Revision of the Schengen Evaluation and Monitoring Mechanism
Regulation (EU) No 1053/2013

This briefing is one in a series of implementation appraisals produced by the European Parliamentary Research Service (EPRS) on the operation of existing EU legislation in practice. Each briefing focuses on a specific EU law that is likely to be amended or reviewed, as envisaged in the European Commission's annual work programme. Implementation appraisals aim at providing a succinct overview of publicly available material on the implementation, application and effectiveness to date of specific EU law, drawing on input from EU institutions and bodies, as well as external organisations. They are provided by the Ex-Post Evaluation Unit of EPRS to assist parliamentary committees in their consideration of new European Commission proposals, once tabled.

SUMMARY

To put in place a system for verifying the application of the Schengen acquis by the Member States, in 2013 the Council of the EU and the European Parliament adopted Regulation (EU) No 1053/2013, establishing the Schengen evaluation and monitoring mechanism. This mechanism assesses, in particular, the implementation of measures in the following areas: the external borders, return, visa policy, police cooperation, the Schengen Information System (SIS), data protection, and the absence of border control at the internal borders. The mechanism became operational on 1 January 2015.

Recently, a number of challenges have put the Schengen area under strain. Security threats, the increased arrival of migrants and asylum-seekers, and the outbreak of the coronavirus pandemic have all highlighted the need for the EU to strengthen its crisis preparedness and management of cross-border pressures, and to keep the Schengen legislation updated.

As a component of the Schengen strategy that the European Commission intends to adopt in 2021, the revision of Regulation (EU) No 1053/2013 would aim to make the Schengen evaluation and monitoring mechanism more efficient, by revising current practices – for example, by shortening the adoption processes of the evaluation reports and recommendations, and by ensuring timely follow-up by the Member States. These measures are necessary to safeguard the free movement of persons in the EU and to guarantee that internal border controls remain measures of last resort in line with the applicable legal framework.

1. Background

The Treaty on the Functioning of the EU (TFEU) stipulates, among other things, that EU citizens shall have the right to 'move and reside freely' within the territory of the Member States, and that the absence of internal border controls on any persons within the EU territory, regardless of their nationality, shall be ensured by the EU (Articles 21(1), 67(2) and 77(2) (b) and (e) TFEU). Since the
entry into force of the Treaty of Amsterdam in 1997, the EU has offered its citizens an area of freedom, security and justice (ASFJ). To ensure this, the EU has consolidated the body of law referred to as the Schengen acquis.4

To put in place a system for verifying the correct application of the Schengen acquis by the Member States, in 2013 the Council of the EU and the European Parliament adopted Regulation (EU) No 1053/2013,5 establishing the Schengen evaluation and monitoring mechanism (the mechanism). As such, the regulation provides that 'the evaluation mechanism should set up transparent, efficient and clear rules on the method to be applied for the evaluations, the use of highly qualified experts for on-site visits and the follow-up to the findings of the evaluations'.

The mechanism covers the assessment of all aspects of the acquis, including:

- external borders;
- visa policy;
- data protection;
- police cooperation;
- judicial cooperation in criminal matters;
- the functioning of authorities when applying the acquis;
- the absence of border controls at the internal borders;
- the Schengen Information System (SIS).

The European Commission is responsible for the overall organisation of the evaluation and monitoring exercise. However, the mechanism is a shared responsibility between the Commission and the experts elicited by the Member States.6 The Council of the EU is responsible for issuing recommendations to the evaluated Member States, based on a Commission proposal on how to rectify shortcomings identified during the evaluations.7

Figure 1 below, taken from the 2020 Commission report on the first multiannual evaluation programme,8 presents a schematic view of this process. Figure 2 provides an overview of the timeline of the most important events involved in implementing the Schengen evaluation and monitoring mechanism.

