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Three-stage enlargement of the Schengen area to include new EU member states under the post-Amsterdam principles

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Abstract

The article presents the most important legal consequences of the enlargement of the Schengen area based on the post-Amsterdam principles, which can be described as the three-stage accession to the Schengen area. They are defined in the Schengen Protocol and extended in the accession treaties and in EU secondary law. The research area is the rules on the integration of new member states into the Schengen area and the legal consequences of this process. They are crucial reform of the Schengen area and set a new direction for the development of the "area without borders". The article presents the main hypothesis and two partial hypotheses. The main hypothesis is that the post-Amsterdam principles have become the most important reform of the Schengen *acquis*, setting out the legal necessity and the new legal implications of the enlargement of the Schengen area. Two partial hypotheses can be made that the development of the post-Amsterdam principles has accelerated the development of the Schengen area and thus strengthened the principles of EU law as the "area without borders". The second sub-hypothesis indicates that this area should be considered in two aspects: as a legal area and as a territorial area, which are gradually becoming unified through the implementation of the post-Amsterdam principles. The methodology for legal research has been used to analyse the primary EU law of the Schengen *acquis* as incorporated into EU law by the Amsterdam Treaty (AT).

Key words: acquis Schengen, Schengen area, legal consequences, post-Amsterdam principles, incorporation, European Union

Trójetapowość rozszerzenia strefy Schengen o nowe państwa członkowskie Unii Europejskiej na mocy zasad poamsterdamskich

Streszczenie

Artykuł przedstawia najistotniejsze prawne następstwa rozszerzenia strefy Schengen na podstawie zasad poamsterdamskich, które można określić jako trójetapową akcesję do strefy Schengen. Zostały one zdefiniowane w Protokole Schengen i rozszerzone w traktatach akcesyjnych oraz prawie pochodnym UE. Obszarem badawczym są reguły dotyczące włączania nowych państw do obszaru Schengen oraz prawne

konsekwencje tego procesu. Stanowią one kluczową reformę strefy Schengen i wyznaczają nowy kierunek rozwoju „obszaru bez granic". W artykule postawiono hipotezę główną i dwie hipotezy cząstkowe. Hipoteza główna zakłada, że zasady poamsterdamskie stały się najważniejszą reformą *acquis* Schengen, wyznaczając prawną konieczność oraz nowe prawne następstwa rozszerzenia strefy Schengen. Konsekwentnie można postawić dwie hipotezy cząstkowe, że opracowanie zasad poamsterdamskich przyspieszyło rozwój strefy Schengen, a tym samym wzmocniło „obszar bez granic". Druga z hipotez cząstkowych wskazuje, że obszar ten należy rozpatrywać dwuaspektowo, jako obszar prawa i obszar terytorialny, które poprzez realizację zasad poamsterdamskich ulegają stopniowemu ujednolicaniu. Przy zastosowaniu metodologii badań prawnych dokonano analizy prawa pierwotnego UE oraz unijnego prawa pochodnego w zakresie dorobku Schengen inkorporowanego do prawa UE na mocy Traktatu amsterdamskiego (TA).

Słowa kluczowe: *acquis* Schengen, strefa Schengen, prawne następstwa, zasady poamsterdamskie, inkorporacja, Unia Europejska

Introduction

The legal consequences of the enlargement of the Schengen area are the consequences of the European Union reforms made by the Amsterdam Treaty (hereinafter: AT). Attached to the AT, Schengen Protocol, which from the legal point of view has the same legal validity as the treaties, radically reformed the principia of the Schengen area enlargement, which can be described as the post-Amsterdam principles. They are clarified at the stage of accession of new states to the EU. These rules were subsequently extended in the accession treaties and approved in the Council decisions under which states incorporated into the Union after the AT become Schengen states. European Union law has redefined the *acquis* Schengen in two dimensions. First, including it in the legal and institutional framework of the EU. Secondly, as a consequence of this incorporation, defining the rules of covering the new member states with it. The article focuses on this second aspect, defining the post-Amsterdam principles and the stages of their implementation; indicating special legal status of these solutions, the correctness and effectiveness of their application and legal problems caused by non-legal conditions.

