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From:	Presidency
To:	Working Party on Integration, Migration and Expulsion (IMEX - Expulsion)
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Subject:	Presidency paper on Ireland's participation in the Return Regulation

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During previous Integration, Migration and Expulsion (IMEX Expulsion) Working Party meetings, Ireland has signalled its interest in participating in the Return Regulation, also pointing out its participation in the Migration and Asylum Pact, to the greatest extent possible and the close relationship between the asylum and returns procedures brought about by the Pact. It also reiterated this interest at the JHA Council on 14 October 2025. Ireland has also highlighted concerns that a lack of its participation in the measure will create a weak point in the system due to misalignment and will potentially undermine efforts to bring about the effective harmonisation and EU-wide coherence in union wide migration and return policy.

**Ireland participation in legislative measures under Title V of Part 3 of the TFEU**

The legal basis for the proposed Returns Regulation is Article 79(2)(c), which falls under Title V of Part 3 of the TFEU. There are two protocols annexed to the TEU and the TFEU that establish parallel procedures governing Irish participation in legislative measures which have a substantive legal base in Title V of Part 3 of the TFEU, the application of which depends on whether the measure is considered to develop the Schengen acquis. They are as follows:

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**Protocol 19 on the Schengen acquis integration into the framework of the European Union,**

provides for integration of agreements on the gradual abolition of checks at common borders signed by some Member States of the European Union in Schengen on 14 June 1985 and on 19 June 1990, as well as related agreements and the rules adopted on the basis of these agreements, into the framework of the European Union by the Treaty of Amsterdam of 2 October 1997, **Article 4** affords Ireland (and formerly the UK) the possibility of **applying to participate in part of the Schengen acquis, subject to a decision of Council**, acting with the unanimous approval of the Member States. Ireland will also vote on this Decision.

**Protocol 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice,**

provides that Ireland shall not take part in the adoption by the Council of proposed measures pursuant to Title V. Per **Article 3(1)**, Ireland may notify the Council that it wishes to take part in such a measure **within three months** of a proposal being presented to Council, whereupon the State is entitled to do so. **Article 4** further provides Ireland may **opt-in after such a measure has been adopted**, but this is subject to the proviso that the Commission is satisfied “*the conditions of participation have been fulfilled*” in accordance with Article 331 TFEU.

Under Protocol 19, Ireland does not take part in the Schengen *acquis*, with the exception of the specific provisions in which it requested to participate and was authorised to do so by the Council<sup>1</sup>.

Per **Decision 2002/192/EC**, the Council accepted an Irish application to participate in certain provisions of the Schengen *acquis* (including Directive 2001/40/EC on the mutual recognition of return decisions), and partial participation commenced when the Council approved it separately (Implementing Decision 2020/1745). Today, Ireland participates in most of the criminal law and policing provisions of the Schengen *acquis*.

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<sup>1</sup> See Council Decision 2002/192 of 28 February 2002. The Council Decision includes some of the provisions concerning the area of police cooperation contained in Title III of the Schengen Convention, but not those concerning the abolition of checks at internal borders, movement of persons or return.

## **Return legislation as a development of the Schengen *acquis* to which Protocol 19 applies**

The Return Regulation has been proposed by the Commission as a ‘hybrid’ instrument on the basis of its consideration that all provisions are both Schengen and not Schengen, depending on the context, based on the fact that the new legal framework for return would be applicable both when returning third-country nationals who do not fulfil the conditions for entry, stay or residence outlined under the Schengen Borders Code and when returning those who do not fulfil the conditions for entry, stay or residence under national law. As a consequence, even if the proposal is considered to be a development of Schengen *acquis* in which Ireland does not take part in accordance with Protocol 19<sup>2</sup>, recital 50 provides for the possibility for Ireland to *opt into* the application of Protocol 21<sup>3</sup>.