Figure 1 – Schengen evaluation cycle

Source: European Commission report – First multiannual evaluation programme.
Figure 2 – Timeline of events relating to the Schengen evaluation and monitoring mechanism

- **Decision of the Executive Committee of 16 September 1998 to establish a Standing Committee on the evaluation and implementation of Schengen**

- **Regulation (EU) 1053/2013 establishing an evaluation and monitoring mechanism (SCH-EVAL) to verify the application of the Schengen acquis and repealing the decision of September 1998**

- **The mechanism becomes operational**
  - Some Member States see the need to impose border controls following events of terrorist attacks and the increased arrival of migrants and asylum-seekers

- **The first multiannual evaluation programme report** from the Commission to the Council and the Parliament is published - need identified to make SCH-EVAL speedier and more efficient
  - **The health crisis and the pandemic** show the need for the EU to **strengthen its crisis preparedness**, while also keeping its Schengen legislation up to date and future proof

- **Commission to review regulation in Q2 2021** to ensure that it can achieve its full potential as a tool to evaluate the functioning of Schengen and to ensure that improvements are effectively implemented

Data source: Author’s own contribution.
2. EU-level reports and evaluations

Inception impact assessment: revision of the Schengen evaluation and monitoring mechanism (2020)

At the end of 2020, the Commission published an inception impact assessment (IIA) proposing a revision of the legislation on the Schengen evaluation and monitoring mechanism. According to the Commission’s IIA, although the mechanism has led to substantial improvements in implementing the Schengen acquis, a number of shortcomings challenging its effective functioning have been identified. The IIA identified six specific concerns:

- the evaluation process was excessively long and resource-intensive, which had a significant impact on the experts’ ability to swiftly identify and report deficiencies;
- the Member States’ experts’ contributions did not always match the needs. Moreover, at times, the experts did not have the required profile or relevant experience in the relevant policy fields;
- on average, the Member States needed more than two years to adopt the measures envisaged in their action plans. Certain recommendations remained unaddressed for a number of years, as there was no clear and binding timeline for their implementation;
- the planning of unannounced visits required lengthy procedures, with 24 hours notice having to be given to the Member States. All this limited the capacity to rapidly adapt to changing circumstances and undermined the surprise nature of on-site visits;
- the system did not ensure the holding of thorough political discussions on the state of the Schengen area;
- the assessment of respect for fundamental rights in the implementation of the Schengen acquis was not sufficiently integrated in the evaluation mechanism.

European Commission report on the functioning of the Schengen evaluation and monitoring mechanism (2020)

In November 2020, the Commission published a report on the functioning of the Schengen evaluation and monitoring mechanism (pursuant to Article 22 of Council Regulation (EU) No 1053/2013), for the 2015-2019 period. All of the relevant Member States were evaluated, in line with the first multiannual evaluation programme, as regards their implementation of measures in relation to the Schengen external borders, return, visa policy, police cooperation, the Schengen Information System (SIS), data protection, and the absence of border control at the internal borders. The report found that one of the main shortcomings of the current mechanism was the excessive length of the first phase of the evaluation process (adoption of a report and recommendations).

In addition, it was also found that there was room for improvement in what concerned the quality of reports and recommendations, as well as regarding the coherence of evaluations across different policy fields. Discrepancies in this respect existed both across countries and within policy fields. Furthermore, the check-lists used to carry out evaluations needed to be revised to focus more on the main elements affecting the Schengen area as a whole. Yet again, there was a lack of systematic use of the available analytical tools – in other words, thematic evaluations (focussing on evaluating several or all Member States at once in a particular Schengen-relevant aspect), could be used in a systematic way to assess the implementation of major legislative changes as they enter into force.

A need to improve synergies and cooperation with other actors and evaluation mechanisms was also identified. In particular, the role played by EU agencies – for example, the European Border and Coast Guard Agency (Frontex), the European Union Agency for the Operational Management of Large-scale IT Systems (eu-LISA), the European Agency for Fundamental Rights (FRA), and
Europol) – and the European Data Protection Supervisor and national quality control mechanisms needed reinforcing.

This could be achieved by involving agencies more extensively in the evaluations and by establishing more regular and systematic exchange of information between them and the Commission. It is particularly important to increase synergies with the Frontex vulnerability assessments¹¹ and for the FRA and Europol to develop more targeted risk analyses that would help design better evaluations.

Lastly, the report emphasised the need for a more regular and structured political dialogue among the actors involved in the functioning of the Schengen area.

Commission staff working document (2020)

Accompanying the report on the functioning of the Schengen evaluation and monitoring mechanism, the Commission published a staff working document providing further details on the findings of the evaluations that had been carried out, as well as statistics on the application of the main provisions of the Schengen acquis. The document portrayed the situation as of 5 November 2020.

