

## JUDGMENT OF THE COURT (Grand Chamber)

8 September 2015 (\*)

(Actions for annulment — Regulation (EU) No 1052/2013 — Crossing of the external borders — Eurosur system — Development of the provisions of the Schengen acquis — Participation — Cooperation with Ireland and the United Kingdom — Validity)

In Case C-44/14,

ACTION for annulment under Article 263 TFEU, brought on 7 January 2014,

**Kingdom of Spain**, represented by A. Rubio González, acting as Agent,

applicant,

v

**European Parliament**, represented by D. Moore, S. Alonso de Leon and A. Pospíšilová Padowska, acting as Agents, with an address for service in Luxembourg,

**Council of the European Union**, represented by M. Chavier, F. Florindo Gijón, M.-M. Joséphidès and P. Plaza García, acting as Agents,

defendants,

supported by:

**Ireland**, represented by E. Creedon, G. Hodge and A. Joyce, acting as Agents, and G. Gilmore, Barrister,

**United Kingdom of Great Britain and Northern Ireland**, represented by L. Christie, acting as Agent, and J. Holmes, Barrister,

**European Commission**, represented by J. Baquero Cruz and G. Wils, acting as Agents, with an address for service in Luxembourg,

interveners,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, R. Silva de Lapuerta, M. Ilešič, L. Bay Larsen (Rapporteur), A. Ó Caoimh, C. Vajda, S. Rodin, K. Jürimäe, Presidents of Chambers, E. Juhász, A. Borg Barthet, J. Malenovský, E. Levits, J.L. da Cruz Vilaça and F. Biltgen, Judges,

Advocate General: N. Wahl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 March 2015,

after hearing the Opinion of the Advocate General at the sitting on 13 May 2015,

gives the following

## Judgment

1 By its application the Kingdom of Spain seeks the annulment of Article 19 of Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur) (OJ 2013 L 295, p. 11, ‘the Eurosur Regulation’).

### Legal context

#### *Decision 2000/365/EC*

2 In accordance with Article 4 of the Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union (‘the Schengen Protocol’), the Council of the European Union on 29 May 2000 adopted Decision 2000/365/EC 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).

3 Article 1 of that decision lists the provisions of the Schengen *acquis* in which the United Kingdom of Great Britain and Northern Ireland is to take part. The provisions of the Schengen *acquis* on the crossing of the external borders are not among the provisions thus listed.

#### *Decision 2002/192/EC*

4 In accordance with Article 4 of the Schengen Protocol, the Council on 28 February 2002 adopted Decision 2002/192/EC concerning Ireland’s request to take part in some of the provisions of the Schengen *acquis* (OJ 2002 L 64, p. 20).

5 Article 1 of that decision lists the provisions of the Schengen *acquis* in which Ireland is to take part. The provisions of the Schengen *acquis* on the crossing of the external borders are not among the provisions thus listed.

#### *The Eurosur Regulation*

6 Recitals 16, 20 and 21 in the preamble to the Eurosur Regulation read as follows:

‘(16) This Regulation includes provisions on the possibility of close cooperation with Ireland and the United Kingdom which may assist in better achieving the objectives of EUROSUR.

...

(20) This Regulation constitutes a development of the 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.

(21) This Regulation constitutes a development of the provisions of the Schengen *acquis* in which Ireland does not take part, in accordance with [Decision 2002/192]; Ireland is therefore not taking part in its adoption and is not bound by it or subject to its application.’

7 Article 1 of the Eurosur Regulation provides:

‘This Regulation establishes a common framework for the exchange of information and for the cooperation between Member States and the [European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (“the Agency”)] in order to improve situational awareness and to increase reaction capability at the external borders of the Member States of the Union ... for the purpose of detecting, preventing and combating illegal

immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants (“EUROSUR”).’