It should be emphasised that they are not optional for these EU member states, but they determine the legal necessity to join the Schengen area. The innovative nature of this legal solution lies in the fact that the condition for the commencement of the accession procedure to the Union is the obligation to adopt the *acquis* Schengen and future inclusions in the Schengen area. This obligation cannot be mitigated by any exemptions that were applied to some of the states of the then EU. These conditions, which can be described as the post-Amsterdam principles, differ from the previous rules of the Schengen area enlargement.

For the purposes of the article, the concept of post-Amsterdam principles was developed to define the legal rules for the Schengen area enlargement by new EU member states, whose accession to the Union and subsequent incorporation into the Schengen area took place after AT. The concept of 'post-Amsterdam' principles already applies to candidate countries for the European Union (in the first stage), and fully to its new member states (in the second and third stage). They constitute the legal consequences of the wider process of incorporation of the *acquis* Schengen into EU law under the Amsterdam Treaty, so they can be more accurately described as the post-Amsterdam principles of the enlargement of the Schengen area. They were shaped in primary and secondary EU law, specifically in the Reform Treaty, which was AT and in the accession treaties and confirmed in the Council's decisions. In this sense, one can speak about the three-stage access to the Schengen area binding on new EU member states. In practice, it has been fully applied to nine countries that joined the EU in 2004, and in 2007 the Schengen area (i.e. Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Lithuania, Latvia, Estonia and Malta). Four countries went through the first two stages (Cyprus, Bulgaria, Romania and Croatia). Their position in relation to the Schengen area can be defined as pending membership (Szachoń-Pszenny 2014a: p. 302–303). It is expressed in the fact that these countries are bound by the *acquis* Schengen, but it is only the Council decision that allows them full membership in the Schengen area.

The post-Amsterdam principles in primary law originate in the Schengen Protocol, which is an integral part of AT. They are developed in accession treaties that form an integral part of the accession treaty to the EU. The choice of primary law on the basis of the post-Amsterdam principles provides certainty of their invariability, and at the same time, as practice shows, it guarantees their strengthening. This has happened under the Treaty of Lisbon, which has not only maintained, but even deepened the reforms of the Amsterdam Treaty regarding the application of the *acquis* Schengen. This results in an even closer link to EU law, because virtually every piece of legislation that is an extension of the *acquis* Schengen is at the same time legislation belonging to the EU's area of freedom, security and justice (AFSJ), (Szwarc-Kuczer 2012: p. 248; 255). The incorporation of the *acquis* Schengen into EU law also results from the very logic of the unification of Europe, based, inter alia, on the principle of free movement of people (Skorzycki 2017: p. 85–86). In this way, the principles of EU law have been strengthened by the incorporation of the *acquis* Schengen.

Proper application of the post-Amsterdam principles contained in primary law and consequently, full inclusion in the Schengen area is sanctioned by secondary law. The three-stage nature of the post-Amsterdam principles can therefore be distinguished as follows:

1) preparation for membership in the EU, in particular within the framework of the Copenhagen criteria, the ability to adopt the *acquis commumautaire*, part of which is the *acquis* Schengen (which results from the Schengen Protocol);
2) binding *acquis* Schengen in accordance with the accession treaties (new member states are associated with it from accession to the EU, but apply part of the *acquis* Schengen, while the Council decision is required to apply the remaining part);
3) applying the whole of Schengen under Council decisions (land and sea borders, and then air borders).

