2004 are, in its view, measures of the second kind. As regards Regulation No 2252/2004, the United Kingdom contends that it is a Schengen-related measure, which does not supersede or amend any provision.

45. The United Kingdom's main argument is that the Council acted unlawfully by preventing it from participating in the adoption of Regulation No 2252/2004. The United Kingdom notified the Council, under Article 5(1) of the Schengen agreement and Article 3(1) of the Title IV Protocol, that it wished to participate in the adoption of Regulation No 2252/2004. In its view, the Council's conduct amounts to an infringement of essential procedural requirements within the meaning of the second paragraph of Article 230 EC.

46. United Kingdom contends that, with regard to the first pillar and the principle of cooperation in relation to Title VI EU,[5] Article 10 EC provides sufficient protection of the integrity of the Schengen *acquis* from any abuse. The Council's approach is particularly formalistic if it is borne in mind that the earlier measures were adopted on the basis of inter-governmental cooperation and not at Community level. The United Kingdom has an interest in the common control of the external borders of the Schengen area.

47. The United Kingdom contests the Council's assertion that the application of Article 5 of the Schengen Protocol depends on the prior application of Article 4 of that protocol. The Council has misinterpreted Article 5 of the Schengen Protocol to the effect that that article may be applied only to that part of the Schengen *acquis* which applies to the United Kingdom by virtue of the decision adopted on the basis of Article 4 of that protocol. The United Kingdom describes that interpretation as the 'subordination thesis'. It conflicts with the literal wording of the Schengen Protocol, the nature of Article 5 and Declaration No 46 annexed to the Treaty of Amsterdam. Rather than the subordination thesis, the United Kingdom proposes application of the 'independence thesis', according to which the application of Article 5 is independent of that of Article 4 of the Schengen Protocol, given that those two articles do not display any reciprocal relationship of superiority or subordinacy.

48. The wording of Article 5(1) of the Schengen Protocol, according to which measures adopted on that legal basis are applicable to all the Member States, runs counter to the subordination thesis. Therefore, development of the Schengen *acquis* is governed by the relevant provisions of the Treaties. The second paragraph of Article 5(1) of the Schengen Protocol governs not the opting- out mechanism but rather that of enhanced cooperation. It is clear from that provision that the United Kingdom's participation does not depend on the consent of the other Member States which cooperate in the Schengen *acquis* (hereinafter 'the Schengen Member States'). The arguments relied on to show that Article 5(1) of the Schengen Protocol concerning Ireland and the United Kingdom's right to participate is ambiguous and incomplete are unconvincing. The United Kingdom does not need the consent of the other Schengen Member States, given that written notification from the United Kingdom excludes (or deactivates) the mechanism of enhanced cooperation.

49. The United Kingdom maintains that the independence thesis is compatible with Article 7 of the Title IV Protocol. The essential aim of that article is to make it

5 — Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 42.

clear that, on the basis of the Title IV Protocol, the United Kingdom and Ireland are not entitled to associate themselves with those parts of the Schengen *acquis* which, on the basis of Council Decision 99/436, [6] have their legal basis in Title IV. But if the United Kingdom gives written notice to the Council in accordance with Article 5(1), second subparagraph, of the Schengen Protocol, and the legal basis of the proposal in which it intends participating is Title IV EC, the Title IV Protocol will apply. Moreover, the independence thesis is also in conformity with the requirement that the integrity of the Schengen *acquis* must be preserved. The United Kingdom's cooperation in that *acquis* without prior authorisation does not threaten the integrity of the Schengen *acquis*, given that the latter is sufficiently guaranteed by Article 10 EC and Article 3(2) of the Title IV Protocol, which, in certain circumstances, allows the adoption of certain measures without the participation of the United Kingdom.

50. According to the United Kingdom, the Schengen Protocol provides for two mechanisms for enhanced cooperation. The first is governed by Article 4 of that protocol and applies to the integration of the Schengen *acquis* into Union law and Community law. The second, governed by Article 5 of that protocol, is on the other hand concerned with the development of that *acquis*. Articles 4 and 5 of the Schengen Protocol provide for different procedures for accession to that *acquis* or participation in measures merely developing it.

51. In the United Kingdom's opinion, the only possible interpretation of Article 5 of the Schengen Protocol is that it applies solely to measures based on the Schengen *acquis* in which the United Kingdom does not participate. If that article did in fact refer to the measures in which the United Kingdom participates, it would, like Article 5(2) of the Protocol on the position of Denmark for example, have to contain provisions for the situation in which the United Kingdom decided not to participate in the adoption of such measures.

52. The United Kingdom also maintains that the interpretation of Article 5 proposed by the Council, in accordance with the subordination thesis, constitutes a breach of the principle of proportionality. The United Kingdom and Ireland have participated in many instances in the development of the Schengen *acquis*, but without resorting to the procedure under Article 4 of the Schengen Protocol. Many exceptions, in which participation was possible without recourse to the procedure provided for in Article 4 of the Protocol, show that the integrity of the Schengen *acquis* was not threatened.

6 — Council Decision 1999/436/EC 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 Schengen *acquis* (OJ 1999 L 176, p. 17).

53. The broad and loose conception of measures building on the Schengen *acquis* which the Council employs in its practice also conflicts with the principle of legal certainty. The two-step test used by the Council in order to ascertain whether the measures concerned are legally based on the Schengen *acquis* is therefore incompatible with Article 5 of the Schengen Protocol. The second part of the test, which seeks to ascertain whether the matter involved is essential to the free movement of persons in a context in which checks of persons at common borders have been abolished, is too loose to be compatible with the requirements of legal certainty.

54. It is true that the United Kingdom does not wish to proceed with abolition of internal borders of the kind adopted by the Schengen Member States. But that objective does not theoretically imply any risk, for the Schengen Member States, that the integrity of the Schengen *acquis* might be imperilled.

55. Lastly, the principle of the equal treatment of citizens of the Union with regard to the checks on passports that may be performed at external borders implies the need for the United Kingdom and Ireland to cooperate in Regulation No 2252/2004. If the equipment intended for recognition of passports at border crossings at the external borders of the European Union were unable to read the passports of the nationals of the United Kingdom and Ireland, the latter would without justification be afforded treatment different from that of the nationals of the other Member States.

56. In the alternative, the United Kingdom claims that, if the Court upheld the merits of the independence thesis, it would necessarily follow that Article 5 of the Schengen Protocol does not apply to Schengen-related measures. That article applies only to integral measures. Since, however, the contested regulation does not fall within the latter category, the United Kingdom should have participated in its adoption.

B — *Interveners supporting the United Kingdom*

57. Referring to the provisions on the interpretation of international Treaties contained in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, the Irish Government maintains that there are no grounds for departing from the clear wording of Articles 4 and 5 of the Schengen Protocol. Ireland also supports the United Kingdom's thesis that Articles 4 and 5 of that protocol are independent one of the other,

referring to Article 8 of that protocol and to Article 6(2) of Council Decision 2002/192/EC.[7] The fact that that decision mentions also measures that form part of the Schengen *acquis* and were adopted in accordance with the Schengen Protocol does not mean that a dynamic interpretation of the Schengen Protocol is permissible. Rather, the Council may not, by its decision, amend primary law. The Irish Government also considers that the Council practice disproportionately obstructs cooperation by Ireland and the United Kingdom.

58. The Slovak Government supports the United Kingdom. The fact that a Member State does not participate in the Schengen *acquis* cannot prevent it from participating on the basis of Article 5 of the Schengen Protocol or Article 3(1) of the Title IV Protocol. In its view, the analysis to be undertaken requires additional factors and it therefore proposes a different analysis, based on Articles 4 and 5 of the Schengen Protocol. According to that analysis, cooperation based on Article 5 of the Schengen Protocol may be denied only where there are reasonable grounds for thinking that the integrity and coherence of the Schengen *acquis* might be put at risk. For that to be the case, cooperation by non-Schengen States must clearly and directly conflict with the objectives of the Schengen *acquis*, which means, in practice, that it must actually give rise to restrictions on both the effectiveness and the functioning of measures forming part of the Schengen *acquis*

59. The Slovak Government also maintains that the Council's position, according to which Article 4 of the Schengen Protocol is binding in respect of cooperation on development measures, implies that Article 5 of that protocol is superfluous.

