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OPINION OF THE LEGAL SERVICE[1]

From:	Legal Service
Subject:	The proposed new Pact on Migration and Asylum - "Variable geometry" - Schengen and Dublin *acquis* relevance of components of the proposed Pact – Respect of the coherence, operability and ability to evolve of the Schengen and Dublin *acquis* – Respect of the relevant Protocols, notably of the *effet utile* of Protocol 21

This legal opinion addresses variable geometry issues in three proposals and is therefore unavoidably lengthy. To facilitate reading, it is preceded by a table of contents.

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I. INTRODUCTION

1. On 23 September 2020, the Commission submitted to the Council a New Pact on Migration and Asylum ("Pact"). In terms of acts to be adopted by the Parliament and the Council through the ordinary legislative procedure, the Pact consists of three new legislative proposals and two amended legislative proposals:

   - proposal for a Regulation introducing a screening of third country nationals at the external borders ("proposed Screening Regulation");
   - proposal for a Regulation on asylum and migration management ("AMMR Proposal");
   - proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum ("proposed Crisis Regulation");
   - amended proposal for a Regulation establishing a common procedure for international protection in the Union ("amended APR Proposal");
   - amended proposal for a Regulation on the establishment of 'Eurodac' ("amended Eurodac Proposal").

2. In the Council's preparatory bodies, questions have been raised regarding the proposals' relevance for, and possible impact upon, the Schengen and Dublin *acquis*. During the discussions in the Asylum and IMEX Working Parties, the Legal Service already indicated that it was examining whether the Pact, in its different components, is operable and respects the coherence of the Schengen and Dublin *acquis*.

3. The essential question that needs to be addressed is whether it is legally possible to adopt the proposals in the form presented by the Commission, or whether a reorganisation of parts of those proposals by moving certain provisions and/or using cross references is required in order to respect the coherence of the Schengen and Dublin *acquis* respectively, as well as the relevant Protocols, and more particularly the *effet utile* of the right to opt in that Ireland draws from Protocol 21.

4. The Legal Service will focus in particular on three of the proposals, namely the amended APR Proposal, the AMMR Proposal and the proposed Crisis Regulation. These are the acts where the issue of variable geometry, i.e. the issue of whether and to what extent their provisions belong to the Schengen *acquis*, the Dublin *acquis* or other areas of Union *acquis*, and the consequences of this as regards the application of the relevant Protocols and the participation or non-participation of certain States, is directly at stake.

5. Solving the question of the Schengen and Dublin "variable geometry" aspects of the Pact at this preliminary stage of the legislative works is necessary to ensure full compliance with the relevant Protocols annexed to the Treaties which set out requirements for the participation, or non-participation, of Ireland and Denmark in the proposed legislative instruments. It also has a bearing on the question of the association of the Schengen and Dublin Associated States (Norway, Iceland, Switzerland and Liechtenstein) with the development of the relevant *acquis*, i.e. the application of the Association Agreements between the Union and those States and, as regards those provisions of the Pact which constitute developments of the Schengen *acquis*, the work in the Mixed Committee established by the Schengen Agreements.

6. Ultimately, ensuring a coherent application by all the relevant States - Member States and Associated States[2] - of the components of the Pact that belong, respectively, to the Schengen *acquis* or to the Dublin *acquis* is essential to ensure the proper functioning and practical operability of the Schengen and Dublin systems.

7. It is underlined from the outset that the purpose of this opinion is only to address variable geometry questions raised by the above-mentioned proposals, in order to ensure the coherence of the relevant *acquis* and the conformity with the relevant Protocols. This opinion seeks to provide an overall answer to these questions, taking into account (and keeping as much as possible) the architecture and the underlying logic of the Pact as presented by the Commission.

[2] For the purpose of this opinion, Norway, Iceland, Switzerland and Liechtenstein are referred to as Schengen Associated States, Dublin Associated States or Associated States depending on whether the reference is made to Schengen *acquis*, Dublin *acquis* or both.

This opinion does not assess or touch upon the substance of the proposed texts. In particular, the replies to legal questions given in this opinion, are without prejudice to the issue of whether, and to what extent, in substance, any form of border procedure or mandatory solidarity, as proposed by the Commission, will be agreed upon in the course of the discussions in the Council and between the co-legislators, or whether and to what extent implementing powers will be conferred on the Commission.

8. This opinion confirms and develops the indications given orally by the representative of the Council Legal Service. It will i) explain the legal background and context in which the proposals operate and the link between the Schengen and Dublin *acquis*; ii) examine the Schengen or Dublin relevance of the amended APR Proposal, the AMMR Proposal and proposed Crisis Regulation in turn by reference to some of their components; and, by way of conclusion, iii) outline some legally sound and operable avenues to solve identified problems.

II. LEGAL BACKGROUND AND CONTEXT OF THE PROPOSALS

1) The Schengen *acquis*

9. The "Schengen *acquis*" is a set of rules adopted and developed on the basis of the Schengen Agreement, signed on 14 June 1985, and the Schengen Convention, signed on 19 June 1990, with the ultimate objective of ensuring the absence of controls on persons at internal borders within the Schengen area. In order to compensate for the abolition of controls at internal borders, the Schengen Convention provided for a number of so-called "compensatory measures" meant to substitute the controls at internal borders and to keep a high level of security within the area of free movement.

10. As from 1 May 1999, the Amsterdam Treaty integrated the Schengen *acquis* into the Treaties[3], the declared aim being to "[enhance] *European integration and, in particular,* [to enable] *the European Union to develop more rapidly into an area of freedom, security and justice*"[4].

[3] See Protocol 2 integrating the Schengen *acquis* into the framework of the European Union (1999).
[4] See first recital of the 1999 version of the Schengen Protocol (op. cit. in footnote 3).

11. The Lisbon Treaty has elevated the "*area (...) without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures* [i.e. the compensatory measures] *with respect to external border controls, asylum, immigration and the prevention and combating of crime* [5]" to a Union objective. Hence, Article 67 TFEU, which sets the objectives of the area of freedom, security and justice, provides in its paragraph 2 that the Union "*shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States* (…)". Under Article 77(1) TFEU, the Union's policy is to "*ensure the absence of any controls on persons, whatever their nationality, when crossing internal borders*", as well as to "[carry] *out checks on persons and efficient monitoring of the crossing of external borders*" and to "[introduce] *an integrated management system for external borders*".

12. Within the current Union law framework, the Schengen *acquis* is a closer, or enhanced, cooperation among 26 Member States directly authorised by the Treaties[6] and which is part of the Union *acquis* to be accepted by new Member States in case of enlargement (Articles 1 and 7 of Protocol 19). The Schengen *acquis* "*was conceived and functions as a coherent ensemble*".[7] The importance of the coherence of the Schengen *acquis* was underlined on several occasions by the Court, notably in its *biometric passports* and *VIS* judgments.[8]

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5 See Article 3(2) TEU on the objectives of the Union.

6 See points 26 and 47 of the judgment of the Court of 8 September 2015, Case C-44/14, *Eurosur*, ECLI:EU:C:2015:554.

7 See second whereas clause of Council Decision 2000/365/EC of 29 May 2000 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 L 131, 1.6.2000, p. 43). See CLS opinion on the Entry/Exit System, doc. 13491/16, para. 5. The necessary coherence that governs the Schengen *acquis* is similar to the consistency that governs enhanced cooperation pursuant to Article 334 TFEU. The particular need for coherence of the Schengen *acquis* led the authors of the Treaties to prohibit a situation of enhanced cooperation within the Schengen enhanced cooperation. Hence, the last subparagraph of Article 87(3) TFEU prohibits the enhanced cooperation provided for in that paragraph from being applied to acts constituting a development of the Schengen *acquis* on police cooperation.

8 See judgment of 18 December 2007, Case C-77/05, *biometric passports* (UK v. Council), ECLI:EU:C:2007:803, points 60 and 61, in which the Court states that the measures intended as an implementation or further development of the Schengen *acquis* "*logically,* (…) *must be consistent with the provisions they implement or develop"*; see also judgement of 26 October 2010, Case C-482/08, *VIS* (UK v. Council), ECLI:EU:C:2010:631, point 48, in which the Court refers to *"the need for coherence of* [the Schengen] *acquis, and the need – where that acquis evolves – to maintain that coherence*"; see also points 49 and 58 of that judgement. See CLS opinions on the Schengen relevance of the GDPR, doc. 12682/12 (para. 8); on the Entry/Exit System, doc. 13491/16 (para. 5) and on SIS return, doc 10768/17 (para. 22 to 26).

