

**Action brought on 17 February 2005 by the United Kingdom of Great Britain and Northern Ireland against the Council of the European Union**

(Case C-77/05)

(2005/C 82/50)

(Language of the case: English)

An action against the Council of the European Union was brought before the Court of Justice of the European Communities on 17 February 2005 by the United Kingdom of Great Britain and Northern Ireland, represented by Elizabeth O'Neill, acting as Agent, with an address for service in Luxembourg.

The applicant claims that the Court should:

1. annul Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union <sup>(1)</sup>;
2. determine, pursuant to Article 233 EC, that, following the annulment of the Border Agency Regulation, and pending the adoption of new legislation in this matter, the provisions of the Border Agency Regulation should remain effective, except in so far as they have the effect of excluding the United Kingdom from participating in the application of the Border Agency Regulation;
3. order the Council to pay the costs of the proceedings.

*Pleas in law and main arguments:*

The United Kingdom was denied the right to take part in the adoption 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 (**the Border Agency Regulation**), despite having given notice of its wish to do so pursuant to Article 5(1) of the Protocol integrating the Schengen acquis into the framework of the European Union (**the Schengen Protocol**) and to Article 3(1) of the Protocol on the position of the United Kingdom and Ireland. The annulment of the Border Agency Regulation is sought on the grounds that the exclusion of the United Kingdom from its adoption entails the infringement of an essential procedural requirement and/or the infringement of the Treaty, within the meaning of Article 230, second paragraph, EC.

The main contention of the United Kingdom is that, in so excluding it from the adoption of the Border Agency Regulation, the Council acted on the basis of an erroneous interpretation of the relationship between Article 5 and Article 4 of the Schengen Protocol. It is contended more particularly as follows:

- (a) The Council's interpretation, according to which the right of participation conferred by Article 5 of the Schengen Protocol applies only to measures building on provisions of the Schengen acquis in which the United Kingdom partic-

pates pursuant to a Council decision adopted on the basis of Article 4, is contradicted by the structure and language of those Articles, by the very nature of the Article 5 mechanism, and by the Declaration on Article 5 that was annexed to the Final Act of the Treaty of Amsterdam.

- (b) The Council's interpretation of the Schengen Protocol is not required to enable the 'without prejudice' rule in Article 7 of the Protocol on the Position of the United Kingdom and Ireland to have useful effect. Nor is such an interpretation required to preserve the integrity of the Schengen acquis. Indeed, as a means of safeguarding the acquis, its adverse impact on the United Kingdom would be grossly disproportionate.
- (c) Given the broad and loose conception of measures building on the Schengen acquis which the Council employs in its practice, the mechanism of Article 5 of the Schengen Protocol, as interpreted by the Council, would be liable to function in a way that violates the principle of legal certainty and the fundamental principles governing enhanced cooperation.

In the alternative, the United Kingdom contends that, if the Council's interpretation of the relationship between Article 5 and Article 4 of the Schengen Protocol were correct, this would necessarily entail taking a narrow view of the notion of a measure that builds upon the Schengen acquis within the meaning of Article 5, as a measure inextricably connected with the acquis; and the Border Agency Regulation is not such a measure.

<sup>(1)</sup> OJ L 349, p. 1.

**Reference for a preliminary ruling from the Amtsgericht Freiburg by order of that court of 14 January 2005 in the case of Bernd Voigt v Regierungspräsidium Karlsruhe-Bretten**

(Case C-83/05)

(2005/C 82/51)

(Language of the case: German)

Reference has been made to the Court of Justice of the European Communities by order of the Amtsgericht Freiburg (Freiburg Regional Court) (Germany) of 14 January 2005, received at the Court Registry on 18 February 2005, for a preliminary ruling in the proceedings between Bernd Voigt and Regierungspräsidium Karlsruhe-Bretten on the following questions: