



# SCHENGEN, DIFFERENTIATED INTEGRATION AND COOPERATION WITH THE ‘OUTS’

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**ABSTRACT:** In case C-44/14, *Spain v. European Parliament and Council*, the Court of Justice of the European Union has had the opportunity to clarify the scope and effects of the British and Irish opt-out in the Schengen area. The Court held that a limited cooperation with those countries by means of international agreements in an area of the Schengen *acquis*, that does not apply, notoriously, to Ireland and the United Kingdom, does not infringe Art. 4 of the Schengen Protocol. By upholding the legality of such agreements, the judgment introduces some flexibility in dealing with opt-outs, while at the same time confirming that an unrestrained *à la carte* approach would not be tolerated.

**KEYWORDS:** differentiated integration – opting-out – Ireland and the United Kingdom – Schengen *acquis* – EUROSUR Regulation – cooperation through international agreements.

## I. INTRODUCTION

In times where differentiation is increasingly seen as a necessary path to accommodate diverging views of European integration, a judgment delivered by the Grand Chamber of the Court of Justice of the European Union in September 2015<sup>1</sup> may provide some interesting clarifications as to the functioning of the opt-outs in the development of the Schengen *acquis*.<sup>2</sup>

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<sup>1</sup> Court of Justice, judgment of 8 September 2015, case C-44/14, *Kingdom of Spain v. European Parliament and Council of the European Union*. For a first comment, see A. MARLETTA, *Kingdom of Spain v. Council: another piece in the “Schengen puzzle”*, in *European Law Blog*, 15 March 2016, [www.europeanlawblog.eu](http://www.europeanlawblog.eu).

<sup>2</sup> The Schengen *acquis* originates from the Schengen Agreement originally concluded by five Member States with the aim of progressively abolishing internal border controls (Agreement 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, 14 June 1985, [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu)). Five years later the objectives of the Agreement were further developed by the Convention implementing the Schengen Agreement 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

The judgment concerned the legality of arrangements establishing a limited form of cooperation between Member States that fully participate in the *acquis* and Member States that have a partial opt-out from it. The case arose from a challenge brought by Spain against a provision of the EUROSUR Regulation<sup>3</sup> entitling Member States to conclude international agreements between themselves with a view to extending the applicability of certain rules of the Regulation No 1052/2013 to Ireland and the United Kingdom, to whom the Regulation does not apply. Indeed, neither Ireland nor the United Kingdom could participate in the adoption of the Regulation No 1052/2013, as they do not take part in the underlying portion of the Schengen *acquis*. Therefore, recourse to international agreements was the only way to allow for a partial extension of the relevant provisions.

In reviewing Regulation No 1052/2013 in the light of the Schengen Protocol,<sup>4</sup> the Court held that such arrangements are not conflicting with primary law, as long as they do not constitute for Ireland and the United Kingdom a form of “taking part” in measures developing the *acquis* within the meaning of Art. 4 of the Protocol No 19.

The case is interesting for several reasons and may have implications that go beyond the area of Schengen-related measures. First, while confirming the need to ensure the coherence of the *acquis*, it adopts a more flexible approach compared to the pre-Lisbon case law. Secondly, it underscores the importance of effectiveness as a guiding principle in assessing the legality of the contested measure. Finally, it allows for some considerations on the use of international agreements between Member States at the service of European integration more generally.

After a brief overview of the rules of the Schengen Protocol on the participation of Ireland and the United Kingdom (II) this comment will analyse the key points of the judgment (III) and finally draw some concluding remarks (IV).

their common borders, 19 June 1990, [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu). The *acquis*, comprising the two conventions, the related agreements and the decisions adopted on their basis of the conventions, was later incorporated into European Union (EU) law by the Treaty of Amsterdam, which also established new legal bases for its development (on this process, see M. DEN BOER, L. CORRADO, *For the Record or Off the Record: Comments About the Incorporation of Schengen into the EU*, in *European Journal of Migration and Law*, 1999, p. 397 *et seq.*; D. THYM, *The Schengen Law: A Challenge for Legal Accountability in the European Union*, in *European Law Journal*, 2002, p. 218 *et seq.* For an overall reconstruction of the Schengen *acquis* see S. PEERS, *EU Justice and Home Affairs Law*, Oxford: Oxford University Press, 2012; S. PEERS, *The Future of the Schengen System*, in *SIEPS Report No. 6*, 2013, [www.sieps.se](http://www.sieps.se).

