Eating the Cake Too – Access for Consultation of the Visa Information System and the UK's Partial Schengen Opt-Out

*Xiaolu Zhang**

Case C-482/08 United Kingdom v. Council of Europe[1]

Council Decision 2008/633/JHA on access for consultation of the Visa Information System for the purposes of prevention, detection and investigation of terrorist offences and other serious criminal offences must be read as a development of the Schengen acquis and not merely as a measure as to police cooperation, preventing the United Kingdom and Ireland from participating in adopting the measure (author's headnote).

I. Facts

The United Kingdom and Northern Ireland applied to the Court for annulment of Council Decision 2008/633/JHA (the "Decision") on access for consultation of the Visa Information System (VIS) for the purposes of "prevention, detection and investigation of terrorist offences and other serious criminal offences". In June 2004, the Council of the European Union established the VIS as a system for exchanging visa information between Member States and to promote a common visa policy.[2] The VIS works by storing alphanumeric and biometric data on any short-stay visa applicant, including information on visa status, photographs, fingerprints and links to previous visa applications or files of persons travelling together. Access to this database is restricted to participant Member States and Europol through their national interfaces. Council Decision 2008/633/JHA outlined the requirements for accessing the VIS for the purposes of "prevention, detection and investigation of terrorist offences and other serious criminal offences". The Decision builds upon the Schengen *acquis* which the UK is not part of. The UK and Ireland could still access the VIS through the authorities in participating Member States, but were not allowed direct access to the database. In the Council discussions concerning Decision 2008/633/JHA, the UK and Ireland advocated for their right to participate in the adoption and application of the Decision, arguing that the measure could not be classified as one building upon the Schengen *acquis*. When the Council adopted the Decision without participation by the UK, the UK appealed to the Court claiming an infringement of essential procedural requirements and/or the EU Treaty.

II. Judgment

The UK demanded that the Court annul the Decision, but maintain the effects of the Decision and allow the UK to obtain full access to the VIS. They argued that the Decision does not constitute a development of the provisions of the Schengen *acquis* but is instead a measure as to police cooperation. While the VIS and the Decision are meant to complement each other, their aims and purposes are separate and must therefore be analysed on separate legal bases. If the legal basis for the Decision consisted of provisions falling under Title VI of the EU treaty, dealing with police and judicial cooperation in criminal matters, then it cannot also be a development of the Schengen *acquis*, which falls under Title IV of the EC Treaty. The Court however, disagreed with the UK and found that, while the purposes of the Decision are in principle a form of police cooperation, that cooperation could not exist independently of the VIS itself. The VIS falls squarely within the scope of the Schengen *acquis* regarding the common visa policy and the rules in the Decision pertaining to access on the basis of internal security concerns are merely an

* Research Fellow and Lecturer in Comparative Law, University of Lucerne, Switzerland.

1 Decision of 26 October 2010.

2 Council Decision 2004/512/EC of 8 June 2004.

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auxiliary part of the database itself. The Court also noted that limiting the UK's access was borne out of practical concerns. The UK had never participated in the VIS program, nor did it have the technology needed to interface with the system. Thus, the UK would in any case have to consult with a participating Member State to access the database. If the Decision were merely a police cooperation measure, then all Member States could participate in the rules dealing with access to the database, regardless of whether they were themselves obligated to enter data into the VIS or whether they had contributed to its funding or management. This would also restrict access to the database for the purposes of investigating terrorism by Norway, Iceland, and Switzerland who were full participants in establishing the system. Given these objective factors, the Court held that the Decision was inextricably linked to the Schengen *acquis* and therefore the Council did not commit an error of law in adopting the Decision.

In the alternative, the UK argued that, even if the Decision is a development of the common visa policy, it has been wrongly adopted. The Decision cites Articles 30(1)(b) and 34(2)(c) of the EU Treaty in its preamble and these Articles are in Title VI of the EU Treaty concerning police cooperation. The Court, however, pointed out that legal analysis of whether a measure is a development of the Schengen *acquis* is separate from the legal basis on which the development is founded. Although the aim was to develop the Schengen *acquis*, the Decision still needed to have a basis in the EU Treaty which allowed it to legislate in the field of police cooperation. The UK itself made the argument that the Decision dealt explicitly with police cooperation, and therefore the legal basis was proper.