C — *The Council*

60. The Council emphasises that the United Kingdom's independence thesis is inconsistent with the principle of the integrity of the Schengen *acquis* and is contradicted by the construction and logic of the Schengen Protocol and the Title IV Protocol. The independence thesis puts at risk the principle of the integrity of the Schengen *acquis*, above all if it is applied together with the limitation on integral measures. The Council rejects the view that the aim of Article 5 of the protocol is to confer rights on the United Kingdom and Ireland. It is intended, rather, to protect the activities of the Schengen Member States against obstacles to the development of enhanced cooperation on the part of one or more States. That aim of

7 — Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis* (OJ 2002 L 64, p. 20).

Article 5 of the Schengen Protocol is apparent from its difference from Article 4. Consequently, the argument that, once the Council has been notified, the United Kingdom and Ireland cooperate automatically cannot be accepted

61. The Council maintains that protection of the integrity of the Schengen *acquis* is the *ratio legis* of Article 4 of the Schengen Protocol. There is a clear causal link between the abolition of internal border controls and accompanying measures.

62. In addition, the measures adopted in the area of enhanced Schengen cooperation are dependent on and linked to each other. It is therefore possible that integrity may be compromised even where the measure concerned is not one defined as integral by the United Kingdom but, rather, it is established, in the light of a two-step test, that the problem is one linked to the free movement of persons in a context in which internal borders have been abolished.

63. Referring to the principle of safeguarding the integrity and coherence of the Schengen *acquis*, the Council also maintains that, following any declaration and procedure provided for in Article 4 of the Schengen Protocol, the United Kingdom can no longer unilaterally opt out of the development of that *acquis*. As an example of the possible lack of coherence of development of the Schengen *acquis*, the Council mentions the United Kingdom's participation in repatriation measures and its non-participation in the denial of a new entry to the EU.

64. The relationship of subordination or primacy between Article 5 and Article 4 of the Schengen Protocol is also necessary to avoid the Article 4 mechanism in the Article 5 procedure. In that regard, Article 10 EC and the principle of cooperation do not sufficiently protect the integrity of the Schengen *acquis*. The reference to Article 3(2) of the Title IV Protocol is misconceived, in that Article 7 of that protocol limits the applicability of the protocol in such a way that, in the case of conflict, the Schengen Protocol assumes the nature of *lex specialis* in relation to the Title IV Protocol. The opt-in mechanism in Article 3(1) of the Title IV Protocol relates only to measures adopted on the basis of Title IV EC and not to measures developing the Schengen *acquis*. If the independence thesis advocated by the United Kingdom were upheld, Article 7 of the Title IV Protocol would be meaningless. The United Kingdom could simply apply Article 3(1) and give notice of its wish to participate in Title IV measures, that is to say measures to build on the Schengen *acquis*. However,

the protection provided for by Article 4 of the Schengen Protocol would thereby be undermined.

65. The Council contests the United Kingdom's arguments concerning the broad and loose interpretation of the concept of a measure building on the Schengen *acquis* and contends that a straightforward two-step test makes it possible to establish whether or not such a measure is involved. That test seeks to determine how close the link between the proposed measure and the abolition of controls at internal borders must be for the measure to be considered a development of the Schengen *acquis*. The first stage of that test establishes whether the Schengen *acquis* is applicable to the measure. The scope of that *acquis* can be inferred from Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*.[8] The second stage of that test consists in asking a question contained in the note from the Presidency of 22 October 1999, examined and approved by COREPER, namely whether the measure concerns a matter that is essential to the free movement of persons within an area in which checks on persons at internal borders have been eliminated and in which a common system of border control has been set up, and by which Iceland and Norway should therefore be bound. The purpose of that test is, for the Council, to ensure greater coherence in the treatment of legal acts in the area of Schengen cooperation. That test makes an important contribution to the choice of the correct procedure. The objection that that test was developed for the Mixed Committee for Norway and Iceland is unfounded. There is no difference of content between the measures adopted by that Mixed Committee and those adopted on the basis of Article 5 of the Schengen Protocol.

66. As regards the distinction between Schengen-integral measures and Schengen-related measures contended for by the United Kingdom, that distinction has no basis in Community law. The Schengen Protocol deals with the Schengen *acquis* in its entirety. When Decision 1999/435[9] was adopted, the Council could have taken the position of the United Kingdom into consideration, but did not do so.

67. As regards the United Kingdom's argument regarding cooperation in Schengen *acquis* measures, the Council contends that the United Kingdom's position can be determined on the basis of a specific

8 — OJ 1999 L 176, p. 31.

9 — 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).

examination. In the case of a proposal whose legal basis is Title IV and which does not imply further development of that *acquis*, the United Kingdom may participate (opt in) in accordance with Article 3(1) of the Title IV Protocol. If, on the other hand, the proposal implies further development of the Schengen *acquis*, the Council will consider the United Kingdom's position on the basis of Article 4 of the Schengen Protocol. If the United Kingdom cooperates in those parts of the Schengen *acquis* that are mentioned by Decision No 2000/365, it may cooperate in the adoption of measures without first giving special notification. If, on the other hand, it is apparent from that decision that the United Kingdom does not cooperate in those parts of the *acquis*, it must, in order to cooperate, proceed in accordance with Article 4 of the Schengen Protocol.

68. The cooperation of the United Kingdom in the adoption of measures falling within the Schengen *acquis* reflects, according to the Council, the specific nature of the cooperation in each individual case. So, for example, Regulation No 334/2002 [10] was adopted on the legal basis of the old Article 100c of the EC Treaty, before integration of the Schengen *acquis* into the framework of Union law. As regards the other legal acts, they are of an executive rather than normative nature, or are measures clearly falling within the executive sphere, such as for example Decision 2004/573 [11]. As regards Directive 2001/40 [12] and Decision 2004/191, [13] the Council maintains that those measures are based on the Schengen *acquis*, in which the United Kingdom does not participate. Cooperation in the adoption of those two measures is based on the fact that that directive governs only reciprocal recognition of decisions on the expulsion of aliens. It concerns the expulsion of nationals of non-Member States who might easily be able to avoid expulsion by entering the United Kingdom.

69. Measures connected with checks on persons at external borders fall within the Schengen *acquis*. They include Regulation No 2252/2004, inasmuch as the checking of passports is in practice carried out at external borders. Article 62(2)(a) EC, which is the legal basis for Regulation No 2252/2004, acts a link between that regulation and external borders. The checking of passports is a fundamental matter in relation to the free movement of persons in an area in which checks on persons at internal borders have been abolished. The United Kingdom never sought to cooperate in that sector of

10 — Council Regulation (EC) No 334/2002 of 18 February 2002 amending Regulation (EC) No 1683/95 laying down a uniform format for visas (OJ 2002 L 53, p. 7).

11 — Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third country nationals who are subjects of individual removal orders (OJ 2004 L 261, p. 5).

12 — Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (OJ 2001 L 149, p. 34).

13 — Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals (OJ 2004 L 60, p. 55).

the Schengen *acquis*. As a result, Decision 2000/365 contains no provision concerning the cooperation of the United Kingdom in that part of the Schengen *acquis*.

D — *Interveners supporting the Council*

70. The Commission considers that the Council's position regarding the relationship between Article 4 and Article 5 of the Schengen Protocol is correct. Although it does not accept the United Kingdom's position regarding the distinction between integral measures and related measures, it maintains that Regulation No 2007/2004 is an integral measure, in that it is inextricably linked to those parts of the Schengen *acquis* in which the United Kingdom does not participate.

71. According to the Commission, the essential characteristic of enhanced cooperation and the Schengen *acquis* is represented by the principle of integrity. Consequently, the basic aim is to protect such integrity and the cohesion of the Schengen *acquis*. It is true that the Schengen Protocol provides for partial cooperation for individual Member States which do not form part of the Schengen system; it does not, however, leave it open to the will of the Member States to pick and choose in which part of the *acquis* to cooperate, which would give rise to a patchwork of cooperation and of obligations.

72. Article 5 of the Schengen Protocol cannot be considered separately, that is to say outside the context of the protocol as a whole. Consequently, the independence thesis regarding the relationship between Articles 4 and 5 of that protocol is misconceived. The Commission contends that the phrase 'building upon the Schengen *acquis*' in Article 5 of the Schengen Protocol is not vague or broad. The procedure for the adoption of measures based on that article, in the case of development of the Schengen *acquis*, does not differ from determination of the legal basis for the adoption of Community law measures. The two-step test relied on by the Council regarding development is correct and sufficient

73. Lastly, the Commission maintains that the purpose of Regulation No 2252/2004 is to lay down minimum security standards for passports and travel documents. In that way it is possible to establish by biometrics a more specific link between the holder of the passport and the passport itself. That aim is inextricably bound up with the checks at external borders that represent the essence of Schengen cooperation. The fact that the United Kingdom does not cooperate in Regulation No 2252/2004 does not, therefore, constitute discrimination against nationals of the United Kingdom. Ireland and the United Kingdom may insert bio-

metric details in their passports also on the basis of the provisions of the International Civil Aviation Organisation (ICAO).