8 Article 4 of the regulation, ‘EUROSUR framework’, provides in paragraphs 1 to 3:

‘1. For the exchange of information and for the cooperation in the field of border surveillance, and taking into account existing information exchange and cooperation mechanisms, Member States and the Agency shall use the EUROSUR framework, consisting of the following components:

- (a) national coordination centres;
- (b) national situational pictures;
- (c) a communication network;
- (d) a European situational picture;
- (e) a common pre-frontier intelligence picture;
- (f) a common application of surveillance tools.

...

3. The Agency shall give the national coordination centres, via the communication network, unlimited access to the European situational picture and to the common pre-frontier intelligence picture.’

9 Article 9(9) and (10) of the regulation provides:

‘9. The national coordination centres of neighbouring Member States shall share with each other, directly and in near-real-time, the situational picture of neighbouring external border sections relating to:

- (a) incidents and other significant events contained in the events layer;
- (b) tactical risk analysis reports as contained in the analysis layer.

10. The national coordination centres of neighbouring Member States may share with each other, directly and in near-real-time, the situational picture of neighbouring external border sections relating to the positions, status and type of own assets operating in the neighbouring external border sections as contained in the operational layer.’

10 Articles 14 to 16 of the regulation lay down the rules governing reaction capability at the external borders of the Member States.

11 Article 19 of the regulation, ‘Cooperation with Ireland and the United Kingdom’, reads as follows:

‘1. For the purposes of this Regulation, the exchange of information and the cooperation with Ireland and the United Kingdom may take place on the basis of bilateral or multilateral agreements between Ireland or the United Kingdom respectively and one or several neighbouring Member States or through regional networks based on those agreements. The national coordination centres of the Member States shall be the contact points for the exchange of information with the corresponding authorities of Ireland and the United Kingdom within EUROSUR. Once those agreements are concluded, they shall be notified to the Commission.

2. The agreements referred to in paragraph 1 shall be limited to the following exchange of information between the national coordination centre of a Member State and the corresponding

authority of Ireland or the United Kingdom:

- (a) information contained in the national situational picture of a Member State to the extent transmitted to the Agency for the purposes of the European situational picture and the common pre-frontier intelligence picture;
- (b) information collected by Ireland and the United Kingdom which is relevant for the purposes of the European situational picture and the common pre-frontier intelligence picture;
- (c) information as referred to in Article 9(9).

3. Information provided in the context of EUROSUR by the Agency or by a Member State which is not party to an agreement as referred to in paragraph 1 shall not be shared with Ireland or the United Kingdom without the prior approval of the Agency or of that Member State. The Member States and the Agency shall be bound by the refusal to share that information with Ireland or the United Kingdom.

4. Onward transmission or other communication of information exchanged under this Article to third countries or to third parties shall be prohibited.

5. The agreements referred to in paragraph 1 shall include provisions on the financial costs arising from the participation of Ireland and the United Kingdom in the implementation of those agreements.'

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

12 The Kingdom of Spain claims that the Court should:

- annul Article 19 of the Eurosur Regulation;
- order the Parliament and the Council to pay the costs.

13 The Parliament and the Council contend that the Court should:

- dismiss the action as unfounded;
- order the Kingdom of Spain to pay the costs.

14 By decision of the President of the Court of 19 May 2014, Ireland, the United Kingdom and the Commission were granted leave to intervene in support of the form of order sought by the Parliament and the Council.

### **The action**

#### *Arguments of the parties*

15 In support of its action, the Kingdom of Spain relies on a single plea in law, alleging breach of Article 4 in conjunction with Article 5 of the Schengen Protocol.

16 The Kingdom of Spain submits that Article 19 of the Eurosur Regulation is contrary to those provisions, in that, bypassing Article 4 of the protocol, it establishes an ad hoc procedure for Ireland and the United Kingdom to take part in that regulation by means of cooperation agreements.

17 According to the Kingdom of Spain, the association of Ireland and the United Kingdom with the Eurosur system, provided for in Article 19 of the Eurosur Regulation, is a form of participation within the meaning of the Schengen Protocol, since the cooperation of those Member States with

that system constitutes taking part in the implementation of that regulation and their integration in an exchange of information places them in the common framework for the exchange of information and cooperation which the regulation seeks to establish, pursuant to Article 1. Any distinction between that association of Ireland and the United Kingdom with the Eurosur system and taking part within the meaning of the Schengen Protocol would consequently be artificial.