<sup>3</sup> Regulation (EU) No 1052/2013 of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR).

<sup>4</sup> Protocol (No 19) integrating the Schengen *Acquis* into the Framework of the European Union. The Protocol is a modified version of the Schengen Protocol annexed to the Amsterdam Treaty. On the modifications introduced by the Lisbon Treaty see S. PEERS, *In a World of Their Own? Justice and Home Affairs Opt-Outs and the Treaty of Lisbon*, in *Cambridge Yearbook of European Legal Studies*, 2007-2008, p. 383 *et seq.*; E. FAHEY, *Swimming in a Sea of Law: Reflections on Water Borders, Irish (British) Euro Relations and Opting-Out and Opting-In After the Treaty of Lisbon*, in *Common Market Law Review*, 2010, p. 690 *et seq.*

## II. THE SCHENGEN PROTOCOL AND THE POSITION OF IRELAND AND THE UNITED KINGDOM

The Schengen area represents a primary example of differentiated integration<sup>5</sup> due to the special status granted to Ireland, the United Kingdom and, in different terms, Denmark.<sup>6</sup>

While Ireland and the United Kingdom are not, in principle, bound by the Schengen *acquis*,<sup>7</sup> the Schengen Protocol introduces two mechanisms regulating, respectively, their participation in the application of the *acquis* (Art. 4)<sup>8</sup> and in its implementation through the adoption of further measures (Art. 5).<sup>9</sup>

The judgment must be viewed against the background of previous cases where the Court clarified the relationship between these provisions. In two judgments rendered on 18 December 2007 on application of the United Kingdom which challenged the Council

<sup>5</sup> On the notion and classification of forms of differentiated integration see F. TUYTSCHAEVER, *Differentiation in European Union Law*, Oxford: Hart Publishing, 1999; B. DE WITTE, D. HANF, E. VOS (eds), *The Many Faces of Differentiation in EU Law*, Antwerp, Oxford, New York: Intersentia, 2001; C. GUILLARD, *L'intégration différenciée dans l'Union européenne*, Bruxelles: Bruylant, 2007.

<sup>6</sup> On the Schengen opt-out regime see S. PEERS, *In a World of Their Own? Justice and Home Affairs Opt-outs and the Treaty of Lisbon*, cit.; M. SION-TZIDKIYAHU, *Opt-Outs in the Lisbon Treaty: What Direction for Europe à la Carte?*, in *European Journal of Law Reform*, 2008, p. 497 *et seq.*; M. FLETCHER, *Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom's 'Ins' and 'Outs'*, in *European Constitutional Law Review*, 2009, p. 71 *et seq.*; E. FAHEY, *Swimming in a Sea of Law: Reflections on Water Borders, Irisi(-British)-Euro Relations and Opting-out and Opting-in after the Treaty of Lisbon*, cit.; J.J.E. SCHUTTE, *UK v. EU: A Continuous Test Match*, in *Fordham International Law Journal*, 2010-2011, p. 1346 *et seq.*; G. CORNELISSE, *What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area without Internal Borders*, in *Common Market Law Review*, 2014, p. 741 *et seq.*; P. MENGGOZI, *La Corte di giustizia confrontata agli Stati membri opting out*, in *Il diritto dell'Unione europea*, 2015, p. 261 *et seq.*; S. MONTALDO, *L'integrazione differenziata e la cooperazione giudiziaria e di polizia in materia penale nell'UE: il caso degli opt-out di Regno Unito, Irlanda e Danimarca*, in *La legislazione penale*, 4 febbraio 2016.