In its case-law on the Schengen *acquis*, the Court has constantly been protective both of the coherence of that *acquis*, but also of its ability to develop to the benefit of those States which have accepted and apply all its provisions, without these States being hindered by those which do not apply all its provisions. The Court has, in effect, prevented attempts that would have resulted in "cherry picking" in the Schengen *acquis* at the expense of its coherence, practical operability and ability to evolve.

13. The Court ruled that "*the system as a whole of which that acquis forms part must* (…) *be taken into account*". Proposals that build upon that *acquis* "*must be consistent with the provisions they implement or develop, so that they presuppose the acceptance both of those provisions and of the principles on which those provisions are based*" and "*the coherence of the Schengen acquis and of future developments thereof means that the States which take part in that acquis are not obliged, when they develop it and deepen the closer 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 which have not taken part in the adoption of the measures relating to earlier stages of the acquis' evolution*".[9]

14. Respecting the coherence, as well as the practical operability, of the different parts of the Schengen *acquis* is also referred to in Protocol 19 as an important element to take into account when looking at a differentiated application of that *acquis*. Coherence and practical operability are criteria guiding the use of the "guillotine" mechanism (Article 5(2) of Protocol 19), which provides for such *acquis* to cease to apply to the extent considered necessary by the Council in the event of Ireland (or, at the time, the United Kingdom (UK)) not taking part in a proposal building upon an element of the Schengen *acquis* by which it was already bound.

[9] See judgement in Case *VIS*, points 45 to 49 (op. cit. in footnote 8).

15. As a result, participation or non-participation in the Schengen *acquis* or parts thereof cannot be the result of a purely political and discretionary choice but, to ensure its proper functioning, must be based on objective criteria and respect the coherence of the subject areas which constitute the *ensemble* of the *acquis*, as well as their ability to evolve and their practical operability.

16. As regards differentiated participation in the Schengen *acquis*, Ireland and the UK did not participate in the 1990 Schengen Convention. Denmark became part of the Schengen Convention in 1996[10]. With the integration of the Schengen *acquis* in the Union framework by the Amsterdam Treaty in 1999, the modalities of participation in the Schengen *acquis* of Ireland and the UK on the one hand and Denmark on the other, were regulated by means of Protocols annexed to the Treaties[11].

17. The Schengen Protocol acknowledged, and accommodated, two pre-existing situations: the Common Travel Area between Ireland and the UK, which resulted in these two States not willing to take part in the Schengen area (see also Protocol 20), and the Nordic Passport Union between the Nordic States - three of which are Union Member States and two of which, Iceland and Norway, are third States - which resulted in all five Nordic States wishing to take part in the Schengen area with a view to maintain this special relationship between them (see 6th recital of Protocol 19).

[10] Agreement on the Accession of the Kingdom of Denmark to the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders signed at Schengen on 19 June 1990 (OJ L 239 , 22.09.2000 p. 97). Finland and Sweden did the same.

[11] See Articles 3 and 4 of the 1999 version of the Schengen Protocol (op. cit. in footnote 3) and the 1999 version of the Protocol on the position of Denmark (OJ C 340, 10.11.1997).

18. Under the current Union law framework, and after the exit of the UK from the EU, Ireland is the only Member State which is not part of the Schengen area.[12] It is however allowed, in accordance with Article 4 of Protocol 19 (Schengen Protocol), to request at any time to take part in some or all parts of the Schengen *acquis*, subject to the obligation of respecting the coherence and the practical operability of that *acquis*. Ireland has requested, and has been authorised by the Council in 2002, to take part in those parts of the Schengen *acquis* related to police cooperation and judicial cooperation in criminal matters, and a first "putting into effect" decision was taken by the Council in 2020.[13] However, Ireland does not participate in the Schengen *acquis* related to borders (including visa policy and return).

19. As regards Denmark, it has a special position governed by Article 4 of Protocol 22, which reflects the fact that Denmark acceded to the Schengen Convention in 1996, and under which it is effectively required to implement any measure developing the Schengen *acquis* in its national law, such measure creating an obligation under international law. Although Denmark is free to decide whether or not to implement such a measure, if it decides not to do so then "*appropriate measures to be taken*" will be considered as regards its participation in the Schengen area.

[12] Bulgaria, Romania, Cyprus and Croatia are, in accordance with their respective Acts of Accession, part of the Schengen area. However, the controls at their internal borders have not yet been lifted (see para. 8 of the CLS opinion on the Entry/Exist System, doc. 13491/16).

[13] See Council Decision 2002/192 on Ireland's request to take part in some provisions of the Schengen acquis (OJ L 64, 7.3.2002, p. 20) and Council Implementing Decision (EU) 2020/1745 of 18 November 2020 on the putting into effect of the provisions of the Schengen *acquis* on data protection and on the provisional putting into effect of certain provisions of the Schengen *acquis* in Ireland (OJ L 393, 23.11.2020, p. 3).

20. Finally, as regards the four Associated States, Norway, Iceland, Switzerland and Liechtenstein, they are associated with the application and development of the Schengen *acquis* by means of the respective Schengen Association Agreements they have concluded with the Union.[14] As a result, the Union shares with these countries the area without internal border controls on persons, where the entirety of the Schengen *acquis*, including all its consecutive developments, fully and coherently applies. They are associated to the development of that *acquis* in a dynamic fashion, including in the decision-shaping phase through their participation in the Mixed Committee, which, in practice, meets back-to-back to the relevant meetings of the Council and its preparatory bodies. Once a Schengen measure is adopted by the Union, the Associated States have to decide whether or not to accept it. In case of non-acceptance, a so-called "guillotine" clause provides that the Association Agreement is terminated.

2) The Dublin *acquis* and its close link with the Schengen area

21. Chapter VII (Articles 28 to 38) of the 1990 Schengen Convention contained provisions concerning the "*responsibility for processing applications for asylum*". Those provisions were included as so-called "compensatory measures" in Title II of the Schengen Convention, entitled "*Abolition of Checks at Internal Borders and Movement of Persons*", together with the parts of the Schengen *acqui*s related to the crossing of external borders, visas, free movement of legally staying third country nationals within the Schengen area and return of illegally staying third country nationals from that area. The provisions dealing with the identification of the Member States responsible for processing asylum applications have thus been considered, since the foundation of Schengen, as constituting an essential component for the proper functioning of an area without internal border controls on persons.

[14] - Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis* (OJ L 176, 10.7.1999, p. 36).
- Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* (OJ L 53, 27.2.2008, p. 52).
- Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* (OJ L 160, 18.6.2011, p. 3).

22. Chapter VII of the Schengen Convention was replaced, in September 1997, by the so-called Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States[15]. This allowed the UK and Ireland, which were not interested in participating in the Schengen *acquis* related to borders, to participate in the provisions concerning the responsibility for processing asylum applications. The Dublin Convention, like the Schengen Convention's provisions on responsibility for processing asylum applications, was not aimed at harmonising substantive or procedural rules of asylum but rather was limited to setting out uniform criteria for allocating to one single State the responsibility for examining an asylum application.

23. As from the date of entry into force of the Dublin Convention in September 1997, Chapter VII of the Schengen Convention was replaced by the Dublin Convention and thus ceased to be, formally, a development of the Schengen *acquis*. Nevertheless, this splitting was without prejudice to the substantive link between the functioning of the Schengen area and the new Dublin provisions and its aim to contribute to the establishment of an area without internal frontiers.[16] In 2003, the Dublin Convention was replaced by the so-called Dublin II Regulation[17] which was based on the legal basis that had been introduced in the EC Treaty by the Amsterdam Treaty (then Article 63(1)(a) TEC, now Article 78(2)(e) TFEU).

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15 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990 (OJ C 254, 19.8.1997, p. 1). The Dublin Convention first came into force on 1 September 1997 for the first 12 signatories (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom).

16 The provisions of Articles 28 to 38 of the 1990 Schengen Convention were repealed by the so-called Bonn Protocol, ratified by all the Contracting parties to the Convention, following a decision by the Schengen Executive Committee meeting in Bonn on 26 April 1994. Under the preamble of the Bonn Protocol "(…) *la Convention relative à la détermination de l'État responsable de l'examen d'une demande d'asile présentée dans l'un des États membres des Communautés européennes, signée à Dublin le 15 juin 1990, constitue une convention conclue entre les États membres des Communautés européennes en vue de la réalisation d'un espace sans frontières intérieures au sens de l'article 142, paragraphe 1 de la Convention* [de Schengen] *de 1990*" (emphasis added).

