JUDGMENT OF THE COURT (Grand Chamber)

26 October 2010 *

In Case C-482/08,

ACTION for annulment under Article 35(6) EU, brought on 6 November 2008,

United Kingdom of Great Britain and Northern Ireland, represented by V. Jackson and I. Rao, acting as Agents, and by T. Ward, barrister,

applicant,

v

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

defendant,

* Language of the case: English.

supported by:

Kingdom of Spain, represented by J.M. Rodríguez Cárcamo, acting as Agent,

European Commission, represented by M. Wilderspin and B.D. Simon, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot (Rapporteur) and A. Arabadjiev, Presidents of Chambers, G. Arestis, A. Borg Barthet, M. Ilešič, J. Malenovský, L. Bay Larsen, P. Lindh and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 14 April 2010,

after hearing the Opinion of the Advocate General at the sitting on 24 June 2010,

gives the following

Judgment

1 By its application, the United Kingdom of Great Britain and Northern Ireland asks the Court, first, to annul Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences (OJ 2008 L 218, p. 129) and, second, to maintain the effects of that decision, except in so far as it excludes the United Kingdom from participation in its application.

Legal context

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

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

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

4 Under Article 4 of the Schengen Protocol:

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

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

5 Article 5(1) of the Schengen Protocol provides:

'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 [EC] or Article 40 [EU] 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 sectors of cooperation in question.'

Decision 1999/437/EC

6 Under Article 1 of 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* (OJ 1999 L 176, p. 31):

'The procedures laid down in the Agreement of 18 May 1999 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* … shall be applied to proposals and initia-

tives for the further development of those provisions in respect of which closer cooperation has been authorised under the Schengen Protocol and which fall within one of the following sectors:

…

B. Short-stay visas, particularly the rules on a uniform visa, the list of countries whose nationals must be in possession of visas for the States concerned and those whose nationals are exempt from that requirement, the procedures and conditions for the issue of uniform visas, and cooperation and consultation between the issuing services …'

Decisions 2000/365/EC and 2004/926/EC

7 Article 1 of 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) lists the articles of the Convention Implementing the Schengen Agreement which constitute provisions of the Schengen *acquis* in which the United Kingdom is to participate. They include some of the provisions concerning the area of police cooperation contained in Title III of that convention, but not those concerning the abolition of checks at internal borders and movement of persons, including the common visa policy, contained in Title II of the convention.

8 Under 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), the provisions of Decision 2000/365 were put into effect in the United Kingdom as from 1 January 2005.

Decision 2004/512/EC

9 Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS) (OJ 2004 L 213, p. 5) set up the VIS as a system of exchange of visa data between Member States.

Regulation (EC) No 767/2008

10 Recital 29 in the preamble to Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (OJ 2008 L 218, p. 60) ('the VIS Regulation') states:

'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 … and subsequent Council Decision 2004/926 … The United Kingdom

is therefore not taking part in its adoption and is not bound by it or subject to its application.'

11 Article 1 of the VIS Regulation, headed 'Subject matter and scope' states:

'This Regulation defines the purpose of, the functionalities of and the responsibilities for the Visa Information System (VIS), as established by Article 1 of Decision 2004/512/EC. It sets up the conditions and procedures for the exchange of data between Member States on applications for short-stay visas and on the decisions taken in relation thereto, including the decision whether to annul, revoke or extend the visa, to facilitate the examination of such applications and the related decisions.'

12 According to Article 2 of the VIS Regulation:

'The VIS shall have the purpose of improving the implementation of the common visa policy, consular cooperation and consultation between central visa authorities by facilitating the exchange of data between Member States on applications and on the decisions relating thereto, in order:

(a) to facilitate the visa application procedure;

(b) to prevent the bypassing of the criteria for the determination of the Member State responsible for examining the application;

(c) to facilitate the fight against fraud;

(d) to facilitate checks at external border crossing points and within the territory of the Member States;

(e) to assist in the identification of any person who may not, or may no longer, fulfil the conditions for entry to, stay or residence on the territory of the Member States;

(f) to facilitate the application of Regulation (EC) No 343/2003 [Council Regulation of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1)];

(g) to contribute to the prevention of threats to the internal security of any of the Member States.'

