Improving the Schengen evaluation and monitoring mechanism

Impact assessment (SWD(2021) 119, SWD(2021) 120 (summary)) accompanying a Commission proposal for a Council Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) 1053/2013

This briefing provides an initial analysis of the strengths and weaknesses of the European Commission’s impact assessment (IA) accompanying the above-mentioned proposal, submitted on 2 June 2021 and referred to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE).

The proposal is a revision of Council Regulation (EU) 1053/2013 (the Regulation) establishing the evaluation and monitoring mechanism used for verifying the application of the Schengen acquis, which includes three pillars: 1) measures at the external borders; 2) compensatory measures – common visa policy, police cooperation, return policy and the Schengen Information System (SIS); and 3) a robust monitoring mechanism. Under the third pillar, the Commission was assigned the responsibility for the coordination and the overall organisation of the Schengen evaluation and monitoring mechanism (SCH-EVAL, or the Mechanism). Since 2014, the Commission has been carrying out the evaluations jointly with the Members States, according to multiannual and annual programmes. The objective of the present revision1 is to ensure that SCH-EVAL becomes a fully effective tool for evaluating the functioning of Schengen and for ensuring that the recommendations stemming from the evaluations are effectively implemented by the Member States. This proposal on the establishment and operation of an evaluation and monitoring mechanism for verifying the application of the Schengen acquis was announced by the European Commission President, Ursula von der Leyen, in her State of the Union address on 16 September 2020 and is part of the 2021 Commission work programme (CWP). Over time, the European Parliament has highlighted a number of critical shortcomings of SCH-EVAL; in a 2018 resolution it invited the Commission to address them. Additionally, the Parliament has commissioned several studies,2 most recently on the state of play of Schengen governance, in which it has made recommendations on how to strengthen SCH-EVAL. These recommendations were picked up by the Commission in its IA. The Council has adopted conclusions on the Mechanism, in which it invites the Commission to put forward initiatives.

Problem definition

The problem definition draws on the findings of the Commission’s evaluation of the Mechanism’s first five years of operation (2015-2019). According to the IA, the problem is three-fold (IA, pp. 10-21). The Mechanism is characterised by:

- limited strategic focus and a high degree of fragmentation;
- limited capacity to identify, quickly adapt and react to new circumstances, legislative developments and trends, particularly violations of fundamental rights at the EU’s external border; and
- slow adoption and implementation of remedies, with a peer-to-peer system that does not exert the expected pressure.
Limited strategic focus and significant fragmentation that prevent an overview of the functioning of Schengen as a whole

Article 4 of the Regulation states that evaluations may cover all aspects of the Schengen acquis, but lists six specific policy areas, thereby creating an expectation that these are the areas to be evaluated. These areas are: external border management, common visa policy, SIS, data protection, police cooperation, and return. Given the many policy areas and legal acts that regulate Schengen (around 200 acts), the Member States and the Commission ‘pre-selected’ about 25 legal acts in the six policy areas that should be evaluated in the first five-year cycle (2015-2019).

As a result, about 35-40 detailed reports were prepared every year, focusing on correct transposition and implementation of all the provisions of these 25 acts. According to the IA, this focus on details made it almost impossible to identify potential problems generated by the interplay of policy areas. In contrast, thematic evaluations seeking to identify common challenges and trends took place only twice over the five-year period. As a consequence, the reports remained at technical level and were rarely discussed at political level. This, despite the fact that the Regulation clearly states that SCH-EVAL should contribute to ‘political discussions at ministerial level on the correct functioning of Schengen’ (recital 11). In addition, the Council’s involvement in the adoption of all recommendations has limited its capacity to put pressure on the Member States to adopt remedial actions and to focus on the most politically relevant aspects that could have an impact on the functioning of Schengen. Furthermore, Article 4’s specific reference to the Member States created a situation where evaluations did not cover the new relevant activities of the EU agencies, even though they were traditionally the Member States’ responsibility. This created an asymmetry, as the Mechanism did not cover the activities implemented by private entities on behalf of a Member State (e.g. service providers in the field of visa policy or airlines under external border management). Finally, Article 3 and 10’s general obligation for all Member States to nominate experts for the evaluation teams did not always match the needs of individual evaluations in terms of the number or qualifications of experts. All Member States appointed experts for the Schengen evaluation teams, but in very different proportions, with five Member States providing one-third of experts: Romania, Poland, Germany, the Netherlands and Portugal (IA, p. 34); this resulted in a disproportionate amount of work for the team members.