The aim of the article is to prove the hypothesis that the post-Amsterdam principles have become the most important reform of the *acquis* Schengen by determining the legal necessity and new legal consequences of the enlargement of the Schengen area. At the same time, two partial hypotheses can be put forward that the development of the post-Amsterdam principles has accelerated the development of the Schengen area and thus strengthened the "area without borders". The second partial hypothesis indicates that this area should be considered in two aspects as the area of law and the territorial area, which, by implementing the post-Amsterdam principles, are gradually being unified. At the same time, it is not possible to marginalise problems that are currently occurring in the Schengen area, mainly related to the migration crisis.

The article is based on a legal approach based on legislation primarily of primary EU law on the integration of *acquis* Schengen into EU law and the legal consequences of this process. The classic formal and dogmatic method was used, which is necessary to first determine the post-Amsterdam principles and to analyse the treaties of accession of EU member states after AT and, in the alternative, the systemic method for indicating the position of the *acquis* Schengen in EU law.

First stage – post-Amsterdam principles in the Reforming Treaty (Schengen Protocol)

The essence of post-Amsterdam principles are the regulations of the primary EU law, specifically the provisions of the Schengen Protocol governing the Schengen enlargement by new EU Member States. This way of developing the Schengen area

is called in the doctrine a highly selected border regime that regulates access to the Schengen area (Scott 2016: p. 29). It has brought the most far-reaching effects as far as the enlargement of both the EU and the Schengen area is concerned.

The Schengen Protocol is an integral part of the Amsterdam Treaty, so the rules for the enlargement of the Schengen area are governed by the highest hierarchical source of the EU law. It should be noted that these principles are already in force at the stage of accession negotiations regarding the accession of new member states to the European Union, when the *acquis* Schengen and other measures taken by the institutions to apply it are considered as the *acquis*, which should be fully accepted by all accession candidate countries (Schengen Protocol: Article 8). This is the core of the post-Amsterdam principles, while their development and at the same time an integral part, are the provisions of the accession treaties on the application of the *acquis* Schengen and the Council decisions sanctioning full inclusion in the Schengen area. In this way, the development of the Schengen area was inextricably linked to the development of the EU, representing its consistency and the strengthening the EU law by the *acquis* Schengen.

Joining the Schengen area begins with the moment of submitting the application for accession to the EU. It means that the state meets the Copenhagen criteria, including in particular the ability to adopt the entire EU legal system, of which the *acquis* Schengen is an integral part. In the doctrine, the *acquis* Schengen is known as the *acquis* of the organisation (Jesień 1998: p. 85). Thus, the state starting the EU accession procedure at the same time starts the accession procedure to the Schengen area. EU law does not provide for any other possibility that existed before AT, it was even sanctioned by the provisions of the Schengen Protocol for the United Kingdom and Ireland, and to a certain extent to Denmark. It seems that the post-Amsterdam principles have stopped the process of disintegration of the EU and the Schengen area, striving for their gradual unification not only by eliminating the possibility of maintaining exemptions from the Schengen area, but by developing uniform rules of joining the Schengen area. Due to the fact that the incorporation of the *acquis* Schengen into the EU law occurred on specific legal principles, the consequences of the Schengen area extension also retained a certain specificity.

Previously, this was done on the basis of classic international agreements. As international agreements, the Schengen Agreement and the Schengen Implementation Convention contained principles allowing for accession to them, which was subject to ratification

by both the acceding state and the parties Schengen I and Schengen II. The accession agreement could enter into force only after all ratifications have been carried out (Tchorbadjiyska 2007: p. 23–24). They were concluded both with the then EC member states and countries outside the Community structures. They have been included in the *acquis* Schengen as these mentioned protocols and agreements on accession. In accordance with the Schengen Protocol, the Schengen principles have been applied to them without delay (Schengen Protocol: Article 2 (1)). Some of the countries that have concluded protocols and agreements on accession have become Schengen member states after the signing and even the entry into force of AT. In this way, the post-Amsterdam principles also partially cover the countries of the "old EU", which signed the agreements on the accession to the *acquis* Schengen, but they became fully Schengen states after the entry into force of the AT, and thus by virtue of the Council decision. These include: Greece (accession agreement of November 6, 1992, Council Decision of December 13, 1999) and Denmark, Finland, Sweden (accession agreement of December 19, 1996, Council Decision of 01.12. 2000). At the same time, it accelerated the integration of Norway and Iceland into the Schengen area at the same time, but on a different basis than EU Member States.