13 Article 3 of the VIS Regulation, headed 'Availability of data for the prevention, detection and investigation of terrorist offences and other serious criminal offences', states:

'1. The designated authorities of the Member States may in a specific case and following a reasoned written or electronic request access the data kept in the VIS referred to in Articles 9 to 14 if there are reasonable grounds to consider that consultation of VIS data will substantially contribute to the prevention, detection or investigation of

terrorist offences and of other serious criminal offences. Europol may access the VIS within the limits of its mandate and when necessary for the performance of its tasks.

2. The consultation referred to in paragraph 1 shall be carried out through central access point(s) which shall be responsible for ensuring strict compliance with the conditions for access and the procedures established in Council Decision 2008/633 …'

Decision 2008/633

14 Recitals 1 to 5 in the preamble to Decision 2008/633, which is the measure contested in the present application, are worded as follows:

'(1) Council Decision 2004/512 … established the VIS as a system for the exchange of visa data between Member States. The establishment of the VIS represents one of the key initiatives within the policies of the European Union aimed at establishing an area of freedom, security and justice. The VIS should have the purpose of improving the implementation of the common visa policy and should also contribute towards internal security and to combating terrorism under clearly defined and monitored circumstances.

(2) During its meeting of 7 March 2005, the Council adopted conclusions stating that "in order to achieve fully the aim of improving internal security and the fight against terrorism", Member State authorities responsible for internal security should be guaranteed access to the VIS, "in the course of their duties in relation

to the prevention, detection and investigation of criminal offences, including terrorist acts and threats", "subject to strict compliance with the rules governing the protection of personal data".

(3) It is essential in the fight against terrorism and other serious crimes for the relevant services to have the fullest and most up-to-date information in their respective fields. The Member States' competent national services need information if they are to perform their tasks. The information contained in the VIS may be necessary for the purposes of preventing and combating terrorism and serious crimes and should therefore be available, subject to the conditions set out in this Decision, for consultation by the designated authorities.

(4) Moreover, the European Council has stated that Europol has a key role with respect to cooperation between Member States' authorities in the field of cross-border crime investigation in supporting Union-wide crime prevention, analyses and investigation. Consequently, Europol should also have access to VIS data within the framework of its tasks and in accordance with the Convention of 26 July 1995 on the Establishment of a European Police Office [OJ 1995 C 316, p. 2].

(5) This Decision complements [the VIS Regulation] insofar as it provides for a legal base under Title VI of the Treaty on European Union authorising access to the VIS for designated authorities and for Europol.'

15 Recitals 13 and 15 in the preamble to Decision 2008/633 state as follows:

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

…

(15) However, in accordance with Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [OJ 2006 L 386, p. 89], information contained in the VIS can be provided to the United Kingdom and Ireland by the competent authorities of the Member States whose designated authorities have access to the VIS pursuant to this Decision. Information held in the national visa registers of the United Kingdom and Ireland can be provided to the competent law enforcement authorities of the other Member States. Any form of direct access for central authorities of the United Kingdom and Ireland to the VIS would, under the present state of their participation in the Schengen *acquis*, require an agreement between the Community and those Member States, possibly to be supplemented by other rules specifying the conditions and procedures for such access.'

16 According to recital 16 in its preamble, Decision 2008/633 constitutes a development of provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council 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*, which fall within the area referred to in Article 1(B) of Council Decision 1999/437.

17 According to recital 17 in its preamble, Decision 2008/633 constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, the signature of which was approved by Council Decision 2004/849/EC of 25 October 2004 (OJ 2004 L 368, p. 26), which fall within the area referred to in Article 1(B) of Decision 1999/437 read in conjunction with Article 4(1) of Decision 2004/849.

18 Article 1 of Decision 2008/633 provides:

'This Decision lays down the conditions under which Member States' designated authorities and the European Police Office (Europol) may obtain access for consultation of the Visa Information System (VIS) for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences.'

19 Article 2(1)(e) of Decision 2008/633, under the heading 'Definitions', states that the designated authorities within the meaning of that decision are those which are responsible for the prevention, detection or investigation of terrorist offences or of other serious criminal offences and are designated by the Member States pursuant to Article 3 of the decision.

20 Article 3(3) and (5) of Decision 2008/633 state:

‘3. Every Member State shall designate the central access point(s) through which the access is done …

5. At national level, each Member State shall keep a list of the operating units within the designated authorities that are authorised to access the VIS through the central access point(s).’