Insufficient capacity to identify, quickly adapt and react to new circumstances, legislative developments and trends, particularly violations of fundamental rights at the EU’s external borders

The Regulation introduced multiannual and annual (periodic) evaluation programmes, as well as unannounced visits, revisits and thematic evaluations. However, the first five-year cycle focused mostly on periodic – comprehensive and predictable – evaluations per Member State and per policy field. Overall, 83 % of the visits were announced evaluations. The IA explains that it took disproportionately long to programme an evaluation and carry it out, even for unannounced visits. Furthermore, since the 2015 ‘refugee crisis’, the migrants arriving irregularly increased the pressure on front-line Member States to protect the EU’s external borders. An increased reporting of violence and illegal pushbacks at the EU’s external border triggered concerns regarding the fundamental rights protection of third-country nationals. According to the IA, the Mechanism proved less effective in detecting, reacting to and addressing those claims and material breaches. Its limited capacity to detect fundamental rights violations at the external borders originates from the rigidity of the programming and conditions for unannounced visits, lack of experts with the right profile, inadequate risk analysis, insufficient use of sources of information from third parties and insufficient involvement of the EU Fundamental Rights Agency (FRA) in external borders evaluations.

Slow adoption and implementation of remedies, with a peer-to-peer system that does not exert the expected pressure

Between 2015 and 2019, it took on average about one year, with some cases taking up to 18 months, from the end of the evaluation visit to the adoption of the recommendations by the Council based on the Commission’s proposal, which is usually adopted at the same time as the evaluation report. This delayed the capacity of the Mechanism to bring about concrete changes swiftly, as the adoption of the
recommendations is what triggers the Member States’ obligation to implement action plans to remedy identified deficiencies. The five-year evaluation confirmed that it took over two years on average to close an action plan from the date of its submission. A number of recommendations remained open for years and at the end of the five-year cycle, the Commission had formally closed only about 25% of the procedures.

According to the IA, the above problems hinder SCH-EVAL from operating at its full potential, which in its turn hinders the implementation of the Schengen acquis and trust among the Member States. The IA elaborates on the corresponding problem drivers that are grouped into four categories (IA, pp. 21-34):

- material and temporal scope of evaluations;
- rigid evaluation programming and inadequate criteria underlying the evaluation and monitoring tools;
- inadequate articulation of processes and procedures with disproportionate institutional balance; and
- inadequate and insufficient participation of relevant actors in the design and implementation of evaluations.

Besides the findings of the evaluation, the problem definition in the IA is underpinned by stakeholder contributions, a recent European Parliament study, internal Commission data, a FRA report and a European Court of Auditors report. Overall, the problem addressed in the IA is well defined and substantiated with evidence. The IA mentions briefly that the coronavirus pandemic has highlighted the rigidities and inability of SCH-EVAL to account for the changing conditions and to cope with uncertainty, but does not provide further detail on how the pandemic has affected the functioning of the Mechanism.

Subsidiarity / proportionality

In addition to explaining the legal basis (Article 70 of the Treaty on the Functioning of the European Union, TFEU), the IA discusses the need for action at EU level and the EU added value. Furthermore, the IA compares the options in regard to their proportionality, as required by the Commission’s Better Regulation Guidelines (BRG). At the time of writing, four national parliamentary assemblies had started scrutinising the Commission proposal.

Objectives of the initiative

The general objective as set in the IA is to improve SCH-EVAL, to boost its effectiveness, and to strengthen the monitoring pillar of the Schengen governance to make Schengen more resilient. For the purpose of achieving the general objective, the following specific objectives have been set (IA, pp. 37-38):

1. Avoid gaps in SCH-EVAL’s scope and make more strategic use of different tools proportionately to different situations (increase strategic focus);
2. Rationalise the distribution of tasks and responsibilities of the different actors involved, simplify and accelerate process and procedures;
3. Strengthen the implementation of fundamental rights safeguards under the Schengen acquis; and
4. Optimise the participation of Member State experts, the involvement of EU bodies and agencies and synergies with other instruments that complement the Mechanism.