74. The Spanish Government contends that the interpretation of the Schengen Protocol advocated by the United Kingdom constitutes a threat to measures already adopted in the area of enhanced cooperation and would therefore undermine the principle of the integrity of the Schengen *acquis*. According to the Spanish Government, a right for the United Kingdom to cooperate does not follow from a systematic, teleological and historical interpretation of Article 5(1) of the Schengen Protocol. As regards the arguments put forward in the alternative by the United Kingdom, the Spanish Government maintains that it is for the Council to determine which measures are based on the Schengen *acquis*.

75. The Government of the Netherlands, supporting the Council's view of the relation of subordination between Articles 5 and 4 of the Schengen Protocol, argued at the hearing that Article 4 of that Protocol requires a decision taken unanimously by the Schengen States and by the United Kingdom. The requirement of unanimity means that the Member States cannot at their own discretion express a decision as to cooperation in just one area of the Schengen *acquis*, and in that way it safeguards the integrity of that *acquis*. If Article 5 of the Schengen Protocol were to be interpreted to the effect proposed by the United Kingdom, that would mean that the Member States were entitled not to cooperate in measures building on the Schengen *acquis*, even though they did cooperate in the Schengen *acquis*.

V — Assessment of the Advocate General

76. The Treaty of Amsterdam opened a new dimension in European integration. [14] That Treaty created an area of freedom, security and justice. [15] Legal writers emphasise that the concept of closer cooperation applies also to the development and completion of that area [16] which, in the light of Article 1 of the Schengen Protocol, includes the Schengen *acquis*. [17] That *acquis* was conceived at an early stage as part of public international law and was incorporated in the law of the

14 — Thym, Daniel, Ungleichzeitigkeit und europäisches Verfassungsrecht, Baden-Baden, 2004, p. 79. According to the author, this is a new phase of integration following completion of the single market and monetary union.

15 — It should be noted that, as a result of the area of freedom, security and justice, the Treaty of Amsterdam amended Title VI EU and inserted the new Title IV EC.

16 — Bribosia, Hérvé, Différenciation et avant-gardes au sein de l'Union européenne, Bilan et perspectives du Traité d'Amsterdam, *Cahiers de droit européen*, No 1-2/2000, p. 57(88). As regards the significance of closer cooperation, reference is made to the address given by the ex-President of the European Commission, Jacques Delors, to the Senate of the Kingdom of Belgium in March 2007, a summary of which was published in Agence Europe No 9407 of 17 April 2007.

17 — Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 83. The author also refers to Article 43(1) EU, which provides that the proposed closer cooperation is not to affect the provisions of the Protocol integrating the Schengen *acquis* into the framework of the European Union.

Union and of the Community in accordance with Article 2(1) of the Schengen Protocol. [18]

77. In Cases C-137/05 and C-77/05, the Court is called on to interpret protocols which relate in particular to closer cooperation. [19] The traditional concept of European integration flows from the notion of unity of integration, that is to say the creation of uniform rules that are valid in all the Member States. [20] Following the amendments to the founding Treaties, which extended the competences of the European Community and the European Union, and following later enlargements of the Union, which involve greater heterogeneity of structures and interests, the concept of unitary integration can no longer be applied in the same way as in the period in which the European Economic Community comprised six or nine members. [21] Enhanced cooperation is a legal expression of the balancing exercise between making the Union wider and making it deeper. [22] According to legal writers, the Schengen *acquis* is a special and modified form of closer cooperation established by certain Member States by means of international Treaties, [23] by means of the Agreement on the gradual abolition of checks at common borders, signed in Schengen on 14 June 1985 by the Governments of the Benelux Economic Union, the Federal Republic of Germany and the French Republic (hereinafter 'the Schengen Agreement'), and the Convention of 19 June 1990 implementing the agreement on the gradual abolition of checks at their common borders, signed in Schengen on 14 June 1985 (hereinafter 'the CAA'), which go beyond the institutional scope of the then Community, now the Union. [24] As autonomous measures of international law, both those agreements ceased to exist when the Treaty of Amsterdam entered into force. [25]

18 — Boer den, Monica, Not Merely a Matter of Moving House: Police Co-operation from Schengen to the TEU, *Maastricht Journal of European and Comparative Law*, 7(2000), p. 336 (337); *Bender, Tobias*, Die verstärkte Zusammenarbeit nach Nizza, *ZaöRV* 2001, p. 730(743); Gautier, Marie, Accords de Schengen, entry 2630, *JurisClasseur Europe Traité*, paragraph 38; Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 82. The last-mentioned author maintains that the Schengen Protocol applies to the first and third pillars, and for that reason was adopted as an annex to the EU Treaty and the EC Treaty.

19 — In its judgment in Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097, paragraph 34, the Court stated that 'The provisions of the Schengen *acquis* are applicable only if and as far as they are compatible with European Union and Community law'. Article 1 of the Schengen Protocol provides that the closer cooperation is to be conducted within the institutional and legal framework of the European Union and with respect for the Treaties. That provision is an important expression of the principle, upheld in Article 43(1) EU, that closer cooperation is to respect the Treaties and the institutional framework of the Union, as well as Community law.

20 — Bender, *Die verstärkte Zusammenarbeit nach Nizza*, pp. 730, 731 and 767.

21 — Jacqué, Jean-Paul, *Droit institutionnel de l'Union européenne*, 3rd edition, Paris 2004, p. 161, maintains that closer cooperation derives from the idea that it is impossible for all the Member States to progress towards integration at the same speed.

22 — Blanke, Titel VII, Bestimmungen über eine Verstärkte Zusammenarbeit, in Grabitz/Hilf, paragraph 1.

23 — Referring to Article 134 CAA, legal commentators have pointed out that, even at its earliest stage, the Schengen *acquis* did not conflict with Community law (Van Simaeys, Benoit, Carlier, Jean-Yves, Le nouvel espace de liberté, de sécurité et de justice, in Lejeune, Yves (ed.): *Le traité d'Amsterdam, Espoirs et déceptions*, Brussels, 1999, p. 250).

24 — Blanke, Titel VII, Bestimmungen über eine Verstärkte Zusammenarbeit, in Grabitz/Hilf, paragraph 9, Gautier, Accords de Schengen, paragraphs 1 and 2. A stage has been reached which goes beyond the founding Treaties, in that the Community, although enjoying competence regarding the free movement of persons, was not yet competent to regulate the legal position of the citizens of non-member countries.

25 — Gautier, Accords de Schengen, paragraph 3. According to the author, the Treaty of Amsterdam integrated the *acquis* deriving from the Schengen agreements into the European institutional framework.

78. First of all, it must be observed that primary Community law knows no distinction between Schengen-integral measures and Schengen-related measures. Even the United Kingdom refers to that fact, when in its reply it states that that distinction is an analytical device to help identify the small number of cases in which it would be justified to exclude Ireland or the United Kingdom from cooperation in the adoption of measures based on the Schengen *acquis*. [26]

79. Article 5 of the Schengen Protocol mentions proposals and initiatives to build upon the Schengen *acquis*. [27] However, at the hearing all the parties spoke of 'development' of the Schengen *acquis*. It is therefore necessary to establish whether the concepts of measures which 'build upon the Schengen *acquis*' and measures which 'develop the Schengen *acquis*' are synonymous.

80. In secondary law, for example, recital 6 in the preamble to Council Directive 2001/51/EC of 28 June 2001, which supplements the provisions of Article 26 of the Convention implementing the Schengen agreement of 14 June 1985 (hereinafter 'Directive 2001/51), [28] uses the same expression as Article 5 of the Schengen Protocol in the English and Spanish versions but not in the Slovene, French, German or Italian versions. [29] Recital 13 in the preamble to Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network (hereinafter 'Regulation No 377/2004') [30] uses the same words as the Schengen Protocol in the English, French, Italian and Spanish versions, but not in the Slovene and German versions. [31] Recital 12 in the preamble to Council Decision 2005/267/EC of 16 March 2005 establishing a secure web-based information and coordination network for Member States' migration management services (hereinafter 'Decision 2005/267') [32] mentions measures that develop provisions of the Schengen *acquis* against the organisation of illegal immigration. [33] In the English, French,

26 — Reply in Case C-77/05, paragraph 72.