<sup>7</sup> See Art. 4 of the Schengen Protocol, in addition to Art. 2 in conjunction with Art. 1. Although the wording of Art. 1 indicates that the other Member States are entitled to "to establish closer cooperation among themselves in areas covered by provisions defined by the Council which constitute the Schengen *acquis*", it in fact introduces an opt-out in favour of the United Kingdom and Ireland.

<sup>8</sup> Art. 4 provides that the Ireland and the United Kingdom "may at any time request to take part in some or all of the provisions of this *acquis*", subject to a unanimity decision by the Council. Application of the Schengen *acquis* was partially extended to the United Kingdom and Ireland pursuant to this procedure: see, respectively, Decision 2000/365/EC of the Council 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* and Decision 2002/192/EC of the Council concerning Ireland's request to take part in some of the provisions of the Schengen *acquis*.

<sup>9</sup> Art. 5 of the Protocol makes participation of the 'outs' subject to less stringent requirements: they merely need to notify the President of the Council, within a reasonable period from the launch of the proposal, that they wish to take part in the adoption of the measure.

refusal to let it participate in Schengen-related measures,<sup>10</sup> the Court found that participation of a Member State in the adoption of a measure developing the Schengen *acquis* is only admissible where that State has accepted the area of the *acquis* upon which the measure is based.<sup>11</sup> If a Member State could rely on Art. 5 of Protocol No 19 to participate in any measure developing the *acquis*, the procedure set out in Art. 4 would become meaningless, as the Council refusal could be easily circumvented by participating in the implementing measures.<sup>12</sup> This strict approach, which may seem at odds with the Court's traditional favour for European integration,<sup>13</sup> was aimed to limit fragmentation and to provide an incentive for Ireland and the United Kingdom to join the whole of the Schengen *acquis*.

Finally, in a subsequent case the Court reiterated the strict approach to opt-out rules, adding that the other Member States are not required, where they intend to adopt provisions developing the Schengen *acquis*, to provide for special adaptation measures for opt-out countries.<sup>14</sup>

### III. DISTINGUISHING “LIMITED COOPERATION” FROM A FULL “TAKING PART” IN THE SCHENGEN ACQUIS

While the pre-Lisbon cases concerned the scope of Art. 5 of Protocol No 19 in relation to Art. 4 of the Regulation, in case *Kingdom of Spain v. European Parliament and Council* the Court was confronted only with the interpretation of the latter.

The case arose from a challenge that Spain brought against a provision of the EUROSUR Regulation, a measure adopted in October 2013 in order to improve the management of the EU external borders.

Regulation No 1052/2013 establishes a European Border Surveillance System (EUROSUR) based on a network of national authorities responsible for border control. Their task is to collect and share, with the other Member States and with the European

<sup>10</sup> Court of Justice, judgment of 18 December 2007, case C-77/05, *United Kingdom v. Council*; Court of Justice, judgment of 18 December 2007, case C-137/05, *United Kingdom v. Council*; Court of Justice, judgment of 26 October 2010, case C-482/08, *United Kingdom v. Council*.

<sup>11</sup> *United Kingdom v. Council*, case C-77/05, cit., para. 62. The judgment also established that the Schengen Protocol and the Protocol on participation of Ireland and the UK in the area of Freedom, Security and Justice (at that time, Justice and Home Affairs) are mutually exclusive (para. 73 *et seq.*). By construing the scope of application of the Schengen Protocol broadly, it correspondingly reduced the scope of the AFSJ Protocol.

<sup>12</sup> *United Kingdom v. Council*, case C-77/05, cit., para. 67.