17 Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L50, 25.3.2003, p. 1).

24. In 2000, the Eurodac Regulation[18] was adopted to ensure the effective application of the Dublin Convention. Given its inextricable link with the Dublin Convention, it became part of the so-called "Dublin *acquis*". Today, the Dublin III Regulation[19] and the 2013 Eurodac Regulation[20] form the so-called Dublin *acquis* based on Article 78(2)(e) TFEU which is part of the Union asylum *acquis*.

25. In 2016, as part of the "asylum package", the Commission presented a "Dublin IV" proposal in which for the first time a so-called "corrective allocation mechanism"[21] was proposed. If finally adopted, such a corrective allocation mechanism would have applied as part, and by way of replacement, of the Dublin *acquis*, to all States applying that *acquis*. Progress on this file has however come to a standstill within the Council.

26. With regard to the position of Ireland, the Dublin III and the 2013 Eurodac Regulations, currently in force, fall within the scope of Protocol 21 on the position of Ireland. Pursuant to this Protocol, Ireland has the right to opt-in either at the beginning of the procedure, i.e. within three months after a proposal has been presented to the Council pursuant to Title V of Part Three of the TFEU (Article 3, early opt-in) or any time after the adoption of the measure (Article 4, post-adoption opt-in).

    So far, consistently with its participation in the Dublin Convention, and pursuant to Protocol 21, Ireland has opted in to both the Dublin III and the 2013 Eurodac Regulation. It did not however make an early opt-in to the 2016 Commission proposal on the Dublin IV Regulation and the proposal for a new Eurodac Regulation, nor to the AMMR Proposal, presented by the Commission in September 2020. In accordance with Article 4 of Protocol 21, Ireland will have the right to opt-in post-adoption any time after the adoption of the AMMR.

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18 Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention (OJ L 316, 15.12.2000, p. 1).

19 Regulation EU No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-Country national or a stateless person (OJ L 180, 29.06.2013, p.31).

20 The first 'Eurodac' Regulation was replaced in 2013 by Regulation (EU) No 603/2013 (OJ L 180, 29.6.2013, p. 1).

21 See Chapter VII of the proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM/2016/0270 final - 2016/0133 (COD). The latest text discussed within the Council's preparatory bodies is in doc. 9367/18. See also the progress report in 6600/19.

27. As regards Denmark, when the Dublin II Regulation replaced the Dublin Convention, an Agreement[22] was concluded with Denmark - which was already part of the Schengen area[23] and a party to the Dublin Convention - since Denmark could not participate in the Dublin II Regulation due to its special (automatic opt-out) position set out in the Protocol on the position of Denmark annexed to the Treaties[24]. That agreement, concluded in 2006, extended to Denmark the provisions of the Dublin II Regulation and the 2000 Eurodac Regulation. The Agreement provides for a dynamic adaptation to the evolution of the Dublin *acquis*. Whenever amendments to those Regulations are adopted, Denmark shall notify of its decision whether or not to implement the content of such amendments. In case of non-acceptance, a "guillotine" clause provides for the termination of the agreement. Denmark has subsequently accepted the Dublin III and the 2013 Eurodac Regulations.

28. As regards Norway, Iceland, Switzerland and Lichtenstein, their Schengen Association Agreements excluded, as a consequence of the conclusion of the Dublin Convention, Articles 28 to 38 of the Schengen Convention from the scope of application of the Schengen *acquis* applicable to them. However, when, in 1999, Norway and Iceland were associated with the Schengen *acquis*, it was considered necessary that an appropriate arrangement on the criteria and mechanisms for establishing the State responsible for examining a request for asylum should be concluded and applied simultaneously with the provisions of the Schengen *acquis*[25].

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22 Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention (OJ L 66, 8.3.2006, p. 37).

23 See Agreement op. cit. in footnote 10.

24 It should be noted that concluding such an agreement which made parts of the Union *acquis* applicable to Denmark in spite of its opt-out Protocol was then considered possible because the 1999 version of the Protocol on the position of Denmark did not contain the same possibility as the current version of that Protocol (No 22). This now gives Denmark the option (Article 8), should it decide to do so in accordance with its constitutional requirements, to replace Part I of Protocol 22 with a more flexible opt-in mechanism similar to that of Protocol 21 (the text of which is annexed to Protocol 22), thus giving Denmark a possible avenue to participate, like Ireland, in those pieces of Union *acquis* it wishes to participate in.

25 Article 7 of the Schengen Association Agreement with Ireland and Norway (op. cit. in footnote 14) stipulates: *"The Contracting Parties agree that an appropriate arrangement should be concluded on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in any of the Member States or in Iceland or Norway. Such as arrangement should be in place at the time the* [Schengen acquis] *provisions* (…)*, are put into effect for Iceland and Norway* (…)*."* (emphasis added). Like the Schengen Association, the Dublin Association is conceived as dynamic, i.e. it adapts to evolutions of the *acquis*. The Dublin Association however does not give the Dublin Associates the same participation level on decision-shaping as in the Schengen Mixed Committee. The institutional model on decision-shaping is similar to that of the EEA (no Mixed Committee back-to-back to Council bodies).

29. Similarly, the Schengen Association Agreement with Switzerland is even more precise and makes participation in the Dublin *acquis* a legal condition for its association to Schengen. Article 15 (4) provides that "[the Schengen Association] *Agreement shall be applied only if the agreement between the European Community and Switzerland on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in any of the Member States or in Switzerland is also implemented*"[26] (emphasis added).

30. The above confirms that participation in the Dublin *acquis* - which was originally part of the Schengen *acquis* - was and is intrinsically linked to, and a prerequisite for, participation in the Schengen area and the proper functioning of the Schengen area. A State cannot be part of the Schengen area without being part also of the Dublin *acquis*.[27] In addition to Denmark, the four Schengen Associates therefore also had to conclude agreements associating them to the Dublin *acquis*.[28]

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[26] See also the two last recitals of the preamble of the Schengen Agreement which refer to "*the link between the Schengen acquis and the Community acquis*" and the fact that "*this link requires that the Schengen acquis be applied simultaneously with the Community acquis concerning the establishment of criteria and mechanisms for determining the State responsible for examining a request for asylum lodged in one of the Member States and concerning the setting-up of the 'Eurodac' system*" (emphasis added).

[27] It is noted in this regard that the Commission has made some aspects of the proper application of the Eurodac Regulation part of the monitoring under the Schengen evaluations (external borders and police cooperation). The evaluation questionnaires cover aspects such as whether Eurodac is accessible at border crossing points, whether category II data is entered in Eurodac in relation to irregular border crossings and unauthorised entry (Article 14 of the Eurodac Regulation) or whether the Regulation has been implemented so as to allow law enforcement authorities to request comparisons of fingerprints, under police cooperation.

[28] - Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway (OJ L 93, 3.4.2001, p. 40).
- Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (OJ L 53, 27.2.2008, p. 5).
- Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (OJ L 160, 18.6.2011, p. 39).

III. LEGAL ANALYSIS

1) The amended APR Proposal: Schengen relevance of certain of its components

31. The amended APR proposal aims essentially at introducing two new procedures at the border, which the Commission proposes to include in the Asylum Procedure Regulation:

    - a new border procedure for the examination of applications for international protection (asylum border procedure, see point 15 of the proposal, on Article 41); and
    - a new border procedure for carrying out return (return border procedure, see point 16 of the proposal, on Article 41a).

32. Since rules on harmonisation of substantive asylum provisions and procedures for examining applications for international protection laid down in the Asylum Procedure Regulation are not part of the Schengen Convention and of the Schengen *acquis*, the amended APR proposal is rightly, to that extent, not presented as constituting a development of the Schengen *acquis*.

33. The question however arises as to whether the proposed new return border procedure belongs to the Schengen *acquis* and should therefore be included in an instrument classified as Schengen *acquis* rather than in an asylum *acquis* instrument. The question also arises as to whether the very principle of having, as part of the applicable legislative framework, an asylum border procedure should be part of the Schengen *acquis* as border management measures, while the substantive rules of such a procedure would be regulated in the asylum legislation. The question on the principle of having an asylum border procedure in place as part of the border management measures is without prejudice to the political discussion as to the voluntary or mandatory nature of such border procedure.

a) The Union law provisions on return as part of the Schengen acquis

34. Provisions on the return of third country nationals from the territory of the Member States 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*". Those provisions are therefore part of the Schengen *acquis* related to borders.