It was found that, in terms of the length and variability of the evaluation process, the yearly average length of the evaluation process was relatively stable throughout the duration of the multiannual evaluation programme. However, the length of the individual procedures varied greatly – ranging from three months to over two years. Most implementing decisions carrying recommendations had been adopted between six and 15 months from the end of the evaluation visits, but in 15% of the cases it had taken up to 18 months.

A significant variability characterised all stages of the process, in particular the stage at the Council. Most evaluation reports had been adopted by the Commission in less than nine months from the evaluation visit. The Council had adopted the majority of the implementing decisions within nine weeks from the Commission proposal, but more than a third had required over 12 weeks.

3. Members' written questions

Written question by Peter Kofod (ID), 1 December 2020

Subject: Remarks from the Commission at the Schengen Forum of 30 November 2020

The question concerned the remark by the Commission that internal border checks were not an effective tool in preventing crime and terrorism. The Member enquired whether this remark was based on specific security assessments performed by the Commission itself or by the national authorities in the Member States.

Answer given by Ms Johansson on behalf of the European Commission, 3 March 2021

The said remark was based on the information available to the Commission on the identity and status (in terms of legality of stay) of those who had perpetrated terrorist attacks in the EU over the past five years. This information pointed to the conclusion that most of these perpetrators had been legally residing in the territory of the Member States affected by the attack.

Written question by Cornelia Ernst (The Left), 5 February 2020

Subject: 'Alerts issued by third countries in the Schengen Information System'

Under SIS II, alerts¹² can be issued at the request or the behest of SIS II countries. The Member enquired which SIS II Member States had made entries or issued alerts on the basis of information provided by third countries, and requested a number of details on these entries and alerts.
Answer given by Ms Johansson on behalf of the European Commission, 28 April 2020

Some Member States have created alerts on foreign terrorist fighters in the SIS, based on information originating from third countries – but it is not possible to disclose information about these, due to the sensitive nature of the data.

Member States issuing alerts must fulfil the legal requirements of proportionality, accuracy and lawfulness of data (which also apply to cases when an alert is issued on behalf of third countries). Member States are liable for any damage caused by entering data that is factually inaccurate or is stored unlawfully.

Written question by several Members (Renew), 3 September 2019

Subject: ‘Illegal use of the Schengen information system database by UK authorities’

This question concerned the UK’s illegal retrieval of classified personal information (including fingerprints and photographs) from the SIS. The Members requested that the Commission recognise the gravity of the breach and examine the situation in a full, detailed and swift inquiry. The Members enquired if the Commission was planning to start infringement procedures against Member States not complying with the rules regarding the retrieval of classified personal information.

Answer given by Ms Johansson on behalf of the European Commission, 30 January 2020

In general, SIS legislation allows Member States to keep a national copy of its data for consultation purposes. Member States are allowed to cooperate with external contractors in the execution of the requirements laid out in the SIS legislation, but must not entrust the complete operational management of technical SIS copies to private actors. In effect, SIS data cannot be transferred or be made available to third countries or international organisations.

4. European Court of Justice

Ruling in Case C-193/19

Schengen acquis – national policies and the SIS

In 2015, a Gambian national residing in Sweden applied for an extension of his temporary residence permit. The application was made on grounds of family reunification. During the examination of his request, the Swedish Migration Agency received information from the Norwegian authorities that the person concerned had used multiple identities in Norway and was subject of an SIS alert.

In 2017, the Swedish Migration Agency turned down the above Gambian national’s application for an extension of his residence permit because his identity could not be confirmed. The referring court asked the ECJ whether it was a requirement of the Convention Implementing the Schengen Agreement (CISA) and the Schengen Borders Code (SBC), that someone must also provide proof of identity in a situation where the application is made in the Member State in which the person concerned is already residing – when the application is not related to humanitarian concerns.

The ECJ ruled (C-193/19) that the SBC covers the issuing of residence permits to third-country nationals already present in the Schengen territory. However, the Member State must take the interest of the country issuing the SIS alert into account when deciding on the issue of a residence permit. In practical terms, this means that the receiving Member State must consult the issuing Member State and can only issue, extend or renew a residence permit for ‘substantive reasons’ within the meaning of Article 25 of the CISA.
Ruling in Case C-482/08

Development of provisions of the Schengen acquis – exclusion of the United Kingdom from the procedure for adopting a decision

This case concerned access to the Visa Information System (VIS). In 2008, the Council adopted Decision 2008/633, regulating access to VIS data for the purposes of prevention, detection and investigation of serious criminal offences. The UK claimed that the provision indirectly established a significant level of police cooperation and that the Schengen Protocol did not provide the correct legal basis for this. It was enquired whether or not Decision 2008/633 was built upon the Schengen acquis.