The Court dismissed the action by the UK and found in favour of the Council.

III. Comment

The UK's relationship with Schengen has been one fraught with skepticism and demurrals. On a broader scale, the UK has had similar misgivings about many of the other fixtures of European Union membership such as the euro and financial rebates. With a bargaining position that has allowed them to pick and choose measures, the UK has shied away from full participation. In this case, the Court has sent a strong signal to the UK that it cannot have its cake and eat it too.

Case 482/08 *United Kingdom v. Council* is the most recent in a line of similarly named cases all dealing with the troubled relationship between the island and Schengen. The UK first opted out of the Schengen Protocol[3] and then partially opted back in[4] to certain provisions later, particularly to those involving police cooperation. Notably, however, they have not opted back into the provisions of pillar I EC which covers "visas, asylum, immigration and other matters dealing with the free movement of third-country nationals". In Case 137/05 *United Kingdom v. Council*, the UK sought to annul a regulation requiring security features and biometrics in passports. The Council excluded the UK from the measure as it was also a development of the Schengen *acquis* and therefore the UK could not participate in the adoption of this measure.

Case C-77/05 *United Kingdom v. Council*, issued simultaneously as C-137/05, concerned the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). The United Kingdom was not allowed to take part in the adoption of Regulation No 2007/2004 establishing Frontex and sought to annul the Regulation by arguing that the Council wrongly interpreted the Schengen Protocol and infringed Article 5 of that Protocol. The UK argued that Article 4 and Article 5 of the Schengen Protocol are independent of each other and thus, Article 5 allows for the UK to participate without having to accept the corresponding area of the Schengen *acquis*. The Court disagreed and held that measures referred to in Article 5 are merely an implementation or development of the Schengen *acquis* and must be consistent with those provisions. It is not theoretically possible then, for a Member State to accept a measure under Article 5 without accepting the corresponding area of the Schengen *acquis* first. The Court further noted that, should they adopt the interpretation the UK asserts, it would mean that the UK could take part in all the initiatives built upon the Schengen *acquis* even if it had not received approval from all of the other member state governments to participate in the underlying *acquis*. Since the UK had clearly not accepted those provisions relating to the crossing of

3 Protocol on the Application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and Ireland and the Protocol on the Position of the United Kingdom and Ireland.

4 Council Decision 2000/365/EC.

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external borders, the Council did not err in excluding the UK from participating in Frontex. That the UK desired the benefits such an agency could provide in strengthening their external borders is not a surprise. However, the Court wanted to incentivize maximum participation in the Schengen *acquis* and eliminate the option of merely picking and choosing the extent to which the UK and Ireland would obligate themselves to Schengen. The Court further rejected distinguishing between "Schengen-integral measures" and "Schengen-related measures" as such a distinction has no basis in the EU and EC Treaties or in Community law. The problems caused by the UK's inability to participate in Frontex were supposedly meant to be dealt with in Decision 2008/633/JHA by allowing for access to the Visa Information System (which Frontex uses in the area of Border Checks and Border Surveillance) through the procedure outlined in the Decision. However, given the UK's subsequent court challenge, this framework was clearly unsatisfactory.

The Court's decision in Case C-482/08 *United Kingdom v. Council* is in line with their goal of incentivizing the United Kingdom and Ireland to participate fully in the Schengen *acquis* by limiting the benefits they can receive as partial participants. It is clear also that the Court will continue to resist any interpretation that will serve to weaken the core attribute of Schengen, which is to develop a *common* policy on the movement of persons. The UK approach of making their participation *uncommon* will most likely continue to be met with disapproval from the Court. It appears that, given the line of cases, the UK and Ireland must balance their desire to benefit from Schengen border protections with their long-asserted need to decide their border control policy internally. With the opening of borders comes a greater need for monitoring and intelligence. Perhaps the UK will decide that the benefits of VIS and Frontex are not outweighed by the risk of fully embracing the free movement of persons.

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