In relation to the above, it is worth noting that in the case of Greece, late accession to the Schengen area in relation to other countries of the "old EU" still translates into real difficulties with controlling external borders (which are mostly sea borders). In the case of Scandinavian countries, historical and geopolitics relations proved to be stronger than European integration - the actual full inclusion of the Scandinavian countries into the Schengen area took place at the same time (some of them joined the EU by the AT and some still remain outside the EU).

It should be noted that with the entry into force of the Amsterdam Treaty on 1 May 1999, the Council replaced the Schengen Executive Committee (Schengen Protocol: Article 2 (1)). The main decision-maker in the field of the *acquis* Schengen has become the EU Council for Justice and Home Affairs, sitting as a Mixed Committee with the participation of Iceland and Norway (with time also Switzerland and Liechtenstein), (Dudzic 2008: p. 10). This is an unprecedented institutional change, where the body established under international agreements has been replaced by an EU institution. Furthermore, this EU institution, with regard to the *acquis* Schengen, holds debates in the panel covering non-EU countries.

Since the entry into force of the AT, a 5-year transition period related to the full "communitisation" of the *acquis* Schnegen has begun, so that it will be possible

to achieve an AFSJ within which it is necessary to ensure free movement of people (Rokicka 2000: p. 80). The idea was to grant the legislation based on the *acquis* Schengen a supranational rank, instead of an intergovernmental one. The end of the transitional period was also the date of the largest EU enlargement, which is another factor indicating the legal unification of the *acquis* Schengen and EU law, and, consequently, a significant reduction of territorial differences.

The Schengen Protocol has made a new division of the states of integrated Europe ("an area without borders"). By introducing the obligation to adopt the *acquis* Schengen by the new member states, the Union has made a "quantum leap" in strengthening the free movement of people, however allowing a separate position of the United Kingdom and Ireland at the same time, this process has slowed down. In the context of commenced Brexit, it seems that basically there is no possibility of retreat. At the same time, allowing for the incorporation of Norway and Iceland into the Schengen area, it allowed the Schengen area to be expanded to include countries outside the EU, but closely related to it in particular in terms of facilitating the movement of people. This opened the road to membership in the Schengen area to Switzerland and Liechtenstein, which together with Norway and Iceland were incorporated into the Schengen area after the entry into force of AT. The first and third stage of the post-Amsterdam principles were applied to them, while the second stage was obviously replaced by special EU agreements.

It should be noted that both the creation of the Schengen area and the legal consequences of its enlargement are immanently linked to the development of the EU. Establishment and strengthening of the Schengen area occurred during the period of intense debate on amendments to the treaty law. In fact, from the very beginning, Schengen legal regulations have been envisaged as solutions for the whole European integration, and not just for a selected, narrow group of signatories of the Schengen agreements. They were conceived as a model regulation for future instruments of EU law, which will be adopted if these issues are within the competence of the then European Community (Czapliński 2005: p. 18–32). This has become a quantum leap in the regulation of the legal consequences of the enlargement of the Schengen area, which has since been immanently connected with the enlargement of the Union. By binding the *acquis* Schengen with the rights of EU citizens and the EU freedom of movement of people, EU member states have placed this area under Treaty law and have included the Union institutions in its management. It cannot go unnoticed that the member states, agreeing