The ECJ ruled that (C-482-08) the decision was in fact part of the Schengen acquis, since:

- it organised the ancillary use of a database concerning visas and was, by way of consultation, a secondary basis for police cooperation;
- it complements [the VIS Regulation] insofar as it provides for a legal basis under Title IV of the EC Treaty authorising access to the VIS for designated authorities and for Europol;
- if the decision were to be regarded as a simple police cooperation measure, it would enable all Member States to participate in the laying down of the detailed rules for consultation of the VIS, even though 'some of them did not participate in the definition of the principles which governed the establishment of that database on visas, are not obliged to enter in the system the data for all visa applications received by them, and do not contribute to the management or financing of the system'.

Ruling in Case C-355/10

Introduction of additional rules governing border surveillance – Legislative powers

In 2010, the Council adopted a decision supplementing the SBC as regards the surveillance of EU external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. The European Parliament contested this decision, stating that it exceeded the Council's implementing powers.

Since the relevant legislation delegated, only to the Council, the competence of adding non-essential elements, the question was posed as to whether the contested decision concerned essential or non-essential elements of the SBC. The ECJ ruled (C-355/10) that the SBC holds that the aim of sea border surveillance is to keep unauthorised individuals from crossing the border, but that it does not contain any rules governing this aspect.

Given that the contested decision laid down measures that border guards could take against detected ships and persons on board these ships, and under which border guards could enter such ships, the ECJ considered that the enforcement powers entail political choices within the responsibility of the European Union. An assessment of the conflict of interests is needed in the execution of these powers. The ECJ concluded that the decision implied a major development in the SBC, and as such annulled it.

5. Stakeholder opinions/academic papers

Stakeholder opinions

In November 2020, the Commission organised the first ever Schengen forum, bringing together Members of the European Parliament and home affairs ministers, with the aim of gathering political opinions to be considered in the context of the revision of the Schengen acquis regulation. A press
release summarising the main positions expressed during the event stated that one of the focal points was about improving the mechanism evaluating the implementation of the Schengen rules. During this meeting, Member State representatives emphasised the need for regular meetings both at the political and the technical level.

Relevant research and EPRS publications

Both in European Parliament publications and in research on the Schengen evaluation and monitoring mechanism, the suggestions for improvement appear to be in line with the Commission inception impact assessment (IIA) proposing a revision of the existing legislation, with the report on the mechanism for the 2015-2019 period and with the staff working document outlined in Section 2 of the present paper. A research article published in 2019 addresses the shortcomings of the experts recruited by the Member States to do the Schengen acquis evaluations. Namely, it advises on:

- the creation of a permanent pool of experts with regular training (organised by the European Union Agency for Law Enforcement Training (CEPOL), by Frontex or by any other relevant organisation);
- working with evaluation experts to develop a review mechanism to ensure that evaluations meet the needs of the changing context in Europe;
- supporting the exchange of best practices and information among the different evaluation fields and experts – making sure that best practices remain updated.

A study on 'The state of play of Schengen Governance', commissioned by the European Parliament’s Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Civil Liberties, Justice and Home Affairs (LIBE), itself makes a number of recommendations for the improvement of the evaluation and monitoring mechanism, some of which involve amendments to specific articles of the relevant legislation:

- Article 2 – introducing a definition of 'serious deficiencies' to be addressed urgently by the Member States, while retaining enough flexibility to cover the range of possible scenarios;
- Article 10 – amending the regulation to provide the Commission with the possibility of building an expert pool of evaluation experts.

In 2020, France and Germany appealed for 'proper operation of the Schengen Area, with increased coordination by Member States in times of crisis'. In the research domain, there are various opinions regarding the impact of the arrival of migrants into the European Union and the presence of a 'crisis' in the Schengen area. However, there appears to be a consensus that the arrival numbers of asylum-seekers have dropped significantly since 2016 – despite several Member States such as Austria, Germany and France 'continuing to refer to secondary movements', and Sweden, Austria and Germany mentioning concerns regarding the 'situation at the external borders'.

