Council of the European Union

Brussels, 19 February 2021
(OR. en)

6357/21

LIMITE

JUR 97
JAI 172
MIGR 42
ASILE 16
SCHENGEN 9

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

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (27.04.2021)

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.

[1] This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

TABLE OF CONTENTS

I. INTRODUCTION 3

II. LEGAL BACKGROUND AND CONTEXT OF THE PROPOSALS 5

1) The Schengen *acquis* 5

2) The Dublin *acquis* and its close link with the Schengen area 10

III. LEGAL ANALYSIS 15

1) The amended APR Proposal: Schengen relevance of certain of its components 15
   a) The Union law provisions on return as part of the Schengen acquis 15
   b) The return border procedure as a development of the Schengen acquis 17
   c) Consequences as regards the proposed return border procedure 19
   d) Consequences as regards the proposed asylum border procedure 20

2) The AMMR Proposal: Dublin relevance 22
   a) Hybrid nature of the AMMR Proposal 22
   b) Legal concerns on the AMMR Proposal as a hybrid act 24
   c) Dublin relevance of the different components of the AMMR Proposal 26
   d) The specific case of Part IV of the AMMR, on Solidarity 28
   e) Intermediate conclusion as regards the Dublin relevance of the AMMR Proposal 31

3) The possible option of "schengenising" the Dublin *acquis* by classifying the AMMR Proposal as Schengen *acquis* ..... **Error! Bookmark not defined.**

4) Schengen and Dublin relevance of certain components of the proposed Crisis Regulation **Error! Bookmark not defined.**

IV. CONCLUSION ..... **Error! Bookmark not defined.**

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. **DELETED**

4. **DELETED**

5. **DELETED**

6. **DELETED**

7. **DELETED**

DELETED

8. **DELETED**

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[2], 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*"[3].

[2] See Protocol 2 integrating the Schengen *acquis* into the framework of the European Union (1999).
[3] 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* [4]" 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[5] 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*".[6] 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.[7]

---

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

5 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.

6 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.

7 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*".[8]

14. **DELETED**

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

15. **DELETED**

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[9]. 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[10].

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).

---

[9] 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.

[10] 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.[11] 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.[12] 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.

---

[11] 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).

[12] 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.[13] 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.

---

[13] - 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[14]. 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.[15] In 2003, the Dublin Convention was replaced by the so-called Dublin II Regulation[16] 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).

---

[14] 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).

[15] 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).

[16] 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[17] 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[18] and the 2013 Eurodac Regulation[19] 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"[20] 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.

---

17 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).

18 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).

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

20 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[21] was concluded with Denmark - which was already part of the Schengen area[22] 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[23]. 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*[24].

---

21 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).

22 See Agreement op. cit. in footnote 10.

23 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.

24 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*"[25] (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*.[26] In addition to Denmark, the four Schengen Associates therefore also had to conclude agreements associating them to the Dublin *acquis*.[27]

---

[25] 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).

[26] 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.

[27] - 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. **DELETED**

33. **DELETED**

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[28]. 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.

---

[28] 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. **DELETED**

39. **DELETED**

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

40. **DELETED**

41. **DELETED**

42. **DELETED**

43. **DELETED**

44. **DELETED**

c) Consequences as regards the proposed return border procedure

45. **DELETED**

46. **DELETED**

47. **DELETED** .

48. **DELETED**

d) Consequences as regards the proposed asylum border procedure

49. **DELETED**

50. **DELETED**

51. **DELETED**

52. **DELETED**

e) Intermediate conclusion as regards the amended APR Proposal

53. **DELETED**

2) The AMMR Proposal: Dublin relevance

a) Hybrid nature of the AMMR Proposal

54. **DELETED**

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.[29] Article 73 states that the Dublin III Regulation is repealed[30]. 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.

[29] **DELETED**
[30] **DELETED**

56. **DELETED**

57. **DELETED**

58. **DELETED**

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

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

60. **DELETED**

61. **DELETED**

62. **DELETED**

63. **DELETED**

64. **DELETED**

65. **DELETED**

66. **DELETED**

67. **DELETED**

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

68. **DELETED**

69. **DELETED**

70. **DELETED**

71. **DELETED**

72. **DELETED**

73. **DELETED**

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

74. **DELETED**

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. **DELETED**

77. **DELETED**

78. **DELETED**

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*"[31].

[31] 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. DELETED FROM THIS POINT UNTIL THE END OF THE DOCUMENT (page 41))