to some exceptions in the incorporation of the *acquis* Schengen, have complicated the EU structure by introducing the so-called variable geometry, including non-EU countries that extend beyond their territory, while leaving several EU member states (Martenczuk 2008: p. 499). In this dimension, the Schengen area is defined as a phenomenon of "extended" European integration or "incompatible" territorial map (Gruszczak 2012: p. 25–34). Paradoxically, however, the Amsterdam Treaty at the same time put an end to further progress in this perception of the Schengen area by establishing a clear principle that in the accession negotiations with the EU, the *acquis* Schengen and development measures are recognised as *acquis*, which should be fully accepted by all these countries. It can therefore be concluded that *acquis* Schengen is an EU immanent law, while strengthening the EU's free movement of people, extending its normative and territorial scope. This strengthening has a subjective dimension with respect to citizens of the new member states and the objective, by extending the territorial scope of the "area without borders" by abolishing controls at new internal borders.

Stage two – post-Amsterdam principles in the Treaty of Accession (Act of Accession)

The second stage of post-Amsterdam principles, like the first, are the regulations of the primary law of the European Union. Here, however, they are concretised in acts of accession and accession protocols, which are an integral part of the accession treaties to the Union. After AT, there were three such treaties that resulted in the enlargement of the EU in 2004, 2007 and 2013, additionally as a consequence of the first one there was also the largest enlargement of the Schengen area in 2007, which was the result of the largest EU enlargement three years earlier. The accession treaties contain two legal bases for accession to the EU and the Schengen area. The *acquis* Schengen was included in the legal systems of the new EU member states mainly in the framework of accession negotiations with the EU (Gruszczak 2018). All three stages of post-Amsterdam principles have been applied to Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Lithuania, Latvia, Estonia and Malta, making them full member states of both the EU and the Schengen area. They became the first states to join the Schengen area on the basis of the provisions of post-Amsterdam principles, while maintaining the entire three-stage process. When analysing the legal bases for the extension of the Schengen area, it should be pointed out that Poland (and the other 8 countries) have developed model practices. In this way, the Schengen Protocol and its complementary

accession acts became the beginning of the unification of *acquis* Schengen and EU law in the field of free movement of people across internal borders.

The scope of *acquis* Schengen in the Schengen Protocol does not raise any doubts, as it remains the same for all new EU member states. On the other hand, the scope of the *acquis* Schengen is extended in subsequent accession treaties, which results from the increasingly advanced development of the *acquis* Schengen. This is shown by a brief legal and comparative analysis of accession treaties regarding Poland's accession to the EU (and the remaining 8 states), Romania and Bulgaria as well as Croatia. The *acquis* Schengen is defined in the 2003 Accession Acts concerning the accession of Poland and other states and from 2012 on the conditions of accession of Croatia, and in the 2005 Accession Protocol regarding the conditions and arrangements for the admission of the Republic of Bulgaria and Romania to the European Union. The names do not matter, because both acts and protocols form an integral part of the accession treaties and have the same legal force. The *acquis* Schengen has been divided into two parts for each of these states. The first is the *acquis* Schengen resulting from the Schengen Protocol and the acts based thereon or otherwise related to it, as well as any further acts that may be adopted before accession (detailed in the annexes). The second type is the provisions of the *acquis* Schengen in the form in which they were incorporated into the framework of the European Union and acts based thereon or otherwise related to it, which do not belong to the first part. The first and, at the same time, the most important part of the *acquis* Schengen are states related to and applying it from the day of accession to the EU. The second part is binding for states also due to the accession to the Union, but it is fully applied only by a Council decision taken for this purpose, after checking, in accordance with the applicable Schengen evaluation procedures, that the necessary conditions for applying it are met in the new member state. (Act of Accession 2003, Article 3 (1–2), Accession Protocol 2005, Article 4 (1–2), Act of Accession 2012, Article 4 (1–2)). In practice, this comes down to the fact that the Council's decision allows full abolition of controls at internal borders, which is in fact even more facilitating the free movement of people.