Overall, the specific objectives correspond to the problems that were identified. The IA sets operational objectives defining specific deliverables of policy actions under the preferred option and contains a non-exhaustive list of quantitative indicators proposed to monitor the achievement of the objectives. Furthermore, the IA sets a five-year evaluation timeline following the entry into force of the amended Regulation and mostly qualitative targets, explaining that ‘they are contingent on external factors as they correspond to activities reactive to unpredicted risk situations’ (IA, p. 90). Overall, the objectives set in the IA are specific, measurable, achievable, relevant and time-bound and therefore comply with the SMART requirements of Tool#16 of the BRG, although the targets would be more specific if they were quantified.
Range of options considered

The IA discarded the following two policy options (IA, p. 57):

- **A significant widening of the Mechanisms' scope to include comprehensive evaluations of the asylum systems.** The extension to areas not belonging to the Schengen acquis would require the adoption of a separate legal act, while a solid group of Member States clearly opposes politically a comprehensive integration of the asylum systems;

- **Abolishment of the evaluation cycle** to carry out evaluations on a need basis. The Mechanism provides certain guarantees of transparency and predictability about each Member State's evaluation. The cycle seems to be the easiest and most straightforward option, while regular evaluations create an additional incentive for Member States to bring about improvements.

In addition to the baseline scenario (‘do nothing' option), the IA assesses four options. According to the IA, these options build on each other and are cumulative rather than alternative, depending on the degree of ambition (IA, pp. 39-59):

- **Baseline** – under this option, the Regulation would remain unchanged. The total number of evaluation visits would most likely not change, although the number of announced periodic evaluations would increase, as Bulgaria, Romania, Croatia and Cyprus will need periodic evaluations in all policy areas, while Ireland would be evaluated in at least three. This will happen at the expense of unannounced and thematic evaluations and will result in a 5% increase in human resources, should the same number of experts and current level of fragmentation remain. With an increase in periodic evaluations, the asymmetries and deficits of experts that Member State contribute to the evaluation teams are likely to worsen. No significant changes are predicted in terms of the length of the evaluation process.

1. **Operational changes (Option 1):** under this option, the policy areas referred to in Article 4 (scope) would remain, while new ones would be added (e.g. IT systems) and the existing ones merged (e.g. police cooperation and SIS). Better use would be made of the risk analysis provided by EU agencies, while the annual SCH-EVAL report would include an overview of Member States' state of play in the implementation of recommendations, thereby increasing the peer-pressure and serving as a basis for political dialogue. Internal workflows would be simplified and the frequency of Schengen Committee meetings would increase. To improve follow-up, the use of online and IT tools would increase, e.g. video conferences with Member States. To strengthen the implementation of fundamental rights safeguards, the FRA guidelines would be applied more broadly and FRA involvement in evaluations would be increased by inviting its observers to take part in the evaluation visits. To address the shortcomings related to the designation of sufficiently qualified experts, the Commission and EU bodies/agencies could introduce training in those areas where it is currently lacking (visa policy and data protection) and improve current training.

2. **Targeted legislative changes (Option 2).** This option builds on the operational changes under Option 1 and aims to increase legal certainty. Under this option, the reference to the specific policy areas in Article 4 of the Regulation would be deleted and the Schengen Committee’s current practice of agreeing on the specific policy areas at the beginning of the evaluation cycle would be codified. The legal basis would clarify that EU agencies are governed by the Mechanism whenever they implement executive tasks delegated de facto or de iure by the Member States; that would qualify as implementation of the Schengen acquis. The procedure for adopting and amending the annual programme would be simplified by eliminating the following: 1) the need for a formal amendment, and 2) the obligation to programme unannounced evaluations, which the Commission could plan on a needs basis at short notice. Evaluation reports would be declassified, specific timelines for procedural steps would be set and reporting obligations would be reduced (e.g. six months for adopting the evaluation report and two progress reports per year instead of
four). Explicit reference to the FRA risk analysis would be made in the Regulation and the reference to fundamental rights in the provisions on trainings would be strengthened.