How – and whether – to proceed further, making legislative connections between the Schengen acquis and the Schengen evaluation and monitoring mechanism, on the one hand, and migration and asylum legislation, on the other, is debated. A November 2020 study on asylum procedures at the border by the European Parliamentary Research Service proposes the creation of an EU asylum monitoring mechanism, separate from the Schengen mechanism. Furthermore, a study published by the European Policy Centre argues that Schengen controls and migration and asylum considerations cannot be considered as one,'as Frontex … explained, a border guard has an average of 12 seconds to determine entry or refusal of entry at the EU’s external borders. This is adequate time to ensure that the document presented is in order and quickly check SIS II ... but nothing further'. However, there is research on considering the advantages of establishing further practical links in the implementation of the legislation relating to both the Common European Asylum System and the Schengen acquis.
6. Consultations, citizens' enquiries, petitions

The 2019 standard Eurobarometer survey found that 'more than eight in ten Europeans say they are for 'the free movement of EU citizens who can live, work, study and do business anywhere in the EU' (equivalent to 81 %, 2 percentage points less than in the autumn of 2018), while 13 % are 'against' it (unchanged), and 6 % (2 percentage points more than in 2018) answer that they 'don't know'. The 'free movement of people, goods and services' is perceived as the EU's most positive achievement by six in 10 EU citizens. More than half of Europeans say they have benefited from the absence or reduction of border controls when travelling abroad. Support for 'the free movement of EU citizens who can live, work, study and do business anywhere in the EU' is less widespread in the United Kingdom and Italy (where 68 % were in favour of the common policies).

Enquiries addressed by citizens to the European Parliament related to the Schengen acquis and Schengen monitoring reveal an unclear perception by a part of the public of what the Schengen legislation is about and what the EU's migration and asylum policy and procedures are about. These enquiries are not indicative of or related to the issues tackled in the 2019 standard Eurobarometer survey.

MAIN REFERENCES


ENDNOTES

1 A joint information system that enables the relevant authorities in each EU Member State, by means of an automated search procedure, to have access to alerts on persons and property for the purposes of border checks and other police and customs checks carried out within the country in accordance with national law and, for some specific categories of alerts (Art. 96), for the purposes of issuing visas, residence permits and the administration of legislation on aliens in the context of the application of the provisions of the Schengen Convention relating to the movement of persons.

2 The Commission aims to adopt a Schengen strategy for a stronger border-free area, which includes: a) updating the Schengen Borders Code, b) reviewing the Schengen evaluation mechanism to make the Schengen area stronger, more resilient and adapted to evolving challenges.

3 The Treaty on the Functioning of the European Union (TFEU) is one of the two treaties forming the constitutional basis of the European Union, the other one being the Treaty on European Union.

4 Schengen acquis or Schengen legislation: the body of law accumulated by the European Union relating to the regulation of the Schengen area.

5 Replacing the Standing Committee in the evaluation and implementation of Schengen, previously in place as per the Decision of the Executive Committee of 16 September 1998.

6 The Commission carries out evaluations over a five-year cycle following multiannual and annual programmes, together with experts from the Member States and the EU agencies that participate as observers. Each country is evaluated at least once every five years. Additional ad-hoc evaluations in the form of unannounced evaluations or revisits can be organised, as required. Thematic evaluations are an additional tool for assessing the implementation of specific parts of the Schengen acquis across several countries at the same time.

7 The conditions for the participation of Denmark, the United Kingdom (before its withdrawal from the EU), Ireland, Iceland, Norway, Switzerland, Liechtenstein, Cyprus, Bulgaria, Romania and Croatia are outlined in the regulation.
The figure has been altered for this briefing – namely the abbreviations in the original figure have been spelled out in full.

In the case of the first multiannual programme (2015-2019), 10 months passed between the evaluation visits and the adoption of the evaluation report. It took about two and a half months for the recommendations by the Council to be adopted. This increased the duration of the overall evaluation process, which lasts already more than a year from on-site visits to the implementation of the recommendations.

Fundamental rights: personal, civic, political, economic and social rights enjoyed by people within the EU.

A vulnerability assessment is a systematic review of security weaknesses.

SIS II refers to the second generation Schengen Information System.

The Visa Information System (VIS) allows Schengen States to exchange visa data. It consists of a central IT system and a communication infrastructure that links this central system to national systems.