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NOTE

From:	Presidency
To:	Delegations
Subject:	Recommendations of the Legal Services of the EP and the Council on variable geometry

Delegations find in annex the recommendations that both the Legal Services of the EP and the Council agreed with regard to variable geometry. They are the result of the mandate that was given by the Spanish Presidency and the EP rapporteurs during the trilogues on possible technical solutions to preserve the coherence of the Schengen acquis in the Pact.

ANNEX

Pact on migration

Recommendations of the Legal Services of the EP and the Council

on variable geometry

1. During the negotiations on the Pact, the Legal Services of both the EP and the Council, (hereinafter "the Legal Services") were instructed by the political level to jointly assess, agree on, and present possible technical solutions with regard to risks of illegality deriving from variable geometry.

2. More particularly, the question asked by the political level was whether changes of a purely technical nature were needed (and, if that were the case, in respect of which acts/provisions of the Pact) to preserve the operability and coherence of the Schengen *acquis*[1] as well as its full compliance with, on the one hand, the relevant JHA Protocols[2] and, on the other hand, the Schengen Association Agreements concluded by the Union with Norway, Iceland, Switzerland and Liechtenstein (Schengen associated countries - hereinafter "SAC").[3]

3. The Legal Services agreed, first of all, that preserving such coherence and ensuring full compliance with the relevant Protocols of the Treaties is a requirement that needs to be complied with in order to ensure the legality of all the relevant acts which compose the Pact. This is relevant from both the substantive and procedural points of view (coherence of the Schengen *acquis*, adoption procedures, participation of Ireland by means of their opt in/opt out prerogatives, transposition through international law by Denmark and the SAC).

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1 See, *inter alia*, judgment of the Court of 26 October 2010, Case C-482/08, *VIS* (UK v. Council), 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 judgment.

2 Protocols (No 19) on the Schengen *acquis* integrated into the Framework of the European Union, (No 21) on the position of the United Kingdom and Ireland in respect of the area of Freedom, security and Justice, and (No 22) on the position of Denmark. See also 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).

3 For a reference to the above-mentioned Agreements see, *inter alia*, 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), recitals 27 to 30 and footnotes contained therein.

4. Second, the Legal Services agreed that, for this purpose, the provisions contained in the different acts of the Pact that, because of their nature and/or link with the functioning of the Schengen area, are part of the Schengen *acquis* must, therefore, be contained in an act that is, in its entirety, part of that *acquis* (a "Schengen relevant" act).

5. Third, taking into account the provisional agreement reached last December, the Legal Services identified three provisions, which are part of the Schengen *acquis*, but currently are not in a Schengen relevant act, and should therefore be included in a Schengen relevant act. Two of those provisions are contained in the "APR" Regulation (Articles 41g and 41h - lines 461cr to 461db of the four-column table), and one in the "Crisis" Regulation (article 14 - lines 132ek to 132ep of the four-column table). These provisions concern return.

6. 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 and should be included, with their respective recitals, in a Schengen relevant act.[4]

7. Fourth, the Legal Services identified three possible options to solve this issue: the first one is to amend the Return Directive so as to include the provisions at hand.[5] The second option is to move these provisions into the "Screening" Regulation. The third option is to include them in an autonomous and self-standing act.

8. Amend the Return Directive: the Legal Services do not recommend to follow the first option given the narrow link between the return border procedure and the asylum border procedure. For reasons of legal certainty, it would not be advisable to introduce a return border procedure by means of provisions contained in a directive (which need to be transposed at national level), while the asylum border procedure is provided for in a regulation, which is directly applicable in the Member States. The provisions on the return border procedure have, moreover, been politically agreed as part of regulations: including them in a directive would alter their nature and thus deviate from the outcome of the political negotiations.

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[4] 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. 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.

[5] 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).

9. The second option (moving the provisions to the Screening Regulation), while still legally possible, could be misleading in so far as, contrary to the return border procedure, the screening process is not conceived as a procedure bringing to a legally binding decision to be adopted in the context of the management of the external borders. The screening process takes place upon arrival or apprehension of a third-country national and has the aim of strengthening the control of persons at external borders. The nature of the provisions concerning, respectively, screening and the return border procedure is thus rather different, each even requiring a different legal basis (Article 77(2)(b) and (d) TFEU for the Screening Regulation and Article 79(2)(c) TFEU for the return border procedure. For reasons of legal certainty and clarity it is therefore advisable not to introduce provisions on returns and screening in the same act.

10. The Legal Services agreed that the third option, consisting of an autonomous and self-standing act, should be preferred one and wouldn't entail any particular disadvantage from a legal point of view. The Legal Services would therefore recommend that it be chosen as the preferred solution.

11. The new act would have to be drafted in line with the following criteria:

    a) the act would be an autonomous act based on Article 79(2)(c) TFEU (this legal basis should accordingly be deleted in the APR and the "Crisis" Regulation). The texts of Articles 41g and 41h of the APR and 14 of the "Crisis" Regulation, as well as the respective recitals, in the wording provisionally agreed by the EP and the Council, would be moved therein;

    b) the new act would be, in its substance, neutral and reflect fully and only the political outcome of the negotiations on APR and the "Crisis" Regulation;

    c) other provisions, as agreed by the co-legislators, which are needed and relevant for the application of the separate act (such as provisions on definitions and on entry into force), could be copied therein or adapted accordingly; or cross-references could be used, only to ensure that they apply in both contexts, where relevant and only for the purpose of completing the act as stand-alone acts from a purely technical point of view;

d) the recitals referring to those provisions would need to be adapted in both the APR and "Crisis" Regulation, as well as in the new act, in order to ensure consistency between the asylum border procedure and the return border procedure on the one hand, and between the respective derogations provided by the "Crisis" Regulation on the other hand. The new act would not contain any "new" recital apart from the "standard" recitals provided by the Handbook[6] as regards the Schengen relevant acts.

e) The act could be prepared in agreement by the Legal Services in full compliance with the above-mentioned criteria and the outcome of the negotiations, and then submitted internally to both the EP and the Council for assessment and approval under the respective internal procedures.

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[6] The Joint Handbook of the European Parliament, the Council and the Commission for the presentation and drafting of acts subject to the ordinary legislative procedure.