27 — The English version of that protocol uses the following terms: 'Proposals and initiatives to build upon the Schengen *acquis*'; the French version: 'Les propositions et initiatives fondés sur l'*acquis* de Schengen'; the German version 'Vorschläge und Initiativen auf der Grundlage des Schengen-Besitzstands'; the Italian version: 'Le proposte e le iniziative che si baseranno sull'*acquis* di Schengen'; and the Spanish version 'Las propuestas e iniciativas para desarrollar el acervo de Schengen'.

28 — OJ 2001 L 187, p. 45.

29 — In the Slovene version: '*Ta direktiva pomeni nadaljnji razvoj schengenskega pravnega reda ...*'; in the English version: '*This Directive builds on the Schengen acquis ...*'; in the French version: '*La présente directive constitue un développement de l'acquis de Schengen ...*'; in the German version: '*Diese Richtlinie stellt eine Weiterentwicklung des Schengen-Besitzstands ...*'; in the Italian version: '*Il presente strumento rappresenta uno sviluppo dell'acquis di Schengen ...*'; in the Spanish version '*La presente Directiva constituye un desarrollo del acervo de Schengen ...*'.

30 — OJ 2004 L 64, p. 1.

31 — In the Slovene version: '*Ta uredba je akt, ki temelji na schengenskem pravnem redu ...*'; in the English version: '*This Regulation constitutes an act building on the Schengen acquis ...*'; in the French version: '*Le présent règlement constitue un acte fondé sur l'acquis de Schengen ...*'; in the German version: '*Diese Verordnung stellt einen auf dem Schengen-Besitzstand aufbauenden ... Rechtsakt ...*'; in the Italian version: '*Il presente regolamento costituisce un atto basato sull'acquis di Schengen ...*'; in the Spanish version: '*El presente Reglamento constituye un acto que desarrolla el acervo de Schengen ...*'.

32 — OJ 2005 L 83, p. 48.

33 — In the English version: '*... to the extent that its measures develop provisions of the Schengen acquis against the organisation of illegal immigration ...*'; in the French version: '*... pour autant que ses mesures développent les dispositions de l'acquis de Schengen afin de lutter contre l'organisation de l'immigration illégale ...*', in the German version: '*... deren Maßnahmen eine Weiterentwicklung des Schengen-Besitzstands zur Bekämpfung der illegalen Einwanderung darstellen ...*'; in the Italian version: '*... nella misura in cui le sue misure sviluppano le disposizioni dell'acquis di Schengen volte a combattere l'organizzazione di immigrazione illegale ...*'; in the Spanish version: '*... en la medida en que desarrolla las disposiciones del acervo de Schengen en materia de lucha contra la organización de la inmigración ilegal ...*'.

Italian and Spanish versions, the same terms are used as in Article 5 of the Protocol, but that is not the case in the Slovene or German versions.

81. I would also observe that the content of the language versions in which Schengen *acquis* secondary-law measures do not use the same words, for example the Italian and German texts of the Schengen Protocol and of the secondary-law measures mentioned in point 80, is exactly identical to the content of the language versions in which the same words are used, for example the English version of those measures. Where, by reason of the use of different words in those measures, the content of the various language versions might differ, it would be necessary, in order to interpret a provision of Community law, to compare the various language versions thereof. [34] If the content of the various language versions is found to differ, it is necessary to interpret the provision in question having regard to the purpose and general scheme of the rules of which it forms part. [35] However, the aim of Article 5 of the Schengen Protocol is to provide for a special procedure for cooperation by the United Kingdom and Ireland in new measures that build upon, that is to say, develop, the Schengen *acquis*.

82. It should be noted, first of all, that the present case concerns interpretation of the protocols and declarations annexed to the EU and EC Treaties. The legal literature concerning protocols and declarations identifies two traditional categories of annexures to the founding Treaties. [36] Under Article 311 EC, protocols, [37] which, by common accord of the Member States, are annexed to the EC Treaty, form an integral part thereof. [38] In fact, in the *Miraglia* case, [39] the Court applied Article 2 of the Schengen

34 — I should point out that in its judgment in Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 36, in which, regarding the difference between the Danish and Greek versions of Council Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Council Directive 92/108/EEC of 14 December 1992 (OJ 1992 L 390, p. 124), the Court stated that '... to discount two language versions, as the applicants in the main proceedings suggest, would run counter to the Court's settled case-law to the effect that the need for a uniform interpretation of Community regulations makes it impossible for the text of a provision to be considered in isolation but requires, on the contrary, that it should be interpreted and applied in the light of the versions existing in the other official languages ... Lastly, all the language versions must, in principle, be recognised as having the same weight and this cannot vary according to the size of the population of the Member States using the language in question'.

35 — Case C-30/77 *Bouchereau* [1977] ECR 1999, paragraph 14, and Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28. The *Rockfon* case concerned interpretation of Article 1 of Council Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies (OJ 1975 L 48, p. 29). It was necessary to interpret a term contained in that article: 'establishment' in English, 'stabilimento' in Italian, 'établissement' in French and 'obrat' in Slovene. After an examination of the various language versions of the directive, the Court concluded that '[a] comparison of the terms used shows that they have different connotations signifying, according to the version in question, establishment, undertaking, work centre, local unit or place of work' (paragraph 27).

36 — Michel, Valérie, Actes annexés au traité, entry 150 in JurisClasseur Europe Traité, paragraph 3.

37 — According to German legal literature, Community law contains no definition of the concept of protocol used in Article 311 EC (Weber, in von den Groeben/Schwarze, Article 311, paragraph 1).

38 — Michel, Actes annexés au traité, paragraph 36. According to the author, the protocols have exactly the same legislative force as the founding Treaties.

39 — Case C-469/03 *Miraglia* [2005] ECR I-2009.

Protocol as part of primary law. The declarations annexed to the EC and EU Treaties, on the other hand, must not be seen as being of the same level as protocols, [40] for as they are not binding. [41] Declarations adopted by an inter-governmental conference do not form part of the founding Treaties, but may be relevant in interpreting such Treaties in accordance with Article 31(2)(b) of the Vienna Convention on the Law of Treaties. [42] The difference between protocols and declarations is particularly important, in that the institutions must take account of the protocols when legislating. [43]

A — *Admissibility of the action*

83. The application for annulment was brought, within the time-limits laid down by Article 230 EC, by the United Kingdom in its capacity as a Member State, against Regulation No 2252/2004, a measure adopted by the Council. In the light of the literal wording of Article 230 EC, the application is admissible. [44]

B — *The legal position of certain other Member States in relation to the Schengen* acquis

84. Before I analyse the position of the United Kingdom and Ireland in relation to the Schengen *acquis*, I must first consider the position of certain other States. The Schengen *acquis* recognises various forms of cooperation, which operate vis-à-vis certain States only.

1. Denmark

85. Denmark accepts the principle of the abolition of internal border controls, but not

40 — Weber, in von den Groeben/Schwarze, Article 311, paragraph 2.

41 — Lenaerts, Koen, Van Nuffel Piet, Bray Robert, *Constitutional Law of the European Union*, 2nd edition, London, 2005, p. 710; *Blumann, Claude, Dubois, Louis*, Droit institutionnel de l'Union européenne, 2nd edition, Paris 2005, p. 394.

42 — Weber, in von den Groeben/Schwarze, Article 311, paragraph 3; *Michel*, Actes annexés au traité, paragraph 42. In its judgment in Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, in which the Kingdom of the Netherlands sought, inter alia, annulment of Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), the Court referred to Declaration 17 on the right of access to information, annexed to the final act of the meeting of Heads of State or of Government which adopted the EU Treaty.

43 — Michel, Actes annexés au traité, paragraph 37.

44 — Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 222, refers to another opinion expressed by legal commentators, to the effect that, if a legislative act in the area of closer cooperation is not binding on a Member State, the latter may challenge it only where it has exceeded the legislative scope of closer cooperation, in that the secondary-law measure was adopted *ultra vires*, or the rights, obligations or competences of the Member States not participating in the closer cooperation were infringed. That view cannot be upheld, in that it is contrary to the clear terms of Article 230 EC.

the principle that the so-called Community method applies to the Schengen *acquis* in the area of justice and home affairs. [45] Pursuant to Article 1 of the Schengen Protocol, the Kingdom of Denmark forms part of the Schengen system, but Article 3 of that protocol, by way of *lex specialis,* governs its particular position.

86. A special Protocol on the position of Denmark is also annexed to the Treaty of Amsterdam. Under Article 5 of that protocol, the Schengen *acquis* represents, for Denmark, a part of public international law. [46] On the basis of the principle of integrity, Article 5(2) of that protocol allows the other Schengen States in particular to invoke the principle of reciprocity (*tu quoque)* in the event that Denmark decides not to adopt a Council decision on a proposal or initiative to build upon the Schengen *acquis*.