- 18 Furthermore, to accept as lawful the establishment of an ad hoc participation procedure would render Article 4 of the Schengen Protocol ineffective, since a Member State which was refused permission to take part in the adoption of a measure developing the Schengen *acquis* would, notwithstanding that refusal, be able to participate in the measure by means of that ad hoc procedure. That system would therefore be incompatible with the law as stated by the Court in its judgments in *United Kingdom v Council* (C-77/05, EU:C:2007:803) and *United Kingdom v Council* (C-137/05, EU:C:2007:805).
- 19 The Kingdom of Spain also observes that the Court held in its judgment in *United Kingdom v Council* (C-482/08, EU:C:2010:631) that the Member States which take part in the Schengen *acquis* are not obliged to provide for special adaptation measures for the other Member States.
- 20 Moreover, according to the Kingdom of Spain, Article 19 of the Eurosur Regulation is a particularly serious breach of Article 4 of the Schengen Protocol, since it treats Ireland and the United Kingdom as third countries, it places those States in a more favourable position than the other Member States, the agreements mentioned in Article 19 contain provisions relating to the costs of implementing them, and the system arising from those agreements leads to fragmentation of the management of the crossing of the external borders. The EU legislature has thus unlawfully created a special situation which is not provided for in primary law and is contrary to the objective pursued by Article 4 of the Schengen Protocol.
- 21 The Parliament, the Council, Ireland and the United Kingdom observe that the expression ‘take part’ is used in the Schengen Protocol to designate both taking part in the adoption of measures developing the Schengen *acquis* and taking part in the application of provisions that have already been adopted and form part of that *acquis*. Ireland and the United Kingdom did not take part in the adoption of the Eurosur Regulation and are not taking part in its application either, as recitals 20 and 21 in the preamble to that regulation point out.
- 22 According to the Parliament, the Council, Ireland, the United Kingdom and the Commission, Article 19 of the Eurosur Regulation in fact provides only for a limited form of cooperation which enables the objectives of Eurosur to be better attained, without Ireland or the United Kingdom being assimilated to the States which take part in the provisions of the Schengen *acquis* relating to the crossing of the external borders. The various limitations of the scope of the agreements referred to in Article 19 mean that they cannot have the effect of placing Ireland or the United Kingdom within the common framework established by that regulation.
- 23 The Parliament and the Commission further submit that Articles 4 and 5 of the Schengen Protocol are intended solely to govern situations in which Ireland or the United Kingdom requests to take part in an area of the Schengen *acquis*, and not the status of those Member States where they have not made such a request.
- 24 Moreover, the outcome contended for by the Kingdom of Spain would, in the view of the Parliament and the United Kingdom, lead to Ireland and the United Kingdom being shown less confidence than third countries.
- 25 Finally, the Council, the United Kingdom and the Commission contest the Kingdom of Spain’s argument that Article 19 of the Eurosur Regulation leads to various unfortunate consequences, observing in particular that the complexity that may derive from the conclusion of cooperation agreements does not call in question the purpose of the Schengen Protocol and forms an integral part

of the reality of enhanced cooperation in the Schengen area and the more limited cooperation to be desired with neighbouring third countries and non-participating Member States.