35. In 2008, Articles 23 and 24 of the Schengen Convention were replaced by the Return Directive[29]. Since Articles 23 and 34 of the Schengen Convention were originally applied to return of third country nationals who do not fulfil the short stay conditions in the Schengen area, the Return Directive was classified as a development of the Schengen *acquis*. The recitals explain that it is a measure of the Schengen *acquis*, to the extent that it applies to third country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with Article 6 of the Schengen Borders Code.

36. The entry conditions into the Schengen area are uniformly set out in the Schengen Borders Code. The Code provides that, in addition to short stay visa, entry into the Schengen area is also permitted on the basis of national residence permits or national visas (see Article 6(5) of the Schengen Borders Code). It therefore sets out all possible cases of entry and there is no legal or factual reason why all third country nationals staying illegally in the Schengen area should not be returned following the Schengen rules on return regardless of whether they are over-stayers or whether they have crossed the external borders illegally. As a consequence, all returns of third country nationals from the Schengen area have to be considered as a development of the Schengen *acquis*, since all third country nationals entering the Schengen area are subject to the uniform entry conditions set out in the Schengen Borders Code.

37. However, it was decided in 2008 to make the Return Directive a so-called hybrid instrument (i.e. Schengen and non-Schengen) and to draft it in such a way as to allow also the UK and/or Ireland to eventually opt-in by making use of Protocol 21 so as to apply the common standards of the Directive when returning third country nationals not fulfilling UK or Irish national entry conditions. Therefore, to the extent that it applies also to returns of third country nationals who do not fulfil national conditions for entry, stay or residence other than those set out in the Schengen Borders Code (i.e. conditions in the national law of States not submitted to the Borders Code), it does not constitute a development of the Schengen *acquis*. However, neither the UK nor Ireland ever opted in to the Return Directive.

[29] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98). Article 21 of the Directive provides that: "*This Directive replaces the provisions of Articles 23 and 24 of the Convention implementing the Schengen Agreement*".

38. The Legal Service considers that having introduced such a distinction is contrary to the principles, recalled above in paragraphs 12 to 15, that govern the Schengen *acquis*.
In particular, the fact that a State does not participate in the parts of the *acquis* that concern borders entails the consequence that it cannot participate in an individual instrument which belongs to that borders' *acquis.* As the Court ruled, "*special adaptations measures*" should not be devised to cater for such situations.[30] For these reasons, the Council Legal Service considers that this distinction in the text of the Return Directive between conditions under the Borders Code and national conditions should be corrected at the earliest opportunity, in order to align it with the Court's subsequent case law.

39. In addition, hybridity makes it impossible to correctly apply the voting arrangements on one single legal act, partially covered by Protocol 19 and partially by Protocol 21.

b) The return border procedure as a development of the Schengen acquis

40. The proposed return border procedure applies only to third country nationals who are apprehended in connexion with illegal crossing of the Schengen external border and are not allowed to enter the territory of the Member States. The Legal Service considers that it undeniably constitutes a development of the Schengen *acquis*.

41. In addition to return being in itself a self-standing area of the Schengen *acquis* related to borders, since such a procedure, if adopted, would take place at the Schengen external borders, the return border procedure should be seen also as a part of the Schengen *acquis* related to integrated border management governed by the Frontex Regulation.[31] [32]

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[30] On a similar case of hybridity where the CLS advised that the area of return was part of the Schengen *acquis* and the proposed texts should therefore be modified accordingly, see the CLS opinion on SIS return, doc 10768/17. The Council followed that advice and adopted the Regulation on SIS Return as a Schengen measure.

[31] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (OJ L 295, 14.11.2019, p. 1).

[32] In its presentation on the Pact the Commission referred to the screening, asylum and return border procedure as part of integrated border management measures.

42. The underlying logic of the Commission's approach appears to be that the return border procedure would have to be considered a *lex specialis* to the Return Directive due to its link with the asylum border procedure, i.e. because it is to apply only to third country nationals whose application is rejected in the context of the asylum border procedure which is itself not part of the Schengen *acquis*.

43. However, this is not a valid argument to deny the Schengen relevance of the return border procedure. The Legal Service considers that, given its rationale, the return border procedure cannot be treated differently from any other return procedure which follows after a rejected asylum application or in other cases. There is no substantial difference between a return following rejection of an application in an asylum border procedure and a return following rejection of an application in an accelerated or normal asylum procedure or a return following apprehension of an irregular migrant because of illegal stay or illegal border crossing, without that person having applied for asylum.

44. A return procedure consists in making a person leave the Schengen territory, whatever the process that led to this return. As explained above, the Schengen *acquis* is a coherent ensemble and it is not at the disposal of the legislator to identify arbitrarily some instruments in the same area (here return) as developing the Schengen *acquis* and others not, for reasons of convenience. When classifying a measure as falling within an area of the Schengen *acquis*, the need for coherence and practical operability of that acquis, and the need – where that acquis evolves – to maintain that coherence, must be respected.[33]

[33] See paragraphs 12 to 15, above and the relevant Court case law op. cit. in footnotes 6 and 8.

c) Consequences as regards the proposed return border procedure

45. As a consequence of that need for coherence within the area of return, and of the fact that the return border procedure, if adopted by the Union legislator, would also be part of the external borders management, it must be ensured that other parts of the Schengen *acquis* related to borders, such as relevant provisions of the Frontex Regulation can apply consistently to all returns of third country nationals from the Schengen area without distinction between cases where the return operation results from a return border procedure or a return procedure from within the territory. Not including the return border procedure in the Schengen *acquis* would constitute a loophole in the management of the external borders.

46. As also explained above, identification of a measure as a development of the Schengen *acquis* or not has consequences for the participation of Denmark, Ireland and the Schengen Associated States in that measure. The coherence of the Schengen *acquis* would not be respected if Denmark and the Schengen Associated States would apply the proposed Screening Regulation, the Return Directive, the Schengen Borders Code and the Frontex Regulation, but would not apply the return border procedure at the Schengen external borders.

47. On the other hand, by possibly opting in to the amended APR Proposal under Protocol 21, Ireland would be bound to apply the return border procedure although it constitutes development of the Schengen *acquis* in which it does not participate under Protocol 19. This makes it legally impossible for Ireland to opt in to the amended APR Proposal, in the form most recently proposed by the Commission, while at the same time respecting the limits and the *effet utile* of the said Protocols.

48. For the reasons outlined above, the Legal Service is of the opinion that the inclusion of the provisions concerning the return border procedure in the amended APR Proposal does not respect the Schengen relevance of return as part of the Schengen *acquis* related to borders. Those return related provisions should therefore be taken out of the amended APR Proposal and could be:

a) included in the proposed Screening Regulation (which is development of the Schengen *acquis* related to borders) with the addition of Article 79(2)(c) TFEU as a legal basis;

b) re-included in the proposal for the recast of the Return Directive (as proposed by the Commission in 2018, a proposal which is currently still on the Council's table);

c) kept separately as a proposal amending the Return Directive (in case the discussions on the return border procedure would be seen as a package with those on the asylum border procedure); or

d) grouped together in a separate regulation on the return border procedure, by means of splitting the amended APR Proposal.

d) Consequences as regards the proposed asylum border procedure

49. Should the proposed procedure be accepted during the discussions, the Legal Service considers that a requirement to have an asylum border procedure in place is, as part of integrated border management measures, intrinsically linked to the management of the Schengen external borders.

50. Therefore, such a requirement would also need to be made part of the Schengen *acquis* together with the screening and the return border procedure when restructuring the amended APR Proposal. This would ensure that the return border procedure applies consistently at external borders of all Schengen Member States and Schengen Associated States. Since the proposed return border procedure would apply only following a rejection of asylum application in the asylum border procedure, if there were no requirement to have such an asylum border procedure in place, the return border procedure would be *de facto* not applicable by all Schengen States.

51. As explained above, it would be important for the management of Schengen external borders that, in case the Union legislator would establish such border procedures, third country nationals who cross the external Schengen border illegally are not allowed to enter into the territory of the Schengen States, and are returned directly from the external borders. Legally, this can only be ensured if all three elements of the procedure at the external border are in place and are applied consistently by all Schengen States.