2. New Member States

87. Because the application was lodged before the entry into force of the Treaty on the accession of the Republic of Bulgaria and of Romania to the European Union, in conformity with the principle *tempus regit actum* my analysis will be limited to the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union. In any event, the position of Bulgaria and Romania corresponds essentially to the position of the Member States that acceded in 2004. [47]

88. The position of the new Member States is governed in general by Article 8 of the Schengen Protocol, according to which '[f]or 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'. [48]

45 — Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 103; Gautier, Accords de Schengen, paragraph 39. Those authors emphasise that the Kingdom of Denmark does not accept the fact that the entire Schengen *acquis* has become part of Community law, having regard to the characteristics of that law. Consequently, it does not approve of the supranational approach regarding the first pillar and prefers the intergovernmental approach adopted regarding the third pillar.

46 — Jacqué, *Droit institutionnel de l'Union européenne*, p. 163.

47 — Gautier, Accords de Schengen, paragraph 36.

48 — Gautier, Accords de Schengen, paragraph 36. In other words, the 10 new Member States which acceded in 2004 are to cooperate in the Schengen *acquis* as from the date of accession, since that *acquis* is part of the *acquis* communautaire which they had to accept. See, similarly, Article 3(1) of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded.

89. The provisions of the Schengen *acquis* not contemplated by Article 3(1) of the Act on the conditions of accession are binding on the new Member States as from the date of accession, even though they apply only by virtue of a decision adopted by the Council for that purpose, after verification, in accordance with the applicable Schengen evaluation procedures, that the necessary conditions for the application of all the parts of the *acquis* concerned have been met, and after consultation of the European Parliament. [49] Primary law thus establishes that the new Member States are to become Schengen States upon meeting the conditions laid down in the Schengen evaluation procedures. [50] Therefore, the position of the new Member States may more correctly be defined as a kind of transitional period.

3. Iceland and Norway

90. Iceland and Norway, together with Sweden, Finland and Denmark, form the Nordic Passport Union, in which internal border controls were abolished as early as 1957. [51] Sweden, Finland and Denmark thus also became Schengen States following their accession to the European Union.

91. Since the entry into force of the Treaty of Amsterdam, the position of those two States has been governed by Article 6 of the Schengen Protocol, which allows Iceland and Norway, although they are not Member States of the European Union, to cooperate in the Schengen *acquis*. For that reason, Article 6 of that protocol must be regarded not so much as a provision of European Community or Union law as a provision of international law, which governs relations between the Union and two non-member countries.

C — *Position of the United Kingdom and Ireland regarding the Schengen acquis*

92. The United Kingdom and Ireland do not cooperate in the policy of abolishing person-

49 — That is laid down in Article 3(2), first subparagraph, of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded.

50 — Mariani, Thierry, *Rapport d'information déposé par la Délégation de l'Assemblée nationale pour l'Union européenne, sur la politique européenne des visas* (documents E 2811, E 3023, E 3159 and E 3208), Paris 2007, p. 20.

51 — Van Simaeys, Benoit, Carlier, Jean-Yves, *Le nouvel espace de liberté, de sécurité et de justice*, p. 258. The Nordic Passport Union is a federation of the Nordic countries in which citizens may cross common frontiers without passports.

al checks at internal borders and do not wish to be bound by the Community legal rules concerning nationals of non-member countries. [52] Consequently, the Schengen Protocol provides that the United Kingdom and Ireland are not to be bound by the Schengen *acquis*. [53] However, on the basis of Article 4 of the Schengen Protocol, the United Kingdom and Ireland may, at any time, request to take part in some or all of the provisions of that *acquis*

93. The Title IV Protocol allows the United Kingdom and Ireland not to participate in (to opt out of) the legislative provisions adopted on the basis of Title IV EC. [54] Measures adopted on the basis of Title IV EC are not binding on those States. [55]

94. The United Kingdom and Ireland cooperate in relation to what are known as the compensatory measures of the Schengen *acquis* and in relation to the future development thereof. [56] Legal writers describe the United Kingdom's position as appearing to involve a total rejection of the free movement of persons without checks at internal borders, accompanied nevertheless by a wish to cooperate in the repressive part of the legal regime governing free movement. [57]

95. The Council took account of the wishes of the United Kingdom and, by Decision 2000/365, determined those parts of the Schengen *acquis* in which it is to participate. Article 8(2) of that decision clearly establishes that the United Kingdom is to be deemed 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 of Decision 2000/365. [58]

52 — Gautier, Accords de Schengen, paragraph 31, where reference is also made to the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and Ireland, which provides that the United Kingdom and Ireland may maintain checks on persons crossing their borders.

53 — Gautier, Accords de Schengen, paragraphs 30 and 32.

54 — Article 1 of the Title IV Protocol.

55 — Article 2 of the Title IV Protocol. Under the Treaty of Amsterdam, the position of the United Kingdom is such that it not only does not cooperate in the Schengen *acquis* but also has a right of opt-out regarding the entire area of freedom, security and justice (Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 90).

56 — Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 82, makes it clear that the content of the Schengen *acquis* is not limited merely to the management of internal borders and common regulation of external borders, but also extends to compensatory measures in the areas of police cooperation, visa policy, exchange of information within the SIS and the Sirene network, which contain data concerning the citizens of third countries. Other writers emphasise that, in certain sectors, the compensatory measures represent a wider-ranging phenomenon, that they affect the Union in its entirety and that they do not therefore relate only to the Schengen *acquis* (Gautier, Accords de Schengen, paragraph 84, which in that regard refers in particular to the fight against illegal immigration of third-country nationals into the Member States).

57 — Gautier, Accords de Schengen, paragraph 32.

58 — Article 1 of Decision 2000/365 lists the provisions of the Schengen *acquis* which apply to the United Kingdom. See also Council Decision 2004/926/EC of 22 December 2004 on the putting into effect of parts of the Schengen *acquis* by the United Kingdom of Great Britain and Northern Ireland (OJ 2004 L 395, p. 70).

D — *The relationship between Articles 4 and 5 of the Schengen Protocol*

96. The present case raises the question of the relationship between Article 4 and Article 5 of the Schengen Protocol, which both refer to the position of the United Kingdom and Ireland. Article 5(1) contains a kind of *ius variandi* — a right of choice granted to the United Kingdom and Ireland regarding new legal measures of the Schengen *acquis*.[59] In contrast to the position regarding the adoption of measures already in existence in that area, the consent of the other participating Member States or of the Commission is not necessary for the purposes of cooperation by the United Kingdom and Ireland on the basis of Article 5 of the Schengen Protocol. Article 5(1) of the protocol merely requires a written notification from the United Kingdom or Ireland of its wish to take part in proposals and initiatives based on the Schengen *acquis*. Following official notification, the United Kingdom and Ireland have the same rights and the same obligations as the remaining Schengen States and may participate in the adoption of those measures. This means, ultimately, that those two States may conduct themselves in such a way as to slow down or even completely block the adoption of any Schengen measure.[60]

97. In legal literature and in case-law no opinion has yet emerged regarding the question whether Article 5 of the Schengen Protocol, with its mechanism for unilateral declarations of intent, also applies to those legal measures which develop the existing Schengen *acquis* but to which the United Kingdom and Ireland have not adhered under Article 4 of that protocol. Certain legal writers rely on the premiss that, by virtue of a logical and systematic limitation, the United Kingdom and Ireland must be denied the right to cooperate in development based on Article 5 of the Schengen Protocol where development of the Schengen Protocol cannot exist autonomously. That point of view also applies where the measure developing the *acquis* cannot be implemented without the contemporaneous application of measures and acts which do not apply to Ireland and the United Kingdom.[61]

98. On the one hand, certain writers contend that the United Kingdom or Ireland may cooperate in such legal acts only if, as a preliminary measure, they observe the procedure under Article 4 of the Schengen Protocol.[62] On the other hand, the view is also expressed that it is not clear whether, for the purpose of the adoption of acts developing the Schengen *acquis*, Article 4 may be applicable, since, from a systematic point of view, it precedes Article 5, which deals with

59 — Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 96.

60 — Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 96. The author states that because of the special nature of the Schengen Protocol, as is apparent from Article 7 of the Title IV Protocol, the prohibition of obstructionism, which applies as a rule to the other sectors of legal cooperation in the area of freedom, security and justice, does not apply to the Schengen *acquis*.