In the case of Croatia, the full implementation of the *acquis* Schengen was strengthened by underlining the inclusion of all the Schengen provisions in accordance with the agreed common standards and basic principles. This decision is to be taken by the Council in accordance with the applicable Schengen procedures and taking into account the Commission report confirming that Croatia is still meeting its obligations

that are relevant to the *acquis* Schengen during the accession negotiations (Act of Accession 2012, Article 4 (2)). The adoption of such a more precise regulation seems to be significant after the experience of Romania and Bulgaria, which have met all the legal requirements of the *acquis* Schengen included in the accession protocol and determined during accession negotiations with the EU. However, the Council's decision has not yet been issued for political reasons which pose a threat to the functioning of the Schengen area in consideration of some of the member states. These reasons, although justified and appearing already at the stage of efforts to join the EU, have not been included in the legally defined terms of membership in the Schengen area, therefore there are no formal legal obstacles to the full inclusion of Romania and Bulgaria into the Schengen area (Szachoń-Pszenny 2014b: p. 45). They rather result from the migration crisis and more stringent requirements related to the internal security of the Union. With Croatia added at the stage of accession to the EU, an additional requirement for the European Commission to confirm that the state is still fulfilling its obligations under the *acquis* Schengen mentioned in the Act of Accession. Such a procedure allows the state to be controlled on an ongoing basis in terms of compliance with the post-Amsterdam principles set out in the second stage, not only by the Council, but also by the Commission. Therefore, in the institutional dimension, one can speak about the control of the *acquis* Schengen, not only by the Member States represented in the Council, but also by the European Commission representing the Union as a whole.

The second stage of the post-Amsterdam principles combines EU enlargement with the obligation to enlarge the Schengen area. This demonstrates the uniqueness of this historically fifth enlargement of the European Union, which this time has become a process, not just a point in time. Since then, accession to the EU is more than ever a process that continues even after the date of accession. Member states that joined the EU in 2004, 2007 and 2013 must also adopt a new flexibility tool, which is enhanced cooperation in the area of the *acquis* Schengen, and new criteria must be met in relation to the original Copenhagen accession criteria (Tchorbadjiyska 2007: p. 22–23).

The third stage – the post-Amsterdam principles on secondary law (Council decision)

The third stage of the post-Amsterdam principles allows full inclusion in the Schengen area. It is carried out under a secondary law legal act, which is of a nature approving the implementation of two previous stages. The Council decides on the unanimity

rule of its members representing the governments of the EU member states, which are also states of the Schengen area and the representative(s) of the government(s) of the member state(s) in which these provisions are to be implemented (Act of Accession) 2003, Art. 3 (2), Accession Protocol 2005, Art.3, (2): Act of Accession 2012, Article 4 (2). At the same time, it should be remembered that the Schengen states that are outside the EU also have the right to vote in this matter, but they participate in the Mixed Committee's formula.

At this stage, the second part of the *acquis* Schengen that is binding on the new member states from the date of accession to the EU becomes fully applicable in those countries that are *de facto* becoming full members of the Schengen area. The Council's decision is issued after verifying that the necessary conditions for applying the *acquis* Schengen have been met and after consulting the European Parliament. So far, one Council Decision of 6 December 2007 on the full application of the provisions of the *acquis* Schengen has been issued in the Czech Republic, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Republic of Slovakia. It resulted in the largest enlargement of the Schengen area following the largest accession to the EU. In this way, the efficiency of the three-stages principles in the rapid enlargement of the Schengen area has been proven.

The Council Decision is an legal act of secondary law constituted by an institution whose members are representatives of member states at the ministerial level. Granting the Council the ultimate competence regarding full membership of the Schengen area raises some doubts. The question arises, why this competence has not been divided between the main EU legislative institutions from which the Commission represents the Union as a whole, while Parliament acts on behalf of the EU society? Is it not better if the issues of *de facto* strengthening the free movement of people by the abolition of internal border controls would be decided more by an institution coming from general elections? Parliament issues only an opinion in this matter, which the Council takes into account, but has no competence to act jointly with the Council. This is particularly important in relation to the circumstances surrounding the ending of the Schengen enlargement procedure for Poland and other 8 EU member states and the Council's still missing decision regarding Romania and Bulgaria.