21 Under Article 4 of Decision 2008/633:

‘1. Where the conditions of Article 5 are fulfilled the operating units referred to in Article 3(5) shall submit a reasoned written or electronic request to the central access points referred to in Article 3(3) to access the VIS. Upon receipt of a request for access the central access point(s) shall verify whether the conditions for access referred to in Article 5 are fulfilled. If all conditions for access are fulfilled, the duly authorised staff of the central access point(s) shall process the requests. The VIS data accessed shall be transmitted to the operating units referred to in Article 3(5) in such a way as not to compromise the security of the data.

2. In an exceptional case of urgency, the central access point(s) may receive written, electronic or oral requests. In such cases, the central access point(s) shall process the request immediately and only verify *ex-post* whether all the conditions of Article 5 are fulfilled, including whether an exceptional case of urgency existed. The *ex-post* verification shall take place without undue delay after the processing of the request.’

22 Under Article 5(1) of Decision 2008/633:

'Access to the VIS for consultation by designated authorities shall take place within the scope of their powers and if the following conditions are met:

(a) access for consultation must be necessary for the purpose of the prevention, detection or investigation of terrorist offences or other serious criminal offences;

(b) access for consultation must be necessary in a specific case;

(c) there are reasonable grounds to consider that consultation of VIS data will substantially contribute to the prevention, detection or investigation of any of the criminal offences in question.'

23 Article 7 of Decision 2008/633 lays down the conditions for access by Europol to VIS data.

Factual background to the dispute

24 On 30 November 2005, the Commission of the European Communities submitted to the Council a proposal (COM(2005) 600 final) for a decision permitting access to VIS data for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences.

25 In the course of the discussions at the Council, Ireland and the United Kingdom stated that they considered that they had the right to participate in the adoption and application of the decision concerning access to VIS data and, more particularly, that they considered that that measure could not be classified as a measure building on the Schengen *acquis*. They also stated that, even if that measure were to be so regarded, they considered that the legal base did not fall within the area of the Schengen *acquis* covering short-stay visas, and that that did not justify their exclusion from that measure. They stated that, consequently, they should be given direct and full access to the VIS.

26 On 23 June 2008, the Council adopted Decision 2008/633, without the United Kingdom having been permitted to take part in its adoption.

27 Considering that that exclusion amounted to an infringement of an essential procedural requirement and/or an infringement of the EU Treaty, within the meaning of Article 35(6) EU, the United Kingdom brought the present action.

Forms of order sought by the parties and procedure before the Court

28 The United Kingdom claims that the Court should:

— annul Decision 2008/633;

— maintain the effects of that decision, except in so far as it excludes the United Kingdom from participation in its application; and

— order the Council to pay the costs.

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

30 By orders of the President of the Court of 16 April and 14 July 2009, the Commission and the Kingdom of Spain respectively were granted leave to intervene in support of the form of order sought by the Council.

The action

Arguments of the parties

31 In applying for annulment of Decision 2008/633, the United Kingdom submits that that decision does not constitute a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part, that is to say, a development of the common visa policy, but a police cooperation measure, as is also apparent from the Council's choice of legal basis, namely Articles 30(1)(b) EU and 34(2)(c) EU. It also observes that the Commission, in its original proposal, took the view that the proposed decision was not covered by the common visa policy but had other purposes,

and that the Commission had therefore provided for Ireland and the United Kingdom to participate in the drawing up of the decision.

32 The United Kingdom submits that, in Decision 2008/633, the provisions of the Schengen *acquis* on which it is said to build are not identified. Neither the aim nor the content of the decision, which are required by the Court's case-law to be taken into account in order to classify a measure as a proposal or initiative to build upon the Schengen *acquis* within the meaning of Article 5(1) of the Schengen Protocol, demonstrates that the decision can be classified as such. It is clear from Article 1 of the decision that its aim is to lay down the conditions under which designated authorities and Europol may obtain access for consultation of the VIS for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, which has nothing to do with the common visa policy. It is clear in particular from recitals 2 and 3 in the preamble to and Articles 5(1)(a) and 7 of Decision 2008/633 that the purpose of that decision is to contribute to internal security and to combating terrorism by sharing with law enforcement agencies and Europol information entered in the VIS by the visa authorities. Moreover, in substance, the decision relates to the procedure for access to the VIS and has nothing at all to do with the common visa policy.

33 According to the United Kingdom, although the VIS Regulation and Decision 2008/633 may be complementary, they are legally distinct and each of them must be assessed separately in light of the criteria developed by the case-law of the Court of Justice to determine whether a measure builds upon the Schengen *acquis*. The application of those tests itself serves to preserve the coherence of the Schengen *acquis*. While Decision 2008/633 is intended to complement the VIS Regulation, it cannot for that reason be assumed that that decision is a measure building on the Schengen *acquis*.