This approach taken in the proposal follows the precedent of the Return Directive 2008/115 which was adopted as a ‘hybrid’ instrument, so as to allow United Kingdom and Ireland’s participation, even if ultimately neither the United Kingdom nor Ireland ultimately opted into this Directive. The same approach was also followed by Regulation (EU) 2016/1953 on the establishment of a European travel document for the return of illegally staying third-country nationals, which is based on the Return Directive.

Prior to that, in a context where returns had not been harmonized at the Union level, return related instruments had also been adopted as “hybrid” acts. This is the case of Council Directive 2003/110/EC on assistance in cases of transit for the purposes of removal by air and Council Decision 2004/573/EC on the organisation of joint flights for removals and Directive 2001/40/EC on the mutual recognition of return decisions.

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<sup>2</sup> Protocol No 19 on the Schengen *acquis* integrated into the framework of the European Union.

<sup>3</sup> Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

While it is beneficial to ensure the widest possible participation of Member States in the common return system, the hybrid nature of the proposed return instrument is considered problematic in legal terms by the Council Legal Service (CLS)<sup>4</sup>.

In the context of the discussions on the Migration and Asylum Pact, the CLS already took the position that returns were Schengen-only *acquis*, and argued that a return instrument should therefore be a Schengen-only instrument, and not a hybrid instrument<sup>5</sup>.

In particular, the CLS stressed that the Schengen Borders Code already sets out all possible cases of entry, including by reference to national rules, and there is no reason why all third-country nationals staying illegally in the Schengen area should not be returned following Schengen rules on return, regardless of whether they are overstayers under national rules or whether they have crossed the external borders illegally<sup>6</sup>. Moreover, in accordance with the CLS views, all types of returns of third-country nationals from the Schengen area entail the crossing of the common external border and thus the application of rules and instruments relating to the management of the external borders<sup>7</sup>. It follows that the provisions in question remain in their essence a development of the Schengen *acquis*.

Following this advice expressed in the Opinion on the Pact, the co-legislators agreed to separate the border procedure for returns from the Asylum Procedure Regulation and adopted the former as a separate, Schengen-only instrument<sup>8</sup>.

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<sup>4</sup> This approach follows the precedent of the Return directive 2008/115 which was adopted as a ‘hybrid’ instrument, so as to allow United Kingdom and Ireland’s participation. However, neither the United Kingdom nor Ireland ultimately opted into this Directive. A similar approach regarding the hybridity of the return instrument was also followed in 2018, when the Commission proposed the recast of the Return directive.

<sup>5</sup> CLS Opinion on the Pact – ST 6357/21 of 10.2.2021.

<sup>6</sup> CLS Opinion on the Pact – ST 6357/21 of 10.2.2021, in particular point 36.

<sup>7</sup> The rules on returns were originally part of the Schengen Convention (Articles 23 and 24) under Chapter VI of Title II entitled "Abolition of checks at internal borders and movement of persons". In 2008, Articles 23 and 24 of the Schengen Convention were replaced by the Return Directive.

<sup>8</sup> Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148, OJ L, 2024/1349, 22.5.2024.

The clear line already taken by the co-legislators on the occasion of the recent adoption of the various instruments of the Pact speaks supersedes the precedents mentioned above and plead in favour of considering the Return Regulation a Schengen-only instrument as well.

At the IMEX Expulsion Working Party meetings of 23 April and of 23 June 2025, Ireland expressed its wish to participate in the Return Regulation under Protocol 21, and the CLS reiterated its previous advice, stressing for the same reasons mentioned above, that the regime of returns remains in essence a development of the Schengen *acquis*.

This conclusion also applies to the readmission chapter of the current proposal (Chapter VI), laying down rules for the readmission of third country nationals. In that regard, the CLS took the view that the need to ensure the coherence and integrity of the Schengen *acquis* requires that new internal rules on readmission should also be qualified as a measure developing the *acquis* and therefore fall within the scope of Protocol 19. The consequences of this conclusion on the external dimension of readmission (e.g. the impact on the current practice on readmission agreements concluded by EU and third countries) will have to be assessed in light of the final form in which the Return Regulation will be adopted and how far readmission rules will be harmonised.