According to the Council's press release issued just before the decision came into force, it can be seen that the Council was willing to apply it even faster than the EP.

The evaluation of the abolition of internal border controls was finalised and the European Parliament delivered its opinion on 15 November 2007, but the Council, as early as on 8 November 2007, stated that the member states concerned had fulfilled all the necessary conditions for applying the *acquis* Schengen (Council Press Release 2007).

The European Parliament on 8 June 2011 issued a positive opinion on the accession of Bulgaria and Romania to the Schengen area. According to the EP, both states have met the conditions to join the common "area without borders". Having acknowledged the progress of both member states and the results of the audit visits carried out by teams of experts, the EP came to the conclusion that few issues that need to be further developed do not prevent full membership of Bulgaria and Romania in the Schengen area. Parliament's opinion was forwarded to the Council, which has not yet taken a decision (EP 2011). Apart from considering the reasons, it is worth focusing on the legal aspect of this solution, where only the third stage of the Amsterdam regime is missing for full membership in the Schengen area. What can certainly be stated is that the Council's decision in this matter must be taken in the short or long term.

The post-Amsterdam principles do not present the possibility of permanently remaining new member states outside the Schengen area. The same rules apply to Cyprus and Croatia. In this context, we can talk about pending membership, which in accordance with the adopted post-Amsterdam principles will transform into full membership in the Schengen area. In the current situation, the prospect of full membership is conditioned to a certain extent by the consequences of threats resulting from the intensified migratory pressure in recent years.

The Polish road to Schengen turned out to be exemplary in terms of the efficient implementation of all three stages of the post-Amsterdam principles. This does not mean that there were no problems, however, it should be admitted that in relation to the forecasts they were quickly resolved. The justification for more than three years of waiting for the full inclusion of new EU member states in the Schengen area, whose accession took place in 2004, is not only about adapting their borders to the requirements of the *acquis* Schengen. It was decided that due to the modernisation works on the Schengen Information System, the first new member states will be able to fully apply the *acquis* Schengen not earlier than at the end of 2007. In all states that joined the EU on 1 May 2004, the process of preparation for the application of the *acquis* Schengen was similar. Due to geographic conditions, it seemed that the most favourable solution would be the full application of the *acquis* Schengen by all these states at the same

time (Kołakowska, Krystyniak, Żelazo 2004: p. 75–126). It became a fact faster than expected. Interestingly, before the AT came into force, there were also forecasts that it is theoretically possible for Poland to join the Schengen area, but for practical reasons it does not seem possible (Jesień 1998: p. 86). This forecast did not work, although in the opinion of commentators, accession to the EU without full inclusion in the Schengen area was considered a "second category of EU members", while others considered abstaining from full extension of Schengen as justified, pointing to the need to ensure a high level of real protection of external borders. In fact, the truth is in the middle: on the one hand, there was a situation where, due to maintaining controls at the borders with the new member states, the social acceptance of accession was relatively weaker and the principle of free movement was not fully implemented and on the other hand new challenges of the implementation of the rules of the post-Amsterdam principles took on special importance. Work on the new information system SIS II and the process of assessing the readiness of the new member states to fully apply the Schengen provisions (the so-called SCHEVAL) effectively delayed the political decision on the date of enlargement of the Schengen area (Boguszewski, Jasiński, 2007: p. 8–14).

However, the mere fact of being included in the SIS does not directly affect the acceleration of full integration into the Schengen area. The decision regarding the inclusion of Poland (and the remaining 8 member states) in the SIS was taken only less than half a year (12 June 2007) before full inclusion in the Schengen area and a similar decision was taken 8 years ago with regard to Romania and Bulgaria (29 June 2010), and they are still not full members of the Schengen area.