34 In addition, the legal basis of Decision 2008/633 consists of provisions which fall within Title VI of the EU Treaty, which concerns police and judicial cooperation in criminal matters. Therefore, the decision cannot at the same time be a development of the common visa policy, which falls under Title IV of the EC Treaty. If that were however the case, the decision would have to be annulled because of its erroneous legal bases.

35 Finally, the United Kingdom wishes to make it clear that there is no practical or legal difficulty in providing for its partial participation in the VIS, that its access to VIS data for the purposes envisaged by Decision 2008/633 is no more a threat to the coherence of the system than access by Europol, and that it does not seek by its action to challenge the participation of the Republic of Iceland, the Kingdom of Norway or the Swiss Confederation in the decision concerning access to the VIS by the police authorities.

36 The Council submits that it correctly classified Decision 2008/633 as a development of an area of the Schengen *acquis* described in relatively broad terms in Article 1(B) of Council Decision 1999/437, a fact which in itself does not prejudice the question whether the appropriate legal basis for its adoption is to be found in Title IV of the EC Treaty or Title VI of the EU Treaty.

37 It is clear from recitals 1, 3 and 5 in the preamble to Decision 2008/633 and from Article 1 that the aim of the decision is to complement the VIS Regulation by laying down the conditions in which, for the purposes of the prevention, detection and investigation of terrorist offences and other serious criminal offences, the designated authorities may have access to data previously entered and already stored in the VIS by the visa authorities. With regard to the content of that decision, its provisions require the Member States to designate authorities which are to have access to the VIS and the central access points through which searches of the VIS are to be directed.

They define the applicable procedures and the conditions to be fulfilled for the search to be allowed.

38 The Council therefore contends that the legal basis that reflects that aim and content is Article 30(1)(b) EU, because Decision 2008/633 concerns the processing and analysis by the designated authorities of information in the VIS, without however relating to the exchange, collection or storage of data. It is not concerned with the procedures or the conditions for issuing visas, governed by Title IV of the EC Treaty, nor with cooperation between the relevant departments covered by that title, and it therefore cannot fall within the scope of Article 62(2)(b)(ii) EC or Article 66 EC. Consequently, there is no infringement of Article 47 EU. The approach taken in this case is also in line with usual practice.

39 As regards the classification of Decision 2008/633 as a development of the Schengen *acquis* in the area of visas, the Council stresses the importance of the relationship between the decision and the VIS Regulation, which has set up a single integrated system containing data of a single nature, the purpose of which is the coherent implementation of the European Union's visa policy and which designates a main user, namely the visa and border control authorities of the Member States participating in that policy. While that system has secondary purposes such as contributing to the prevention of threats to the internal security of any of the Member States, the VIS Regulation ensures that access for police authorities to information will be compatible with the overall purpose of the system. Therefore Decision 2008/633 fits into the legal framework of that regulation, with which it forms a package which constitutes a development of the Schengen *acquis*, with the aim of preserving its integrity, in the visa area, as described in Article 1(B) of Decision 1999/437.

40 The Council also contends that, while the test developed by the Court of Justice in its case-law in order to classify a measure as a development of the Schengen *acquis*

is similar to that which is used in order to determine the legal basis of a European Union measure, it is not however identical since it must take into account the need to preserve the coherence of that *acquis*. By emphasising the test used for the choice of the legal basis of the measure, focused exclusively on its aim and content, the United Kingdom does not take that requirement into account in any way.

41 For its part, the Commission shares the Council's analysis regarding the choice of the legal basis and its submission that Decision 2008/633 is so intimately linked with the VIS Regulation that it must be classified as a development of the visa area of the Schengen *acquis*, because it builds upon and complements that regulation by allowing access for consultation of the VIS by the designated authorities and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and other serious criminal offences. The Commission submits that Article 3 of the VIS Regulation, which permits consultation of VIS data for the abovementioned purposes, and which thus refers to Decision 2008/633, is not applicable to the United Kingdom. It follows that that decision is not applicable to the United Kingdom either.

Findings of the Court

The main plea in law

42 It is common ground that the United Kingdom, in accordance with Article 4 of the Schengen Protocol, has requested and, under Decision 2000/365, obtained participation in some of the provisions of the Schengen *acquis*. In that regard, it is also agreed that, while the United Kingdom takes part in some of the provisions of the Schengen

acquis concerning police cooperation, it does not, by contrast, take part in the provisions of that *acquis* concerning the abolition of checks at borders and movement of persons, including the common visa policy.

