



*Committee on Legal Affairs
The Chair*

13.3.2024

Mr Juan Fernando López Aguilar
Chair
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a Regulation establishing a return border procedure, and amending Regulation (EU) 2021/1148 (COM(2016)0467 – C9-0039/2024 – 2016/0224B(COD))

Dear Mr Chair,

By letter of 15 February 2024¹, the Chair of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) requested the Committee on Legal Affairs (JURI), pursuant to Rule 40(2) of the Rules of Procedure, to provide an opinion on the appropriateness of, *inter alia*, the legal basis for the proposal for a Regulation of the European Parliament and of the Council establishing a return border procedure, and amending Regulation (EU) 2021/1148 (hereinafter “the proposed Regulation”).

JURI will consider the above question at its extraordinary meeting on 11 March 2024.

I - Background

In December 2023 the European Parliament and the Council reached a provisional agreement on the legislative proposals included in the New Pact on Migration and Asylum² presented by the Commission in September 2020. Part of that Pact were also an amended proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU³ (hereinafter “the APR”) and a proposal for a regulation

¹ D(2024)5159.

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum (COM(2020) 609 of 23.9.2020).

³ COM(2016) 467 of 13.7.2016 and amended COM(2020) 611 of 23.9.2020 (2016/0224A(COD)).

addressing situations of crisis and *force majeure* in the field of migration and asylum⁴ (hereinafter “the Crisis Regulation”).

Following the provisional agreement, the Legal Services of the European Parliament and of the Council were requested to assess the outcome of the interinstitutional negotiations and make technical recommendations aiming to ensure that the operability and coherence of the Schengen *acquis* is observed.

Having conducted the assessment, the Legal Services recommended that the provisions of Schengen relevance be included in a standalone act. What resulted was the proposed Regulation which essentially includes the provisions on the return border procedure, negotiated and provisionally agreed under the APR, together with derogations brought in from the Crisis Regulation and with amendments to the Instrument for Financial Support for Border Management and Visa Policy, established by Regulation (EU) 2021/1148⁵. During the meeting of the Asylum Contact Group with the five rotating Presidencies of the Council⁶ the European Parliament and the Council provisionally endorsed this recommendation and the resulting proposed Regulation in the form of the draft standalone act. LIBE then proceeded with a request for JURI opinion on the appropriateness of using Article 77(2) and Article 79(2), point (c), of the Treaty on the Functioning of the European Union (TFEU) as the legal basis of the proposed Regulation.

II - The relevant Treaty Articles

Chapter 2 (“Policies on border checks, asylum and immigration”) of Title V of Part Three TFEU reads, *inter alia* (emphasis added):

Article 77
(*ex Article 62 TEC*)

1. *The Union shall develop a policy with a view to:*
 - (a) *ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;*
 - (b) *carrying out checks on persons and efficient monitoring of the crossing of external borders;*
 - (c) *the gradual introduction of an integrated management system for external borders.*
2. ***For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:***
 - (a) ***the common policy on visas and other short-stay residence permits;***

⁴ COM(2020) 613 of 23.9.2020 (2020/0277(COD)).

⁵ Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy (OJ L 251, 15.7.2021, p. 48).

⁶ Format established under the Joint EP-Council Roadmap for the negotiations on the CEAS and the New Pact on migration and asylum, signed in September 2022.

- (b) the checks to which persons crossing external borders are subject;*
 - (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;*
 - (d) any measure necessary for the gradual establishment of an integrated management system for external borders;*
 - (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.*
- (...)

Article 79
(ex Article 63, points 3 and 4, TEC)

- 1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.*
 - 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:*
 - (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;*
 - (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;*
 - (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;*
 - (d) combating trafficking in persons, in particular women and children.*
- (...)

III – CJEU case law on the choice of legal basis

The Court of Justice has traditionally viewed the question of the appropriate legal basis as an issue of constitutional significance, guaranteeing compliance with the principle of conferred powers (Article 5 of the Treaty on European Union) and determining the nature and scope of the Union's competence⁷.

⁷ Opinion 2/00 ("*Cartagena Protocol*"), ECLI:EU:C:2001:664, para 5.