### **CLS considerations on legal issues raised by the qualification of proposal as an “hybrid” act**

The CLS further stressed that even if it were accepted that the Return Regulation has an ‘hybrid’ nature, this would raise significant additional legal issues. In CLS view a hybrid act, combining both Schengen-relevant and non-Schengen-relevant provisions, would trigger the contextual application of both Protocol 19 and 21, which are mutually exclusive.

Under Protocol 19, Ireland does not take part in the Schengen *acquis*, with the exception of the specific provisions in which it requested to participate and was authorised to do so by the Council<sup>9</sup>. Under Protocol 21, Ireland does not take part in other non-Schengen measures adopted in the framework of the area of freedom, security and justice (Title V of the TFEU) but it has the possibility to *opt in* at any time in their adoption and application.

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<sup>9</sup> See Council Decision 2002/192 of 28 February 2002. The Council Decision includes some of the provisions concerning the area of police cooperation contained in Title III of the Schengen Convention, but not those concerning the abolition of checks at internal borders, movement of persons or returns:

The contextual application of Protocol 19 and 21 would mean that two different voting rules would apply for the same act, as the Member States participating in the vote may differ, which would put the legality of the whole instrument, in which the Commission, Presidency and Member States have already invested so many efforts, at risk. The fact that two different sets of voting rules would apply could lead to the annulment of the entire legislation by the Court of Justice of the European Union.<sup>10</sup>

In the present case Ireland did not opt in within three months after the proposal has been presented to the Council as required by Article 3 of Protocol 21, and therefore it can no longer take part in its adoption. The Regulation will therefore be validly adopted on the basis of a single voting rule.

This leaves open the possibility for Ireland to opt in in accordance with Article 4 of Protocol 21 *after* the adoption of the Return Regulation. The CLS considers that his solution still entails legal risks, as the application of the Return Regulation to Ireland could be called into question, thus affecting the legality of the national decisions implementing the Regulation. The enforcement of return decisions adopted by the authorities of other Member States could be challenged in Irish courts as they would have been adopted under a Regulation to which Ireland could not have validly opted in under Protocol 21. Similarly, as the Regulation puts forward a system of mutual recognition of mutual decisions there would be a risk of Irish return decisions being contested in other Member States' jurisdictions at the time of their execution.

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<sup>10</sup> In CLS view, the possibility of a cumulative application of Protocols 19 and 21 has already been excluded by the Court of Justice in its Opinion on the Istanbul Convention. In that Opinion, the Court found that a difference in the voting rules within the Council due to the simultaneous application of Protocols 19 and 21 established an objective need to divide the act concluding the agreement into two or more decisions, see paragraph 336 of the Opinion.

## A possible solution for Ireland's participation in the Return Regulation

The CLS has considered the possibility of splitting the Return Regulation into two instruments, one Schengen-relevant and the other non-Schengen-relevant. However, this solution does not appear to be legally sound in the present case. As the Return Regulation provides for a single set of rules for returns, and as those rules are Schengen-relevant in their entirety, the splitting of the proposal into two regulations would artificially fragment the *acquis* and undermine its coherence, integrity and practical applicability.

An alternative solution is to allow Ireland to participate in the Return Regulation on the basis of Article 4 of Protocol 19, which allows Ireland to request, at any time, to take part in some or all of the provisions of the Schengen *acquis*.

In practice, this would require an amendment of Council Decision 2002/192 to include the Return Regulation among the parts of the *acquis* in which Ireland participates and the adoption of a Council Implementing Decision assessing that all the necessary conditions for Ireland to participate in the Regulation have been met<sup>11</sup>. In 2020, the Decision was put into effect to allow for Ireland's participation in the police and judicial cooperation aspects of the Schengen Information System (SIS)<sup>12</sup> to which Ireland is authorised to participate by the 2002 Decision. To that effect, Council Implementing Decision (EU) 2020/1745 was approved in November 2020 and became operational on 15 March 2021. A similar Council Implementing Decision would therefore have to be adopted as regards returns.