52. A requirement for all Schengen States to have an asylum border procedure in place could be introduced into the proposed Screening Regulation, which is part of the Schengen *acquis*. Such a provision would not regulate the substance of the asylum border procedure, only the obligation to have one. The substantive and procedural asylum provisions applying during the asylum procedure itself, which do not constitute a development of the Schengen *acquis*, but belong to the substantive law on asylum, would therefore have to remain in the amended APR Proposal, as part of the Union asylum *acquis* (or as part of the national substantive asylum legislation of those Schengen States not bound by the Union asylum *acquis*).

e) Intermediate conclusion as regards the amended APR Proposal

53. To conclude, the Legal Service is of the opinion that, in order to respect the principle of coherence that governs the Schengen *acquis*, the parts of the amended APR Proposal concerning the return border procedure have to be split and classified as development of the Schengen *acquis* in a Schengen relevant instrument. This will ensure that all States belonging to the Schengen area, including Denmark and the Schengen Associated States, will apply the return border procedure as part of the integrated management of the Schengen external borders. It will also allow Ireland to exercise its right to opt-in post adoption, should it wish to do so, to the amended APR Proposal. Such opt-in would then rightly cover only the asylum related provisions of the APR Proposal.

With a view to secure the coherence and operability of the Schengen *acquis* and as part of the integrated management of the Schengen external borders, a requirement to have an asylum border procedure in place should be inserted in a Schengen *acquis* instrument, while the substantive and procedural provisions applying during the asylum procedure itself would remain in the APR, as part of the Union asylum *acquis*.

2) The AMMR Proposal: Dublin relevance

a) Hybrid nature of the AMMR Proposal

54. The Commission proposal for a new Asylum and Migration Management Regulation is proposed as a hybrid act. It comprises seven Parts, three of which are presented by the Commission as part of the Dublin *acquis* (based on Article 78(2)(c) TFEU) - which would be applicable to all Dublin (and Schengen) States - and four of which are presented as rules on immigration policy (Article 79(2)(a) to (c) TFEU) - which are presented by the Commission as not being applicable to all Dublin (and Schengen) States.[34] The opt-in regime for Ireland is not clear, as the proposal is drafted in such a way as, in effect, to compel Ireland either to opt-in to the whole Regulation, including in those parts identified as not belonging to the Dublin *acquis*, or to abandon its participation in the Dublin *acquis* by not opting-in at all.

55. Parts III, V and VII of the AMMR Proposal integrate into the body of that Regulation the provisions that are presented as replacing the current Dublin *acquis*, i.e. provisions setting out criteria and mechanisms for determining the Member State responsible for examining an application for international protection. They are identified by the Commission in recitals 79 and 82 to 84 as amendments to (in fact replacement of) the Dublin III Regulation within the meaning of the respective Dublin Association Agreements.[35] Article 73 states that the Dublin III Regulation is repealed[36]. Part III contains provisions on the criteria and mechanisms for determining the Member State responsible, Part V contains general provisions and Part VII transitional provisions and final provisions.

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[34] It results from recitals 79, 82, 83 and 84, as drafted by the Commission in its proposal, that Parts I, II, IV and VI of the AMMR Proposal would not apply to Denmark, Norway, Iceland, Switzerland and Liechtenstein, which are all Dublin and Schengen States.

[35] Is should be noted that, contrary to the drafting standards in the Schengen *acquis*, there are no specific recitals in the Dublin *acquis* for the Associated States or the Agreement with Denmark (see for comparison the preamble of the Dublin III Regulation, op. cit. in footnote 19). The Commission proposal is therefore incorrect from a drafting point of view. This should be corrected by deleting those recitals, keeping only the standard recitals as regards Protocols 21 and 22.

[36] For legal certainty, the drafting of Article 73 should be adapted to reflect here also standard drafting, i.e. that the AMMR not only repeals, but also replaces (i.e. it amends) the Dublin III Regulation.

56. In addition to these components, which the Commission identifies as the sole "Dublin" components, Part I of the AMMR Proposal sets out the scope and the definitions applicable throughout the Regulation. Despite the fact that most definitions relate to the Dublin parts of the proposal, Part I on definitions is not identified as Dublin *acquis*.

57. Part II seeks to establish a common framework for asylum and migration management in the Union, a sort of *chapeau* listing all areas of the asylum and migration policies in broad terms, including areas belonging to the Schengen *acquis*, such as border management, visa policy, return and deployment of Frontex, as well as the Dublin *acquis*, the asylum *acquis*, and international cooperation. Although they may seem to be declaratory provisions, it may reasonably be supposed that, if adopted in the form proposed, the list in Article 3 will at least have considerable interpretative effects, both as regards the European Asylum and Migration Strategy, and also for the Court of Justice when examining questions before it relating to the Regulation.[37] The same goes for Articles 4 and 5 which lay down the principles for integrated policy making and the principle of solidarity and fair sharing responsibility. Article 6 relates to the establishment of Union and Member States national migration management strategies and Article 7 sets up a so-called Union return leverage mechanism.

58. Part IV, entitled "Solidarity", is not identified by the Commission, in the above recitals, as being an amendment of the Dublin *acquis* and would therefore not be applicable to all Dublin (and Schengen) States. Ireland, on the other hand, which does not belong to the area without internal border controls on persons, would, in effect, need to choose whether to exercise its right to opt-in the whole Regulation, including Part IV in its entirety.

59. Part VI contains provisions amending two other Union acts (the Long Term Residence Directive and the Asylum and Migration Fund).

[37] In its presentation in SCIFA on 10 February 2021, the Commission stated that these provisions are meant to clarify the underlying obligations elsewhere, and serve as their foundation, and guide their implementation in practice.

b) Legal concerns on the AMMR Proposal as a hybrid act

60. It should be underlined from the outset that the merging of provisions belonging to different parts of the *acquis* in one single instrument as proposed by the Commission makes it legally problematic to accommodate the constraints of the variable geometry applicable in the area of freedom, security and justice, to respect the coherence and operability within the different parts of *acquis* stemming from the rights and obligations set out, respectively, in Protocols 19, 21 and 22 and to provide the necessary legal certainty.

61. The Legal Service observes that, as required by Article 288 TFEU, a Regulation shall be "*binding in its entirety and directly applicable in all Member States*" (emphasis added). The requirement of the applicability of a Regulation in its entirety is all the more relevant where Protocols 19, 21 and 22 apply, in so far as they only refer to participation or non-participation in "*proposed measures*" or "*measures*". They do not open the possibility to participate only in parts or chapters of a given Union measure. Ireland cannot opt in to a chapter or a section of a measure. Denmark cannot decide to implement a chapter or a section of a measure that builds upon the Schengen *acquis*.

62. Such requirement is also translated into the definition of the voting arrangements, in particular where not all the members of the Council participate in voting because of their non-participation in the instrument (Article 238(3) TFEU, as referred to in Article 1, second paragraph, of Protocol 21 and in Article 1, second paragraph, of Protocol 22). To ensure that a Member State is able to vote on the instrument, in must be ensured that it participates in the instrument in its entirety, and not only in parts of the instrument. A Regulation shall therefore have the same geographical scope for all voting participants.

63. To ensure the uniform application of the Union act or measure, the same requirement must also apply when the participation in that Regulation is provided for by the relevant instruments of international law. It therefore applies when Union measures are made applicable to Denmark and Associated States by means of the specific association agreements since such extension has also consequences on the geographical scope of the relevant rules. These have to be applied uniformly[38] to all States that apply the relevant Union *acquis*, without the relevant legal act being divided.

64. The hybrid nature of the AMMR Proposal, as described in paragraphs 54 to 59, creates legal uncertainty as to the geographical scope, the voting arrangements, the applicability of the relevant Protocols, the *effet utile* of the opt-in rights under Protocol 21 and problems as concerns the coherence and the operability of the relevant *acquis*.

65. The most appropriate solution from the legal point of view would be to split and reorganise the AMMR Proposal, in such a way as to ensure the appropriate participation of the Member States and, where relevant, Associated States, in the detached parts as well as the respect of coherence within those parts.

    It is important to note that this would not change the substance of the provisions. They would simply be dispatched in the right instrument, belonging to the right area of Union *acquis*, ensuring coherence and operability of these areas. The issue of which area of Union *acquis* the different provisions belong to as part of the variable geometry applicable to them is therefore to be distinguished from the issue of whether the substance of these provisions, as proposed by the Commission, will, during the discussions in the Council, be acceptable or not or will be amended.

[38] For instance, Article 1(2) of the Dublin Agreement with Denmark provides that the objective of the Contracting Parties is "*to arrive at uniform application and interpretation of the provisions of the* [Dublin and Eurodac] *Regulations and their implementing measures in all Member States*".

66. Most of the provisions of AMMR Proposal have already been identified as belonging to the Dublin *acquis*. Therefore, should the discussions show a general wish to keep, as much as possible, the unity of the AMMR Proposal as designed by the Commission, the most obvious option is to analyse those provisions of the Proposal which the Commission has not identified as belonging to the Dublin *acquis* and consider whether, from a legal point of view, such provisions should belong to, or are susceptible to belonging to, the Dublin *acquis*. This would ensure the coherence and the continuity of the Dublin *acquis* and its correct application geographically, while at the same time not affecting the overall logic and unity of the proposal.