According to well-established case law, the legal basis of a Union act does not depend on an institution's conviction as to the objective pursued, but must be determined according to objective criteria amenable to judicial review, including in particular the aim and the content of the measure⁸.

If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component⁹. Only exceptionally, if it is established that the act simultaneously pursues a number of objectives, inextricably linked, without one being secondary and indirect in relation to the other, may such an act be founded on the various corresponding legal bases¹⁰. This would however only be possible if the procedures laid down for the respective legal bases are not incompatible with and do not undermine the right of the European Parliament¹¹.

IV – Aim and content of the proposed Regulation

The explanations of the aim of the proposed Regulation can be found in the explanatory memorandum of the amended proposal for the APR, which the Commission put forward in 2020 in the framework of the New Pact on Migration and Asylum. The Commission stated therein that it did “*not consider necessary to make far-reaching amendments to the 2016 proposal on which the co-legislators have already made significant progress*” but it made “*targeted amendments to the 2016 proposal to address [...] specific challenges which will further the objectives and put in place, together with the proposal for a Regulation introducing a screening, a seamless link between all stages of the migration process, from arrival to processing of asylum requests and, where applicable, return*” (emphasis added). During the screening, migrants would be registered and screened to establish their identity and health and security risks. Following that, migrants would be referred to the “*appropriate procedure, be it asylum, refusal of entry or return*” (emphasis added). It would then be determined whether an asylum application should be assessed without authorising the applicant’s entry into the Member State’s territory in an asylum border procedure or in a normal asylum procedure. Where an asylum border procedure would be used and if it was determined that the individual was not in need of protection, a return border procedure would follow.

It is following this conception of the procedure at the border that the Commission amended the APR by inserting provisions on return of third-country nationals through the creation of a border procedure for carrying out such returns and added Article 79(2), point (c), TFEU as legal basis of the APR. In the first bullet point on legal basis under point 2 of the explanatory memorandum of the 2020 amendment of the proposal for the APR the Commission explained

⁸ Case C-300/89, *Commission v Council* (“Titanium dioxide”), ECLI:EU:C:1991:244, paragraph 10.

⁹ Ibid. paragraph 30 and Case C-137/12, *Commission v Council*, ECLI:EU:C:2013:675, paragraph 53 and case-law cited.

¹⁰ Case C-300/89, paragraphs 13 and 17; Case C-42/97, *Parliament v Council*, ECLI:EU:C:1999:81, paragraph 38; Opinion 2/00, paragraph 23; Case C-94/03, *Commission v Council* (“Rotterdam Convention”), ECLI:EU:C:2006:2, and Case C-178/03, *Commission v Parliament and Council*, ECLI:EU:C:2006:4, paragraphs 36 and 43.

¹¹ Case C-300/89, paragraphs 17-25; Case C-268/94, *Portugal v Council*, ECLI:EU:C:1996:461.

that the legal bases for the APR were “*Articles 78(2)(d) and 79(2)(c) of the Treaty on the Functioning of the European Union. These foresee the adoption of measures for common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status as well as illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation, respectively*” and that it was “*necessary to add the latter legal basis to provide for specific provisions regulating the return of rejected asylum seekers, notably in relation to the joint issuance of a return decision following a negative decision on an application, the joint remedy against such decisions and the seamless asylum and return border procedures.*”

During the interinstitutional negotiations the co-legislators provisionally agreed on the return border procedure within the context of the APR, including on Articles 41g and 41h on border procedure for carrying out return and on detention respectively. However, in the concluding steps the co-legislators agreed that for reasons of the so-called Schengen variable geometry, the proposed Regulation needed to be split in two: while the first text would include all provisions establishing a common procedure for international protection in the Union (that is the APR), the provisions on the return border procedure would be removed and placed into the second text (proposed Regulation, subject of this opinion).