As regards the process, the Council can proceed towards such an initiative only on the basis of a request from Ireland – no proposal from the Commission for amending the respective Council Decision is needed. The Council would decide by unanimity in accordance with Article 4 of Protocol 19.

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<sup>11</sup> The adoption of the Council Implementing Decision could be aligned to the timeline for the entry into application of the Return Regulation.

<sup>12</sup> Council Implementing Decision (EU) 2020/1745, through which Ireland decided to start implementing parts of the Schengen *acquis* relating to police cooperation, judicial cooperation, and Article 26 of the Schengen Convention.

The responsible working party for the process would be the Working Party for Schengen Matters, which also dealt with the respective Council Implementing Decision in 2020. Needless to say, the involvement of the return experts, at capital and/or JHA counsellors' level, would have to be ensured. Concerning the timeline, such a revised Council Decision should be adopted at the same time as when the Return Regulation is adopted at the earliest, which leaves quite a substantial amount of time to examine the revised Council Decision and prepare it for adoption. The Regulation would then apply to Ireland on the basis of Protocol 19.

As regards the content of the Council Decision, attention should be paid to the fact that Ireland will not be fully participating in the Schengen *acquis*, having regard to the Good Friday Agreement, and the need to maintain its Common Travel Area with the UK in order to ensure continued peace and stability on the island of Ireland. Protocol 20 to the TEU and TFEU recognises the IE-UK Common Travel Area. As such, any envisaged extension of Ireland's participation in the Schengen *acquis* would need to be carefully assessed, and should not give rise to obligations to impose border controls on the border with Northern Ireland. As a consequence, the Council Decision will need to identify and carve out those provisions of the Return Regulation that cannot apply to Ireland given their intrinsic connection with the management of the EU's external borders. A draft list of the provisions to be excluded, as well as other parts of EU *acquis* intrinsically linked to the return *acquis* which could be also included in the scope of the Council Decision is provided in Annex I.

Finally, in order to reflect the nature of the Return Regulation as a fully fledged development of the Schengen *acquis*, the provisions that reflect the hybrid nature of the instrument in the proposal of the Commission should be removed or modified. A draft list of such provisions is provided in Annex II.

## **The way forward**

*At the forthcoming IMEX Expulsion Working Party meeting, the Presidency would like to invite delegations, to express their views on Ireland's participation to the Return Regulation on the basis of Protocol 19, in the event of a request put forward by Ireland to participate on the basis of Article 4 of that Protocol.*

*The Presidency would also like to invite delegations to signal any obstacles they might envisage to having the abovementioned Decision allowing Ireland's participation in the return acquis adopted by unanimity.*

Based on the results of this discussion, and taking into account Ireland's intentions, the Presidency will determine the way forward towards achieving Ireland's participation in the Return Regulation.

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**Outline of the new Council Decision allowing Ireland to participate in certain provisions of the Schengen *acquis* related to the return *acquis***

The exact content of the Council Decision authorising Ireland's participation will depend on the final text of the Return Regulation<sup>13</sup>.

1. Ireland could participate in most provisions of the Return Regulation (with the exclusions foreseen below), notably: the provisions setting out general provisions (Chapter I), the common standards and procedure for the return decision (Chapter II), obligations for returnees (Chapter III), safeguards and remedies (Chapter IV), prevention of absconding and detention (Chapter V), readmission (Chapter VI), sharing of personal data (Chapter VII), the common system for returns (Chapter VIII), final provisions (Chapter IX).
2. The provisions referring to the Schengen Borders Code ('borders *acquis*') should be rephrased or **expressly excluded** from the scope of the Council Decision authorising Ireland's participation:
3. The following provisions should also **be excluded** due to the close links with the 'borders *acquis*' in which Ireland does not participate: Article 6(1), which provides that, when apprehending a third-country national, Member States must ensure that checks are also made in the SIS. For Ireland, this means that checks will not be performed under SIS Borders in accordance with Regulation (EU) 2018/1861<sup>14</sup>.