### *Findings of the Court*

- 26 Article 1 of the Schengen Protocol authorises 25 Member States, not including either Ireland or the United Kingdom, to establish enhanced cooperation among themselves in areas covered by the Schengen *acquis*.
- 27 Since Ireland and the United Kingdom do not take part in all the provisions of the Schengen *acquis*, they are in a special situation, which the Schengen Protocol took into account in two respects (see, to that effect, judgment in *United Kingdom v Council*, C-77/05, EU:C:2007:803, paragraph 57).
- 28 First, Article 4 of the protocol reserves to those two Member States the right to apply at any time to take part in all or some of the provisions of the Schengen *acquis* in force on the date of the application to take part. Secondly, Article 5 of the protocol, which governs the adoption of proposals and initiatives to build upon the Schengen *acquis*, allows those Member States to choose whether or not to take part in the adoption of such a measure, with that option being available to one of those Member States only if the context of the measure is an area of the Schengen *acquis* which that Member State has accepted pursuant to Article 4 of the protocol, or if the measure is a development of such an area (see, to that effect, judgments in *United Kingdom v Council*, C-77/05, EU:C:2007:803, paragraphs 58, 62 and 65, and *United Kingdom v Council*, C-482/08, EU:C:2010:631, paragraph 61).
- 29 In that context, it is common ground that, while, pursuant to Article 4 of the Schengen Protocol and to Decisions 2000/365 and 2002/192, Ireland and the United Kingdom take part in certain provisions of the Schengen *acquis*, that participation does not extend to the provisions of the *acquis* relating to the crossing of the external borders.
- 30 Ireland and the United Kingdom can therefore take part in the provisions in force of the Schengen *acquis* relating to that area, or in the adoption of proposals and initiatives to build upon that *acquis* which relate to that area, only after a request to that effect has been made by the Member State concerned and accepted by the Council deciding in accordance with the procedure laid down in Article 4 of the Schengen Protocol.
- 31 It follows that the EU legislature cannot validly establish a procedure that differs from that provided for in Article 4 of the Schengen Protocol, whether in the direction of strengthening or easing that procedure, for the purpose of authorising Ireland or the United Kingdom to take part in such provisions or in the adoption of such proposals and initiatives (see, to that effect, judgment in *Parliament v Council*, C-133/06, EU:C:2008:257, paragraph 56).
- 32 Similarly, the EU legislature cannot give Member States the possibility of concluding agreements between themselves having such an effect.
- 33 In the present case, Article 19 of the Eurosur Regulation, which is a development of the Schengen *acquis* in the area of the crossing of the external borders, makes provision for establishing cooperation for the exchange of information on the basis of bilateral or multilateral agreements between Ireland or the United Kingdom and one or several neighbouring Member States, without the prior adoption of a decision of the Council under Article 4 of the Schengen Protocol being needed to authorise that cooperation.
- 34 Having regard to the subject-matter of those agreements, Article 19 of the Eurosur Regulation does not allow Ireland or the United Kingdom to take part in the adoption of a proposal or initiative to build upon the Schengen *acquis* in the area of the crossing of the external borders.
- 35 By contrast, in so far as those agreements are intended to establish cooperation between Ireland or

the United Kingdom and one or several neighbouring Member States, it must be determined, in order to assess whether the single plea raised by the Kingdom of Spain in support of its action is well founded, whether that cooperation may be classified as ‘taking part’ in the provisions of the Eurosur Regulation within the meaning of Article 4 of the Schengen Protocol.