43 As is evident from recital 13 in the preamble to Decision 2008/633, the Council considered that that decision constituted a development of provisions of the Schengen *acquis* in which the United Kingdom does not take part and that, therefore, that Member State was not to participate in the adoption of the decision. In seeking annulment of that decision, the United Kingdom submits, as its main plea, that by adopting such a classification the Council committed an error of law.

44 It must therefore be determined whether Decision 2008/633 is one of the 'proposals and initiatives to build upon the Schengen *acquis*' as referred to in the first subparagraph of Article 5(1) of the Schengen Protocol in which the United Kingdom does not take part.

45 The Court has held that, analogy with what applies in relation to the choice of the legal basis of a European Union measure, the classification of such a measure as a proposal or initiative to build upon the Schengen *acquis* within the meaning of the first subparagraph of Article 5(1) of the Schengen Protocol must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure (see Case C-77/05 *United Kingdom* v *Council* [2007] ECR I-11459, paragraph 77).

46 However, as the Court has expressly stated, that reasoning is applicable only by analogy and is therefore limited by the specific nature of the closer cooperation applicable to the Schengen *acquis*, which means that the system as a whole of which that *acquis* forms part must also be taken into account.

47 The system of closer cooperation under the Schengen *acquis* applies to only some of the Member States and requires that all proposals and initiatives to build upon that *acquis* within the meaning of the first subparagraph of Article 5(1) of the Schengen Protocol must be consistent with the provisions they implement or develop, so that they presupposes the acceptance both of those provisions and of the principles on which those provisions are based (*United Kingdom* v *Council*, paragraph 61).

48 It follows that, when classifying a measure as falling within an area of the Schengen *acquis* or as a development of that *acquis*, the need for coherence of that *acquis*, and the need – where that *acquis* evolves – to maintain that coherence, must be taken into account.

49 Thus, it must be pointed out in particular that the coherence of the Schengen *acquis* and of future developments thereof means that the States which take part in that *acquis* are not obliged, when they develop it and deepen the closer cooperation which they have been authorised to establish by Article 1 of the Schengen Protocol, to provide for special adaptation measures for the other Member States which have not taken part in the adoption of the measures relating to earlier stages of the *acquis*' evolution.

50 With regard to the purpose of Decision 2008/633, recitals 2, 3, 4 and 6 in its preamble and Articles 1 and 5(1) make clear that its aim is to permit access to the VIS by the Member State authorities responsible for internal security and by Europol, for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences. On this ground, the decision pursues objectives which, as such, fall within the scope of police cooperation.

51 The content of Decision 2008/633 relates both to the rules on designation, by the Member States, of the authorities responsible for internal security which are authorised to consult the VIS and to the conditions governing access, communication and keeping of data used for the abovementioned purposes. In so doing, the provisions of that decision may, in principle, be regarded as setting up a form of police cooperation.

52 However, it is common ground that those provisions nevertheless contain conditions restricting access to the VIS, as listed in Article 5(1) of Decision 2008/633 and Article 3 of the VIS Regulation, which make clear that they organise in essence the ancillary use of a database concerning visas, the principal purpose of which is linked to the control of borders and of entry to the territory and which is therefore available, merely by way of consultation, for police cooperation purposes on a secondary basis only, solely to the extent that use for those purposes does not call into question its principal use.

53 Also, it should be pointed out that Decision 2008/633 is closely linked to the VIS Regulation which it implements in this regard, and therefore to the common visa policy based on Title IV of the EC Treaty.

54 The cooperation established by Decision 2008/633 could not, from both a functional and a practical point of view, exist independently of the VIS which falls, like Decision 2004/512 and the VIS Regulation on which the VIS is based, within the scope of the Schengen *acquis* concerning the common visa policy.

55 In that context, it must also be noted that the direct access to the VIS authorised by Decision 2008/633 for the authorities responsible for internal security is physically possible only for such authorities of the Member States which have central access

points to the VIS as referred to in Article 3(2) of the VIS Regulation, that is to say the authorities only of those Member States which take part in the provisions of the Schengen *acquis* concerning the common visa policy.

56 In the present case, the United Kingdom's participation by means of direct access to the consultation mechanism permitted by the VIS Regulation and set up by Decision 2004/512 would have required, as is also evident from recital 15 in the preamble to Decision 2008/633, specific measures in respect of that Member State, because it has not participated in the VIS and does not have the national interface which allows every Member State participating in the VIS to communicate with that system.