Similarly, the provision in Article 6(2) **relating to screening** pursuant to Regulation (EU) 2024/1356, and the provisions relating to the return border procedure pursuant to Regulation (EU) 2024/1349 set out in Article 45 should be excluded.

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<sup>13</sup> The articles refer to the content of the Commission's proposal since the compromise text is still under discussion by delegations.

<sup>14</sup> Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, OJ L 312, 7.12.2018, pp. 14–55.

4. The provision on **mutual recognition of return decisions issued by other Member States** (Article 9) requires further assessment, notably in light of the fact that return decisions issued by the Irish authorities would be based on conditions of entry defined in Irish law (or resulting from IE-UK arrangements) over which Member States would have no control.
5. In order to participate in mutual recognition, Ireland would have to request to participate in the Regulation **on the use of the SIS for returns** (Regulation 2018/1860)<sup>15</sup> so as to encode the return decisions and also to check whether other Member States have issued return decisions. Participation in SIS Return is also needed for the purposes of applying a number of others provisions of the proposed Regulation.

Ireland already participates in the Regulation on SIS Police Cooperation<sup>16</sup> but not in the SIS Return and SIS Borders Regulations. As a consequence, alerts on return cannot be made available to Ireland and Ireland is not able to enter alerts on return in the SIS.

If Ireland also requests to participate in the SIS Return Regulation, such a request must be looked at in light of the Good Friday Agreement, and the requirement for Ireland to maintain its Common Travel Area with the UK in order to ensure continued peace and stability on the island of Ireland.. In particular, the relevant provisions from the SIS Return Regulation regarding checks/hits at external borders (Articles 6 and 8) should be exempted from the scope of the SIS Return Regulation in which Ireland will be authorised to participate.

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<sup>15</sup> Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals, OJ L 312, 7.12.2018, pp. 1–13.

<sup>16</sup> Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU.

The following paragraphs list the other measures linked with the Schengen return *acquis* and ensure its coherent functioning. However their absolute necessity for the functioning of the return measures will be reassessed in the light of the Regulation that will be adopted.

- Article 45 on Frontex support should also be further examined unless Ireland requests to set up arrangements with Frontex as foreseen in that Article or to participate in the ECBG Regulation (Regulation (EU) 2019/1896) concerning support for returns. Depending on the final form of the adopted text it should however be noted that this is for now a ‘may’ provision.
- In order to take full advantage of the possibilities envisaged by Article 36(3), Ireland could also consider requesting to participate in Regulation (EU) 2016/1953 on the establishment of a European Travel Document for return also under Protocol 19, namely to include it in the scope of the amended Council Decision.
- Ireland could also consider requesting to participate in Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air also under Protocol 19, namely to include it in the scope of the amended Council Decision.

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**Provisions of the Commission proposal that need to be modified to reflect the nature of the Return Regulation as a development of the Schengen *acquis***

- **Recital 50** should be changed to reflect the nature of the Return Regulation as Schengen *acquis*.

Recital 50a should be added to indicate Ireland's participation in certain provisions of the Schengen *acquis* relating to return in accordance with the Council Decision, in line with Protocol 19;

- **Article 4(2)** comprising the definition of 'illegal stay, as set out in Article 6 of Regulation (EU) 2016/399 **or other conditions for entry, stay or residence in that Member States**' should be replaced with 'or, in the case of Member States not bound by that Regulation (Regulation (EU) 2016/399), equivalent conditions for entry, stay or residence in accordance with their national law'. This type of provision was foreseen in the Commission proposal to cater for IE situation and allows hybridity therefore we would need to have clarity on the solution envisaged under Protocol 19 before going forward.
- **Article 38** should clarify in which situations information-sharing between Member States can take place outside the EU information systems referred to in Regulation (EU) 2019/1818 or through supplementary information in compliance with Regulation (EU) 2018/1860, whereas generally information will be exchanged only by these means.