Nevertheless, the non-Dublin provisions of the AMMR Proposal would still have to be set out separately in other acts, based on the relevant appropriate legal basis. Cross references could be used to preserve the links between the different acts and the unity of the approach.

67. The Legal Service will therefore assess, in detail, whether and to what extent the different components of the AMMR Proposal, other than Parts III, V and VII thereof, should or could legally belong to the Dublin *acquis*.

c) Dublin relevance of the different components of the AMMR Proposal

68. As a preliminary remark, the Legal Service observes that, since the Dublin *acquis* is currently defined as consisting of only two basic Regulations (Dublin and Eurodac)[39], the concept of coherence of the Dublin *acquis* is not developed by the case law of the Court in the same way as the requirement of coherence of the Schengen *acquis*. Nevertheless, apart from the considerations concerning the geographical scope resulting from the application of Article 288 TFEU explained above (see paragraphs 61 to 63), the coherence of the Dublin *acquis* should be assessed on the basis of the rationale of that *acquis* and its intrinsic functional link with the Schengen *acquis* (see paragraphs 21 to 30 above). The coherence of the Dublin *acquis* is to be looked at also from the perspective of the agreements in place with Denmark and Dublin Associated States.

[39] See op. cit. in footnotes 18 and 19. There are also Commission implementing Regulations.

69. As mentioned above in paragraphs 54 and 55, of the seven Parts of the AMMR Proposal, only three Parts have been identified by the Commission as belonging to the Dublin *acquis*. It should therefore be analysed whether other Parts of that Proposal also belong to the Dublin *acquis*.

70. As regards the definitions, in Part I of the proposal, they constitute a necessary element for the operation of the provisions of the other Parts, in particular Parts III to V, and should therefore also be clarified as a development of Dublin *acquis*. Legally, and this is the purpose of having definitions at the beginning of a legal act, the other Parts of the Proposal cannot operate without the definitions which define a number of concepts used throughout the Proposal. Not considering Part I as belonging to the Dublin *acquis* makes the other Parts inoperable.

71. As regards the general provisions set out in Part II and in particular its Article 3, as explained above in paragraph 57, and subject to the outcome of the discussion regarding the precise nature of Article 3 (i.e. whether or not it will be amended to become simply declaratory or whether it will introduce substantive obligations), drafting solutions should be examined as to whether its splitting will be needed because of variable geometry considerations.

In particular, the splitting of the actions belonging to the Schengen *acquis*, such as border management, visa policy, return and deployment of Frontex, will only be necessary if it will become clear during the discussions on the text that such actions contain new substantive legal obligations, in which case they would need to be included in Schengen relevant instruments. If, on the other hand, the nature of those provisions will be only declaratory (e.g. only referring to the existing obligations in the Schengen instruments), those provisions could remain in the text, inserting cross-references to the relevant Schengen instruments where such obligations are established. This would ensure that only Schengen States will be bound by those obligations.

72. As regards Article 6, which empowers the Commission to adopt an asylum and migration strategy, if keeping the unity of the AMMR Proposal in a single instrument would be considered important by the Union legislator and if it would become evident, during the discussions, that there is a clear link between this provision and provisions for determining the responsibility to examine applications for international protection, this Article could remain as part of Dublin *acquis*. This matter should however be considered at a later stage when the discussions on the substance will be more advanced.

73. As for Article 7 on the return leverage mechanism, the Legal Service finds that, being part of the return policy, which, as explained above (see paragraphs 34 to 39), belong to the Schengen *acquis*, this Article should be included in a Schengen relevant instrument such as, for instance, the Return Directive. A cross reference to it could be left in the AMMR Proposal.

d) The specific case of Part IV of the AMMR, on Solidarity

74. As mentioned above in paragraph 58, without any apparent legal reasons and notwithstanding the fact that it took a somewhat different approach in its Dublin IV proposal, the approach of the Commission in the AMMR Proposal is to exclude any form of solidarity provided for in Part IV from the scope of the Dublin *acquis*. It should therefore be analysed whether all or part of the provisions in Part IV, entitled "*Solidarity*", also belong to the Dublin *acquis*, i.e. whether such provisions can, legally, be considered as capable of belonging to that *acquis*.

As part of this analysis the Legal Service will assess which of the solidarity measures could be considered a development of the Dublin *acquis* and which, conversely, would fall within another area of Union *acquis* (see paragraph 84 below), without prejudice to their mandatory or voluntary nature.[40]

[40] The issue of whether a solidarity measure is mandatory or voluntary, although significant politically for Member States, is irrelevant from the legal point of view. Legally, the important issue is whether a measure can or cannot be adopted on the basis of the relevant legal basis, i.e. whether it falls within the scope of what can be adopted on that legal basis, here Article 78(2)(e) TFEU

75. Article 45 of the AMMR Proposal lists the following solidarity contributions:

- relocation of applicants not subject to border procedure (Article 45(1)(a)) and of those subject to border procedure (Article 45(2)(a), optional);
- return sponsorship of illegally staying third country nationals (Article 45(1)(b)) and relocation of illegally staying third country nationals (Article 45(2)(b), optional);
- relocation of certain beneficiaries of international protection (Article 45(1)(c));
- capacity building measures in the field of asylum, reception and return, operational support and assistance through cooperation with third countries (Article 45(1)(d)).

76. As a preliminary remark, it must be stressed that the debate on solidarity measures in the context of the Dublin *acquis* is not new. Even though the currently applicable Dublin III Regulation does not contain detailed provisions on measures for helping Member States faced with acute difficulties, or provisions similar to a "corrective allocation mechanism" as was proposed in 2016 by the Commission in its "Dublin IV" proposal (see paragraph 25 above), the Dublin III Regulation nevertheless contains, in its Article 33, a "*mechanism for early warning, preparedness and crisis management*"[41] which may legitimately be considered as a first attempt to address the issue of a Member State confronted with a serious crisis, including a short reference to possible solidarity measures.

77. The Dublin III Regulation sets out what its recital 22 describes as "[a] *process for early warning, preparedness and management of asylum crises serving to prevent a deterioration in, or the collapse of, asylum systems*", such a process being considered as allowing also to "*improve the steering of concrete measures of genuine and practical solidarity towards Member States, in order to assist the affected Member States*". The recital refers to Council Conclusions of 8 March 2012 which established a "*Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems, including through mixed migration flows*" and contained a list of different possible solidarity measures similar to those which were developed and proposed later on in successive proposals.

[41] This early warning mechanism was inserted in the Regulation in response to the judgment of the Court (Grand Chamber) of 21 December 2011 in Joined cases C-411/10 and C-493/10, *N. S.,* ECLI:EU:C:2011:865, about a case of systemic flaw in the asylum procedure and reception conditions for applicants, which itself followed a judgment by the Human Rights Court of 21 January 2011 in case *M.S.S. v. Belgium and Greece*.

On solidarity, the operative part of the Regulation is minimalistic: "[t]he European Parliament and the Council may, throughout the entire process, discuss and provide guidance on any solidarity measures as they deem appropriate" (Article 33(4)).

78. Although somewhat limited, the above demonstrates that the Union legislator and the Council have already considered such measures as capable of being part of the Dublin *acquis*.

79. This is also in line with the principles set out in Articles 67(2) and 80 TFEU. On the one hand, Article 67(2), when referring to the area without internal border controls on persons, refers to solidarity between Member States (see paragraph 11 above). On the other hand, Article 80 TFEU provides that "[t]*he policies of the Union set out in* [the Chapter on border checks, asylum and immigration] *and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States*. *Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle"*. In 2017, the Court of Justice held that *"the burdens entailed by the* (…) *measures adopted* (…) *for the benefit of the Member States must, as a rule, be divided between all the other Member States, in accordance with the principle of solidarity and fair sharing of responsibility between the Member States, since, in accordance with Article 80 TFEU, that principle governs EU asylum policy*"[42].

[42] Judgment of the Court (Grand Chamber) of 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary vs. Council*, ECLI:EU:C:2017:631, see point 291. On the principle of solidarity as constituting "*the bedrock of the European construction*", see also the conclusions by Advocate General Bot of 26 July 2017 in that same case, points 16 to 25.