<sup>13</sup> See J.J. RIJPMMA, case annotation *Case C-77/05, United Kingdom v. Council, Judgment of the Grand Chamber of 18 December 2007*, not yet reported, and *Case C-137/05, United Kingdom v. Council, Judgment of the Grand Chamber of 18 December 2007*, not yet reported, in *Common Market Law Review*, 2008, p. 851; G. CORNELISSE, *What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area without Internal Borders*, cit., p. 769 *et seq.*

<sup>14</sup> *United Kingdom v. Council*, case C-482/08, cit., para. 49.

agency FRONTEX, information gathered through border surveillance activities, in order to improve situational awareness and reaction capability at the external borders for the purpose combating cross-border crime and irregular migration and protecting the lives of migrants.

Since the Regulation No 1052/2013 establishes rules related to the crossing of external borders, it undoubtedly constitutes a development of provisions of the Schengen *acquis* in which the United Kingdom and Ireland do not participate.<sup>15</sup>

Nevertheless, Art. 19 of the Regulation No 1052/2013 allows for cooperation with the United Kingdom and Ireland on the basis of international agreements to be concluded between those countries and neighbouring Member States.

Spain challenged the legality of this provision, alleging that it breached Art. 4 of the Schengen Protocol. It argued that the possible association of Ireland and the United Kingdom to the EUROSUR system by means of international agreements was a form of participation in the Schengen *acquis*. Accordingly, that would amount to a circumvention of Art. 4 of the Protocol No 19, which makes participation in the *acquis* by the Member States concerned subject to precise procedural requirements (namely, a unanimity Council decision).

At the outset, the Court recalled that Ireland and the United Kingdom are in a special situation in respect to the Schengen *acquis*, as they have not joined it in its entirety. In particular, those two Member States do not participate in the measures of the *acquis* concerning the crossing of the external borders.<sup>16</sup>

Therefore, they may "take part" in measures relating to that area, such as the EUROSUR Regulation, only by resorting to the procedure set forth in Art. 4 of the Protocol No 19. Recalling its previous case law, the Court pointed out that "the EU legislature cannot validly establish a procedure that differs from that provided for in Art. 4 of the Schengen Protocol, whether in the direction of strengthening or easing that procedure".<sup>17</sup> It follows logically from this statement that circumvention of Art. 4 of the Protocol No 19 is not permitted even by means of international agreements between Member States.<sup>18</sup>

This, however, was only the starting point of the analysis. The key question was to determine whether the cooperation established with Ireland and the United Kingdom by Art. 19 of the contested Regulation did in fact allow those Member States to "take part" in provisions of the Schengen *acquis*.

<sup>15</sup> See recitals nos 20 and 21 of the Regulation.

<sup>16</sup> *Spain v. European Parliament and Council*, cit., paras 29-33.

<sup>17</sup> *Spain v. European Parliament and Council*, cit., para. 31.

<sup>18</sup> *Spain v. European Parliament and Council*, cit., para. 32.

In rejecting this view, the Court largely followed the Opinion delivered by Advocate General Wahl, who had traced a distinction between actual participation in the *acquis* and more limited forms of cooperation.<sup>19</sup>

The difference does not rest on the nature of the arrangement that would permit cooperation with the *outs*. That is perfectly reasonable, as permitting Ireland and the United Kingdom to fully participate in the measure by concluding a separate international agreement would in fact amount to a circumvention of Art. 4 of the Protocol No 19. The Court clearly stated that this outcome would not be admissible.<sup>20</sup>

Rather, the distinction appears to be based on two criteria.

The first is the difference in scope. The Court observed that the envisaged cooperation only covers part of the subject matter of the Regulation No 1052/2013 and excludes, significantly, any direct relation between the *out* Member States and FRONTEX and the application of provisions on operational coordination.<sup>21</sup> The agreements set out in Art. 19 of the Regulation No 1052/2013 would thus not extend to the *outs* the entire content of the Regulation, only allowing for the exchange of some of the information gathered by the national coordination centres. Had the EU legislature provided for the full extension of the Regulation No 1052/2013 to the United Kingdom and Ireland, the Court would arguably have found the arrangement to be incompatible with primary law.