3 **Ambitious legislative changes (Option 3).** This option presents a more ambitious approach that incorporates the operational and legal improvements under Options 1 and 2 combining them with fundamental changes to the Mechanism’s design and functioning. The scope of the Mechanism would go beyond the Schengen *acquis* to cover ‘all aspects related to the implementation and functioning of Schengen’, within the limits of the evaluations agreed on under the multiannual and annual programme. The Mechanism would carry out comprehensive risk-based Member State evaluations covering only the elements identified through risk analysis and situational awareness. A specific evaluation focusing on fundamental rights would be created, disentangling them from other policy areas. The length of the multiannual evaluation cycle would be extended to seven years, and the criteria for thematic evaluations and the purpose of unannounced visits (i.e. random ‘health check’ or ‘investigative’) would be clarified. The 24-hour advance notice for investigative unannounced evaluation would be eliminated and a fast-track procedure for cases of serious deficiencies would be introduced (2.5 months from the evaluation visit).

Under this option, the Commission would adopt both the evaluation report and the recommendations in a single document, while the Council would retain the power to adopt recommendations for politically relevant cases: first-time evaluations, thematic evaluations and cases of serious deficiencies. This option would introduce an annual call for experts alongside an obligation for the Member States to designate one expert per policy area, and would create a pool of experts managed by the Commission.

4 **Combined approach (Option 4).** This option is a combination of measures envisaged under the three previous options, depending on the intervention area and the level of ambition. Option 4 would delete the reference to the specific policy areas in Article 4 of the Regulation and would extend the evaluation cycle to seven years. It would include systematic thematic evaluations, two types of unannounced visits – with or without 24 h notice, depending on the purpose – and two types of revisits (serious deficiencies revisits and verification revisits). Under this option, the Commission would adopt both the evaluation report and the recommendations in a single document, while the Council would retain the power to adopt recommendations for politically relevant cases. Option 4 would reduce the current length of the first phase of the evaluation procedure from 12 months to 4-6 months (ordinary procedure) and from 12 months to 2.5 months (for the fast-track procedure in cases of serious deficiencies). It would create a yearly permanent pool of experts managed by the Commission, while also rendering the requirement for the size of the evaluation teams more flexible and increasing the non-financial incentives for participation. This option would further maximise the input and coordination with EU agencies and bodies and other quality control mechanisms by way of improved risk analysis, enhanced coordination, situational awareness reports and new legal obligations for coordination with the EU bodies and agencies. Option 4 would include a reference to the regular submission of risk analyses by the FRA, strengthen the reference to fundamental rights in the provision on trainings, increase FRA participation in evaluation visits, and include a specific provision regarding the use of evidence provided by third parties.

The IA concludes that **Option 4 is the preferred policy option.** According to the IA, the combination of measures under the preferred option is based on stakeholders' positions and the legal and operational obstacles that confront some of the options (p. 54). Indeed, stakeholders’ positions seem to have been taken on board. The baseline reflects possible developments in the absence of new EU-level action, but is not fully dynamic in that it does not seem to take into account other policies in place or recent legislative proposals in the field, for example, the proposals to enhance the responsibilities of eu-LISA and Europol. More thorough reflection on the impact of recent circumstances such as the coronavirus pandemic could have further improved the baseline. The content of the policy options is set out in a clear and balanced manner and, by the IA’s own admission, the options are cumulative in their degree of ambition, rather than alternatives to each other.
Assessment of impacts