80. The Union legislator can therefore introduce provisions in the Dublin *acquis* whose aim is to ensure compliance with and implementation of the principle of solidarity and fair sharing of responsibility set out in Article 80 TFEU, a principle that governs the Chapter of the Treaty in which the legal basis of the Dublin *acquis* is contained. Furthermore, in so far as such solidarity measures correct and modulate, under specific circumstances, the criteria for allocating responsibility between Member States for asylum applicants, they are intrinsically linked with those criteria. They constitute alternative criteria and mechanisms, triggered in the specific circumstances defined by the Union legislator, for determining the State responsible for considering an application for international protection. Therefore, such solidarity measures legally fall within the scope of the legal basis that is used for determining the said criteria, i.e. Article 78(2)(e) TFEU, which empowers the Union to set out "*criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection*". In accordance with this legal basis, the Union legislator is free to amend, add or remove such criteria, as long as they constitute criteria to determine a State responsible for considering applications.

81. Such conclusion is also consistent with the rationale of the Dublin *acquis,* which is to provide for a workable system for fairly distributing the burden associated with examining the applications of all persons arriving at the external borders and applying for international protection.[43] An increase in the number of applications for international protection and, as a consequence, the delays and difficulties in processing them quickly and efficiently by the responsible Member States (often the Member States also responsible for the management of the external borders), entail a serious risk for the functioning of the Dublin system and consequently for the proper functioning of the area without internal borders on persons, including its security. The possible consequences of overburdened asylum systems, such as less stringent border checks, illegal entries, secondary movements of asylum seekers and "asylum shopping" are well known. These elements are already identified in the crisis management provision of the Dublin III Regulation (see paragraphs 76 and 77 above).

[43] See in particular recitals 4 and 5 of the Dublin III Regulation:
"(4) The Tampere conclusions also stated that the CEAS should include, in the short-term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.
(5) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. (...)"

82. Therefore, measures intended to give effect to the principle set out in Article 80 TFEU in the context of the Dublin criteria are properly to be regarded as serving the purpose of making the Dublin system and its rationale work, and there are no legal reasons, why, in principle, Part IV of the AMMR Proposal should not belong to the Dublin *acquis* and should not apply to all States bound by that *acquis*. The Union legislator remains of course free to include or not solidarity provisions such as those proposed in Part IV in a Dublin *acquis* instrument. That, however, is a political choice.

83. As to the question of which of the solidarity measures in Part IV of the AMMR Proposal fall within the Dublin *acquis* and which fall within another area of Union *acquis* (see list of measures in paragraph 75 above), the situation is as follows:

a) the relocation of applicants for international protection has the same personal scope as the provisions on responsibility for examining asylum applications (Dublin *acquis*);

b) the relocation of beneficiaries of international protection goes beyond the personal scope of the Dublin *acquis* (asylum *acquis*);

c) the return sponsorship and relocation of illegally staying third country nationals for the purposes of return in substance fall within the area of return (Schengen *acquis*);

d) capacity building measures could be deployed in any area of the Dublin *acquis*, asylum or return including providing any material or operational support. It is thus difficult to determine to which *acquis* such measures would belong, but this could be determined in the light of the different actions that are supported (assessment of applications for international protection, return etc.). It could also be considered as ancillary to the main content of the AMMR Proposal (Dublin *acquis*).

84. In the light of the above, in so far as return related provisions are concerned, the principle of coherence of the Schengen *acquis* and its practical operability should be respected and, therefore, both provisions on the return sponsorship and the relocation for return should be included in an act constituting the development of the Schengen *acquis*. Such solution would entail splitting the return related provisions from the AMMR Proposal, including them in a Schengen relevant instrument such as the Return Directive or the proposed Screening Regulation, while keeping the cross-references to it in the AMMR Proposal in order to keep its unity.

85. Likewise, the legal basis of the Dublin *acquis* being about determining which Member State is responsible for considering "*an application*" for international protection (Article 78(2)(e) TFEU), it cannot cover measures on relocation of persons who are no longer applicants for international protection but beneficiaries of such protection. As indicated above in point b) of paragraph 83, this goes beyond the personal scope of the Dublin *acquis*. This provision should therefore also be separated from the AMMR Proposal, be included in an instrument belonging to the asylum *acquis*, such as for instance in the proposed Qualification Regulation which is still on the Council's table as part of the 2016 asylum package, and may be simply cross-referred to in the AMMR Proposal in order to keep its unity.

86. As regards the position of Ireland under Protocol 21, such splitting would ensure that, in accordance with that Protocol, in the event that Ireland were to exercise its right to opt in to the AMMR Regulation, Ireland would not be compelled to participate in return sponsorship and relocation for return, since it does not take part, under Protocol 19, in the Schengen *acquis* related to returns. The *effet utile* of Protocol 21 would therefore be respected.

87. As regards Denmark and the Associated States and their respective Dublin Association Agreements[44] provide for a dynamic adaptation to the evolution of the Dublin *acquis* according to which whenever amendments (or replacement) to that *acquis* is adopted, those States shall notify of their decision whether or not to implement the content of such amendments (see paragraph 27 above). Even though they refer expressly to the Dublin II Regulation and the first Eurodac Regulation, those Agreements are dynamic, and not static. They use the so-called reference technique, also used, for instance, in the EEA Agreement, which consists in expressly referring to Union *acquis* made applicable to the partner States, that applicable *acquis* being updated as the Union *acquis* evolves and after the partner States have accepted to take over the new *acquis*.

88. In the present case, as the Union *acquis* in question is the Dublin *acquis*, and that, as seen above, such Dublin *acquis* is capable of containing the provisions in Part IV of the AMMR Proposal, nothing in the wording of the Dublin Agreements excludes the possibility of making such provisions part of the Dublin *acquis* as covered by those Agreements. Furthermore, amendments to or developments of the Dublin *acquis* are a matter of political choice for the Union legislator, within the parameters of the relevant legal bases of the TFEU, whilst respecting the principles of coherence, legal certainty and operability. However, only provisions capable of belonging to the Dublin *acquis* are covered by the Dublin Agreements and are therefore applicable to the Dublin States. This means that provisions of the AMMR Proposal on the relocation of beneficiaries of international protection, which go beyond the personal scope of the Dublin Regulation, and which should be included in the Qualification Regulation, would not be part of the Union *acquis* extended to Denmark and the Associated States.[45]

[44] See footnotes 22 and 28.

[45] Conversely, the provisions of Part IV that are about return and should be moved to a Schengen *acquis* instrument will become applicable to Denmark and the Schengen Associated States as part of the Schengen *acquis*.

e) Intermediate conclusion as regards the Dublin relevance of the AMMR Proposal

89. To conclude, the Legal Service considers that a restructured AMMR Proposal should consist only of provisions which belong to the Dublin *acquis* and would therefore apply geographically to the same group of Member States and Associated States. In addition to Parts III, V and VII, such provisions constituting the Dublin *acquis* should include Part I on definitions, without which these parts are not operable.

90. Should the discussions show a wish to keep, as much as possible, the unity of the AMMR Proposal as designed by the Commission, such provisions could also include, as part of the Dublin *acquis*, the following:

a) in Part II (except for Article 7):
   - Article 3, insofar as its provisions which go beyond the scope of the Dublin *acquis* would remain in the Regulation only as declaratory provisions cross-referring to the existing Schengen instruments where such obligations are set out;
   - Article 4;
   - Article 5;
   - Article 6, if it there is a clear link between the application of this provision and the operation of the Dublin *acquis*;

b) Part IV, with the exception of relocation of beneficiaries of international protection and of return related provisions (a reference thereto could be kept in the list in Article 45 of the AMMR Proposal, but the substantive provisions should be inserted in separate instruments, as explained below).

91. If adopted, substantive provisions concerning return sponsorship, as well as the return leverage mechanism (Article 7), should be included in an instrument constituting a development of the Schengen *acquis*. Similarly, relocation of beneficiaries of international protection should be included in an instrument on asylum. The interlinkage between the different components of the proposed Pact as reorganised, in compliance with the variable geometry imposed by the Dublin and Schengen *acquis* and the Protocols, as well as its overall logic, could be kept by introducing appropriate cross-references in the different legal acts.

92. Splitting off those provisions would leave Ireland in a position to be able to correctly exercise its right to opt-in in the AMMR Proposal. Should Ireland decide not to opt-in to this new Dublin *acquis* that would replace the Dublin III Regulation, Ireland could no longer apply that Regulation vis-à-vis the other Member States as they would all be bound by the new Dublin *acquis*. The Dublin III Regulation would no longer be operable, within the meaning of Article 4a of the Protocol 21.