The second criterion relates to the legal effects of the envisaged agreements. In this respect, the Court held that the Schengen Protocol only concerns full participation of Ireland and the United Kingdom in EU measures developing the *acquis*. This conclusion was supported by the reading of the Preamble, which states that the Protocol No 19 is intended to allow those Member States to “accept” provisions of the Schengen *acquis*, thereby suggesting that the procedure set out in Art. 4 only refers to the “full acceptance” of provisions of the *acquis*, not to “limited cooperation mechanisms”.<sup>22</sup>

Based on the wording of Art. 1 of the Protocol No 19, which expressly defines the development of the Schengen *acquis* by the participating Member States as a form of “closer cooperation”, the Court also drew an interesting comparison with the regime of enhanced cooperation set out in the Treaties. It recalled that pursuant to Art. 327 of the Treaty on the Functioning of the European Union (TFEU) the main feature of enhanced cooperation is the distinction between participating and non-participating Member

<sup>19</sup> Opinion of Advocate General Wahl delivered on 13 May 2015, case C-44/14, *Kingdom of Spain v. European Parliament and Council of the European Union*, para. 26 *et seq.*

<sup>20</sup> *Spain v. European Parliament and Council*, cit., para. 32.

<sup>21</sup> *Spain v. European Parliament and Council*, cit., para. 37 *et seq.* According to Art. 19 of the EUROSUR Regulation, bilateral or multilateral agreements with Ireland and the United Kingdom cannot establish relations between them and FRONTEX, nor grant Ireland and the United Kingdom access to the communication network and to all information the other Member States share with each other and with FRONTEX. Additionally, the agreements could not extend to Ireland or the United Kingdom the operational provisions of the Regulation.

<sup>22</sup> *Spain v. European Parliament and Council*, cit., para. 46.

States. Whereas the former are bound by the acts adopted in the context of the enhanced cooperation, even where they have joined it at a later stage, the latter are not. Applying this scheme to the Schengen Protocol, the Court concluded that Art. 4 thereof "must [...] 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*".<sup>23</sup> By contrast, it does not regulate the rights and obligations of Ireland and the United Kingdom where they decide to stay outside that enhanced cooperation.<sup>24</sup>

The effects of agreements such as those envisaged by the contested provision are therefore quite different from full participation of Ireland and the United Kingdom in the adoption of the measure. Additionally, neighbouring Member States may provide for coordination with those Member States by concluding bilateral or multilateral agreements, but are not obliged to do so. In the same vein, since this form of coordination does not amount to participation of Ireland and the United Kingdom in the Schengen *acquis*, it cannot affect their position as regards both the *acquis* and the future adoption of further measures in this area.

Interestingly, the judgement strongly relies on the principle of effectiveness. In assessing the potential impact of cooperation by means of international law on the *effet utile* of Art. 4 of the Protocol No 19<sup>25</sup> the Court noted that the effectiveness of that provision would not be called into question, as Ireland and the United Kingdom would not obtain rights comparable to those of the Member States fully participating in the *acquis*. On the contrary, a restrictive interpretation of Art. 4, preventing coordination with non-participating Member States, could jeopardise the effectiveness of external borders control in neighbouring countries. Thus, if some fragmentation is inevitable, being the necessary consequence of the existence of opt-outs, at least the agreements set out in Art. 19 of the Regulation No 1052/2013 could reduce its negative impact.

#### IV. CONCLUDING REMARKS

The judgment is coherent with previous cases dealing with the situation where one or more Member States have opted out of certain European policies. The case law has constantly emphasised the need to preserve the consistency and the effectiveness of EU law by avoiding a *pick and choose* approach that would increase fragmentation,<sup>26</sup> an

<sup>23</sup> *Spain v. European Parliament and Council*, cit., para. 49.

<sup>24</sup> *Ibidem*.