57 Therefore, Decision 2008/633 must be classified as a measure falling within the area of the Schengen *acquis* concerning the common visa policy.

58 If, furthermore, Decision 2008/633 were to be regarded not as an element of that common policy, but as a simple police cooperation measure, that decision would enable all the Member States to participate in the laying down of the detailed rules for consultation of the VIS, even though some of them did not participate in the definition of the principles which governed the establishment of that database on visas, are not obliged to enter in the system the data for all visa applications received by them, and do not contribute to the management or financing of the system. Such an approach would also result in the exclusion of the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation from the mechanism of consultation of the VIS for the purposes referred to in Decision 2008/633, whereas those State participate in the database's establishment, after having accepted the principles thereof, and contribute to the financing of the database. Decision 2008/633 must, in those circumstances, be regarded as intrinsically linked to the common visa policy and cannot be classified differently without calling into question the very coherence of the VIS.

59 It follows from all of the foregoing that, even though it cannot be disputed that Decision 2008/633 pursues police cooperation objectives, that fact does not, in the light of all the other objective factors which characterise it, preclude it from being held to be a measure developing the provisions of the Schengen *acquis* concerning the common visa policy.

60 It is also common ground that, as stated in paragraph 42 of the present judgment, the United Kingdom does not take part in the provisions of the Schengen *acquis* concerning the abolition of checks at borders and movement of persons, including the common visa policy.

61 The participation of a Member State in the adoption of a measure adopted pursuant to Article 5(1) of the Schengen Protocol is conceivable, in light of the system of closer cooperation applicable to the Schengen *acquis* as described in paragraph 47 of the present judgment, only to the extent that that State has accepted the area of the Schengen *acquis* which is the context of the measure or of which it is a development (*United Kingdom* v *Council*, paragraph 62).

62 Therefore, the Council did not commit an error of law when it took the view that that Decision 2008/633 constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom does not participate and refused to allow that Member State to participate in its adoption.

The alternative plea in law

63 In its application, the United Kingdom submits in the alternative that, if Decision 2008/633 has to be considered to be a development of the common visa policy, it should nevertheless be annulled on the ground that it would then have been wrongly adopted on the basis of Articles 30(1)(b) EU and 34(2)(c) EU which, in Title VI of the EU Treaty, govern common action in the field of police cooperation.

64 However, the question whether a measure constitutes a development of the Schengen *acquis* is separate from that of the legal basis on which that development must be founded. Every European Union measure must be based on a provision of the Treaties which confers on the European Union institutions the power to adopt that measure.

65 According to the Court's settled case-law, the choice of legal basis for a European Union measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure (see Case C-440/05 *Commission* v *Council* [2007] ECR I-9097, paragraph 61, and Case C-301/06 *Ireland* v *Parliament and Council* [2009] ECR I-593, paragraph 60).

66 The line of argument put forward by the United Kingdom in support of its alternative plea in law could succeed only if those criteria used to determine the legal basis of a European Union measure were exactly the same as the criteria for classifying such a measure as a proposal or initiative to build upon the Schengen *acquis*. It is however clear from what has been stated in paragraphs 47 to 49 of the present judgment that that cannot be the case.

67 It follows that, since the Council sought to develop the Schengen *acquis* by permitting, in well-defined circumstances, the use of the VIS for police cooperation purposes, it was obliged, in order to do so, to act on the basis of the provisions of the EU Treaty which entitled it to legislate in that field of police cooperation.

68 Therefore, as is evident from paragraphs 50 and 51 of the present judgment, it is not apparent, in the light of the purpose and content of Decision 2008/633, that the Council was mistaken to consider, specifically in relation to the choice of the legal basis for that decision, that it fell within the field of police cooperation. Moreover, the arguments set out by the United Kingdom to support its main plea in law bear out the correctness of that choice.

69 Therefore, having regard to the only line of argument put forward by the United Kingdom in support of its alternative plea in law, that plea must also be dismissed.

70 Accordingly, the United Kingdom's claim for the annulment of Decision 2008/633 cannot be upheld, and there is consequently no need for the Court to rule on that Member State's claim concerning the maintenance of the effects of that decision.

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

Costs

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

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

1. **Dismisses the action;**

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

3. **Orders the Kingdom of Spain and the European Commission to bear their own costs.**

[Signatures]