3) The possible option of "schengenising" the Dublin *acquis* by classifying the AMMR Proposal as Schengen *acquis*

93. In the event that the Council were to consider it important to maintain as much as possible the unity of the AMMR Proposal and avoid the splitting of its Schengen related provisions, one option would be for the Council to make the political choice of "schengenising" the Dublin provisions. In the current context of the UK having left the Union, and considering the intrinsic link between the Dublin and the Schengen *acquis* and the fact that applying the Dublin *acquis* is a prerequisite for the participation in and the proper functioning of the Schengen area (see paragraphs 21 to 30 above), consideration could be given to the question of whether the separation between the two areas of *acquis* is still useful.

This option would need to be subject to a political discussion and a political choice to that effect to be made in Coreper and in the Council.[46]

[46] On the process for deciding to classify an instrument as Schengen relevant, see doc. 12164/99 of 22 October 1999.

94. From a legal point of view, such a choice would raise one legal issue which should be considered, namely the fact that the Dublin provisions were no longer part of the Schengen Convention when the Schengen *acquis* was integrated into the Treaties in 1999 by means of Protocol 2 integrating the Schengen *acquis* into the framework of the European Union. The Decision (1999/435) whereby the Council defined the Schengen *acquis* for the purpose of this integration[47] still lists Articles 28 to 38 as Part of the Schengen Convention but with a footnote indicating that they were replaced by the Dublin Convention. The question, therefore, is whether adding this "new" area to the Schengen *acquis* as integrated in Union law could still be considered as development of that *acquis*.

95. However, it must be noted that since 1999, the relevant protocols to the Amsterdam Treaty have been superseded by the Lisbon Treaty and the Protocols it annexed to the Treaties. Article 1 of Protocol 19 refers to closer cooperation among Member States in areas covered by "*provisions defined by the Council which constitute the Schengen acquis*". This Article does not refer specifically to Council Decision 1999/435 but rather broadly to "*provisions defined by the Council which constitute the Schengen acquis*" (emphasis added). This therefore gives a margin of discretion to the Council to define the provisions which constitute development of the Schengen *acquis* provided that the requirement of the coherence of that *acquis* is respected.

[47] Council Decision of 20 May 1999 (1999/435) concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis* (OJ L 176, 10.7.1999, p. 1).

96. As to the question of whether such a choice would rest on objective factors, taking into account the historical background and the rationale of Dublin provisions, those provisions would not, in reality, constitute a new area of Schengen *acquis*. As explained above (paragraphs 21 to 30), there is a sound (functional) explanation why the Dublin *acquis* was originally part of the Schengen Convention and the (historical and political) reasons why it was subsequently removed from the scope of the Schengen Convention. A potential re-inclusion in the Schengen *acquis* would therefore rest on objective factors, such as the inextricable link between the application of Dublin provisions and the functioning of the area without controls on persons at internal borders. Hence, such a political choice would be legally feasible.[48]

97. Should Ireland wish to participate in the part of the Schengen *acquis* related to the Dublin *acquis*, a legal solution could be found to allow for its participation. Ireland could request, as is its right under Article 4 of the Protocol 19 (Schengen Protocol), to take part only in the Schengen *acquis* related to Dublin and Eurodac.[49]

98. From a drafting point of view, a consequence of such "schengenisation" of the Dublin provisions of the AMMR Proposal would be that those substantive provisions belonging to the Schengen *acquis* that would have needed to be moved to separate instruments, because of the variable geometry, could remain in the text of the AMMR Proposal.

99. The only provision that would still need to be split would be, as seen above in paragraph 85, the one, in Part IV, on relocation of beneficiaries of international protection which goes beyond the scope of the Dublin or Schengen *acquis*. Such form of relocation could be regulated in a separate (asylum) instrument (for instance in the Qualification Regulation).

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[48] If the option of re-including the Dublin *acquis* into the Schengen *acquis* were to be chosen by the Council, appropriate adaptations would need to be made to the relevant Schengen and Dublin Association Agreements. One of the consequences of the "*schengenisation*" of the Dublin *acquis* would of course be that the Schengen institutional arrangements (Mixed Committee for the decision-shaping) would become applicable for the four Associated States. Likewise, for Denmark, Article 4 of Protocol 22 would become applicable to that *acquis*.

[49] In such a case, the Council would have to assess whether those provisions could be considered as a third, self-standing and self-coherent part of the Schengen provisions, next to the Schengen *acquis* on borders (in which Ireland does not participate) and that on police and judicial cooperation (in which Ireland has been authorised to participate).

4) Schengen and Dublin relevance of certain components of the proposed Crisis Regulation

100. The Commission proposal for a Crisis Regulation addresses situations of crisis and force majeure and essentially sets out derogations from the provisions in the AMMR Proposal related to the application of the solidarity measures, the provisions on asylum and on the return border procedure, as well as from various provisions on deadlines laid down in the APR and in the Dublin *acquis*. In short, this proposal is also a hybrid instrument and contains some provisions which are part of the Schengen *acquis*, some which are part of the Dublin *acquis* and some which are part of the asylum *acquis*.

In order to respect the coherence of the respective *acquis*, the Legal Service suggests that those derogations, if politically agreed during the discussions, be simply placed in the legal instruments regulating the area in question, i.e. the AMMR Proposal (solidarity scheme and derogations from Dublin deadlines), the proposed Screening Regulation or the Return Directive (return crisis management procedure) and the amended APR Proposal (asylum crisis management procedure and derogations from registration deadlines).

IV. CONCLUSION

101. In conclusion, the Legal Service is of the opinion that the proposed new Pact on Migration and Asylum, insofar as it contains hybrid acts, should be adjusted so as to comply with the coherence of the Schengen and Dublin *acquis*, respectively, and to be made consistent with the relevant Protocols annexed to the Treaties. The Legal Service therefore advises that the components and provisions of the proposals identified in this opinion be correctly classified as development, respectively, of the Schengen *acquis* and the Dublin *acquis* and that they be included in Schengen and Dublin relevant instruments, as appropriate.

102. As regards the amended APR Proposal, the Legal Service is of the opinion, that with a view to respect the principle of coherence that governs the Schengen *acquis*, the parts of the amended APR Proposal concerning the return border procedure should be split and classified as development of the Schengen *acquis* in a Schengen relevant instrument, such as the proposal for a Return Directive, the proposed Screening Regulation or a separate Schengen relevant legislative act. In addition, a requirement to have an asylum border procedure in place should be inserted in a Schengen *acquis* instrument, while the substantive and procedural provisions applying during the asylum procedure itself would remain in the APR, as part of the Union asylum *acquis* (or as part of the national substantive asylum legislation of those Schengen States not bound by the Union asylum acquis).

103. As regards the AMMR Proposal, the Legal Service is of the opinion that, should the discussions show a wish to maintain, as much as possible, the unity of the AMMR Proposal as designed by the Commission, the obvious option would be to consider the whole AMMR Proposal as a development of the Dublin *acquis*.

a) In this respect, in addition to Parts III, V and VII, Part I (definitions) should be classified as part of the Dublin *acquis*.

b) As concerns Part II, most of its provisions could remain in the AMMR Proposal as part of Dublin *acquis*, subject to the conditions outlined in paragraph 90 above. Otherwise, they could be regulated in a separate act. Listing Union actions in the area of Schengen *acquis* should only be of declaratory nature, otherwise splitting and moving these actions in Schengen relevant instruments would be required.

   Article 7 on the return leverage mechanism, which in substance fall within the area of return, constitutes a development of the Schengen *acquis* and should be included in a Schengen relevant instrument.

c) As concerns Part IV (solidarity), if kept within the Proposal, it should be classified as a development of the Dublin *acquis*, except for the following, which should be moved to separate legal acts:

i) the provisions on relocation of beneficiaries of international protection go beyond the personal scope of the Dublin *acquis* and should be included in an asylum instrument, such as the proposed Qualification Regulation;

ii) the provisions on return sponsorship and on relocation of illegally staying third country nationals for the purposes of return, which in substance fall within the area of return, constitute a development of the Schengen *acquis* and should be included in a Schengen relevant instrument.

d) The unity of the AMMR Proposal could be further ensured by inserting in that Proposal appropriate cross-references to the above substantive provisions that are moved into other instruments.

104. As regards the proposed Crisis Regulation, the provisions derogating from the substantial rules in case of urgency should be included in the relevant instruments governing those substantive rules according to their respective scope and legal basis in order to ensure the coherence of Schengen *acquis*, Dublin *acquis* and the other relevant Union *acquis*, respectively.