<sup>25</sup> *Ivi*, para. 52 *et seq.*

<sup>26</sup> See S. MONTALDO, *L'integrazione differenziata e la cooperazione giudiziaria e di polizia in materia penale nell'UE: il caso degli opt-out di Regno Unito, Irlanda e Danimarca*, cit., p. 6. Some authors have criticized the Court's approach, arguing that, instead of stressing "the coherence of the Schengen *acquis* from the perspective of the Schengen Member States, [...] it could have focused instead on its substantive coherence", favouring a wider participation of the *outs* in Schengen-related measures (G. CORNELISSE,

approach the Court has also followed in determining the scope of opt-out rules in other areas.<sup>27</sup> In this respect, the judgment has – unsurprisingly – upheld the Court’s previous case law concerning the Schengen Protocol.

The pre-Lisbon cases, however, have often been criticised as excessively rigid. It was argued that by insisting on the coherence of the Schengen *acquis* and on the strict demarcation between the Schengen Protocol and the (then) Title IV Protocol (now Protocol No 21), the Court undermined the equally important objective of ensuring the widest possible participation in EU measures, leading in fact to yet more fragmentation.<sup>28</sup>

Actually, the need to resort to international law arrangements to ensure some coordination with Ireland and the United Kingdom in the context of the EUROSUR Regulation is precisely a consequence of this approach. Since those Member States are not taking part in the underlying *acquis*, they could not just participate in the EUROSUR Regulation by invoking Art. 5 of Protocol No 19. Instead, they would have had to first “take part” in the underlying provisions of the Schengen *acquis*, a step that neither the United Kingdom nor Ireland are willing to take.<sup>29</sup> As a consequence, the only way to ensure some form of cooperation with Ireland and the United Kingdom within the framework of EUROSUR was to resort to *ad hoc* international agreements.

By admitting the legality of such agreements, in case *Spain v. European Parliament and Council*, the Court of Justice has followed a more pragmatic approach compared to the previous case law. This is particularly evident from the reading of paras 55-57 of the judgment, where, following a suggestion of the Advocate General,<sup>30</sup> it recognized that a certain degree of fragmentation is the inevitable by-product of any regime of differentiated integration, but Art. 19 of the EUROSUR Regulation may in fact “contribute to reducing that fragmentation”.<sup>31</sup> This is so not only because it may enhance the effectiveness of border control rules, but also for a different reason: while expressly permitting the conclusion of international agreements between Member States, the Regulation also sets clear limits to the provisions whose application may be extended. By establishing a legal basis for such agreements in EU law provisions, Regulation No 1052/2013 excludes that such agreements are entirely left to the initiative of Member States and es-

*What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area without Internal Borders*, cit., p. 756).

<sup>27</sup> See Court of Justice, judgment of 26 September 2013, case C-431/11, *United Kingdom v. Council*; Court of Justice, judgment of 27 February 2014, case C-656/11, *United Kingdom v. Council*; Court of Justice, judgment of 18 December 2014, case C-81/13, *United Kingdom v. Council*.

<sup>28</sup> M. FLETCHER, *Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom's 'Ins' and 'Outs'*, cit., p. 87.

<sup>29</sup> The reasons for staying out of part of the Schengen *acquis* for these two Member States are, however, quite different: see E. FAHEY, *Swimming in a Sea of Law: Reflections on Water Borders, Irisi(-British)-Euro Relations and Opting-out and Opting-in after the Treaty of Lisbon*, cit., p. 673 *et seq.*

<sup>30</sup> Opinion of Advocate General Wahl, cit., para. 52.