61 — Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 97. The author also refers to the approach of seeking to extend the requirement of consensus of the Schengen States, referred to in Article 4 of the Schengen Protocol, to Article 5 of that protocol. That would, ultimately, result in Articles 4 and 5 each having their own scope, in accordance with the independence thesis.

62 — Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 98.

the possibility of development. [63] In particular, English legal writers assert that United Kingdom cooperation in relation to measures developing the Schengen *acquis* does not require the consent of the Schengen States, [64] consent which is, in contrast, needed under Article 4 of the Schengen Protocol.

99. However, on closer examination, the scope of the *ius variandi* available to the United Kingdom under Article 5 of the Schengen Protocol turns out to be narrower than appears at first sight.

100. It is clear that the United Kingdom and Ireland may cooperate in developing a Schengen *acquis* measure in which they cooperate on the basis of Article 4 of the Schengen Protocol.

101. If, however, the United Kingdom and Ireland do not cooperate on the basis of Article 4 in the area being developed, the position is different. Application of the procedure under Article 5 of the Schengen Protocol without the application of Article 4 thereof is possible only in the case of a measure building on that *acquis* which can be applied autonomously. The *ius variandi* is limited only to proposals and initiatives based on the Schengen *acquis* which are capable of autonomous application. [65] If the United Kingdom or Ireland were able to take part in Schengen cooperation in an area for which, for the purposes of cooperation, the prior application of Article 4 of the protocol is required, and to do so only on the basis of the mechanism provided for in Article 5 of the Schengen Protocol, the *effet utile* of Article 4 would be undermined. [66] This problem has been dealt with by the Commission in its submissions. In its view, that would involve application to the United Kingdom of part of the Schengen *acquis*, even though that State had not on its own initiative adhered to that *acquis*. Therefore, the cooperation of the United Kingdom and of Ireland in the development of part of the Schengen *acquis* is as a rule subject to prior observance of the procedure under Article 4 of the Schengen Protocol. [67] A similar view of the relationship between Articles 4 and 5 of the protocol in question underlies Decision 2000/365. That decision was adopted on the legal basis of Article 4 of the Schengen Protocol. [68] The rules governing the use of

63 — Schauer, Martin, *Schengen — Maastricht — Amsterdam, Auf dem Weg zu einer flexiblen Union*, Vienna 2000, p. 215. The author relies on the assumption that Article 5 constitutes a *lex specialis* as regards Article 4 of the Schengen Protocol.

64 — Dougan Michael, Union Competences, in Arnull Anthony, Dashwood Alan, Dougan Michael, Ross Malcolm, Spaventa Eleanor, Wyatt Derrick, *Wyatt and Dashwood's European Union Law*, 5th edition, London, 2006, p. 115. The author deals with the United Kingdom's approach to the Schengen *acquis* as part of the new organisational principle of flexibility of the Union. In the Schengen Protocol, he perceives a phenomenon of 'primary flexibility', being flexibility governed by the founding Treaties.

65 — Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 98.

66 — As regards the principle of *effet utile* in the interpretation of international treaties, legal writers maintain that that principle is closely linked with the teleological interpretation of international treaties (Stein Torsten, von Buttlar Christian, *Völkerrecht*, 11th edition, (completely recast), Cologne, 2005, p. 28).

67 — Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 98. The author emphasises that a unilateral declaration of intent, based on the discretionary decision to cooperate, as referred to in Article 5 of the Schengen Protocol, will thus not be of great significance regarding the development of measures or areas which are not capable of autonomous application.

68 — The text regarding the legal basis of Decision 2000/365 is as follows: '[h]aving regard to Article 4 of the Protocol integrating the Schengen *acquis* into the framework of the European Union annexed to the Treaty on European Union and to the Treaty establishing the European Community (hereinafter referred to as 'the Schengen Protocol'), ...'.

the procedure under Article 5 of the Schengen Protocol are referred to only in Article 8(2) of Decision 2000/365. That means, therefore, that the only legal basis of the rules on the application of the mechanism in Article 5 of the Schengen Protocol is Article 4 of that protocol. Moreover, that is clearly confirmed by the practice of having recourse to the Article 4 procedure before the Article 5 procedure under the Schengen Protocol.

102. It is therefore necessary to establish whether Regulation No 2007/2004 is a measure based on the Schengen *acquis* which is capable of autonomous application. As I have pointed out, the abolition on checks on persons at internal borders is an essential feature of the Schengen *acquis*. The abolition of internal borders is, however, necessarily linked to the standardisation of checks at external borders. [69] Therefore, checks at external borders also form part of the Schengen *acquis*. [70]

103. Article 1(3) of Regulation No 2252/2004 provides that '[t]his Regulation applies to passports and travel documents issued by Member States'. Historically, the legislation concerning passports and travel documents began with the primary purpose of checking a state's own nationals when they went abroad. Secondly, even today it represents a means of checking the entry of foreigners into the state. [71] Passports are internationally recognised legal instruments essential, according to legal writing, in order to allow freedom of movement for persons between States. [72] Because of the particular rules of the Schengen *acquis* which abolished checks on persons at internal borders, the international movement of persons in respect of whom passport checks are required takes place at the external borders of the Schengen States. [73]

104. Although Regulation No 2252/2004 governs minimum security standards only, those include, pursuant to Article 1(2) of the

69 — Oppermann, Thomas, *Europarecht*, München, 2005, p. 504.

70 — In 2006 there was adopted Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen borders code) (OJ 2006 L 105, p. 1). Recital 27 in the preamble to that regulation states clearly that '[t]his regulation 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 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*. The United Kingdom is therefore not taking part in its option and is not bound by it or subject to its application.' Under Article 1 thereof, that regulation deals with two aspects on an equal basis, namely, first, the principle of the absence of border control of persons crossing internal borders between the Member States of the European Union and, second, rules governing border control of persons crossing the external borders of the Member States of the European Union.

71 — Graßhof, Malte, Melderecht, Reisepassrecht, Namensrecht, Staatsangehörigkeits- und Einbürgerungsrecht, v *Bergmann, Jan and Kenntner, Markus* (editors), *Deutsches Verwaltungsrecht unter europäischem Einfluss*, Stuttgart, 2002, pp. 301, 307 and 310, maintains that passports and travel documents are control mechanisms for checking the identity and nationality of persons.

72 — Graßhof, Melderecht, Reisepassrecht, Namensrecht, Staatsangehörigkeits- und Einbürgerungsrecht, p. 309.

73 — Oppermann, *Europarecht*, str. 505; *Harms, Karsten*, Ausländerrecht, v *Bergmann, Kenntner*, Deutsches Verwaltungsrecht unter europäischem Einfluss, p. 166, draws attention to Article 61(a) EC, which provides that within a period of five years after the entry into force of the Treaty of Amsterdam, the Council .was to adopt measures aimed at ensuring the free movement of persons ... in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration.

regulation, control data to be checked on the crossing of external borders, such as, for example, a facial image and fingerprints. Those control data show the proper role of the regulation. Checking those data, especially the facial image, forms the core of checks on persons who cross the external borders of the Schengen area. In other words, these control data, such as the facial image, are used to check persons crossing frontiers. Regulation No 2252/2004 cannot, therefore, be applied independently.

105. According to the definition given in paragraph 97 above, that means that Regulation No 2004/2007 cannot apply without the simultaneous implementation of other legal measures of the Schengen *acquis*.[74] This demonstrates, in this specific case, that the thesis that Article 5 is subordinate to Article 4 of the Schengen Protocol, contended for in particular by the Council and the Commission, represents the correct interpretation of that protocol.

74 — In order to establish to which part of the legal order Regulation No 2252/2004 belongs, the example may be cited of Article 1A Council Decision 1999/437/EEC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis (OJ 1999 L 176, p. 31). That article provides that provisions concerning '[t]he crossing by persons of the external borders of those States which have decided to abolish checks at their internal borders, including the rules and arrangements with which those States must comply when carrying out checks on persons at external borders, surveillance of border areas and cooperation with the services responsible for border control' form part of the Schengen *acquis*.

106. This conclusion is not undermined by the reference to Declarations Nos 45 and 46 annexed to the Treaty of Amsterdam. Declaration No 45 refers expressly to the procedure under Article 4 of the Schengen Protocol and not to the Article 5 procedure.

107. I consider that Declaration No 46 annexed to the Treaty of Amsterdam shows that the action of the Schengen States in relation to development of the Schengen *acquis* is subject to the procedure under Article 4 of the Schengen Protocol. It is not possible to interpret that declaration as representing any threat to the principle of the integrity of the Schengen *acquis*.