According to the Commission, evaluating the benefits of the Schengen acquis as such is outside the scope of the IA, and measuring SCH-EVAL’s contribution to the correct implementation of the Schengen acquis is a highly speculative endeavour. Instead, the IA predominantly analyses the administrative costs and benefits of the options for the stakeholders directly involved in SCH-EVAL’s functioning: the Member States, the Commission and the EU bodies and agencies. The preferred option is estimated to: reduce the administrative costs for the submission of Member States’ progress reports by at least 50%; redistribute more equally the contribution of national experts among the Member States; decrease the average number of experts needed by 33-36%; and reduce the costs of announced evaluations by almost 40% for the Member States and by 40% for the Commission. The IA assigns qualitative scores to the options, compares them based on the mandatory criteria of efficiency, effectiveness and coherence, as well as in regard to their proportionality as required by the BRG, and concludes that Option 4 is the preferred option. Among the factors leading to the choice of Option 4 was its potential for simplification and for reducing the administrative burden (IA, p. 87). Economic, social and fundamental rights impacts are touched upon only briefly and are expected to be positive under all options, although they were not possible to quantify. Considering that one of the objectives of the IA it to strengthen the implementation of fundamental rights safeguards under the Schengen acquis, such a limited assessment of the fundamental rights impacts is surprising. The recommendations of Tool #28 of the BRG Toolbox on fundamental rights and human rights would have been useful for the IA in this regard.

SMEs/ Competitiveness

According to the IA, citizens and undertakings will benefit from the better implementation of the Schengen acquis and are the main beneficiaries of this initiative. However, the Regulation has no immediate or practical effects for them (IA, p. 132).

Simplification and other regulatory implications

According to the IA, the preferred Option 4 should reduce the overall burden on Member States and EU institutions (IA, pp. 88-90). For the Commission, the administrative burdens arising from the adoption of formal communications on the assessment of action plans and their translations would be eliminated, while the amendments to the multiannual and annual evaluation programmes would no longer be required with the same frequency. Furthermore, the burden generated by the need to encrypt the evaluation reports would be eliminated with the declassification of reports. For the Member States, administrative burden reductions would be generated by the lower frequency of announced evaluations (extension of the evaluation cycle to seven years) and follow-up reports. Finally, the changes to the decision-making would reduce the number of cases in which the Council would adopt the recommendations to politically relevant ones, limiting the administrative burden for the Council. Consistency and coherence of the proposed revision with the existing initiatives, such as, among others, Regulation (EU) 2019/1896 on the European Border and Coast Guard and the proposal on the screening of third-country nationals at the external borders, is mentioned in the comparison of options (IA, p. 83).

Monitoring and evaluation

The IA contains a list of operational objectives and the corresponding quantitative indicators to monitor their achievement. The targets set in the IA are mostly qualitative (e.g. an increasing trend in the number of unannounced visits, a decreasing trend in deficiencies identified by SCH-EVAL) and therefore not very concrete. According to the IA, the Commission will submit a report to the Council and the European Parliament within six months of the adoption of all evaluation reports regarding the evaluations covered by the five year cycle following the entry into force of the amendment to the Regulation (IA, p. 90). Under the preferred option, however, the evaluation cycle is extended to seven years, which is reflected in Article 12 of the proposal. It is not clear why the evaluation provisions of the IA are not coherent with the preferred option or the proposal.
Stakeholder consultation

Stakeholders were offered an opportunity to provide their feedback on the inception IA between 4 January and 1 February 2021, but only two replies were submitted. According to the IA, a derogation from an open public consultation was granted on 30 July 2020. It was considered that the general public could not contribute to the issues related to the functioning of the Mechanism through a public consultation in a productive and constructive way, because of these issues' specificity, technicality and them being subject to strict confidentiality rules (IA. p.95). Instead, a targeted stakeholder consultation in the form of workshops, questionnaires and interviews was conducted between December 2020 and February 2021. Additionally, the IA takes into account the conclusions of the first Schengen Forum. The results of all stakeholder consultation activities are reported in Annex 2 of the IA and broken down into the following categories of respondents: European Parliament, Member State authorities, national data protection authorities/European Data Protection Supervisor, EU bodies/agencies (including FRA and Europol) and civil-society organisations (pp.94-117). The results of stakeholder consultations are reported consistently throughout the IA and the combination of measures under the preferred option is based on the stakeholders' positions, among other things.