<sup>31</sup> *Spain v. European Parliament and Council*, cit., para. 57.



establishes the proper framework for verifying that agreements concluded on the basis of Art. 19 respect the primacy of EU law.<sup>32</sup>

This conclusion suggests a more general reflection on the value of international agreements as an instrument of differentiated integration. It is well-known that Member States may use international law to foster the aims of European integration.<sup>33</sup> The case of the EUROSUR Regulation is a classic example where recourse to such instrument offers clear advantages, namely an improvement in the efficiency of rules on control of the external borders that would not have been possible by applying the rules of the Schengen Protocol, all the more important at the height of a migration crisis that has placed the Schengen system under unprecedented strain.<sup>34</sup>

International agreements between Member States, however, are often contested, as they are seen as more disruptive to the integrity of the EU legal order compared to other forms of differentiated integration that take place entirely within the framework of Union law and are regulated by the Treaties.<sup>35</sup>

Yet, there are several types of international agreements between Member States that may be distinguished according to how they relate to existing EU law or to competences of the Union.<sup>36</sup> In this respect, agreements of the kind permitted by the EUROSUR Regulation appear well-coordinated with the European legal order. It is a clear advantage that their conclusion is explicitly foreseen by an act of EU secondary

<sup>32</sup> On the constraints that the principle of primacy poses on agreements between Member States see B. DE WITTE, *Old-Fashioned Flexibility: International Agreements between Member States of the European Union*, in G. DE BÜRCA, J. SCOTT (eds), *Constitutional Change in the EU. From Uniformity to Flexibility*, Oxford: Hart, 2000, p. 45 *et seq.*

<sup>33</sup> See B. DE WITTE, *Old-Fashioned Flexibility: International Agreements between Member States of the European Union*, cit., p. 31 *et seq.*; B. DE WITTE, *Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements*, in B. DE WITTE, D. HANF, E. VOS (eds), *The Many Faces of Differentiation in EU Law*, cit., p. 231 *et seq.*; L.S. ROSSI, *Le convenzioni fra gli Stati membri dell'Unione europea*, Milano: Giuffrè, 2000.

<sup>34</sup> Recourse to international agreements in order to ensure cooperation with opt-out Member States in this area is likely to grow. It is no coincidence that after the judgment was delivered the Commission seized the opportunity to include a similar mechanism in its proposal for the establishment of a European Border and Coast Guard (Communication COM(2015) 671 final of the Commission, *Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC*).

<sup>35</sup> See especially P. CRAIG, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance*, in *European Constitutional Law Review*, 2013, p. 263 *et seq.*; A. DIMOPOULOS, *The Use of International Law as a Tool for Enhancing Governance in the Eurozone and its Impact on EU Institutional Integrity*, in M. ADAMS, F. FABBRINI, P. LAROUCHE (eds), *The Constitutionalization of Budgetary Constraints*, Oxford: Hart, 2014, p. 41 *et seq.*; P.J. KUIJPER, *International Law in the Case Law of the Court of Justice*, in *Legal Issues of Economic Integration*, 2013, p. 1 *et seq.*

<sup>36</sup> See the classification proposed by J. HEESSEN, *Interne Abkommen: Völkerrechtliche Verträge zwischen den Mitgliedstaaten der Europäischen Union*, Berlin-Heidelberg: Springer, 2015, p. 9 *et seq.*: the Author distinguishes six types of agreements according to their connection with EU law.

law, which lays down rules limiting its content and effects, without in any way conditioning or limiting the effectiveness of the Regulation No 1052/2013 among participating Member States. Moreover, this technique is easily amenable to judicial review, since the legality of the envisaged arrangements may be contested by challenging the Regulation No 1052/2013, as Spain did in the case at stake.

In conclusion, it may be argued that the judgment strikes a fair balance between the reality of differentiated integration and the need to ensure the coherence of the system. By distinguishing full participation in the Schengen *acquis* from more nuanced forms of cooperation, the Court could allow for a measure of flexibility in the application of opt-out rules without disavowing its pre-Lisbon case law, which strongly relies on the consistency of the Schengen *acquis*. By moving in the wake of the previous judgments, the Court also made clear that while a limited cooperation by means of international agreements may be permissible, it would not tolerate an unrestrained *à la carte* approach.