- 36 It should be noted here, first, that recitals 20 and 21 in the preamble to the Eurosur Regulation state that Ireland and the United Kingdom are not bound by the regulation or subject to its application, and that Article 19 of the regulation does not provide for the agreements mentioned in that article to have the object of changing that situation.
- 37 It follows, next, from Articles 1 and 4 of the Eurosur Regulation that the regulation establishes a common framework for the exchange of information and for cooperation between Member States and the Agency, which consists of six components set out in Article 4(1) of the regulation. The agreements mentioned in Article 19 of the regulation concern, pursuant to Article 19(2), only two of those six components, since they allow the exchange of information with the national coordination centres of those Member States alone which have concluded such an agreement relating to information in the national situational pictures of those Member States.
- 38 That limitation of the subject-matter of the agreements mentioned in Article 19 of the Eurosur Regulation means in particular that, as the Advocate General observes in points 27 and 31 of his Opinion, those agreements cannot establish relations between Ireland or the United Kingdom and the Agency, and that direct access is also excluded to the communication network, the European situational picture and the common intelligence picture, to which the other Member States have unlimited access under Article 4(3) of the regulation, and which constitute the core of the common framework established by the regulation.
- 39 Furthermore, the agreements mentioned in Article 19 of the Eurosur Regulation cannot relate to the operational aspect of the regulation, namely reaction capability at the external borders of the Member States, which is the subject of Articles 14 to 16 of the regulation.
- 40 It must be observed, finally, that the information which may be transmitted to Ireland and the United Kingdom on the basis of the agreements mentioned in Article 19 of the Eurosur Regulation is precisely identified in Article 19(2) and (3) of the regulation. In particular, the exchange of information with Ireland or the United Kingdom cannot extend to the information mentioned in Article 9(10) of the regulation or to information provided in the context of Eurosur by the Agency or by a Member State which is not party to such an agreement without the prior approval of the Agency or of that Member State.
- 41 It is therefore apparent that the cooperation allowed by Article 19 of the Eurosur Regulation can relate only to a limited part of the areas governed by the regulation, and that in those areas the agreements mentioned in that article do not permit even indirect access to information exchanged within the common framework established by the regulation without the prior consent of the Member States which provided the information.
- 42 It follows that the agreements mentioned in Article 19 of the Eurosur Regulation allow the implementation of a limited form of cooperation between Ireland and the United Kingdom and one or several neighbouring Member States, but cannot place Ireland or the United Kingdom in a situation equivalent to that of the other Member States, in that those agreements cannot validly lay down rights or obligations for those two Member States comparable to those of the other Member States in connection with the Eurosur system or a large part of it.
- 43 None the less, the Kingdom of Spain submits, contrary to the Parliament and the Council, that even a limited form of cooperation must be regarded as taking part within the meaning of Article 4 of the Schengen Protocol, which means that, despite the limits of the cooperation provided for in Article 19 of the Eurosur Regulation, that article is incompatible with the Schengen Protocol.

- 44 On this point, it should be recalled that, according to settled case-law of the Court, when interpreting a provision of EU law account must be taken of its wording, its context and its aims (see, to that effect, judgments in *United Kingdom v Council*, C-77/05, EU:C:2007:803, paragraph 55, and *van der Helder and Farrington*, C-321/12, EU:C:2013:648, paragraph 36).
- 45 As regards, first, the wording of Article 4 of the Schengen Protocol, it follows from that article that Ireland and the United Kingdom have the option of asking to take part in some or all of the provisions of the Schengen *acquis*. The terms of that article do not, on the other hand, raise the possibility of the Council using the procedure laid down in that article to vary the intensity of that participation by providing for the restricted or adjusted application to those two Member States of the provisions in which they are authorised to take part, as in Article 19 of the Eurosur Regulation.
- 46 As regards, secondly, the context of Article 4 of the Schengen Protocol, it must first be pointed out that the preamble to the protocol states that it makes provision for Ireland and the United Kingdom to ‘accept’ provisions of the Schengen *acquis*, thus indicating that the procedure laid down in Article 4 of the protocol is intended to ratify the full acceptance by those Member States of provisions in force of that *acquis*, not to establish limited cooperation mechanisms in the areas of that *acquis* which they have not signed up to. That analysis is borne out by the fact that the word ‘accept’ is also used in Article 7 of the protocol in relation to new Member States of the Union.
- 47 It must be recalled, next, that it follows both from the preamble to the Schengen Protocol and from Article 1 of the protocol that the integration of the Schengen *acquis* into the framework of the European Union is based on the provisions of the Treaties on enhanced cooperation.
- 48 It follows from Title III of Part Six of the FEU Treaty, in particular Article 327 TFEU, that the implementation of enhanced cooperation is structured by the distinction between participating States, which are bound by the acts adopted in that context, and non-participating States, which are not. Moving from the status of a non-participating Member State to that of a participating Member State is governed generally by Article 331 TFEU, and, as that article indicates, means that the Member State in question is required to apply the acts already adopted within the framework of the enhanced cooperation concerned.
- 49 Article 4 of the Schengen Protocol, which applies in lieu of Article 331 TFEU within the framework of enhanced cooperation in the areas covered by the Schengen *acquis*, must therefore be read as having the objective of allowing Ireland and the United Kingdom to be placed, as regards certain provisions in force of the Schengen *acquis*, in a situation equivalent to that of the Member States participating in that *acquis*, not of regulating the rights and obligations of Ireland and the United Kingdom where they choose, in certain areas, to stay outside that enhanced cooperation.
- 50 Thirdly, the argument of the Kingdom of Spain that the aim of Article 4 of the Schengen Protocol precludes accepting the lawfulness of the establishment of limited forms of cooperation with Ireland and the United Kingdom must be rejected.
- 51 In the first place, it follows from the general scheme of the Schengen Protocol, from Declaration No 45 on Article 4 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, and from the principle of sincere cooperation that the system established in Articles 4 and 5 of the Schengen Protocol cannot be regarded as intended to require Ireland and the United Kingdom to participate in the entire Schengen *acquis*, excluding any form of limited cooperation with those Member States (see, to that effect, judgment in *United Kingdom v Council*, C-77/05, EU:C:2007:803, paragraph 66).
- 52 In the second place, it must be observed that to interpret Article 4 of the Schengen Protocol as not applying to limited forms of cooperation does not call into question the effectiveness of that article, in so far as that interpretation does not allow Ireland and the United Kingdom to obtain rights comparable to those of the other Member States as regards the provisions in force of the Schengen