The result is a standalone act the aim of which is to “*streamline, simplify and harmonise the procedural arrangements of the Member States by establishing a return border procedure.*” The recitals of the proposed Regulation also stipulate that “*to ensure continuity between the asylum procedure and the return procedure, the return procedure should also be carried out in the context of a border procedure*”. The proposed Regulation also clarifies the relation with the Directive on ‘regular’ return¹². It lays down rules for detention of a person who no longer has a right to remain and has not been allowed to remain, for the purpose of preventing entry into the territory and of carrying out a return. The return border procedure should also “*facilitate, in a situation of crisis, the return of irregularly staying third-country nationals or stateless persons whose applications were rejected in the context of a crisis [...] and who have no right to remain and are not allowed to remain.*” This is reflected in the Articles, notably Articles 4, 5 and 6 on return border procedure, detention and measures applicable to the return border procedure in a situation of crisis, respectively.

Lastly, the proposed Regulation also amends the Instrument for Financial Support for Border Management and Visa Policy, established by Regulation (EU) 2021/1148¹³ (Article 9), in order to allow that Instrument to be mobilised to provide support to Member States' efforts in applying the proposed Regulation.

V – Analysis

The proposed Regulation essentially contains what used to be Articles 41g and 41h in the APR (Articles 4 and 5 of the proposed Regulation) and Article 14 of the Crisis Regulation (Article 6 in the proposed Regulation), and the corresponding recitals. Those are all

¹² 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).

¹³ Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7 July 2021 establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy (OJ L 251, 15.7.2021, p. 48).

provisions related to the return of third-country nationals which was 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*”. They are therefore undisputedly part of the Schengen *acquis*, but have not been placed in a Schengen-relevant act.

It is essential to preserve the operability and coherence of the Schengen *acquis*¹⁴, as well as its full compliance with, on the one hand, the relevant JHA Protocols¹⁵ and, on the other hand, the Schengen Association Agreements concluded by the Union with Norway, Iceland, Switzerland and Liechtenstein. Furthermore, 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 also subject to the uniform entry conditions set out in the Schengen Borders Code.

The return border procedure, including in situation of crisis, should, therefore, also be seen as a part of the Schengen *acquis* related to integrated border management. Those provisions thus seem to have now rightly been included, with their respective recitals, in a standalone Schengen-relevant act, correctly based on Article 79(2), point (c), TFEU.

In addition, the amendments of Regulation (EU) 2021/1148 were also brought into the proposed Regulation in order to amend the Instrument for Financial Support for Border Management and Visa Policy to be mobilised to provide support to Member States in their efforts to ensure strong and effective European integrated border management at the external borders. Article 77(2) TFEU serves as the legal basis for measures on, *inter alia*, visas, border checks, the Union’s integrated border management system and the absence of internal border controls. This provision therefore seems to be correctly used in addition to Article 79(2), point (c), TFEU, since the objectives pursued are intrinsically linked and one is not merely secondary and indirect in relation to the other. The use of the dual legal basis would therefore be consistent with the criteria referred to in point III of this note.

VI – Conclusion and recommendation

At its meeting of 11 March 2024 the Committee on Legal Affairs accordingly decided, by 17 votes in favour, none against and one abstention¹⁶, to recommend to the Committee on Civil Liberties, Justice and Home Affairs that Article 79(2), point (c), and Article 77(2) TFEU seem to be appropriate legal basis of the proposed Regulation.

¹⁴ See, *inter alia*, judgment of 26.10.2010 in Case C-482/08, *UK v. Council (VIS)*, ECLI:EU:C:2010:631, paragraph 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 paragraphs 49 and 58 of that judgment.

¹⁵ 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.

¹⁶ The following were present for the final vote: Adrián Vázquez Lázara (Chair), Marion Walsmann (Vice-Chair), Lara Wolters (Vice-Chair), Alessandra Basso, Ilana Cicurel, Ibán García Del Blanco, Pascal Durand, Daniel Freund (for Sergey Lagodinsky, pursuant to Rule 209(7)), Heidi Hautala, Pierre Karleskind, Gilles Lebreton, Maria-Manuel Leitão-Marques, Karen Melchior, Sabrina Pignedoli, René Repasi, Franco Roberti, Michaela Šojdrová (for Jiří Pospíšil, pursuant to Rule 209(7)), Axel Voss, Javier Zarzalejos.

Yours sincerely,

Adrián Vázquez Lázara