Supporting data and analytical methods used

The IA is informed by the findings of the Commission evaluation of the Mechanism's first five years of operation (2015-2019), the results of stakeholder consultation activities, internal Commission data and a recent European Parliament study, among other sources. The data sources are consistently referenced and were publicly available at the time of writing, although they remain rather limited. The administrative costs seem to be the focus of the analysis: they are identified and partially quantified, while the benefits are only covered in a qualitative manner (IA, pp. 71, 144-145). The assumptions and limitations of the IA analysis are stated throughout the impacts analysis. For instance, it was not possible to quantify the additional costs of an increased number of thematic or unannounced evaluations (due to their non-standardised character) or the benefits from the training of experts (IA, p. 60). Overall, the evidence used in the IA seems reliable and is recent, but the quantification and the analysis of economic, social and fundamental rights impacts remain very limited.

Follow-up to the opinion of the Commission Regulatory Scrutiny Board (RSB)

The RSB adopted a positive opinion with reservations on a draft version of the IA report on 19 March 2021, observing that the report contained some shortcomings. The RSB found that the problem analysis did not sufficiently draw on available evidence and that the report was not sufficiently clear on the link between the problems, the policy objectives and the policy options (i.e. the intervention logic). Finally, the RSB noted that the impact analysis and the comparison of options were incomplete and the preferred option did not correspond to the analysis and relied on unclear criteria. In its suggestions to improve the latter shortcomings, the RSB recommended including the preferred package of measures as a self-standing option and outlining all of the significant impacts on the different categories of stakeholders for each option, including the preferred one. The IA does not provide an explanation as to how it tackled the observations of the RSB opinion, contrary to the recommendation of Tool #8 of the BRG. Although it is difficult to assess how the RSB comments have been addressed in the absence of any explanation in the IA, the issues raised by the RSB seem to have considerably improved in the final IA report.

Coherence between the Commission’s legislative proposal and IA

The legislative proposal appears to follow the IA recommendation, in that it is based on the preferred Option 4.

Some of the strong points of the IA are that the problem addressed by the proposal is well defined and substantiated with evidence. In addition to this, the objectives set in the IA are specific, measurable, achievable, relevant and time-bound and therefore compliant with the SMART requirements of Tool#16 of the Better Regulation Guidelines (BRG). Besides the baseline scenario (‘do nothing’ option), the IA assesses four options and compares them based on the mandatory criteria of efficiency, effectiveness and coherence, as well as based on their proportionality, as required by the BRG. Furthermore, stakeholder
opinions are reported consistently throughout the IA and are used as input for the combination of measures under the preferred option. Moreover, the data sources underpinning the IA are recent, reliable, consistently referenced and were publicly available at the time of writing. While it is difficult to assess how the RSB recommendations have been addressed in the absence of any explanation in the IA, the issues raised by the RSB seem to have considerably improved in the final IA report. On the downside, however, the targets set under the preferred option are mostly qualitative and therefore not very concrete. The focus of the IA analysis is predominantly on the options’ administrative costs and benefits to the stakeholders directly involved in the functioning of the Schengen evaluation and monitoring mechanism: the Member States, the Commission and the EU bodies and agencies. Here, the benefits are covered in a qualitative manner, while the costs are partially quantified. The assessment of the economic, social and fundamental rights impacts of the Mechanism’s functioning remains very limited. This is surprising, considering the fact that strengthening the implementation of fundamental rights safeguards under the Schengen acquis is among the objectives of the IA.

ENDNOTES


3 The legal obstacles briefly touched upon in the IA are: modifying the scope beyond the Schengen acquis, issuing recommendations to EU agencies and bodies; issues that were very divisive among the Member States mentioned in the IA are: moving to an all-encompassing evaluation which would require multidisciplinary teams, specific legal act for a very limited extension of SCH-EVAL’s scope without discussing asylum integration.

4 However, in the inception IA contains the following estimates: the full reintroduction of border controls to monitor the movement of people within the Schengen area would generate immediate direct costs for the EU economy in a range between €5 and €18 billion annually; border controls at the internal borders would cost commuters and travellers between €1.3 and €5.2 billion in terms of time lost. Several estimates can also be found in the European Parliament studies (see references in endnote 2). Nevertheless, none of these estimates were not taken on board in this IA.