Final conclusions

The reforms of the Amsterdam Treaty included in the Schengen Protocol initiated the introduction of new rules for the development of the *acquis* Schengen, which were closely linked to the European Union law. In the context of the incorporation of the *acquis* Schengen into EU law, it is possible to talk about the enlargement of the Schengen area on the pre-incorporation (pre-Amsterdam) and post-incorporation (post-Amsterdam) principles. The first of them were based on the principles of voluntary accession to intergovernmental cooperation. The second, which can also be described as EU rules for the development of the Schengen area, introduced the obligation to join the Schengen area as a legal necessity resulting from the accession to the European Union. The fulfilment of this obligation has been extended over time and regulated

in EU primary and secondary law. One can therefore speak more precisely about the legal necessity of joining two areas – first, the *acquis* Schengen and then the territory of the Schengen area. The analysis leads to the conclusion that the introduction of the post-Amsterdam principles accelerated the enlargement of the Schengen area. It first includes the EU member states whose accession took place after the AT, but also countries outside the Union, but fully applying *acquis* Schengen. Currently, the further enlargement of the Schengen area depends to a certain extent on the consequences of the migration crisis.

The post-Amsterdam principles of enlargemet of the Schengen area have been developed in three stages, along with the development of the *acquis* Schengen in the legal and institutional framework of the European Union. Starting from the obligation to adopt the *acquis* Schengen as part of EU law, through clarification in the treaties of accession to the Union, until approval by the Council decision of full membership in the Schengen area. The choice of primary law as the legal basis for the extension of the Schengen area gives the certainty of the immutability of the post-Amsterdam principles. The new EU member states received clear legal guidelines set out in primary law (the Reform Treaty and accession treaties), whose fulfilment is confirmed in secondary law. In this way, you can talk about the three-stage membership in the Schengen area, first as a candidate country to the EU, then a member state of the Union, until full participation in the Schengen area. This was very effectively and efficiently applied to the "first enlargement" of the Schengen area by new EU member states after AT. This confirms the hypothesis that the post-Amsterdam principles have accelerated the enlargement of the Schengen area, and at the same time influenced the process of unification of the EU law and the *acquis* Schengen not only in the legal but also territorial area. The principle of the three-stage accession to the Schengen area has, however, become a new formula for the enlargement of the Schengen area.

Subsequent enlargements are lagging behind in time, not so much due to the legal mechanism set out in the post-Amsterdam principles, but are part of the overall crisis tendency in the Schengen area. It seems that the current situation is unlikely to promptly apply the third stage of the post-Amsterdam principles to other new EU member states. The prospects of enlarging the Schengen area are confronted with the violation of legal principles regarding the temporary reintroduction of border control, which is already less and less temporary. However, it remains to be hoped that, just as the post-Amsterdam principles were quickly and effectively applied in all three

stages, leading to the largest enlargement of the Schengen area after the largest EU enlargement, they will also be applied to other new EU member states. The effectiveness of three-stages and its exemplary application cannot remain a single event and solutions should be found that would accelerate their full completion in relation to the countries with membership pending in the Schengen area. The lack of the last stage cannot be conditioned by political reasons, but should be reflected in meeting the conditions of the previous two stages. Two possible solutions can be seen here, the first of which is to adhere to the principles of the already adopted post-Amsterdam principles and the second to reform them for the future. The latter solution is, however, more difficult, because from the formal point of view it can take place in the next accession treaty at the earliest. The current stage of European integration does not indicate the possibility of a rapid EU enlargement, so this solution is unlikely in the nearest perspective. What remains to be done is to count on unanimity in the Council, the achievement of which is currently the only formal condition for the enlargement of the Schengen area. In fact, this requires the unanimity of the member states, which is difficult to achieve especially in view of the multifaceted consequences of the migration crisis.

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