E — *The principle of integrity*

108. The second recital in the preamble to Decision 2000/365, concerning the position of the United Kingdom, emphasises the meaning of the principle of the integrity of the Schengen *acquis*: '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'. [75]

109. That principle is also upheld in Article 8 of the Schengen Protocol, which provides that States candidates for admission to the Union must accept the Schengen *acquis* in full.

110. The principle of the integrity of the Schengen *acquis* is an embodiment of the general legal principle *qui habet commoda ferre debet onera et contra* (he who takes the benefits must bear the burdens and vice versa), which is recognised also in public international law. With regard to that legal principle legal writers [76] refer, in relation to the first pillar, to, among others, the judgment of the Court of Justice in Case 39/72, [77] in which it is stated that 'it cannot be accepted that a Member State should apply in an incomplete or selective manner provisions of a Community regulation so as to render abortive certain aspects of Community legislation which it has opposed or which it considers contrary to its national interests. For a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before Community law and creates discrimination at the expense of their nationals ...'. That reasoning can easily be applied to the Schengen *acquis*.

111. The principle of the integrity of the Schengen *acquis* protects not only the equilibrium between the Schengen States regarding the development and application of the Schengen *acquis* but also the Schengen *acquis* as a whole. [78] By reason of the protection of the entire Schengen *acquis*, that principle represents the expression of the general interest of the Schengen countries.

112. Cooperation in a part of the Schengen *acquis* requires, by virtue of the principle of integrity, that any Member State that cooperates to any extent in the Schengen *acquis* should accept both the advantages and the burdens inherent in cooperation in that part of the *acquis*. It is for that reason that the principle of integrity does not allow a free choice to be made regarding cooperation, on the basis of Article 5 of the Schengen Protocol, in a measure developing the Schengen *acquis* where it is not possible to

75 — Similarly, the second recital in the preamble to Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen *acquis* (OJ 2002 L 64, p. 20) states that '[t]he Schengen *acquis* was conceived and functions as a coherent ensemble to be fully accepted and applied by all States supporting the principle of the abolition of checks on persons at their common borders'.

76 — Kolb Robert, La maxime, *qui habet commoda, ferre debet onera et contra*' (celui qui jouit des avantages doit supporter aussi les charges et vice versa) en droit international public, *Revue Belge de Droit International*, 2004, p. 12(23).

77 — Case 39/72 *Commission* v *Italy* [1973] ECR 101, paragraphs 21 and 24.

78 — De Kerchove d'Ousselghem, Gilles, Un espace de liberté, de sécurité et de justice aux dimensions incertaines. Quelques réflexions sur le recours aux coopérations renforcées en matière de justice et d'affaires intérieures, in Lejeune, Yves (ed.): Le traité d'Amsterdam, Espoirs et déceptions, Brussels, 1999, p. 290. The author emphasises that the desire for greater consistency (*cohérence*) in Schengen cooperation was the primary reason for integration of the Schengen *acquis* into the framework of the European Union

apply that measure autonomously. The reasoning set out in points 97 to 102 above shows that Regulation No 2252/2004 cannot be applied autonomously. The advantage associated, in this specific case, with cooperation by the United Kingdom in Regulation No 2252/2004 consists of common minimum standards and technical specifications governing the legibility by electronic means of travel documents. On the other hand, the burden to be borne is that of cooperating in that part of the Schengen *acquis* of which Regulation No 2252/2004 represents a development.

F — *Allegedly contradictory conduct of the Council in determining whether the measure is one building on the Schengen acquis*

113. In its pleadings and at the hearing, the United Kingdom drew particular attention to the fact that it had been authorised by the Council, in certain cases, to cooperate in relation to measures building on the Schengen *acquis*. Thus, the United Kingdom refers inter alia to Directive 2001/51, to Council Decision 2002/463 of 13 June 2002 adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme) (hereinafter 'Decision 2002/463'),[79] to Regulation No 377/2004 and to Decision 2005/267, and asserts that the concept of a 'measure that builds upon the Schengen *acquis*' is imprecise and obscure.

79 — OJ 2002 L 161, p. 11.

114. In order to determine whether a measure is based on the Schengen *acquis*, the Council uses a two-step test. In the first stage it determines whether the measure is an ordinary measure within the scope of Title IV EC or a measure forming part of the Schengen *acquis*.[80] In the second stage, on the other hand, it determines whether the matter is essential to the free movement of persons in an area in which checks on persons at internal borders have been abolished. This two-step process is comparable to the examination carried out in relation to the first pillar for the purpose of choosing the correct legal basis for measures to be adopted by the institutions. The Court has held that, '[a]ccording to settled case-law, in the context of the organisation of the powers of the Community the choice of the legal basis for a measure must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure'.[81]

115. The Council's two-step test enables the Court of Justice to ascertain, on the basis of objective factors, whether the measure in question builds upon the Schengen *acquis*. The objective factors on which the test is based include a determination whether, by

80 — Certain legal writers contend that acts modifying the existing Schengen *acquis* without doubt represent a part of the development of that *acquis*. On the other hand, in the case of measures not modifying the existing Schengen *acquis*, the situation may be different (Bracke, Niels, Flexibility, Justice Cooperation and the Treaty of Amsterdam, in Marinho, Clotilde, *Asylum, Immigration and Schengen Post-Amsterdam*, Maastricht, 2001, p. 65).

81 — Case C-269/97 *Commission* v *Council* [2000] ECR I-2257, paragraph 43; Case C-36/98 *Spain* v *Council* [2001] ECR I-779, paragraph 58, and Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA* [2005] ECR I-10423, paragraph 54.

virtue of its subject-matter, a measure can be generally associated with the Schengen *acquis*, and a determination whether the matter is essential to the free movement of persons in an area in which internal borders have been abolished.

116. According to settled case-law, 'the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it'. [82] 'With regard to judicial review of the conditions referred to ... it should be noted that the Community legislature must be allowed a broad discretion in an area such as that in issue in the present case, which involves political, economic and social choices on its part and in which it is called on to undertake complex assessments. Consequently, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue'. [83]

117. The Council's two-step test is not manifestly inappropriate, in that it is suitable for attaining the aim pursued, namely that of determining whether a particular proposed measure builds on the Schengen *acquis*. Therefore, the claims that the concept of the Schengen *acquis* is excessively vague are unfounded.

118. The purpose of Regulation No 377/2004 is to set up an immigration liaison officers network. According to recital 10 in the preamble to that regulation, the United Kingdom takes part in that regulation in accordance with Article 5 of the Schengen Protocol and Article 8(2) of Decision 2000/365. Article 8(2) of Decision 2000/365 confirms that the United Kingdom cooperates in that area of the Schengen *acquis* and introduces the presumption [84] that the notification referred to in Article 5(1) of the Schengen Protocol is deemed to have been made. Also, recital 12 in the preamble to Decision 2005/267, which establishes a secure web-based information and coordination network for the exchange of information regarding irregular migratory flows, illegal entry and immigration and the return of illegal residents, emphasises that the procedure under Article 5(1) of the Schengen Protocol was applied. It states that Article 8(2) of Decision 2000/365 was applied, in so

82 — *ABNA*, cited in footnote 79, paragraph 68.

83 — *ABNA*, cited in footnote 79, paragraph 69.

84 — That presumption is based on the sentence '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'.

far as the measures of Decision 2000/267 develop provisions of the Schengen *acquis* against the organisation of illegal immigration in which the United Kingdom participates. [85] Consequently, so far as that legal measure was concerned, Article 5 of the Schengen Protocol was correctly applied by virtue of the authorisation for which the legal basis is to be found in Article 4 of that protocol.

119. Directive 2001/51 supplements the provisions of Article 26 CAA regarding the obligations of carriers transporting foreign nationals into the territory of the Member States. That directive is an example of a measure adopted on the basis of Title IV EC, in which the United Kingdom cooperates by virtue of Article 1 of Decision 2000/365. Recital 7 in the preamble to that directive explains that '[i]n accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, the United Kingdom gave notice ... of its wish to take part in the adoption and application of this directive'. However, recital 10 to the same directive indicates, with regard to Iceland and Norway, that 'this directive constitutes a development of the Schengen *acquis* ...'. [86]

The directive in question thus represents a development of the Schengen *acquis*, but does not however constitute an ordinary Title IV measure. Any application of the Title IV Protocol would therefore have been incorrect.