*acquis*, or to take part in the adoption of proposals and initiatives to build upon the Schengen *acquis*, without first having been authorised to take part in those provisions by a unanimous decision of the Council on the basis of that article.

- 53 Similarly, the fact that the Member States participating in the Schengen *acquis* are not obliged, when they develop and deepen the enhanced 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 (judgment in *United Kingdom v Council*, C-482/08, EU:C:2010:631, paragraph 49) does not mean that the EU legislature is prohibited from enacting such measures, in particular allowing certain limited forms of cooperation with those other Member States, where it finds it appropriate.
- 54 The contrary conclusion would be liable to prevent the full implementation of the objectives of the Schengen *acquis*, for example by limiting the effectiveness of the surveillance of the external borders in the neighbouring geographical areas of the territory of the States that do not take part in the Schengen *acquis* in the area of the crossing of those borders.
- 55 The fact that the establishment of limited forms of cooperation may lead to fragmentation of the rules applicable in that area, assuming that to be the case, cannot call that conclusion into question, as the implementation of enhanced cooperation inevitably leads to a certain fragmentation of the rules applicable to the Member States in the area concerned.
- 56 In that context, the fact that Ireland or the United Kingdom is, with respect to the common framework established by the Eurosur Regulation, in a situation differing from that of the other Member States which could be compared to some extent to that of a third country cannot therefore be regarded as relevant.
- 57 It should be observed, moreover, that Article 19 of the Eurosur Regulation may contribute to reducing that fragmentation, by delimiting the content of the agreements which the Member States are able to conclude with Ireland and the United Kingdom in the area of the exchange of information on the crossing of the external borders.
- 58 It follows from all the above considerations that limited forms of cooperation do not constitute a form of taking part within the meaning of Article 4 of the Schengen Protocol.
- 59 Consequently, in the light of the findings in paragraph 42 above, Article 19 of the Eurosur Regulation cannot be regarded as giving the Member States the option of concluding agreements which allow Ireland or the United Kingdom to take part in the provisions in force of the Schengen *acquis* in the area of the crossing of the external borders.
- 60 The single plea raised by the Kingdom of Spain in support of its action must therefore be rejected in its entirety, and that action must consequently be dismissed.

### **Costs**

- 61 Under Article 138(1) of the Court's 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 Parliament and the Council have applied for the Kingdom of Spain to be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs.
- 62 In accordance with Article 140(1) of those Rules, Ireland, the United Kingdom of Great Britain and Northern Ireland, and the Commission must bear their own costs.

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

### **1. Dismisses the action;**

2. **Orders the Kingdom of Spain to pay the costs;**
3. **Orders Ireland, the United Kingdom of Great Britain and Northern Ireland, and the European Commission to bear their own costs.**

[Signatures]

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\* Language of the case: Spanish.