120. Directive 2001/40 is concerned with the mutual recognition of decisions on the expulsion of nationals of non-member countries and therefore recognition of an expulsion decision adopted by a competent authority of a Member State against a national of a non-member country who is within the territory of another Member State. Recital 6 to that directive states that, in accordance with Article 3 of the Title IV Protocol, the United Kingdom gave notice of its wish to take part in the adoption and application of that directive. It is stated in legal literature that, in the case of that directive, the application of Article 3 of the Title IV Protocol was incorrect since it is undoubtedly a measure based on the Schengen *acquis*. However, at the same time, legal writers observe that the directive in question is a measure based on the Schengen *acquis* which is capable of autonomous application, and that it is therefore a typical example of the application of Article 5 of the Schengen Protocol. [87]

121. Decision 2004/573 coordinates removals by joint flights from the territory

85 — It should be noted that the recital referred to also indicates that Article 3 of the Title IV Protocol was applied, being a measure based on Title IV EC.

86 — Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 98, states that, for similar legal acts, in the light of the wording of the recitals relating to Norway and Iceland, it is clear that what is involved is a development of the Schengen *acquis*. Therefore, the reason for which they refer to the protocol on Title IV is not clear.

87 — Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht*, p. 98.

of two or more Member States of third-country nationals who are subjects of individual removal orders. It is clear from recitals 11 and 12 to that decision that it is a measure to build upon the Schengen *acquis*. Recital to 4 to the same decision clearly establishes that the Community must avoid a vacuum in the field of the organisation of joint flights. The use of the term vacuum makes it clear that the decision in question can be applied autonomously. Therefore, Decision 2004/573 is also a measure building on the Schengen *acquis* which can be applied autonomously. This means that the United Kingdom can adhere to it by virtue of Article 5 of the Schengen Protocol.

122. Council Decision 2002/463 (the ARGO programme) is designed to promote cooperation between national administrative and judicial authorities of the Member States, to promote uniform application of Community law in an area of freedom, security and justice, to improve overall efficiency of the national administrative and judicial authorities of the Member States in carrying out their tasks when implementing Community rules and to encourage transparency of actions taken by national administrative and judicial authorities of the Member States by strengthening their relations with the relevant national and international governmental and non-governmental organisations. In recital 12 to Decision 2002/463, it is also stated that, in accordance with Article 3 of the Title IV Protocol, the United Kingdom gave notice of its wish to take part in the adoption and application of the decision in question. The Council, in determining the relationship between Decision 2002/463 and the abolition of checks at internal borders, took the view that the decision was not a measure based on the Schengen *acquis*. If we analyse the objectives referred to in Article 3 and the actions referred to in Chapter II, and also in particular the types of action described in Article 8 of Decision 2002/463, [88] it is clear that they are not essential to the free movement of persons. In reality, that decision is an ordinary legal measure within the meaning of Title IV EC. Therefore, the Council was correct to conclude that it was not a measure based on the Schengen *acquis*.

123. Regulation No 334/2002 [89] lays down a uniform format for visas. It is a Title IV EC measure and, on the basis of Decision 2000/365, a part of the Schengen *acquis* in which the United Kingdom does not participate. The Council made it clear that the regulation in question amends Regulation No 1683/95, [90] which was adopted as a first-pillar measure even before the entry into force of the Treaty of Amsterdam on the

88 — Article 8 of Decision 2002/463 lists the following types of action: training actions, staff exchange, action promoting the use of computerised handling of files and procedures, including use of the most up-to-date techniques for electronic data exchange, evaluation of the impact of common rules and procedures based on Articles 62 and 63 of the Treaty, actions intended to promote the development of best practices with a view to improving working methods and equipment, simplifying procedures and shortening deadlines, operational activities which might include the setting up of common operative centres and of teams composed of joint staff, studies, research, conferences and seminars, mechanisms for consulting and associating the relevant national and international governmental and non-governmental organisations, Member States' activities in third countries, in particular fact-finding missions in countries of origin and transit, and the fight against document fraud.

89 — Council Regulation (EC) No 334/2002 of 18 February 2002 amending Regulation (EC) No 1683/95 laying down a uniform format for visas (OJ 2002 L 53, p. 7).

90 — Council Regulation (EC) No 1683/95 of 29 May 1995 laying down a uniform format for visas (OJ 1005 L 164, p. 1).

basis of Article 100c(3) of the Treaty establishing the European Community, as then in force. For the Council, those are special circumstances which enabled the United Kingdom to cooperate in the adoption of Regulation No 334/2002. In fact, it is difficult to understand, at first sight, how the Council, in adopting that regulation, accepted that special circumstances existed, by reason of the United Kingdom's having cooperated in the adoption of Regulation No 1683/95, yet did not on the other hand recognise the existence of similar circumstances surrounding the adoption of Regulation 2252/2004. The uniform format for visas and the standards for security features in passports and travel documents represent two similar spheres, which are in fact connected to a considerable degree to the control of external borders. The uniform format for visas regulates the checking of nationals of non-member countries when they cross external borders. The minimum technical standards for passports and travel documents, however, concern only the nationals of the Schengen states, Norway, Iceland and Switzerland. The purpose of the uniform format for visas and the standards for security features in passports and travel documents is the same, that is to say, control at external frontiers. I therefore consider that the Council has treated similar situations unequally.

124. It must be emphasised that the Council's practice of allowing the United Kingdom to cooperate in the adoption of certain Title IV EC measures or Schengen *acquis* measures, even if it were correct, does not constitute a legal precedent and cannot create for the United Kingdom a right to the application of Article 5 of the Schengen Protocol. According to settled case-law, 'what is merely Council practice cannot derogate from the rules laid down in the EC Treaty, and cannot therefore create a precedent binding on the Community institutions with regard to the correct legal basis'. [91]

G — *The allegedly unequal treatment of British and Irish nationals at external borders*

125. The fact that the United Kingdom and Ireland are not bound to issue passports that comply with the minimum security standards does not imply discrimination against their nationals on account of any unequal treatment at external borders. The obligation imposed on the Schengen states to issue passports that do comply with the minimum security standards arises out of participation in the Schengen *acquis*, in which the United Kingdom does not cooperate. The United Kingdom is not, therefore, in the same position as other Schengen States, Norway,

91 — Case C-414/04 *Parliament* v *Council* [2006] ECR I-11279, paragraph 37. That judgment declared void Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity (OJ 2003 L 176, p. 1).

Iceland or Switzerland. For that reason, the fact that British and Irish passports may be different, from the point of view of minimum security standards, from those of the Schengen States does not constitute discrimination against the holders of British or Irish passports. [92]

126. I would also stress the fact that Regulation No 2252/2004 might present problems from the perspective of fundamental rights — especially in relation to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [93] and Article 8 of the Charter of Fundamental Rights of the European Union, [94] as has been observed by legal writers, particularly German writers. [95] The United Kingdom has not, however, challenged the regulation on the ground of breach of the fundamental right to protection of personal data.

127. It follows that the United Kingdom's action is unfounded.

H — *Costs*

128. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be

92 — The Council observed in its rejoinder in Case C-137/05 that an identity check [on EU Nationals] at the crossing of an external border is carried out on the basis of the presentation of travel documents, with the result that the checking of nationals of Ireland and the United Kingdom is identical to the checking carried out in respect of nationals of other Member States, although the Irish and British documents do not have the same security features.

93 — This article governs the 'Right to respect for private and family life' and provides:
'1 Everyone has the right to respect for his private and family life, his home and his correspondence.
2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

94 — Article 8(1) of the Charter provides 'Everyone has the right to the protection of personal data concerning him or her.'

95 — Roßnagel, Alexander, Hornung, Gerrit, Reisepässe mit elektronischem Gesichtsbild und Fingerabdruck: die EG-Verordnung 2252/2004 über Normen für Sicherheitsmerkmale und biometrische Daten in von den Mitgliedstaaten ausgestellten Pässen und Reisedokumenten, *Die öffentliche Verwaltung*, 58 (2005), p. 983 (896 an 897). Here I would draw attention to the fact that legal writing, referring to the case-law of the European Court Human Rights in *Leander* v. *Sweden* (Series A, No 116, paragraph 48), considers memorisation and communication of personal data to amount to interference with the right to respect for private life within the meaning of Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Sudre, Frédéric, *Droit européen et international des droits de l'homme*, 8th ed., as amended and supplemented, Paris, 2006, p. 439).

ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has asked for costs, the United Kingdom, having failed in its submissions, must be ordered to pay the costs.

129. Under the first paragraph of Article 69(4) of the Rules of Procedure, the Member States and institutions that have intervened in these proceedings are to bear their own costs.

VI — Conclusion

130. In the light of the foregoing considerations I propose that the Court:

(1) Dismiss the application;

(2) Order the United Kingdom to pay the costs;

(3) Order the interveners to bear their own costs.